

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION

2000

Volume I

*Summary records
of the meetings
of the fifty-second session
1 May–9 June and
10 July–18 August 2000*

UNITED NATIONS
New York and Geneva, 2005



NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook . . . 1998*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

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 fifty-second session of the Commission (A/CN.4/SR.2612-A/CN.4/SR.2664), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/2000

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Second Vice-Chairman: Mr. Peter TOMKA
Chairman of the Drafting Committee: Mr. Giorgio GAJA
Rapporteur: Mr. Víctor RODRÍGUEZ CEDEÑO

Mr. Hans Corell, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mr. Václav Mikulka, 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 2612th meeting, held on 1 May 2000:

1. Filling of casual vacancies (article 11 of the statute).
2. Organization of work of the session.
3. State responsibility.
4. International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities).
5. Reservations to treaties.
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-third session.
11. Other business.

ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
ECOWAS	Economic Community of West African States
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
IMO	International Maritime Organization
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
UNHCR	Office of the United Nations High Commissioner for Refugees
WTO	World Trade Organization

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AJIL	<i>American Journal of International Law</i>
<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.)
ILR	<i>International Law Reports</i>
<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>
UNRIAA	United Nations, <i>Reports of International Arbitral Awards</i>

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In the present volume, 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; and 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.

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NOTE CONCERNING QUOTATIONS

In quotations, words or passages in italics followed by an asterisk were not italicized in the original text. Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.

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The Internet address of the International Law Commission is: www.un.org/law/ilc/index.htm.

CASES CITED IN THE PRESENT VOLUME

SHORT TITLE	NATURE OF THE DECISION
<i>Aerial Incident of 3 July 1988</i>	<i>Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)</i> , Order of 13 December 1989, <i>I.C.J. Reports</i> 1989, p. 132.
<i>Aerial Incident of 10 August 1999</i>	<i>Aerial Incident of 10 August 1999 (Pakistan v. India)</i> , <i>Jurisdiction, Judgment</i> , <i>I.C.J. Reports</i> 2000, p. 12.
<i>Air Service Agreement</i>	<i>Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France</i> , decision of 9 December 1978 (UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 417).
“Alabama”	The Geneva Arbitration (The “Alabama” case) (<i>United States of America v. Great Britain</i>), decision of 14 September 1872 (J. B. Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> , (Washington, D.C., United States Government Printing Office, 1898), vol. I, p. 572).
<i>Alexander</i>	<i>Executors of R.S.C.A. Alexander v. the United States</i> (J. B. Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> (Washington, D.C., United States Government Printing Office, 1898), vol. III, p. 2529).
<i>Ambatielos</i>	<i>Ambatielos, Preliminary Objection, Judgment</i> , <i>I.C.J. Reports</i> 1952, p. 28.
<i>Aminoil-Kuwait Arbitration</i>	Arbitration between Kuwait and the American Independent Oil Company (Aminoil), <i>ILM</i> , vol. XXI, No. 5 (September 1982), p. 976.
<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i>	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993</i> , <i>I.C.J. Reports</i> 1993, p. 3; and <i>ibid.</i> , <i>Order of 13 September 1993</i> , <i>I.C.J. Reports</i> 1993, p. 325. <i>Ibid.</i> , <i>Preliminary Objections, Judgment</i> , <i>I.C.J. Reports</i> 1996, p. 595. <i>Ibid.</i> , <i>Counter-claims, Order of 17 December 1997</i> , <i>I.C.J. Reports</i> 1997, p. 243. <i>Ibid.</i> , <i>Order of 22 January 1998</i> , <i>I.C.J. Reports</i> 1998, p. 3. <i>Ibid.</i> , <i>Order of 11 December 1998</i> , <i>I.C.J. Reports</i> 1998, p. 743. <i>Ibid.</i> , <i>Order of 14 September 1999</i> , <i>I.C.J. Reports</i> 1999, p. 1015. <i>Ibid.</i> , <i>Order of 27 June 2000</i> , <i>I.C.J. Reports</i> 2000, p. 108.
<i>Armed Activities on the Territory of the Congo</i>	<i>Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi)</i> , <i>Order of 21 October 1999</i> , <i>I.C.J. Reports</i> 1999, p. 1018. <i>Ibid.</i> (<i>Democratic Republic of the Congo v. Rwanda</i>), <i>Order of 21 October 1999</i> , <i>I.C.J. Reports</i> 1999, p. 1025. <i>Ibid.</i> (<i>Democratic Republic of the Congo v. Uganda</i>), <i>Provisional Measures, Order of 1 July 2000</i> , <i>I.C.J. Reports</i> 2000, p. 111.

SHORT TITLE	NATURE OF THE DECISION
<i>Barcelona Traction</i>	<i>Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964</i> , p. 6. <i>Ibid.</i> , <i>Second Phase, Judgment, I.C.J. Reports 1970</i> , p. 3.
<i>Border and Transborder Armed Actions</i>	<i>Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988</i> , p. 69.
<i>Canevaro</i>	<i>Canevaro case (Italy v. Peru)</i> , award of 3 May 1912 (UNRIAA, vol. XI (Sales No. 61.V.4), p. 397).
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- Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (Amsterdam, 2 October 1997) *Official Journal of the European Communities*, No. C 340, vol. 40 (10 November 1997), p. 1.
- Consolidated version of the Treaty on European Union (Amsterdam, 2 October 1997) Ibid., p. 145.
- Consolidated version of the Treaty establishing the European Community (Amsterdam, 2 October 1997) Ibid., p. 173.
- Inter-American Convention against Corruption (Caracas, 29 March 1996) Document E/1996/99.
- Criminal Law Convention on Corruption (Strasbourg, 27 January 1999) Council of Europe, *European Treaty Series*, No. 173.
- Civil Law Convention on Corruption (Strasbourg, 4 November 1999) Ibid., No. 174.

CHECKLIST OF DOCUMENTS OF THE FIFTY-SECOND SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/502 and Add.1 and 2	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	Reproduced in <i>Yearbook . . . 2000</i> , vol. II (Part One).
A/CN.4/503	Provisional agenda	Mimeographed. For agenda as adopted, see p. viii above.
A/CN.4/504 and Add.1	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the fifty-fourth session of the General Assembly	Mimeographed.
A/CN.4/505	Third report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur	Reproduced in <i>Yearbook . . . 2000</i> , vol. II (Part One).
A/CN.4/506 [and Corr. 1] and Add.1	First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur	Idem.
A/CN.4/507 and Add.1 [and Add.1/Corr.1], Add.2 [and Add.2/Corr.1 and 2], Add.3 [and Add.3/Corr.1] and Add.4	Third report on State responsibility, by Mr. James Crawford, Special Rapporteur	Idem.
A/CN.4/508 and Add.1–4	Fifth report on reservations to treaties, by Mr. Alain Pellet, Special Rapporteur	Idem.
A/CN.4/509	International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities): comments and observations received from Governments	Idem.
A/CN.4/510	Third report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) by Mr. Pemmaraju Sreenivasa Rao, Special Rapporteur	Idem.
A/CN.4/511	Unilateral acts of States: replies from Governments to the questionnaire	Idem.
A/CN.4/L.590	Draft report of the International Law Commission on the work of its fifty-second session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10 (A/55/10)</i> . The final text appears in <i>Yearbook . . . 2000</i> , vol. II (Part Two).
A/CN.4/L.591	Idem: chapter II (Summary of the work of the Commission at its fifty-second session)	Idem.
A/CN.4/L.592	Idem: chapter III (Specific issues on which comments would be of particular interest to the Commission)	Idem.
A/CN.4/L.593 [and Corr.1] and Add.1–6	Idem: chapter IV (State responsibility)	Idem.
A/CN.4/L.594	Idem: chapter V (Diplomatic protection)	Idem.
A/CN.4/L.595 and Add.1	Idem: chapter VI (Unilateral acts of States)	Idem.
A/CN.4/L.596 and Add.1–4	Idem: chapter VII (Reservations to treaties)	Idem.
A/CN.4/L.597	Idem: chapter VIII (International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities))	Idem.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.598 and Add.1	Idem: chapter IX (Other decisions and conclusions of the Commission)	Idem.
A/CN.4/L.599	Reservations to treaties. Titles and texts of the draft guidelines adopted by the Drafting Committee: guidelines 1.1.8, 1.4.6 [1.4.6, 1.4.7], 1.4.7 [1.4.8], 1.7, 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4], 1.7.2 [1.7.5]	See summary record of the 2640th meeting (para. 61).
A/CN.4/L.600	State responsibility. Draft articles provisionally adopted by the Drafting Committee on second reading	Mimeographed. For the text, see <i>Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10 (A/55/10)</i> . The final text appears in <i>Year-book . . . 2000</i> , vol. II (Part Two), chap. IV, annex.
A/CN.4/SR.2612–A/CN.4/SR.2664	Provisional summary records of the 2612th to 2664th meetings	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-SECOND SESSION

Held at Geneva from 1 May to 9 June 2000

2612th MEETING

Monday, 1 May 2000, at 3.10 p.m.

Outgoing Chairman: Mr. Zdzislaw GALICKI

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the fifty-second session of the International Law Commission and recalled that, in accordance with the Commission's wish, the session would be divided into two parts. He welcomed the members of the Commission and thanked them for the cooperation and support they had given him during the previous session.

2. In accordance with his mandate, he had attended the meetings of the Sixth Committee of the General Assembly, whose interesting discussions on the report of the Commission on the work of its fifty-first session were reflected in the topical summary (A/CN.4/504 and

Add.1). His professional obligations had unfortunately prevented him from taking part in the meetings of the regional bodies with which the Commission maintained relations. At his request, however, Mr. Hafner had represented the Commission at the thirty-ninth session of the Asian-African Legal Consultative Committee, held at Cairo, from 19 to 23 February 2000, where his statement on the Commission's work had been welcomed with great interest.

Election of officers

Mr. Yamada was elected Chairman by acclamation.

Mr. Yamada took the Chair.

3. The CHAIRMAN thanked the members of the Commission for the confidence they had shown in him by electing him to the post of Chairman. He would do his best to prove himself worthy of that confidence, but he knew that he would be able to count on the cooperation of the members of the Commission and the assistance of the secretariat in carrying out his task.

Mr. Kamto was elected first Vice-Chairman by acclamation.

Mr. Tomka was elected second Vice-Chairman by acclamation.

Mr. Gaja was elected Chairman of the Drafting Committee by acclamation.

Mr. Rodríguez Cedeño was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/503)

4. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/503).

The agenda was adopted.

Organization of work of the session

[Agenda item 2]

5. The CHAIRMAN proposed that the meeting should be suspended to enable the Enlarged Bureau to meet to consider the organization of work of the session.

The meeting was suspended at 3.40 p.m. and resumed at 4.35 p.m.

Filling of casual vacancies (article 11 of the statute) (A/CN.4/502 and Add.1 and 2)

[Agenda item 1]

6. The CHAIRMAN announced that, on the recommendation of the Enlarged Bureau, the Commission was required to fill two casual vacancies. In accordance with established practice, he suspended the meeting so that the elections could be held in a closed meeting.

The meeting was suspended at 4.45 p.m. and resumed at 5 p.m.

7. The CHAIRMAN announced that the Commission had elected Mr. Kamil Idris to fill the vacancy created by the death of Doudou Thiam and Mr. Djamchid Momtaz to fill the vacancy created by the election of Mr. Awn Al-Khasawneh to ICJ. On behalf of the Commission, he would inform the newly elected members and invite them to take their places in the Commission.

Organization of work of the session (continued)

[Agenda item 2]

8. Mr. PELLET said he disapproved of the fact that the Commission was starting its work on 1 May, the day of the celebration of a secular international holiday recognized everywhere but in Switzerland and the United Nations. That was not at all normal, especially as the United Nations was required to observe holidays that had nothing to do with it. He also objected to the fact that the badge he had been given had the English abbreviation "ILC". That was inadmissible in an international organization located in a French-speaking country, Switzerland.

The meeting rose at 5.10 p.m.

2613th MEETING

Tuesday, 2 May 2000, at 10.10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Organization of work of the session (continued)

[Agenda item 2]

1. The CHAIRMAN recalled that, at its previous meeting the Commission had adopted its programme of work for the next two weeks. He invited members to inform Mr. Gaja, Chairman of the Drafting Committee, and Mr. Kamto, Chairman of the Planning Group of their interest in participating in either of those bodies. The Drafting Committee would be concerned initially with the articles on State responsibility.

State responsibility¹ (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPOREUR

2. Mr. CRAWFORD (Special Rapporteur), introducing his third report on State responsibility (A/CN.4/507 and Add.1-4), said that an informal meeting held earlier in the year in Cambridge, United Kingdom, had advanced his consideration of a number of issues, and he was grateful to the participants. ILA had established a study group on State responsibility whose first report was now available. The group consisted of a number of eminent jurists, including the previous Special Rapporteur on the topic, Mr. Gaetano Arangio-Ruiz.

3. The third report launched the Commission's reconsideration of Part Two of the draft articles and would consist of two further components. One would deal with the precise content of reparation, restitution and compensation, with particular emphasis on whether the articles on compensation should be made more detailed in response

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

to the criticisms of Governments. Another would address what could be called the implications of responsibility, the possibility that several States, not just one, might be injured States, and any issues that emerged from the consideration of the first two instalments of the report. He reaffirmed his own commitment and, he hoped, that of the Commission, to completing the second reading of the draft articles at the fifty-third session of the Commission, in 2001. To achieve that goal, the Drafting Committee could produce a text, leaving aside the question of settlement of disputes, by the end of the current session, so that the Commission could perform the *toiletage* of the entire text and commentary at its fifty-third session: an ambitious programme, but one that was nonetheless feasible.

4. Chapter I, section A, of the third report identified four issues left outstanding in relation to Part One: State responsibility for breach of obligations owed to the international community as a whole (art. 19), the formulation of an article on exhaustion of local remedies (art. 22) and also of one on countermeasures (art. 30), and the possible insertion of the exception of non-performance as an additional circumstance precluding wrongfulness. The four issues also related to Part Two and so could not be finalized until some aspects of Part Two had been decided. In a number of instances, notably in article 42, paragraph 4, material from Part One was repeated in Part Two. That was unnecessary and raised doubts about whether the principles in Part One on breaches of international obligations were applicable to the international obligations stated in Part Two. It had to be assumed, however, that they were.

5. The report dealt with two interrelated questions: the content of Part Two, chapter I (General principles), and the overall structure and approach for the remainder of the draft articles. In addition to general principles, Part Two incorporated provisions on the rights of the injured State, countermeasures and the consequences of international crimes. Part Three covered settlement of disputes. It had been provisionally decided not to establish a link between the taking of countermeasures and the settlement of disputes. Part Three should accordingly be set to one side for the time being. Once the entire draft was adopted, the settlement of disputes could be considered in general terms, as could the form to be taken by the draft. If it was not to be submitted to the General Assembly as a convention, there was plainly no point in inserting provisions on settlement of disputes. He was sceptical as to whether such provisions would be acceptable, since the text covered literally the whole of the obligations of States.

6. Paragraph 7, subparagraphs (b) and (c), of the report reflected the difficulties he experienced, as a practitioner of the common law, in addressing the material in Part Two. In the common law, that material was deemed to be part of the law of remedies, and much of it was articulated in terms of the powers or functions of courts. The draft articles, on the other hand, were formulated in terms of the obligations and prerogatives of the States concerned, in line with the approach traditionally taken in international law, wherein judicial settlement depended on the consent of States. It was an approach that required the articles to be formulated in terms of categorical rights, or alternatively, the term “where appropriate” to be inserted throughout. Such awkward drafting had attracted the criticism of Governments from various legal traditions on the grounds that

the articles were either too rigid or so vague as to lack content. The problem could not be corrected now, but it must be borne in mind in future drafting work.

7. Paragraphs 8 and 9 of the report set out a number of suggestions, along with the underlying reasons, for improving the structure of Part Two. The current title, “Content, forms and degrees of international responsibility”, was not readily comprehensible to the majority of international lawyers and could be replaced by the more straightforward phrase “Legal consequences of an internationally wrongful act of a State”, which conformed to the traditional view of State responsibility as a secondary legal consequence arising from a breach.

8. Chapter I of Part Two was entitled “General principles” but contained none. Some should therefore be included, as in chapter I of Part One. There should also be a chapter on the three forms of reparation: restitution, compensation and satisfaction. Cessation, which was currently included in chapter II of Part Two, was not a form of reparation and ought to be formulated in Part One as a general principle, alongside a general principle of reparation. That would make it possible to explain in chapter II of Part Two what restitution, compensation and satisfaction were, without necessarily specifying the modalities of the choice between them. In the tradition of the *Chorzów Factory* case (Jurisdiction), the fundamental obligation of the wrongdoing State was treated as an obligation to make reparation. The content of that general principle varied, depending on the circumstances or the contributory fault of the victim State. Another question he intended to address, in the second instalment of his report, was how to handle cases when a plurality of States was responsible for, or was injured by, a single wrongful act.

9. Consideration should be given to including two additional Parts. One, he was firmly convinced, should be a Part Four on general provisions, to include, inter alia, the provision on *lex specialis*. A more controversial proposal for a new Part would introduce a distinction between the legal consequences for the responsible State of an internationally wrongful act and the invocation of those consequences by the primary victim of the breach or, in certain circumstances, by other States. That distinction would cut out some of the confusion created by article 40. He was therefore proposing the insertion of a Part Two bis, to be entitled “The implementation of State responsibility”. At a very early stage in his work, a former Special Rapporteur, Roberto Ago, had had the same idea, taking the view that the Part could also cover diplomatic protection, which he had seen as a method whereby a State invoked the responsibility of another State in respect of injury done to one of its nationals.

10. Article 40 addressed the general question of who was entitled to deal with a breach, but it did so in a highly unsatisfactory manner. The Vienna Convention on the Law of Treaties (hereinafter “the 1969 Vienna Convention”) covered loss of the right to invoke grounds for the termination or suspension of a treaty. By parallel reasoning, there was a case for including in a Part Two bis an article on loss of the right to invoke responsibility. Again, countermeasures could be considered a form of invocation of responsibility. The reason why they were taken against a State was that it had refused to acknowledge its

responsibility and cease its wrongful conduct. Hence, countermeasures fell under the heading of implementation of responsibility rather than that of forms of reparation. In addition, the issues addressed in article 19 could generally be termed the invocation of a responsibility to the international community as a whole.

11. For those reasons, he was proposing for the remaining substantive articles the structure indicated in paragraph 10. The proposal was by no means final and was merely intended to serve the purposes of discussion. Article 40 entangled a great many issues, and the suggested structure was designed to disentangle them.

12. As to Part Two, to be entitled "Legal consequences of an internationally wrongful act of a State", he was indebted to Mr. Pellet for proposals that he had put forward at the Cambridge meeting. Four general principles could be included in a chapter I of Part Two: the principle that an internationally wrongful act entailed legal consequences; the general principle of reparation which was now contained in article 42; the question of cessation; and the issues raised under article 40.

13. Article 36, paragraph 1, was simply a formal introductory provision on the international responsibility of States. No Governments had objected to it as being unnecessary, and as Mr. Brownlie had pointed out, linking articles were sometimes needed. The general principle of reparation was a more complex issue, however. It was formulated throughout the draft articles as a right of the injured State. France had suggested starting with the idea that all responsibility was the responsibility of a wrongdoing State to an injured State.³ Special Rapporteur Ago had favoured treating responsibility as something stemming from a State's breach of an obligation and addressing the consequences of responsibility only after the obligation had been defined.⁴ In other words, the concept of the injured State could be introduced at the very beginning or at the end of a logical construct, but article 40 put it squarely in the middle, without any consequent reasoning. That created serious problems.

14. Moreover, in the framework of responsibility vis-à-vis several States or the international community as a whole, the identification of the rights of an injured State implied that that injured State was the only State involved. The Commission had said it was not simply "bilateralizing" multilateral obligations, but that was precisely what it had done, because it had not carried through its earlier promise, and the result was a radically incoherent text in that respect. He proposed fixing it, not in the "French way", but in the "Ago way", in other words, by maintaining the basic concept of responsibility embodied in Part One, chapter I, and carrying it over to Part Two, leaving Part Three to deal with questions of invocation. As they stood, the draft articles failed to address the problem they created by taking multilateral obligations in article 40 and attributing them singularly to individual States, thereby producing an intolerable situation. The primary victim of

a human rights breach under article 40 in its current wording could accept compensation and treat the matter as closed; other States were nonetheless entitled to intervene by way of countermeasures. As a number of Governments had already pointed out, that could not possibly be true. He proposed to address the problem by dealing with the general principles in Part Two and the content of reparation in its chapter II and formulate them in terms of the obligation of the State identified in Part One, i.e. the responsible State. No content was lost by so doing, and much was gained by leaving for subsequent treatment the question as to who could do what in relation to that State. Whether that was taken up in a later section of Part Two or in his proposed Part Two bis was of lesser concern. The analytical point was essential: it was necessary either to start out with the concept that responsibility arose vis-à-vis another State or to carry through the Ago concept that responsibility existed before the law in respect of a breach, a concept embodied in draft articles 1 and 3, and then carry that through, at least to the immediate consequences of the breach. That was what had to be done in respect of both the obligation of reparation generally speaking and the obligation of cessation.

15. He had argued that the general principle of reparation should be formulated as an obligation of the State committing the internationally wrongful act to make reparation, in an appropriate form, for the consequences of that act. A number of questions arose with regard to giving effect to such a general principle, which was of course already contained in the formulation of a right of an injured State in article 42, paragraph 1. The first problem related to causation. Special Rapporteur Arangio-Ruiz had had strong views on the subject, which were formulated in the commentary to article 42, arguing that if particular consequences of a wrongful act arose by reason also of other circumstances and there were thus concurrent causes, the State should only be responsible for the loss to a certain degree.⁵ Personally, he disagreed. A State was responsible for the direct or proximate consequences of its conduct. Admittedly, it was difficult to specify what adjective to use in that context. Different legal systems used different terms, but they all distinguished between consequences which flowed directly from a wrongful act and the long-term by-product, the inadvertent consequences, that followed from human conduct in general.

16. He saw no reason to depart from the tradition which addressed the question of causation in that manner, and he was proposing simple language in the draft article to achieve that end, bearing in mind the warning of one legal scholar that the problem could not be solved by a given wording, but only in the application of the particular rules to the particular facts. It was clear, however, that a problem did exist concerning remoteness or directness of damage or whatever one wished to call it. It needed to be properly formulated and the commentary amended accordingly. Of course, there were cases in which the law would, as it were, intervene to rule that only certain consequences could follow from particular sorts of breach, and in relation to other sorts of breach it might be much

³ See *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1-3.

⁴ Second report (*Yearbook . . . 1970*, vol. II, p. 192, document A/CN.4/233).

⁵ See paragraph (6) of commentary to former article 6 bis (*Yearbook . . . 1993*, vol. II (Part Two), p. 59).

more severe. The concept must be incorporated in the general article, at least in general terms.

17. Article 42, paragraph 3, namely, “In no case shall reparation result in depriving the population of a State of its own means of subsistence”, had been included in the draft because the previous Special Rapporteur had been concerned about excessively penal consequences for wrongdoing States. It was a concern reflected in some of the provisions on restitution. For example, where restitution was so onerous as compared with the advantage the injured State would gain, there was no obligation to make restitution. Thus, there were ways of dealing with excessive penalization of reparation in the specific articles. Yet the previous Special Rapporteur had felt that some general provision was also required. The wording of article 42, paragraph 3, had been strongly criticized by Governments; only one country, Germany, had supported it, for historically understandable reasons. The criticism seemed justified. The form that reparation might take, its timing and questions of modalities might well be affected by the position of the responsible State. Moreover, in extreme instances, as in the *Russian Indemnity* case, a State might have to defer compensation until it was in a position to make such payments. But except for the fiasco of reparations payments at the end of the First World War, there was no history that called for a guarantee of the kind in question. In addition, including such a guarantee created huge problems. In principle, reparation required a State to make restitution of something which, by definition, was not its own means of subsistence, but someone else’s, i.e. someone else’s territory or property. The questions that might come up could be covered at the level of modalities.

18. For those reasons, he proposed deleting article 42, paragraph 3, and dealing with the problems raised in the context of the specific forms of reparation in chapter II. The basic principle, as stated in the *Chorzów Factory* case, was that the responsible State should make reparation for the consequences of its wrongful act, and provided that there was some concept of “direct and not too remote” implied in that wording, there was no reason to fear that the requirement to do so would deprive that State of its own means of subsistence. Vastly greater liabilities of States in the context of international debt arrangements were settled every year than ever arose from compensation payments. Also, for those reasons, article 42, paragraph 3, created more problems than it resolved.

19. Pursuant to article 42, paragraph 4, the State that had committed the internationally wrongful act could not invoke the provisions of its internal law as justification for the failure to provide full reparation. However, that had already been stated in article 4 of the draft. He therefore proposed, in paragraph 119, that a general principle should be incorporated in Part Two, chapter I, namely in article 37 bis, paragraphs 1 and 2.

20. The general principle of cessation appeared in two slightly different forms in article 36, paragraph 2, and article 41. He agreed with the draft’s underlying idea that the two were related and should be placed in a single article, but favoured a slightly different wording.

21. The first issue was the consequence of the breach for the primary obligation. There was no obligation to cease

conduct if the primary obligation ceased to exist, and in certain circumstances, most obviously the material breach of a bilateral treaty which the other State used as a ground for the termination of the treaty, issues of cessation would not arise. That point needed to be made in the form of a saving clause, but it was an important one.

22. As to the more positive issue of cessation (art. 41), few States had complained about that provision. But the view had been expressed in the literature that cessation was really the consequence of the primary obligation, not a secondary consequence of breach, and therefore did not belong in the draft. He had sought to explain in paragraph 50 of his report why he disagreed with that opinion. The notion of cessation arose only after the breach occurred. It might not be a secondary consequence in quite the same way as reparation was, but it was a consequence of a breach. Moreover, there was a relationship between cessation and the other consequences of the breach, for example—but not only—in respect of countermeasures. Secondly, and most importantly, in the majority of State responsibility cases that raised questions in the context of the draft articles, the primary concern of the State was not so much the monetary compensation which would flow from the breach, but cessation of the wrongful act and restoration of the legal relationship impaired by the breach. That was why remedies such as declarations had played such an important part in State responsibility cases. It would misrepresent the reality of State responsibility to omit a provision on cessation.

23. The question remained of the wording. France had proposed a formulation that he had included in paragraph 52. For the purpose of discussion, he had suggested a somewhat different wording which took into account the fact that the question of cessation could arise only if the primary obligation continued in force. That was set out in article 36 bis, in paragraph 119 of the report. The general principle of cessation should be stated first because, logically, it came before reparation: there would be cases in which a breach was drawn to the attention of the responsible State, which would immediately cease the conduct and the matter would go no further. He had formulated the obligation in respect of cessation by reference to the concept of the continuing wrongful act, which also took up that concept as rightly retained in Part One of the draft.

24. The second question to be discussed was that of assurances and guarantees of non-repetition, which the previous Special Rapporteur had treated as a sort of *sui generis* consequence of the breach, aware that it was not exactly a question of reparation because, by definition, one was talking about the future, not the past. Mr. Arangio-Ruiz’s separate identification of the notion of assurances and guarantees was extremely useful. The consequences of an internationally wrongful act were essentially twofold, one future-oriented and one past-oriented. The future-oriented one was cessation and assurances and guarantees against non-repetition, on the assumption in both cases, of course, that the obligation continued. The other aspect was reparation, i.e. undoing the damage which the breach had caused. That was a coherent way of approaching the question, and it was equally appropriate to include assurances and guarantees under an article dealing with cessation. After all, a State

seeking cessation wanted assurances that the legal relationship impaired by the breach had been restored. Two conditions had to be met: first the breach stopped, and second, if appropriate, there were guarantees that it would not be repeated. The legal relationship was then back in place, without prejudice to questions of reparation arising from the breach.

25. In some cases, the assurances and guarantees demanded were extraordinarily rigorous and, in others, mere promises or undertakings were deemed sufficient. Despite his earlier criticism of such imprecision, he saw no alternative but to use the word “appropriate” and to incorporate the phrase “to offer appropriate assurances and guarantees of non-repetition”.

26. He agreed with France that articles 37 and 39 were saving clauses which could be placed in a general part, but not article 38, which was concerned with other consequences of a breach and should stay where it was if it was to have any meaning. Article 38 implied that there were specific rules, whether of treaty law or of customary international law, which governed the consequences in a specific case of a breach. Of course such rules applied, but they did so under the *lex specialis* principle; there was no need for article 38 to say so. However, a further implication behind article 38 was that there were other general consequences of a breach under international law that were not set out in the provisions of that Part. The Sixth Committee was likely to say that if, after 40 years, the Commission still did not know what those were, then article 38 was perhaps unnecessary. The commentary identified two consequences of a wrongful act, but neither had any bearing on the subject of responsibility. If the Commission could pinpoint other consequences of an internationally wrongful act within the field of State responsibility, then it might try to indicate what they were. The only case for retaining article 38 was the general principle of law embodied in the maxim *ex injuria ius non oritur*, which held that, when a State had committed a wrongful act, it could not rely on that act to extricate itself from a particular situation. That general principle of law could generate consequences in different situations. ICJ had cited that principle in the *Gab Ž kovo-Nagymaros Project* case to generate a consequence about Hungary not being able to terminate a bilateral treaty that had been breached. The particular consequences the Court had drawn in that case had fallen within the framework of the termination of treaties rather than responsibility, but legal obligations might conceivably arise in specific contexts because of the generating effect of the principle *ex injuria ius non oritur*. Accordingly, there might be a case for retaining article 38 and a more convincing explanation for it in the commentary. His tentative proposal was, however, to place article 38 in square brackets, in the hope that the Commission would do away with it once and for all.

27. As to article 40, the term “injured State” could not simply be defined. It had to be considered in the context of the draft as a whole to determine what the consequences were of including it. Every injured State had the right to restitution, compensation and satisfaction and to take countermeasures but not, oddly enough, to demand cessation; there were, however, reasons for distinguishing between cessation and reparation in the case of several injured States.

28. Article 40 conveyed the impression of a whole series of concepts put forward without any attempt to sort out how they were interrelated. For instance, it was extraordinary to say that every State was injured by any breach of any human rights obligation in general and then to add international crimes at the end. The provisions of paragraph 3, as pointed out by one State, were completely otiose in the context of article 40, because in the event of an international crime as defined, other paragraphs of article 40 would have already been satisfied.

29. There were essentially two ways in which article 40 could have been handled. One, proposed by a former member of the Commission, Mr. Balanda, was set out in a footnote to paragraph 68 of the report.⁶ It was a very simple definition, and its effect would have been to refer back to the primary rules or general operation of international law all the issues involved in the identification of persons injured or affected. That would have been a rather extreme version of the distinction between primary and secondary rules, but it would have been defensible. The other course would have been to try to explain more precisely how responsibility worked in the context of injuries to a plurality of States or to the international community as a whole. The problem was that the article merely stopped in a fatal limbo in between. He proposed what was basically Mr. Balanda’s solution for bilateral obligations and a more refined and articulated solution for multilateral obligations. In regard to bilateral obligations, Mr. Balanda had been absolutely right, and the rather elaborate provisions set out in article 40, paragraph 2, subparagraphs (a), (b), (c) and (d), were unnecessary; international law would say when bilateral obligations were applicable. The Commission could simply affirm that, where a State had an obligation vis-à-vis another State, then the other State was injured by the breach of that obligation. The real problem lay in the context of multilateral obligations, not so much several obligations towards several States which might have the same content, but a single obligation vis-à-vis a group of States, all States or the international community as a whole. That category of concepts was dealt with in article 40, paragraph 2, subparagraphs (e) and (f), and paragraph 3, without any distinction being drawn between them and the others. That was where the various concepts had not been sorted out.

30. The first point to note was that until recently there would have been a credible case for claiming that, even though obligations might in some sense be owed to a group of States, when a breach occurred the consequences were always bilateral. If that were so, then Mr. Balanda’s approach to the definition in article 40 was the right one. Amazingly, even Mr. Ushakov had adopted that stance, despite the persistent support of the Soviet Union for the notion of crimes of State.⁷ However, in his own view that approach was no longer possible, for several reasons.

⁶ He had stated: “Rather than consider each and every instance in which a State was deemed to be injured, at the risk of overlooking some possibilities, the Commission could define the injured State as the State which had suffered material or moral prejudice as a result of an internationally wrongful act attributable to another State.” (*Yearbook . . . 1984*, vol. I, 1867th meeting, pp. 315–316, para. 9).

⁷ See *Yearbook . . . 1985*, vol. I, 1929th meeting, p. 310, para. 47.

31. First, in the *Barcelona Traction* case ICJ had categorically stated that there were obligations owed to the international community as a whole. Those obligations were not owed to any individual State as such, even though that State was part of the international community and was entitled to invoke responsibility. Instead, they were owed to some collective. And the basic dilemma was that, although the obligations were in a sense owed to the collective, there was no collective. In his dissenting opinion in the *Namibia* case, Sir Gerald Fitzmaurice had pointed out that the international community as a whole was not a separate legal entity, and that no person was authorized to act on its behalf for general purposes. No organ personified the international community in the way in which, for instance, the Attorney-General personified the public interest in common law systems.

32. What was required was to fashion an equivalent in the context in which States could not or did not act validly and collectively. In doing so, it was necessary to distinguish, first, between the primary victim of the breach and the legal interests of other States. Indeed, the Court had done precisely that in the *Namibia* case, immediately following its dictum in the *Barcelona Traction* case, where it had pointed out that the breach in that case, which the Court had refused to decide upon in 1966, was a breach vis-à-vis the people of South West Africa, rather than vis-à-vis any State. In the *South West Africa (Second Phase)* case, the Court had said that in the circumstances it was not prepared to hold that two other African States were entitled to invoke the responsibility of South Africa in respect of that breach. However, the Court had not said it was legally impossible for them to do so; it had merely said that, on the interpretation of a jurisdictional provision dating back to 1920, they had not been given that right. Deplorable as the fact might be, the decision in that case had simply been a decision on the interpretation of a particular jurisdictional provision. That being so, and in the light of the subsequent development of international law, the legal issue facing the Court in the *South West Africa (Second Phase)* case could be set entirely to one side. What was clear from later decisions was that it was possible that States would be recognized as having a legal interest in compliance, i.e. the right to invoke responsibility, without themselves being the entity injured by the breach. It was not a mere academic distinction, and it made a huge difference. Part One said that wrongfulness was precluded where consent had been validly given. But it was perfectly clear that the consent of Ethiopia and Liberia could not have cured the illegality: they had been acting, as it were, in the public interest in respect of a breach; it had not been their right that was involved. Any coherent system of State responsibility that went beyond the “Balanda formula”, by seeking to address those issues rather than referring them elsewhere, would have to make that distinction.

33. As to the reformulation of article 40, the Commission should draw as heavily as possible on existing legal experience, the primary element of which was article 60 of the 1969 Vienna Convention, which represented the Commission’s previous attempt, first, to distinguish between bilateral and multilateral treaties in terms of their legal consequences; and secondly, to work out, in the field of multilateral treaties, what the consequences of a breach might be. In the course of that exercise the Commission had been concerned, not with the consequences of a breach

in the field of responsibility, but with the consequences in terms of giving States individually the right to respond, for example, by suspending the operation of a treaty. The Convention, which had been adopted prior to the *Barcelona Traction* dictum, distinguished between two kinds of cases: those where a particular State party was specially affected by a breach; and those where the material breach of the provisions by one party radically changed the position of every party with respect to performance—what he would term “integral obligations”.

34. Article 60 of the 1969 Vienna Convention was concerned only with material breach—the breach that gave rise to suspension or termination of treaties. The Commission was now concerned, not just with material breach, but with any breach. It should also be noted that an integral obligation of itself affected all States parties. Clearly, such obligations could exist. For example, under a regional disarmament treaty, the undertaking of each State not to acquire particular weapons was conditional upon none of the other States doing so. If one State acquired such weapons, all the other States were affected ipso facto, not specially but equally. So the notion of integral obligations developed by Sir Gerald Fitzmaurice as Special Rapporteur on the law of treaties seemed to be of value.

35. A second aspect of the formulation of article 40 concerned the situation where all of the States parties to an obligation were recognized as having a legal interest. The relevant provision of article 40 required express stipulation and was limited to multilateral treaties. He saw no reason why the stipulation should be express: it needed to be clear, but might be clearly implied. Nor did he see any reason why it should not be an obligation under general international law. Exactly the same interest might be reflected in a general rule of international law—for example, respecting the freedom of the seas—as would be reflected in the equivalent provision of the United Nations Convention on the Law of the Sea.

36. Accordingly with respect to bilateral obligations there should simply be a single provision stating that, for the purposes of the draft articles, a State was injured by an internationally wrongful act of another State if the obligation breached was owed to it individually. That was in effect the “Balanda approach” as applied to bilateral obligations.

37. It should be noted in passing that, even in regard to obligations normally viewed as bilateral, some interest of other States might exist. For instance, diplomatic immunity was normally thought of as a purely bilateral relationship between the sending State and the receiving State, and those States were plainly free to modify the content of the relationship by abolishing the immunities of their diplomats if they so wished. Yet there were examples of other States expressing concern at grave breaches of diplomatic immunity. There was, however, no need to abolish the concept of purely bilateral breaches of international law. Instead, it could be pointed out in the commentary that, even in the context of a bilateral obligation, the possibility existed of informal diplomatic exchanges in the interests of compliance.

38. As for multilateral obligations, previously tackled by the Commission in article 60, paragraph 2, of the 1969 Vienna Convention, suspension of treaties and State responsibility were of course two very different matters. However, it would be very odd if a State that was specially affected by a breach of an international obligation to which it was a party, or that was a party to a breached integral obligation, was able to suspend the obligation but unable to require performance, namely, cessation of the breach. State responsibility was about requiring performance and accepting the consequences of non-performance. Thus, the coverage of article 40 should be no less than that of article 60, paragraph 2, of the Convention, bearing in mind that the concept of “material” breach was specific to that Convention. There was thus authority for adopting three distinct categories of multilateral obligation. The first was the *Barcelona Traction* category, namely, obligations to the international community as a whole. Unfortunately, the literature had tended to trivialize that category. In fact, an obligation to the international community as a whole was a single obligation owed to that community, not a large number of minor individual obligations owed to individual States. If a particular obligation was deemed to be subject to derogation between two States, there was a strong implication that it was not an obligation *erga omnes*. Such obligations constituted a very restricted category indeed.

39. The second category, often confused with the first, was that of obligations to all the parties to a particular regime, *erga omnes partes*. Examples were to be found among at least some of the obligations under the Antarctic Treaty. A claim to sovereignty by any of the States parties to the Treaty would necessarily affect the others. Integral obligations were a subcategory of obligations *erga omnes partes*. A regional human rights treaty embodying a human right that was not of such standing as to be owed to the international community as a whole was, presumably, an obligation *erga omnes partes*. Of course, the Commission need not state—as, to its discredit, did article 40—which obligations fell into which category. It need only decide what the categories were, and the existing corpus of international law offered significant help in that regard. There were also obligations owed to some or many States, where particular States were recognized as having a legal interest: for example, where a particular State was specially affected in terms of article 60. Table 1, in paragraph 107 of the report, gave examples of those categories.

40. The question of how to distinguish between different States affected in different ways by a breach was discussed in paragraphs 108 et seq.. Part Two as it stood already made such a distinction, though inchoately, as it did not use the term “injured State” in respect of cessation. There must be a broader interest on the part of States in seeking cessation, as compared with, for example, compensation, since, as parties to the system, all had an interest in compliance.

41. A further example, on the assumption that the draft was to deal with countermeasures in Part Two or Two bis rather than Part One, was the case where a State was the particular victim of a breach. Serious problems arose with countermeasures taken by third States where the victim State did not want the countermeasures to be taken, just as, in the regime of collective self-defence, difficulties arose where third States acted in defence of a State that had not

sought their assistance. Any exploration of those issues demonstrated that there was some need for differentiation.

42. As a general point, it should be noted that Part Two, and especially article 40, was concerned with the responses of States to breaches of international law. Part One, on the other hand, was concerned with breaches of obligations by States. Hence there was a disjunction between Parts One and Two. The obligations covered in Part One might, for example, be obligations to an international organization or to an individual—breaches whose implications were not dealt with in Part Two. That was simply a corollary of the approach to responsibility adopted by Special Rapporteur Ago, whereby the Commission would not deal with international responsibility as distinct from State responsibility. Accordingly, he was proposing a saving clause stating that Part Two was without prejudice to any rights arising from the commission of an internationally wrongful act by a State that accrued to any person or entity other than a State.

43. As to the question of which responses by “injured States” might be permissible, table 2 in paragraph 116 set out one possible approach. It must be recognized that, where the Commission was concerned with obligations to the international community, it found itself fairly and squarely in the area of progressive development. Any proposals he made were inevitably somewhat tentative.

44. Table 2 proposed that, in the purely bilateral context, the injured State would have each of the rights to respond that were included in the existing text. In the framework of multilateral obligations, the analogy with article 60, paragraph 2, of the 1969 Vienna Convention implied that specially affected States would be treated as if they were in the position of States injured by the breach of a bilateral obligation. As for the other categories, where a State was a party to an obligation *erga omnes* or where there was an obligation to the international community as a whole, all those States could reasonably be regarded as having the right to demand cessation. The question was to what extent they could go further and demand the rights associated with reparation. His suggestion was that, assuming those States were no more affected than any other State in the group, they could not individually demand any of those rights, but could do so only in agreement with the other States in the group—except in the case of an obligation *erga omnes* where the breach was a gross breach.

45. That attempt to impose order on a disorderly and somewhat scanty body of material was intended simply to facilitate a logical discussion of the issues. The existing text answered each of the questions posed in table 2, but the answers were very unsatisfactory. Could any State party to an obligation *erga omnes* demand restitution? The answer in the existing text was “yes”, that in the existing commentary was “no”. Could any State party to an obligation *erga omnes partes*, though not affected, demand compensation? The answer was again “yes”. Could any State take countermeasures? Again the answer was “yes”. Those answers he could not accept. The Commission needed to identify the cases in which an answer in the affirmative was acceptable. Such an approach would be consistent with general international law in

analogous fields such as collective self-defence, and would enable States that were victims of breaches *erga omnes* to have some control over the situation without being left isolated, as would be the case under a bilateral conception. The implication was that aspects of the problem currently addressed by articles 19 and 51 to 53 would be resolved in later provisions. What was clear was that the problem should not be resolved by lumping together the whole concept of crimes, along with a multitude of other issues, in article 40.

46. He also wondered whether it was advisable still to apply the concept of injured State to all the States included in table 2 that were entitled to respond, or whether a distinction should be drawn between the injured State and other States with a legal interest, a form of language that had actually been used by ICJ in the *Barcelona Traction* case, quoted in paragraph 97 of the report. It was a moot point whether it should be adopted. Another question was the positioning of article 40 or article 40 bis. If a new part were to be adopted on the invocation of responsibility, it would be logical for the part to incorporate article 40 bis. Again, that would depend on whether the Commission opted for that distinction, but there was nothing to preclude discussion of the underlying issues associated with article 40 itself.

47. He was therefore proposing a new title for Part Two, but chapter I should retain its existing title and it should consist of at least three articles: article 36, a general introductory article, article 36 bis, dealing with cessation as a general principle, and article 37 bis on reparation as a general principle. Furthermore, the draft articles should contain a definition of “injured State”, set out in article 40 bis, but it could be placed somewhere else in the text. It was uncertain whether article 38 was needed, but it had been included for the purposes of discussion. On that basis, there would then be a chapter II dealing with restitution, compensation, satisfaction and the consequences including the contributory fault of the injured State, or the State concerned, together with any other provisions that might be considered appropriate in the light of the debate.

48. His presentation had raised fundamental issues about the structure of the draft as a whole. It did not seem that the Commission could reach a considered conclusion about the proposed new schema on the basis of the material before it, nor could a satisfactory debate be held on whether there should be a separate Part Two bis. He suggested that discussion of that matter be postponed. Since there was no doubt that articles 37 and 39 should be put in Part Four, they could be examined in that context. Each of the principles formulated in articles 36, 36 bis, 37 bis and 38 obviously needed to be discussed, as did the range of issues associated with existing article 40 and its alternative, so they could perhaps form the material basis of the debate on the text. It was for the Commission to decide whether it wished to divide up those issues or to deal with them as a group. If it decided to consider them as a group, he suggested that articles 36, 36 bis, 37 bis and 38 be studied first, before moving on to the nexus of questions associated with article 40, which were of a structural character. That approach might facilitate early reference to the Drafting Committee of the first four articles, together with the titles of the part and chapter. Article 40 and its implications might be considered thereafter.

49. Mr. PELLET said the third report was so meaty that it was hard to pick out particular points and he would have preferred the Special Rapporteur to make his presentation in several parts, as each would certainly have given rise to a fruitful debate. The Special Rapporteur had decided to give an overall presentation of what in fact corresponded to chapter I of Part Two of the draft. His own remarks for the moment would be confined to paragraphs 1 to 65 of the report and to draft articles 36 to 38. Although he supported the main thrust of the report, there were some points where he disagreed with the Special Rapporteur and the introduction in particular called for a number of observations.

50. In paragraph 2 (a) of the report, the Special Rapporteur introduced the notion of obligations *erga omnes*, which he defined, as he had done in his oral introduction, as obligations owed to the international community as a whole, in accordance with the formulation adopted by ICJ in the *Barcelona Traction* case. Nevertheless, within obligations to all States, a distinction must certainly be made between obligations owed individually to all States making up the international community and those owed to that community as a whole. His impression was that the Special Rapporteur had forgotten the first category and concentrated too heavily on the obligations owed to the international community as a whole. He was somewhat concerned about that emphasis because, for example, the right of innocent passage in the territorial sea was an obligation owed by each State to all other States and was indeed an obligation *erga omnes*. Hence it was not an obligation to the international community as a whole. It was important for that first category to be taken into account somewhere. If the Special Rapporteur did not wish to term it an obligation *erga omnes*, he should find another name for it. It was nonetheless an obligation which had its place among international rules and obligations and which should be differentiated from obligations to the international community as a whole.

51. In contrast, some legal theory regarded the ban on genocide or the obligation to respect fundamental human rights as integral obligations owed by a State not to other States individually, but to the international community as a whole, and that category of obligations was indeed dealt with extensively and thoroughly in the report. It was only in relation to that second category of obligations that the issue arose of an international crime committed by a State, briefly mentioned by the Special Rapporteur in paragraph 2 (a).

52. He agreed that, as the Special Rapporteur had indicated in paragraph 9 (d) of his report, the question of crime was doubtless of no relevance in chapter I of the restructured Part Two, at least up to and including article 38. Nevertheless, the problem would inevitably arise and would have to be settled when article 40 was tackled and when chapters II and III of Part Two were examined. The Commission had not studied Part Two until the very end of the first reading. The perusal of articles 51 to 53, in other words, the consequences of the notion of a crime on the implementation of State responsibility, had been undertaken separately and, in his opinion, the Commission had botched those articles. Moreover, several States had often expressed that view in their observations. He hoped the Special Rapporteur would not repeat that

mistake by the Commission. Before discussing chapter II of Part Two, the Commission ought to know whether something resembling the notion of a crime did exist.

53. It was clearly necessary to drain the abscess of articles 19 and 51 to 53 before seriously broaching chapters II and III of Part Two. Despite the Special Rapporteur's promises, he felt only partially reassured that such action would be taken. While he noted with approval that, in paragraph 59, the Special Rapporteur recognized in connection with non-repetition that much depended on the nature of the obligation and of the breach, he would have preferred a statement to the effect that particularly serious breaches of essential obligations could not be treated in the same way as ordinary breaches. That would have amounted to an oblique reference to acts deemed by article 19 to constitute a crime, without attaching any penal connotations to that word, notwithstanding the viewpoint expressed by the Special Rapporteur in paragraph 9 (*d*) of his report. The conundrum did not seem to have been resolved by article 40 either, yet it was vital for the Commission to acknowledge that serious breaches of essential obligations had to be subject to a special regime, in order that consensus might be achieved.

54. He was greatly attracted by the proposed restructuring of the draft and was convinced in particular that Part Three, on the settlement of disputes, had to be set aside. Nothing would be more harmful than to make substantive rules on State responsibility depend on the highly hypothetical acceptance of compulsory dispute settlement procedures by States, as was the case with countermeasures at the current time. The Commission's attitude implied a belief that it was going to succeed in "selling" its entire draft to States. The conscience of some members was salved by the argument that it was of no importance if the right to take countermeasures was poorly regulated, because recourse could always be had to dispute settlement. That approach was hazardous, because it was by no means certain that the whole draft would be accepted.

55. Similarly, the Special Rapporteur was right to propose the addition of a Part Four—or what might be an introductory part—containing common "without prejudice" clauses as well as any definitions other than that of responsibility. If such a general part was drawn up, it should include all the provisions concerning more than one part of the draft. For example, the Special Rapporteur had made two very interesting points in paragraph 7 (*a*), to wit that article 42, paragraph 4, and article 4 were identical in meaning. He was not entirely certain of that, but if so, an attempt should be made to fuse those articles into a single provision in the general part. The working group set up at the previous meeting might usefully concern itself with that matter over the next few days. Further on in paragraph 7 (*a*), the Special Rapporteur stated that force majeure could be a circumstance precluding the wrongfulness of the non-payment of compensation. Later on, in the highly convincing arguments set out with regard to article 42, paragraph 3, the Special Rapporteur appeared to suggest that, as it stood, the draft was open to criticism. He concurred, because the legal reason was not that a population should be deprived of its means of subsistence, but because a state of necessity existed and that particular reason could be linked to a much more general legal reason which precluded wrongfulness.

56. If that was so, should not the articles on circumstances precluding wrongfulness be moved to a general part when article 35 came to be revised? It might prove to be a somewhat complicated solution, but if such a course of action was not taken, it would prove necessary to indicate somewhere, possibly in chapter I, that circumstances precluding wrongfulness applied in the event of a failure to respect the obligations set forth in Part Two and it should be explicitly stated that the rules on circumstances precluding wrongfulness applied to the obligations to make reparation. As he had said in the past, obligations deriving from State responsibility were international obligations to which the rules of responsibility applied. In a way, the rules of Part One were primary rules when the rules of Part Two had to be applied. The Special Rapporteur seemed to agree that in some cases the obligations stemming from responsibility might not be respected, for circumstances did exist in which wrongfulness was precluded. It was necessary to say so in chapter I.

57. In that context, he echoed an idea apparently cherished by the Special Rapporteur and alluded to in paragraph 7 (*b*), namely that the draft was worded in terms of the rights of victims and not in terms of the obligations of the responsible State. While the Special Rapporteur's reasoning was highly persuasive, he could also see some counter-arguments. The Special Rapporteur was quite right to point out that in a system like international law which depended so little on courts, it was better to speak in terms of obligations. Nevertheless, two matters were somewhat disturbing.

58. The first, and less important, point was that an obligation would remain virtual if no injured State or member of the international community as a whole demanded performance. A State might well have an obligation to make reparation, but no consequence would ensue if no one demanded performance. Nevertheless, that was how the whole system of international responsibility worked and it did not unduly bother him. On the other hand, he was more concerned that no explicit mention was made anywhere of injury. Of course, it could be affirmed that articles 40 or 40 bis implicitly referred to injury because they alluded to victims, but that was not the same thing. Although he was a fervent supporter of the Ago position on the incurring of responsibility, which excluded injury from the actual definition of responsibility—an approach that was confirmed by the adoption of articles 1 and 3—he felt that the idea of injury had to be mentioned when drawing the inferences of responsibility. It seemed necessary to have a provision equivalent to article 3 of Part One, which might read along the lines of "An internationally wrongful act incurs an obligation to make reparation when (*a*) that internationally wrongful act has caused injury, (*b*) to another subject of international law". Nevertheless, the Special Rapporteur had said he wanted no mention of injury to another subject of international law but only to a State, in which case it would be necessary to explain somewhere that the draft was not simply a draft on State responsibility, but a draft on State responsibility vis-à-vis States. That was not perfectly plain at the current time. It was essential to reintroduce the notion of injury somewhere else in the draft as well as in article 40. Injury must have occurred and someone must have been injured, but those were two quite different matters. Symmetry with article 3 was required. An indispensable provision on

that subject might be better placed in Part Two bis, on the implementation of State responsibility.

59. While the division of the current draft into Part Two and Part Two bis was an excellent idea, it nonetheless called for some comment. He was not enamoured of the title of Part Two, “Legal consequences of an internationally wrongful act of a State”, as it applied equally well to Part Two bis. “The implementation of State responsibility” (Part Two bis), including possible recourse to countermeasures, was also a legal consequence of an internationally wrongful act. Perhaps an enumerative title like “Reparation and obligation of performance” might be preferable for Part Two.

60. Part Two bis ought to have contained articles on diplomatic protection, an issue central to the implementation of State responsibility where injury was caused to a person other than a subject of international law, but since diplomatic protection was being treated as a separate topic, there could be no question of re-including it in Part Two bis. Nevertheless, he strongly urged the Special Rapporteur to think about proposing a draft “without prejudice” provision referring to diplomatic protection. The natural place for that clause would be in chapter I of Part Two bis.

The meeting rose at 1 p.m.

2614th MEETING

Wednesday, 3 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN extended a warm welcome to Mr. Idris, who had been newly elected as a member of the Commission, and invited the members of the Commission to continue their consideration of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. IDRIS thanked the Chairman and said that, owing to the spectacular development of information technologies and world trade, the Commission’s role in the codification and progressive development of international law was more important than ever before.

3. In recent years, the Commission had studied important topics such as the establishment of an international criminal court, the draft Code of Crimes against the Peace and Security of Mankind, jurisdictional immunities of States and their property and State responsibility. It had also made tangible progress on reservations to treaties, unilateral acts of States, prevention of transboundary damage and diplomatic protection. He intended to participate actively in the Commission’s work in all fields of international law and believed it should tackle new topics, such as information technologies.

4. Mr. PELLET, replying to comments by two members of the Commission who thought that the term *préjudice* was better than the term *dommage*, said that, in international law, the two terms were synonymous.

5. Continuing with his comments (2613th meeting) on the third report of the Special Rapporteur, he said that, as it stood, Part Two of the draft articles was a failure compared with Part One, which was undeniably a success. The Special Rapporteur recognized that Part Two needed to be fully revised. In paragraph 8 of his report, the Special Rapporteur had stated that Part Two had been formulated on the basis of detailed and careful reports of the previous Special Rapporteur. He himself did not share that view. The previous Special Rapporteur, Mr. Gaetano Arangio-Ruiz, had greatly neglected the technical aspects of reparation and he earnestly hoped that, particularly in chapter II of Part Two, the current Special Rapporteur would propose much more specific and detailed articles on the forms and modalities of reparation, including its purpose, particularly compensation for *lucrum cessans*, and the means of calculating the amount and possible interest payments, on which the draft as it stood said nothing. States needed to know when they had to make interest payments and required general guidelines for calculating them. The more detailed provisions which the Special Rapporteur undertook to provide in paragraph 19 of the report would therefore be welcome.

6. With regard to reparation in cases of a plurality, not of injured States, an issue dealt with in article 40, but of authors of an internationally wrongful act, as covered in paragraphs 31 to 37 of the report, he had identified a number of weaknesses. Paragraph 37 stated that the case where concurrent acts of several States together caused injury was dealt with in further detail below; but it was not; the problem was not analysed further on in the report. He therefore hoped that the Special Rapporteur would take up the major issue of joint and several responsibility in international law. That was a very important and real

problem, as demonstrated by the cases heard by ICJ, such as the *East Timor* case and the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In a draft on State responsibility, it was essential that the articles themselves should clearly answer the question whether there was a distinction in international law between joint responsibility and several responsibility.

7. In his view, the Special Rapporteur referred incorrectly in paragraphs 39, 50 and 53 of the report to a “secondary” obligation or consequence. It would be better to refer to a “derived” obligation or consequence. The entire law of responsibility was made up of secondary norms and the rules applicable to responsibility were, by extension, secondary. However, it served no purpose to say that the consequences of a breach were secondary; they flowed—or were derived—from secondary norms. For the sake of clarity, terms that complicated matters unnecessarily should not be used in the commentaries to articles.

8. Turning to the draft articles proposed by the Special Rapporteur, he said that he had no problem with article 36, but, as he had noted the day before, the issues dealt with in Part Two bis were also among the consequences of an internationally wrongful act, with the possible exception of countermeasures, which were the consequence of the absence of reparation, non-cessation or the non-performance of an obligation. In a way, they were derived consequences. On the other hand, the possibility of invoking responsibility provided for in chapters I and III of Part Two bis was very definitely one of the consequences of an internationally wrongful act. The problem with the title of Part Two bis to which he had drawn attention was thus also to be found in the drafting of article 36.

9. Article 36 bis was very well presented in paragraph 50 and he found it satisfactory, particularly for the reason stated in paragraph 50 (c): a State must not be able to “buy back” a wrongful act or conduct contrary to international law.

10. He was somewhat sceptical, however, about the general obligation to provide assurances and guarantees of non-repetition. It was very difficult to express such an abstract idea. He did not object to that provision, but it had very little basis in international law and he suspected that it was not realistic. In any event, if the Commission decided to retain article 36 bis, paragraph 2 (b), it would have to specify the cases in which that so-called obligation actually existed.

11. Article 37 bis appeared to be excellent, provided that “the following articles” to which it referred clearly indicated the cases in which reparation was payable jointly or severally. The problem of joint or several responsibility should be dealt with in the articles and not just in the commentaries.

12. He was less sceptical than the Special Rapporteur about the usefulness of article 38. As shown by paragraphs 60, 61 and 65 of the report, general consequences were not absent from the draft, but article 38 did not state that it was the general consequences not provided for by the draft articles that continued to be governed by custom. It said that customary rules continued to be applicable in situations that were not covered by the draft articles. In any draft, it was reasonable to refer to custom in order to show

clearly that the draft was not in any event only of a residual nature. He therefore considered that the article should be retained, all the more so as Part Two had so many shortcomings. He hoped that the Special Rapporteur would do everything possible to remedy those shortcomings, but he doubted that he would succeed in codifying everything and covering every circumstance. Article 38 should therefore be retained. Like the Special Rapporteur, however, he thought that it should be placed in the part on general provisions, because the principle it embodied applied to the draft as a whole.

13. Mr. CRAWFORD (Special Rapporteur) requested the members of the Commission to limit their comments to the first four articles, as Mr. Pellet had done. Once the debate on those articles had been completed, they could then be referred to the Drafting Committee.

14. Mr. BROWNLIE said that, since the subject was an extremely difficult one, the Special Rapporteur’s work was of great assistance in that it helped to establish parameters and to see what the problems were. He supported the Special Rapporteur’s proposals on the placement of articles and the need for a Part Four.

15. He had some general concerns, however, about the current state of the work on Part Two of the draft articles on State responsibility. It seemed to him, both from the doctrinal point of view and in terms of how the law worked, that the content of principles relating to remedies—compensation, restitution, remoteness of damage—was necessarily determined by primary rules. The Commission therefore had to take great care with how the articles were formulated. He was suggesting not that it was necessary to stay away from the subject of remedies, but rather, that the Commission must be careful not to formulate what appeared to be general rules when in fact it was only listing optional remedies. Unlike Mr. Pellet, he thought the Commission must avoid over-elaborating on the topic. In the context of reparation as a general topic, he thought that restitution was clearly not a general consequence of a wrongful act. It was an optional remedy whose applicability depended on the particular context, which itself was determined by primary rules. By way of illustration, he referred to the legality or otherwise of confiscation or expropriation of foreign property by a State. Expropriation could be illegal only *sub modo*. For example, expropriation for a public purpose, which was *prima facie* lawful, became unlawful if appropriate compensation was not provided. Expropriation could also be illegal *per se*—for example, if it was carried out on what were clearly racial grounds or if it was in breach of some fundamental principle of human rights. In such cases, the absence of compensation was simply an aggravation of the illegality, not a condition for it. It was probable that restitution would apply to the second category as a remedy, but not to the first. There were other contexts in which it was perfectly clear that the “geography of primary rules”, i.e. the precise legal context, would determine whether compensation or restitution was the appropriate remedy. The Commission could not possibly make a catalogue of cases where restitution would be appropriate and compensation would not be. The drafting of article 37 bis might have to be analysed to see whether it implied that restitution was a generally applicable rem-

edy. The commentary, if necessary, should provide the required clarification.

16. One question directly related to the general problem of reparation dealt with in article 37 bis was that of the cessation of the wrongful act, dealt with in article 41 adopted on first reading. The Special Rapporteur rightly pointed out in paragraph 50 of his report that the cessation of a continuing wrongful act could be seen as a function of the obligation to comply with the primary norm. On that view, it was not a secondary consequence of a breach of an international obligation and it had no place in the draft articles. Nonetheless, the Special Rapporteur then made a good pragmatic case for including cessation in Part Two of the draft. Unfortunately, that did not resolve the analytical problem, i.e. apart from the exclusively judicial sphere in which “cessation” could be called for by a court by way of an injunction (as in the case concerning *Military and Paramilitary Activities in and against Nicaragua*), the concept could be linked in general international law to the “consequences of an internationally wrongful act” only by means of a somewhat artificial construct. Consequently, the text should at least avoid any reference to “cessation of a continuing wrongful act”. Not only was the concept of a continuing wrongful act in itself difficult to pinpoint and use, but the obligation of cessation also applied when there was a series of instantaneous acts.

17. The question of reparation was also related to that of a causal link and the intention underlying the wrongful act. Clearly, a State committing the violation could not incur the same degree of responsibility for a wrongful act that was intentional as for one that resulted from pure negligence. But, once again, that directly concerned the area of primary rules and so-called “universal” assertions should be avoided.

18. Lastly, with regard to appropriate assurances and guarantees of non-repetition, which the Special Rapporteur dealt with in paragraphs 53 to 59 of his report, he would like to know what their actual place was in the current State practice. They seemed directly inherited from nineteenth-century diplomacy. Even if they were accepted in principle, today their appropriateness and applicability varied greatly with the particular legal context. That did not mean that those questions should not be touched on in the framework of reparation, but the relevant provisions had to be worded in very flexible and general terms.

19. Mr. SIMMA said that the Commission should not rush through the adoption of unsatisfactory texts merely in order to complete the consideration of the second reading of the draft articles by its fifty-third session, in 2001. The draft articles of Part Two adopted on first reading had not been considered with anywhere near the same care as those of Part One. In particular, the question of the violation of multilateral obligations should be the subject of an in-depth discussion. The drafting of the commentary was still in the embryonic stage. It would certainly be preferable to extend the completion of the draft articles in a truly satisfactory manner into the new quinquennium than to repeat what had happened at first reading. If the Commission wanted to finish its work at the next session, it would have to come up with a complete draft by August because the fifty-fifth session of the General Assembly would be the last opportunity for the Commission to obtain feedback

from the Sixth Committee on a great number of vital questions still in abeyance, such as multilateral injury, countermeasures and dispute settlement. These issues were too important to be waved through. In the introduction of his report, the Special Rapporteur had again noted the correspondence between the draft articles of Part Two and those of Part One, which set out general secondary rules on State responsibility, and he had spoken of “reflexive” articles. But although that correspondence was real and the two sets of articles were counterparts, it was important to avoid conclusions that might prove premature. For instance, if the Commission decided to include the *exceptio inadimpleti contractus* in the draft—something the Commission should, in his view, refrain from doing—the “reflexive” character of the rules might lead to the possibility for States to reciprocally emancipate each other from these rules altogether.

20. With regard to methods, he agreed with Mr. Pellet on the desirability of re-examining the approach of having a Part Two and a Part Two bis. As to the articles themselves and the new wording proposed by the Special Rapporteur, he had no objection to article 36 or to the deletion of article 42, paragraph 3, although the issue should no doubt eventually be reconsidered in connection with countermeasures. The problem of the proportionality of countermeasures or the limitations which respect for human rights imposed on countermeasures would inevitably require a more in-depth discussion. He was thinking in particular of the consequences for the Iraqi population of the sanctions imposed on Iraq by the Security Council.

21. He agreed with the Special Rapporteur’s suggestion that cessation should be placed in a *chapeau* and that that concept should be linked with appropriate assurances and guarantees of non-repetition. Unlike Mr. Pellet and Mr. Brownlie, who had questioned the desirability of including appropriate assurances and guarantees of non-repetition in the draft, he thought that they had their place in a judicial context and he referred the Special Rapporteur to the WTO Panel’s decision on Section 301 of the United States Trade Act of 1974.³ If the legislation of a State allowed repeated violations of international law, it made sense for an international court to grant a guarantee of non-repetition. He agreed that the wording “where appropriate” might be too loose, leaving loopholes particularly in favour of references to internal law. One solution, as proposed in the Sixth Committee by the Czech Republic, would be to replace the words “where appropriate” in article 46 by the words “if the circumstances so require”.

22. The problem posed by article 38 regarding the application of customary international law might be solved in two ways: the general tenor of the article could be retained, provided that reference was made not only to the provisions of Part Two, but also to those of Part One of the draft articles on State responsibility. Moreover, article 38 would be better placed in the preamble, as had been done with other conventions. Unlike the Special Rapporteur, he did not think it needless to add a saving clause, which might be modelled, for example, on article 73 of the 1969 Vienna Convention.

³ See WTO, report of the Panel on *United States—Sections 301–310 of the Trade Act of 1974* (document WT/DS152/R of 22 December 1999); reproduced in ILM, vol. XXXIX (March 2000), p. 452.

23. Notwithstanding the Chairman's recommendation that article 40 should be put aside for the time being, he wanted to make several introductory comments on that provision for fear of not having the opportunity to return to it later. Article 40 concerned the entitlement to invoke the consequences of State responsibility. As a preliminary comment, he had considerable difficulties with the Special Rapporteur's piecemeal approach to the topic at hand, because it was very difficult to consider the subject matter of article 40 adequately without knowing how the Special Rapporteur would take the multilateralization of injury into consideration in his treatment of the range of remedies and, particularly, with regard to countermeasures. In table 2, in paragraph 116 of the third report, the Special Rapporteur provided an outline, but clearly all the problems had not been resolved. For example, in the last item in that table, it was stated that under certain conditions countermeasures could be adopted by agreement between all States. He challenged the members of the Commission to come up with a single example where all States in the world would agree on sanctions or countermeasures following a breach of an obligation *erga omnes*. Again, according to that item, in case of well-attested gross breaches, all States were to be entitled to resort to countermeasures. The phrase used by the Special Rapporteur reminded one of the magic formula of resolution 1503 (XLVIII) of 27 May 1970 of the Economic and Social Council—an unfortunate precedent in a way, because this procedure had turned out so cumbersome and politically charged that it almost amounted to a fraud.

24. He said the contours of the new regime replacing draft article 19 were satisfactory but again, until the current time only contours were visible and the concepts of *jus cogens* and obligations *erga omnes* had, to use a metaphor coined by Mr Brownlie, remained pretty much in the garage. In this context he could not but regard it as an element of retributory justice that the Special Rapporteur, who, with reference to the *East Timor* case, had tried to lock the garage door, as it were, saw himself confronted with the task of defending those concepts and implementing them in the context of State responsibility.

25. The vagueness of the concepts of *jus cogens* and obligations *erga omnes* might be tolerable in the law of treaties, where their consequences were isolated and where some procedural safeguards had been provided. Indeed, that was why the car had hitherto remained in the garage. However, State responsibility was a much more dangerous vehicle and, in a way, the moment of truth for those notions. Again, as far as he was concerned, he agreed with the general direction of the report; the Special Rapporteur appeared to steer clear of the Charybdis of positing multilateral responsibility as one vis-à-vis an "international community" that had no Claimant status, and the Scylla of too generously handing out entitlements to everybody, irrespective of closeness to breaches of international law.

26. Draft article 40 constituted the gate to this difficult terrain. As the Special Rapporteur had had scathing criticism for article 40 as adopted on first reading, he in turn thought that he could be a little critical of the Special Rapporteur's article 40 bis. The new draft article had several flaws. The first was structural. Not only did the title "Right of a State to invoke the responsibility of another State" not

really correspond to the content of the article, but there was no logical link between the first two paragraphs, which dealt successively with the definition of the "injured State" and with the conditions under which a State had a "legal interest" in the performance of an international obligation to which it was a party. But the concepts of a State being injured and a State having a legal interest did not really belong together. They belonged to different categories. The notion of "legal interest" had to be understood in a broader sense than had the Special Rapporteur: an interest was protected by law and was thus turned into a right. Thus, his interpretation of the judgment of ICJ in the *Barcelona Traction* case differed substantially from that of the Special Rapporteur. There was nothing on page 32 (para. 97) of that judgment that rendered the Special Rapporteur's reading the cogent one.

27. He wanted to conclude his comment on draft article 40 with a constructive proposal. Why not cut the Gordian knot and get rid of the notion of "injury" as the legal trigger to invoking State responsibility altogether? In his view, the notion of "injury" as such a trigger had become as useless and meaningless as the concept of "damage". The broadening of "damage" to "legal damage" had been coupled to a respective broadening of "injury" to a point where everybody was injured somehow through every violation of international law—and thus lead *ad absurdum*. He therefore suggested that the Special Rapporteur's proposed title of article 40 bis should be retained but that the introductory words of paragraph 1 should be replaced by the following: "For the purposes of these draft articles, a State has the right to invoke the responsibility of another State if . . .". Paragraph 1, subparagraphs (a) and (b), could then be adopted as proposed by the Special Rapporteur.

28. Paragraph 2 might begin with the following words: "In addition, for the purposes of these draft articles, a State may invoke certain consequences of internationally wrongful acts in accordance with the following articles", after which paragraph 2, subparagraphs (a) and (b), as proposed by the Special Rapporteur could follow.

29. The text of article 41 might be amended accordingly. He said he would submit a written version of his proposal for discussion at the next meeting on the topic.

30. Mr. BROWNLIE, speaking on a point of order, said that Mr. Pellet and he had obeyed the Chairman's injunction not to touch on article 40, although they both had extensive views on it. As Mr. Simma had disregarded that recommendation, he asked the Chairman either to open the discussion on article 40 or to reiterate more firmly his recommendation not to comment on it for the time being.

31. Mr. CRAWFORD (Special Rapporteur) noted that there had never been a substantive discussion on article 40.

32. The CHAIRMAN said that the members of the Commission would have the opportunity to have a thorough discussion of article 40 in due course; he asked them to confine themselves for the time being to articles 36, 36 bis, 37 bis and 38.

33. Mr. GAJA congratulated the Special Rapporteur on his impressive third report, which he largely endorsed,

particularly with regard to the proposed reorganization of the contents of a new draft. He endorsed the Special Rapporteur's proposal that the perspective of the State incurring responsibility rather than that of the injured State should be adopted for Part Two, as had been done for Part One. However, the draft articles should go further and consider all cases in which the State was responsible, not only those in which the responsibility of a State arose towards other States. In view of its workload, the Commission might be tempted to confine itself to that particular case. But if one took the Special Rapporteur's view that infringements of human rights or of the principle of self-determination injured not only States, but also individuals, or peoples, the situation of the latter could hardly be ignored in the draft articles. That affected the very obligations the responsible State had to fulfil as a consequence of the internationally wrongful act. Thus, for example, if an individual whose human rights had been infringed requested compensation rather than restitution, States should be precluded from insisting on restitution. In describing consequences of internationally wrongful acts, account would inevitably have to be taken of the position of all those who, under international law, had been injured, whether States, international organizations, other entities or individuals. It was not necessary to define more precisely when an individual or an entity other than a State had been injured. That was a question of primary norms which need not be resolved in detail in the draft articles.

34. With regard to article 36 bis, he tended to agree with the imaginative proposal that assurances and guarantees of non-repetition should be grouped with cessation. The Special Rapporteur suggested that, in order to establish when assurances and guarantees were required, the Commission should go beyond the text adopted on first reading, and also that the nature of the obligation infringed was of special relevance. That suggestion had been taken up by Mr. Pellet and could also be found in an observation by the Czech Republic.⁴ In some cases, assurances of that type might not be needed because there was no risk of a repetition, while, on the contrary, a risk might exist for wrongful acts of less importance. For example, in the case of a Government that had committed an act of genocide and that was still in power, it might reasonably be assumed that there was a serious risk that acts of genocide would be repeated. That would be a good reason for insisting on assurances or guarantees of non-repetition. But it might also be the case that the same Government had been replaced by another that had a very good human rights record. The State would then still have committed the wrongful act, but there would be no point in requesting guarantees of non-repetition once the risk had disappeared. On the other hand, a serious risk of repetition could exist for minor infringements. A link might be established in the text between assurances or guarantees of non-repetition and the seriousness of the risk of repetition, illustrating the point in the commentary by quoting the example given by Mr. Simma concerning a law that remained in force after the wrongful act stemming from the application thereof had been committed. If there was a risk of that legislation being applied again and giving rise to a wrongful act, it was reasonable for States to insist that

that legislation, which was not per se the cause of the wrongful act, should be repealed.

35. Article 37 bis should express the idea, already present in the commentary and taken up by the Special Rapporteur in his presentation, that not all consequences of an infringement should give rise to full reparation. Only direct or proximate consequences were concerned. Perhaps, as Mr. Brownlie had suggested, account should also be taken of another element, that of intention. Article 37 bis would be the appropriate place for that element, since it would concern all the possible consequences of the internationally wrongful act.

36. Turning to article 38, he said that the fact that the article was in square brackets augured ill for the fate awaiting it. The provision might be recast in positive terms, indicating by way of example some of the legal consequences that had not been dealt with, rather than, as proposed by Mr. Pellet, attempting to cover all the consequences provided for by customary law and including a saving clause to cover anything that might have been overlooked. Perhaps a reference should be inserted somewhere in the draft articles to the consequences that were not really part of the law of State responsibility. The best place for such a reference would be, not in Part Two, but in a Part Four, next to the reference to the rules relating specifically to the consequences of some wrongful acts (*lex specialis*). In drafting article 38, the Commission had had in mind issues of the validity or termination of treaties. If a wrongful act representing a material breach of a treaty was committed, the consequences set forth in article 60 of the 1969 Vienna Convention also applied. It might be unnecessary to say so, but there was no harm in stating that the breach of a treaty obligation could have consequences that went beyond the kind of consequences pertaining to the law of State responsibility. Those were not direct consequences, in the sense that the wrongful act would not bring about the termination of a treaty, but, in those circumstances, there would be the right to terminate the treaty. It might be useful to add such a provision. Perhaps the difficult case of unlawful situations created by wrongful acts should also be mentioned. In the case of the occupation of a territory by force, there was a set of consequences that clearly belonged to State responsibility, but other consequences might arise from the fact that the occupying State, throughout the time it occupied that territory, could not be entitled to prerogatives implied by possession of a territory. He thus favoured the retention of a recast article 38, placed somewhere else in the text.

37. Mr. KAMTO welcomed the work done by the Special Rapporteur in reorganizing Part Two of the draft articles on State responsibility so as to make it more coherent and substantial. He had always had some doubts about the distinction between primary and secondary rules, a distinction that was intellectually tempting, but difficult to apply in practice. Various arguments put forward by the Special Rapporteur in his second⁵ and third reports, and by some members in their oral statements, clearly showed that that distinction was sometimes invalid. That being said, as that was the plinth on which the entire drafting

⁴ See 2613th meeting, footnote 3.

⁵ *Yearbook* . . . 1999, vol. II (Part One), document A/CN.4/498 and Add.1-4.

exercise rested, it was perhaps unnecessary to dwell unduly on the problem.

38. While agreeing with the Special Rapporteur on the need to reformulate the title of Part Two, he nevertheless wondered whether the expression “legal consequences” was appropriate, given that it did not seem to offer a fully satisfactory reflection of the content of the articles in Part Two. Perhaps it would be more appropriate to speak of legal implications; for the word “consequences” implied the full range of effects immediately attached to the wrongful act itself, whereas what underlay the treatment in Part Two was the reaction provoked by the wrongful act, or what it implied, and not the consequence in the strict legal sense as usually understood.

39. In the French text of article 36, the words *est engagée par un fait* should be replaced by the words *est engagée à raison d'un fait*, as the responsibility of a State could not arise from the act itself.

40. With regard to paragraph 2 (b) of article 36 bis, the need for appropriate assurances and guarantees should be retained, although that would not be possible in every case. A guarantee of non-repetition would be useful in the case of a breach committed by recourse to force, as it would reassure the party that had been the victim of the breach. The term “guarantee” was perhaps somewhat strained, for the fact that a State undertook not to repeat the action did not mean that it would be as good as its word. At any rate, from a legal standpoint, the fact that such a guarantee had been given would be an additional element. In essence, it would be a new undertaking over and above the initial undertaking that had been breached. Psychologically, it could provide the other party with additional assurances. Such a guarantee could take a number of forms. It might be a commitment made before a court or a diplomatic act of the State that had been guilty of the internationally wrongful act.

41. Paragraph 2 of article 37 bis posed a drafting problem. Full reparation perhaps eliminated the legal consequences of the internationally wrongful act, but its material or factual consequences might persist, as reparation did not in every case seek to eliminate the consequences of the act, but was sometimes intended to compensate for them. The words “eliminate the consequences” should perhaps be amended. In his view, the paragraph should perhaps adopt the classical approach of stating that reparation could be made through restitution in kind and that, if that was not possible, it must take the form of compensation or satisfaction. The final phrase, stating that the two forms of reparation could be combined, would then be appropriate. But in the current formulation, the impression given was that restitution in kind and the other forms of reparation, namely, compensation and satisfaction, were placed on the same footing.

42. Lastly, on article 38, he shared the view of members who considered that the article served a purpose. The title might be improved: the words *autres conséquences* were preferable to *conséquences diverses* because even the consequences referred to previously were included in *conséquences diverses*, an expression that might encompass what had already been covered in article 36 bis or in article 37 bis.

43. Mr. KUSUMA-ATMADJA said he agreed with Mr. Kamto that the distinction between primary rules and secondary rules was rather artificial and hard to maintain. With regard to State responsibility, he referred to the case of the nationalization of a colonial Power's estates by the former colony on gaining independence. In that case, the former colony was entitled to correct the discrimination between foreigners and natives that had been practised by the former colonial Power by rejecting the rule of prompt, effective and adequate compensation. Furthermore, what Mr. Gaja had said concerning article 38 seemed very reasonable and he welcomed his proposal that the consequences of the internationally wrongful act should be dealt with in a Part Four specially drafted for that purpose. As for article 40, it was a very difficult provision which would require special treatment and should be considered separately.

44. Mr. CRAWFORD (Special Rapporteur) said that, in order to expedite the Commission's deliberations, he would immediately respond briefly to the comments made on his third report. First, no matter how the notion of “crime” was perceived, attention had to focus on the consequences of the gravest breaches.

45. During the work of the Drafting Committee, he would carefully study Mr. Pellet's proposal that a provision on damage should be drafted as a counterpart to article 3 of Part One. That concept had to be dealt with in Part Two of the draft articles in a variety of contexts, for example, restitution and compensation, to which it was unquestionably related. The title of Part Two admittedly covered some aspects which ought to be incorporated in Part Two bis. He was pleased about the apparent agreement on the need to draw a distinction between the consequences flowing from a wrongful act and their invocation. At a later stage, it would be necessary to consider whether the provisions in question should form two separate parts or two chapters of the same part.

46. The subject of detailed provisions had been dealt with in the report in the context of compensation because that was where it arose. He would seek guidance from the Commission during the first part of the session because of the disagreement between Mr. Pellet and Mr. Brownlie on the matter. In chapter I, section B, of his report, he would propose a separate article on interest, since interest was different from compensation. As to the advisability of going into details on the quantification of compensation or the underlying principles thereof, he would also require instruction from the Commission, for that was a highly complex question entailing lengthy research and it was not unconnected with the subject of diplomatic protection.

47. Similarly, joint and several responsibility, an important issue raised by Mr. Pellet, would be dealt with in chapter III, section B, of his report.

48. On the question of assurances and guarantees of non-repetition, he had merely disentangled the issues entangled in articles 19 and 40. It was true that, in the history of responsibility, especially in the nineteenth century, there had been instances in which demands for ironclad guarantees and assurances had been made in coercive terms and enforced coercively, and that explained some

reactions. Nevertheless, there were modern examples of guarantees and assurances supplied in the form of a declaration before a court and of demands therefor submitted without coercion. He himself endorsed Mr. Gaja's position that it would be useful to clarify the notion of assurances and guarantees of non-repetition and to refer in the commentary to the question of the gravity of the breach and the risk of repetition. That was a very delicate subject because it concerned the relationship between international and internal law. Hence, in that connection, it would be wise to hold that the mere existence in internal law of legislation which might be capable in certain circumstances of producing a breach was not per se a breach of international law, provided that the text at issue could be implemented in a way consistent with international law. At a general level, that seemed to be a correct principle.

49. There seemed to be general support for the retention of article 38 in some form. It would be a matter for the Drafting Committee to decide whether it was placed in Part Two or in Part Four. Personally, he would prefer the second option and a recasting of the provision.

50. He agreed with Mr. Brownlie that the application of the concept of "remote damage" depended on the particular legal context, but it also depended on the facts themselves. The Commission should not get lost in details and it might be better to avoid retaining classical formulas based on an analogy with internal law. Was restitution an optional remedy? Article 37 bis was neutral on the choice between restitution and compensation, whereas article 43, as it stood, established restitution as the primary remedy. He would return to that question when dealing with article 43. He was grateful to Mr. Brownlie for the argument he had set out for maintaining the notion of cessation in the draft articles. He was pleased that that position had been generally accepted. Furthermore, like Mr. Brownlie, he considered that the notion was not exclusively linked to that of a continuing wrongful act, since there could be a pattern of individual breaches not itself separately classified as a wrongful act, but which nonetheless called for cessation and, possibly, for assurances and guarantees. The Drafting Committee should examine that point.

51. Mr. Pellet and Mr. Simma were uncertain about reflexivity, a matter requiring further consideration in the Drafting Committee, which would have to decide on the retention or deletion of certain provisions. Moreover, he agreed with Mr. Simma that the Commission should review the limitation referred to in article 42, paragraph 3, when it studied countermeasures.

52. He noted that Mr. Gaja was in agreement with the need to pursue reflection on the topic of directness or proximity in the context of article 37 bis. His comments on the location of article 38 deserved consideration.

53. In his own opinion, the Commission was more concerned with cessation and reparation than with underlying issues like the validity of legal acts. Although that subject was a question of legal effects, it raised problems of its own.

54. He subscribed to most of Mr. Kamto's drafting comments. The distinction between primary and secondary

rules should not be abandoned, although the application of many secondary rules would be affected by primary rules.

55. Mr. PELLET asked the Special Rapporteur to cite examples of cases in which the courts had given assurances and guarantees of non-repetition. He did not see any, apart from a vague kind of judicial guarantee of non-repetition by which ICJ had specified, in its judgment in the *Nuclear Tests* case (*New Zealand v. France*), that the applicant could request an examination of the situation if the situation had changed. But that was not a problem of responsibility. In that case, the Court had not found France guilty of committing an internationally wrongful act and its conclusion did not really seem to be a guarantee of non-repetition. He was not convinced by Mr. Simma's example either: he did not have the impression that the appeals body in question had given the slightest guarantee of non-repetition. He was in favour of the progressive development of international law, but it was necessary to decide in which direction to point it.

56. Concerning the question of restitution, he agreed a priori with the Special Rapporteur that the problem should be considered in connection with article 43. In that context, he disagreed with Mr. Brownlie: once the principle established in the judgment in the *Chorzów Factory* case was accepted, it was only logical to give priority to *restitutio in integrum*. The purpose of reparation was to do away as much as possible with the consequences of the internationally wrongful act. If that principle was not applied first, States, and rich States in particular, would be able to commit an internationally wrongful act. That was unacceptable: *restitutio in integrum* must be the primary form of reparation. Restitution was the rule.

57. He was troubled by the references which Mr. Brownlie and Mr. Kusuma-Atmadja had made to nationalizations. That question had nothing to do with the problem of responsibility. In international law, nationalization was a lawful act and the right to nationalize was subject to a number of conditions, including the obligation to pay compensation and not to discriminate. It was only when a State failed to comply with those obligations that it committed an internationally wrongful act entailing its responsibility. Compensation for nationalization was not compensation for an internationally wrongful act.

58. With regard to the direct nature of the damage, he pointed out that the chain of causality, or "transitivity", must be direct and uninterrupted, whereas the cause might not be immediate. He was not certain whether the word "proximity" should be used in connection with causality. A whole series of events could take place between an internationally wrongful act and the damage and the chain of "transitivity" was such that the damage was reparable on the basis of responsibility for a breach, i.e. for a wrongful act. That idea should be reflected in an article rather than in the commentary.

59. Mr. SIMMA said he concluded from the discussion that assurances and guarantees of non-repetition should be a function of two parameters: the seriousness of the breach and the probability of repetition. He could not see that the seriousness of a breach was a factor calling for

assurances and guarantees to a greater degree than in other cases. What was important, for example, in the case of the illegal occupation of a territory, would be a declaration by a court that such an occupation was illegal. Assurances and guarantees of non-repetition were also needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent. In such a case, it made perfect sense for an international court to declare that certain assurances and guarantees of non-repetition were to be given, without necessarily going so far as to call for the repeal of the legislation at issue.

60. Mr. CRAWFORD (Special Rapporteur) said that he did not really have in mind any example of a court decision concerning the granting of assurances and guarantees of non-repetition. In State practice, however, such assurances and guarantees were frequently given, for example, by the sending State to the receiving State concerning the security of diplomatic premises.

61. Mr. TOMKA pointed out that guarantees of non-repetition did not exist only in judicial practice. Some authors had considered that certain measures contained in peace treaties signed after the Second World War contained guarantees of non-repetition.

62. Mr. KAMTO said that, although guarantees of non-repetition could be regarded as part of the progressive development of international law, they were nonetheless useful. It must be asked, however, who gave the guarantees: was it the court before which the case had been brought or the State which had been guilty of the internationally wrongful act? On the basis of the discussion, he had the impression that it was the court which had to give such guarantees, but, in fact, it was the State that had to do so. The question then arose whether the State must give the guarantees before the court, during the proceedings, or outside the proceedings. Both alternatives were conceivable. Returning to the example of the violation of international law through use of force, to which he had referred earlier, he said that it was in such an instance that guarantees of non-repetition were most necessary. They could be given in the form of a declaration before the court, and might or might not be included in the court's ruling, or in the form of a diplomatic declaration, which would not necessarily be made during the proceedings. In either case, guarantees of non-repetition were only an undertaking in addition to the one initially violated by the State concerned. When a State was asked to put a stop to its wrongful conduct, it was actually being asked to comply with its international undertaking or, in other words, to give a guarantee of non-repetition. The legal effect of guarantees of non-repetition was thus basically only psychological. Except in a few cases, materially speaking, there was no definite guarantee that the State would not violate its commitment in the future. He gave as an example the case of State A, that had on its territory a military training camp situated near its border with State B. If nationals of State A or foreigners in training in that camp crossed the border from time to time to commit crimes or take military action in the territory of State B, the international responsibility of State A could be invoked. By taking measures to stop such acts, State A put an end to an internationally wrongful act attributable to it. However, it could also have given

guarantees of non-repetition consisting, for instance, of a commitment to dismantle the military training camp or move it away from the border in question. A provision on guarantees of non-repetition certainly had a place in the draft articles under consideration.

63. Mr. GAJA (Chairman of the Drafting Committee) announced that the Drafting Committee on the topic of "State responsibility" was composed of the following members: Mr. Crawford (Special Rapporteur), Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Pellet, Mr. Rosenstock and Mr. Rodríguez Cedeño as ex officio member.

The meeting rose at 1.05 p.m.

2615th MEETING

Thursday, 4 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (continued) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that he would concentrate on the most salient issues addressed in the third report (A/CN.4/507 and Add.1–4) before turning to draft articles 36 to 38. He reserved his position on articles 40 and 40 bis.

2. He supported most of the views expressed by the Special Rapporteur in the report. For example, paragraph 6 clearly demonstrated the linkage between the form of the draft articles and the peaceful settlement of

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

disputes, and paragraph 7 dealt with the reflexive nature of the provisions and the question of secondary norms. Personally, he did not understand what problems that qualification posed, since it was clear that the function of a norm in a given context determined whether it was of a primary or secondary nature. Similarly, the question could be raised whether the 1969 Vienna Convention applied to that Convention itself. The difficulty in answering that query resulted from its provision on non-retroactivity, a clause which did not in any case apply in the current context, otherwise there would be no problem to apply the Convention to itself. Hence it had to be assumed that State responsibility amounted to a sum of obligations resulting from a breach of international law. If one of those obligations was not honoured, State responsibility arose on grounds of non-compliance with that rule of State responsibility. In such a case, the rules of State responsibility applied to rules of State responsibility themselves. The rule violated acted as a substantive or primary norm and the rules applicable to that breach were secondary norms or meta-norms. For example, if a State committed a delict of an instantaneous nature and did not fulfil the duties ensuing therefrom under the regime of State responsibility, a new delict of a continuous nature would take place. He saw no need to spell out that idea in the articles; a comment would suffice.

3. As paragraph 9 rightly indicated, the first draft totally ignored the particularities when a plurality of the States was involved. Nevertheless, the Commission had to deal with that matter, since the increasing integration of the community of States meant that a wider range of States would be affected by a single breach of international law. In the case of a multiplicity of injured States, it was necessary to identify the States which were entitled to react, the type of reaction that would be appropriate and the relationship between those States. In the case of a multiplicity of author States, it was necessary to determine which States were under an obligation, to what extent (joint or joint and several liability) and what the relationship was between them, for instance, the case could occur that one of them was entitled to compensation from another.

4. He endorsed the new structure of the draft proposed by the Special Rapporteur in paragraph 10. The only debatable point was whether chapter III of Part Two did not belong in Part Two bis. Perhaps the rules on a plurality of States could be divided. Chapter II dealt with the obligations of the author State, so the question of plurality should be addressed there. Chapter II bis was concerned with the rights of injured States, so the rules on a plurality of those States should be included in that chapter. Another possibility would be to list all the rules on plurality in a separate chapter.

5. There had been some discussion of the issues which should be included in or omitted from the draft articles in view of the brevity of the remaining time. The Commission should not attempt the impossible, but should endeavour to complete the exercise at the fifty-third session, since States stood in urgent day-to-day need of the articles and were already applying some of the existing draft articles from Part One. Furthermore, there had been a shift in paradigms in international relations and law, accompanied by the emergence of different kinds of responsibilities, such as the responsibility of and to international organiza-

tions, individual responsibility and responsibility for violations of human rights, all of which had specific features which could not be dealt with comprehensively in the foreseeable future. He therefore favoured restricting the subject matter to State responsibility as between States and, for that practical reason, did not subscribe to Mr. Pellet's proposal (2613th meeting) to refer to subjects of international law. Nor was he in favour of regarding damage as a constituent element of State responsibility, although it was undoubtedly a criterion which had to be taken into account when deciding the amount of reparation. Another question which had to be excluded was the validity of acts giving rise to State responsibility. A checklist ought to be made of issues that could be covered.

6. A middle way had to be found between the approaches of Mr. Brownlie and Mr. Pellet to detailed rules on reparation. It had to be remembered that the more detailed the rules were, the less likely it was that reparations would fully comply with them, something that would in turn engender further cases of State responsibility. As the Commission's aim was not to create the conditions for more breaches of international law but to settle the issue, some flexibility was required in the rules on reparation. Nevertheless, the ultimate goal as spelled out in the *Chorzów Factory* case had to be borne in mind. Of course, cases of State responsibility would usually be dealt with through negotiations, rather than by an international court. While it was therefore necessary to provide an injured State with some guidelines on the reparations it could expect, detailed provisions would not be conducive to the settlement of such questions. The real issue of such negotiations was not normally the amount of State reparations, but whether a wrongful act had occurred. If a State was accused of having committed a wrongful act and was confronted with that situation, it would be easier for that State to admit that it had acted wrongfully when there was a margin of discretion in assessing reparations.

7. The new formulation of article 36 posed no major problems. Former article 42, paragraph 3, could not be applied to reparation in full, but it might apply to compensation. Similarly, in the light of those considerations, the existence of article 4 would appear to render article 42, paragraph 4, redundant. He endorsed the separation of article 36 and article 36 bis and the latter's structure. The duty of cessation was not a separate duty following a breach of international law. If the courts declared a duty of cessation, then the main gist of such a finding was not that there was a duty to refrain from wrongful activities, but rather an acknowledgement that the activity was wrongful and, only as a consequence, that the rules of international law had to be observed. He would, however, agree to including that duty in the field of State responsibility, if the formulation used in the draft article was employed and provided it was made clear that the duty did not relate solely to continuing wrongful acts.

8. The duty to provide assurances and guarantees of non-repetition should not be included in the same provision as the duty of cessation. He shared Mr. Kamto's view (2614th meeting) that there was a major difference between those duties, despite the fact that the Special Rapporteur had referred to the forward-looking nature of both obligations. The new additional duties of author

States imposed by assurances and guarantees were triggered by the breach, whereas the duty to stop wrongful activities was not a new one prompted by the breach. At the same time, he concurred with the Special Rapporteur that, as the duty to offer appropriate assurances did not belong to the field of reparations, it should be covered separately, perhaps in an article following article 37 bis.

9. Although doubts had been expressed about the need for such an article, practice justified it and indeed the Special Rapporteur had referred to cases of diplomatic immunity where frequent demands had been made for such assurances. An article of that kind was particularly necessary when national law obliged State organs to violate international law. Since the delict would have been accomplished only in application of national law, that law itself did not amount to a delict. A declaration that the State had breached international law would not affect the national statute. A device was therefore needed to oblige the State to bring the domestic statute into conformity with international law. The best illustration of such a situation was article 36 of the Vienna Convention on Consular Relations. The visiting rights provided for in that article were frequently denied, with the result that assurances and guarantees had to be requested. On the other hand, the categorical character of the new text should not be maintained. He supported the formulation “if circumstances so require” proposed by the Czech Republic and then by Mr. Simma (2614th meeting), which would certainly answer the point made by Mr. Gaja.

10. The position of article 37 had still to be debated. He subscribed to the idea reflected in article 37 bis that reparation should be deemed a duty or obligation of the wrongdoer instead of a right of the injured State. That approach would leave open the question of the legal position of the injured State and of third States with regard to the wrongful act. The question of causality and remote causes was an extremely thorny issue. National criminal and civil law took different views on the matter. Sooner or later the Commission would have to make a general study of *causa proxima*, *causa remota*, *causa causans*, *causa sine qua non*, as well as concurrent, intervening and superseding cause. As there were few precedents in international law, each case had to be judged on its merits. In that respect, he shared the view expressed in the commentary to article 44,³ which was mentioned in paragraph 32 of the report. As to Mr. Kamto’s proposal (*ibid.*) to replace “eliminate”, in article 37 bis, paragraph 2, by a different expression, it was a question of eliminating the consequences of the wrongful act and not the act itself, which clearly could not be undone, and the new formula would no longer convey the original meaning.

11. Article 38 was placed in square brackets, but it was needed, since the draft might not cover all the legal consequences of wrongful acts. If it was argued that it did, what would be the position with regard to individual responsibility, opposability of illegal acts and succession in responsibility? Would it not be wise to make an explicit reference to article 73 of the 1969 Vienna Convention, since the

commentary did not mention it? In his opinion, a reference to that article ought to be incorporated in the commentary.

12. Mr. ECONOMIDES said that he would largely focus on articles 36, 36 bis, 37 bis and 38, but would begin with some general observations. He fully supported the view expressed by the Special Rapporteur in paragraph 3 of the report and thought that it should be possible to present the complete text of the draft to the Sixth Committee of the General Assembly at its fifty-fifth session, provided the Commission worked hard.

13. With reference to paragraph 6 of the report, the only form the text could take was that of an international convention, which would clearly call for a general, comprehensive system for the settlement of any disputes that might arise from the interpretation or application of the draft as a whole. If, however, the introduction of such a system were to prove difficult, it would be necessary to revert to the idea of setting up a dispute settlement procedure at least for disputes entailed by countermeasures.

14. He commended the Special Rapporteur’s efforts to find a compromise solution to article 19. The definition in article 19, paragraph 2, had to be taken up by the Special Rapporteur, since it was vital to such a compromise. The definition, which brought to the forefront the concept of an international community, constituted substantial progress towards the development of international law and an international community.

15. As the Special Rapporteur pointed out in paragraph 17, the draft covered all international obligations of the State and not only those owed to other States. Hence it might serve as a legal basis when other subjects of international law, such as international organizations, initiated action against States and raised issues of international responsibility. That question deserved careful examination. Personally, he had nothing against extending State responsibility to encompass international organizations.

16. As far as paragraph 7 (a) and paragraph 42 of the report were concerned, if the intention was that the circumstances precluding wrongfulness, set out in Part One, should also apply to obligations stemming from Part Two, that fact had to be stated explicitly in the draft. A reference thereto in the commentary was inadequate and on that point he fully agreed with Mr. Pellet (2613th meeting). For his own part, he did not think the question should be regulated; it should be left to customary international law. On the other hand, article 42, paragraph 3, which stipulated that in no case should the population be deprived of its means of subsistence, should be maintained. As article 4 did not seem to cover the cases referred to in article 42, paragraph 4, it might be wise to keep the latter, whereby internal law could not be invoked as justification for failure to provide full reparation, a provision which followed the example of article 27 of the 1969 Vienna Convention. Alternatively, the scope of article 4 might be broadened in order expressly to deal with such cases.

17. In his opinion, the title of Part Two should be worded “Legal consequences of international responsibility”. Logically speaking, the internationally wrongful act came first and gave rise to the State’s international

³ See paragraph (13) of the commentary to former article 8 (*Yearbook . . . 1993*, vol. II (Part Two), p. 70).

responsibility. Once the latter had come into being, it entailed a number of consequences, which were in fact set out in Part Two. As article 36 clearly stated, the consequences in question were therefore those of international responsibility and not those of the wrongful act.

18. As to article 36, he was not entirely satisfied with the title, which should be reviewed by the Drafting Committee. The assurances and guarantees of non-repetition mentioned in article 36 bis should be demanded when the worst breaches occurred, especially those covered by article 19. Owing to the reasons he had stated earlier for amending the title of Part Two, article 37 bis, paragraph 1, should read “An internationally responsible State is under an obligation to make full reparation for the consequences of the internationally wrongful act that it has committed”. As it stood, the wording of the article completely ignored international responsibility, although it was the essential element.

19. He agreed with Mr. Kamto’s proposal (2614th meeting) regarding the title of article 38 and also that the article should be placed in Part Four. Lastly, it would be advisable to amalgamate the contents of articles 37 (*lex specialis*) and 38 in one provision.

20. Mr. LUKASHUK said that the Commission had to rise to the challenges of the new millennium, and none was more important than that of completing the draft articles on State responsibility. The Sixth Committee had underscored the need to do so in the current quinquennium, and the Special Rapporteur had demonstrated his determination to fulfil that obligation. He supported the proposals set out in the very detailed report and found the fact that the footnotes contained full publishing information, not just the authors and titles of works, to be especially welcome.

21. In formulating the draft, the Commission must take account, not only of legal obligations, but also of other types of international obligations and of the corresponding responsibility. There were numerous uses in the literature of the phrase “non-binding agreements”. That did not mean the same thing as agreements that were binding but not in the legal sense; it often referred to obligations under the instruments, of OSCE, which were clearly defined as being political in nature. That was why he had found article 16,⁴ which spoke of an international obligation “regardless of its origin or the character”, so unsatisfactory. Each individual article should clearly refer to international responsibility in the legal sense.

22. The Special Rapporteur had rightly devoted a great deal of attention to the structure of the draft articles and his proposal could be adopted, subject to minor revision when all the draft articles were in final form. The articles were not supposed to codify the entire law of international responsibility, which was still too young to warrant such treatment. The objective was rather to lay down a foundation for a new branch of law—the law of international responsibility. The Special Rapporteur’s emphasis on the formulation of general provisions was therefore of partic-

ular importance: the details and nuances would be worked out in future as practice in the field evolved.

23. The report raised a significant point: that reparation must not result in depriving the population of a State of its own means of subsistence. That could be of critical importance for developing countries, since the adoption of countermeasures could have heavy consequences for their unstable economies. A provision on the subject must be retained, in his view. Assurances and guarantees of non-repetition were an integral part of responsibility. When a child was punished for bad behaviour, it exclaimed, “I won’t do it any more!”, thereby acknowledging that it had acted wrongfully and promising to behave properly in future. The same reaction occurred in inter-State relations.

24. As Mr. Economides had already pointed out, the draft articles equated similar but differing concepts the legal consequences of internationally wrongful acts and international responsibility, thus obscuring their real relationship of cause and effect. The title proposed by the Special Rapporteur for Part Two referred to the legal consequences of internationally wrongful acts, but those consequences constituted responsibility, although the word was not used. Similarly, article 37 bis stated that a State which had committed an internationally wrongful act was under an obligation, but said nothing about responsibility. On the other hand, the proposed new version of article 36, in paragraph 119, was correctly worded in that it referred to international responsibility which entailed legal consequences.

25. Many members of the Commission supported the retention of article 38, but he agreed with the Special Rapporteur that there were no grounds for doing so. Such a provision would typically be included in a convention: witness the Vienna Conventions. But there was significant doubt as to whether the draft articles would ultimately be transformed into a convention. In the new field of international law covered by the draft, a very general provision like the one in article 38 could generate a great many questions and doubts.

26. Mr. PELLET said that Mr. Economides and Mr. Lukashuk had raised an extremely important issue: it was not logical to speak in Part Two of the consequences of an internationally wrongful act, because responsibility was engaged by the internationally wrongful act, and it was from the responsibility that the consequences stemmed. That approach, it must be said, went a step further from the stance taken by Special Rapporteur Ago, who had considered that responsibility was the entire set of consequences of an internationally wrongful act. If the new approach was adopted, as he believed it should be, article 37 bis should be reformulated along the lines of “A State responsible for an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act”. The Drafting Committee could deal with that matter.

27. He remained unconvinced, however, by the proposal advanced by Mr. Economides regarding the title of Part Two. If it was to be “Legal consequences of State responsibility”, the problem he had raised (2613th meeting) of the relationship between Part Two and Part

⁴ For the draft articles adopted by the Drafting Committee at the fifty-first session of the Commission, see *Yearbook ... 1999*, vol. I, 2605th meeting, p. 275, para. 4.

Two bis remained unresolved, since Part Two bis also dealt with the consequences of State responsibility, including probably the possibility of recourse to countermeasures.

28. Mr. HAFNER, referring to Mr. Lukashuk's contention that article 38 would have no place in a non-binding agreement because it was typical of conventions, pointed out that the 1969 Vienna Convention, among others, contained an equivalent, not in the substantive part but in the preamble, which was not binding.

29. Mr. LUKASHUK said the fact that a provision was in the preamble did not deprive it of significance. According to article 31 of the 1969 Vienna Convention, the context of the terms of a treaty comprised the text itself including its preamble and annexes. More important than whether article 38 would typically be placed in a convention or in some other instrument was the fact that such an unspecific formulation could raise numerous extraneous questions and complications, and that was why he thought it should not be retained.

30. Mr. ECONOMIDES thanked Mr. Pellet for his constructive comments and said that his own proposal regarding the title of Part Two was merely a preliminary formulation, since the title would be reviewed once all the provisions in that Part had been finalized. He endorsed the comments just made by Mr. Lukashuk: the preamble was an essential element of any treaty and in some specific cases incorporated extremely serious commitments. As a reflection of the will of the parties, the preamble created legal obligations that were just as binding as those in other parts of the treaty.

31. Mr. HE expressed appreciation to the Special Rapporteur for an excellent report which provided a good basis for moving forward as planned at the start of the current quinquennium. He could basically go along with the proposed structure of the draft articles from Part Two onwards and welcomed the fact that the draft articles in Chapter I of Part Two had been reformulated in terms, not of the rights of the State, as in the version adopted on first reading, but of the State's obligations. That would make it possible to solve some difficult issues.

32. Part One was concerned with internationally wrongful acts, in other words the focus was on the State responsible for the conduct in question. Part Two was concerned with the rights of the injured State, but the link between obligation and right was abrupt. The notion of obligations *erga omnes* which had been implied in article 40, paragraph 3, as adopted on first reading and now appearing in article 40 bis, did not easily translate into the language of rights. With the reformulation of the articles in Part Two in terms of obligations, the injured State could now be classified according to whether the obligation breached was owed to the State individually or to the international community as a whole (in other words, *erga omnes*), and the concept of obligations *erga omnes* could be introduced in the new article 40 bis.

33. The obligation of reparation, the main legal consequence of a State's internationally wrongful act, did not extend to indirect or remote results flowing from a breach, as distinct from those flowing directly or immediately. The customary requirement of a sufficient causal link between conduct and harm should apply to compensation as well as

to the principle of reparation. The proposed general article on reparation should be formulated in terms of the obligations of the State which had committed the internationally wrongful act, and the commentary should bring out that relevant point.

34. Cessation and assurances or guarantees of non-repetition were two different concepts. Even if a breach of an obligation had ceased, assurances or guarantees were still needed, as they related to future performance of the obligation. While cessation of continuation of the wrongful act was the negative aspect of future performance, assurances or guarantees of non-repetition could be described as the positive aspect and had a distinct and autonomous function. Unlike the cessation of a breach of an obligation, they were future-oriented and played a preventive rather than remedial role, presupposing the risk of repetition of the wrongful act. Some States, accordingly favoured a strengthened regime of assurances and guarantees of non-repetition. That was why the title of the proposed new article 36 bis seemed inadequate: instead of "Cessation", it should read "Cessation and non-repetition".

35. As to article 38, on other consequences of an internationally wrongful act, although it seemed difficult to specify the precise customary rules in the field, it was possible that the principle of law might generate new consequences in specific instances. It would thus be better to leave room for manoeuvre. The scope should not be limited to the rules of customary international law: rules from other sources might also be relevant. He agreed with other members that article 38 should be retained, subject to the necessary amendments.

36. Mr. GALICKI said he admired the Special Rapporteur's efforts to simplify the material inherited from the Commission's predecessors. He fully supported that approach and endorsed the concept and form of the proposed reformulation of articles 36 to 38 in paragraph 119 of the report.

37. Specifically, he supported the cumulation in article 36 bis of all the existing provisions on cessation. Certainly drafting problems might arise, particularly regarding the offer of appropriate assurances and guarantees of non-repetition, but some such wording must be included. It was not enough to say that a State that had committed an internationally wrongful act was entirely responsible for ceasing that act. A more aggressive attitude should be taken, and proper assurances and guarantees of non-repetition should be sought. There appeared from the report to be a reasonable basis in State practice for including such a formulation in article 36 bis.

38. He approved of article 37 bis in general but would point to some specific problems. Paragraph 2 catalogued ways of exercising full reparation which had not been invented by the Special Rapporteur but rather had been taken from the formula applied before the Second World War by PCIJ in the *Chorzów Factory* case (Jurisdiction). The Court had referred to restitution in kind or, if that was not possible, payment, thereby giving priority to restitution. But the draft placed restitution in kind on exactly the same level as compensation and satisfaction. In his view, and as the Court had indicated, restitution was the best

means of reparation, in that it restored insofar as possible the situation that had existed before the breach of international rules.

39. As the United Kingdom Government had pointed out,⁵ the draft deprived the affected State of the opportunity to choose among means of reparation, to insist upon a particular level or kind. If no hierarchy among means of reparation was designated, the choice of such means was left to the State that had committed the internationally wrongful act, to the detriment of the injured State. The Commission should reflect on whether that approach was warranted.

40. The Special Rapporteur had expressed doubts about retaining article 38, but he himself thought it should find a place in the draft for the reasons already advanced by a number of other members.

41. The CHAIRMAN, speaking as a member of the Commission, said that he fully supported the Special Rapporteur's proposed new structure as set out in paragraph 10 of the report. Dividing the question of the obligation of a wrongdoing State and that of how an injured State could invoke the wrongdoing State's responsibility was most appropriate. The new title of Part Two was much better than the previous one. The only problem was that Part Two bis, "The implementation of State responsibility", might also fall in the broader category of legal consequences, but that matter could easily be taken up in the Drafting Committee.

42. He had only a few peripheral questions. Was it necessary to retain article 36 bis, paragraph 2 (b), on appropriate assurances and guarantees of non-repetition? Admittedly, in daily diplomatic practice Governments often provided such assurances. As the Special Rapporteur had said earlier, in a case of trespassing on diplomatic premises, the receiving State apologized, promised to provide strengthened police protection and assured the sending State that it would not be allowed to recur. But that kind of statement was given as a political or moral commitment; was it to be regarded as a legal consequence? He agreed with the Special Rapporteur's analysis in paragraph 58 of the report, where he noted that it was unlikely that a State which had tendered full reparation for a breach could be liable to countermeasures because of its failure to give appropriate assurances and guarantees against repetition satisfactory to the injured State. In that case, however, the provision had no legal significance and might as well be deleted.

43. Article 37 bis was now devoid of the provision of article 42, paragraph 3, which stipulated that reparation must not result in depriving the population of a State of its own means of subsistence. That provision had been unpopular, and many Governments, including that of Japan,⁶ had objected to it, as it would be abused by States to avoid their legal obligations and erode the principle of full reparation, a principle to which he subscribed. At the same time, he agreed with the comment by Germany that

paragraph 3 had its validity in international law.⁷ The Special Rapporteur had referred to the case of war reparations demanded from Germany after the First World War. When they had negotiated peace with Japan in 1951, the Allied Powers had had the German case very much in mind. The peace treaty with Japan had recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused during the war, but also that Japan's resources had not been sufficient, if it was to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations. As a result, countries like Indonesia, the Philippines and a number of others in Asia which had been occupied by Japan had received reparation in the form of services, for example assistance in building factories or other construction projects, rather than monetary compensation. All the other Allied Powers had waived all reparation claims. It might be said that that was *lex specialis*, but the Special Rapporteur had cited relevant provisions from human rights treaties.

44. He also referred to a Japanese civil procedure rule on measures of constraint. Such items as clothing, bedding, furniture and kitchen utensils which were required for livelihood, food and fuel etc. must be exempted from attachment. Those rules had been adopted on the basis of a more than 100-year-old German model. That legal concept was needed in particular for third-world countries. The matter would be solved by resorting to circumstances precluding wrongfulness, as suggested in paragraph 41 of the report. In any event, he hoped that the commentary to article 37 bis would indicate that the Commission had given careful consideration to that notion.

45. He interpreted the words "flowing from that act" in article 37 bis, paragraph 1, as an attempt to introduce the causal link between an act and damage or harm without actually mentioning damage or harm. The word "flowing" was somewhat unclear, and he preferred the wording "reparation for all the consequences of that wrongful act".

46. Mr. SIMMA said he took issue with the Chairman's comment about appropriate assurances and guarantees of non-repetition. As it currently stood, the text might indeed be rather too broad and lenient, but there were cases in which there was a real danger of a pattern of repetition. Mr. Hafner had referred earlier to two instances in which provisions of multilateral conventions were violated by a number of countries. Some countries simply apologized each time and then went on to continue their violations in an almost routine fashion. That concern could be met by adopting the formulation proposed in the Sixth Committee by the Czech Republic: instead of saying "where appropriate", say "if circumstances so require", because there were undeniably circumstances which required the wrongdoer to do more than merely apologize.

47. Mr. HAFNER said that the State Treaty for the Re-establishment of an Independent and Democratic Austria contained a similar provision on protection of the means of survival. Assuming that the draft articles on State responsibility also applied to obligations ensuring firm State responsibility, he asked whether the case cited

⁵ See *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1-3.

⁶ See *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/492.

⁷ See footnote 5 above.

by the Chairman might not be covered by article 33, on state of necessity.

48. The CHAIRMAN, speaking as a member of the Commission, said that he could agree to the question being dealt with in that way. It was dangerous to have a provision like the one in question, because it might be abused. But somehow, it must be made known that the Commission had considered that point.

49. Mr. CRAWFORD (Special Rapporteur) said that the Chairman's statement on article 42, paragraph 3, was most notable. He did not think that the position was covered by either necessity or distress, because he himself had been addressing the use of those provisions as grounds merely for postponing the payment of compensation. They were not grounds for annulling obligations. What had happened in the Treaty of Peace with Japan and on a number of other occasions at the end of the Second World War was that the Allied Powers, for a variety of reasons, including the realization that terrible mistakes had been made at the end of the First World War, had decided not to insist on reparations at all. In a sense, it had been an act of generosity, which had since been repaid a thousandfold. But it was also an indication that there was no point in insisting on reparation if it simply beggared the State which had to pay it. Such extreme situations posed a problem that was not addressed by circumstances precluding wrongfulness. The problem facing the Commission was that the wording in article 42, paragraph 3, which had been taken from human rights treaties, was there to express that concern in extreme cases. On the other hand, it had been criticized by a number of Governments from various parts of the world as being open to abuse. The Commission accepted, especially in the context of countermeasures but even in that of the quantum of reparation, that problems could arise and could not all be covered merely by a requirement of directness. The reparations Germany had in theory been required to pay at the end of the First World War had included such matters as pension benefits of the armed forces of the victorious Powers, although those armed forces had of course existed prior to the outbreak of the war, and under no theory of causality could Germany have been required to make those payments as a matter of international law. The position after the Second World War had been different in some respects, as had been the approach adopted. The Drafting Committee would need to consider whether there was some way of reflecting that concern.

50. Mr. GALICKI said that that was precisely the problem with article 42, paragraph 3. The Special Rapporteur himself had acknowledged the need to reflect the growing impact of the humanitarian aspect in international law. In his view, article 33 was insufficient. It dealt with a different problem, that of precluding the wrongfulness of the act, whereas article 42, paragraph 3, was addressing not wrongfulness, but the humanitarian side of things. That was completely different from article 33, and he therefore wanted to bring the problem to the Drafting Committee's attention so that it could be mentioned at some point as a separate difficulty.

51. Mr. GOCO said that he saw two different obligations: the obligation to cease a wrongful act, and the subsequent obligation to offer appropriate assurances and guarantees of non-repetition. Cessation might not be

enough for the purpose of article 36 bis. Hence the need for the wrongdoing State to offer such assurances and guarantees, because that had to respond to the cessation aspect.

52. To his mind, implicit in article 37 was the fact that reparation was in full. The word "full" was superfluous and could be deleted.

53. Mr. Sreenivasa RAO, referring to the current wording of article 36, paragraph 1, noted that the Special Rapporteur explained that it covered all international obligations, including human rights violations. In that sense, it included the case of entities, individuals and international organizations, even when the primary beneficiary of the obligation was not a State itself. The point was well taken, but at the same time, as Mr. Gaja had observed, the matter could be left to the primary obligation when it came to those other entities and, even when it fell under State responsibility, only inasmuch as the primary obligation so specified. That would also need to be contrasted with the manner in which human rights obligations were to be implemented through reporting requirements, domestic legal forums and many other avenues. That structure could not be displaced by a not so well appreciated system of State intervention, but there was probably scope for such action when violations were massive, continuing and of a nature that they might affect international peace and security.

54. The trend was well recognized, and within those parameters, the Commission could find some place for State responsibility also to play a role. To lump them all together and put them on the same level as State-to-State obligations, without appropriate qualifications attached, might convey a wrong impression, which he hoped would be avoided. The commentary to the articles could clarify those points.

55. His second remark had to do with the reference in article 37 bis, paragraph 1, to full reparation. Presumably the goal was not full reparation, but as much reparation as possible, for there seemed to be a number of instances in which full reparation would not apply. The Special Rapporteur had rightly noted that the population should not be deprived of the means of subsistence, that the responsible State's ability to pay must be taken into account, and that a State must not be beggared. States tended to be pragmatic in dealing with such matters. Like Mr. Goco, he wondered whether the word "full" was really needed, and he agreed with Mr. Brownlie that, ultimately, reparation would always have to be seen in relation to actual cases; intentional wrongs and other aspects would then be factored into the kind of reparation demanded. The basic point was that reparation must be as complete as possible in order to remedy the consequences of the wrongful act.

56. Reparation, it was said, was a right of the injured State, and the commentary to article 42 stated that it was by a decision of the injured State that the process of implementing that right in its different forms was set in motion.⁸ He agreed. However, the statement that obligation of reparation arose automatically, without some

⁸ See paragraph (4) of the commentary to former article 6 bis (*Yearbook ... 1993*, vol. II (Part Two), p. 59).

linkage to the question of who could set in motion the claim could give rise to difficulties. More particularly if the concept of differently injured States was brought into play, certain complications would be created if States had differing degrees of injury and the State most directly affected decided not to set in motion the process of reparation, whereas other States were in favour of doing so. That matter should be looked into further, and at any rate by the Drafting Committee.

57. As for the issue of remoteness of damage, the point was made in paragraph 29 of the report that there was an element, or complex of elements, over and above that of natural causality and that should be reflected in the proposed statement of the general principle of reparation. But it was also observed that remoteness of damage was not part of the law. The two situations had to be reconciled without doing violence to the economy of the draft.

58. With respect to the duty to mitigate as an exception to adequate reparation, a point well explained in the report, the question again arose whether full reparation was at all times the sole criterion. The requirement to make reparation could be continuously modified by the circumstances of the case and by the failure of the affected party to take appropriate and reasonable measures which it was expected and had the capacity to take, as was illustrated by the *Zafiro* case.

59. As for the problem of concurrent causes, he agreed that in a situation where, even though the wrongful act was substantially attributable to one party, more than one cause had interacted to produce a cumulative effect, the extent of the reparation would again be affected. Thus, his conclusion was that “full” reparation was never full, a point already made by the Chairman and others, who had pointed out that the means of subsistence of the injured State must be balanced against those of the responsible State.

60. That point emerged even more clearly in the context of the initial postulation of the quantum of the damages. Full reparation was possible only in the case of straightforward commercial contracts where damages were quantifiable. In the broader scheme of inter-State relations, where issues such as aggression and human rights violations arose, the concept was not appropriate. Rather than the approach advocated by the Special Rapporteur, whereby full reparation was assigned and a secondary set of mitigating criteria then introduced, he favoured factoring in a more humanitarian approach at the initial stage of allocating responsibility and the consequences thereof, having regard to such important considerations as the State’s ability to pay.

61. He agreed with the Special Rapporteur that the issue of cessation of the breach and continued performance of an international obligation would have to be addressed, but doubted the wisdom of linking the two concepts. Paragraph 2 of the new version of article 36 proposed by France⁹ appeared to be reflected in the new article 36 bis, paragraph 1, proposed by the Special Rapporteur in paragraph 119 of his report. But something in the French proposal was still lacking from the Special Rapporteur’s

formulation. The French proposal emphasized the linkage to primary obligations, whereas the Special Rapporteur’s formulation placed more emphasis on continuation of the consequences of wrongfulness. The Special Rapporteur and the Drafting Committee needed to pay further attention to that issue.

62. As to assurances and guarantees of non-repetition, he endorsed the view expressed by the Special Rapporteur in paragraph 59 of his report that much must depend on the precise circumstances, including the nature of the obligation and of the breach. The question arose whether a specific proposition was needed in the set of draft articles, posited in the form of a legal, as opposed to a moral, obligation. The issue should certainly not be treated on the same level as consequences such as reparation. Mr. Brownlie and Mr. Pellet were of the opinion that little support existed in State practice for embodying the idea in a concrete legal formulation. Mr. Hafner and Mr. Simma, on the other hand, appeared to be of the view that the idea needed to be reflected in the draft articles. They were rightly concerned about a State that did not give assurances of non-repetition of wrongful conduct, which in some cases required an amendment to national legislation to implement international standards agreed upon or applicable to the State. That problem however could not be canvassed within the modest scope of the provision under review, and should be dealt with at a different level. At the current juncture, a moderate and flexible formulation along the lines suggested by the Special Rapporteur might be the most appropriate solution.

63. Lastly, he noted the Special Rapporteur’s preference for omitting article 38. That was also his own preferred solution. He nonetheless respected the position of those members who held that the Commission must try to tackle the issue addressed in that article. He had an open mind as to the form such an approach would take, and would leave it to the Drafting Committee to produce an appropriate formulation.

64. Mr. ROSENSTOCK said that in the interests of an efficient use of time the problems raised should be considered in the Drafting Committee. He wished, however, to comment on the notion that mitigation, if not performed, logically led to a decrease in the reparations. In fact, mitigation led to a decrease in the damage for which the reparation was paid. A rigorous use of terms would help contribute to developing a framework in which disputes between Governments could be resolved over time.

65. Mr. HAFNER said that, in a situation where a law obliged State organs to act in a way contrary to international law, it was the application of that law, not the law itself, that was a breach of international law. Assurances and guarantees of non-repetition constituted a means of obliging a State to bring its laws into conformity with international law. What obligation would be imposed on a State to change its law if the concept of assurances and guarantees of non-repetition were to be omitted from the draft articles?

66. Mr. PELLET said that, while there were legal arguments on both sides, it seemed to him that Mr. Hafner was being overly hasty in claiming that adoption of a law did not engage State responsibility. For instance, a law organizing an act of genocide, if adopted but not

⁹ See footnote 5 above.

implemented, would surely still constitute an internationally wrongful act.

67. As to the precise question posed by Mr. Hafner, he was still not convinced that the issue fell within the sphere of guarantees of non-repetition. Admittedly, a repeal of the law in question would constitute such a guarantee. He wondered, however, whether there was any need to make assurances and guarantees of non-repetition an autonomous concept. All the examples cited could be in fact linked either to satisfaction, to performance or to cessation. No one had come up with a concrete example of a different context in which a guarantee was actually owed by virtue of international law, as was stated in the Special Rapporteur's proposed draft article 36 bis, paragraph 2 (b).

68. Mr. Sreenivasa RAO said he shared Mr. Pellet's understanding of the concepts under consideration. Clearly, no State could invoke its internal law as an excuse for evading its international obligations. Once a State assumed an obligation, it must implement it effectively through its internal legislation. There was no disagreement between himself and Mr. Hafner on that score. Matters, however, were not so straightforward. The enactment of new legislation about evolving and not so well defined standards would be meaningless, particularly if the State lacked the capacity to implement it. The situation was more complex still where customary international law, and international standards not universally accepted, were involved.

69. Mr. HAFNER said that Mr. Pellet had been right to accuse him of rushing to conclusions. He had intentionally compressed his argument with a view to simplifying matters. Of course some primary norms obliged States to enact certain legislation. On the other hand, other primary norms obliged States to pursue a certain attitude. In such cases a delict was committed only if the internal law was applied and therefore the law itself was not up to that point a breach of an international obligation. He could accept that an article on satisfaction included the right to request assurances or guarantees of non-repetition, provided the fact was made explicit in the text, or at least in the commentary. He could not, however, accept that there was no obligation for a State to change its laws, for in that case internal law would rank higher than international law for that State.

70. Mr. ROSENSTOCK said the fact that it was hard to quantify reparations in a given case did not mean that the rules were invalid. The draft articles called for "full reparation" while recognizing that reparation would never be truly full in an imperfect world.

71. Mr. Sreenivasa RAO said that he and Mr. Rosenstock were in agreement, though looking at the issue from different standpoints. The glass was half full, but it was also half empty.

72. Mr. CRAWFORD (Special Rapporteur) pointed out that the words "full reparation" were to be found in draft article 42 as adopted on first reading, and had not been criticized by Governments.

The meeting rose at 1 p.m.

2616th MEETING

Friday, 5 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

later: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of articles 36, 36 bis, 37 bis and 38, contained in paragraph 119 of the third report of the Special Rapporteur (A/CN.4/507 and Add.1-4).

2. Mr. TOMKA said that the third report was a highly interesting and useful introduction to the second reading of Part Two of the draft articles.

3. In particular, he agreed with the new structure proposed by the Special Rapporteur, especially the new Part Two bis entitled "The implementation of State responsibility". That approach was faithful in every way to the original intention of the Commission and of the then Special Rapporteur, Roberto Ago, namely, to consider including, after a Part One devoted to the origin of international responsibility and a Part Two devoted to the content, forms and degrees of international responsibility, a Part Three on the settlement of disputes and the implementation of international responsibility.³

4. The Special Rapporteur was to be commended on his intention to move the provisions on countermeasures, which were currently located in Part Two, although they bore no relation to the content or forms of international responsibility. Countermeasures were an instrument designed to induce the State that had breached an international obligation to comply with its new obligation

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Yearbook . . . 1975*, vol. II, pp. 55-59, document A/10010/Rev.1, paras. 38-51.

of reparation, which was at the core of responsibility. The provisions on countermeasures thus belonged in the part on the implementation of responsibility.

5. With regard to the Special Rapporteur's proposal for the addition of a Part Four entitled "General provisions" and incorporating the substance of the current articles 37 and 39 adopted on first reading, more detailed analysis was still needed.

6. He was convinced by the Special Rapporteur's argument that the provisions of Part One applied to all international obligations of States, thus including new obligations that had arisen as a consequence of a previous wrongful act. Accordingly, article 42, paragraph 4, should avoid repeating the substance of article 4. In that connection, he recalled that, in its commentary to the title of chapter I, "General principles", of Part One, the Commission had expressly stated that "Chapter I of the draft, which comprises four articles (articles 1–4) is devoted to certain principles of law which apply to the draft as a whole".⁴ He was therefore not in favour of the proposal made by Mr. Pellet (2613th meeting) that Part Two should include a provision stating that chapter V of Part One was also applicable to Part Two. Such an addition would create unnecessary problems of interpretation using arguments *a contrario*.

7. As to the title proposed by the Special Rapporteur for Part Two, namely, "Legal consequences of an internationally wrongful act of a State", responsibility was in fact a legal consequence of an internationally wrongful act. Consequently, the slightly different title suggested by a member of the Commission, namely, "Legal consequences of international responsibility", would not be appropriate.

8. He considered that the title of article 36, "Content of international responsibility", proposed by the Special Rapporteur, did not reflect the content of the provision itself, perhaps because the Special Rapporteur had proposed a different wording for the title of Part Two. It would be for the Drafting Committee to consider that point. As for article 36 bis, he agreed with the Special Rapporteur's intention to establish a closer link between the continuing validity of the obligation breached, cessation of the internationally wrongful act and assurances and guarantees of non-repetition. He noted, however, that those three concepts, although similar in some respects, were distinct and he would therefore prefer them to be dealt with in separate articles. In any event, the title of article 36 bis, "Cessation", did not cover all three concepts. Paragraph 1 must reaffirm that the primary international obligation, although breached, continued to be in force and must be performed by the State in question. The proposed wording of paragraph 2 (b) implied that assurances and guarantees of non-repetition should be provided in all circumstances, but the debate had shown that they were relevant only in certain circumstances. The Drafting Committee should take due account of that point.

9. On article 37 bis, entitled "Reparation", he noted that the corresponding previous provision (art. 42, also entitled "Reparation") provided for full reparation and that it had met with no opposition from Governments. It would thus not be wise to abandon that concept. In that regard, the

Commission should focus less on the situation of the wrongdoing State than on the injury suffered by a State as a result of the wrongful act of another State. Lastly, with regard to the new text of article 38, entitled "Other consequences of an internationally wrongful act", proposed by the Special Rapporteur, he was inclined to agree with him that there was no need for a specific article to that effect. Usually, provisions relating to the application of the rules of customary international law not enumerated in an instrument appeared in the preamble thereto. That, then, was the approach that should be adopted if the draft articles were ultimately to take the form of a convention.

10. Mr. ADDO said that he endorsed most of the proposals made by the Special Rapporteur in his third report, such as the proposal on the insertion of a Part Two bis on the implementation of State responsibility and a Part Four on general provisions, as well as the setting aside of Part Three for the time being.

11. He saw no problems with articles 36 bis and 37 bis. There were different types of reparation and the choice would depend on the facts of the case. In that context, it should be stressed that the responsibility of a State could be invoked from the moment the injured State demonstrated that there had been commission or omission of a wrongful act; it did not have to prove actual damage. It could not be gainsaid that a State discharged the responsibility incumbent on it for the breach of an international obligation by making reparation for the injury caused. "Reparation" was the generic term that described the various methods available to a State for discharging or releasing itself from such responsibility. It encompassed the right to cessation of the breach, the right to restitution in kind, the right to compensation when restitution in kind was not possible and the right to receive satisfaction. Articles 36 bis and 37 bis, reformulated by the Special Rapporteur, embodied all those forms of reparation. Together with article 36, they should be referred to the Drafting Committee. With regard to article 38, he preferred the new text proposed by the Special Rapporteur, but was not a particularly enthusiastic advocate of its retention. As Mr. Lukashuk had already pointed out (2615th meeting), the article added nothing substantial and might safely be left out. If it had to be retained, he would support it only *ex abundanti cautela* and on condition that it was placed in Part Four. He reserved the right to speak on article 40 bis at a later stage.

12. Mr. ILLUECA said that the third report was to be commended and that it enriched not only the work of the Commission, but also international law in general. He considered that articles 36, 36 bis, 37 bis and 38 had a place in the draft articles and that they could be refined by the Special Rapporteur and the Drafting Committee on the basis of the comments made in the debate.

13. The ambitious programme of work submitted by the Special Rapporteur on the schedule for the consideration of the draft articles on second reading took as its starting point the principle that, at its fifty-first session, the Commission had completed its second reading of the draft articles of Part One, whose underlying conception had basically not been called into question, although the Commission had set aside for further reflection a number of questions relating to Part One, such as State responsibility for breaches of obligations *erga omnes* and the

⁴ For the commentary, see *Yearbook ... 1973*, vol. II, pp. 173 et seq., document A/9010/Rev.1, para. 58.

relationship between the provision in question and article 19 as adopted on first reading.

14. Article 19, entitled “International crimes and international delicts”, was, in his view, the keystone of the draft articles, securing their cohesion. The concept of “international crime”, which had emerged from the Second World War, referred to State responsibility for the most serious internationally wrongful acts. And there was a single regime of responsibility for the most serious internationally wrongful acts and a single regime for other wrongful acts. Unless it took account of that fact, the Commission would not be able to bring to a successful conclusion the commendable exercise it had undertaken by embarking on the subject.

15. Mr. CRAWFORD (Special Rapporteur), summing up the debate on articles 36, 36 bis, 37 bis and 38, noted that the Commission and the working group had made good progress on many issues, including the one to which Mr. Illueca had just referred, although there were still a number of outstanding questions on which a final decision would be taken during the consideration of other aspects of the report.

16. He noted with satisfaction that there was general agreement on the strategy of formulating Part Two, or at least the consequences set forth therein, in terms of the obligations of the responsible State and on the need to deal with those obligations and their invocation by other States, if not in different parts, at least in different chapters, of the same part. It had also become apparent that the existing provisions, even if rearranged, would in substance be retained, together with some additional elements, such as, perhaps, an article on interest, which had been proposed by the previous Special Rapporteur, Mr. Arangio-Ruiz, in his second report.⁵

17. With regard to the possibility of entities other than States invoking the responsibility of a State, a matter raised by Mr. Gaja, he stressed that the open conception of responsibility formulated in Part One allowed for that possibility. It was clear that the responsibility of the State to entities other than States was part of the field of State responsibility. It did not follow that the Commission must become involved in those questions: there were a number of reasons, not related to the field of State responsibility, why it should not do so, though it needed to spell out the fact that it was not doing so in order to make clear the discrepancy between the content of Part One and that of the remaining parts. That was the purpose of the saving clause in paragraph 3 of proposed article 40 bis. It was not desirable to go beyond the current proposed scope.

18. As for the difficulty of establishing a distinction between primary and secondary rules, a problem several members had raised, he considered that the Commission had no choice but to adhere to its original decision and maintain that distinction.

19. Turning to the various articles he had proposed, he noted that there had been a helpful debate on the language of the title of Part Two and also on the titles of the various articles. It was now for the Drafting Committee to consider

all the proposals that had been made as to the form. There seemed to be general agreement that the four articles should be referred to the Drafting Committee and that they should be retained somewhere in the draft. In that connection, he had been persuaded of the need to retain article 38, either in Part Four or in the preamble, in the light of the proposals to be made by the Drafting Committee.

20. Similarly, there was general agreement that articles 36 bis and 37 bis should contain general statements of principle on cessation and reparation, respectively, so as to establish a balance in chapter I. Interesting comments had been made as to the form, particularly by Mr. Brownlie, who had stressed, with regard to article 36 bis, that the question of cessation and particularly that of assurances and guarantees of non-repetition arose not only in the context of continued wrongful acts, but also in the context of a series of acts apprehended as likely to continue, even though each of them could be viewed individually. It would be for the Drafting Committee to decide whether the reference to continuing wrongful acts in paragraph 2 (a) was necessary. As paragraph 2 (b) concerned assurances and guarantees of non-repetition, the current title of the article should perhaps be amended. Different views had been expressed on the retention of that subparagraph; however, it was clear from the debate that most members of the Commission favoured its retention. It should be borne in mind that no Government had proposed the deletion of article 46, as adopted on first reading, although there had been proposals that it should be relocated. Replying to Mr. Pellet's comments that there appeared to be no examples of guarantees of non-repetition ordered by the courts, he said it was true that there were very few such examples. He noted, however, that the award made by the Secretary-General in the “*Rainbow Warrior*” case included certain elements that might be conceived of as falling within the category of assurances and guarantees of non-repetition. He had already made the point that the draft articles operated primarily in the area of relations between States, although it was the courts that had to apply them. It was certainly true that assurances and guarantees of non-repetition were frequently given by Governments in response to breaches of an obligation, and not only continuing breaches. The Drafting Committee might wish to reformulate the subparagraph, incorporating the proposal by the Czech Republic on chapter III⁶ referred to in paragraph 56 of the third report, perhaps mentioning the gravity of the wrongful conduct and the likelihood of its repetition and drawing on the corresponding article adopted on first reading.

21. Article 37 bis had raised several difficulties, particularly with regard to the expression “full reparation”. Mr. Sreenivasa Rao had queried (2614th meeting) whether the phrase should be retained. As it had appeared in the original text of the article and had not been criticized to any significant extent by Governments, it would be preferable to retain it. It must, however, be borne in mind that there was a problem of balance. Mr. Sreenivasa Rao had devoted his remarks almost entirely to the concerns of the responsible State, but, as Mr. Tomka had pointed out, the

⁵ *Yearbook* . . . 1989, vol. II (Part One), pp. 23–30 and 56, document A/CN.4/425 and Add.1.

⁶ See 2613th meeting, footnote 3.

Commission must also consider the concerns of the State that was the victim of the internationally wrongful act. It was true that there were extreme cases in which the responsible State could be beggared by the requirement of full reparation. Safeguard measures might thus be needed to cope with that situation, without prejudice to the principle of full reparation. As to the words “eliminate the consequences”, which appeared in article 37 bis, paragraph 2, Mr. Kamto had rightly pointed out (*ibid.*) that it was impossible completely to eliminate the consequences of an internationally wrongful act. Furthermore, in its judgment in the *Chorzów Factory* case, PCIJ had indicated that reparation should eliminate the consequences of the wrongful act “so far as possible”. It might be a question for the Drafting Committee to consider whether that phrase should be included so as to qualify the term “full reparation” or whether the question should be dealt with in the commentary.

22. There had been general agreement that a notion of causality was implied in the concept of reparation and ought consequently to be expressed. There again, it would be for the Drafting Committee to decide whether the notion was correctly formulated in paragraph 1 of article 37 bis.

23. There was a fairly strong consensus in favour of the retention of article 38, but some difference of opinion as to its precise location in the text. The Drafting Committee might consider whether it should be incorporated in the proposed Part Four.

24. With regard to article 40 bis, he stressed that the underlying purpose had been to give effect to the distinction between the responsible State’s obligations in the fields of cessation and reparation, on the one hand, and the right of other States to invoke that responsibility, on the other. He was pleased that the Commission had at least gone a considerable way towards accepting that distinction.

Mr. Kamto took the Chair.

25. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 36 to 38 to the Drafting Committee.

It was so agreed.

26. He invited the members of the Commission to consider article 40 bis.

27. Mr. SIMMA said that the current title of article 40 bis, “Right of a State to invoke the responsibility of another State”, did not keep its promises because it did not give clear answers to the question whether such a right existed. Instead, it introduced two different concepts: that of “injured State” in paragraph 1 and that of a State having a “legal interest” in paragraph 2. The two were of course related in a sense, but did not really correspond to each other in the way they should in article 40 bis. Moreover, different interpretations of the judgment of ICJ in the *Barcelona Traction* case suggested a minefield of theoretical problems; his reading of it differed from the Special Rapporteur’s. He therefore suggested avoiding the notion of “injury” as triggering the invoking of State responsibility because it was virtually impossible to “calibrate” it

according to the proximity of a State to a breach and, in that context, he cited the example of human rights treaties. Either all States were regarded as injured, as Mr. Arangio-Ruiz had done, or none was so considered, thus leaving such treaties toothless. He thought it wiser to steer clear of the idea of “legal interest” and favoured instead a direct reference, in line with the title, to the “right to invoke” certain legal consequences. The Special Rapporteur had proposed a new wording of the article that was very close to his. He was not opposed to drafting changes, such as the ones proposed by Mr. Economides, namely replacing the words “legal consequences of the responsibility” by the words “legal consequences of an internationally wrongful act of another State”. His primary concern was to arrive at an acceptable operational structure for article 40 bis.

28. Mr. BROWNLIE said that he was more or less in agreement with Mr. Simma on the substance of article 40 bis. He was chiefly concerned about collateral problems, notably matters of legislative policy which the Commission must take into consideration.

29. First, any draft articles which the Commission produced, however well crafted, would generate opposition and confusion because the subject matter was extremely technical and complex and could not simply be based on customary law. That article 40 bis or some similar version would generate opposition was testified to by the content of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth Session (A/CN.4/504 and Add.1). The paragraphs of that document on the original version of article 40 raised a number of issues concerning obligations *erga omnes*. The reaction of the Sixth Committee was symptomatic, not eccentric.

30. Secondly, the Commission should also take notice of the consumers of documents that it produced, even at the provisional level. Such documents would not be used exclusively by courts, but also by legal advisers with very little time to spare and who were not always experts in international law, as well as by non-lawyers. Hence the need to avoid being too elaborate so as not to create confusion.

31. Lastly, although it was possible to produce a reasonable definition of “injured State”, drafting a comprehensive definition of the concept raised major technical difficulties. The Special Rapporteur had at one point drawn a distinction between bilateral and multilateral obligations and observed that, in general international law, obligations were always owed bilaterally. That comment was well founded and must be accepted. But then the Special Rapporteur had gone on to suggest that the situation was different with multilateral obligations. He did not agree. He thought that the difference would lie in the difficulty of identifying the principles of general international law, but he was somewhat tempted by the sort of solution found in the 1969 Vienna Convention in relation to obligations *erga omnes*, namely, that there might be a cross-reference to developments in customary law.

32. A related consideration was the economy of completing the current task. He took the footnote to article 40 bis, in paragraph 119 of the report, very seriously

and shared the Special Rapporteur's concern, but the Commission could certainly elaborate on the principles in article 40 bis in a new chapter, although that would hold it up for a long time.

33. Mr. GAJA said that article 40 bis was based on an essential distinction between bilateral and multilateral obligations which, in a specific context, could give rise to bilateral relations, on the one hand, and obligations *erga omnes* on the other. That distinction was formulated in a much clearer and more coherent way than in the version of article 40 adopted on first reading. The distinction was necessary and should appear somewhere in the text. Further clarifications and developments were possible and might be considered for inclusion in the general provisions.

34. A number of interesting proposals had already been made. He personally suggested that article 40 bis should be divided according to the type of obligation. The first part of the provision could then deal with breaches of bilateral or multilateral obligations which, in a specific context, gave rise to bilateral relations. A typical example could be the breach of an obligation relating to freedom of navigation on the high seas: that would be a multilateral obligation, whether it was set out in a treaty or in general international law. But, in the specific circumstance where a foreign ship was stopped by a warship of another State, infringement affected only one State. The other States might be concerned by the problem, but there was only one injured State.

35. A second part of the provision would relate to obligations *erga omnes*. Their infringement would affect all States. However, in certain situations, a violation of such obligations specially affected one or more States.

36. The first part of article 40 bis, namely, the current paragraph 1 (a), could deal with the first situation, whereas the second part of the article, which would combine paragraph 1 (b) and paragraph 2, would address obligations *erga omnes* and could start by saying that, in the event of the infringement of those obligations, all States were entitled to request cessation and seek assurances and guarantees of non-repetition.

37. In his opinion, the Commission might consider whether all States might also request reparation, with the proviso that compensation was to be given to the ultimate beneficiary, which might be another State, an individual or even the international community as a whole. The Commission did not have to determine who the beneficiary was; as Mr. Sreenivasa Rao had pointed out (2614th meeting), that was a matter of primary rules. In the case of obligations *erga omnes*, there might be a special beneficiary, and that beneficiary was the only one entitled to compensation. If it followed the Special Rapporteur's line of reasoning, the Commission should not consider in detail the situation of beneficiaries other than States. If a State was the target of an aggression, that was of concern to the international community as a whole. All States could demand cessation and assurances and guarantees of non-repetition and they could also ask for reparation, but only the State that was the target of the aggression could demand compensation. It could be said that that State had further rights and it would also have a role with regard to

implementation. It was up to the State which was specially affected to choose between restitution and compensation. That matter should be dealt with in Part Two bis relating to implementation. In chapters I and II of Part Two, the Commission could refer to obligations only from the point of view of the responsible State.

38. According to the theory of the three concentric circles, as it was called by *Abi-Saab*, the widest circle was that of norms imposing obligations *erga omnes*. The circle in the middle comprised *jus cogens*, i.e. rules which were designed to invalidate or terminate a treaty if it contained provisions infringing obligations *erga omnes*. The last circle, the smallest one, included norms imposing obligations whose infringement constituted what in the past had been called "crimes of State", i.e. serious violations of some obligations *erga omnes*. Whether or not the theory was right, he had referred to it because, contrary to the Special Rapporteur's suggestion, he did not think that the Commission should dwell on *jus cogens*. The basic distinction was the one drawn in the text of article 40 bis between bilateral obligations and obligations *erga omnes*, irrespective of whether those obligations *erga omnes* were imposed by peremptory norms. The State which was directly affected by the infringement of an obligation *erga omnes* could not cancel that obligation by agreement or unilateral consent and it could not even cancel the consequences of an infringement by a waiver. It was in the very nature of obligations *erga omnes* that the obligations were owed to all the other States in any given case. In his view, the concept of obligation *erga omnes* was sufficient for the Commission's purposes. All that remained was to see whether, in the presence of serious infringements of certain obligations *erga omnes*, further provisions needed to be added in Part Two or elsewhere.

39. Mr. GOCO said that his comments on article 40 bis, especially on the question of the "injured State", were provisional and he reserved the right to return to the subject in the future, in particular during drafting. He commended the Special Rapporteur on his very lucid presentation of the question in his report.

40. As seen in the topical summary, the Sixth Committee had formulated a number of general comments on the meaning of the words "injured State". Some delegations had suggested that the provision on "injured State" should clearly define the delictual infringement of a right of an injured State and that an explicit reference should be made to material or moral damages suffered by the State in question. Others had maintained that it was not necessary to refer to the damage so caused, since the infringement of a right might give rise to potential damage and not cause actual damage. Support had been expressed for the proposal that a State or States specifically injured by an internationally wrongful act should be distinguished from other States which had a legal interest in the performance of the relevant obligations, but which did not suffer quantifiable injury. Only the specifically injured State should have the right to seek reparation and to be compensated; States could not seek reparation in the absence of actual harm. It had also been observed that the list of situations in article 40, paragraph 2, was not exhaustive, since it did not expressly mention either bilateral custom or breach of obligations arising from a unilateral act. Finally, it had been maintained that violations of treaty provisions

should first be governed by the provisions of the treaty itself, after which the appropriate legal framework would be the law of treaties, and not State responsibility.

41. The Special Rapporteur's references, in paragraph 67 of his report, to the discussions that had led to the formulation of the original version of article 40⁷ were very useful. At that time, some members of the Commission had proposed a wording "flexible enough to cover all cases".⁸ He fully agreed with the Special Rapporteur when he had said that article 40 operated as a hinge for the entire draft, linking the treatment of obligations in Part One and that of rights in Part Two.

42. Article 40, paragraph 1, of the original version was very clear: it gave a general definition of injured State as a State whose rights had been infringed by the internationally wrongful act of another State. One could not help but draw a parallel with the provisions of internal law: in the area of criminal law or simply in that of damages and torts, the injured party was the one whose rights had been violated or infringed by an act or omission of another party. That act or omission afforded the injured party relief or remedies against the author of the violation. The concepts were always the same: the existence of an act or omission violating the rights of a party, the responsibility of the author of that act or omission and the granting of some form of reparation to the victim. Incidentally, article 3 in Part One of the draft also spoke of "action or omission". Thus, it was perhaps unnecessary to list the various situations that might occur, as had been done in paragraph 2 of the original version of article 40. After all, it was the injured State which must raise the issue of the violation of its rights.

43. Governments had expressed concern, in connection with article 40, about possible overlapping or inconsistency with the law of treaties. One delegation had rightly considered, as a condition for invoking responsibility under customary international law, that there must exist a sufficient connection between the violation and the State claiming the status of "injured State".

44. The first version of article 40 had been too cluttered and complex. Most fortunately, the Special Rapporteur had proposed, in paragraph 119 of his report, a new, "lighter" version which was much simpler and easier to understand and apply. Article 40 bis emphasized on the obligation breached, an obligation which was owed to the injured State individually, to the international community as a whole or to a group of States of which the injured State was one. Paragraph 2 of the new version also referred to the case of a State which had a legal interest in the performance of an international obligation to which it was bound if the obligation was owed to the international community as a whole or if the obligation was established for the protection of collective interests. Lastly, paragraph 3 dealt with the question of rights which accrued directly to any person or entity other than a State. That question should be the subject of a separate provision.

⁷ For former article 5 proposed by the Special Rapporteur, Mr. Riphagen, in his fifth report, see *Yearbook . . . 1984*, vol. II (Part One), p. 3, document A/CN.4/380 and vol. II (Part Two) pp. 101–102, para. 355.

⁸ *Ibid.*, p. 103, para. 367.

45. With all due apologies to the drafters of the original provision, the new wording of article 40 was definitely an improvement over the old version. It was now up to the Drafting Committee to improve it further, taking into account the comments of the Sixth Committee and seeking to find a sufficiently flexible formulation to cover all cases.

46. The provisions to be drafted on such an important topic as State responsibility must be clear and comprehensible not only for lawyers and professors, but also for all readers, and students in particular. He had been very struck by a comment of one of his students in Manila, who had asked him whether the extreme complexity of rules of international law had not been intentional, so that States had an excuse for not applying them. That ought to give the Commission food for thought.

47. Mr. HAFNER said that the Commission had two options for taking a position on the issues raised by article 40 and proposed article 40 bis: it could go back to the roots of international relations and law or it could simply try to find an acceptable formulation for the article. In view of the difficulties inherent in the two exercises, it might be necessary to steer a middle course.

48. Despite the progress of multilateralism, the "Westphalian" system, in which it was for individual States, not a central organ, to enforce the law, prevailed today. On the basis of that concept, it would be very easy to formulate an article indicating that the injured State had the right to invoke responsibility. But what was meant by injured State still had to be defined. For example, could a landlocked State consider itself injured if a coastal State extended its exclusive economic zone or its rights over the continental shelf beyond the admissible distance? ICJ had considered that problem and had come to the conclusion that, because of its geographical situation, a landlocked State could not consider itself injured by such an activity. He did not think that that was true, since conclusions regarding a State's interests could not be derived solely from its geographical location. In addition, there were new developments in international law stemming from the emergence of human rights law and of the notion of duties owed not to individual States, but to all States or to mankind in general. International law was no longer to be seen only as governing synallagmatic relations between identifiable States; multilateralism was progressing. In trying to come to grips with those new trends, ICJ now referred to *erga omnes* obligations.

49. In attempting to determine which States should be entitled to invoke international responsibility, the Commission had to bear those trends in mind. It had to take account of the fact that States which were not really or not at all injured must have the right to respond to breaches of certain norms of international law. Three situations could arise when such a norm was breached: (a) there was no injured State per se (for example, when there was a violation of human rights); (b) all States considered themselves injured (for example, in a case of environmental damage or the breach of an environmental protection treaty); or (c) there was a fundamental breach of international law to which all States must be entitled to react (for example, in the event of aggression). Increased multilateralism led to a further category: (d) obligations which were owed to

several States, but fulfilled only in relation to one individual State (as in the case of diplomatic immunities). In case (b), any State party to an environmental treaty would normally be entitled to respond and to invoke international responsibility if, for example, another State violated the prohibition on the emission of chlorofluorocarbons. In case (d), however, it could be asked whether States other than the directly affected State should be considered endowed with a legal interest in the abstract observance of the relevant norm—in other words, whether their legal interest sufficed to give them the right to invoke responsibility. A reflection of that question could be seen in Article 63 of the Statute of ICJ, which dealt with the right of States to intervene in cases relating to the interpretation of a treaty to which they were parties. It could therefore be asked whether this system should also apply to the right to invoke responsibility. In general, there was a tendency to broaden the right to invoke responsibility, but it did not go so far as to give that right to all States in all circumstances.

50. Having identified the problem, he wished to find out how the Special Rapporteur had tried to solve it in his article 40 bis. The new text considerably differed from the former insofar as it no longer distinguished between bilateral and multilateral norms, but instead differentiated between bilateral obligations and obligations *erga omnes*, a difference which had a major impact on the definition of the State entitled to invoke responsibility.

51. Bilateral obligations were analysed in paragraphs 99 to 105 of the report. In paragraph 105, the Special Rapporteur explained that there might be an interest of third States to refer to a given breach but that did not need to be regulated in the draft articles. He himself held the opposite view: if a third State was to be given the opportunity to intervene in the event of a breach of an international obligation owed to a particular State but resulting from a multilateral treaty, there was a need for a positive norm (something which could be useful if the directly injured State did not wish to take action), creating an exception to the non-intervention rule, which was that of classical doctrine.

52. As to the breach of obligations *erga omnes*, the new draft article provided only two cases when States had the right to invoke responsibility: when they were directly affected by the breach and when they were parties to an integral treaty. According to that definition, no State would be entitled to invoke the responsibility of another State for human rights violations and, in respect of environmental damage which did not amount to injury of another State, the right likewise would not exist systematically. The Special Rapporteur had accordingly included a provision in his article 40 bis, paragraph 2, stating that a State which had a legal interest in the performance of an international obligation to which it was a party was entitled to act if the obligation was owed to the international community as a whole, respectively an *erga omnes* obligation, or if it was established for the protection of collective interests. Certainly, since it was not easy to grasp the precise meaning of *erga omnes* obligations, it would be necessary to include a definition in the commentary.

53. It would be interesting to see the consequences of that distinction between two categories of States, since the wording of the provision did not make those consequences

clear. The Special Rapporteur explained, in his report, that the “interested” States could intervene either on behalf of the victim (something which raised no problems) or by agreement between the States parties, by analogy with article 60, paragraph 2, of the 1969 Vienna Convention. He himself agreed with Mr. Simma that the requirement of a prior agreement could cause problems. If the “interested” State was entitled only to claim cessation or restitution, then such a prior agreement was not needed, provided, however, that the victim State did not consider that there had been interference with its rights. It was a different matter to claim compensation or satisfaction or to take countermeasures. In that case, unless the interested State acted on behalf of the victim, an agreement seemed necessary since otherwise disorder would be generated. The final wording on those problems, which urgently needed to be dealt with clearly, had not yet been worked out.

54. To sum up, a final judgement on article 40 bis could not be made as long as the consequences of the distinction between the two categories of States were not known. Lastly, as Mr. Simma had pointed out in proposing a new title, the wording of the title of article 40 bis as proposed by the Special Rapporteur did not correspond to its content and a link should be established between the two. He also agreed with Mr. Goco that paragraph 3 should be kept separate.

55. Mr. PELLET said that the role of article 40 bis as the Special Rapporteur saw it was to determine which States had the right to invoke the responsibility of a State that had allegedly committed an internationally wrongful act. That approach had the advantage of being more pragmatic than the general theories of obligations under international law put forward by Mr. Gaja and Mr. Hafner and ultimately answered the questions asked by the Special Rapporteur in paragraphs 117 and 118 of his report. The Special Rapporteur’s version of article 40 bis should therefore appear at the start of Part Two bis because that Part was to be about the implementation of State responsibility and the article dealt with the question of who could trigger such implementation. That was, moreover, the solution which the Special Rapporteur had proposed. He had certainly been right to amend both the title and the philosophy of article 40 as adopted on first reading, which could be criticized on a number of grounds, but it was unfortunate that he had not followed his approach through to the end by drawing all the logical conclusions from his critical analysis. He seemed to have remained imprisoned in the doctrinal approach of former Special Rapporteur Riphagen, which Mr. Brownlie had said was much too complex. Mr. Simma’s version was better, at least at the beginning. In paragraph 1, it identified the cases in which a State had the right to invoke the responsibility of another State for an internationally wrongful act. Unfortunately, it then again raised the question of what type of obligation had been breached, whereas the problem really was to determine when a State had the right to draw the consequences of international responsibility. The nature of the obligation breached mattered very little: what did matter was the position of the State that wished to react to the breach.

56. If article 40 bis was moved to the beginning of Part Two bis, as was logical, the immediate consequences of

responsibility would have been listed and defined in Part Two. In referring articles 36, 36 bis and 37 bis to the Drafting Committee, the Commission had sketched out the broad lines of what Part Two would be, even though provisions on interest payments in connection with reparation must be added and the Special Rapporteur had agreed to do so. He himself continued to believe that the articles on reparation should be made a bit more complicated. Part Two should also include the article 45 bis which the Special Rapporteur was planning to draft on a plurality of wrongdoing States and which he believed belonged more in Part Two than in Part Two bis. In the final analysis, the consequences of responsibility were not very complicated. As had already been pointed out, they included performance of the international obligation (art. 36 bis, para. 1), cessation of the internationally wrongful act (art. 36 bis, para. 2 (a)), perhaps also assurances and guarantees of non-repetition (art. 36 bis, para. 2 (b)), if that was considered important, although the Special Rapporteur still had not given real examples thereof, and, last but not least, one or a combination of the three forms of reparation. That would all be in Part Two. Then would come article 40, where it would be only logical to indicate who had the right to call for cessation, assurances, etc. The four consequences could easily be grouped together. Reparation would come first and the rest would follow: cessation, performance and, perhaps, guarantees of non-repetition. It would be better to deal with countermeasures after the Special Rapporteur had completed his report.

57. If that reasoning was accepted and if what preceded article 40 was to be taken as a starting point, the only problem that article 40 had to solve was which consequence or consequences of responsibility could be triggered by a State on the basis of its position in relation to the obligation breached. That was what the Special Rapporteur tried to do in table 2, in paragraph 116 of his report. It was also what article 40 bis tried to put into words, but it did so in a way that seemed extremely complicated without being very precise because it could be read every which way. It was clear that differences existed, but it was hard to see what could be triggered on the basis of which situation. Once again, the Special Rapporteur was much more concerned with the theory of obligations than with the triggering of the process of responsibility. His approach was nearly as complicated as the article which Riphagen had proposed as article 5 in his sixth report⁹ and which, in principle, had been based on different thinking. In his own view, a simple distinction that emerged fairly clearly from the report should be made between injured States strictly speaking, namely, those which had suffered damage or injury directly, and other States, which could be called indirectly injured and which were identified by the judgment of ICJ in the *Barcelona Traction* case as having a legal interest, namely, the other States concerned.

58. He agreed with the Special Rapporteur on that point, but found the conclusions he reached on the basis of his reasoning to be strange. The situation was clear. On the one hand, there were States that had the right to invoke all the consequences deriving from responsibility, namely, injured or directly injured States and then there were other

States which had the right to invoke all the consequences of responsibility except reparation. A State could not claim pecuniary reparation for genocide committed in another State and affecting the population of that State. On the other hand, it was entirely clear, and that was one of the major virtues of the notion of crime, that all other States certainly had the right and probably the duty to react. At the very least, they had the right to demand cessation, performance of the obligation and, where appropriate, guarantees of non-repetition. In short, the State directly injured had the right to request reparation, either on its own or through its nationals. Other States had the right to trigger the consequences of responsibility, but not to claim reparation.

59. There was nothing very complicated in that and it was what he was trying to say in his proposed articles 40-1 and 40-2 (ILC(LII)/WG/SR/CRD.2). The wording of his proposal, which he thought was simple and more functional than that of the texts submitted by the Special Rapporteur and Mr. Simma (ILC(LII)/WG/SR/CRD.1), could be improved and must be supplemented. Somewhere, it would no doubt be necessary to define what was meant by damage or injury. Personally, he would prefer that it be done in a draft article rather than in the commentary. Legal interest would also have to be defined and that could be done without difficulty in a draft article which could simply use paragraph 2 as proposed by the Special Rapporteur and as reproduced by Mr. Simma in his proposal, perhaps with some drafting changes. In his own proposal, he had merely transposed article 40 bis, paragraph 2, into article 40-2, subparagraph (b), with a minor drafting change. Paragraph 3 as contained in the proposals of both the Special Rapporteur and Mr. Simma must be retained and he used it in article 40-X of his own proposal. He nevertheless agreed with Mr. Hafner that paragraph 3 did not belong in article 40 bis. It should be removed and its wording might be amended: “without prejudice to any rights, arising ...” could be replaced by “without prejudice to the consequences flowing from the commission of an internationally wrongful act”, for the consequences of responsibility were not only rights, but also obligations. In the case of a crime like genocide, for example, it was obvious that the States concerned, i.e. all States in the international community, had not only the right, but indeed the obligation, to react and that had to be reflected in paragraph 3.

60. To sum up, his first proposal was that article 40 bis should be divided into three articles because, compared to the other draft articles, it was much too wordy. That was, however, purely a drafting amendment that should be made even if the proposal by the Special Rapporteur or that by Mr. Simma was adopted.

61. His second proposal was that the wording of paragraph 1 should be totally changed in order to bring out the distinction, which the Special Rapporteur himself, had made, between injured States and States having a legal interest. That was a helpful clarification that would allow the article to play its role of determining who could trigger the consequences of responsibility, something that was not at all clear from the proposals by the Special Rapporteur and Mr. Simma.

⁹ *Yearbook* . . . 1985, vol. II (Part One), p. 3, document A/CN.4/389.

62. His third proposal was designed to bring back the concept of damage or injury. Damage had to exist if the obligation of reparation was to be justified because, otherwise, international law would become completely immoral. However, if the fact of having suffered damage was what authorized a State to demand reparation, what authorized it and, in some cases, made it an obligation for it to react otherwise than to demand reparation might be that an obligation *erga omnes* had been breached.

63. His fourth proposal was designed to ask the Special Rapporteur whether it might be possible to define the concept of damage, preferably in the draft articles. If the Special Rapporteur did so in the commentary, however, he would not object.

64. What he was proposing was basically no different from what the Special Rapporteur had analysed in his report, except for article 40 bis, paragraph 1, in which the Special Rapporteur said that he drew the appropriate conclusions from his report. He had based himself on the report of the Special Rapporteur in proposing a text which was clearer. He nevertheless wished to reaffirm that he agreed with the general philosophy underlying paragraphs 66 to 118 of the report, without prejudice to his future reactions to what the Special Rapporteur would propose with regard to serious violations essential for the safeguard of fundamental interests of the international community of States as a whole, alias crimes under article 19. The Special Rapporteur was, however, entirely right to say that, as far as what could trigger the consequences of responsibility was concerned, it mattered little whether or not a crime had been committed if an obligation vis-à-vis the international community had been breached. There was, in his opinion, thus practically no need to reintroduce the concept of crime in article 40 bis.

65. Mr. SIMMA, reserving the right to come back to Mr. Pellet's proposal in greater detail at a later stage, said that it might be misleading to call the approach taken by Mr. Pellet a much simpler and more elegant one. Article 40-1 bis did not, of course, take up much space in the proposal, but it might open up Pandora's box. If the Commission really tried to nail down a definition of the terms "damage" and "injury", the elegance and simplicity of Mr. Pellet's approach might quickly dissolve. Without going so far as to remove the concept of damage from the draft as a whole, it might be a good idea to avoid making it a constituent element of an internationally wrongful act. It would be much easier to mention it only in connection with reparation, since reparation presupposed damage, rather than in connection with the issue of entitlement to act.

66. In his view, article 40-2, of Mr. Pellet's proposal, entitled "Protection of a legal interest", was based on the same wrong reading of the judgment of ICJ in the *Barcelona Traction* case as that by the Special Rapporteur, i.e. on too narrow an interpretation of the concept of "legal interest". Both Mr. Pellet's proposal and that by the Special Rapporteur gave the impression that the fact of having "a legal interest" was something less than being directly injured. That was, however, not how he himself read the judgment in that case. His own view was that States having a legal interest had rights which were not inferior to those of directly injured States, which would, according to the

proposals by Mr. Pellet and the Special Rapporteur, be the only ones fully entitled to act.

67. In respect of article 40-1, paragraph 2, of Mr. Pellet's proposal, granting States which had a legal interest, but had not suffered injury, the rights provided for in article 36 bis proposed by the Special Rapporteur did not go far enough. He was in favour of adding other elements which the Special Rapporteur sketched out in table 2, in paragraph 116 of his report, such as acting on behalf of the victim or by agreement with the States parties, even though he recognized that it might be difficult to arrive at precise definitions of those concepts.

68. Mr. CRAWFORD (Special Rapporteur) thanked the members who had proposed new versions of article 40 bis containing common features on the basis of which the Drafting Committee could begin its work. Without being mischievous, he would suggest to Mr. Pellet that what was missing in his proposal were the three elements of the definition of damage which he had managed to get into a single article. He agreed that that article could well be disaggregated. He was certainly adopting a strategy of disaggregation in order to try to solve the problems of article 40, which adopted a strategy of aggregation. It might be that he had not gone far enough.

69. If he was asked to define "damage", he would say that it was first, by definition, what was suffered by a State party to a bilateral obligation which was breached; secondly, what was suffered by the State specially affected; and, thirdly, what was suffered by the State affected just by virtue of the fact that it was a party to an integral obligation and the fact that such obligations were calculated to affect all States. He and Mr. Pellet thus agreed on the substance.

70. Without wanting to play the role of a third-division professor, he pointed out that those concepts did have a theoretical basis. What he had tried to do in developing the concept of injury was to take the bilateral case and the case indicated in article 60, paragraph 2, of the 1969 Vienna Convention. It had to be said that the Commission had worked on that paragraph at a fairly late stage in the drafting of the Convention. It had made it up. There had not been much material on which to base it. The commentary¹⁰ did not give many arguments in favour of that provision and yet it had been widely accepted. Inspiration could apparently be drawn from that example. In any event, there was more in the general theory of obligations than met Mr. Pellet's eye.

71. He noted that Mr. Simma had also offered valuable suggestions for taking the matter further and one of the virtues of Mr. Simma's radical proposal was that it avoided any debate on concepts such as injury and interest. He had tried to draft article 40 bis on the basis of interest rather than on the basis of injury, but he had come to the conclusion that that was not an improvement.

72. It was not impossible that all the elements of the proposed solutions might be adopted. What he thought all

¹⁰ See the commentary to article 57, *Yearbook . . . 1966*, vol. II, pp. 253-255.

the members did agree on—and that was the only point he considered essential and was to be found in the judgment of ICJ in the *Barcelona Traction* case—was that there was a distinction between the position, for example, of the peoples of South West Africa and those of Ethiopia and Liberia. Once the members had agreed on that, they would have gone a long way towards disentangling the problems which article 40 had entangled.

73. He welcomed those constructive contributions. He agreed with Mr. Brownlie that the Commission would have to be ready to go to the Sixth Committee with a proposal that was clear and had a sufficiently firm basis in pre-existing texts to meet with some level of acceptance. The Commission's own level of acceptance had been fairly good so far and, with the efforts of the members of the Drafting Committee, the problem could be solved. If it was not solved and if the Commission did not go back to the original article 40, there would have to be a much simpler formulation—and that would be regrettable. Just as the Commission had considered that it had to go further than article 60, paragraph 1, of the 1969 Vienna Convention in the context of multilateral treaties, so must it go further in the field of the law of responsibility in the context of multilateral obligations. On the basis of the current discussion, it could take that important step forward.

74. Mr. HAFNER, agreeing with Mr. Simma and the Special Rapporteur, asked Mr. Pellet whether two consequences should be drawn from the interpretation of the words “a State which has suffered [material or moral] injury” in his proposed article 40-1, paragraph 1: first of all, that a breach of an international obligation did in itself constitute moral injury; and secondly, that in a situation where there had been a violation of a bilateral agreement on the protection of a minority, the State which protected the minority must, even if it could not be regarded as having suffered injury, be authorized to take any measures deriving from the responsibility of the other State. In other words, the interpretation of that article depended greatly on the definition of injury.

75. Mr. Sreenivasa RAO, reserving the right to refer again to the question at a later stage, said he thought that Mr. Pellet had been trying to propose a manageable way of dealing with the very difficult concepts underlying responsibility. If reparation was not what was intended in article 40 for indirectly injured States which had no *locus standi* to raise the issue of compliance with the obligation breached, he asked what was being invented that was new and did not already exist in United Nations forums. An indirectly injured State could go only to a multilateral forum to obtain satisfaction. It could, of course, send diplomatic notes, but, if it wanted to achieve results, it had to turn to United Nations resolutions, the WTO system for the settlement of disputes and other mechanisms created for that purpose. If those mechanisms were not used, a new wheel had to be invented. Otherwise, there would be only a unilateral, highly disoriented and selective set of reactions to the defence of a community of interests. That was the fundamental difficulty and it had not been discussed.

Organization of work of the session (*continued*)*

[Agenda item 2]

76. The CHAIRMAN announced the establishment of a working group on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). The Working Group would be composed of Mr. Sreenivasa Rao (Chairman and Special Rapporteur), Mr. Baena Soares, Mr. Galicki, Mr. Hafner, Mr. Kateka, Mr. Lukashuk, Mr. Rosenstock and Mr. Rodríguez Cedeño (*ex officio*).

The meeting rose at 1 p.m.

* Resumed from the 2613th meeting.

2617th MEETING

Tuesday, 9 May 2000, at 10.05 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his first report on diplomatic protection (A/CN.4/506 and Add.1), containing draft articles 1 to 9, which read:

Article 1. Scope

1. In the present articles diplomatic protection means action taken by a State against another State in respect of an injury to the

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.

2. In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national.

Article 2

The threat or use of force is prohibited as a means of diplomatic protection, except in the case of rescue of nationals where:

(a) The protecting State has failed to secure the safety of its nationals by peaceful means;

(b) The injuring State is unwilling or unable to secure the safety of the nationals of the protecting State;

(c) The nationals of the protecting State are exposed to immediate danger to their persons;

(d) The use of force is proportionate in the circumstances of the situation;

(e) The use of force is terminated, and the protecting State withdraws its forces, as soon as the nationals are rescued.

Article 3

The State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. Subject to article 4, the State of nationality has a discretion in the exercise of this right.

Article 4

1. Unless the injured person is able to bring a claim for such injury before a competent international court or tribunal, the State of his/her nationality has a legal duty to exercise diplomatic protection on behalf of the injured person upon request, if the injury results from a grave breach of a *jus cogens* norm attributable to another State.

2. The State of nationality is relieved of this obligation if:

(a) The exercise of diplomatic protection would seriously endanger the overriding interests of the State and/or its people;

(b) Another State exercises diplomatic protection on behalf of the injured person;

(c) The injured person does not have the effective and dominant nationality of the State.

3. States are obliged to provide in their municipal law for the enforcement of this right before a competent domestic court or other independent national authority.

Article 5

For the purposes of diplomatic protection of natural persons, the "State of nationality" means the State whose nationality the individual sought to be protected has acquired by birth, descent or by *bona fide* naturalization.

Article 6

Subject to article 9, paragraph 4, the State of nationality may exercise diplomatic protection on behalf of an injured national against a State of which the injured person is also a national where the individual's [dominant] [effective] nationality is that of the former State.

Article 7

1. Any State of which a dual or multiple national is a national, in accordance with the criteria listed in article 5, may exercise diplomatic protection on behalf of that national against a State of which he or she is not also a national.

2. Two or more States of nationality, within the meaning of article 5, may jointly exercise diplomatic protection on behalf of a dual or multiple national.

Article 8

A State may exercise diplomatic protection in respect of an injured person who is stateless and/or a refugee when that person is ordinarily a legal resident of the claimant State [and has an effective link with that State?]; provided the injury occurred after that person became a legal resident of the claimant State.

Article 9

1. Where an injured person has undergone a *bona fide* change of nationality following an injury, the new State of nationality may exercise diplomatic protection on behalf of that person in respect of the injury, provided that the State of original nationality has not exercised or is not exercising diplomatic protection in respect of the injured person at the date on which the change of nationality occurs.

2. This rule applies where the claim has been transferred *bona fide* to a person or persons possessing the nationality of another State.

3. The change of nationality of an injured person or the transfer of the claim to a national of another State does not affect the right of the State of original nationality to bring a claim on its own behalf for injury to its general interests suffered through harm done to the injured person while he or she was still a national of that State.

4. Diplomatic protection may not be exercised by a new State of nationality against any previous State of nationality in respect of an injury suffered by a person when he or she was a national of the previous State of nationality.

2. Mr. DUGARD (Special Rapporteur) said he wished to acknowledge the invaluable contribution made to the preparation of his first report by Ms. Zsuzsanna Deen-Racsmany, a research assistant funded by the Cornelis van Vollenhoven Stichting of the University of Leiden, to whom he was greatly indebted for assistance.

3. The first report contained an introduction, in chapter I, suggesting how the right of diplomatic protection might be employed as a means to advance the protection of human rights. There then followed chapter II containing the draft articles and comments thereon. The articles raised a number of controversial issues on which he required the assistance and guidance of the Commission, matters which might have been raised in an introductory report, along the lines of the preliminary report prepared by the previous Special Rapporteur, Mr. Bennouna,² with no attempt made to formulate them in draft articles. In his view, however, the formulation of a questionable rule as a draft article brought it into clearer focus, provoking debate and dissent of the kind required at the current stage of study of the topic. The report also contained an outline of further articles to be submitted in future reports.

4. The draft articles fell into two groups. Of the first group (arts. 1–4), articles 1 and 3 were largely foundational, whereas articles 2 and 4 were particularly controversial. Of the second group, articles 5 to 8 were equally controversial, but all dealt with issues relating to nationality. He thus proposed to present for the time being only the introduction and the first four draft articles for debate.

5. As to the introduction, in chapter I of the report, in embarking on his task he had been under the mistaken impression that many of the areas of diplomatic

² *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/484.

protection were already settled, as much practice and precedent existed on the topic. To his dismay, he had discovered that the subject was plagued with controversy. Before the Second World War and the advent of the human rights treaty, few procedures had been available to the individual under international law to challenge his treatment by his own State. On the other hand, if the individual's human rights had been violated abroad by a foreign State, the individual's national State might intervene to protect him. In practice it was mainly the nationals of the powerful Western States that had enjoyed that privileged position, as it was those States that most readily intervened to protect their nationals. To aggravate matters for non-Western States, diplomatic protection had been exalted to the status of an important political category by the fiction that an injury to a national constituted an injury to the State itself. Inevitably, therefore, diplomatic protection had come to be seen by developing nations, particularly in Latin America, as a discriminatory exercise of power rather than as a method of protecting the human rights of aliens.

6. He said that much had changed in recent years. Standards of justice for individuals at home and for aliens had undergone major changes. Some 150 States were now parties to the International Covenant on Civil and Political Rights and/or its regional counterparts in Europe, the Americas and Africa, which prescribed standards of justice both for nationals and for aliens in the signatory States. In addition, someone who did business abroad now frequently had remedies available to him, either in bilateral agreements or in multilateral treaties such as the Convention on the Settlement of Investment Disputes between States and Nationals of other States creating ICSID.

7. Those developments had led many to contend that diplomatic protection was obsolete. Roughly, the argument was that the equality-of-treatment-with-nationals standard, advocated by the developing nations, and the international minimum standard of treatment of aliens, largely advocated by Western Powers, had been replaced by an international human rights standard which accorded to nationals and aliens the same standard of treatment—a standard incorporating the core provisions of the Universal Declaration of Human Rights.³ The individual was now a subject of international law with standing to enforce his or her own human rights at the international level. The right of a State to claim on behalf of its national should be restricted to cases where there was no other method of settlement agreed on by the alien and the injuring State. Only in such a case might the national State intervene, and then it did so as agent for the individual, and not in its own right. According to that argument, the right of a State to assert its own right when it acted on behalf of its national was an outdated fiction and should be discarded—except, perhaps, in cases in which the real national interest of the State was affected.

8. In his view, the argument was flawed on two grounds. First, it showed an unnecessary disdain for the use of fictions in law; and secondly, it exaggerated the current state of the international protection of human rights.

9. On the subject of fictions, in some situations the violation of an alien's human rights would engage the interests of the national State—for instance, where the violations were systematic and demonstrated a policy by the injuring State of discriminating against all nationals of the State in question. However, in the case of an isolated injury to an alien, the intervening State did in effect act as the agent of the individual in asserting his or her claim. There, the notion of injury to the State was indeed a fiction. That was borne out by a number of rules: the requirement that local remedies be exhausted, the requirement of continuous nationality, and the fact that tribunals, in assessing the quantum of damage suffered by the State, generally had regard to the damages suffered by the individual.

10. Thus, it was quite clear that diplomatic protection was premised on a fiction, one which had been a source of particular concern to the previous Special Rapporteur. He did not share his predecessor's disdain for fictions in law. Roman law had relied heavily on procedural fictions in order to achieve equity—a tradition most legal systems had inherited. The Commission should not dismiss an institution that served a valuable purpose, simply on the ground that it was premised on a fiction and could not stand up to logical scrutiny.

11. Secondly, the suggestion that developments in the field of international human rights law had rendered diplomatic protection obsolete called for closer scrutiny. The first Special Rapporteur on the topic of State responsibility, García Amador, had argued that the traditional view of diplomatic protection allowing the State to claim on behalf of its injured national belonged to an age in which the rights of the individual and the rights of the State had been inseparable. The position was now completely different and aliens, like nationals, enjoyed rights simply as human beings, not by virtue of their nationality. That meant, as García Amador had argued, that the alien had been internationally recognized as a legal person—independently of his State; he was a true subject of international rights. A necessary implication of that reasoning was that the individual, with rights and duties under international law, should, other than in exceptional cases, fend for himself when he ventured abroad.

12. He did not wish to enter into an unhelpful debate on the question of whether the individual was a "subject" or an "object" of international law. It was better to view the individual as a participant in the international legal order. As such, the individual might participate in the international legal order by exercising his or her rights under human rights treaties or bilateral agreements. At the same time, it must be recognized that while the individual might have rights under international law, his or her remedies were limited—a fact that García Amador had tended to overlook.

13. While the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) offered real remedies to millions of Europeans, it was difficult to argue that the American Convention on Human Rights: "Pact of San José, Costa Rica" or the African Charter on Human and Peoples' Rights had achieved the same degree of success. Moreover, the majority of the world's population, situated in Asia, was not protected by any regional human rights

³ General Assembly resolution 217 A (III) of 10 December 1948.

convention. To suggest, therefore, that universal or regional human rights conventions provided individuals with effective remedies for the protection of their human rights was in most cases to engage in a fantasy. The sad truth was that only a handful of individuals, in the limited number of States that accepted the right of individual petition to the monitoring bodies of those conventions, had obtained or would obtain satisfactory remedies under those conventions.

14. The position of the alien was no better. Universal and regional human rights conventions extended protection to all individuals—national and alien alike—within the territory of States parties. But no multilateral convention sought to provide the alien with remedies for the protection of his or her rights outside the field of foreign investment. Until the individual acquired comprehensive procedural rights and real remedies under international law, it would be a setback for human rights to abandon diplomatic protection. As an important instrument in the protection of human rights, it should be strengthened and encouraged, rather than simply dismissed as something from a bygone era.

15. International human rights law did not consist only of multilateral treaties. There was a whole body of customary international law on the subject, which included the institution of diplomatic protection. International human rights treaties were important, particularly as they extended protection to both aliens and nationals in the territory of States parties, but their remedies were weak. Diplomatic protection was available only to protect individuals against a foreign Government; on the other hand, it was a customary rule of international law that applied universally and, potentially at least, offered a more effective remedy. Most States would treat a claim of diplomatic protection from another State more seriously than a complaint about its conduct to a human rights monitoring body. That was a realistic, albeit sad, assessment of the current state of international life.

16. He would submit therefore that diplomatic protection remained an important weapon in the arsenal of human rights protection. As long as the State remained the dominant actor in international relations, the espousal of claims by States for violation of the rights of their nationals remained the most effective remedy for human rights protection. Instead of seeking to weaken that remedy by dismissing it as a fiction that had outlived its usefulness, every effort should be made to strengthen the rules that comprised the right of diplomatic protection. That was the philosophy on which his report was founded.

17. As to the draft articles, it must be said at the outset that the term “diplomatic protection” was misleading and probably inaccurate. It had much to do with the protection of nationals but little to do with diplomacy or diplomatic action. To take an obvious example, judicial proceedings brought on behalf of an injured individual represented a stage beyond diplomatic action. Governments could, therefore, hardly be blamed for assuming that the Commission was dealing, not with protection of aliens, but with protection of diplomats. In response to its request for advice on their practice in that area, the majority of Governments had simply transmitted copies of their diplomatic privileges and immunities legislation. That was under-

standable, for “diplomatic protection” was a term of art rather than an accurate reflection of the content of the subject.

18. Article 1 sought to be not a definition, but rather a description, of the topic. Nor did the article attempt to address the subject of functional protection by an international organisation—a matter briefly touched upon in the report, and one which perhaps had no place in the study, raising, as it did, so many very different issues of principle. The doctrine of diplomatic protection was clearly closely related to that of State responsibility for injury to aliens. Indeed, the Commission’s initial attempt to draft articles on State responsibility had tried to cover both the principles of State responsibility as currently formulated and also the subject of diplomatic protection. The idea that internationally wrongful acts or omissions causing injury to aliens engaged the responsibility of the State to which such acts and omissions were attributable had gained widespread acceptance in the international community by the 1920s. It had been generally accepted that, although a State was not obliged to admit aliens, once it had done so it was under an obligation towards the alien’s State of nationality to provide a degree of protection to his person or property in accordance with an international minimum standard of treatment of aliens.

19. Several attempts had been made to codify the principle and most of them had linked the topic of diplomatic protection with State responsibility. Writers on the subject had also largely defined diplomatic protection in that context. Following a time, during the period of decolonization, when the institution had been perceived by some as an instrument of Western imperialism, that argument appeared to have been discarded and there was now general acceptance that diplomatic protection was a customary rule of international law.

20. The draft articles were essentially secondary rules and no attempt was made to present a provision incorporating a primary rule describing the circumstances in which the State’s responsibility was engaged for a wrongful act or omission vis-à-vis an alien. Nor was any attempt made to formulate a provision on reparation, as that was a matter to be dealt with fully in the draft on State responsibility.

21. The question whether the right of protection was one pertaining to the State or to the individual was addressed in article 3. At the current stage, suffice it to say that historically that right was vested in the State of nationality of the injured individual. The fiction that the injury was to the State of nationality dated back to the eighteenth century and Vattel,⁴ and had been endorsed by PCIJ in the *Mavrommatis* and the *Panevezys-Saldutiskis Railway* cases, and also in the *Nottebohm* case.

22. The term “action” in article 1 presented some difficulties. Most definitions of diplomatic protection failed to deal adequately with the nature of the actions open to a State exercising diplomatic protection. In the cases cited,

⁴ 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).

PCIJ had appeared to distinguish between “diplomatic action” and “judicial proceedings”, a distinction repeated by ICJ in the *Nottebohm* case and by the Iran-United States Claims Tribunal in case No. A/18. In contrast, legal scholars drew no such distinction, and tended to use the term “diplomatic protection” to embrace consular action, negotiation, mediation, judicial and arbitral proceedings, reprisals, retortion, severance of diplomatic relations, economic pressure and, the final resort, the use of force. It was a particularly controversial issue, in respect of which he had relied heavily on Borchard’s authoritative work on the subject,⁵ which listed all those remedies. Dunn, too, had stated⁶ that the term was used therein as a generic term covering the general subject of protection of citizens abroad, including those cases in which other than diplomatic means might be resorted to in the enforcement of obligations.

23. The question of what action might be taken by the injured State would to a large extent be covered in the articles on countermeasures in the draft on State responsibility. In the current context the vexed question of the use of force was addressed in article 2. The article raised two highly controversial questions: first, the perennially topical question whether forcible intervention to protect nationals was permitted by international law; and second, whether the matter indeed fell within the sphere of diplomatic protection. He had been reluctant to devote too much space to the matter in his comments, particularly as there was a prospect of article 2 being rejected by the Commission. Nonetheless, his report contained sufficient material for a debate on the basis of which a decision could be taken as to whether a provision of that nature should be included in the draft.

24. The use of force as the ultimate means of diplomatic protection was frequently considered part of the current topic. History was replete with examples of cases in which the pretext of protecting nationals had been used as a justification for military intervention. Following such intervention by the imperial powers in Venezuela, the Convention respecting the limitation of the employment of force for the recovery of contract debts (Porter Convention) had prohibited the use of armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals. The prohibition had not been absolute and it had been acknowledged that, if the respondent State failed to submit to arbitration or to the award, States might still resort to the use of force. The question had been considered by previous special rapporteurs of the Commission, who had generally taken the view that the use of force was prohibited as a means of diplomatic protection. At the eighth session, in 1956, García Amador had produced a first report entitled “International responsibility”⁷ containing a number of “bases of discussion”, in which he had asserted that in no event should the direct exercise of diplomatic protection imply a threat, or the actual use, of force, or any other

form of intervention in the domestic or external affairs of the respondent State.⁸ Although the records of the Commission’s discussions did not indicate any objections to those provisions, the only views expressed in favour had been short notes of approval by Krylov and Spiropoulos.⁹ In spite of that, for reasons unknown to himself the provision had been omitted from all subsequent reports.

25. In his preliminary report, the previous Special Rapporteur had declared without qualification that States might not resort to the threat or use of force in the exercise of diplomatic protection. Personally, he believed that, while the wish to prohibit the threat or use of force in those circumstances was laudable, it took little account of contemporary international law, as evidenced by interpretations of the Charter of the United Nations and State practice. The dilemma facing international lawyers was mirrored by Nguyen Quoc Dinh,¹⁰ who first stated that the use of force was prohibited in the case of diplomatic protection, and then considered that the legality of military action by States to protect their nationals was a delicate subject. Indeed it was. Nevertheless his own report had not evaded the issue of whether international law, as it stood, permitted the use of force to protect nationals and whether that matter came within the field of diplomatic protection.

26. Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force. The only exception, as far as unilateral intervention was concerned, was embodied in Article 51, on the right of self-defence. The Charter made it plain that the use of force to recover contract debts was prohibited by Article 2, paragraph 4, as was the threat of the use of force by way of a reprisal. Hence the threat or use of force in the exercise of diplomatic protection could be justified only if it could be characterized as a kind of self-defence.

27. The right of self-defence in international law had been formulated well before 1945. It was generally accepted that the wide scope of that right included both anticipatory self-defence and intervention to protect nationals. Article 51 of the Charter of the United Nations made no reference to them, but only to cases in which armed attack occurred. A considerable scholarly debate had arisen in which some authors, including Mr. Brownlie and Mr. Simma, had argued that Article 51 contained a complete, exclusive formulation of the right of self-defence, which meant that a State might intervene only in response to an armed attack. Others, such as Mr. Bowett, had held that the phrase “inherent right” in Article 51 preserved the pre-Charter customary right allowing a State to intervene to protect its nationals.

28. The decisions of international tribunals and political organs of the United Nations provided little guidance on the subject. Courts had generally avoided the topic. ICJ had skirted it when considering the United States operation to rescue nationals in the Islamic Republic of Iran. On most occasions when the issue had been raised in

⁵ E. M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York, Banks Law Publishing, 1919).

⁶ F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Baltimore, Johns Hopkins Press, 1932).

⁷ *Yearbook* . . . 1956, vol. II, p. 173, document A/CN.4/96.

⁸ *Ibid.*, p. 221, basis of discussion No. VII, para. (3).

⁹ *Ibid.*, vol. I, 371st meeting, pp. 233–235.

¹⁰ P. Daillier, Nguyen Quoc Dinh and A. Pellet, *Droit international public*, 6th ed. (Paris, Librairie générale de droit et de jurisprudence, 1999).

the political organs of the United Nations, the veto power had prevented any unequivocal decision. It was noteworthy that Oppenheim¹¹ had asserted that there was little disposition on the part of States to deny that intervention properly restricted to the protection of nationals was justified in emergencies.

29. The right had been greatly abused in the past and still lent itself to abuse. Consequently, if article 2 was to be included, it had to be narrowly formulated. In attempting to do that in article 2, he had been influenced by the Israeli rescue operation at Entebbe Airport, Uganda, in 1976. It was debatable whether or not the territorial power had had the capacity or willingness to release the hostages. If, for the sake of argument, it was agreed that Uganda had been unable to launch a rescue, the operation had amounted to one in which no attempt had been made to destabilize the territorial State politically. He had therefore based his arguments on that precedent, rather than on many others where there was evidence that the intervening State had harboured territorial or political ambitions.

30. In his opinion, article 2 reflected State practice more accurately than an absolute prohibition on the use of force as this was difficult to reconcile with actual State practice. On the other hand, a broad right to intervene was impossible to reconcile with the protests made by the injured State and third States in the case of an intervention to protect nationals. The wisest policy would be to recognize the existence of a right of that nature, but to prescribe severe limits on its exercise.

31. In paragraph 60 of the report he pointed out that the study did not deal with humanitarian intervention. A number of authors failed to distinguish between humanitarian intervention to protect humanity at large or the nationals of any State and diplomatic protection in the form of intervention to protect solely nationals, or a preponderance of nationals, of the intervening State. He was sure that article 2 would provoke considerable debate. The options were to include article 2 or one based on the principle asserted in it or to exclude the article on the grounds either that Article 2, paragraph 4, of the Charter of the United Nations prohibited such intervention or that, while the threat or use of force might be lawful under customary international law and perhaps under the Charter, it should no longer be seen as part of the doctrine of diplomatic protection. He would find it helpful to have a decision on that subject at the outset so as to preclude the issue arising again when the subject matter had already been debated at length.

32. Article 3 was possibly less controversial. It raised the issue of whose rights were asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. The traditional view was that the injury caused to the State itself had been challenged on the grounds that it was riddled with internal inconsistencies. As he had already pointed out, the doctrine had been accepted for centuries and had been endorsed by PCIJ in the *Mavrommatis* and the *Panevezys-Saldutiskis Railway* cases. The Court had asserted that, by taking up

the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State was in reality asserting its own right to ensure, in the person of its subject, respect for the rules of international law. That principle had been restated by ICJ in the *Nottebohm* case and affirmed by the Institute of International Law in article 3 of its resolution on "The national character of an international claim presented by a State for injury suffered by an individual" adopted at its Warsaw session, in 1965.¹²

33. A number of suggestions had been made as to the basis of that doctrine. Some writers had advanced the view that it lay in the sovereignty of the State and the State's right to self-preservation, and right to equality. Brierly had offered a satisfactory explanation, quoted in paragraph 63 of the report, namely that when a State intervened to protect its national, or when it took action as a result of an injury to that national, it was not necessarily concerned only about that particular person, but it generally had a greater interest in upholding the principles of international law.¹³ The interest of the State as a whole was therefore involved and not just that of the individual. On the other hand, it had to be acknowledged that international tribunals were not consistent in their approach. They frequently spoke of the individual as the claimant, when proceedings were brought by the State on behalf of the injured individual. The implication was that the State simply acted as the agent of the person concerned and many scholars contended that the State enforced the rights of the individual rather than its own. Again, scholars pointed to the existence of institutions such as the exhaustion of local remedies, the continuous nationality requirement and the assessment of a quantum of damages in keeping with injury suffered by the individual.

34. Developments in the human rights field were such that if an individual was able to bring proceedings before an international tribunal or monitoring body to assert his or her human rights, it was difficult to argue that the State was asserting its own right. He was therefore prepared to accept that the subject matter was a fiction. On the other hand, it was necessary to address the question of the utility, rather than the logical soundness, of the traditional view. Diplomatic protection, albeit premised on a fiction, was an accepted institution of customary international law that continued to serve as a valuable instrument for the protection of human rights. It provided a potential remedy for the protection of millions of aliens who had no access to remedies before international bodies and a more effective remedy for those who had access to the often ineffectual remedies embodied in international human rights instruments.

35. The debate on the identity of the holder of the right to diplomatic protection had important consequences with regard to scope. If the holder was the State, it might enforce its right irrespective of whether the individual

¹² Institut de droit international, *Tableau des résolutions adoptées (1957–1991)* (Paris, Pedone, 1992), p. 59.

¹³ J. L. Brierly, "The theory of implied State complicity in international claims", *The British Year Book of International Law*, 1928, vol. 9, p. 48.

¹¹ R. Jennings and A. Watts, eds., *Oppenheim's International Law*, 9th ed., vol. I, *Peace* (London, Longman, 1992), p. 440.

himself had a remedy before an international forum. If, on the other hand, the individual was the holder, it was possible to argue that the State's right was purely residual and procedural, that was to say, it was a right that might be exercised only if there was no remedy open to the individual. That approach had been suggested by Orrego Vicuña in his report to ILA,¹⁴ which had proved helpful in the compilation of the first report currently before the Commission.

36. Article 3 attempted to codify the principle of diplomatic protection in its traditional form. It recognized diplomatic protection as a right attached to the State, which the State could exercise at its discretion, subject to article 4, whenever a national was unlawfully injured by another State. The right of diplomatic intervention of the State of nationality was not limited to instances of large-scale and systematic human rights violations, nor was the State obliged to refrain from exercising that right when the individual enjoyed a remedy under human rights or foreign investment treaties. In practice, a State would undoubtedly refrain from asserting its right when the person did have an individual remedy, or it might join the individual in asserting his right under the treaty in question. In principle, according to article 3, a State was not obliged to exercise such restraint, as its own right was violated when its national was unlawfully injured.

37. Article 4 dealt with another controversial question and was a proposal *de lege ferenda* in the field of progressive development, not codification. According to the traditional doctrine, a State had an absolute right to decide whether or not to exercise diplomatic protection on behalf of its national. It was under no obligation to do so. Consequently, a national injured abroad had no right to diplomatic protection under international law, as Borchard had clearly stated. It was, however, also a position that had been reaffirmed by ICJ in the *Barcelona Traction* case. Similarly, it was a proposition supported by many authors. Yet, in the opinion of other scholars, that position was an unfortunate feature of international law and current developments in international human rights law required that a State be under some obligation to accord diplomatic protection to an injured individual. The matter had been discussed in the Sixth Committee, where most speakers had expressed the view that the State had absolute discretion whether to grant diplomatic protection. Nevertheless, other speakers had argued to the contrary.

38. State practice in that field was interesting. Many States had constitutions indicating that the individual did have a right to diplomatic protection. Some constitutions, especially those of Eastern European countries, contained wording to the effect that the State had to protect the legitimate rights of its nationals abroad or that the nationals of the State should enjoy protection while residing abroad. He did not, however, know whether those rights were enforceable under the municipal law of those countries or were simply intended to ensure that a national injured abroad had the right of access to the State's consular offi-

cial. He would be grateful if colleagues from countries with constitutions containing such provisions could inform him whether there was a domestic remedy for the enforcement of that right.

39. In paragraphs 84 to 86 he described the practice of certain States which suggested that, in some circumstances, States were under a legal obligation to afford diplomatic protection to an injured individual. In paragraph 84 he referred to an interesting theory concerning the law of the United Kingdom, namely that the doctrine of administrative law relating to an individual's legitimate expectation might be extended to the field of diplomatic protection. If that were done, an injured individual might contend that, if he had complied with the conditions stated in the United Kingdom's rules relating to international claims, he had a legitimate expectation that he would be protected.

40. In paragraph 85 he drew attention to an American statute dating from 1868 under which the President was obliged to afford protection to nationals in certain circumstances. Nevertheless, in the last footnote in that paragraph, he pointed out that in *Redpath v. Kissinger*¹⁵ the Court had held that the right to diplomatic protection was not subject to judicial review. Uncertainty in that field had led to a number of cases in which individuals had asserted their right to diplomatic protection and a duty on the part of the State to provide such protection.

41. In the light of the fact that some constitutions seemed to impose a duty on States, that the Sixth Committee had signalled some support for that proposition and that there had been considerable litigation on the subject, the Commission should consider the matter and decide whether it was ripe for progressive development. It was not a question that could be dismissed out of hand, particularly as the aim was to advance the rights of the individual. As he had suggested, diplomatic protection was largely concerned with promoting the human rights of the individual.

42. It was interesting that Orrego Vicuña had offered the opinion that the discretion of a State to grant diplomatic protection was not absolute and should be subject to judicial review.¹⁶ In article 4, he sought to give effect to suggestions of that kind, by proposing that, in very limited circumstances, a State might have a duty to afford diplomatic protection to a national.

43. Paragraphs 89 to 93 of the report described the restrictions that should be imposed on that right. First, it was a right that should be limited to the violation of *jus cogens* norms. Secondly, the national State should have a wide margin of appreciation and should not be compelled to protect a national if its international interests dictated otherwise. Thirdly, a State should be relieved of that obligation if the individual had a remedy before an international tribunal. Fourthly, a State did not have that obligation if another State could protect an individual with dual or multiple nationality. Finally, he had put

¹⁴ F. Orrego Vicuña, "The changing law of nationality of claims", final report submitted to the ILA Committee on Diplomatic Protection, unpublished, 1999.

¹⁵ 415 F. Supp. 566 (W.D. Tex. 1976), *aff'd.*, 545 F.2d 167 (5th Cir. 1976).

¹⁶ See footnote 14 above.

forward the idea that a State should be under no obligation to protect a national who had no genuine or effective link with the State of nationality, that being an area where the *Nottebohm* test might apply. He was therefore bringing article 4 to the Commission's attention in the full realization that it was an exercise in progressive development. Again, the Commission should decide at an early stage whether the proposal was too radical.

44. Mr. BROWNLIE said that the first report was comprehensive and might even extend beyond the Special Rapporteur's mandate. It had been well researched and was helpful in that it set out the issues in a clear manner. With reference to the interaction between the development of new human rights norms and the old subject of diplomatic protection, he wished to pay tribute to the pioneering work done by Richard Lillich, an American international lawyer who had died recently and whose writings had often been underestimated. They had, however, been used by the Special Rapporteur.

45. He agreed with many of the Special Rapporteur's conclusions as, in substance, he had taken the view that diplomatic protection was not obsolete, but formed part of State practice. His own assumption was that not much was heard about it, because most of the time it just happened. Government action in that field was not always publicized and many incidents went unreported in published material.

46. The Special Rapporteur nevertheless seemed somewhat prone to exaggerate the elements of controversy in the topic. In paragraph 10, he indicated that diplomatic protection was one of the most controversial subjects in international law. That was not necessarily true, although some important questions were indeed involved and it was a worthwhile subject for the Commission's agenda.

47. On the actual relationship between the individual or corporation and the State, he accepted Briery's views as quoted in paragraph 63 and agreed with the Special Rapporteur that it was not helpful to describe the relationship as a fiction. In the final analysis, it could not be reduced to a single element, and even in the field of human rights, the relationship was complex—witness the procedural history of the *Loizidou* case under the European Convention on Human Rights.

48. The report, particularly in paragraphs 25 and 29, contained some lucid and realistic assessments of the topic's relation to human rights protection. In the fairly rough contemporary world, it would be irresponsible to throw away any of the protective mechanisms now available. An orchestra of instruments was needed and diplomatic protection, with all its faults and difficulties of application, remained part of that orchestra. The institution could be refurbished, but it should not be damaged. That was clearly the view of the Special Rapporteur, and he agreed with it.

49. He experienced no major structural problem with article 1. He was astounded, however, by article 2, for a number of reasons. Paragraph 43 indicated that the term "diplomatic protection" was used by legal scholars to embrace a variety of actions and "the final resort, the use of force". Paragraph 47 stated that the use of force as the ultimate means of diplomatic protection was frequently considered part of the topic of diplomatic protection.

Those were very surprising assessments of the current situation in the doctrine. He believed that the use of force was not a part of the topic and that it lay outside the Commission's mandate. Diplomatic protection was essentially concerned with the admissibility of claims, and he was surprised not to see such terms used more often in the report. Article 2 covered a form of self-help. The Commission could not possibly deal with all of the mechanisms, some of them very important in themselves, by which protection could be given to individuals who had complaints against States. Those mechanisms comprised a whole range of actions, including peace-keeping, consular activities and, for example, the steps recently taken by the Staff Association of the World Bank. In addition, the use of force to protect nationals abroad could not be considered in isolation from the whole question of the use of force and the application of the Charter of the United Nations.

50. He also had problems with the apparent identification of customary law as that of 1842, not 1945 or 1999, and with the use of the sources of the law. Drawing attention to paragraph 58, he said that to take the failure of political organs to condemn an action as evidence of customary law was an unreliable proposition. If the paragraph referred to Security Council inaction, that did not mean the General Assembly had failed to pronounce itself in relation to the incident concerned or that the Non-Aligned Movement or the Commonwealth of Nations had adopted no relevant resolutions. Some State practice went against the proposition: the Entebbe raid and other incidents involving alleged protection of nationals or alleged resort to humanitarian intervention involved a sort of waiver of illegality by the international community, which was something quite different from positive approval of an action as lawful. Entebbe itself was not a reliable precedent: the debate in the Council showed that the African members had been far from satisfied. Given the circumstances, States had been slow to condemn the Israeli action, although some had done so. Many people had been killed, it must not be forgotten, including hostages and Ugandans.

51. On a preliminary basis, article 3 posed no problems. The Special Rapporteur was entirely candid in saying that article 4 was *de lege ferenda*, and the same issue arose in respect of article 7. He admired article 4 as a first attempt to deal with an extremely difficult matter, but it was paradoxical to suggest that it was supported by evidence in State practice. The constitutional provisions mentioned in paragraphs 80 and 81 provided absolutely no evidence of *opinio juris*, except in the case of Germany, where it was made perfectly clear that they were based on general international law. Compelling practice would involve examples of States making claims against other States in respect of non-nationals that were entertained by the respondents, but no examples were given. The Borchard's position cited in paragraph 75¹⁷ reflected the prevailing viewpoint in 1915, but there were not very many modern writers who thought that diplomatic protection was a duty of the State. The conclusion reached in paragraph 87 that there were "signs" in recent State practice of support for

¹⁷ *Op. cit.* (footnote 5 above), p. 29.

that viewpoint was an optimistic assessment of the actual materials available.

52. Mr. BAENA SOARES said the report was clear and direct and conveyed a concern for human rights he was sure all members of the Commission shared. The comments and suggestions made went in the direction of progressive development of international law and existing legal procedure was analysed with a view to moving forward and adapting it better to present circumstances.

53. The topic was controversial and difficult: its long history resonated with tragic events and acts of force that were summed up in the evocative phrase “gunboat diplomacy”. Under the pretext of protection of nationals, lamentable and totally unjustifiable acts had been committed. Legal procedure in international affairs must not be undermined because of such distorted use. The aim must rather be to serve as the impetus for the establishment of norms to improve respect for legal procedure. To that end, the Commission must give States the requisite elements to reach a decision, and draft articles with commentaries formed the most suitable means.

54. As for the introduction to the report, it was fruitless to debate the issue of whether diplomatic protection was a legal fiction or not. The important thing was to see whether it served a purpose, was useful and merited retention, or whether it should be jettisoned as a thing of the past. He thought it had its place and was not obsolete. With reference to paragraph 11, the time was long past when the protection of citizens who were not treated in accordance with the ordinary standards of civilization was the privilege of powerful States. Yet the use of force under sundry pretexts was still very much a part of international relations. He was not convinced that the end of the cold war and the globalization of information, trade and finance had yielded greater security for nationals or foreign citizens and their possessions. Similarly, the significant progress made in the protection of human rights in contemporary international law had not produced improvements effective enough to dispense with international mechanisms such as diplomatic protection.

55. The Special Rapporteur cited two important recent instruments attesting to the continued practice of diplomatic protection: the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live¹⁸ and the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. Those instruments gave migrant workers and foreigners the right to have recourse to the consular or diplomatic authorities of their State of origin when their rights were impaired. One of the main drawbacks of globalization was the intensification of international movements of persons in search of better living and working conditions, with a consequent need to protect them when their rights were infringed.

56. He endorsed the Special Rapporteur’s comment in paragraph 32 that, instead of seeking to weaken that remedy by dismissing it as an obsolete fiction, every effort should be made to strengthen the rules that comprised the right of diplomatic protection. Hence the imperative need

to regulate the procedure more strictly for the purpose, first, of preventing the use of force under the pretext of protection, and secondly, of improving access by individuals to the remedy.

57. In paragraph 25, the Special Rapporteur referred to the American Convention on Human Rights: “Pact of San José, Costa Rica”, which, as implemented in the long history of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, had been highly successful in comparison with other international instruments in the field.

58. As preliminary remarks on the draft articles, he would suggest that article 2 created nearly insuperable difficulties. It was extremely dangerous to expand the prohibition of the use or threat of use of force beyond the terms of the Charter of the United Nations. He was not convinced by that very broad interpretation of the right to self-defence. He agreed, rather, with the previous Special Rapporteur, who had written in his preliminary report that a State may not resort to the threat or use of force in the exercise of diplomatic protection.

59. In conclusion, he wished to underline the fact that the consideration of the topic was an excellent opportunity to alter the view of diplomatic protection as the exclusive instrument of the strong against the weak and to ensure that it operated in a balanced manner to the benefit of the individual.

60. Mr. GAJA said that the stimulating report dealt with the most controversial issues the Commission might have to face in connection with diplomatic protection. The Special Rapporteur accorded great importance in his report to diplomatic protection as an instrument for ensuring that human rights were not infringed. It was not immediately obvious that use was made of diplomatic protection when a State raised human rights issues for the benefit of its nationals. Under international law, obligations concerning human rights were typically obligations *erga omnes*. Any State could request cessation of the breach, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. Thus, any requirement of nationality of claims appeared to be out of context when human rights were invoked. States were mainly concerned with protecting the human rights of their own nationals, however, and while the rules of general international law on human rights did not for most purposes distinguish between persons protected according to their nationality, they did tend to be more effective where aliens were concerned. He was therefore tempted to agree with the Special Rapporteur in saying that the concept of diplomatic protection extended to the protection of the human rights of one’s nationals, but diplomatic protection presented some special features that made it difficult to generalize and cover all the other aspects of diplomatic protection.

61. The first feature was that, as pointed out by ICJ in its famous dictum in the *Barcelona Traction* case, just one State, the State of nationality, could intervene in cases of diplomatic protection, but in human rights cases, any State could do so. As a consequence, the State of nationality was not in a position to waive all claims for the protection of the human rights of its own nationals. A second

¹⁸ General Assembly resolution 40/144 of 13 December 1985, annex.

feature emerged with respect to the topic of State responsibility: as far as human rights were concerned, an individual had a higher degree of protection under international law. It seemed reasonable to hold that in a case of State responsibility for infringement of human rights, the individual was entitled to choose whether to seek restitution or compensation, a conclusion that would be much more difficult with regard to other instances of diplomatic protection. For instance, could one say that, when the State of nationality concluded a lump sum agreement with the infringing State, the agreement was not lawful under international law if the company whose property had been affected wished to have restitution rather than compensation? While it might be true that the role of the individual had increased with regard to the treatment of aliens generally, the special features in the protection of human rights made it difficult to place all instances of diplomatic protection in the same category.

62. Articles 2 and 4 concerned instances in which human rights had been given a different status. He entirely agreed with Mr. Brownlie that article 2 did not belong in the draft and that the Commission should concentrate on matters that were specific to diplomatic protection. Article 4 went too far in establishing a duty to make use of diplomatic protection. He would like some clarification on one point. The Special Rapporteur suggested that there should be a duty to exert diplomatic protection in certain circumstances, but did not make it entirely clear to whom that duty was owed. It might be to the individual, but because he also referred to peremptory norms, that raised the question of whether he thought there should also be a duty to the international community as a whole.

63. Mr. ECONOMIDES, making some preliminary remarks, said the first report would enable the Commission to examine diplomatic protection in as comprehensive a manner as possible. Article 1 used the phrase "action", which raised certain problems. Diplomatic protection was a long and complex process that had a beginning and, often but not always, an end. Normally, when a State received a complaint from an individual, it examined the complaint to determine how serious it was and whether or not it was lawful. That first preparatory, investigatory stage did not constitute diplomatic protection. The embassy, the consulate, even the ministry, might be engaging in contacts, but diplomatic protection was not involved. It came into play when a Government decided to make a claim on behalf of its national to the Government that had allegedly failed to apply to that person certain rules of international law.

64. Diplomatic protection usually had two stages. The first stage was diplomatic: the State of the individual concerned negotiated with the other State to try to find a solution. If a solution was found, diplomatic protection was guaranteed and the matter was closed, failing which the State could either discontinue its initiative, which often happened, or a dispute arose between the two States. Once the dispute was settled, that was the end of the diplomatic protection procedure. Article 1 was somewhat vague on all those possibilities.

65. Article 2, subparagraph (a) was surprising, since it created insuperable difficulties and ran counter to the Charter of the United Nations, particularly the principle of the non-use of force in international relations. The sole

exception was the case of self-defence, a concept that the Charter defined very restrictively. Self-defence always presupposed an act of armed aggression and could only last until the Security Council had taken the necessary measures to maintain peace and international security. As international law regulated self-defence so closely, it was inconceivable that other exceptions, particularly ones so dangerous as those proposed by the Special Rapporteur concerning aliens, could be so quickly added to that of the principle of non-recourse to force, which from a legal standpoint was the century's most important rule of international law.

66. The Special Rapporteur's proposal was also at variance with another crucial principle of international law, that of non-intervention in the internal affairs of States. Developed in customary law, that principle was most comprehensively expressed today in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁹ which stipulated that no State or group of States had the right to intervene, directly or indirectly, for any reason whatsoever—and thus including the protection of nationals—in the internal or external affairs of any other State and that consequently, armed intervention and all other forms of interference or attempted threats against the personality of a State or against its political, economic or cultural elements were in violation of international law.

67. He would remind members in that context of the categorical condemnation by ICJ in the *Corfu Channel* case, in which the Court had found that the so-called right of intervention could only be viewed as a manifestation of a policy of force, which in the past had given rise to the worst abuses and which, regardless of the inadequacies of the international organization, had no place in international law. The Court had also condemned that so-called right in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. The Special Rapporteur's proposal was also contrary to respect for the sovereignty of States. Pursuant to the Charter of the United Nations and to customary law, States were under a strict obligation to respect the sovereignty of other States, in particular territorial sovereignty.

68. Lastly, the principles of non-use of force, non-intervention and respect for national sovereignty were so categorical and absolute that they ruled out any possibility of using force as a means of ensuring diplomatic protection. Accordingly, he agreed with Mr. Baena Soares that the examples of the previous Special Rapporteurs must be adopted, as they expressly excluded recourse to the threat or use of force in the exercise of diplomatic protection. Such a clear unambiguous provision was needed today more than ever. For those reasons, he could not endorse article 2, which constituted a dangerous regression for the law on diplomatic protection in particular and for international law in general.

69. Mr. GOCO, referring to a point raised by Mr. Baena Soares and Mr. Economides on the possibility of a

¹⁹ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

restricted scope for diplomatic protection, cited a specific example. The Philippine Government had intervened on behalf of a national, a maid who had been detained in Singapore, in order to save her from the death penalty, unsuccessfully as it had turned out. The difficulty had been to find fault with the way her trial had been conducted. His point was that the State could not be accused of committing an internationally wrongful act vis-à-vis the person detained, because detention was a matter for the courts.

70. Mr. TOMKA said that the first report of the Special Rapporteur raised a number of controversial issues. He personally considered diplomatic protection to be a classic subject of international law with well-established customary rules. There had been a number of decisions by PCIJ and ICJ on diplomatic protection, and it was important to build on them. It was his impression that the Special Rapporteur was belittling the importance of such decisions. The Commission must be cautious with the proposal for progressive development. It must first try to codify the rules of customary international law and only then fill in lacunae as necessary.

71. As he understood it, diplomatic protection was related to an initial dispute between a person and a foreign State; the dispute became an inter-State matter when the State of the national allegedly injured by an internationally wrongful act espoused its national's claim and presented it as its own or on his or her behalf. Hence, it was an inter-State dispute with all the legal consequences that stemmed therefrom, one of them being that the dispute should be resolved by peaceful means and not by resorting to the use of force.

72. Although the Special Rapporteur had said that his intention had not been to provide a definition in article 1, that provision nevertheless contained one, rather than the scope of application of the articles that followed. Secondly, as already pointed out by Mr. Economides, the Special Rapporteur referred to action taken by a State without explaining what kind of action that might be, whether diplomatic or judicial proceedings. It led the Special Rapporteur to say that force might be used in the framework of diplomatic protection, a proposition he could not endorse. Again, the phrase "injury ... caused by an internationally wrongful act or omission attributable to the latter State" in article 1, paragraph 1, should be brought into line with the articles on State responsibility. As he recalled, paragraph (14) of the commentary to article 1 of the draft on State responsibility contained an explanation of why the words "wrongful act" had been used,²⁰ and not "act and omission". As the current topic was closely related to that of State responsibility, the Commission should endeavour to employ the same language.

73. He was against including article 2 because it was not related to the subject of diplomatic protection. The actions referred to by the Special Rapporteur might be justified or excused on the basis of other principles of international law, such as necessity, but like humanitarian intervention, those were controversial issues.

74. As he experienced difficulties with article 4, he did not consider it appropriate to make a reference to it in article 3, the wording of which should make it clear that a national was injured by the internationally wrongful act of another State. The Special Rapporteur had said that article 4 was intended as a matter of progressive development and, when he had sought to explain under which circumstances a State had a legal duty to exercise diplomatic protection, one of the questions that arose was to whom the duty was owed: to other States that, it was hoped, would become party to the instrument currently being elaborated, or to a national? He asked whether the Commission was drafting a human rights instrument providing for obligations of States in respect of their nationals, and in some cases even non-nationals, or rules for inter-State relations. Furthermore, those duties were to be tied in with the issue of *jus cogens*, although the nature of the rules of *jus cogens* continued to be controversial. That too would create further difficulties when the draft article was submitted to the Sixth Committee. The Special Rapporteur proposed that that obligation should be enforceable before a competent domestic court or other independent national authorities (para. 3), but it was difficult to see how a court would decide as far as the exception under paragraph 2 (a) was concerned. Would it find that there was an overriding interest in the State not providing diplomatic protection in a case of grave breach of *jus cogens*? There was considerable disagreement about that approach.

75. Some States viewed the issue of diplomatic protection as an *acte de gouvernement*, and the Special Rapporteur had referred to French practice. A number of representatives in the Sixth Committee, which the Special Rapporteur had enumerated in a footnote to paragraph 78 of the report, had argued that diplomatic protection was at the discretion of States; if the Commission submitted article 4 as currently drafted, States might well reject it.

76. He said that articles 1 and 3 could be referred to the Drafting Committee. Article 4 was not ready for such a course and article 2 should be deleted.

77. Mr. Sreenivasa RAO said it had emerged in the course of the discussion that diplomatic protection was directly linked not to the denial of due process of law, but to an internationally wrongful act attributable to a State, something which led directly to the topic of State responsibility. There was a problem of nuance, and Mr. Goco had raised the issue. If the matter was addressed solely as one of State responsibility—as one of the consequences of demanding satisfaction and certain kinds of cessation—then the whole body of the law on diplomatic protection sometimes seemed irrelevant. He asked whether that was really the approach the Commission wished to adopt, or whether it was the best approach at the current time, given State practice.

78. Mr. TOMKA said that the Commission's approach should be based on established practice, namely the condition for diplomatic protection was that the international obligation of a State as far as treatment of foreign nationals was concerned had been breached and the foreign national had exhausted local remedies. The national's State might then take up the case and present the claim as the claim of the State, transforming the dispute from

²⁰ *Yearbook* . . . 1973, vol. II, p. 176, document A/9010/Rev.1.

one between a foreign national and a State to one between two States.

79. Mr. GOCO said he wondered whether that question should really be linked to the internationally wrongful act. Retaining the words “in respect of an injury to the person or property of a national caused” in article 1 brought in the whole issue of State responsibility.

80. Mr. SIMMA said that, in his view, the Special Rapporteur had correctly based his report on the outcome of discussions in the Working Groups at the forty-ninth²¹ and fiftieth²² sessions, namely that the Commission was to work on the subject of diplomatic protection within its classical meaning: the action of a State from the moment one of its nationals was treated in a way that led to an internationally wrongful act, i.e. a violation of international law, and that the Commission would not include in the topic what some people loosely referred to as diplomatic protection and signified consular and diplomatic assistance on a day-to-day basis. The problem which that created was deciding what to do with exhaustion of local remedies, an issue on which the Commission was beating around the bush but on which it would need to take a decision at some stage. Exhaustion of local remedies might come either at the stage preceding the Special Rapporteur’s topic, i.e. something to be regarded in accordance with the substantive theory of the subject as a pre-condition of an internationally wrongful act, and it would not be of any concern to the Special Rapporteur or, on the other hand, if the Commission chose to regard exhaustion of local remedies as a procedural matter which would have to be built into the process of submitting a claim, the Special Rapporteur would not get around to tackle his topic.

81. Mr. HAFNER said that, according to Mr. Simma, diplomatic protection came into play if an internationally wrongful act was committed. The problem was that the exercise of the right to diplomatic protection led only to a determination as to whether there had been an internationally wrongful act. The question therefore arose as to whether diplomatic protection already came into play when an internationally wrongful act had merely been alleged.

82. Mr. SIMMA said that diplomatic protection would of course come into play when a State took the legal view that one of its nationals had been injured in violation of international law. The other State might disagree and argue that the national must first exhaust local remedies. But that was a factual question which did not invalidate the legal point he had just made.

83. Mr. DUGARD (Special Rapporteur) said that the Commission was currently approaching the difficulty inherent in the separation of primary and secondary rules. Mr. Goco had to some extent suggested that it might be helpful for a provision to be included on the denial of justice. But as he saw that as a primary rule, he had carefully steered away from it. Mr. Simma had drawn attention to the difficulties in respect of the

exhaustion of local remedies. He was seeking to confine himself to secondary rules.

The meeting rose at 1 p.m.

2618th MEETING

Wednesday, 10 May 2000, at 10 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (continued) **(A/CN.4/506 Add.1¹)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN extended a warm welcome to Mr. Momtaz, a newly elected member of the Commission who was now taking up his functions, and invited the Commission to continue its consideration of draft articles 1 to 4 contained in the first report on diplomatic protection (A/CN.4/506 and Add.1).

2. Mr. MOMTAZ thanked the Commission for the confidence it had shown in him by electing him as a member and assured it of his full cooperation.

3. Mr. ILLUECA said that the first report of the Special Rapporteur was a masterpiece of political, diplomatic and legal balance. The Special Rapporteur rightly pointed out that, although there was much practice and precedent on diplomatic protection, it remained one of the most controversial subjects in international law. The right to diplomatic protection was a means of promoting the protection of human rights on the basis of the values of the modern-day legal system. Before going on to consider the substance of the report, he drew attention to a discrepancy

²¹ *Yearbook . . . 1997*, vol. II (Part Two), p. 62, para. 189.

²² *Yearbook . . . 1998*, vol. II (Part Two), p. 49, para. 108.

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

between the original English text and the Spanish version. In article 1 and in paragraphs 41 et seq. of the report, the word “action” had been translated into Spanish by the word *medidas*, which was not appropriate and should be replaced by the word *acción*, which had, moreover, been used in Article 48 of the Charter of the United Nations to translate the word “action”. He hoped that the necessary corrections would be made.

4. In paragraph 14 of his report, the Special Rapporteur rightly referred to the great abuses to which diplomatic protection had given rise, noting that the United States military intervention on the pretext of defending United States nationals in Latin America had continued until recent times and expressly citing the interventions in Grenada in 1983² and in Panama in 1989.³ Those examples supported his theory that diplomatic protection, in the sense of action taken by a State against another State to repair injury to its nationals, was still entirely topical. In order to avoid any misunderstandings, it should be pointed out that the intervention in Panama could not be justified as a case of intervention designed to defend United States nationals in that country. The fact was that, on 20 December 1989, the United States had invaded Panama with some 24,000 men and there had been many military and civilian victims of its action, which had led to the arrest of General Noriega, the de facto head of the Panamanian Government, and his transfer to the United States, where he had been tried and sentenced for illicit drug trafficking offences. It was true that the situation in Panama had changed since then and that, on 31 December 1999, the United States had transferred the Panama Canal to Panamanian sovereignty in accordance with the Treaty concerning the Permanent Neutrality and Operation of the Panama Canal⁴ and the Panama Canal Treaty,⁵ known as the Torrijos-Carter treaties, and had dismantled its military bases, thus paving the way for a new era of harmonious relations with Panama and the countries of Latin America and the Caribbean.

5. In article 2, the Special Rapporteur considered the possibility of allowing the threat or use of force by a State in the case of the rescue of its nationals. It was obvious that that idea was contrary to Article 2, paragraph 4, of the Charter of the United Nations. In the case of the invasion of Panama, for example, there had been questions about the use of force. The advocates of military action had wanted to reinterpret Article 2 of the Charter, holding that the right of self-defence was a “natural” right and that it had not been uncommon for States to use force to defend not only their territory, but also their nationals and their property. Briefly describing the arguments for and against United States military action in Panama in order to add his contribution to the consideration of the topic and the formulation of the draft articles, he indicated that Sofaer, then Legal Adviser to the United States Department of State, had published an article,⁶ in which he had maintained that

the use of armed force by the United States was lawful. However, other well-known jurists had challenged the lawfulness of that action. For example, Henkin had pointed out that Sofaer’s explanations did not justify the use of force by the United States and that the invasion of Panama had been a flagrant violation of international law.⁷ He had refuted, point by point, all the reasons the United States had given to justify its action. His arguments led to the following conclusions.

6. With regard to protection of the life of United States citizens, there was no proof that the United States forces and the other United States nationals in Panama could not have been safely evacuated to the United States or to the Canal Zone or that the well-armed United States forces in the Canal Zone had not been able to defend themselves and their families and other United States nationals. Even if the lives of United States citizens had hypothetically been threatened, that would not have justified the invasion, since it was contrary to Article 2, paragraph 4, of the Charter of the United Nations. According to Henkin, the use of force in humanitarian intervention was recognized as an exception to the prohibition of the use of force under Article 2, paragraph 4, only by virtue of the Entebbe principle, which provided that a State could enter another country by force to the extent strictly necessary to defend and release individuals whose lives were in danger if the Government of the country in question lacked the capacity or willingness to protect them. However, Article 2, paragraph 4, of the Charter did not allow any exception authorizing an armed invasion designed to rescue persons who could have been rescued if they had been evacuated from the territory in which their lives had been in danger. There was no exception to that provision of the Charter which allowed the use of force to overthrow a regime because it had threatened lives or was responsible for the death of a large number of innocent persons.

7. The justification of the invasion in the name of endangered democracy in Panama did not hold water in international law, which had rejected the “Reagan doctrine”, which had defended the right to use force to establish democracy, just as it had earlier rejected the “Brezhnev doctrine”, which had defended the right to use force to establish socialism. As to the argument of Panama’s declaration of war, the United States would not have been justified in invading Panama even if Panama had declared war on it. The Charter of the United Nations did not authorize war, declarations of war or counter-declarations of war. It would authorize the use of force on the grounds of a declaration of war only in the case where the State which had made the declaration of war had also carried out an armed attack.

8. With regard to the argument of the defence of the Panama Canal, the use of force against Panama’s territorial integrity or political independence to guarantee the continuing operation of the Panama Canal in conditions of safety was not authorized either by the Charter of the United Nations or by the Torrijos-Carter treaties. The theory that the maintenance of the integrity of the treaties allowed a military invasion must be refuted half a century after the establishment of the United Nations and the

² See M. N. Leich, “Contemporary practice of the United States relating to international law”, *American Journal of International Law* (Washington, D.C.), vol. 78, No. 1 (January, 1984), p. 200.

³ *Ibid.*, vol. 84, No. 2 (April, 1990), p. 545.

⁴ United Nations, *Treaty Series*, vol. 1161, No. 18342.

⁵ *Ibid.*, vol. 1280, No. 21086.

⁶ A. D. Sofaer, “The legality of the United States action in Panama”, *Columbia Journal of Transnational Law*, vol. 29, No. 2 (1991), p. 281.

⁷ L. Henkin, “The invasion of Panama under international law: a dangerous precedent”, *ibid.*, p. 293.

promulgation of the Charter. As to the motive that General Noriega had been arrested so that he could be tried in the United States for threatening the lives of United States citizens, it could be asked whether, under international law, the United States had had the right to invade Panama in order to achieve its objectives. Perhaps the then President of the United States had made that arrest part of his general reference to the right of self-defence. In international law, however, the definition of the right of self-defence in no way included the right to invade another country to arrest an alleged drug trafficker.

9. The main argument used to justify the invasion of Panama had been to describe it as the legitimate exercise of the right of self-defence recognized by Article 51 of the Charter of the United Nations in response to acts of hostility, including one or two attacks on United States military personnel in Panama, and to a declaration of war. In invoking the right of self-defence, the United States Government had in no way referred to the basic idea underlying Article 51 of the Charter, namely, that the use of force in self-defence was authorized only as a response to an armed attack. It had apparently not been claimed that the act or acts of hostility by the Noriega regime had constituted an armed attack against the United States within the meaning of Article 51. The United States Government of that time had maintained that Article 51 allowed the use of force in the exercise of the natural right of self-defence even in cases where no armed attack had occurred. That particular point had been discussed at length, but the dominant idea which had come out of the discussion had been that the use of force in the exercise of the right of self-defence was legitimate only in response to an armed attack.

10. It should be noted that the international community had found no justification for the invasion of Panama, either as an action carried out to protect nationals abroad or on any other grounds, and that it had regarded that invasion as a flagrant violation of international law. In a resolution which it had adopted on 21 December 1989, by 20 votes to 1, with 5 abstentions, OAS had deplored the intervention in Panama and had called for the withdrawal of United States troops. On 23 December, the Security Council had had before it draft resolution S/21048 along the same lines, which had received 10 votes in favour and 4 against, with 1 abstention, but which had not been adopted because of the exercise of the right of veto.⁸ The most striking statement had been made by the General Assembly, which, in its resolution 44/240 of 29 December 1989, had strongly deplored the intervention in Panama by the armed forces of the United States, which had constituted a flagrant violation of international law, and had demanded the immediate cessation of the intervention and the withdrawal from Panama of the armed invasion forces of the United States.

11. He reserved the right to refer at a later stage to draft articles 4 to 8 proposed by the Special Rapporteur.

12. Mr. KABATSI congratulated the Special Rapporteur on his detailed, well-structured, lucid and unambiguous report, in which he had not shied away from controversial

issues and had clearly premised the institution of diplomatic protection on the need to further the protection of human rights.

13. The question whether a State resorted to diplomatic protection to assert its own right, that of its nationals or a combination of the two was not, in his view, of particular importance. What mattered, as the Special Rapporteur had indicated in paragraph 10 of his report, was the existence of a substantial body of relevant practice and precedent. The place of diplomatic protection in customary international law was well established. A State that resorted to such protection was, in his view, exercising its own right for the benefit of the nationals it defended. The State was not simply acting as an agent, as in the rendering of consular services, for a subject without *locus standi vis-à-vis* another State or an international judicial body.

14. Diplomatic protection was thus not an obsolete facility. It was still a very useful tool, as ably argued by the Special Rapporteur in paragraph 32 of his report. The Special Rapporteur was also to be commended on the gender-sensitive language he used in paragraphs 23, 24 and 26.

15. With regard to the draft articles, he had no difficulty in accepting articles 1 and 3, which could be referred to the Drafting Committee for the usual finishing touches.

16. Article 4, as acknowledged by the Special Rapporteur in paragraphs 80 and 81 of his report, was based on scant State practice. As agreed by most members of the Commission who had addressed the matter, diplomatic protection was a sovereign prerogative of the State, exercised at its discretion. National legislation at best spelled out the objectives of State policy in terms of affording protection to a country's nationals abroad, but failed to establish binding legal provisions. Diplomatic protection was clearly not recognized as a human right and could not be enforced as such. One was left wondering what type of right under international law would be progressively developed by the Commission. Any such putative right of the individual or duty of the State could not, at any rate, be construed as a right or duty of the international community as a whole. He was therefore not convinced of its existence and felt that article 4 should be abandoned at the current stage.

17. Article 2, apart from the fact that it fell outside the scope of the topic, was a dangerous proposition. The Special Rapporteur himself was aware of the dangers involved. In paragraphs 48 and 59 of his report, he clearly demonstrated that history, both past and present, was replete with examples of cases in which the protection of nationals had served as a pretext for military intervention. Article 2, paragraph 4, of the Charter of the United Nations prohibited the use of force, the sole exception being the right to self-defence set forth in Article 51. But the right to self-defence could not include the right to military intervention on the pretext of exercising diplomatic protection. Even in putative emergency situations or in rescue operations conducted by an attacking State in another State on behalf of its nationals, it would be dangerous to give States the latitude to take unilateral decisions about the existence of an emergency or the need for a rescue operation.

⁸ See S/PV.2902. For the final text, see *Official Records of the Security Council, Forty-fourth year, 2902nd meeting*.

18. The Entebbe operation had been hailed as a success, not only outside Uganda, but also by many Ugandans, mainly on account of the unpopularity of the then regime in Uganda and the daring nature of the operation. But it could not safely be termed lawful. It had claimed the lives of many innocent Ugandans who had had nothing to do with the hijacking or the operation to rescue the hostages. Property had been destroyed. The raid could not therefore constitute a precedent establishing a right to use force notwithstanding the prohibition contained in international law, particularly in the Charter of the United Nations. Any attempt to address the issue in the context of the progressive development of international law should be in the direction of a world order based on legality, multilateralism, the pacific settlement of disputes among and between States, and the furtherance of human rights, and not in the direction of the use of force, especially on the basis of unilateral decisions by States. If there were instances in which the use of force might be legitimate, the diplomatic protection facility was not one of them. He therefore strongly supported abandoning article 2.

19. Mr. PELLET said that, although the protection of human rights certainly constituted one of the major advances in international law in the twentieth century, it did not follow that such a relatively precise technical topic as diplomatic protection should be systematically converted into another entirely different and far wider topic, namely, the protection of nationals or, in even broader terms, ways of safeguarding human rights in the modern world. But that was the approach that the Special Rapporteur seemed to have adopted in his study.

20. Reviewing the background to the inclusion of the topic in the Commission's long-term programme of work, he said that the basic and indeed sole purpose had been to bridge a gap in the draft articles on State responsibility, as the original idea had been to deal with diplomatic protection in Part Three on the implementation of responsibility. That idea had been shelved, although, as noted by Mr. Kabatsi, diplomatic protection was a tool that States could use in implementing international responsibility. When a State had committed an internationally wrongful act entailing its international responsibility, in accordance with the provisions of articles 1 and 3 of the draft on State responsibility, it could cause damage either to a foreign State—"immediate" damage—or to a foreign national—"remote" damage. It was then, and only then, that diplomatic protection came into play. It was a long-standing institution whose main features had not been fully outlined until the late nineteenth and early twentieth centuries. As indicated by the Special Rapporteur, the European States and the United States had then been faced with a dilemma: on the one hand, they had wanted to protect their nationals, and particularly their property, in Latin America, the "third world" of the time; and, on the other hand, they had had no intention of questioning the basic assumption that international law was law between sovereign States and between them alone, as graphically illustrated by the "*Lotus*" case. There had thus been no question of recognizing that private individuals, whether natural or legal, had any measure of international legal personality. It was to resolve that dilemma that the fiction of diplomatic protection, admirably articulated by PCIJ in the *Mavrommatis* case and constantly repeated ever since, had been invented. According to that fiction, when a State espoused the cause of one of

its nationals, taking diplomatic or international legal action on his or her behalf, it was actually claiming its own right. Diplomatic protection was nothing more than that. It was not, as the Special Rapporteur thought, the actions open to a State in affording protection to its nationals and still less the actions whereby private individuals could protect their own rights. Admittedly, in cases where an individual's basic rights were violated by a breach of the rules of international law by a State other than that whose nationality he or she held, diplomatic protection could offer one means of guaranteeing respect for the rights in question. But that was not the purpose of the institution of diplomatic protection, which had incidentally existed long before the idea of the international protection of human rights had been conceived. Its purpose was not to protect human rights or even, in general terms, to protect nationals, contrary to the Special Rapporteur's argument in, for example, paragraph 54 of his report. It was a procedural means of obtaining reparation for fictional damage suffered by the State.

21. The question arose whether the fiction should be maintained. For want of anything better, it should be. On that point, he shared the views expressed by the Special Rapporteur in paragraphs 17 to 30 of his report. He subscribed to the view that, at the dawn of the twenty-first century, the individual should finally be recognized as a subject of international law, as shown, for example, by the impressive expansion of international criminal law, which made the individual a subject of *jus gentium*, and by the expansion of the international protection of human rights and even of international investments, which enabled private individuals, under certain circumstances, to bring international judicial or quasi-judicial proceedings themselves. On that point, he would go further than the Special Rapporteur had done in paragraph 24 of his report. The individual was already a subject of international law, with special characteristics that differed sharply from those of a State. Admittedly, however, the trend was not widespread enough to allow diplomatic protection to be dispensed with.

22. But if the fiction was maintained, as seemed necessary, the draft articles must, without fail, fulfil one basic condition. As indicated by the Working Group established at the fiftieth session, and reiterated by the Special Rapporteur in paragraph 4 (a) of his report, the Commission should continue to adopt an approach to diplomatic protection as conceived in customary law.⁹ In other words, it should take as its starting point the traditional notion of diplomatic protection and keep to that notion instead of seeking, at all costs, to move international law forwards in unpredictable and unforeseen directions. Moreover, diplomatic protection, as a fundamentally conservative institution, certainly would not lend itself to such developments save through a very artificial grafting process.

23. In the light of the foregoing, he had a number of comments to make on the first four draft articles proposed by the Special Rapporteur. Article 1, paragraph 2, was, in his view, redundant because article 8, to which it referred, was self-contained and could simply be mentioned in the commentary to article 1. Article 1, paragraph 1, called for

⁹ See 2617th meeting, footnote 22.

two comments of unequal importance. The first and less important point was that the terminology used should be brought into line with that used in the draft articles on State responsibility. In particular, as Mr. Tomka had noted (2617th meeting), it would be preferable to delete the reference to an “omission”, since the draft articles on State responsibility had established that an internationally wrongful act comprised both acts and omissions. In the French version, it would also be better to speak of *attribution* of the internationally wrongful act instead of *imputation*, in keeping with the carefully considered wording used in the draft articles on State responsibility. It was for the Drafting Committee to rule on that point if the draft article was referred to it by the Commission. Secondly, and more importantly, he certainly did not believe that diplomatic protection was an action, as Mr. Economides had clearly shown (*ibid.*). It could lead to an action, but it was not an action. It consisted simply in the endorsement of a claim by a private individual who had suffered an injury. It was not the diplomatic or judicial action itself: it was the setting in motion of such action, which was something entirely different. The word “action” was misleading and all the more regrettable since it led up to the disastrous draft article 2, which had been denounced by other members of the Commission.

24. In that connection, he urged the Special Rapporteur to delete all reference to the use of force. Although no subject was taboo and, unlike Mr. Tomka, he did not subscribe to the view that the Commission should systematically anticipate the wishes of the Sixth Committee, there should still be sound reasons for provoking the kind of reaction that draft article 2 could be expected to produce. And he saw no scientific reason for doing so in the case in point. On the contrary, draft article 2 was, in his view, totally irrelevant. On the one hand, it was based on the law of the Charter of the United Nations, which was outside the Commission’s remit, and not on the law of international responsibility, which formed part of its terms of reference. On the other hand, it referred to actions, with which the Commission was not concerned, and not to the endorsement of complaints, with which it was concerned. Citing an example mentioned in paragraph 59 of the report in support of his argument, without passing a value judgement on the Israeli action, he submitted that the Entebbe raid had absolutely no bearing on the issue of diplomatic protection: there had been no question of obtaining reparation for damage caused by an internationally wrongful act that had obviously not been attributable to Uganda, but rather of obtaining the release of hostages in total disregard of the territorial sovereignty of a State that had been powerless in the matter. As to the sorry case of Panama mentioned by Mr. Illueca, it had no bearing whatsoever on diplomatic protection.

25. As a final comment on article 2, he drew attention to a footnote in the report which referred to *Droit international public*¹⁰ with a view to setting the record straight. As co-author, he said that page 777 dealt with “the implementation of diplomatic protection” and stated, *inter alia*, that: “Diplomatic protection cannot constitute a pretext for the use of unlawful means in international law: the use of

force is no longer justifiable on such grounds, since it is prohibited by international law”. Page 905 of the book, which had also been mentioned, initiated a lengthy discourse on armed intervention and reprisals, but made no reference whatsoever to diplomatic protection. On the contrary, it put forward a strong argument against armed reprisals and interventions. Having reviewed some past cases of armed intervention, the authors argued that, since armed force had been used, the reprisals were covered by the prohibition of the use of force set forth in Article 2, paragraph 4, of the Charter of the United Nations. As to armed interventions undertaken by States in defence of a right, the authors stated that “the ICJ judgment against the defendant in the *Corfu Channel* case is too general not to be applicable also to this case” and concluded that there might at most be some grounds for accepting the extremely reasonable and limited position of ICJ in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, according to which:

if the provision of ‘humanitarian assistance’ is to escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely ‘to prevent and alleviate human suffering’ and ‘to protect life and health and to ensure respect for the human being’; it must also, and above all, be given without discrimination to all in need. In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect [see pp. 125 and 134, paras. 243 and 268, respectively].

He was thus far from convinced by draft article 2.

26. Article 3 had been overlooked by previous speakers, even though it was of very great importance. It was of far greater relevance than article 2, but he was still unable to accept it. If he had rightly understood the Special Rapporteur, the idea was to adhere closely to the traditional doctrine of diplomatic protection. Although he did not “like” that doctrine, he thought the Commission should nonetheless stick to it, but article 3 did not do so and also covered too many subjects. In his view, the crux of the matter lay in the words “on behalf of a national unlawfully injured by another State”. To begin with, it would be more appropriate to say, as Mr. Tomka had noted, “injured by the internationally wrongful act of another State”, which would have the advantage of keeping the subject matter within its proper bounds, namely, that of international responsibility. Secondly, and more importantly, precisely in terms of traditional theory, it was not the individual who was injured, but the State which suffered damage in the person of its national. That was where the traditional fiction lay; one could either accept it or wish to be rid of it, but, if one resigned oneself to keeping it, as the Special Rapporteur had done—a point on which he concurred—one could not, having let it in the front door, subsequently throw it out through the back door.

27. Contrary to what the Special Rapporteur had stated in paragraph 66 of the report, it could not be argued that the very welcome step of recognizing direct individual rights, in the context either of the protection of human rights or the protection of investments, had undermined the traditional doctrine. In legal terms, the only serious problem arising from the recognition of such rights was whether it left intact or replaced traditional diplomatic protection. He did, however, share the Special Rapporteur’s view that diplomatic protection was a discretionary

¹⁰ *Ibid.*, footnote 10.

power of the State under existing positive international law—and that should perhaps be stated more explicitly—and that the question arose whether the time had come to confine the State's discretionary power within narrower bounds.

28. With regard to article 4, he would be less severe than previous speakers, since he agreed with its underlying postulates. It basically stated that, in the event of a grave breach of an obligation of crucial importance for the safeguarding of the fundamental interests of the international community as a whole, a State could not remain passive. To put it plainly, if genocide was committed somewhere or if a State systematically resorted to torture or racial discrimination as a means of governance, other States could not stand idly by. But that issue was also not one of diplomatic protection. It was a far more general issue and one with which the members of the Commission were familiar, since it related to the international crimes of States. In such circumstances, States not only had the right, but also the duty, to act although there was still no justification for the use of force. However, that did not mean that diplomatic protection should serve as the instrument for such action, first because diplomatic protection was not an action and, more importantly, because it was not the rights and interests of nationals alone that were to be endorsed, but those of the international community as a whole. The issue came not under diplomatic protection, but under the far broader topic of State responsibility—and under article 51 of the draft on State responsibility, to be precise.

29. The easy option for him would be to support the idea of referring draft articles 1 and 3 to the Drafting Committee and of consigning draft articles 2 and 4 to oblivion. However, given the fundamental questions regarding the overall approach that needed to be answered, he wondered whether it might not be better to suggest that the Special Rapporteur should review all the draft articles in the light of the Commission's discussion. That was for the Special Rapporteur to decide.

30. Mr. IDRIS commended the Special Rapporteur on the high quality of his in-depth report. He had shown flexibility in admitting that some parts of his report should be trimmed. The Commission should therefore consider only the relevant aspects of the report and leave aside what it considered to be superfluous.

31. The diplomatic protection regime was well established both in theory and in the practice of States and had enabled those nationals of a State whose rights had been violated by another State to obtain reparation. That starting point was very well reflected in the report. Despite the adoption of international human rights instruments, including at the regional level, international law on the subject was not as well developed as it should be. If only for that reason, diplomatic protection was a useful mechanism, acting as a safeguard against the infringement of the rights of aliens, who would not be able to obtain any reparation without the intervention of the State of which they were nationals. As pointed out by the Special Rapporteur, instead of seeking to weaken diplomatic protection, the Commission should make every effort to strengthen it. The question whether diplomatic protection was a fiction was not very important. The Commission should, rather, focus on making the diplomatic protection regime more useful in

practice, in order to protect the rights of the nationals of a State who lived in another State. With that in mind, the Commission should therefore give priority to the codification of the rules of customary law rather than the progressive development of new rules.

32. While he agreed with the principles embodied in article 1, he thought the article should deal only with secondary rules and leave aside primary rules, which could be considered within the much broader framework of State responsibility. With regard to the question of the threat or use of force, as referred to in article 2, he shared the view of many other members of the Commission that it was not relevant in the context of diplomatic protection and might lead to confusion with the regime of counter-measures provided for in the framework of State responsibility. Moreover, many States would find the idea unacceptable, since diplomatic protection could be used as a pretext for violating the territorial integrity of another State. The principles relating to the use of force were clearly defined in the Charter of the United Nations, which provided for the use of force solely in cases of self-defence. That question should therefore be excluded from the scope of article 2.

33. With regard to article 3 on the holder of the right to diplomatic protection, he asked whether, if the holder was the State, the latter could intervene at any time, before all domestic remedies had been exhausted. If, on the other hand, that right belonged to the alien concerned, could the State exercise it only once its national had exhausted all local domestic remedies? The Special Rapporteur had pointed out that, in its traditional form, the right of diplomatic protection was attached to the State, but that was a very controversial issue and the Commission should explore it further.

34. Article 4 was equally controversial. The question to whom the legal duty to exercise diplomatic protection was owed had been raised; was it to other States parties or to the person who had been injured? Noting that there was a general view in the Commission that individuals were also subjects of international law, he invited the Special Rapporteur to study that question further.

35. Lastly, he said that the current title of the report was confusing. It gave the impression that it actually dealt with the protection of diplomats. In order to avoid any misunderstanding, it should be reviewed.

36. Mr. PELLET, referring to Mr. Idris' last comment, said that anything could of course be called by any name at all. However, words did have a meaning and institutions did have a name. While it was unfortunate that diplomats did not know their international law, their ignorance was not a reason for the Commission to rename an institution that dated back to Vattel. The title "Diplomatic protection" should therefore be retained.

37. Mr. KATEKA said that, in his view, Mr. Idris' comment was justified. Only the day before, the Special Rapporteur had pointed out that Governments themselves, in their replies, confused diplomatic protection with the privileges and immunities of diplomats. It would therefore be desirable for the Special Rapporteur to amend the title of his report or else to clarify its meaning in the general comments.

38. Mr. SIMMA said he took the view that the problem was one of information and education. If diplomats and other users of international law such as legal advisers did not properly understand the meaning of diplomatic protection, the Commission should make an effort to explain it to them clearly.

39. Mr. ECONOMIDES said that he agreed with Mr. Pellet. There was no need to change the title, but it could be improved by adding a few words to clarify the concept.

40. Mr. BAENA SOARES said that he also agreed with Mr. Pellet. It was not the title that had been chosen that was wrong, but the interpretations of it.

41. Mr. BROWNLIE said that he too agreed with Mr. Pellet. However, in order to avoid complicating matters, the concept of “diplomatic protection” could be clarified in the introduction to the report.

42. Mr. LUKASHUK said that the Commission should not spend too long on the question; he too was opposed to changing the title, as diplomatic protection was too deeply rooted in international law.

43. Mr. HE said that it would be useful to distinguish, from the start, between diplomatic protection and the protection provided for in the Vienna Convention on Diplomatic Relations.

44. Mr. OPERTTI BADAN suggested that “diplomatic protection of persons and property” might be a more accurate title, but, in any case, the question should not be considered until the end of the debate.

45. Mr. CANDIOTI said that there was no justification for changing the title and that it would be more appropriate to give a clear and precise definition of it in article 1.

46. Mr. DUGARD (Special Rapporteur) said, by way of information, that Borchard’s work, the bible on the subject, was entitled *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*.¹¹

47. Mr. ADDO said that the term “nationality of claims” was frequently used in works on international law as a synonym of diplomatic protection. It could therefore be included in brackets after the title or else the commentary could explain that it could also be used.

48. The CHAIRMAN said he took it that the current title of the topic under review, “Diplomatic protection”, could be retained even though its meaning might need to be defined in the introduction or the commentary. With regard to sending the draft articles to the Drafting Committee, it would be better if the Commission took a decision on that matter at the end of the debate.

49. Mr. LUKASHUK congratulated the Special Rapporteur on his report, which was a serious study of one of the most complex problems of international law. The Special Rapporteur had been right to start from the principle that special attention should be paid to customary law or, to be more precise, positive law. There had been significant developments in the area of diplomatic protection, linked

to those in international human rights law. It was difficult to disagree with the idea that allowing claims by States concerning violations of the rights of their citizens was one of the most effective means of providing legal protection against human rights violations. That idea was at the very core of diplomatic protection.

50. He noted with satisfaction that the Special Rapporteur had consulted Russian sources, which was a rather infrequent occurrence in the work of the Commission. He also welcomed the Special Rapporteur’s stated intention to complete the first reading during the current quinquennium.

51. Although the Special Rapporteur spoke a good deal about legal fictions, his report was absolutely realistic. However, not everyone agreed with the attention he paid to the fiction of the dichotomy between the rights of the State and those of the individual. Many members, including Mr. Idris, Mr. Kabatsi and Mr. Pellet, had already dealt with it. The State had not only a right, but also an obligation to defend the rights of its citizens. That was one of its principal functions: a State that was unable to defend its nationals was of no use to them. In international law, that principle found its concrete expression in the institution of diplomatic protection. To violate the rights of the citizen was to violate the rights of the State. Article 1, paragraph 1, dealt with the injury caused by a State to nationals of another State as a result of an internationally wrongful act; the internationally wrongful act entailed the responsibility of the State. While the report cited a large number of examples in support of that idea, the Special Rapporteur thought that, in some cases, the State still acted as the representative of the individual and not in order to defend and protect its own rights. It did not seem necessary constantly to underline the discretionary nature of the State’s power. It was enough to say that that power was attached to the State and it was the State that exercised it.

52. The Special Rapporteur rightly drew attention to the tendency in domestic law to consider the granting of diplomatic protection as an obligation of the State. Generally speaking, the development of both internal law and international law led to the recognition of the individual’s right to diplomatic protection. The Russian Federation was one of the States whose internal law included provisions of that sort. The principle whereby the State had an obligation to defend its citizens abroad was written into the Constitution (art. 61) and given effect in a number of legislative texts, such as the Decree on the Ministry for Foreign Affairs and the Decree on Embassies of the Russian Federation, in which the protection of Russian nationals abroad figured prominently.

53. Article 1 rightly stipulated that diplomatic protection could be extended only in cases where an internationally wrongful act had been committed, not in the case of an infringement of internal law. The term “unlawfully” in the English version of article 3 should therefore be amended accordingly.

54. As the discussions had shown, article 2 was the most controversial. It deserved special attention as it dealt with the use of force. He agreed in principle with the statement that the threat or use of force in the exercise of diplomatic

¹¹ Ibid., footnote 5.

protection could be justified only in cases of self-defence. In support of that view, the Special Rapporteur had drawn on traditional customary law in his interpretation of Article 51 of the Charter of the United Nations. His own interpretation of Article 51 was somewhat different from that of the Special Rapporteur. That article dealt with the case in which “an armed attack occurs against a Member of the United Nations”, in other words, an armed attack against a State. The concept of the State encompassed not only that of territory, but also that of population.

55. He agreed with the Special Rapporteur that it was vital to reflect the practice of States and that a total ban on the use of force would be ignored. If a television channel in France or some other democratic State were to broadcast pictures of acts of cruelty committed against French people abroad and the French Government did not take the necessary steps at once, that Government’s stay in office might well be short. One only had to think of the episode in which a United States television station had shown United States peacekeepers being dragged through the streets of Mogadishu. A few days later, the United States Government had announced the withdrawal of its troops from Somalia. That was why he saw it as the task of the Commission, not to close its eyes to reality, but to adopt practical provisions. It should restrict the possibility of abuse of the right in question by legitimizing it only in extreme cases. Mr. Illueca, Mr. Kabatsi and other members had presented persuasive arguments along those lines. If the case of self-defence was accepted, it would seem necessary to include a reference to Article 51 of the Charter of the United Nations in article 2 and, to be more precise, to indicate that the Security Council should be informed without delay about the measures taken by Member States in the exercise of the right of self-defence. Moreover, the article could be entitled “Cases of self-defence”.

56. Article 4 was the least successful of all the draft articles proposed. The Special Rapporteur stated that the State had a legal obligation to exercise diplomatic protection when there was a grave breach of *jus cogens* norms. It might be asked whether there were grounds for establishing such an obligation in international law. If such an obligation existed, it was more an obligation under internal law. The statement at the end of paragraph 80 of the report that certain States consider diplomatic protection for their nationals abroad to be desirable seemed strange because it was impossible to imagine which States might not consider the protection of their nationals desirable. The Special Rapporteur’s conclusion that the State had not only the right, but also the legal obligation to protect its citizens abroad was quite right and in conformity with the main objective of contemporary international law, which was to strengthen the rights of the individual and not those of sovereign States. However, in advocating that the State should be allowed a broad margin of discretion in fulfilling that obligation, the Special Rapporteur greatly reduced its scope. Lastly, according to article 4, paragraph 3, “States are obliged to provide in their municipal law for the enforcement of this right”. It was not clear to what the word “right” referred, since that article dealt only with obligations. In general, there was good reason to think that article 4, which seemed to raise many more questions than it gave answers, should be dropped. The other draft articles should, however, be sent to the Drafting Committee.

57. Mr. RODRÍGUEZ CEDEÑO congratulated the Special Rapporteur on the high quality of his work. As diplomatic protection was an important issue, the aim of the work should be to draft conclusions that would be reflected in the draft articles. Although it was too early to take a decision on the final form that the latter would take, it could nevertheless be stated that they would have to be realistic if they were to be accepted. It was therefore necessary to move forward carefully, since, although the codification of international law was an acceptable process, the same could still not be said of its progressive development. One could not force international law to develop in unexpected, or even sometimes uncertain, directions.

58. Diplomatic protection was linked to two important issues, namely, human rights and State responsibility. As far as human rights were concerned, diplomatic protection was a mechanism (not an “action” or a “measure”, as stated in the report) aimed at protecting the rights of a national of a State in the territory of another State in cases where those rights might be violated. It could not be said that all the rights that might be violated were human rights, although in fact many of them were, as in cases of the denial of justice, the unlawful deprivation of liberty, the lack of a normal judicial procedure or, indeed, the violation of the rights of migrant workers or discrimination against foreigners.

59. Moreover, the mechanisms of diplomatic protection and those relating to the protection of human rights, while complementary, were different. Human rights instruments had been developing continuously since 1945. There were both universal and regional mechanisms, such as the Inter-American Commission on Human Rights and the American Convention on Human Rights : “Pact of San José, Costa Rica”. Those regional mechanisms usually worked quite well. However, the rules on diplomatic protection should not be reduced to the question of human rights, as that would limit their scope. Diplomatic protection should be treated as a separate subject. Nevertheless, as Mr. Economides had pointed out, it was a subject that was very closely connected to the international responsibility of States.

60. That connection was partly reflected in article 1. In that respect, the Special Rapporteur should further develop the idea he had put forward (2617th meeting), namely, that a State acted when it believed that another State had committed an internationally wrongful act against one of its nationals or else it exercised that right to declare that such an act had been committed by the territorial State. That was an issue. He did not personally think, despite the doctrine, that a State could unilaterally declare that another State had breached a rule of international law. Article 1 referred to the “injury to the person or property of a national [of a State] caused by an internationally wrongful act or omission attributable to [another] State”. That wording suggested that the State of which the injured person was a national considered that the territorial State had committed a wrongful act, and that, in his opinion, prejudged the nature of the act committed. Furthermore, it was perhaps unnecessary to separate an internationally wrongful act from an internationally wrongful omission. Under the title “Scope”, article 1 referred to the basic elements of the definition of diplomatic protection, which was in fact a mechanism rather

than an action. In that connection, it should be pointed out that the inclusion of the word *toute* in the French version—for which there was no equivalent in the original English text—before the word *action* had the effect of unduly extending the scope, and that did not seem to be the purpose of the original English text.

61. With regard to article 2, he shared the misgivings expressed by previous speakers, as he did not believe that the question of the use of force had a place in draft articles on diplomatic protection. The only exception to the general prohibition on the use of force provided for by the Charter of the United Nations was in the case of self-defence (Art. 51). If it created further exceptions, the Commission might well seriously jeopardize rather than promote the development of international law by turning diplomatic protection into a right of intervention.

62. He noted in passing that the Special Rapporteur had deliberately chosen not to deal with the “functional protection” that could be exercised by an international organization on behalf of its officials. Although that question could be left aside for the moment, it would have to be tackled sooner or later, at least in the commentary. Besides, it was related to the question of “humanitarian intervention”, mentioned in paragraphs 55 et seq. of the report. In his view, the term “humanitarian intervention”—to which, in any case, he preferred the term “humanitarian action”—could be used only to describe the action taken by the international community or, rather, by the relevant international agencies, through the mechanisms provided for that purpose, in order to protect persons or populations in danger.

63. Article 3, which provided that the State of nationality had the right to exercise diplomatic protection on behalf of a national injured by another State, set forth a generally accepted principle and appeared to pose no problem.

64. Under article 4, paragraph 1, the “right” to exercise diplomatic protection, provided for in article 3, would become a “legal obligation” if there was a grave breach of a *jus cogens* norm, except in the cases listed in paragraph 2. On that point, he agreed completely with the arguments advanced by the Special Rapporteur in paragraphs 88 to 93 of his report. It seemed to him only natural that a State should have the duty to protect its own nationals abroad when their most basic rights were gravely breached.

65. Those were, basically, his preliminary comments on the draft articles under consideration.

66. Mr. KATEKA said that the report submitted by the Special Rapporteur had at least one great merit: it provided food for thought on a controversial issue, the complexity of which sprang partly from its links with the issues of State responsibility and human rights. To get a measure of that complexity, one only needed to look at the list in paragraph 43 of the report. He hoped that the Commission’s work would help to clarify those questions for the international community. Whatever abuses might arise as a result of diplomatic protection, its advantages clearly outweighed its disadvantages and that principle had not been invalidated by the development of human rights law, especially since, as the Special Rapporteur had quite rightly emphasized, there were no international instruments to

protect the rights of individuals abroad, except in relation to investments. It was also possible that States took diplomatic protection more seriously than complaints by private individuals to human rights bodies.

67. Turning to the draft articles themselves, he said that he approved in general of the contents of article 1, although he thought that paragraph 2 placed too much emphasis on the protection of non-nationals. In his opinion, that was not an issue to be raised in the first article, but one that should be dealt with at a later stage. On the other hand, he tended to agree with Mr. Rodríguez Cedeño about “functional protection”: if that issue was not raised in article 1, where the scope of the subject was defined, it would be difficult to come back to it later on.

68. Article 2 was the one that had aroused the most criticism. As the Special Rapporteur recalled in paragraph 48 of the report, the cases in which the protection of nationals had been used as a pretext to justify the excessive use of force were, unfortunately, only too numerous. The most shocking example was undoubtedly that involving the measures taken in 1902 by Germany, Great Britain and Italy against Venezuela, which had not paid contractual debts owed to nationals of those countries.¹² It was true that the Special Rapporteur had tried to limit the scope of the article by stipulating that force could be used only to rescue nationals who were “exposed to immediate danger”. However, as everyone knew, the use of force was prohibited by the Charter of the United Nations except in the case of self-defence, as provided for in Article 51, and it would be dangerous for the Commission to “legalize” it in any way at all for the purposes of diplomatic protection. On the whole, it would be better to delete that article, which had no place in such a draft.

69. With regard to article 3, he too was of the view that the right to exercise diplomatic protection should be left to the discretion of States. That article therefore seemed acceptable to him.

70. He had more reservations about article 4: it was quite normal that, when there was a grave breach of *jus cogens* norms, the right addressed in article 3 should become a duty and it should at least be explained in the commentary what was understood, in paragraph 2 (a), by endangering “the overriding interests of the ... people”.

71. In conclusion, he believed that only draft articles 1 and 3, which had been found generally acceptable, should be referred to the Drafting Committee and that it would be better to drop articles 2 and 4, which had no place in the draft.

72. Mr. HAFNER said there was no point in once again going into the theory of diplomatic protection, which had already been discussed at length when the preliminary report of the previous Special Rapporteur had been submitted at the fiftieth session.¹³ He would therefore focus only on the report under consideration, in which the current Special Rapporteur fortunately took an approach that was both more pragmatic and more empirical than that of

¹² See *Yearbook . . . 1956*, vol. II, pp. 216–217, para. 228.

¹³ See 2617th meeting, footnote 2.

his predecessor and which was based on a whole range of documents and factual information.

73. The basic idea expressed in article 1 was very clear: a State had the right to present a claim to another State for a wrongful act committed by the latter, even if it was not the State itself, but its national who had suffered the injury caused by that wrongful act. Obviously, that concept was based on the presumption that the State was an entity, a whole, that also encompassed its nationals. The link to State responsibility was quite clear, which meant that some terminology could be borrowed or, at least, that the terminology used in the two areas should be harmonized, as had been pointed out by Mr. Pellet and Mr. Tomka.

74. With regard to article 1, or rather the comments thereon by the Special Rapporteur, he wondered whether there was not some contradiction between paragraph 36 of the report, which referred to the protection of the interests of nationals provided for in article 5 of the Vienna Convention on Consular Relations, and paragraph 43, which cited Dunn's definition,¹⁴ according to which Governments should only be able to take action on behalf of their nationals which was based on an assertion of an international obligation and which fell within the category of protection in the technical sense of the term. Dunn's definition was clearly narrower than that of the Convention and clarification on that point would be welcome.

75. As had been emphasized by several other speakers, article 2 gave rise to a number of major problems that the Commission could not evade indefinitely. The Special Rapporteur had very commendably tackled them head on. Nevertheless, it was inconceivable that States should be given a legal basis, within the framework of diplomatic protection, that would allow them to use force other than for self-defence, as provided for in Article 51 of the Charter of the United Nations. The notion of self-defence could not be stretched to cover also the protection of the nationals of a State in a foreign country. Everyone was aware of the deplorable situation of the hostages currently being held in the Philippines, but could one reasonably hope to improve the situation by giving the States of which they were nationals the right to intervene by force to obtain their release? That would be tantamount to authorizing the State of nationality to act against the wishes of the territorial State, at the risk of provoking a conflict between States with an escalation of violence. He could not therefore subscribe to the opinion expressed at the end of paragraph 59 of the report, according to which from a policy perspective it was wiser to recognize the existence of such a right, but to prescribe severe limits, than to ignore its existence, which would permit States to invoke the traditional arguments in support of a broad right of intervention and lead to further abuse. Furthermore, he doubted whether such activities came within the meaning of acts of diplomatic protection, at least as those were defined by Dunn. In summary, he shared the opinion of previous speakers and former Special Rapporteurs that diplomatic protection should in no case imply the threat or use of force. Article 2 therefore had no place in the draft.

76. With regard to article 3, he would like the meaning of the term "unlawfully injured" in the original English text (the adverb "unlawfully" not being translated in the French text) to be made explicit, even though, according to the commentary, it apparently referred to an injury caused by an act that was unlawful under international law. It was perhaps not appropriate to keep the second sentence, which explained that the right to exercise diplomatic protection was of a discretionary nature, since some might argue that such a wording precluded States from enacting internal legislation that made that right obligatory in certain cases. In fact, it was rather the State to which a claim was addressed that was under the obligation to accept, through diplomatic protection, the presentation of a claim by another State for injury suffered by the latter's nationals. There was no need to dwell on the link between the State of nationality and its nationals; what was important was to specify under what conditions the requesting State could invoke diplomatic protection.

77. He had doubts about the usefulness of article 4. As had been stressed by previous speakers, a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved. Mr. Tomka had already asked what was understood by *jus cogens* in that context, but he would like to know exactly what was meant by the words "is able to bring" at the beginning of paragraph 1. Did they concern a legal or a factual possibility? And, if the violations committed were really grave, could diplomatic protection not be exercised even if it was possible to resort to a court or to the relevant international tribunal? Of course, that might have implications for the question of the exhaustion of domestic remedies, but, when the violations were serious, the important thing was obviously to be able to react quickly. Apart from that aspect, which would deserve further study, article 4 did not seem to offer much of interest.

78. He, too, agreed with the previous speakers who had recommended that only draft articles 1 and 3 should be referred to the Drafting Committee.

The meeting rose at 1 p.m.

2619th MEETING

Thursday, 11 May 2000, at 10 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-

¹⁴ See Dunn, op. cit. (2617th meeting, footnote 6), pp. 18–20.

Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka.

Diplomatic protection (*continued*)
(A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI said that the first problem with the draft articles proposed in the first report of the Special Rapporteur (A/CN.4/506 and Add.1) was their scope as set out in article 1. There were three possible approaches to the concept of diplomatic protection. The first, described by Mr. Simma (2617th meeting) as the “everyday protection” provided by diplomatic missions and consular offices, was too narrow for the Commission’s purposes. He mentioned it, however, because of the Special Rapporteur’s remarks about the constitutions of some central and eastern European countries, including Poland’s, which enunciated the right of nationals to be protected by their States while abroad. But given the lack of other internal regulations concerning possible “local remedies”, as well as existing pre-constitutional practice, he was afraid that that constitutional convention would be too narrowly interpreted, namely as relating solely to such “everyday protection”.

2. The second approach to diplomatic protection was set out in article 1, where diplomatic protection could be associated, as had been recommended by Mr. Brownlie (*ibid.*), with a wider concept of admissibility of claims. Appropriate interpretation of the word “action” would be necessary in such a case. The article might be improved by bringing the wording into line with that used in the draft on State responsibility; the phrase “internationally wrongful act ... or omission”² had already been raised in that context.

3. In article 2, the Special Rapporteur proposed a much wider and riskier definition and scope of application of the draft, including “the threat or use of force” in the meaning of “action”. In the *Mavrommatis* case, PCIJ had ruled that the right way for a State to exercise diplomatic protection was to resort “to diplomatic action or international judicial proceedings” [see p. 12]. In paragraph 55 of his report, the Special Rapporteur acknowledged that the threat or use of force in the exercise of diplomatic protection could be justified only if it could be characterized as self-defence. But as pointed out by Mr. Economides (2617th meeting), the right to self-defence and the right to use force in self-defence were formulated in the Charter of the United Nations in a very precise and narrow manner. Given the overriding importance of the principle of the prohibition of the threat or use of force in modern international law, no additional exceptions should be contemplated. The question of the threat or use of force in situations provided for

in article 2 actually fell within another complex subject, that of the right of humanitarian intervention. In that connection, he appreciated the Special Rapporteur’s attempt to move in the direction of progressive development of the law.

4. However, Mr. Tomka was right to say (*ibid.*) that the Commission should first focus on the codification of existing international law and leave matters of humanitarian intervention, together with the possibility of the use of force, outside the scope of diplomatic protection. The concept of humanitarian intervention was still questioned in doctrine and in practice, and the Special Rapporteur himself had stated in paragraph 60 of his report that the issue of whether international law recognized a forcible right of humanitarian intervention fell outside the scope of the current study.

5. As to article 3, it seemed too early to reach definitive conclusions on the scope and nature of a right of diplomatic protection. The wording in regard to State discretion in exercising diplomatic protection could be developed beyond the limits set out in article 4, where it was associated exclusively with a grave breach of *jus cogens*. That was the proper place to reflect the emerging phenomenon referred to by Mr. Pellet as “international human rightism”. As the question of diplomatic protection was closely linked to that of the nationality of natural persons, it was worth bearing in mind that the legal nature of nationality had changed significantly in recent decades, from a prerogative of the State to an inherent human right of the individual. It had been duly reflected in the draft articles on nationality of natural persons in relation to the succession of States, adopted by the Commission on second reading at its fifty-first session.³ Consequently, the question of a right of nationals of a given State to its diplomatic protection should be reconsidered with a view to possibly further limiting the discretion of States in exercising that right. Lastly, he agreed with Mr. Hafner that the title should remain as it stood.

6. Mr. ROSENSTOCK said he welcomed the Special Rapporteur’s emphasis on strengthening support for human rights and the growing importance of the individual at the international level. The Special Rapporteur recognized that, although there had been marked improvements in the field of human rights and the international standing of the individual, help was needed from the instrument of diplomatic protection. Of course, the topic also included legal persons. Moreover, and the matter might become more delicate when the Commission came to consider article 4, the State in a position to assert diplomatic protection might not be the only State in a position to take action.

7. The question whether to retain the second paragraph of article 1 and whether the word “omission” should be mentioned were matters for the Drafting Committee. He did not think that the term “action” need give rise to metaphysical concerns.

8. Two issues arose with regard to article 2. One was whether it covered material which the Commission should encompass in its work on diplomatic protection

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Yearbook . . . 1999*, vol. II (Part Two), p. 20, para. 47.

and the other concerned the merits of the draft as presented. On the latter point, he believed that the Special Rapporteur was correct both in law and in terms of the view that States would take if their nationals' lives were at stake. References to paradigmatic rescue missions as being covered by some notion of waiver were unconvincing. Defence of dictators who dabbled in drug-running and harassment of legally present military personnel of another country did not make a persuasive case against article 2. The question on which it might be easier to reach agreement was that the ambit of the right to use force was not a matter necessary or useful for the Commission to determine in the context of the topic under discussion. He joined those who favoured deleting article 2 as being outside the Commission's area of concern.

9. Article 3 posed no substantive problems. He was sympathetic to what the Special Rapporteur was trying to achieve in article 4, namely to pressure States to protect the rights of their nationals more energetically. But when all the qualifiers were added up, and frankly they all seemed necessary, one arrived at a rough approximation of a phrase such as "States should do this or that". Perhaps a preamble and a declaration or a treaty which moved States in the right direction without creating more difficulties and confusion would be an appropriate way of addressing the problem and responding to the admirable effort to encourage States to do more. Among the reasons for hesitation in going beyond such a modest approach were the problems of drawing up a useful definition of a gross breach of a norm of *jus cogens*. He did not object to referring article 4 to the Drafting Committee or to an informal working group, but would not insist on that being done either.

10. Mr. ADDO said the bulk of the *lex lata* in the area of law under consideration was clearly a legacy from the international community of the past, when the international community had been much smaller than today. Much of the international law regarding diplomatic protection had come into existence when European and North American economic, social and political ideas had been spreading to other parts of the world.

11. The Special Rapporteur had gone too far in articles 2 and 4. They contained provisions that did not fall within the Commission's mandate and he would not be sorry to see them deleted.

12. In his opinion there was a need for rules regarding diplomatic protection, a subject which was as relevant today as ever. The topic was closely related to that of State responsibility, and the Commission was still discussing the concept of injured State as regards State responsibility. The injured State also featured in the topic under discussion. Nationality, too, was a predominant aspect of diplomatic protection; indeed, the other name given to diplomatic protection was nationality of claims.

13. Where a wrongful act was directed against the State, the question of nationality did not arise. On the other hand, where a wrongful act was committed against a national of the injured State, the position was that the injured State had the right of "diplomatic protection" of all its nationals. Therefore, where a national of a State was subjected to mistreatment abroad contrary to international law, the

State could take up his case with the State in breach. Whether or not it did so was a matter for its discretion alone. There was no duty under international law requiring the injured State to do so. Consequently, he was opposed to article 4. On that score he also disagreed with the Special Rapporteur's views set out in paragraph 87 and with those of Orrego Vicuña cited in paragraph 90.⁴ The attempt to model article 4 on those views was unacceptable.

14. Once the State took up the case of its national, the claim became that of the injured State itself, the reason being that, although a trend was developing in international law to grant limited access to individuals, particularly in the field of international human rights, the general principle still held that individuals could not initiate and maintain an international claim.

15. The State's right of "diplomatic protection" in international law was confined to its own nationals. He was therefore rather hesitant about article 1, paragraph 2: extending diplomatic protection to non-nationals negated that basic principle. According to article 1, paragraph 2, that would take place in exceptional circumstances provided for in article 8, a provision which would generate much debate. Since article 1, paragraph 2, had been made subject to article 8, he was opposed to sending it to the Drafting Committee until article 8 was discussed. If article 8 was deleted, then article 1, paragraph 2, would have to be deleted too. Article 1, paragraph 1, however, could be referred to the Drafting Committee.

16. Since statelessness was the negation of nationality and nationality was the basis of diplomatic protection, it was not clear how the draft could accommodate a provision on stateless persons or refugees. Could any State put the diplomatic protection cloak around a stateless person or refugee in order to espouse that person's cause? Would an international tribunal grant *locus standi* to a State in such a case? Would legal residence and the effective link suffice as alternatives to the nationality requirement? As the right of diplomatic protection was limited to the State's own nationals, the question arose as to what defined nationality. That was a matter for municipal law; international law had no bearing on the question.

17. He did not agree with Mr. Pellet (2618th meeting) that nothing should be sent to the Drafting Committee or that the whole report should be revised.

18. Mr. HE said that, undeniably, diplomatic protection had often been abused and the stronger States were in a better position to exercise it. But as long as it could not be replaced by better remedies, it must be retained, because it was badly needed. In any case, its advantages outweighed its disadvantages.

19. Several points in the introduction in chapter I of the report called for further clarification. First, it had been argued that aliens, like nationals, enjoyed rights simply as human beings and not by virtue of nationality. That was true when the alien was treated as a subject with international rights. As the position of the individual in international law was open to question, the individual's remedies

⁴ See 2617th meeting, footnote 14.

were limited. On the other hand, the State being the dominant factor in international relations, the remedy it provided must be the most effective.

20. Secondly, a related question was whether the alien, enjoying certain rights under international law, could fend for himself when abroad. The answer was that, if his remedy was restricted, it was for the State of nationality to assume its right and act on his behalf.

21. Thirdly, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live⁵ cited in paragraphs 27 and 28 were excellent illustrations of the stark fact that States did not want to extend rights to migrant workers. Regarding aliens, although they might have rights under international law as human beings, they had no effective remedies under international law. The only avenue open to them was to ask for the intervention of their State. For all those reasons, diplomatic protection remained an important tool for providing protection to nationals abroad.

22. As to article 1 and the meaning of the term “action”, it was surprising to find in paragraph 43 that “diplomatic protection” encompassed the “use of force”. In contrast, the previous Special Rapporteur had stressed in paragraph 11 of his preliminary report⁶ that States could not resort to the threat or use of force in the exercise of diplomatic protection.

23. As for article 2, he shared the view of other members that legitimizing the use of force in enforcing diplomatic protection was contrary to the basic principles of the Charter of the United Nations. The issue lay outside the Commission’s mandate for the topic. With reference to article 4, in view of the uncertainties and the dearth of State practice, it would be better not to take up the problem, which was not closely tied in with the topic under consideration.

24. He agreed that articles 1 and 3 could be referred to the Drafting Committee. The term “diplomatic protection” had long been established and so the title should not be changed. However, it seemed necessary to explain the difference between diplomatic protection and certain forms of protection of diplomatic and consular agents provided for in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, either in the introductory part or in a footnote.

25. Mr. PAMBOU-TCHIVOUNDA said that the Special Rapporteur’s first report was impressive in dimensions, but that one might legitimately ask whether it succeeded in marrying the conflicting criteria of quantity and quality. With regard to the structure, it was surprising to see that the report commenced with not one but two introductions. The bulk of the report was devoted to eight draft articles and extensive commentaries thereto, which purported to address the substance of the subject but often merely diluted it. Paragraph 9 (a) of the report promised an intro-

duction in which the history and scope of the topic would be examined. Yet the historical overview confined itself to the period between the two world wars. The assumption was that the subject was familiar to all—an assumption that was highly questionable in view of the difficulties some States had experienced in distinguishing between diplomatic protection and protection of diplomatic staff. It was questionable whether the report would assist the Sixth Committee by making the topic more accessible.

26. Unlike his predecessor, the current Special Rapporteur sought to provide an overview of diplomatic protection from which functional protection was excluded, as was the abundant jurisprudence concerning agents and officials of international organizations, which properly fell within the scope of diplomatic protection. Nor did that overview cast any light on the justification for dealing identically with those regimes in which the initial victim had been a natural person and those in which he or she had been a legal person.

27. A further difficulty was posed by the fact that, unlike his predecessor, and in a departure from the classical conception, the Special Rapporteur proposed a new basis for the concept, as an institution for the protection of human rights. Violation of a fundamental human right or freedom could indeed be one of the situations in which a State took up the cause of an individual, but the violation must also constitute an internationally wrongful act attributable to another State. It seemed somewhat rash to assimilate two categories, the first of which—a subject of international law—constituted a status, whereas the second—human rights—consisted of a regime or group of regimes.

28. The subject of diplomatic protection would remain inaccessible because, as he had already intimated, the historical review of the subject was confined to the inter-war period. The absence of any discussion of developments after the Second World War implied that after 1945 diplomatic protection had become a thing of the past. In fact, there was a considerable body of subsequent case law: the *Nottebohm*, *Interhandel*, *Barcelona Traction* and *ELSI* cases, to name but a few, not to mention the *Diallo* case currently pending before ICJ. Why did the report make no mention of those cases, which had contributed substantially to the consolidation of the traditional concept of diplomatic protection? Given its continuing topicality, the phenomenology of the subject should be clarified from two perspectives: first, as a system, and secondly as a regime.

29. Viewed as a system, diplomatic protection involved at least three major categories of actor: States and international organizations; individuals and economic agents; and judges and international arbitrators. The latter category highlighted the traditional role of diplomatic protection as a mechanism for the peaceful settlement of disputes between nations. Hence there was a conflict between diplomatic protection and the use of force, two mutually incompatible concepts. An instrument diametrically opposed to peace could hardly be put to the service of peace. Article 2 should thus be discarded, a point to which he would return.

⁵ Ibid., footnote 18.

⁶ Ibid., footnote 2.

30. As a scenario, diplomatic protection was also strongly influenced by the presence of economic interests, which imbued the claim with content and enabled the damages claimed by the State to be evaluated. In that respect, diplomatic protection was consubstantial with the international responsibility of States.

31. Viewed as a regime, diplomatic protection was universally acknowledged as a valuable tool functioning on the basis of rules that were already established and thus required codification, rules governing the process whereby a domestic matter was elevated to the status of an international dispute. Those rules also concerned the purpose of diplomatic protection, namely the re-establishment of the rule of law in the international legal order. Both categories of rule concerned the procedures for achieving that end. Were they only secondary, procedural rules? That raised the question of the relevance of the distinction drawn between primary and secondary rules in the draft articles proposed by the Special Rapporteur.

32. In general terms, articles 1 to 4 suffered from three besetting sins. First, they mixed categories. Article 1 bore a title which did not reflect its content, while articles 2 to 4 left the reader groping for his bearings amid a disorderly jumble of categories. Secondly, at the structural level, the concepts of “scope” and “definition” did not correspond. Articles 2 to 4 were based on the undefined notion of “action”, a fact which went some way towards accounting for their incompatibility with general international law and with the nature and spirit of diplomatic protection.

33. Thirdly, the draft articles suffered from a commendable but misdirected desire for innovation. The Commission was mandated to work towards the progressive development of international law. It had no mandate to work towards the excessive development of international law, which would be tantamount to a regressive step, leading the international legal order into uncharted territory. Article 2 was a perfect illustration of that danger, and for reasons already given by other members, was wholly unacceptable. As to specifics, article 1, besides confusing definition and scope, was equally hard to accept because of its treatment of injury to persons and to property from the same standpoint. In terms of mobilization of diplomatic protection, the one could come into play independently of the other, thereby stripping protection of its diplomatic nature. Articles 3 and 4 contradicted one another fundamentally, in that if diplomatic protection was a right of the State, or of the individual, it could not be a right of the international community, or be put to the service of the international community.

34. For all those reasons, he was of the view that none of the first four draft articles was ready to be referred to the Drafting Committee. It had been premature for the Special Rapporteur to present draft articles on a subject that was allegedly familiar but whose parameters had not been defined. Demarcation of the subject called for informal consultations. Only thereafter might it be appropriate to draft a preliminary report.

35. Mr. CANDIOTI said that the first report of the Special Rapporteur and the proposals for draft articles contained therein offered a stimulating basis for debate. In dealing with diplomatic protection, the Commission must have regard to certain premises already established in its

plenary discussions and working groups, namely: retaining an approach based on customary law; codifying secondary rules of international law relating to diplomatic protection, without eschewing consideration of primary rules to the extent that they were useful for the elucidation of certain aspects of the topic; considering diplomatic protection as essentially a discretionary right of the State; and, lastly, taking into account the growing recognition and protection of rights of the individual in the contemporary international legal order.

36. With regard to the introduction in chapter I of the report, he agreed with the Special Rapporteur that the fiction on which the right of the State to exercise diplomatic protection was based, whereby the injury to one of its nationals constituted an injury to the State itself, permitting it to claim on behalf of the individual, as well as the fiction formulated by PCIJ in the *Mavrommatis* case, was a useful legal recourse that did not deserve the criticisms to which it had been subjected.

37. He also agreed with the Special Rapporteur that, while contemporary international law had developed effective regional or other institutions to safeguard the rights and interests of the individual, diplomatic protection was far from obsolete. On the contrary, it continued to be a convenient general remedy available to States to safeguard the rights and interests of their nationals abroad.

38. It was essential for article 1 to begin by describing, and indeed defining, the institution of diplomatic protection, so as to distinguish it from other institutions such as protection of diplomatic staff or consular aid to nationals abroad, thereby avoiding any confusion at the outset.

39. In that purely technical sense, diplomatic protection was one of the means of making the international responsibility of States effective. Article 1 already contained a definition of the components of the subject, although the drafting might perhaps be improved. It was a procedural recourse by one State against another, whereby the claim of a natural or legal person was transformed into an international legal relationship. On the question of extension of diplomatic protection to non-nationals, Mr. Addo had made some interesting remarks which would need to be taken into account when considering article 8.

40. Agreeing with the objections raised by various members to the formulation of article 2 as proposed by the Special Rapporteur, he said that the prohibition of the threat or use of force in the exercise of diplomatic protection should be clear and categorical. The draft articles should not include any exceptions that might cast doubts on that ban. Circumstances exempting a State from responsibility for an act of force might possibly encompass imminent danger or a state of necessity, matters which should be regulated by the draft on State responsibility. Nevertheless, in the context of diplomatic protection, any rule permitting, justifying or legitimizing the use of force was dangerous and unacceptable.

41. As the Special Rapporteur had pointed out, since the formulation of the Drago doctrine⁷ in 1902 and the Porter

⁷ See 2618th meeting, footnote 12.

Convention, the prohibition of the threat or use of force had been one of the most notable aspects of the development of the right of diplomatic protection, which had certainly furthered the development of general international law. It had culminated in the rule embodied in Article 2, paragraph 4, of the Charter of the United Nations.

42. For those reasons, he was not in favour of completely deleting article 2. The notion expressed in the *chapeau* ought to be maintained somewhere in the draft, as it was a significant element in the development of customary international law on diplomatic protection. The remainder of the wording proposed by the Special Rapporteur, as from “except in the case of ...” should, however, be expunged, as the majority of the members of the Commission had indicated. It should be remembered that in article 50 (Prohibited countermeasures) of the draft articles on State responsibility, subparagraph (a) expressly forbade a State to resort by way of countermeasures to the threat or use of force as prohibited by the Charter of the United Nations. Nevertheless any attempt to delete the first part of the first sentence in article 2 as drafted by the Special Rapporteur might be misinterpreted at a time when there was a growing tendency to use force in fringe cases.

43. The characterization in article 3 of diplomatic protection as a right of a State reflected a rule of customary international law recognized by doctrine and jurisprudence, although the wording could probably be improved along the lines suggested by Mr. Hafner, Mr. Pellet (2618th meeting) and Mr. Tomka (2617th meeting).

44. On the other hand, caution was required in respect of article 4, where the Special Rapporteur had proposed that that discretionary right should become an obligation if injury resulted from a grave breach of a *jus cogens* norm. The Special Rapporteur contended that the inclusion of that obligation would be an exercise in progressive development reflecting the recent trend to recognize the right of a national to diplomatic protection. Although the concern to promote the defence and protection of human rights was noteworthy, it would seem inadvisable to establish such an obligation for States, since the concept and scope of *jus cogens* were for many people controversial and imprecise and there were few references to such an obligation in international doctrine or jurisprudence.

45. At all events, as other members had indicated, in codifying the subject the Commission should confine itself to the strictly technical concept of the institution. The ambiguity of the terms “protection” and “diplomatic” should not lead it to confuse notions and venture beyond its mandate. Article 4 should therefore be deleted.

46. Mr. GOCO, requesting clarification, asked if Mr. Candioti was proposing that the first part of article 2, i.e., without the exceptions, should be retained.

47. Mr. CANDIOTI confirmed that that was so. The principle established in the first sentence ought to be upheld. It was also embodied in article 50, subparagraph (a), of the draft on State responsibility. Hence it was important to include the principle in the draft on diplomatic protection.

48. Mr. PELLET said that the principle in question was much more general, a principle that concerned not just diplomatic protection in particular, but also countermeasures. He queried the wisdom of burdening the draft on diplomatic protection with general rules on responsibility.

49. While he largely agreed with the wording of the *chapeau* of article 2, the inclusion of such rules would mean that the Commission was entering a problematical area different to the one the Special Rapporteur seemed to have in mind. It would be tantamount to saying that it was prohibited to resort to certain methods to implement diplomatic protection; in couching the matter in negative terms it would be logical also to counterbalance such a statement by specifying permissible means for exercising diplomatic protection.

50. If Mr. Candioti’s suggestion was accepted, the draft articles might be unbalanced. Personally he was in favour of the substance of the text, but it was questionable whether it was necessary to introduce general rules on international responsibility in the draft on diplomatic protection. If that was done, it would be necessary to specify the lawful means by which diplomatic protection could be exercised, in other words by diplomatic or judicial channels or by all the means used for the settlement of disputes.

51. Mr. BROWNLIE said that, at first, he had been attracted by Mr. Candioti’s apparently logical proposal, but on further consideration he was against including the first proposition in article 2 in any form. The Commission should adopt the categorical rule that the use of force did not fall within the scope of diplomatic protection. Acceptance of Mr. Candioti’s simple proposition would still entail a whole series of confusions and difficulties and much time would be spent on vainly trying to resolve them. He therefore agreed with Mr. Pellet.

52. Furthermore, the statement that the threat or use of force was prohibited as a means of diplomatic protection was confusing because, in descriptive or operational terms, the use of force to protect nationals or pursue claims was a form of self-help and not a form of diplomatic protection at any level, either legal or factual. For that reason, even a truncated version of article 2 would create difficulties.

53. Mr. ECONOMIDES disagreed with Mr. Brownlie and Mr. Pellet with regard to Mr. Candioti’s proposal. Personally he saw no reason for confusion if the provision were clearly worded to the effect that the use of force for the purposes of diplomatic protection was completely prohibited. If no such provision existed, potentially dangerous ambiguity might exist on that point. A small minority of writers maintained that force might be permissible to rescue nationals in danger. It was time to put an end to that theory. A provision like that proposed by Mr. Candioti was indeed required in the draft. Perhaps it should be recast to make it clearer. It did not necessarily have to take the form of article 2, but could be incorporated in the preamble or placed somewhere else in the text. Moreover, the first Special Rapporteur on the topic of State responsibility, Garcia

Amador,⁸ and the previous Special Rapporteur, Mr. Bennouna, in his preliminary report,⁹ had both expressed their views to that effect. He therefore strongly supported Mr. Candioti's proposal.

54. As Mr. Pambou-Tchivounda had forcefully pointed out, the notion of diplomatic protection was inconsistent with the idea of using force. Diplomatic protection was a peaceful institution and had been created in order to avoid possible conflicts. It was therefore essential to state that fact quite plainly.

55. Mr. GALICKI said he was in a quandary over Mr. Candioti's proposal. As far as the substance was concerned, he was fully in favour of the wording. Nevertheless, given the views expressed by some members, it might be unwise to include such a categorical statement in the draft article, because it went beyond the Commission's mandate. Perhaps the precedent set in the *Mavrommatis* case could be followed by stating, when the scope and concept of diplomatic protection were defined, that the "action" referred to in article 1 meant diplomatic measures or international judicial proceedings. The Drafting Committee might consider that possibility. In order to avoid the difficulties mentioned by some members, the use of force should be excluded by specifying the acceptable means of exercising diplomatic protection.

56. Mr. LUKASHUK said that, while he understood the sentiments behind Mr. Candioti's proposal, sentiments he fully shared, he was of the opinion that the resultant legal construction would be very strange. Diplomatic protection, like any international act of a State, should comply with the rules of international law. Article 2 dealt with only one principle. Why was it not possible to say that diplomatic protection must not violate the principle of non-interference in internal affairs? That wording would take the principle in question into account. Mr. Pellet's proposal therefore seemed perfectly logical. If reference was made to unacceptable means, acceptable methods should also be enumerated. In the subsequent discussion of diplomatic protection, it might prove possible to reconsider that issue. Since views diverged on article 2, it should be completely deleted.

57. Mr. GOCO, pointing to the fact that past events had presumably been the reason for including a clause precluding the threat or use of force, said that a text dealing with diplomatic protection should indeed incorporate a clear statement of that principle.

58. Mr. DUGARD (Special Rapporteur) explained that article 2 had been inserted because of difficulties relating to the term "action" in article 1. Classical writers had considered that the term embraced all means, including the use of force, but of course Borchart's views predated the General Treaty for Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact) and the prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations.

59. He was troubled by the body of opinion which argued that the right of self-defence encompassed the defence of nationals. In the debate, little attention had been paid to that school of thought which included two distinguished former members of the Commission. It would seem that the upshot of the debate was that the term "diplomatic protection" did not embrace the use of force in any circumstances and fell outside the Commission's mandate. Perhaps he should make it clear in the commentary that the term "diplomatic action" did not extend to the use of force. The Commission had spoken with some authority on the subject. The consensus view was plainly that it was impossible to regard the use of force as a form of diplomatic protection of nationals.

60. Mr. LUKASHUK said he endorsed the Special Rapporteur's very constructive proposal.

61. The CHAIRMAN said that several proposals had been made with regard to the prohibition of the threat or use of force. The first was that the very purpose of diplomatic protection was to avoid force, even if forcible means had often been employed prior to the adoption of the Charter of the United Nations. The link between diplomatic protection and State responsibility appeared to lie in the implementation of State responsibility. Diplomatic protection logically formed part of State responsibility. That being so, it had been accepted that, at least as far as countermeasures were concerned, the use of force was prohibited. Mr. Candioti's suggestion therefore seemed to be of relevance.

62. When considering a traditional institution like diplomatic protection, it had to be remembered that the hostility towards it had been caused by the abusive use of force in the past. Perhaps the solution would be to adopt the course proposed by Mr. Galicki and to make it clear that diplomatic protection was the initiation of a procedure for the peaceful settlement of a dispute, in order to protect the rights or property of a national who had been threatened with or had suffered injury in another State. In that way, force was excluded without recourse to the wording in the first sentence of draft article 2. Whether the use of force to protect a national formed part of self-defence was a matter that could be debated at length. A constructive solution worth considering might consist in deleting the term "action" from article 1 and instead stating that diplomatic protection meant the initiation of a procedure for the peaceful settlement of a dispute.

63. Mr. Sreenivasa RAO said that, by placing the question of diplomatic protection in the context of human rights, the Special Rapporteur had broadened the Commission's focus on the field it had to study. The Special Rapporteur had shown an awareness of past abuses. Nevertheless, his view was that, although the consolidation of human rights had gradually enhanced the protection of the individual, lacunae in that field meant that the institution of diplomatic protection had its utility and should be strengthened. It was an opinion that deserved close scrutiny. Mr. Baena Soares had been right to hold that a balanced instrument of diplomatic protection was required.

64. The topic before the Commission had been carefully considered by the Working Group established at the

⁸ See 2617th meeting, footnote 7.

⁹ *Yearbook... 1998*, vol. II (Part One), document A/CN.4/484, para. 11.

fiftieth session which had reached certain conclusions.¹⁰ Should the Special Rapporteur not pursue his study of the question within the ambit of those conclusions? Should he not confine himself to customary international law? There were many grey areas within that very traditional context that would present the Commission with many opportunities to contribute.

65. The second conclusion reached by the Working Group, namely that the Commission should deal only with secondary rules, was a very interesting proposition, which was also encountered in the topic of State responsibility. What was the secondary rule at issue when one spoke of limitations on the exercise of diplomatic protection? It was impossible to categorize those limitations as secondary rules. A strict dividing line between primary and secondary rules was not, therefore, entirely possible. Sometimes such a division merely served as an excuse for not answering difficult questions. Thorny issues had nonetheless to be addressed and there was surely room for flexibility.

66. It was unrealistic to try to complete consideration of the topic during the current quinquennium, since the issues involved needed more careful reflection by the Special Rapporteur himself and by all members of the Commission. The Sixth Committee's debates on the subject indicated that any attempt to rush through a draft on diplomatic protection would face difficulties. What was needed was not strengthening of the machinery for diplomatic protection but careful structuring of a balanced instrument.

67. Paragraph 25 of the report stated that to suggest that universal human rights conventions, particularly the International Covenant on Civil and Political Rights, provided individuals with effective remedies for the protection of their human rights was to engage in a fantasy which, unlike fiction, has no place in legal reasoning. The Special Rapporteur was saying that the law of human rights was still evolving, many gaps remained, and the kind of protection needed for the individual was not provided. That was a point well taken, but one that should be addressed in the field of the protection of human rights, not with the limited means of diplomatic protection, which is only an instrument to pursue established rights. As other members had said, the Commission had quite enough to do within the realm of diplomatic protection without trying to solve problems that arose in the field of human rights. Those problems were much more complicated and fundamental, and best left to forums meant to deal with them. It was quite a different matter that where due process was denied and no effective remedy provided, diplomatic protection was required.

68. Article 1 said that "diplomatic protection means action taken . . .". He would have thought that it was first and foremost a right, and indeed, article 3 designated it as such. Since the action was a consequence of the right, the right should be mentioned first, rather than the other way round. Diplomatic protection should be construed as a right, not a duty, because discretion accompanied the exercise of a right, whereas duties had to be performed and no discretion was involved.

69. It was contended that injury caused by a wrongful act at the domestic level did not give rise to international responsibility. If a dichotomy did indeed exist between national and international wrongs, then to extend diplomatic protection for injuries at the international level alone was to limit the operation of the mechanism for redressing wrongs. Was due process of law a problem of international responsibility or one of the implementation of domestic law? He was looking for some insight. The question of whether injury itself could be qualified as lawful or unlawful also had to be addressed.

70. Article 4 said that the State had a "legal duty" to exercise diplomatic protection but that that duty could be exercised only upon a request by the injured person. Therein lay a contradiction: if the State had a duty, then it had to perform it—otherwise it was committing a wrongful act. The report cited Orrego Vicuña¹¹ to indicate that a domestic remedy must be available to the individual concerned when the State of nationality did not choose to exercise diplomatic protection. But if the problem was one of State responsibility, was lack of performance also a wrongful act and, hence, an international problem? Hence the need to envisage diplomatic protection as a right to be exercised by way of discretion and infringement thereof could be the subject of an action by the individual against his or her own State in the domestic courts. To go further than that would require an examination of conditions which could trigger an international action if a State did not defend the rights of its own nationals.

71. In article 4, the "request" from the injured persons was linked exclusively to a grave breach of *jus cogens*, but that formulation radically diminished the scope of the right to diplomatic protection. It implied that a State could intervene only when *jus cogens* was involved. The intention was perhaps that, when a rule of *jus cogens* was breached, a State should intervene regardless of the circumstances, and indeed more effectively and readily than in other situations. The formulation was also required to be contrasted with the principles of State responsibility under which, if *jus cogens* was affected, not only the State of nationality, but all States, had the right and the duty to protect the individual.

72. Article 4, paragraph 3, stipulated that "States are obliged to provide in their municipal law for the enforcement" of a right of the individual. There, too, the Special Rapporteur was approaching the material from a human rights matrix, consisting of the duty of the State and the right of the individual. It should, however, be viewed from the standpoint of diplomatic protection: the right of the State, involving discretion, to protect its nationals in the event of injury.

73. The report raised so many interesting ideas that he could not touch on them all. The very mention of *jus cogens* in the context of diplomatic protection was so intriguing that it was frustrating to see only one short passage devoted to it (para. 89) and no explanation given as to what kind of rights under *jus cogens* were involved. If article 4 was to be retained, much more clarification and substantiation would be required.

¹⁰ See 2617th meeting, footnote 22.

¹¹ *Ibid.*, footnote 14.

74. Another interesting question was the extent to which the individual could pursue his own claims while exercising simultaneously the right to diplomatic protection. The precise point at which the State should exercise the right of diplomatic protection, and if it did, the extent to which the individual continued to be a player in the game, definitely needed further attention. The Draft Convention on the International Responsibility of States for Injuries to Aliens, by Harvard Law School¹² suggested that the State's claim should be given priority. Did that mean that the national's claim would no longer be addressed, or if it was, that it would no longer be the focus of resolution of claims involved? Again, the interrelationship of two claims that could run concurrently was not made clear—particularly in the case of the State that had to address and remedy such claims. Principles must be developed on those issues, which formed a legitimate part of the exercise of diplomatic protection.

75. Tempted by Mr. Candiotti's proposal concerning article 2, he nonetheless endorsed the general sentiment that it should be deleted, and thought that article 4 should likewise be removed. He was open-minded as to whether the remainder of the draft should be referred to the Drafting Committee or held in abeyance pending further work by the Special Rapporteur. He wished to thank the Special Rapporteur for providing an opportunity to ponder on a problem that was often tacitly acknowledged but never given in-depth consideration.

76. Mr. LUKASHUK said there was only one point with which he wished to take issue, in Mr. Sreenivasa Rao's comments, even though it had been expressed, not categorically, but as a question. The draft articles said that only internationally wrongful acts provided the basis for diplomatic protection, but Mr. Sreenivasa Rao suggested that breaches of national law could do so also. In his own view, unless the rules of international law were infringed, there was no basis for diplomatic protection. The alternative would be unrealistic and unacceptable: foreign Governments would be able to monitor compliance with the law in other States. For instance, a foreign Government would be able to intervene if the police in a given country imposed an unduly heavy fine.

77. Mr. Sreenivasa Rao had also inquired about the distinction between lawful and unlawful injury. Quite simply, if Mr. Sreenivasa Rao had his appendix removed, that was lawful injury, whereas if a miscreant stabbed him, that was unlawful injury.

78. Mr. HAFNER said he would try to respond to Mr. Sreenivasa Rao, even though he regarded himself as someone who asked, rather than answered, complex questions. Concerning the definition of injury, there appeared to be general agreement that article 1 must be better drafted, for the matter at hand was definitely injuries under international law, not injuries under domestic law. As to whether the breach of domestic law could entitle a State to exercise the right of diplomatic protection, he agreed with Mr. Lukashuk but thought a compromise could be reached that such a breach could entail denial of due process. If domes-

tic law was breached in respect of an alien, for example, and no redress was provided in the national courts, that should give rise to injury under international law. He was hesitant to go into the definition of injury under international law in the context of diplomatic protection, however, as it was something that could be discussed *ad infinitum*.

79. Mr. Sreenivasa Rao had said that diplomatic protection must be set out in article 1 as a right, a view he shared. Mr. Sreenivasa Rao had further indicated, however, that the element of discretion must be present. Yet if diplomatic protection was seen as a right, was not discretion an automatic consequence? There was no need to emphasize the right's discretionary character.

80. Mr. PELLET, referring to the points made by Mr. Hafner, said the general problem under diplomatic protection was not denial of due process, which was clearly an internationally wrongful act that could give rise to diplomatic protection, but exhaustion of domestic remedies, which was a broader issue than denial of due process. Diplomatic protection could be triggered even in the absence of denial of due process, and focusing on denial of justice would involve the primary rules.

81. The "discretionary" element in the right of diplomatic protection might pose some problems in the context of French law. It was different from arbitrary power. Discretion normally meant that a choice could be made among a broad range of alternatives, but the choice had to be made in accordance with the law. That was the basis for the difference between a law-abiding State and a dictatorial one. In French law, however, as a last vestige of the absolute authority vested in the monarch the State had arbitrary, not discretionary, powers in all decisions relating to the exercise of diplomatic protection. The decisions were in no way subject to judicial control, and the State was bound by no rules whatsoever. He was not proud of that fact, for it put France at the opposite end of the spectrum from the eastern European countries, where, apparently, the exercise of diplomatic protection was more or less compulsory.

82. Mr. GAJA noted that some members had adduced the need for a link between international responsibility and diplomatic protection. The link should not necessarily be understood as making the commission of a wrongful act a condition for diplomatic protection. Rather, diplomatic protection related to an internationally wrongful act and could also be used in order to prevent a wrongful act from taking place. If its nationals risked undergoing torture in a foreign country, a State had every interest in taking diplomatic action and making a claim so as to avert the torture and prevent the breach of an obligation.

83. Mr. GOCO, referring to the term "discretionary", said that PCIJ in its judgment in the *Mavrommatis* case used the word "entitled", which implied that a right was involved but that that right could be waived or a State could choose not to invoke it. In other words, the case accorded the State discretion in the exercise or non-exercise of the right to diplomatic protection.

84. Mr. Sreenivasa RAO welcomed the way Mr. Hafner had responded to the question raised by Mr. Lukashuk about injury. Certainly, what was meant by injury at the

¹² Reprinted in L. B. Sohn and R. R. Baxter, "Responsibility of States for injuries to the economic interests of aliens", *American Journal of International Law* (Washington, D.C.), vol. 55 (July, 1961), p. 548.

domestic level was not small fines. Certain rights were granted to foreigners under domestic law, and if defence of those rights could not be pursued under domestic law, that constituted denial of due process. Mr. Gaja had added to his own reasoning about not linking the exercise of diplomatic protection so totally and exclusively to State responsibility, because diplomatic protection was an instrument that States often utilized to make sure that wrongs did not occur. Generally speaking, States interacted in a number of ways at an informal level before formal claims were made. The process of diplomatic protection was thus one thing at a formal level and another at the informal level.

The meeting rose at 1.05 p.m.

2620th MEETING

Friday, 12 May 2000 at 10 a.m.

Chairman: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*) (A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. OPERTTI BADAN said that, although the principle of diplomatic protection was well established, developing it or defining the conditions in which it could be exercised was more difficult. Nevertheless, it was important to establish rules to prevent or reduce as much as possible abuses of such machinery.

2. One particularly thorny question was that of the use of force, of which there were unfortunately too many examples in the modern-day world, aside from the cases for which Article 51 of the Charter of the United Nations provided. He did not want to reopen the discussion on the so-called "humanitarian interventions" conducted by the

United Nations or regional armed forces for the protection of human rights, but, if the Commission confined itself to the area of diplomatic protection in the strict sense, it had to acknowledge that the use of force might entail grave dangers for international relations. Instead, diplomatic protection must be placed in the context of the peaceful settlement of disputes and any possibility of the use of force must be categorically ruled out. But that did not mean that the question should not be discussed on the pretext that the prohibition of the use of force was implicit or was taken for granted: given that that aspect had been included in the initial draft, such silence might be interpreted as a lacuna on what was a very important subject.

3. Another issue which the Commission must settle was that of the scope of a convention on diplomatic protection, which must be based on the principle of the sovereign equality of States and their obligation to protect the rights and property of their nationals. The "functional protection" exercised by international organizations on behalf of their staff was a separate matter that should not be dealt with in connection with such an instrument.

4. Diplomatic protection as a means of preventing abuses against property or persons was a mechanism which must be preserved because it could not be confused with human rights protection machinery, even though the "human rights" component played an important part in that context. In human rights protection, the procedure was to the immediate benefit of the individual, whereas, in diplomatic protection, the right to take action belonged to the State of nationality and depended on that State's willingness. The idea that nationality constituted the "link of attachment" enabling that right to be exercised was perhaps somewhat obsolete. Today, what counted was place of residence. A State could feel just as bound vis-à-vis a person who had taken up residence in its territory as vis-à-vis one of its own nationals. Otherwise, it would be accused of discrimination. Unfortunately, that point had not been dealt with in the first report of the Special Rapporteur (A/CN.4/506 and Add.1).

5. In general, the Sixth Committee had supported the idea that the decision on whether or not to exercise diplomatic protection was the prerogative of each sovereign State. In his view, the State's protection obligation existed as soon as a person had a tie to that State, and not only within, but also outside, the national territory. A very clear provision along those lines should be included in the future convention. He also recognized the need to establish a conceptual balance between the principles on which the exercise of diplomatic protection and those of human rights protection were based.

6. He thought that it would be better for the draft articles not to prejudice the lawful or unlawful nature of the act attributable to a State which triggered the diplomatic protection machinery. If they did, the Commission would be moving into the realm of State responsibility and reparation or compensation, whereas the basic objective was to ensure the effective protection of persons and property. It must be clearly understood that the wording of article 1, paragraph 1, which contained a qualification of the act or omission attributable to another State, was only provisional.

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

7. In closing, he said that the subject of diplomatic protection had perhaps not been discussed thoroughly enough in the Commission for the draft articles to be sent to the Drafting Committee at the current time, even assuming that the Drafting Committee had a clear and precise mandate. That was obviously not the case and the Commission was still a long way from a consensus on those questions.

8. Mr. GOCO said that he had carefully read the Special Rapporteur's very helpful comments. They could be compared to the work of implementing agencies which issued decrees and orders spelling out the content of a particular legislative act. The comments not only interpreted the draft articles, but also stimulated discussion in the Commission.

9. Beginning with a general remark, he pointed out that the expression "diplomatic protection" was linked to the word "diplomacy". The question therefore arose whether diplomatic protection could be invoked in the absence of diplomatic relations between the States concerned. Today there were still States that had no diplomatic relations with other States.

10. Turning to the Special Rapporteur's first four draft articles, he noted that in article 1, paragraph 1, diplomatic protection was defined as action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State. However, the Special Rapporteur did not specify whether that also covered injury caused by defects or flaws in proceedings or a failure to respect the rights of the defence. In paragraph 43 of the report, the Special Rapporteur cited Dunn, according to whom the term diplomatic action "embraces generally all cases of official representation by one government on behalf of its citizens or their property interests",² which also seemed to cover sham proceedings of which the national of a State was the victim in another State. That should be made clear in the article.

11. Concerning article 2, on the use of force, it was useful to return to the case of the hostages being held in the Philippines, to which other speakers had already referred. The kidnappers were rebels and the countries of which the hostages were nationals had contacted the Philippine Government, urging it to negotiate instead of attempting a rescue operation. That approach, which constituted a form of diplomatic protection, had already had rather unpleasant consequences for the Philippine Government and everyone knew that the use of force would only worsen the situation. The use of force must thus be categorically excluded and only the beginning of article 2, until the words "diplomatic protection", should be retained.

12. As for article 3, on the right of the State of nationality to exercise diplomatic protection, attention should be drawn to the judgment of PCIJ in the *Mavrommatis* case, which stated that "It is an elementary principle of international law that a State is entitled to protect its subjects ..." [see p. 12]. The words "is entitled" meant "to give a right". Of course, article 3 should be read in conjunction with article 4, since both articles spoke of the right and legal obligation of the State and its discretion to act.

13. Everyone remembered the case of the young woman hired as a domestic helper in another State who had been sentenced to death after having stabbed her employer who had tried to rape her. The State of which she was a national had intervened on her behalf, affording her diplomatic protection and thereby saving her from hanging. If the State of her nationality, using its discretion, had declined to exercise that right, she would certainly have found herself in a difficult situation. To be sure, she would still have had recourse before an international body, since she had been denied her human right to a fair trial. The problem had been that the State in which she had been tried had had good commercial relations with the protecting State, which it supplied with oil. Under its current wording, article 4 provided that the State of nationality was relieved of the legal duty to exercise diplomatic protection if it would "seriously endanger the overriding interests of the State and/or its people". The Special Rapporteur stressed in his comments that, according to the traditional doctrine of diplomatic protection, a State had the right to protect its nationals, but was under no obligation to do so. Accordingly, it was an imperfect right. That position had been reaffirmed by ICJ in the *Barcelona Traction* case. Moreover, the Special Rapporteur pointed out in paragraph 64 of his report that the notion that an injury to the individual was an injury to the State itself was not consistently maintained in judicial proceedings. He also stated that when States brought proceedings on behalf of their nationals they seldom claimed that they asserted their own right and often referred to the injured individual as the "claimant". Diplomatic protection nevertheless offered possibilities other than the human rights defence machinery, whose effectiveness the Special Rapporteur questioned a bit too severely in paragraph 25 of his report, and by no means had such protection been rendered obsolete by the development of human rights law. That led him to reaffirm the position that he had already taken during the consideration of the preliminary report of the previous Special Rapporteur³ on the issue of discretion given the State to exercise diplomatic protection: to prevent arbitrary acts, standards must establish the conditions under which a State could refuse to exercise the right of diplomatic protection for one of its injured nationals. He supported the interesting compromise solution recommended in the Draft Convention on the International Responsibility of States for Injuries to Aliens:⁴ both the injured individual and the State of nationality could pursue claims against the injuring State, but priority would be given to the State claim.

14. In closing, he recommended that articles 1, 3 and 4 should be referred to the Drafting Committee for reformulation. As for article 2, the first sentence should be retained up to the word "protection"; the exceptions should be deleted.

15. Mr. SIMMA said that there seemed to be two extreme views on the concept of diplomatic protection. On the one hand, neither the Special Rapporteur in his first report nor members of the Commission in their comments neatly excluded from the concept what could be

² See Dunn, *op. cit.* (2617th meeting, footnote 6), p. 18.

³ See 2617th meeting, footnote 2.

⁴ See 2619th meeting, footnote 12.

called the day-to-day protection given in other countries to a State's nationals by consular agents. It was in the context of those very activities, which were designed to assist a national in maintaining his or her rights and being unaffected by violations, that the topic of military protection came up as a natural extension or culmination of consular protection. Paragraphs 36 and 43 of the report were not free from such confusion. Article 5 of the Vienna Convention on Consular Relations had in mind a "diplomatic protection" that was not really part of the Commission's topic. He was not criticizing that interpretation, but would simply like clarification as to what the Commission would be discussing in future and what it should be prepared to discuss. At the other extreme, there was the view that diplomatic protection was not really a process at all, but just a synonym of "admissibility of claims" or "nationality of claims". That view seemed to be a little too narrow. If the concept of diplomatic protection was used in the technical sense, in the sense used by PCIJ in the *Mavrommatis* case, then it comprised issues connected with the submission of claims, and not just admissibility. He conceded, however, that the question of nationality of claims was very much at the heart of the topic.

16. The Special Rapporteur referred repeatedly to a book on human rights and diplomatic protection by Borchart⁵ that had been written in 1915 at a time when the United States Marine Corps had occupied Veracruz and between 500,000 and 1,500,000 persons had been butchered in a southern European country without any great concern on the part of other States. The question thus was whether a book written in 1915 could still be regarded as the bible. If so, then it should be called the Old Testament and the report by the Special Rapporteur should be seen as a New Testament.

17. As to whether diplomatic protection was based on a fiction or not, he shared Mr. Brownlie's view that there was a thread of common sense going through the thinking of Anglo-Saxon international lawyers, according to whom there was nothing fictitious about the concept of diplomatic protection that emerged from the *Mavrommatis* case. In that regard, he was not really sure what the Special Rapporteur had in mind in the last sentence of paragraph 21 because it was not clear whether he viewed diplomatic protection, as defined in the *Mavrommatis* case, as unable to stand up to logical scrutiny. In his own view, that was not true.

18. Mr. Pellet had said (2618th meeting) that the Special Rapporteur's approach to diplomatic protection was too human-rights oriented. He agreed that it was so oriented, but not that it was excessively or wrongly so. The members of the Commission all seemed to agree that the draft articles on diplomatic protection were supposed to fill a gap in the law of State responsibility and were to be annexed to it. The Special Rapporteur's work should therefore share the human rights spirit that had started to permeate the Commission's work on State responsibility.

19. To elaborate on a point made by Mr. Gaja (2619th meeting), he said the Commission must be aware that its task was to hammer out, put together or establish doctrine on diplomatic protection in the sense of the *Mavrommatis*

case or, in other words, to reconfirm and codify very strict requirements and limitations on the nationality of claims. The question of continuous nationality would then arise. A State was entitled to espouse a claim only for a person who had been a national at the time of the breach and had continuously remained a national up until his or her claim had been made. He did not know whether the Commission was going to endorse that principle: he simply wanted to indicate how technical the topic was. Some members of the Commission went so far as to identify the topic with the question of nationality or admissibility of claims. On the other hand, at the current session, the Commission was to recognize human rights as obligations *erga omnes* whose breach entitled every State to demand at least cessation. If Mr. Crawford's schema was followed, the State of nationality would qualify as a specially affected State to which would be attributed more rights than to all the other States in the case of a breach of an obligation *erga omnes*. What that meant was that, in the event of a breach that took the form of injury to aliens, which at the same time was also a violation of human rights, the State of nationality had two sets of rules at its disposal: a very venerable, old-fashioned and rigid set and a much more modern, streamlined, "politically correct" set involving the concept of human rights protection. When in future the Commission came back to consider the protection of human rights, it must keep in mind what it was doing thereby with the concept of diplomatic protection and see it in the light of the inflation of claims concerning human rights in customary international law. If, in future, property rights were recognized as human rights, then very little would be left for diplomatic protection because the invocation of human rights was more effective than entitlements deriving from some international minimum standard. Care should be taken not to create areas of overlap and probably of confusion between human rights and diplomatic protection, something that might weaken the right of diplomatic protection that now existed.

20. The final format of the work on diplomatic protection would probably depend on the final format of the draft articles on State responsibility. It would be hard to imagine that, if the Commission decided to couch State responsibility in a form other than a draft convention, the same would not have to be done for diplomatic protection.

21. In article 1, the term "action" had been criticized, but, in the context of the article, its meaning was clear. Diplomatic protection did not involve simply going through a checklist of whether claims were admissible. Some procedural aspects were involved, but, of course, not military aspects. He agreed with many preceding speakers that the terms "action" and "act or omission" would have to be brought into line with article 1 of the draft on State responsibility.

22. He congratulated the Special Rapporteur on having had the courage to propose draft article 2 while being perfectly aware of the controversy to which it would give rise. It could be said that it was dead on arrival and should be abandoned. Unlike Mr. Economides, who had suggested (2617th meeting) that armed force must be expressly excluded from the ambit of diplomatic protection, he thought that nothing should be said about it, simply because it was not part of the Commission's mandate.

⁵ See 2617th meeting, footnote 5.

With regard to the footnote in paragraph 52 of the report, which referred to a book of which he was a co-author,⁶ he said the book stated that there was a tendency to tolerate, for political reasons, such actions as military protection of nationals if and when they were more or less proportionate and were really the only available means. He differed with Mr. Brownlie (*ibid.*), however, who had referred to a waiver of illegality. He did not think that illegality was really waived in a situation where, for instance, the Security Council was paralysed by a veto and the opinions expressed in the General Assembly differed considerably. But that was not the Commission's concern at the moment.

23. With regard to article 3, the use of the words "a national unlawfully injured" could be criticized from the logical viewpoint, but, in the context, the meaning of those words was quite clear. It was a slightly inelegant expression of the principle derived from the *Mavrommatis* case which could be improved on in the Drafting Committee.

24. He was afraid that article 4 would not work and should also be abandoned. Members of the Commission had already asked to whom the duty of diplomatic protection would be owed and if it was supposed to be a human right. If it was, it would be an obligation *erga omnes* and it would spill over and create entitlements for all other States to become involved in a State's decision-making process and "help it" decide whether or not to help a national. That would lead to great confusion. It was one thing to derive from obligations *erga omnes* a sort of right to see a given provision respected, but quite another to derive from obligations *erga omnes* obligations on other States to do something. Accordingly, if diplomatic protection was not a human right, it was a constitutional right, a right based on domestic law and it was consequently not the Commission's business. Article 4, paragraph 3, made the problem even more tangible, in that it gave domestic courts jurisdiction to decide the matter. He had doubts about whether domestic courts were really qualified to adjudicate questions of *jus cogens*. Domestic litigation on the basis of article 4, paragraph 3, would inevitably lead to outrageous and exorbitant claims in which individuals would demand assistance or protection from their State of nationality and Governments would inevitably deny that a certain right invoked by an individual was really *juris cogentis*.

25. Mr. BROWNLIE said that he was troubled by the tendency of speakers to assume that there was a close relationship between State responsibility and diplomatic protection. It was obvious that there was an operational relationship, but the overlap in substance was not very great. There were some boundary problems and it could be asked, for example, whether the "clean hands" doctrine was a question of admissibility or of responsibility. It was probably both. But by and large, the issues of whether a State was qualified to exercise diplomatic protection in different forms and of the merits of a claim were sufficiently distinct. The Commission should not go out of its way to create more problems than it already had on the agenda. He himself thought that the admissibility of claims should at least be mentioned in the report because it was

relevant, but that the two topics were not synonymous. In the scenario mentioned by Mr. Goco, unless the State of nationality of the individual on trial in the other State actually presented a claim, what was happening was precisely the operational part of diplomatic protection. The State of nationality of the individual on trial was exercising diplomatic protection in an operational sense and it was not necessarily a question of characterizing the act itself, the trial and the punishment as illegal. That might be the consequence, but the two were not to be equated. The fact remained that the issue to be considered was admissibility of claims in the world either of negotiated adversarial claims, claims subjected to arbitration or claims in ICJ and that should be recognized. Quite a lot of the material rightly invoked by the Special Rapporteur consisted of decisions of PCIJ or ICJ.

26. Mr. MOMTAZ congratulated the Special Rapporteur on his first report, which provided very useful material. As part of his general comments on the report, he said that, somewhere in the introduction, one or two paragraphs should sketch out the boundaries of the topic and clearly state what the Special Rapporteur was leaving to one side. The first issue to be excluded was that of functional protection, which was mentioned in paragraph 38 of the report. At the same time, it could be explained that, like the protection of experts and civil servants employed by international organizations, the protection and, more precisely, the immunities given to diplomats by international law were not part of the topic. It would also be useful for the Special Rapporteur to stipulate at the outset, instead of waiting until paragraph 60, that the question whether international law recognized a forcible right of humanitarian intervention fell outside the scope of the study. In his own view, the Special Rapporteur did not always draw a distinction between diplomatic protection and that sort of intervention, as could be seen in paragraph 52, in which the Special Rapporteur mentioned a practice that was more part of so-called humanitarian intervention than of diplomatic protection.

27. As to the substance of the issue, while he recognized the merit of the many quotations from doctrine and case law, he believed the Special Rapporteur should concentrate more on State practice, of which there was a great deal, as he pointed out in paragraph 10. That would certainly create a better foundation for the introduction in future articles of the procedures that States could set in motion in the exercise of diplomatic protection. That was a long-term project, but the study would undoubtedly be enriched by it.

28. Turning to article 1, he agreed with other members that the use of the word "action" was not felicitous. The Special Rapporteur himself had made it clear during his introduction that the term was likely to create difficulties. It would be better to avoid it, as it carried connotations of Chapter VII of the Charter of the United Nations and the coercive action that could be taken by the Security Council. Other solutions could be envisaged. The word "procedure" would be better than the word "action". That term was used in all the definitions of diplomatic protection given by doctrine and referred to by the Special Rapporteur in paragraph 37 of his report. Another solution would be to revert to the wording used by the Working Group on

⁶ A. Verdross and B. Simma, *Universelles Völkerrecht: Theorie und Praxis*, 3rd ed. (Berlin, Duncker & Humblot, 1984).

diplomatic protection at the forty-ninth session⁷ and referred to by the Special Rapporteur in paragraph 40, namely, the right to espouse the cause of a national.

29. He, too, was in favour of the deletion of article 2, for all the relevant reasons that had been given. He was also against the retention of the *chapeau* of the article. The express prohibition of the threat or use of force would only weaken rather than strengthen the principle of the prohibition of the use of force. He endorsed the views expressed by Mr. Brownlie and Mr. Pellet, who was certainly not one of the advocates of a broad interpretation of Article 2, paragraph 4, of the Charter of the United Nations. He nevertheless wondered whether it would not be useful to pay a bit more attention to article 2, subparagraph (b), and specifically, to a situation where a State was unable to provide diplomatic protection, even though it wished to do so, for example, in what was unfortunately becoming an increasingly frequent situation where the structure of a State collapsed and the State could be described as having “disintegrated”. Perhaps, at some later stage, the Special Rapporteur could provide the Commission with material for the study of that problem. It must be acknowledged that, in that type of situation, the problem of use of force arose under entirely different conditions.

30. Article 3 did not call for any particular comments, except for the reference to article 4, which brought him to the few words he wished to say about that provision. Although he was in favour of retaining article 19 of the draft articles on State responsibility⁸ and, consequently, of retaining the distinction between the concepts of crime and delict, he believed that the distinction was of no consequence in the field of diplomatic protection. He entirely agreed with the Special Rapporteur, who pointed out in a footnote to paragraph 89 of his report that article 19 of the draft articles on State responsibility made no reference to *jus cogens*, but that there was a clear correlation between norms of *jus cogens* and the examples cited. In any event, the situations in question added up to what was not an isolated, but a large-scale, violation of the rights of individuals of all categories and the citizens of one State could hardly be isolated from the nationals of the State which wished to exercise diplomatic protection. He thought that any intervention aimed at putting an end to the situations referred to in the footnote was something close to humanitarian intervention, but he did not approve of the use of force for that purpose. In any case, humanitarian intervention was not the topic under consideration. It was primarily the case where a State refused to grant a national minority the right to self-determination that gave rise to a problem and it would be difficult to imagine the exercise of diplomatic protection in such circumstances.

31. Mr. HAFNER said that the example given by Mr. Momtaz of a disintegrated State in which foreigners needed diplomatic protection, possibly through the use of force, did not come within the context of diplomatic protection, defined in article 1 proposed by the Special Rapporteur as “action taken by a State against another State”.

32. Mr. PAMBOU-TCHIVOUNDA, recognizing that the problem raised by Mr. Momtaz was relevant, said

that he was inclined to agree with Mr. Hafner. The disintegrated State in question was not so much the State-territory or the State-population as the Government, the administration of the State. Was it at that level—the level where power was wielded and sovereignty was exercised—that the disintegration took place? If so, there was reason to ask how diplomatic protection could be exercised, since that presupposed that the Government of the claimant State, the State that espoused the cause of its national, was applying to another State. It was between two Governments that dialogue and in fact negotiation must take place because, otherwise, it was entirely appropriate to ask whether the claim was genuinely being made with a view to diplomatic protection.

33. Mr. LUKASHUK said that he regarded the question raised by Mr. Momtaz as highly important. He did not share Mr. Hafner’s view that, where there was no State, there could be no question of diplomatic protection. Who was to determine whether or not a State existed? That was a matter of subjective political judgement. The example given by Mr. Momtaz was not a fiction or a flight of fancy; it was a day-to-day reality. It was legally well founded and deserved the Commission’s attention and support.

34. Mr. MOMTAZ explained that his proposal derived directly from article 2, subparagraph (b), which referred to the case where the injuring State was unable to secure the safety of the nationals of the protecting State. It dealt not with unwillingness, but with inability.

35. Mr. KABATSI said that he understood Mr. Momtaz to be referring to the case of a State where a Government did exist, but, for exceptional reasons, was unable to secure the safety of a foreigner. If the State of nationality wished to act on behalf of its national, it had to find a way of doing so with the other State concerned.

36. Mr. MOMTAZ conceded that there could be different degrees in the disintegration of a State. In some cases, several authorities existing in the territory of a State might be seeking to take power without any of them being capable of securing the protection of the nationals of other States.

37. Mr. CANDIOTI said that the proposal made by Mr. Momtaz was very interesting. In particular, he had been struck by the general comment made at the beginning of the statement concerning the need for a clear delimitation of the topic under consideration as a means of shedding light on a number of points.

38. The CHAIRMAN, speaking as a member of the Commission, in response to the exchange of views that had taken place, said he agreed with Mr. Candiotti that everything would become clearer and the discussion would progress more smoothly once the concept of diplomatic protection had been defined for the purposes of the study. The problem raised by Mr. Momtaz could also arise from the point of view of the State of nationality; that State might well find itself unable to exercise diplomatic protection for the benefit of its nationals.

39. Commenting on the report under consideration, he congratulated the Special Rapporteur on the bold and courageous stand he had not been afraid to adopt on the question of human rights and humanitarian intervention. He

⁷ *Yearbook ... 1997*, vol. II (Part Two), p. 61, para. 182.

⁸ See 2613th meeting, footnote 1.

personally was greatly interested in all efforts made with a view to the progressive development of international law, not only because that was one of the two main elements of the Commission's mandate—and one which could not be set aside either as a matter of principle or in the interests of a specious conservatism—but also because it could pave the way for major legal advances. What worried him, however, was that the Special Rapporteur had chosen to embark on an exercise of the progressive development of international law in the field of diplomatic protection without clearly saying that he was doing so, without indicating his sources and his reasons, and, above all, without taking care not to disturb what was reasonably believed to be one of the achievements of international law and indeed one of the pillars of the law of relations between States, namely, the prohibition of the use of force. In the first place, the use of force was governed by a rather clear-cut set of legal conditions and could not be envisaged outside the strict legal framework provided by the Charter of the United Nations. Secondly, the international protection of human rights, for its part, was governed by legal and institutional conditions and mechanisms of its own which could not be extended to diplomatic protection without distorting the very nature of the latter; defining its legal regime would then become extremely difficult, since, in such a case, a single concept would be used to refer to two completely different things. Thirdly, humanitarian intervention could not be brought into the field of diplomatic protection, even under the guise of human rights, as it was an institution invented in the nineteenth century as a means of developing power policies at a time when the prohibition of the use of force had not yet been proclaimed as one of the principles of international law.

40. In his view, the Special Rapporteur should have begun by asking two simple questions. The first related to the definition of diplomatic protection. As could be seen from paragraphs 10 to 21 of the report, the point had certainly not escaped the Special Rapporteur, but he had not provided a full answer, although it was essential to do so not only by analysing the institution on the basis of the entire body of international case law, but also by distinguishing, either in the introduction or in the ensuing sections, between the concept of diplomatic protection and similar or related concepts such as the protection of diplomatic and consular staff or of officials of international organizations. The second question should have been whether diplomatic protection could today be used for ends other than those it served in traditional international law. The answers to those two questions would certainly have helped to delimit the topic by making it possible to conclude that diplomatic protection was not connected either with the protection of human rights or, still less, with humanitarian intervention. The concept of diplomatic protection had to be understood strictly within the meaning it had in traditional international law; custom in that area was sufficiently well established, the practice of States relatively well known and case law sufficiently abundant to provide precise rules whose codification would not be controversial.

41. Turning to the consideration of draft articles 1 to 4, he noted that article 1 was concerned with the definition of diplomatic protection rather than with its scope, as stated in the title. Paragraph 1, and particularly the word "action", gave rise to legal problems of a fundamental

nature. Diplomatic protection was a right; it was the right of a State to set in motion against another State procedures for the peaceful settlement of disputes with a view to protecting the rights or property of one of its nationals in the event of injury suffered by that national in the host State. The origin of the injury did not necessarily have to be an internationally wrongful act. For example, it was possible to imagine the case of a person whose property in a foreign State had been confiscated and who had exhausted all available domestic remedies without success. There had been no denial of justice, but the law had been manifestly misapplied, either because of judicial corruption or because of pressures or instructions emanating from the State in question. Should or should not diplomatic protection be exercised in such a case? Had there been a violation of international law—an internationally wrongful act? Those questions deserved, at the least, to be asked. It was precisely in such a case that diplomatic protection could be exercised because an injury had been caused to the rights or property of an individual in a foreign State; the case law of PCIJ and ICJ contained many examples in that regard. Yet another question that arose and that would have to be answered in the commentary was whether diplomatic protection could be transformed into a procedure aimed at providing a fourth level of jurisdiction in countries which had only three such levels and where the country's supreme court had handed down a ruling that was injurious to the interests of a foreign national. Diplomatic protection would then become a mechanism for instituting proceedings for a review of the judicial review.

42. Another question that called for an answer was whether diplomatic protection should be viewed solely as a contentious procedure. Like other members of the Commission, he was inclined to think that it could be exercised through diplomatic negotiations without necessarily resorting to litigation. Article 1, paragraph 2, could be retained subject to the contents of article 8 to which it referred and which would, at first glance, seem to give rise to a great number of problems.

43. He endorsed all the comments already made on article 2 and believed that it should simply be deleted, especially in view of the suggestion that the idea of the peaceful settlement of disputes should be introduced in article 1. In that way, the problem could be resolved without having to refer to the use of force or the prohibition of the use of force.

44. Turning to the debate on the discretionary or compulsory exercise of diplomatic protection that had arisen in connection with article 3, he thought it both logical and normal to support the view that diplomatic protection should be exercised in a discretionary manner. That view not only complied with well-established jurisprudence in positive law, but also corresponded, from both the legal and practical points of view, to the original fiction whereby the State substituted itself for its national in setting the procedure in motion. In legal terms, that fiction made diplomatic protection a right of the State and it was then the right of the State that was concerned. In that sense, diplomatic protection became a subjective right and not an obligation. Once the State had substituted itself for its national, it was no longer the national but the State that was protected by international law or the international court; and it was the State that exercised that

subjective right. Moreover, to consider diplomatic protection to be an obligation would be tantamount to creating a right to diplomatic protection, which would then become an inherent right of the human individual, thus placing the matter outside the framework of the topic. Furthermore, in practical terms, the exercise of diplomatic protection in its classical and traditional meaning implied a financial cost for the State even if the outcome of the proceedings was favourable and reparation was granted. At the outset, the State had to bear the costs of the proceedings. But it was possible that the State did not have the means to do so and that, all things considered, it decided not to institute proceedings for that very reason. No one could have the right to oblige it to take action. The State's view of whether embarking on the procedure would or would not be timely had also to be taken into account. It would therefore seem that the idea of the discretionary exercise of diplomatic protection should be maintained, subject to the reasons for that choice being explained and the concept of "discretionary exercise" spelled out in the commentary.

45. Lastly, referring to article 4, which gave rise to many difficulties already mentioned by other members of the Commission, he said that he, too, was in favour of its deletion.

46. Mr. HAFNER said that he wondered whether the Special Rapporteur should not also deal in his future work with the question of the possible legal effects of the exercise of diplomatic protection on the recognition of a State or a Government.

47. Mr. PELLET, referring to two important points raised by the Chairman, said that, in the first place, it seemed perfectly obvious to him that the normal course of exercising diplomatic protection was through negotiations, all other procedures, including court action, in particular, being somewhat exceptional. Secondly, with regard to the question whether diplomatic protection could be exercised in the case of injury suffered as a result of a lawful act, he thought that the point was well taken, but the example quoted was not relevant because it related to wrongful acts. The problem was undoubtedly a complex one and deserved to be raised, not only in relation to the topic of State responsibility, but also in relation to that of international liability for injurious consequences arising out of acts not prohibited by international law.

48. Mr. PAMBOU-TCHIVOUNDA, also referring to the two points in the statement by the Chairman mentioned by Mr. Pellet, said he agreed that action before a court or a tribunal was somewhat exceptional as a means of exercising diplomatic protection. Moreover, the practice as described by Mr. Economides (2619th meeting) showed that politics and diplomacy were the real means of exercising diplomatic protection. Diplomacy was, by definition, the method *par excellence* of establishing relations between States and diplomatic protection had much to gain by placing itself within the scheme of friendly relations and, in that way, obviating the need for court action, which was often costly and complex. Secondly, with regard to the question of the exercise of diplomatic protection within the framework of lawful conduct, he entirely agreed with the view of Mr. Operti Badan that initiating the process of diplomatic protection did not prejudice the wrongfulness or otherwise of the act giving rise to such action.

49. Lastly, referring to the question by the Chairman as to whether diplomatic protection should not be regarded, as it were, as an additional level of jurisdiction, he thought the point important and essential on both theoretical and practical grounds. At the theoretical level, it referred back to the question whether there was a border between the domestic and international legal systems and, if so, to the question of the means of crossing that border. At the practical level, to bring a claim before an international judge or arbitrator was to put on trial the operation of the domestic legal system of the State in question; it had to be ascertained whether all domestic remedies had been exhausted, whether justice had been properly administered, etc. That, however, meant shifting from the sphere of justice to that of private law.

50. Mr. BROWNLIE said that the issue raised by the Chairman concerning the exercise of diplomatic protection in the case of activities by a State that were not unlawful was not particularly relevant. On the other hand, the principle of diplomatic protection was often applied, in his view, in cases of threatened injury to a State, for example, when a bill had been drafted and was about to be submitted to a parliament and particular measures that were likely to cause injury to a State under international law were going to be adopted. The example of the treatment of diplomatic missions could be cited in addition to the examples relating to the expropriation or confiscation of the property of foreigners. Article 1, in its current form, referred only to the injuries actually caused to the personal property of a national, but not to cases of threatened injury.

51. Mr. LUKASHUK, referring to the question of principle raised by Mr. Sreenivasa Rao (*ibid.*) and taken up by other members, said that he would like to know whether diplomatic protection could be exercised only once an internationally wrongful act had been committed or, in other words, whether a breach of national law by a State was enough to trigger it. Most experts did believe that it was sufficient under traditional international law, but, even then, according to the rule on the exhaustion of domestic remedies, that had to involve some level of inter-State responsibilities defined by international rules.

52. The current situation was different; the breach of a national law was not sufficient grounds for exercising diplomatic protection. A State had to have breached one or more international rules governing the rights of aliens and it had to be liable for those breaches for diplomatic protection to be justified. Mr. Gaja had asked (*ibid.*) what should be done if a foreign national was the victim of torture or degrading treatment. He believed that an answer to that question was provided by the rule on the exhaustion of domestic remedies. In fact, if it was known beforehand that the rights of foreign nationals were not really guaranteed through domestic remedies, diplomatic protection could be resorted to directly. For example, if the passengers on an Italian ship were taken hostage and tortured or subjected to degrading treatment, what kind of action would Mr. Gaja propose to his Government?

53. The Commission should also consider the case where a State was for some reason unable to provide diplomatic protection to its citizens, as in that of Sierra Leone at the current time. Which State could provide such protection to the nationals of Sierra Leone?

54. Mr. GOCO said that he had taken note of the Chairman's comments on diplomatic protection as the exercise of a discretionary power of the State. He agreed that, in practical terms, when a right existed, a State could exercise it or not. What worried him was that, when referring to a State, what was meant was the Government or, in other words, the persons in charge, but those persons could change policy in certain circumstances. What was then involved was an act of Government that was beyond the control of the courts. He was concerned about the concept of discretionary power, as it might cause an injury to a national of a State. For example, in the case of an individual who had been declared *persona non grata* while in another State and against whom an internationally wrongful act had been committed, diplomatic protection should clearly be exercised. However, the State concerned might not wish to exercise it, for one reason or another. In other words, he feared that discretionary power might give rise to abuses.

55. Going back to the example given by Mr. Brownlie, he recalled a bill submitted to the United States Congress which had provided for sanctions against foreign companies established in the United States and dealing with countries such as Cuba. The bill constituted a threatened injury for a country like Canada which had trading relationships not only with the United States, but also with Cuba and other countries. He understood that discretionary power should be taken into account, but in order to avoid abuses, rules were needed to safeguard the exercise of the right of diplomatic protection.

56. Mr. OPERTTI BADAN noted that, according to article 1, paragraph 2, "In exceptional circumstances provided for in article 8, diplomatic protection may be extended to a non-national." Those exceptional circumstances were indeed provided for in article 8. Moreover, article 5 defined the State of nationality as "the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization". In that context, he asked the Commission to consider the question of habitual residence, a concept that was the basis for the link between a person and a State. It was a concept that had evolved greatly in recent years, especially within the framework of the protection of persons and their families. In his next report, the Special Rapporteur could study the possibility of extending diplomatic protection to persons who had their habitual residence in a given State.

57. Mr. ECONOMIDES said that he agreed with the Chairman that diplomatic protection was always an exclusively peaceful operation or process. That idea should be brought out clearly in the Commission's work; it should perhaps be included in a provision stating explicitly that diplomatic protection was incompatible with the use of force.

58. Actual practice provided an answer to the question whether diplomatic protection could be exercised in relation to an act that was wrongful not only under international law, but also under domestic law. Wrongfulness at the domestic level was in the first place a question to be settled by the domestic courts; if the domestic wrongfulness subsisted after domestic remedies had been exhausted, domestic and international wrongfulness would coincide in most cases in the form of either a denial of justice or a material breach of a rule of law. If doubts

continued to exist, a dispute settlement procedure would settle the question whether a breach of domestic law or of international law was to be decided. In any event, diplomatic protection applied only in the event of a breach of international law.

59. Mr. GAJA, replying to the question put to him by Mr. Lukashuk, took as another example the case of a bill concerning the expulsion of aliens on a discriminatory basis. If that was considered a wrongful act, the State of nationality of the aliens affected could make representations to the State concerned even before they had been expelled. The State of nationality could not say that the wrongful act had already been committed, since the bill might not be adopted or, even if it was adopted, expulsion might not take place. Nevertheless, the State was entitled to ensure that international law was observed in respect of its nationals. In the two examples given, torture and expulsion, there were no remedies to be exhausted. If there were, that raised the difficult question of the nature of the rule of exhaustion of domestic remedies, but it was not the time to consider that question. Turning back to the kind of situation mentioned by Mr. Lukashuk, he said that the State could use peaceful methods in its attempts to settle the dispute.

60. Mr. ADDO said he agreed with Mr. Pellet that the normal way to exercise diplomatic protection was through negotiation. On its own, however, that was not enough; judicial proceedings also played a part. That was in fact the conclusion to be drawn from the judgment of PCIJ in the *Mavrommatis* case. The starting point was thus indeed negotiation, but, when that produced no results, judicial proceedings had to be taken before ICJ in the form, for example of arbitration or international litigation.

61. With regard to the case of Sierra Leone, he pointed out that, within the limits prescribed by international law, a State could exercise diplomatic protection to the extent it deemed fit, as it was its own right it was asserting. The State was the sole judge of whether or not to grant its diplomatic protection and to what extent it should do so. Therefore, although the Government of Sierra Leone was currently not able to exercise diplomatic protection, that did not mean that it would not be able to do so in future.

62. Mr. TOMKA said that the discussions had shown that there was a danger of confusing concepts which, despite some similarities, were legally different. Taking a customary law approach, which should be the basis of the Commission's work, the precondition for the exercise of diplomatic protection was the claim that international law had been breached. For that reason, the situation relating to a bill or to the preventive measures taken by a State did not come within the scope of diplomatic protection. In those cases, a State could draw the attention of another State to the need to respect its obligations, but it could not invoke its responsibility in an international court, as there had been no breach. A dispute might arise between those two States over the interpretation of an international convention, but that had nothing to do with diplomatic protection. The situation was also different in cases of damage caused to a foreign national by an activity that was not unlawful; what would be the grounds for the dispute between the national and a State? The national could not claim that international law or domestic law had been

breached. The State of nationality could, of course, exert pressure on his behalf, but it was not a question of diplomatic protection. The latter applied when there had been a breach of international law relating to the treatment of aliens or to human rights and when the injured national had been unable to obtain reparation after exhausting domestic remedies. In that case, the State of nationality could take up the case at the international level. It was necessary to distinguish clearly between those different situations in order to avoid any risk of confusion.

63. Mr. Sreenivasa RAO congratulated the Special Rapporteur on the quality of his work. However, in his next report, he should concentrate his attention on the conditions under which diplomatic protection was exercised: it was necessary to know when such protection was legitimate or illegitimate, in what conditions it was legitimate and at what point it touched on the area of State responsibility. The current confusion was the result of his failure to provide precise guidelines. The definition of diplomatic protection given in article 1 also gave rise to a problem, as it was linked only to State responsibility. In his future reports, the Special Rapporteur should therefore provide guidelines for the Commission in those areas.

64. Mr. SIMMA said that it was necessary to go even further. Before asking the Special Rapporteur to come up with clear replies to the questions raised about the limitations on or the conditions for the exercise of diplomatic protection, it had to be indicated clearly what was meant by diplomatic protection. He noted that there was no consensus on that point.

65. Mr. CANDIOTI said it was true that the Commission did not have a clear idea of what the legal concept it was trying to codify actually was. The first thing to do was therefore to agree on a strict definition of diplomatic protection under international law; the Commission should not include in diplomatic protection other kinds of diplomatic actions that were unrelated to it.

66. Moreover, as Mr. Hafner had said, it was essential to understand the effects of diplomatic protection. As he believed that that question could be studied in a working group before written rules were drafted, he supported Mr. Pellet's proposal that such a working group should be set up. Diplomatic protection was well defined in a number of judgements, including the judgment of PCIJ in the *Mavrommatis* case, but, if unrelated concepts were added to them, there was a risk of opening a Pandora's box, by mixing up fundamentally different concepts. That was why it was important to set up the working group to help the Special Rapporteur define the scope of diplomatic protection.

67. Mr. OPERTTI BADAN said that he supported that proposal and suggested that the working group should be set up the following week.

68. Mr. DUGARD (Special Rapporteur) said that he would like not only to reply to Mr. Operti Badan's suggestion, but also to sum up the comments made on articles 1 to 4 at the soonest possible date.

The meeting rose at 1.10 p.m.

2621st MEETING

Tuesday, 16 May 2000 at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (continued)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN, extending a warm welcome to Mr. Hans Corell, Under-Secretary-General for Legal Affairs, the Legal Counsel, invited the Commission to continue its consideration of the third report by the Special Rapporteur (A/CN.4/507 and Add.1-4), and specifically, of article 40 bis.

2. Mr. GAJA said that he wished to respond to Mr. Pellet's proposal (2616th meeting) that issues currently dealt with in article 40 bis should be addressed in Part Two bis, on the implementation of State responsibility. Paragraph 118 of the report showed that the Special Rapporteur was inclined to share that view. He endorsed the idea of couching the provisions in Part Two in terms of obligations of the wrongdoing State, but thought that those obligations had to be owed to someone: either one or more States or another subject of international law. Hence the need in chapter I of Part Two for a provision such as the current article 40 bis, a text which, irrespective of its heading, attempted to identify the categories of subjects to which obligations arising from a wrongful act were owed. On the other hand, there was no need to characterize the legal position of the *omnes* with regard to obligations stemming from the commission of a breach of an obligation *erga omnes* in terms of rights, legal interests or in any other way.

* Resumed from the 2616th meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

3. As he understood the majority opinion in the Commission, the draft articles should envisage only the relations established between States as a consequence of a wrongful act. If that was so, when the draft said that the wrongdoing State was under an obligation, it necessarily implied that the obligation was owed to one or more States. Thus, if a State that infringed an obligation *erga omnes* was said to be required to make reparation, the obligation was owed to all the other States, whether or not they were the ultimate beneficiaries of restitution and/or compensation.

4. What he had said about the need to include in Part Two a reference to the States to which the obligation was owed did not mean that there was no need to refer to invocation of responsibility in Part Two bis, but the issue of concurrent claims relating to a breach of an obligation *erga omnes* could be resolved when Part Two bis came to be discussed later.

5. Mr. RODRÍGUEZ CEDEÑO welcomed the Special Rapporteur's efforts to improve the texts already adopted on first reading, particularly in regard to article 40. The earlier version had a number of merits, although it was undoubtedly complex and too detailed. A number of its defects were listed in paragraph 96 of the report, and by and large he agreed with what was said there.

6. Article 40 bis raised four issues: the meaning of "injured State", the definition of legal interest in the performance of an international obligation, the right to invoke responsibility and the right of a State with a legal interest. None of the proposed versions of the article addressed all four issues, and the Drafting Committee should look into that problem. For example, the Special Rapporteur's proposal as set out in the report did not incorporate a definition of "injured State", although apparently a proposal submitted to the Drafting Committee did so. The draft should include a paragraph, preferably an entire article, specifically covering the meaning of that term. Many Governments had mentioned the importance of such a provision, and it would help to balance the text, placing "injured State", "wrongdoing State" and State with a "legal interest" on an equal footing.

7. The title of the article did not fully conform to its content. On the other hand, the Special Rapporteur's proposal for paragraph 2 met very well the need for a reference to States which had a legal interest, States that were not directly affected and, although they could not invoke responsibility, could call for cessation of a breach by another State. Mr. Pellet's proposal put it very clearly, referring back to the provisions in article 36 bis on the continued duty of the State to perform the obligation, to cease the wrongful act and to offer assurances and guarantees of non-repetition.

8. Paragraphs 1 (a), 1 (b), 2 (a) and 2 (b) of the Special Rapporteur's proposal for article 40 bis mentioned specific obligations the breach of which constituted the foundation for the injured State's invocation of international responsibility. The two categories of obligations mentioned covered all obligations, including those arising from unilateral acts and customary international law. He agreed with other members, however, that it would be better not to list the obligations, so as to avert a complex discussion and avoid complicating the drafting.

9. He did not see the need for the Special Rapporteur's proposed paragraph 3 and was particularly opposed to the reference to rights that accrued directly to any person or "entity other than a State", which was a very broad and even dangerous notion.

10. All the proposals now before the Commission could be referred to the Drafting Committee, but the Commission should decide whether detailed consideration would be given to obligations and whether paragraph 3, one which in his opinion had no place in the draft, was to be retained. Lastly, in the interests of clarity, the Drafting Committee should divide article 40 bis into four separate provisions.

11. Mr. SIMMA said it should be remembered that, in its judgment in the *Barcelona Traction* case, ICJ had in mind solely fundamental human rights, although these exact words had not been used. It was therefore problematic to say that obligations deriving from human rights were obligations *erga omnes* across the board. The category of obligations *erga omnes* should be reserved for fundamental human rights deriving from general international law and not just from a particular treaty regime, in the context of which they could be considered as obligations *erga omnes partes*. That distinction should be taken into account in dealing with article 40 bis.

12. Regional treaty-based regimes imposed human rights obligations of various kinds, some of them going far beyond those of a fundamental nature in the sense of the *Barcelona Traction* case. In some situations the general regime of State responsibility could be applied to obligations under such treaties, but only in a residual manner. The human rights enshrined in the European Convention on Human Rights were interpreted in such a way as to scrutinize every nook and cranny of the administrative law of member States. For example, Germany had found certain judgements made by the European Court of Human Rights on the German law on misdemeanours to be entirely out of place, the issues involved not having the necessary stature for consideration by a human rights organ. The very idea of regarding each and every obligation derived from the Convention or from the International Covenant on Civil and Political Rights as an obligation *erga omnes* was simply absurd and led to untenable conclusions.

13. The notions of injury and of damage should be kept out of the draft. A perusal of previous commentaries indicated that, if damage was included as a constitutive element, the concept would have to be broadened to a degree that rendered it meaningless. Damage should accordingly be absent from the list of elements of an internationally wrongful act and from article 40 bis, which triggered the invocation of State responsibility, and should be mentioned solely in the provision on compensation, where such a reference was entirely appropriate.

14. He wholly disagreed with Mr. Rodríguez Cedeño about article 40 bis, paragraph 3, and thought it was a good place to express human rights sensibility. The paragraph said that, irrespective of what was agreed with regard to the operation of human rights obligations between States, the fact that States had the power to remedy breaches of human rights obligations had no impact on rights to which other entities might be entitled. Of

course, in the human rights context, such entities included persons. The principle set out in paragraph 3 was of the greatest importance for Germany and for Austria in the current debate on compensation for forced labour. One legal claim was that if reparations were being dealt with at the State-to-State level, there was nothing left for individuals. He did not believe that approach was justified: hence the need for a “without prejudice” clause with regard to individuals in the human rights context.

15. He had already explained that his proposal for the wording of article 40 bis had been motivated by a concern to bring the text into line with the title and that the contents of his proposed paragraph 1, subparagraphs (a), (b) (i) and (b) (ii), were negotiable. He now considered that subparagraph (b) could be deleted altogether, since all the cases it envisaged had to do with obligations owed to States individually as well as to the international community as a whole, and were therefore covered by subparagraph (a).

16. Under paragraph 1, subparagraph (b) (i), an obligation *erga omnes* the breach of which specially affected one State was an obligation also owed to that State individually. An obligation *erga omnes* could be broken down into obligations owed by one State to other States individually: for example, Austria owed Liechtenstein an obligation not to occupy it by military means. The same was true for subparagraph (b) (ii): an obligation *erga omnes* whose non-performance necessarily affected a State’s enjoyment of its rights or performance of its obligations was, at the same time, owed to the State individually.

17. If subparagraph (b) was deleted in its entirety, the analogy with the 1969 Vienna Convention, as proposed by the Special Rapporteur, could be placed in the commentary. He was not convinced that the analogy worked, for article 60, paragraph 2, of the Convention could be criticized from a number of standpoints, and such distinctions were confusing and unnecessary.

18. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Simma about the need to be careful not to assert that all human rights were necessarily obligations *erga omnes*: clearly, human rights under regional agreements and some provisions even in universal human rights treaties were not. One of the faults of the earlier version of article 40 was that it had very broadly singled out human rights as a special category of obligation. To try to limit it would have also created problems. The Commission must adhere to the basic methodology. Although the distinction between primary and secondary rules could be rather ragged, in drafting the articles on State responsibility the Commission was not making statements about the content of particular primary rules. That was as true in the field of human rights as anywhere else. Human rights were an important part of international law, and the draft articles should accommodate them, but it was equally important for the articles not to overlap with the field of substantive human rights or to proceed on the basis that the general international law of human rights was one thing or another. It was sufficient to know that it existed and that it was capable of producing certain effects; the rest could be dealt with in the interpretation and application of the primary rules.

19. By inference from the foregoing, he agreed with Mr. Simma on the need for paragraph 3, but human rights obli-

gations were not the only category which that provision was meant to preserve. Paragraph 3 was a saving clause, although it did not say anything about the content or operation of the rules described therein. It was necessary, because otherwise there would be a disparity between the content of Part One, which dealt with all obligations of States, and the content of Part Two, which, in accordance with what Mr. Gaja had identified as the majority opinion, would touch only upon the invocation of the responsibility of a State by another State. Since it was possible for a State’s responsibility to be invoked by entities other than States, it was necessary to include that possibility in the draft. Whether that should be done in a separate article or as part of article 40 bis was a question that could be addressed in the Drafting Committee, but the principle set out in paragraph 3 was important.

20. He wished to defend his analogy with the 1969 Vienna Convention. It was not enough to insert, by stipulation or by way of commentary, the proposition that the States identified in paragraph 3 and in article 60, paragraph 2, were themselves the beneficiaries of the obligations concerned. They might be, but then again, they might not. The structure of article 60 of the Convention was such that it distinguished between bilateral treaties and multilateral treaties. By analogy, the Commission was distinguishing between bilateral obligations and multilateral obligations. In the event of a breach of a bilateral obligation, the State affected had the right to invoke the obligation, and that was the end of the matter. However, when a State was a party to a multilateral treaty or obligation, it might not be identified as the State to which the obligation was owed, but it was reasonable for it to be able to invoke the obligation in the circumstances identified in paragraph 2. It was also a reasonable analogy to say that if the State could unilaterally suspend the obligation, as it could under article 60 of the Convention, it ought to be able to invoke the obligation of cessation.

21. International law must speak in favour of the preservation, rather than the suspension, of obligations and it would be incoherent to specify that the sole option open to a State confronted with a serious breach of an obligation was to suspend the obligation. It might not be in anyone’s interest for the obligation to be suspended and in everyone’s interest for the breach to cease. At least when talking about cessation and reparation itself, it was reasonable to extend the scope of the draft articles in that manner. There were different ways of doing so, as a matter of drafting. But simply to force those two categories into the category of bilateral obligations was artificial.

22. Mr. PELLET said Mr. Simma’s comments showed that it was impossible to separate diplomatic protection from State responsibility. It could not be argued that the two drafts were unrelated; not only was it the same problem, but diplomatic protection was nothing more than the extension of State responsibility.

23. He was somewhat concerned about Mr. Simma’s interpretation of the expression “*erga omnes*”, which basically meant “towards everyone”. It did not mean “peremptory” or “fundamental”. He did not see why the Commission mutilated a term on the pretext that it was interpreting in a certain manner an esoteric dictum of ICJ in the *Barcelona Traction* case, in which the Court had found that, in view of the importance of the rights at issue,

all States could be regarded as having a legal interest in seeing that those rights were safeguarded. That meant that at issue was an obligation which created a legal interest on the part of all States, but not automatically that a fundamental obligation was involved. It might be that in its enumeration, the Court had given examples of fundamental obligations. But the idea of *erga omnes* could not be reduced to that of such an obligation. Several distinctions must be made.

24. First, there were obligations which the Court had found were owed to the international community as a whole. Those obligations could concern, for example, human rights, environmental matters or the prohibition on the use of force: they were obligations towards everyone. It might be tempting for Austria to invade Liechtenstein or for Germany to invade Austria, but temptation was not a legal concept, regardless of the state of mind of Germany or Austria in respect of a particular neighbour. He did not see how that could be a particular interest. States, including each State individually, owed it to the international community as a whole not to use force; it was an obligation *erga omnes*, the respect of which concerned the international community as a whole. Such obligations could be fundamental, such as the non-use of force, but there could also be “smaller” obligations, such as those concerning human rights obligations entered into through a treaty and owed to all the States parties, for example the particular obligations *erga omnes* which the Special Rapporteur had in mind. Nevertheless, they were obligations towards everyone, or towards the entire community bound by the obligation.

25. Secondly, there were obligations which were not owed to the international community as a whole, but to each of its members, for example, the right of innocent passage: the obligation owed to each State of the international community to allow ships to pass through one’s territorial waters. It was not an obligation owed to the international community as a whole, but it was nonetheless an obligation *erga omnes* because it was owed to all States. The problem was that some of those obligations owed to the international community as a whole were *cogens*, or peremptory, and others were not. It was a very important distinction. But it was unacceptable, as Mr. Simma had done, to equate obligations *cogens* and obligations *erga omnes*.

26. Another associated problem was the nature of the breach. A State could breach a *cogens*, *erga omnes* rule without committing a crime. To cite one example, in the *Selmouni* case France had been condemned for torture by the European Court of Human Rights. It seemed indisputable that the prohibition of torture was a peremptory rule of international law, both *cogens* and *erga omnes*. The act of torture for which France had been condemned was different from a systematic policy of torture: no one claimed that France practised systematic, widespread torture as a principle of government. That difference must have consequences in the law of responsibility. That was where crime came in: if France used torture as a systematic policy, it would commit what article 19 called a crime. In the example given, it had violated a rule of *jus cogens*, *erga omnes*, but it was not a crime. Thus, at some point, most likely in Part Two bis, the Commission would need to address not only the obligations breached but also the nature of the

breach. He had the impression that the Special Rapporteur was in agreement on that point, although the Special Rapporteur rejected his “criminalistic” vocabulary. It must be made clear that obligations towards the international community as a whole were not all obligations *erga omnes*; that obligations *cogens* were not the same as obligations *erga omnes*; and that the nature of the breach was important in the area of responsibility. But it was not for the Commission to produce a general theory of international obligations in the context of the draft articles; it was sufficient for it to weigh up the consequences of such a theory with regard to responsibility.

27. Mr. HAFNER, noting that according to Mr. Pellet the obligation stemming from innocent passage could not be considered an obligation *erga omnes*, cited the example of a State that closed a strait with its warships or by a legal act, which was then publicized. Was that a breach of an obligation *erga omnes* that entitled every State to react, or was it a breach of an obligation solely to neighbouring States or to States that used the strait?

28. Mr. Sreenivasa RAO said that the issue of human rights was raised with increasing regularity. If some fundamental human rights obligations could be treated as *erga omnes*, a breach thereof could be something of common concern and give *locus standi* to States at large to demand their observance. Did such human rights obligations also compel States to contribute to their fulfilment as a matter of duty? Perhaps it should not be entirely left to the authorities concerned, particularly as they are willing but unable to discharge the duty. There must be a meaningful discussion on human rights that went beyond generalities. He was most grateful to Mr. Simma and to the Special Rapporteur for their observations in connection with human rights.

29. Mr. PELLET, replying to Mr. Hafner, said that the right of innocent passage was a right of all, and therefore an obligation owed to all, and not an obligation *cogens*. In Part Two bis, specific consequences must stem from that dual nature. The State whose passage was refused, regardless of whether it was a riparian State, would therefore have a right of reparation for the harm suffered, and the other States members of the international community could probably demand cessation. He greatly hoped that the Special Rapporteur would provide an answer to that in Part Two bis. For the moment, his own reply was that the obligation was *erga omnes* but not *cogens*.

30. Mr. SIMMA thought that the word *omnes* simply did not capture all the implications of multilateral obligations found in the literature and in jurisprudence. It was therefore not very useful to read too much into the meaning of the word.

31. Mr. IDRIS said that the notion of an injured State was the *raison d’être* of the topic of State responsibility. The subject raised a number of questions. Could an *erga omnes* breach, such as a crime of aggression, result in injury to all other States? If so, were all other States entitled to reparation, and to what degree? What should be the nature of the response by all other States to an internationally wrongful act? Should the response be collective and, if so, what collective interests were to be protected? Furthermore, should material loss or damage be the basis for defining the injury suffered and for seeking redress, or

should a mere legal or moral interest suffice to justify a claim for reparation or compensation for a breach of an internationally wrongful act? Should a distinction be made between States which were directly harmed and those indirectly harmed by a breach of an international obligation? Should aggression be classified as an international crime?

32. The Special Rapporteur's approach to article 40 differed in two aspects from that of former Special Rapporteur Riphagen, in his sixth report,³ for he took the view that the earlier version of the provision was not adequate to deal with situations in which more than one State was injured by the same wrongful act and that it also shifted the focus from breach of obligations by the wrongdoing State to the rights of the injured State.

33. The Special Rapporteur nonetheless seemed to believe that the earlier version of article 40 had focused more on injury and consequences on a bilateral basis than in terms of a multilateral relationship in which all States were injured and had a right to act. For that reason, he had expressed doubts that article 40 provided a suitable basis for the codification and progressive development of the legal consequences of State responsibility.

34. Article 40 bis was different, as it sought to differentiate between the affected States by categorizing them in groups and drawing different legal consequences for different obligations breached, ranging from cessation, including assurances and guarantees, to restitution, compensation, satisfaction and countermeasures.

35. With regard to the scope of article 40 bis, he found merit in making a distinction between States that were directly injured by an internationally wrongful act and those that merely had a legal interest. He was also sympathetic to the view that only those States whose rights were directly affected by the breach should be eligible to seek appropriate remedies, and that States which might have a mere legal interest should not seek compensation, though they could be entitled to seek other measures for redress of a wrongful act involving a breach of an *erga omnes* obligation, such as the crime of aggression, mass violations of human rights, and massive destruction of the environment or the common heritage of mankind. The measures of redress to be applied might take the form of cessation, restitution, satisfaction or countermeasures. That distinction was well supported by the *Barcelona Traction* case, in which ICJ had distinguished between rights arising in a bilateral context and a mere legal interest of the international community as a whole, a point well reflected by the Special Rapporteur in paragraph 97 of his report.

36. In addition, there should be material damage or a tangible loss in order for the affected State to assert a claim of State responsibility. A mere infringement of a State's legal interest, that did not result in material damage or loss, should not be grounds for an automatic claim for damages or compensation.

37. The draft should also contain a saving clause in favour of specific legal regimes governed by a treaty or convention in a given subject area, such as the common

heritage of mankind, which was governed by the outer space treaties and the conventions on the law of the sea respectively.

38. The reference in article 40 bis, paragraph 1 (b), to "a group of States of which it is one" further complicated the issue and questioned the very foundation of international law. Was the sovereignty of the State the basis for invoking the State responsibility of the infringing State or was the basis the fact that the State was part of that group? Where did the entitlement stem from? He very much hoped that the Special Rapporteur would shed more light on that question in the general debate. The same questions could be posed with regard to the reference in paragraph 2 to the international community as a whole. It was difficult to see how the rule on State responsibility could be applied in practice to such a loose and theoretical characterization of the affected group. The reference might perhaps be attractive in a political statement, but caution was needed when it came to the practical legal utility of such a concept.

39. Reverting briefly to the question of aggression, he said that his response to the Special Rapporteur's question would be in the affirmative. Article 2, paragraph 4, of the Charter of the United Nations was crystal clear.

40. As to the place of the draft article, if there was an inclination to differentiate between those two groups of injured States, then the article should be placed in the chapter on general principles.

41. Mr. CRAWFORD (Special Rapporteur) said that Mr. Idris had several times referred to a "mere legal interest", an expression that might give rise to confusion. Obviously, in the case of a breach of an obligation owed to the international community as a whole, an individual entity or State might well be the primary victim, for example, of an armed attack, but it would be agreed that in such a case other States had an interest of a juridical character. In that instance, those States' situation could in a sense be said to be secondary. But the category dealt with in his article 40 bis, paragraph 2, and in the other versions submitted, was not in any sense secondary to the category of bilateral obligations: it was simply different, in the same way that legal systems distinguished between the right to invoke responsibility in the framework of private law and in that of public law. The public law tests were obviously different because of the character of the subject matter: one was not simply dealing with subjective rights, as was the case in the field of private law (contract and tort or delict). So it was not a case of one category being superior to the other, it was simply that there was a distinction. The Commission was grappling with draft articles dealing with the whole field of international obligations, not just with the aspect of the field of international obligations that was analogous with private law in national legal systems.

42. Mr. LUKASHUK said that article 40 bis occupied a key place among the draft articles. With globalization, the interests of the international community as a whole took on increasing importance, and one of the chief tasks of international law was to defend the interests of that community. The task could be achieved only on a universal basis, and no individual State or group of States was

³ See article 5 of part 2 of the draft articles, together with a commentary thereto (*Yearbook* . . . 1985, vol. II (Part One), pp. 5-8, document A/CN.4/389).

entitled to consider itself the representative of the international community as a whole.

43. In substantiation of his assertion he referred to the current debate among legal experts concerning the questions of the intervention in Kosovo and of unilateralism. Mr. Simma had initiated the first debate by publishing an article⁴ in which he had convincingly demonstrated that the actions of NATO were a breach of international law. All would have been well if Mr. Simma had left it at that, rather than concluding that the thinnest of red lines separated NATO's action from legality. The same tendency could be seen at work in the debate on unilateralism, in which the participants had tried to clarify the circumstances in which unilateral acts otherwise prohibited by international law were permissible. In other words, while the Commission was discussing liability for the consequences of acts not prohibited by international law, the unilateralists found a way to avoid responsibility for acts prohibited by international law.

44. On article 40 bis, Mr. Simma had rightly pointed out that the Commission was speaking of responsibility rather than of the consequences of the breach, because responsibility was a legal consequence of the breach. He had not had time properly to acquaint himself with Mr. Simma's new proposal, but his impression was that it was inferior to his initial draft. Though the article was entitled "Right of a State to invoke the responsibility of another State", paragraph 1 for some reason referred to the right of a State to invoke, not the responsibility of another State, but all legal consequences of the responsibility of another State. It thus appeared that responsibility had some further, accessory legal consequences. In his view, it would have been enough simply to say that a State was entitled to invoke the responsibility of another State.

45. It would also be advisable to discuss the possibility of including at the end of the Special Rapporteur's proposed paragraph 1 (b) a provision reading: "(iii) or [the breach of the obligation] is incompatible with the object and purpose of the obligation". That provision flowed directly from article 60, paragraph 3, of the 1969 Vienna Convention, and would make it possible to cover the worst breaches of an obligation, those that called into question the very possibility of the continuing existence of the obligation.

46. It followed from the judgment in the *Barcelona Traction* case that, in order to file a claim relating to bilateral obligations, a State must first establish the existence of its right to do so; whereas in the case of *erga omnes* obligations, all States had legal interests relating to the protection of those obligations. It seemed to him that the Special Rapporteur's proposal met precisely those requirements, basically reproducing the decision of ICJ, and that it represented the best that could be done in the circumstances. The difficulties the Commission was encountering were partly explained by the fact that it was discussing the international community and the obligations owed to it, while ignoring the international community as such in the draft. Yet the international community was a genuine legal phenomenon. The 1969 Vienna Convention had established

that only the international community as a whole created peremptory norms. Furthermore, States bore responsibility vis-à-vis the international community in the event of a breach of international law. No one disputed that. The crux of the problem was how responsibility was to be implemented. Mr. Simma had rightly referred to the impossibility of securing the unanimous will of States. But in fact there was no need for such unanimous will. In the course of its work on drafting the Convention, the Commission had clearly established that the international community of States as a whole was to be understood as a sufficiently representative majority, rather than as all States in the literal sense—a decision confirmed at the United Nations Conference on the Law of Treaties.⁵ It was thus possible to achieve the agreement of the international community in the framework of the United Nations, of its specialized agencies, or of representative international conferences.

47. Consequently, the Commission should consider the desirability of including in the draft articles a provision entitled "Responsibility of the State in respect of the international community", the text of which would read: "In the case of a breach of an obligation *erga omnes* the State bears responsibility towards the international community of States represented by the universal international organs and organizations". Such a provision seemed indispensable.

48. The proposal for a Part Two bis submitted by Mr. Pellet merited careful consideration. Though entitled "Implementation of State responsibility", the draft appeared to refer, not so much to implementation, as to the concept of legal interest. The first sentence of paragraph 1 of article 40-1 basically repeated the general rule on responsibility already set out in chapter I, on general principles. The text did not single out responsibility for a breach of a bilateral obligation, as, crucially and importantly, did the text proposed by the Special Rapporteur.

49. Lastly, it did not seem desirable to take a decision lightly, as it were in passing, on the highly controversial problem of the international community as "a subject of international law", referred to by Mr. Pellet in his article 40-X. The Commission had already taken a position on that question at its fifty-first session, when discussing the draft articles on unilateral acts of States.⁶ He would comment on the proposal submitted by Mr. Economides once he had had the opportunity to study it in detail.

50. Mr. KAMTO said that the Special Rapporteur's proposed article 40 bis seemed not to correspond entirely to its title, focusing as it did on the definition of the injured State. It would be advisable to establish a provision to that issue, in accordance with the wishes expressed by States in the Sixth Committee, so as to distinguish between the

⁴ B. Simma, "NATO, the UN and the use of force: Legal aspects", *European Journal of International Law*, vol. 10 (1999), No. 1, p. 1.

⁵ See *Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March–24 May 1968, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), p. 472, 80th meeting of the Committee of the Whole, para. 12; and *ibid.*, *Second Session, Vienna, 9 April–22 May 1969, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 94, 19th plenary meeting, paras. 11 and 17.

⁶ See *Yearbook . . . 1999*, vol. II (Part Two), p. 138, para. 586.

different categories of obligation whose breach entailed international responsibility of the State; and to consider the question of implementation in a separate article.

51. The Commission should also consider whether the notion of damage should, at the risk of complicating the Special Rapporteur's task, be reintroduced into the debate. That concept was presently better established in internal and international law than much vaguer notions such as "specially affected State". Furthermore, the concept seemed indispensable if the essential distinction was to be drawn between a State suffering direct injury on the basis of which it could invoke article 37 bis, and one that, in the framework of *erga omnes* obligations or as a member of the international community, merely had a legal interest in cessation of the internationally wrongful act. The approach adopted by the Special Rapporteur enabled that distinction to be drawn.

52. It was essential to retain paragraph 3, either in article 40 bis or elsewhere in the draft, since States not only had responsibilities towards other States but also towards other entities. He saw no problem in using the term "entity", which was already used in various international conventions, such as the Convention on Biological Diversity.

53. On the question of the link between the concept of *erga omnes* obligations and human rights, he had serious doubts about whether it was advisable to attempt to draw a distinction between fundamental human rights and other human rights. Any such distinction would also be very difficult to put into practice and would go against the current trend to take a holistic approach to human rights. Attempts to draw such a distinction would raise several awkward questions: was it feasible to rank human rights? Would a right set out in a regional instrument, or in customary law, not be considered a fundamental right if it was not also contained in a universal human rights instrument? Some rights that had been eventually recognized as fundamental human rights had first been enunciated in regional instruments before being incorporated in universal instruments.

54. There might be some practical value in the Special Rapporteur's suggestion that the question of the settlement of disputes should be left aside, for it might permit the Commission to complete its work on State responsibility within the time limits of its current mandate. However, it was a crucial issue and one that needed to be considered in the debate on State responsibility. Since the landmark advisory opinion of PCIJ in the *Eastern Carelia* case, the question of dispute settlement had been considered purely a matter for States, but there was a trend in international law for each multilateral instrument to be viewed as a kind of legal subsystem, with its own dispute settlement procedure. Nevertheless, the inclusion of such procedures in particular instruments did not imply that a general dispute settlement procedure was being established for all other instruments. Recently, several major universal instruments had incorporated such a procedure; for example, the United Nations Convention on the Law of the Sea contained a very flexible procedure which did not prevent States from settling their disputes through traditional diplomatic or political channels, but which did establish the principle of judicial settlement if all else failed. The question was, regardless of the final form of the draft, whether a State should be allowed to block any judicial settlement

if it was unable to resolve a dispute with another State. While he was not suggesting that the provisions of the Convention could be applied to the current draft, he was in favour of a provision that would allow a dispute to be settled by an impartial third party if it could not be settled by any other means.

55. Mr. LUKASHUK said he understood why Mr. Kamto was pleading for a special position for the injured State. In one case, the interests of the State suffered, while in the other, injury was inflicted. Interests were affected in both instances, but the thing was to identify the specific nature of the interests that caused material damage.

56. He was not in favour of incorporating a provision on the settlement of disputes in the draft articles. The United Nations Convention on the Law of the Sea had introduced its own dispute settlement procedure as it was creating its own legal regime, but the Commission had a very different task, namely, to codify the general provisions on State responsibility. To codify the rules on the settlement of disputes would be a huge task, one which would take years to complete and would make it impossible for the Commission to adopt the draft articles in the foreseeable future. There were already substantial obstacles to the adoption of the draft articles by the General Assembly.

57. Mr. CRAWFORD (Special Rapporteur) said that the settlement of disputes was a separate issue and one that could hold up the progress of the draft. The majority view in the Commission, as he understood it from the previous year's debate, was that there was no integral relationship between countermeasures and the settlement of disputes; on that basis, the work on countermeasures had been carried forward. Moreover, if the draft articles were not to take the form of a convention, provisions for the settlement of disputes would be out of place. The United Nations Convention on the Law of the Sea, which had a very complex dispute settlement regime, dealt with a special area of conduct, whereas the draft articles on State responsibility were very general and dealt with all the obligations of States. Even residual provisions on the settlement of disputes covering the draft articles would therefore provide a residual regime in respect of all the obligations of States. The introduction of such a regime was not necessary for the success of the draft articles, and indeed might well guarantee their failure.

58. While it would be disappointing if the draft did not take the form of a convention, in the current international climate that option might be unrealistic. The question of including provisions on dispute settlement therefore would not arise. In any case, even if the articles were to take the form of a convention, the inclusion of such provisions would sink the text as a whole. It was one thing to adopt dispute settlement procedures in the context of WTO or the United Nations Convention on the Law of the Sea, but it would be quite another to do so on a global basis. Although the debate in the Sixth Committee later in the year might shed new light on the attitudes of States, it was clear that States were reluctant to adopt new general conventions. Moreover, the draft articles might provide a better and more integral product if they could be adopted without wholesale renegotiation at a diplomatic conference.

59. Mr. GOCO said that interest in the article would not always be confined to scholars of international law and that it might be useful to approach the question from the viewpoint of an eventual user, such as a lawyer representing an injured State in ICJ or some other forum. If he were that lawyer, he would prefer to be dealing with a simple article that, to begin with, clarified the meaning of an “injured State”. His argument would be that his client State had been injured as a result of a breach of an obligation, and that that obligation was owed to his client. He would point out that there was a legal interest on the part of the wrongdoing State under an instrument to which that State was a party. Things would become more complicated when *erga omnes* obligations to the international community were involved, but his main concern would be to ensure that the case of a State party that had breached an obligation specially affecting his client would be properly aired before the court, and to demonstrate that the wrongdoing State had a legal interest in the performance of that international obligation.

60. His concern was that in, say, the case of a multilateral treaty, one would have to implead the other States whose rights might be affected. Nevertheless, while on an earlier occasion he had voiced doubts about the original article 40 expressed by some members of the Sixth Committee, he agreed that the new article, 40 bis, was an improvement.

61. Mr. PAMBOU-TCHIVOUNDA said that he shared Mr. Kamto’s concerns about the attempt to make a distinction between the formal and the “customary” aspects of the “unity of rules” governing the undoubtedly complex category of human rights. He was not in favour of making a distinction between fundamental and non-fundamental human rights as it would be very difficult to apply such a distinction in practice. From a legal viewpoint, more was to be gained by maintaining a homogeneous approach than by defining a person as somehow central in some respects and peripheral in others. It was the whole package of people’s problems, needs and claims that gave substance to the concept of human rights, and all attempts to integrate them into law contributed to the unity of the human rights regime. He could not therefore support any discrimination between fundamental human rights and other human rights.

62. With regard to article 40 bis, the question was whether the term “injured State” lent itself to a standard definition, and preferably one that offered a homogeneous concept. Various kinds of obligations had been discussed—bilateral, multilateral and *erga omnes* obligations, as well as those based on custom—but the form in which they were set forth was not in itself critical. The reason it was important to provide a homogeneous concept of an injured State, was that a measure of the injury had somehow to be established. It was the damage suffered as a result of the breach of an obligation that made an injury quantifiable. Was there a norm other than prejudice or damage that would make an accurate assessment possible of a claim or of a demand for cessation of the wrongful act? It was the breach of the obligation, irrespective of whether it was a bilateral or some other kind of obligation, that constituted the wrongful act. In seeking cessation of the wrongful act, or reparation, a minimum amount of concrete elements must be presented. However great the interests at stake might be, a claim lacking in those elements would not be

received—either by a judge, an arbitrator or a group of States—in the same way as a claim that provided evidence of the consequences of the breach of a particular obligation.

63. He shared Mr. Kamto’s view that there was a need to incorporate a minimum provision on the settlement of disputes. He had held that view for some time and believed that it was in keeping with the current trend towards the integration of the international legal system. A statement of the general principles and rules that would establish a general framework for the law on responsibility, which would not affect the functioning of the international legal order from the point of view of the jurisdictional mechanisms, appeared to have been pushed very much into the background. Rather than produce a law on responsibility of marginal relevance to the mechanisms that constituted the international legal system, the Commission should take a much more integrationist approach in order to make the best use of the results of the Special Rapporteur’s work.

64. With regard to the question of the inclusion or non-inclusion of the concept of damage, Mr. Pellet had been guided by a need to propose an objective rule while being aware of the need to retain the concept of the internationally wrongful act. He strongly supported Mr. Pellet’s proposal, on the understanding that it could be rewritten, since the claimants would include some who were directly affected and a range of others who were less directly affected. Including the concept of damage could make it possible to establish the whole range of claimants and could allow implementation to be structured in terms of the “distribution of rewards” or simply of giving satisfaction to all sides.

The meeting rose at 1 p.m.

2622nd MEETING

Wednesday, 17 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

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

State responsibility¹ (continued) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of article 40 bis proposed by the Special Rapporteur on State responsibility in his third report (A/CN.4/507 and Add.1-4).

2. Mr. KATEKA said that Mr. Lukashuk had indicated (2621st meeting) that it could take years to deal with the topic of dispute settlement and that the Special Rapporteur had doubts about the possibility of adopting a convention on the subject, given that a large number of States would not accept its provisions. It should be noted that many Governments in the Sixth Committee had not even raised the issue. He wondered whether their attitude indicated that they attached no importance to the topic or whether it presented them with special problems. The Commission should perhaps look into the matter, for example, in the Planning Group.

3. The Special Rapporteur had also stated that the form of the instrument adopted would determine whether there should be provision for compulsory dispute settlement. The mini-debate had left him somewhat puzzled. He had been under the impression that the questions of the form of the instrument and dispute settlement were still open. When the Commission had considered those points the previous year, it had concluded that dispute settlement required further clarification. But the omission of article 40, paragraph 2 (b), as adopted on first reading, from the text proposed by the Special Rapporteur seemed to confirm the tendency to exclude any reference to dispute settlement. If the Commission omitted all such provisions from the draft articles, it would find itself adopting a non-binding instrument. It could be argued that the current quinquennium had been characterized by the adoption of soft law, as evidenced by the draft articles on nationality of natural persons in relation to the succession of States, which were in the form of a declaration.³ The same fate seemed to await the draft articles on unilateral acts of States and perhaps those on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). Such a state of affairs would doubtless add grist to the mill of those who claimed that the Commission was running out of topics to codify. It would in any case be a pity if, after four decades of work, it ended up adopting a non-binding instrument on State responsibility. It could rightly be concluded that the mountain had brought forth a mouse. He was also reminded of Mr. Sreenivasa Rao's observation (ibid.), in connection with obligations *erga omnes* and human rights, that matters of concern to the majority of the human race were arbitrarily dismissed as inconsequential, while other issues

of interest only to particular groups continued to dominate the international law agenda. Mr. Kamto had raised the issue (ibid.) of how basic human rights were to be determined and whether, for example, the right to development would be included among them. He hoped that the Commission would have another opportunity for an in-depth debate on the settlement of disputes, as envisaged by the Special Rapporteur in his proposed timetable of work for the current quinquennium.

4. Mr. LUKASHUK said that the ideas put forward by Mr. Kamto and Mr. Kateka deserved careful consideration by the Commission. One way of addressing the problem was to set aside the topic of the pacific settlement of disputes for future codification. The main thing, in his view, was to avoid establishing a rigid link between the means used for the pacific settlement of disputes and the question of responsibility, since that would impede the adoption of an instrument on State responsibility in the near future.

5. He drew attention to the ambiguity of the expression "pacific settlement of disputes", a phrase inherited from the distant past of international law, when there had been two categories of legitimate means of settling disputes—peaceful means and military means. The present situation was radically different, since only peaceful means were legitimate. It was therefore preferable to refer solely to the "settlement of disputes".

6. Mr. DUGARD congratulated the Special Rapporteur on his work. He agreed with his criticism of both the form and substance of article 40 as adopted on first reading. The article was far too long and confusing. As a key provision in the draft articles, it lacked clarity in its current form. However, the Special Rapporteur's proposed article 40 bis went a long way towards resolving the problems raised. He had a special interest in the article because it had a bearing on his own work in the area of diplomatic protection. He wondered whether a State could protect a non-national who had suffered a violation of a *jus cogens* norm where the State of nationality either declined or was unable to afford protection. It was important to differentiate in that context between the violation of a *jus cogens* norm and the violation of a human right. ICJ had delivered a clear ruling on that point in its judgment in the *Barcelona Traction* case: "With regard more particularly to human rights, to which reference has already been made in paragraph 34 of this Judgment, it should be noted that these also include protection against denial of justice. However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" [see p. 47, para. 91]. The Court had thus drawn a distinction between violations of human rights that breached a *jus cogens* norm and those that did not.

7. Although he had prepared a draft article on the subject, he would refrain from including it in his report until the fate of article 40 bis had been decided. In his view, article 40 bis, paragraph 2, provided the answer to his question. However, he was not quite satisfied with its wording. For example, he saw no reason to include the words "to which it is a party". In any event, he assumed that the interest protected by that provision referred to

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ See *Yearbook . . . 1999*, vol. II (Part Two), paras. 44 and 47.

customary international law obligations such as the prohibition on torture or discrimination. In other words, if State A tortured a national of State B and State B failed to respond, he took it that State C might intervene on behalf of the national of State B as a secondary victim, as suggested in paragraph 109 of the report. If State C had an interest, under the terms of article 40 bis, paragraph 2, he presumed that it might take action of the kind proposed in paragraphs 110 and 113, i.e. it might protest or demand cessation or restitution. On the other hand, while State C could not claim compensation on its own behalf, it could do so on behalf of the injured State or the injured individual.

8. The issue drew attention to the far-reaching changes which had taken place in the international legal order over the past 30 years and which affected the scope of the doctrine of diplomatic protection. Recognition of the possibility of State intervention to protect non-nationals had serious implications for the rules relating to diplomatic protection and the way in which they were applied. It raised very difficult questions, for instance, in respect of the exhaustion of the local remedies rule. Any guidance that the Special Rapporteur was able to provide in the matter would assist him in delimiting the scope of his own work on diplomatic protection.

9. Mr. ECONOMIDES, introducing his proposal on article 40 bis (ILC(LII)/WG/SR/CRD.3), said that it took account of the distinction between the injured State and the State having a legal interest both in the title and in the content of the article; the two concepts should, in his view, be defined before the question of the implementation of international responsibility was discussed. Moreover, the proposed list of cases in which a State suffered an injury was open-ended, since it could be difficult to envisage all cases in which a State could be injured by an internationally wrongful act attributable to another State. As international practice in the area varied considerably, it was advisable to keep the list open-ended by adding the words “in particular”.

10. Paragraph 1 (a) referred essentially to bilateral obligations and was included in all the other proposals. Paragraph 1 (b), on the other hand, was the key component of the proposed text inasmuch as it specified that an internationally wrongful act by a State could injure “all States if the obligation breached is essential for the protection of fundamental interests of the international community”. That was the definition contained in article 19 of the draft articles adopted on first reading. It was out of the question for him to approach fundamentally different things in the same way, i.e. a *jus cogens* rule prohibiting an international crime such as genocide or aggression and the mere breach of a multilateral customary or treaty-based obligation such as the inviolability of the diplomatic pouch. The former case involved a breach of a major or vital interest of the international community affecting international public order, while the latter merely involved a normative international rule, however important it might be. The formulation of an effective strategy for the deterrence of international crimes called for the adoption of provisions such as those contained in his proposal. Moreover, all the consequences of international responsibility, except perhaps that of compensation, should be applied to all States in cases of international crime, particularly the principle of

restitution in the form of a return to the status quo; in cases of aggression, for example, the situation that had existed prior to the commission of the international crime must be restored. In that connection, the obligations provided for in article 53 as adopted on first reading would become far more comprehensible if the concept of “injured State” was applied to all States of the international community in cases of crime.

11. He would not comment on paragraph 1 (c) since its wording was similar to that used in all the other proposals. The provision covered multilateral obligations, including those of an *erga omnes* character.

12. Paragraph 2 endeavoured to spell out more clearly which States had a legal interest in requiring the cessation, in the broad sense of the term, of a breach of an *erga omnes* obligation or a multilateral obligation. They were States that were bound by the obligations in question, but had not been directly injured by the breach.

13. Mr. GOCO said that he found the proposal by Mr. Economides interesting, but also noted that some Governments took the view that there had to be a sufficient link between the violation and the State for the responsibility of that State to be invoked under customary international law.

14. When a State breached an obligation, that surely implied that the injured State was particularly affected by the breach, that the breach affected the exercise of that State’s rights and that the obligation breached was bilateral or multilateral. To spell out those points did not seem necessary. It was obvious that the injured State had a special interest in the obligation in question being respected by the other State. In brief, he wondered whether the distinction was necessary once it had been established that an obligation had been breached and that the injured State was the State affected by the breach.

15. Mr. HAFNER said that the debate on State responsibility had reached the crucial point where it had a bearing both on international law and, at the same time, on international politics. The expression *erga omnes* was giving him a great deal of trouble because its meaning was not very clear. Authors’ views on the subject were divided and the definitions of *erga omnes* obligations which they gave also varied very considerably. Thus, some authors spoke about norms to protect values common to the international community. Others spoke about norms the breach of which injured all States. Some identified those norms with norms of *jus cogens*; others, with those establishing international crimes, whether they were crimes of the State or crimes entailing individual responsibility; still others applied the qualification *erga omnes* to obligations whose violation was not allocable to any State in particular. In such a case, no State would be entitled to invoke responsibility, something which was most surprising in view of the judgment of ICJ in the *Barcelona Traction* case. In order to escape being qualified as *lex imperfecta*, that doctrine explained that any State was entitled to invoke responsibility. If an obligation *erga omnes* meant an obligation owed to the international community as a whole, he wondered whether the absence of allocability justified such a qualification.

16. Another question that had to be raised was the meaning of the term “international community as a whole”. Did it include, say, individuals and non-governmental organizations in all cases and for all types of obligations? Article 53 of the 1969 Vienna Convention, which had been invoked in that connection, spoke only of the “community of States”. In his view, there was a difference between the “community of States” and the “international community as a whole”. Mr. Gaja’s proposal (ILC(LII)/WG/SR/CRD.4) distinguished between the two and that distinction should certainly be kept. Even ICJ, when it referred to obligations *erga omnes*, placed several different kinds of obligations in the same category.

17. In the context of article 40 bis, the Commission should define to what kind of obligations *erga omnes* it was referring. Was it referring to all such obligations or only to some?

18. The Commission could, of course, say that it need not bother with those matters, since the question whether or not an obligation fell within the *erga omnes* category was defined by the primary rules. But that approach did not solve the problem; on the contrary, it raised more questions than it answered. Some clarification was needed; otherwise, States might ask the Commission to justify the different treatment given to those obligations. In that connection, he recalled that, on 1 November 1967, when the representative of Malta had proposed that the principle of the common heritage of mankind should be applied to the international seabed, no one at the time had known what was meant.⁴ It had taken 15 years of negotiations to define the concept. The Commission should avoid similar situations.

19. Another way of defining the concept would be to adopt the procedural method used to define norms of *jus cogens* in article 53 of the 1969 Vienna Convention. Consequently, an obligation to define obligations *erga omnes* would be imposed on the community of States. Such an approach would perhaps simplify matters, but it would not provide the answer to the question. It was more important at the current time to define obligations *erga omnes* than *jus cogens* norms. Certain common legal characteristics would therefore have to be defined to distinguish those obligations from others. The question then would be simply whether those characteristics were constituent elements of obligations *erga omnes* or a consequence of the creation of that particular category of obligations.

20. In draft article 40 bis, the Special Rapporteur distinguished between obligations *erga omnes*, obligations *erga omnes partes* and obligations established for the protection of the collective interests of a group of States (paragraphs 2 (a), 1 (b) and 2 (b), respectively). While recognizing that the approach was dictated by a desire for clarity, he wondered whether the list really covered all possible cases or whether it left some loopholes.

21. For example, in a case of violation of the law of the sea, would all States—including landlocked States—have the right to invoke international responsibility, as envisaged in the draft, or would a distinction be drawn between

landlocked States parties to the United Nations Convention on the Law of the Sea and those which were not parties and would therefore not be entitled to act? Would the obligation to protect and preserve the marine environment set forth in article 192 of the Convention be regarded as an obligation *erga omnes*? Those were among the issues that remained to be clarified.

22. Similarly, with regard to human rights, to which he referred rather often, the Special Rapporteur also failed to settle the issue. After stating in paragraph 88 of the report that human rights obligations were not owed to any particular State, which was tantamount to saying that they were obligations *erga omnes*, he explained in paragraph 106 (b) that obligations arising under a regional human rights treaty were matters of the collective interest of a group of States (which meant, according to the definition in paragraph 92, that they were obligations *erga omnes partes*). For his own part, he considered that human rights came within the category of obligations *erga omnes* only insofar as they were based on a general conviction. It would be interesting to see whether all rights under the International Covenant on Civil and Political Rights or the European Convention on Human Rights fell into that category.

23. In view of all those problems, he concluded that, despite the need for definition, the only practical solution for the Commission would be to refrain from any attempt to define such obligations and to confine itself to describing them. It could be said that for any obligation in article 40 bis which could be considered an obligation *erga omnes*, the community of States recognized the right of a State other than the directly injured State to invoke State responsibility in a restricted manner. That would not, of course, apply to obligations under a regional human rights treaty, which could fall under the “protection of the collective interests of a group of States” referred to in paragraph 2 (b) for which no right of the directly injured State was provided. He would be interested to hear the Special Rapporteur’s views on that point.

24. Turning to some of the drafting proposals made by members of the Commission in connection with article 40 bis, he said that he found the wording proposed by Mr. Simma (ILC(LII)/WG/SR/CRD.1) less flexible than that proposed by the Special Rapporteur. In particular, the Special Rapporteur’s reference to a State having “a legal interest in the performance of an international obligation to which it is a party” seemed to him to offer more possibilities than the formulation “a State has the right (is entitled) to invoke certain legal consequences of the responsibility of another State”, which amounted to placing all States which were not directly injured, but only “interested”, on the same level and to conferring the same rights on them. The expression “the obligation breached is owed to it individually” in paragraph 1 (a) ought to be clarified in that context.

25. With regard to the proposal by Mr. Economides, it would be useful to hear what meaning the author attached to the expression “protection of fundamental interests of the international community” used in paragraph 1 (b). The underlying intention seemed to be to give to all States the right to react to an internationally wrongful act by invoking international responsibility. But was that really what the Commission wanted? The meaning of the words

⁴ See *Official Records of the General Assembly, Twenty-second Session, First Committee*, 1515th meeting (A/C.1/PV.1515), and corrigendum, paras. 3 et seq.

“may, as the case may be, injure, in particular” used at the beginning of paragraph 1 also needed to be clarified. Did the use of the word “may” mean that certain “other conditions” had to be met in order for a State to be the injured State or that the State was not “injured” in all cases? He would be grateful for an elucidation of those points.

26. Mr. LUKASHUK said that Mr. Hafner had raised an essential problem of principle by referring to the proposal by Mr. Gaja establishing a distinction between responsibility towards all States and responsibility towards the international community as a whole. At the legal level, such a distinction had no *raison d'être*. Article 53 of the 1969 Vienna Convention referred, very rightly, to the “international community of States* as a whole” and it went without saying that there could be no international [State] responsibility except within the framework of relations between States. The concept of the “international community as a whole” corresponded to a quite different idea, the point at issue being no longer the community of States, but world society as a whole, a concept which not only was yet to be defined, but which, in his view, was completely foreign to the topic under consideration.

27. Mr. BROWNLIE, repeating the warnings he had already expressed in that connection, said that the Commission ought not to embark on an impossible attempt to classify all rights and obligations of States. However great the efforts made, the subject could never be exhausted, because it had no end. To the extent that, as Mr. Economides had it in paragraph 1 (b) of his proposal, an internationally wrongful act could injure “all States” if the obligation breached was “essential for the protection of fundamental interests of the international community”, that “essential obligation” would have to be defined. The Commission could, of course, decide that the problem would resolve itself automatically as customary international law developed, but by persisting in the attempt to codify a whole series of new concepts it would be embarking on a task which, interesting as it might be at the theoretical level, would slow down its work and reduce the chances of that work being approved by the Sixth Committee. In the field of State responsibility, the Commission already had enough to do to define the injured State, not to mention the problem of possible overlapping or duplication with the topic of diplomatic protection.

28. Mr. SIMMA said that his analysis of the problem was not the same as Mr. Brownlie's. What the Commission needed to do was not to define the injured State, but to define or specify who was entitled to invoke State responsibility.

29. Paragraph 1 (b) of the proposal by Mr. Economides in fact drew its inspiration from article 19, paragraph 2, on the question of international crimes, a subject of essential importance to which the Commission would have to revert at some stage.

30. As for the “international community as a whole” to which Mr. Gaja had referred, there was no need for a definition, since what was really meant was the international community of States as referred to in article 53 of the 1969 Vienna Convention.

31. Similarly, there was no need to exaggerate the difference that might exist between regional and universal protection of human rights, which in substance came to the

same thing. Lastly, with regard to Mr. Hafner's examples drawn from the law of the sea, it should be noted that the problem in that context was not one of State responsibility, but only one of opposability.

32. Mr. PAMBOU-TCHIVOUNDA said that the wording proposed by Mr. Economides had the merit of providing an answer to a specific question, that of the cases in which the breach of an international obligation entitled States to act to ensure compliance with that obligation. The link between paragraph 1 (b) of the proposal and article 19, paragraph 2, referred to by Mr. Simma, was indeed very clear and he shared Mr. Simma's view of the importance of the concept of international crimes, which had to be taken into consideration at all stages of the draft until a final decision had been reached.

33. He wondered whether there was not a duplication of purpose between subparagraphs (a) and (c) (i) of paragraph 1 of the text proposed by Mr. Economides—which, incidentally, suffered from an overabundance of adverbs. Was there really a difference of meaning between the expression “the State to which the obligation breached is owed individually” and “any State, if the breach of the obligation specially affects that State”? In the second of those subparagraphs, was Mr. Economides' thinking, without expressly saying so, of breaches of customary obligations, while having in mind, in the earlier subparagraph, breaches of obligations set forth in a bilateral treaty? If so, it might be preferable to say so clearly.

34. Those minor criticisms apart, the proposal by Mr. Economides seemed to be well in line with the effort to achieve a synthesis and it deserved to be followed up.

35. Mr. ECONOMIDES, replying to questions and comments by previous speakers, explained to Mr. Hafner that, in paragraph 1 (b) of his proposal, he had merely reproduced the definition given in article 19 and had not thought it necessary to go into greater detail than article 19 did. He agreed, however, that it might be useful for the commentary to highlight the close link between the concept of *jus cogens* and that of international crime. The rules prohibiting international crimes were in reality rules of *jus cogens*, but they were even more stringent because there was no exception.

36. The structure of paragraph 1, in which the expression “may ... injure” was followed by a list, was likewise modelled on article 19, which gave a non-exhaustive list of cases in which States were injured or could be injured by a serious breach of an international obligation. Nevertheless, the structure could certainly be improved.

37. He agreed with Mr. Brownlie that not everything could be defined in the context of the progressive development of international law and that some concepts were more the result of the development of customary international law.

38. Mr. Pambou-Tchivounda's comment was extremely interesting: there was indeed a similarity between the cases covered in paragraphs 1 (a) and 1 (c) (i), but, in paragraph 1 (a), a bilateral obligation was involved (an obligation stemming from a bilateral treaty was owed exclusively to the State concerned), whereas, in paragraph 1 (c) (i), the obligation breached was a multilateral

obligation which existed for all States parties, even if only one of them had been specially affected by that breach.

39. Mr. PAMBOU-TCHIVOUNDA said that, having heard the explanation just given, he was more than ever convinced of the value of Mr. Economides' proposal. It would merely be necessary to delete the adverb "individually" in paragraph 1 (a), to stipulate that the obligation breached was a bilateral obligation and to replace the words "specially affects" by the words "violates a customary rule" in paragraph 1 (c) (i).

40. Mr. GOCO thanked Mr. Economides for his explanations on the various categories of obligations, but agreed with Mr. Brownlie that the Commission should not try to make too much of them as it might then be moving away from the topic. Article 40 as adopted on first reading had clearly indicated that "injured State" meant "any State a right of which is infringed by the act of another State, if that act constitutes ... an internationally wrongful act of that State". During the discussions, that initial definition had gradually been revised and supplemented, something that was somewhat unfortunate from a lawyer's point of view, since the classical link between the concepts of injury and reparation provided a satisfactory analytical basis. As international lawyers, however, the members of the Commission should perhaps, in an article of that kind, categorize the obligation that had been breached. If it was an obligation to the entire international community, it might be useful to say so, since, in such cases, States other than the directly injured State might be affected by the breach of the obligation. That was why he was not against the inclusion in the draft article of a reference to an obligation that affected the entire international community; nevertheless, the matter should not be complicated endlessly. Perhaps the Drafting Committee should be given the task of improving and simplifying the article, concentrating on the meaning of the words "injured State".

41. Mr. OPERTTI BADAN said he feared the Commission was only moving away from a solution rather than drawing closer to one. One member had requested a definition of the words "the obligation breached is essential" in paragraph 1 (b) of Mr. Economides' proposal. Another had asked what was meant by the "fundamental interests of the international community" in the same proposal. As Mr. Brownlie had quite rightly pointed out, that related more to the development of customary international law than to the development of international law in the strict sense. Mr. Economides had explained that the difference between paragraph 1 (a) and paragraph 1 (c) (i) lay in the source of the responsibility: a bilateral obligation in one case and a multilateral obligation in the other.

42. In his opinion, the Commission had by no means yet formed a sufficiently solid conceptual basis to understand the various elements properly. It had been concerned with theoretical issues for too long and, if it stayed on that course, it would certainly not be at the end of its troubles. It must be pragmatic and move away from doctrinal subtleties that merely obscured the true nature of things.

43. The responsibility of States to the international community was responsibility for the breach of obligations owed to the international community as a whole, as stated in the Special Rapporteur's proposed draft article 40 bis. The issue was not "fundamental interests", but obligations

clearly stated in treaty law. He hoped that the Commission would hold to that meaning and refrain from including private entities such as non-governmental organizations, which definitely did not have the constituent elements to qualify as States, among the subjects of law legally entitled to invoke State responsibility. If it continued to adopt that approach, it might end up with a convention that dealt not with State responsibility, but with international responsibility in general, and that was not in keeping with the mandate entrusted to it.

44. Mr. ADDO said he agreed with the Special Rapporteur that the aspects of article 40 as adopted on first reading that related to multilateral obligations, including obligations *erga omnes*, had never been thoroughly considered, and that that was why article 40 had been defective in several respects. The reformulation proposed by the Special Rapporteur in draft article 40 bis was surely an improvement because it brought in the concept of an obligation *erga omnes*, even if the application of that concept remained problematic. For instance, when the internationally wrongful act was a breach of a multilateral treaty, all the other States parties to the treaty that qualified as injured States had the right to bring action in ICJ to protect the "public" or "collective" interest of the international community. Surely such a right could not be exercised unless the respondent State, i.e. the State that had committed the breach, had specifically agreed to the jurisdiction of the Court in a treaty or by making the statement provided for in Article 36, paragraph 2, of the Statute of the Court. The exercise of the right arising out of the breach of an obligation *erga omnes* thus had to have a jurisdictional basis. The *East Timor* case was an interesting one, since Portugal had invoked not only the violation of its own rights as the Administering Power of the territory recognized by the United Nations, but also the violation of the rights of the people of East Timor. As a non-State entity, East Timor could not have brought the claim itself, but Portugal had asserted the rights of the people of East Timor to self-determination and sovereignty over their natural resources in the maritime areas adjacent to the coast. In its judgment, the Court had held by a majority of 14 to 2 that it had no jurisdiction to adjudicate the dispute because, in order to rule on Portugal's claims, it would have to rule first on the lawfulness of Indonesia's conduct, and it could not do so, as Indonesia had not consented to its jurisdiction.

45. The question was whether the law would be more widely observed if every State could bring judicial action against a State for that State's infringement of collective interests. Such a solution involved the danger that every State could appoint itself as policeman of the international community and as responsible for ensuring respect for *erga omnes* obligations as determined by itself.

46. He endorsed the Special Rapporteur's reformulation in draft article 40 bis, although it was not without conceptual difficulties. With regard to paragraph 3, since the Commission was dealing with the responsibility of States, rights that accrued to any other subject of international law should not concern it. Paragraph 3 could be retained, however, out of an abundance of caution. Lastly, the Special Rapporteur was silent on article 40, paragraph 3, namely, the crime issue, which the Commission would need to discuss sooner or later.

47. Mr. TOMKA said that article 40, as article 5 provisionally adopted by the Commission at its thirty-seventh session, which contained the definition of an “injured State”, had attracted a good deal of criticism from States. The Special Rapporteur had made a very convincing case in paragraph 96 of his report and elsewhere for considering that article as defective in a number of respects. When the Commission had adopted it, it had departed from its earlier position that the origin of the international obligation breached was irrelevant both to the qualification of an act as a wrongful act and to the international responsibility arising from the internationally wrongful act, an idea formerly expressed in article 17 and currently covered to some extent by article 16 as adopted by the Drafting Committee at the fifty-first session of the Commission.⁵ The Special Rapporteur had been right to view the source of the obligation (treaty, custom, decision) as irrelevant and to devote himself to the analysis of different types of obligations for the purpose of identifying the injured State.

48. A striking feature both of the commentary to article 40 as adopted on first reading⁶ and of the report by the Special Rapporteur was the fact that references to cases and precedents were rather scarce, whereas Part One and at least the introductory articles of Part Two were based on an abundance of international practice. There, the Special Rapporteur was using arguments of logic more than experience or State practice, as could be seen in the second sentence of paragraph 112.

49. One of the Special Rapporteur’s criticisms of article 40 was that it made a premature conversion from the language of obligation to the language of right. He wondered, however, whether the Special Rapporteur was not opening himself up to the same criticism in entitling article 40 bis the “Right of a State to invoke the responsibility of another State”. It could be asked when, in the opinion of the Special Rapporteur, the conversion from the terminology of obligations to that of rights should occur and whether it was really necessary. Could the content of responsibility be defined as new obligations of the State which had breached its primary obligation? The report and the discussion in the Commission had demonstrated that what was surprisingly lacking was a well-elaborated theory of international legal obligations. The Commission should therefore be grateful to the Special Rapporteur for his contribution in characterizing four types of obligations: bilateral; obligations to the international community as a whole (*erga omnes*); obligations to all the parties to a particular regime (*erga omnes partes*); and obligations to which some or many States were parties, but in respect of which particular States or groups of States were recognized as having a legal interest. A number of questions arose in that context. For example, did the existence of obligations to the international community as a whole mean that the international community was a subject of international law, since obligations were owed to it? If that was the case, who acted on behalf of the international community? The United Nations? He had serious doubts that the international community had become a subject of international law with the right to invoke the

responsibility of a State which had breached its international obligations.

50. The examples of obligations *erga omnes partes* given by the Special Rapporteur, particularly obligations in the field of the environment in relation to biodiversity or global warming, were par excellence obligations for the benefit of all States, irrespective of whether they were parties to the relevant multilateral treaties. With regard to the last category of multilateral obligations mentioned above, who would recognize that particular States or groups of States had a legal interest? He concurred with the Special Rapporteur that the existence of a legal interest would be a question of the interpretation or application of the relevant primary rules. That might offer an overall approach to the issues currently of interest to the Commission. The interpretation of a primary obligation that had been breached by a State would help to identify the State or States to which the obligation was owed and for which a new obligation of responsibility as a consequence of a previous breach of a primary obligation would arise. He had some sympathy for the proposal by Mr. Gaja because it applied the same approach to responsibility in terms of obligations and it was brief.

51. Since the draft articles were to apply to inter-State relations, but, in practice, there were quite a few cases of the international responsibility of States vis-à-vis international organizations or other subjects of international law, there was full justification for including a saving clause in the text stating that nothing in the articles prejudiced the issue of the responsibility of a State which had committed an internationally wrongful act breaching an international obligation owed to an international organization or other subjects of international law. That idea was expressed in article 40 bis, paragraph 3, as proposed by the Special Rapporteur, although in a narrower sense, since it covered only Part Two of the draft. It should be included in the draft, on the understanding that the Drafting Committee would refine its language and find an appropriate place for it.

52. Mr. MOMTAZ, referring to the treatment of human rights obligations, said that it had been asked whether the obligation to respect human rights was an obligation *erga omnes* and whether it followed that all States without distinction could be considered “injured States”. In order to be realistic, a distinction had to be drawn. Unfortunately, for the moment, there was no consensus in the international community on human rights rules. Nevertheless, States agreed on a minimum of rules, a “hard core” of rights which ICJ had described in the *Barcelona Traction* case as principles and rules concerning basic human rights. The Court had cited several examples, such as the protection from slavery and racial discrimination, to which the right to life, freedom of thought and conscience and the prohibition of torture might be added. The existence of such basic rights, to which there could be no exception or reservation, was recognized by treaty law and, in particular, by international human rights instruments, whether universal or regional, such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the American Convention on Human Rights: “Pact of San José, Costa Rica”. It must, however, be said that the distinction between those basic rights and other rights was

⁵ See 2615th meeting, footnote 4.

⁶ For the commentary to the article (former article 5), see *Yearbook ... 1985*, vol. II (Part Two), pp. 25 et seq.

awkward and prejudicial to the unity of human rights and he welcomed the fact that it was becoming blurred; the most recent international instruments, such as the African Charter of Human and Peoples' Rights, did not make the distinction. He also referred in that context to the attitude of certain States parties to the European Convention on Human Rights which had recently undertaken not to invoke its safeguard clause. It might be asked whether practice had not tended to replace that somewhat obsolete distinction between basic and other rights by a threshold based on the concept of systematic or gross breaches, to which the Special Rapporteur referred in paragraph 86 of his report. In cases of systematic or gross violations of human rights, all States could thus be regarded as injured. The advantage of that criterion, or threshold, was that it had been retained in article 7 of the Rome Statute of the International Criminal Court, which used the words "widespread or systematic". It was also interesting to note that, in the Rome Statute, crimes within the jurisdiction of the International Criminal Court, namely, genocide, aggression, war crimes and crimes against humanity, were of concern to the international community as a whole in that they were prejudicial to international peace and security. Accordingly, it was fair to say that all States parties to the Rome Statute could be considered injured when such crimes were committed. Such an approach would also have the advantage of responding to the concern which the Special Rapporteur expressed in paragraph 87, namely, that a distinction should be drawn between the rights of the individual victims and the responses of States and translating human rights into States' rights must be avoided. He wondered whether, in order to define the concept of injured State in respect of human rights, a quantitative criterion might not be added, as opposed to the qualitative criterion used to distinguish between basic and other rights, so as not to call the unity of human rights into question. Having consulted Mr. Gaja, he gathered that the "circumstances of the breach" referred to in his proposal on article 40 bis at the beginning of the meeting could refer to both the qualitative criterion and the quantitative criterion.

53. Mr. KAMTO commended the Special Rapporteur on his attempt to explain international obligations before dealing with breaches of those obligations that were likely to give rise to State responsibility. That question could not be considered without bearing in mind the theory of obligations.

54. The various proposals made for article 40 bis were not mutually exclusive and, apart from Mr. Gaja's, they all sought to define which States could be regarded as injured and which as having a legal interest. The two concepts having now been carefully set out, the Commission should first try to define them and only then draw the appropriate conclusions of those definitions for the purpose of implementation.

55. With regard to the words "the international community as a whole", the Commission could not ignore the current international context; that wording, taken from article 19 of the draft, was completely in line with the current trend in international law. The idea of State crime could not be left out, even if the term was not used. The problem was knowing in which circumstances it could be considered that an internationally wrongful act constituted a crime that was likely to give rise to the international

responsibility of its perpetrator and to be invoked by all States.

56. Concerning human rights, Mr. Momtaz had given a good summary of the discussion. It was illusory to want to distinguish between basic and other human rights. In some cases, what was regarded as a secondary right was the condition for the implementation of a basic right. Human rights formed a whole and their unity must be respected. The concept of threshold introduced in the Rome Statute of the International Criminal Court could not apply to such individual rights as the right to life. That did not mean that the concept of essential rights for the international community as a whole must be discarded, but that the Commission must give some thought to ways of recasting it in the light of article 19 and practice.

57. Mr. ROSENSTOCK said that he agreed in large measure with Mr. Kamto, although he would not go so far as to associate the word "crimes" with a State.

58. He agreed that article 40 bis suggested by the Special Rapporteur was more in keeping with the approach which the Commission must follow than the other formulations, in particular Mr. Gaja's. It would be best to retain article 40 bis, improving it and perhaps dividing it into two articles, one focusing on the State injured by an internationally wrongful act of another State and the other on the State which had a legal interest in the performance of an international obligation.

59. Mr. ECONOMIDES said that, to avoid the confusion created by the words "have a legal interest in requiring the cessation of the internationally wrongful act" in paragraph 2 of his proposal, they should be replaced by the words "have a legal interest in requiring respect for the obligation breached". The consequences of the breach of the obligation in question must be set out and regulated in the following chapter of the draft articles.

60. Mr. HE, noting that article 40 bis was pivotal to the whole draft, said that he was grateful to the Special Rapporteur for posing and analysing in detail, in paragraphs 66 to 119 of his report, the problems raised by article 40 adopted on first reading; unless those problems were resolved, the Commission would be unable to discuss all the relevant articles. Those issues included the excessive attention given to bilateral obligations, on which there were four lengthy paragraphs which might be simplified, as the Special Rapporteur proposed in article 40 bis by means of the words: "For the purposes of these draft articles, a State is injured by the internationally wrongful act of another State if the obligation breached is owed to it individually".

61. Regarding whether the draft articles should retain a unitary concept of "injured State", he thought that, in view of the analysis in the report and the discussion, it seemed unnecessary to produce a unilateral concept of "injured State". It would be preferable to distinguish between an "injured State" and a "State with a legal interest" which was not specifically affected by the breach. That was the idea contained in the Special Rapporteur's article 40 bis, as well as in Mr. Economides' and Mr. Simma's proposals.

62. As to whether damage should be at the heart of the definition of "injured State", as proposed by Mr. Pellet

(ILC(LII)/WG/SR/CRD.2), he said that the fact that damage was not included as an element of the wrongful act did not mean that all States could invoke the responsibility of the wrongdoing State. On the contrary: only the State whose subjective right had been injured could do so. In other words, only the State in respect of which an obligation had been breached could demand reparation. Thus, there seemed to be no need to include damage in article 40 bis.

63. With regard to the combined reference to multilateral treaties and customary international law in article 40, paragraph 2 (e), he agreed that it would be preferable to deal with those two sources of international law separately. Lastly, if the Commission intended to specify the secondary obligations without referring to the concept of “injured State”, it would be better to place article 40 bis in chapter I of Part Two.

64. Mr. Sreenivasa RAO said that, in his report, the Special Rapporteur had given a very good explanation of the limitations of article 40, which article 40 bis was meant to remedy. Under the circumstances, article 40 bis was better than its initial version, but it could still be improved, as could be seen in the proposals made by some of the members of the Commission. In his proposal (ILC(LII)/WG/SR/CRD.1/Rev.1), Mr. Simma was more interested in *locus standi* than in the definition of injury itself. On that point, it was very difficult to transpose concepts from domestic to international law. In domestic law, only direct injury gave rise to *locus standi*, whereas, in international law, it was necessary to go beyond injury to establish it, but that could not be done unless the injury was significant.

65. Indian constitutional law also had the concept of public interest litigation, which provided a solution to the problems of responsibility and reparation, but that concept was not applicable in the case of the “international community”, which was a group of States. How could it be maintained that a legal interest was an interest of the international community as a whole? States did not all have the same interests. That was the difficulty in translating obligations *erga omnes* into *locus standi*. The idea that obligations *erga omnes* triggered the invocation of the responsibility of a State was not sufficiently developed to be able to assert that it would be a legal interest exercised on behalf of the international community as a whole and not a particular interest, which might be at variance with that of the international community.

66. The conditions needed so that the international community could duly act in the event of a breach of an obligation *erga omnes* of the kind listed in article 19 had not been met. Hence the need to consider discarding article 19. The only reason for doing so was that no State was really in a position to invoke its provisions on behalf of the international community.

67. He would support a proposal for dropping article 40 bis and leaving it for the future development of international law. The same approach might even be taken with article 19. He likewise suggested leaving article 40 for later development.

68. Mr. CRAWFORD (Special Rapporteur) said that the Commission had not invented the concept of “obligations owed to the international community as a whole”: it had

been introduced by ICJ. The Commission could only endorse it, the question being to what extent. It was in fact focusing on legal interest or legal standing; it certainly did not want to reduce international obligations to debates in political forums which had nothing to do with questions of international obligations.

69. Mr. GAJA said that his proposal did not contain anything very new, although its wording differed from the text proposed by the Special Rapporteur and from the other proposed texts.

70. The aim of his proposal was to avoid giving a definition of “injured State” or making the difficult distinction between “rights” and “legal interests”, while seeking to define which States were owed the obligations set out in Part Two. Depending chiefly on the primary rule, that might be another State, several States, all other States or the international community as a whole. If a State breached an international obligation, it owed reparation, but reparation was not necessarily for the benefit of the above entities; it might be for the benefit of a specifically affected State, an individual or another entity.

71. Mr. CRAWFORD (Special Rapporteur) noted that the Commission had, in substance, the choice between making sense of article 40 or coming up with an extremely simple wording such as “an injured State is an injured State”. In fact, that was what he proposed for violations of bilateral obligations and it was certainly appropriate. The problem was that the international legal order was not made up solely of bilateral obligations. The question thus arose whether the Commission should ignore the right to invoke State responsibility for a breach of an obligation that was not purely bilateral. In order to help move forward with the discussion on that point, the members of the Commission should focus on the crucial question, namely, whether to seek to elaborate and explain the content of the notion of “multilateral obligation” so far as the principle of legal standing and its consequences were concerned or whether it was sufficient simply to refer to general international law.

72. He agreed entirely with Mr. Pellet that the fact that a fundamental norm was breached did not mean that the breach was necessarily serious.

Organization of work of the session (*continued*)*

[Agenda item 2]

73. Mr. KAMTO (Chairman of the Planning Group) said that the Planning Group was composed of: Mr. Baena Soares, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda and, as a member *ex officio*, Mr. Rodríguez Cedeño. The Planning Group was open to all members of the Commission.

The meeting rose at 1 p.m.

* Resumed from the 2613th meeting.

2623rd MEETING

Thursday, 18 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. AL-BAHARNA said that, for the sake of completeness, three basic elements must be incorporated in article 40. The first was the notion of the injured State, as identification of the injured State was a vital part of the process of invoking the responsibility of a State for an internationally wrongful act. The second was the notion of the State's legal interest, for a distinction had to be made between a State that was directly injured by an internationally wrongful act and other States that merely had a legal interest in the act giving rise to the obligation invoked by the injured State. The third element was the obligation to the international community *erga omnes*, because, where an obligation was owed to the international community as a whole, all States had a legal interest in the performance of the obligation, in which case the obligations *erga omnes* would arise, according to the judgment of ICJ in the *Barcelona Traction* case, either directly under international law or under generally accepted multilateral treaties, such as human rights treaties.

2. Article 40, as adopted on first reading, included all three elements, but had been criticized for not being comprehensive and for its inconclusive formulation, which had led to some confusion over the correlation of obligations and rights, as pointed out by the Special Rapporteur in paragraph 75 of his third report (A/CN.4/507 and Add.1–4). As stated in paragraph 78, Governments had also expressed serious concerns over the wording of paragraph 2, subparagraphs (e) and (f), and paragraph 3, although they had supported the idea of drawing a distinc-

tion between States specifically injured by an internationally wrongful act and States having a legal interest in the performance of the obligation. That distinction would lead to the creation of two categories of States: those in the first category would have the right to seek reparation in their own right, whereas those in the second could only claim cessation of the wrongful conduct and for reparation to be made to the specifically injured State.

3. He agreed with the Special Rapporteur, in paragraph 96, that article 40 failed to spell out the ways in which multilateral responsibility relations differed from bilateral ones, equated all categories of injured State and failed to distinguish between States "specially affected" by a breach of a multilateral obligation and States not so affected. Draft article 40 bis addressed those shortcomings and contained all the necessary elements within the context of the legal consequences of State responsibility: it drew a distinction between specifically injured States and those having a legal interest in the performance of the obligation, and it clarified the obligation owed to the international community *erga omnes* or to a group of States of which the injured State was a member. It also distinguished between cases where the obligation breached was owed to the injured State individually and cases where a State had a legal interest in the performance of an obligation established for the protection of the collective interests of a group of States. In addition, it differentiated between responsibility arising from multilateral relations and that arising from bilateral ones.

4. Mr. Simma's proposal (ILC(LII)/WG/SR/CRD.1/Rev.1) did not meet the requirements he had outlined, as it completely avoided the central issue of the injured State. The proposal did retain the distinction between cases where an obligation breached was owed to the State individually and cases where it was owed to the international community, or where it had been established to protect the collective interests of a group of States. However, to say that a State was entitled to invoke all legal consequences of an internationally wrongful act while drawing no distinction between the individual injured State and States not directly injured but having a legal interest in the performance of the obligation was not helpful in determining the legal consequences of the author State's responsibility. Moreover, there was an apparent contradiction between paragraphs 1 and 2: paragraph 1 stated "all legal consequences" but "all" was replaced by "[certain]" in paragraph 2.

5. Mr. Pellet's proposal (ILC(LII)/WG/SR/CRD.2) included all the necessary elements to which he had referred, but the English version, at least, was confusing and stood in need of redrafting. Paragraph 2 seemed to be irrelevant since its application was dependent on article 36 bis and it overlapped with the proposal's article 40-2, which also dealt with the legal interest of a State. Moreover, the confusion was compounded by the inconsistent numbering of the paragraphs and the use of unnecessary headings. However, it was significant that neither Mr. Pellet's nor Mr. Simma's formulations changed paragraph 3 of the Special Rapporteur's proposal for article 40 bis.

6. The one merit of Mr. Pellet's proposal was that it contained a definition of an injured State, defining it as "a State which has suffered [material or moral] injury as a

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

result of internationally wrongful conduct attributable to the State responsible". It would be recalled that the Government of France considered that the articles should make express reference to the material or moral damage suffered by a State as a result of an internationally wrongful act of another State.³

7. As to the proposal by Mr. Economides (ILC(LII)/WG/SR/CRD.3), it contained all the elements of the Special Rapporteur's proposal but with stylistic variations. In paragraph 1, the choice of the words "may, as the case may be, ... in particular" weakened the paragraph, making it non-exclusive. However, the introduction in paragraph 1 (b) of the notion of the "protection of fundamental interests of the international community", even though the expression was rather vague and there was no legal basis to define when an obligation was "essential" for that protection, would be welcomed by those in favour of taking stronger measures against States responsible for serious violations.

8. With regard to the contentious issue of paragraph 3 of article 40 as adopted on first reading, it could be argued that paragraph 1 (b) of the proposed article provided general coverage of the most serious internationally wrongful acts and violations of human rights that affected the international community as a whole, but, in his view, such acts, which constituted international crimes, should be placed in a category of their own. A reference to such acts should therefore be included in one form or another in paragraph 1 (b) of article 40 bis. Moreover, the Special Rapporteur, in response to the concerns expressed by some members, should provide a definition of the injured State in a new paragraph to be added to his proposals.

9. Mr. GALICKI said that the Special Rapporteur had done an excellent job of redrafting an article which, in its original form, was a model case of the over-detailed but unproductive exemplification of possible situations. He had shifted the emphasis from the complicated, though still not exhaustive, definition of an "injured State" to the question of the right of a State to invoke the responsibility of another State. In doing so, he had focused on the problems of States' entitlement to invoke responsibility in respect of multilateral obligations and on the extent to which differently affected States might invoke the legal consequences of a State's responsibility. He had also introduced a distinction between injured States, in the narrow sense, and States with a legal interest which were not themselves specifically affected by the breach of an international obligation. That distinction seemed to be fully justified, especially in the light of the *Barcelona Traction* case concerning obligations *erga omnes*—obligations towards the international community as a whole, where all States could be held to have a legal interest in the protection of the rights involved.

10. Article 40 bis seemed to meet with the general approval of the members of the Commission. The individual proposals submitted by members were aimed, not at contesting the Special Rapporteur's ideas, but at improving and clarifying them. An emphasis on the right of a State to invoke the responsibility of another State, rather than on the definition of an injured State, was common to

all the proposals. The best way forward would be to identify the common points in the proposals and in the opinions expressed during the debate and to combine them with the draft article submitted by the Special Rapporteur.

11. The final version of article 40 bis would have to take into account the basic distinction between the two main possible sources of a State's right to invoke the responsibility of another State, namely, the injury suffered by a State as a result of an internationally wrongful act and the legal interest of a State in the performance of an international obligation. Mr. Pellet had rightly stressed that distinction, which was important for further consideration of the secondary consequences of State responsibility. When a State's legal interest was affected, but the State did not suffer direct injury, the range of permissible responses appeared to be narrower. However, another distinction should also be reflected in the article, namely, the distinction between bilateral and multilateral obligations. The treatment of bilateral obligations was, as pointed out by the Special Rapporteur in paragraph 102 of his report, a relatively simple matter, and seemed to be adequately reflected in paragraph 1 (a) of article 40 bis. In the much more complex case of multilateral obligations, the Special Rapporteur had distinguished, in table 1, three categories of multilateral obligations: obligations to the international community as a whole (*erga omnes*); obligations owed to all the parties to a particular regime (*erga omnes partes*); and the obligations to which some or many States were parties, but in respect of which particular States or groups of States were recognized as having a legal interest. Unfortunately, that classification was not clearly reflected in the actual text of article 40 bis. The classification into three categories of multilateral obligations seemed to be lost when combined with the distinction between injured States and States with a legal interest, which was reflected in the division of the article into two paragraphs. There was also some repetition: for example, obligations *erga omnes* appeared in both paragraph 1 (b) and paragraph 2 (a), and obligations concerning a group of States appeared in paragraph 1 (b) and paragraph 2 (b). The need to harmonize the two systems of classification—according to the sources of the right of States to invoke the responsibility of another State and according to the categories of obligations—appeared unavoidable.

12. In the proposals put forward by members, there was a common trend towards simplifying the wording and the underlying concept, although Mr. Gaja's proposal (ILC(LII)/WG/SR/CRD.4) went rather too far. It would be of use only if the concepts presented by the Special Rapporteur were rejected, but in the light of the discussion, that did not seem likely. The best course would be to refer article 40 bis as proposed by the Special Rapporteur to the Drafting Committee, together with the comments and proposals made during the discussion.

13. One proposal, that of Mr. Rosenstock (2622nd meeting), seemed particularly worthy of note, concerning the possible division of article 40 bis into two separate articles. Paragraphs 1 and 2 dealt with different sets of problems relating to injury and legal interest, and they could be separated if that would make it possible to formulate more clearly the conditions for, and the extent of, the right of a State to invoke the responsibility of another State. A proper place would have to be found for

³ See 2613th meeting, footnote 3.

article 40 bis, paragraph 3, since the importance of the content had been stressed during the debate.

14. Lastly, he thought the text of article 40 bis did not fully or optimally reflect the ideas expressed by the Special Rapporteur in his report. Since those ideas seemed to be fully acceptable, the Drafting Committee should try to give them final form.

15. Mr. KABATSI thanked the Special Rapporteur for an excellent third report and the five draft articles on general principles under chapter I of Part Two. Useful questions had been raised and important suggestions had been made during the discussion enriching the topic and furnishing guidance for the Special Rapporteur and the Drafting Committee. The first four articles were quite satisfactory, but article 40 bis was less so. The disparity between the title and contents of the article, for example, had already been pointed out.

16. An article clearly indicating which State or States could invoke the responsibility of another State or States was indeed necessary and was central to the whole project. Article 40 bis as proposed by the Special Rapporteur substantially met the need. Since a State could invoke the responsibility of another State only if it could claim to be materially or morally injured by an internationally wrongful act of another State, it was important to spell out how and when a State was considered to be so injured.

17. The article was in many respects a major improvement over article 40 as adopted on first reading. For legal advisers and practitioners, including leaders who were not lawyers, a more concise provision than the earlier article was very much called for. The four proposals by members of the Commission each had great merit and the Drafting Committee should take them duly into account. The Special Rapporteur's formulation, however, went a long way towards meeting the needs of the final users. Particularly welcome was the important distinction drawn between article 40 bis, paragraph 1, relating to direct injury to a State owing to a breach of a bilateral or multilateral obligation, and article 40 bis, paragraph 2, concerning a State that had only a legal interest in the performance of an obligation. Such a legal interest could be satisfied by ensuring that the international obligation was performed. In such a case the State should be concerned only with cessation and, where appropriate, assurances of non-repetition, and not with seeking reparation, which would be the concern of the States envisaged in paragraph 1.

18. With the various suggestions made during the discussion, article 40 bis as proposed by the Special Rapporteur should be referred to the Drafting Committee.

19. Mr. CRAWFORD (Special Rapporteur), summing up the discussion, thanked members for their helpful comments and penetrating criticisms in what had been the first debate since the thirty-seventh session of the Commission, in 1985, on the central question of Part Two. Another virtue of the discussion was that to some degree it put to rest Mr. Brownlie's concern that the Commission was taking on too much.

20. Article 40 had few supporters, and his catalogue of its deficiencies had been generally endorsed. The article

was prolix in dealing with bilateral obligations. On multilateral obligations, it was diffuse, repetitive and lacking in symmetry with the rest of the draft, as Mr. Tomka had cogently argued (*ibid.*). It failed to build on existing law on the invocation of multilateral responsibilities, in particular the *Barcelona Traction* case and article 60, paragraph 2, of the 1969 Vienna Convention. Lastly, it equated obligations and rights and consequently failed to cope with the issue of States that had differing interests in the performance of an obligation. Mr. He had pointed to the dramatic difference between an obligation *erga omnes* and a right *erga omnes* (*ibid.*). There was general support for the formulation of Part Two in terms of the obligations of the responsible State rather than the rights of another State or States, and for the proposed distinction between Part Two and Part Two bis. Plainly, there was also strong support for referring article 40 bis to the Drafting Committee. The proposed treatment of bilateral obligations in a single, simple phrase had likewise been endorsed.

21. Beyond those points, however, were areas of greater controversy. Mr. Brownlie had indicated (2616th meeting) the need to write, not for law professors, but for practitioners, a text that was intended primarily for use by States, and not to delve so deeply into underlying theory as to lose sight of the purpose of the draft. Mr. Operti Badan had very pertinently recalled that the text had to be completed for submission to the General Assembly at its fifty-sixth session, in 2001. He agreed with Mr. Brownlie on the need for caution and that it was a question, not of whether there was to be a *renvoi* to general international law in the matter of multilateral obligations, but of how extensive that *renvoi* should be. Clearly, the situation was still developing and could hardly be enunciated comprehensively, let alone codified, and the formulations therefore had to be flexible to some degree.

22. Two approaches had been suggested. The first, reflected in his proposal and those of Messrs Economides, Pellet and Simma, sought to provide additional clarification and further specification in the field of multilateral obligations. The second, advocated by Mr. Gaja, pointed to the placement of a series of definitions on the specification of States that were entitled to invoke responsibility without actually saying what they were. It was true, as Special Rapporteur Riphagen had said in his preliminary report,⁴ that the more important and general the obligation, the less guidance there was in international law concerning who had the right to invoke the obligation. ICJ had hardly distinguished itself by the guidance it gave, despite the dictum in the *Barcelona Traction* case. Yet the second approach should be used, not as a first line of reasoning, but as a fall-back, in case the work in the Drafting Committee did not yield greater clarity with regard to multilateral obligations. If a general *renvoi* were adopted, the Commission would disbar itself from making any further distinctions between categories of injured States. Such distinctions were nonetheless necessary, for it was widely held that the positions of a victim—even of a crime like aggression—and of a third State with an interest in the maintenance of peace and security were different. The Drafting Committee should explore the

⁴ *Yearbook* . . . 1980, vol. II (Part One), pp. 128–129, document A/CN.4/330, para. 97.

various versions of article 40 bis with a view to providing some further specification with regard to multilateral obligations.

23. He agreed with Mr. Brownlie and Mr. Pellet, though not with Mr. Hafner, that although article 40 must be approached against the background of the general theory of obligations, the Commission had a more precise concern, namely to identify those States which ought to be able to invoke the responsibility of another State, and the extent to which they could do so. In that respect he wished to stress the value of article 60, paragraph 2, of the 1969 Vienna Convention, which was the only place in the Convention where the word “bilateral” appeared. The Commission had approached the problem in the context of the law of treaties, had distinguished between bilateral and multilateral obligations, and had emphasized that the State specially affected by a breach of a multilateral obligation should be able to invoke that breach against a background in which the “ownership” of the rights associated with a multilateral obligation lay with the States that were collectively parties to a treaty, and not with individual States. The recent discussion in the Commission had implied that the relevant rights belonged to particular States. That was true in regard to bilateral treaties and of bilateral obligations. Article 60, paragraph 2, was concerned with a different problem, however, namely the suspension of multilateral treaties for a material breach. It would be odd if a State could suspend a treaty but could not require the cessation of the breach. There was thus a direct analogy between the two problems.

24. The reference to “specially affected State” also helped to deal with the problem of harm or damage, because the State that was injured must surely be regarded as being in a special position. There might be a spectrum of specially affected States, but if so it was a relatively narrow one. The failure of article 40 to address that issue was a problem, as was the failure of some of the proposals, including Mr. Simma’s revised proposal, to do so.

25. In the discussion of multilateral obligations there had been some disagreement about the interpretation of relevant passages of the judgment of ICJ in the *Barcelona Traction* case, but that case had been only the starting point of the discussion. No one disputed the contention that there was a difference between the victim of a breach and a State which had an interest in the performance of the obligation, and that article 40 should reflect that difference.

26. There had also been some disagreement about the reservation concerning the invocation of responsibility by entities other than States as set out in article 40 bis, paragraph 3, but the prevailing view seemed to be that it was of value. He thought it essential, because it reconciled the difference in scope between Part One of the draft and the remaining parts. It had, accordingly, to find a place somewhere, but exactly where was a matter for the Drafting Committee to decide.

27. Article 40 had referred to human rights in very broad terms, had overridden other provisions in the draft and had indirectly conferred rights of response that went well beyond anything that could be justified in the context of

“ordinary” breaches of human rights. His own view was that the Commission should be consistent in insisting that the draft should apply to the whole range of international obligations and did not operate on the basis of any particular primary obligation. A position should be reached in respect of international obligations, and the various human rights obligations, universal and regional, particular and general, widely accepted and controversial, should be allowed to find their place within that framework. Mr. Hafner was right to say that the implicit treatment of regional human rights obligations in article 40 bis was questionable, and the Drafting Committee would have to consider that matter.

28. He wholly agreed with Mr. Simma’s reaction to the issue of injury raised by Mr. Pellet. The concept of harm, to use a neutral term, was directly relevant, and he had incorporated the reference to the “specially affected State”, derived from article 60, paragraph 2, of the 1969 Vienna Convention, to reflect it. Mr. Galicki had mentioned the overlapping of references to multilateral obligations, and it was certainly inelegant, but it was necessary, because the victim of aggression was in a different position from a third State that was concerned by the aggression. That was precisely what ICJ had said in the *Namibia* case with respect to the distinction between the rights of the people of South West Africa and the concerns of the United Nations or of individual Member States such as Ethiopia and Liberia. A further problem with Mr. Pellet’s proposal was that the phrase “[material or moral] injury” called up a morass of uncertainty. It was a *renvoi* to some unspecified body of law, not a description in its own right.

29. Another point common to the various alternatives was what could be described as “the article 19 issue”. He fully respected the wish of some members that the draft should incorporate proper distinctions between the most important obligations, those of concern to the international community as a whole, and the most serious breaches of such obligations, and he agreed with Mr. Pellet that there could be breaches of non-derogable obligations which did not raise fundamental questions of concern to the international community as a whole in terms of collective response.

30. The problem with article 40, paragraph 3, was that it overlapped with and was subsumed by the more general category of obligations owed to the international community as a whole, of which, if it existed, it was a sub-category. But once it was established, as ICJ had done in the *Barcelona Traction* case, that all States had an interest in compliance with those obligations, no more need be said for the purposes of article 40 bis. Mr. Pellet, although asserting that States could commit crimes, had expressly accepted that point in his proposal. For his own part, he thought it might well be necessary to reflect those other elements elsewhere in the draft, but the approach he had been advocating for several years was to treat the problem in a functional manner and scrutinize responsibility for the particular purposes for which it arose in the draft. Invocation of responsibility was one thing: the consequences of the invocation might be something else. In that way, the problem could be disaggregated and agreement reached on some of its elements. He thus preferred Mr.

Pellet's approach to the one followed by Mr. Economides, although aspects of Mr. Economides' proposal were very elegant and economical and could be considered by the Drafting Committee. Nevertheless, once it was accepted that States had a legally protected interest in respect of compliance with obligations *erga omnes*, then the question of invocation was to that extent solved. Further questions could be dealt with as they arose. Mr. Economides had also asked whether the definition should be inclusive or exclusive. It was a thoughtful observation the Drafting Committee should bear in mind. In the context of a changing horizon, there was a case for an inclusive definition.

31. Mr. SIMMA said that in order to simplify the Drafting Committee's work, he withdrew his revised proposal (ILC(LII)/WG/SR/CRD.1/Rev.1), but maintained his original proposal (ILC(LII)/WG/SR/CRD.1).

32. Mr. GAJA said that both the Special Rapporteur's draft and members' proposals implicitly referred to concepts the Commission could not possibly define, such as "obligations *erga omnes*", "specially affected State", and so on. The Drafting Committee would endeavour to address those questions, but it could only go so far; the Commission was heading towards the difficulties of which Mr. Brownlie had spoken at the outset of the discussion.

33. According to some of the proposals, the *omnes*, the States that had only a legal interest, would be merely in a position to invoke responsibility: they could ask for cessation and perhaps assurances and guarantees of non-repetition, but nothing else. Supposing that one of the obligations in question was a human rights obligation which had been infringed by a State with regard to its nationals, the Commission was saying that there was an obligation of reparation. However, when no other State was specially affected, should no other State be entitled to invoke the obligation of reparation, the Commission might as well say that there was no obligation of reparation. It was important to consider both aspects: to whom the obligation was owed and who was the obligation's beneficiary. The right to invoke, in the sense of the right to claim that a certain obligation must be fulfilled, should be given to all the *omnes*, albeit not for their own benefit. Countermeasures were not the issue at present.

34. Mr. SIMMA said that Mr. Gaja's comments were a telling example of the procedural problem facing the Commission that was responsible for part of the confusion and some of the misgivings voiced by Mr. Sreenivasa Rao and others about opening the door to invoking State responsibility. In other words, the Commission did not really have a clear picture of all the implications. All it had at the moment was table 2 of the report, which, regarding the rights of States that were not directly injured by a breach of an obligation *erga omnes*, listed a number of possibilities. As he understood that list, those States could go beyond merely putting something on paper or claiming a breach: any State could act on behalf of the victim and had a whole range of remedies, including countermeasures in case of well-attested gross breaches. It was on the basis of that reading of table 2 that he generally agreed with the Special Rapporteur's approach.

35. Mr. KAMTO said that, regarding an approach based on obligations and not on rights, he had never been

opposed to including the element of exceptional seriousness to justify intervention. Confusion between human rights and international obligations to protect a certain number of rights meant that it was difficult to introduce a distinction between different categories of human rights. As for the potential rights of any other State member of the international community to intervene or to invoke the responsibility of another State for human rights violations, it was clear that a degree of seriousness was required. It might even be necessary expressly to use the term "seriousness" in the text, because when the Commission spoke, for example, of torture or genocide, it approached the issue from the standpoint of international obligations, whereas when it spoke, say, of the right to life, it addressed the question from the standpoint of human rights. That distinction was useful.

36. Clearly, the content of the concept of obligations *erga omnes* was unknown. If the term was used without defining it or providing for safeguards, it might well be concluded that every State faced with an obligation *erga omnes* had the right to invoke the responsibility of another State and even take countermeasures. It was a very dangerous course, because it would open Pandora's box. It should be remembered that other mechanisms already existed for dealing with situations affecting human rights: the Security Council intervened regularly in such instances under Chapter VII of the Charter of the United Nations, and hence there was no reason for the Commission to allow States to take countermeasures in response to breaches of obligations *erga omnes*.

37. Mr. GOCO said that when article 40 had been adopted on first reading, it had been hoped that a provision could be produced that was brief, yet flexible enough to encompass all relevant issues. His initial impression was that Mr. Gaja's proposal did just that.

38. Mr. Sreenivasa Rao had referred to *locus standi*, which he seemed to equate with legal interest. That point was germane to the current discussion and might be addressed in the Drafting Committee.

39. Mr. ECONOMIDES said that Mr. Gaja was entirely right: the example he had given was pertinent and was not covered by the Special Rapporteur's draft. He also agreed with most of Mr. Kamto's remarks. For certain very serious breaches, it was necessary to expand the list of injured States. But in any event, the Commission's final version must not prevent the development of international law through customary law.

40. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft article 40 bis to the Drafting Committee.

It was so agreed.

The meeting rose at 11.25 a.m.

2624th MEETING

Friday, 19 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*)* (A/CN.4/506 and Add.1¹)

[Agenda item 6]

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

1. The CHAIRMAN, noting that the Commission had completed its consideration of draft articles 1 to 4 on diplomatic protection, invited the Special Rapporteur to sum up the discussion.

2. Mr. DUGARD (Special Rapporteur) thanked the members of the Commission for having participated in the debate in a constructive manner. He was aware that many of them would have preferred him not to have included draft articles 2 and 4 in his first report (A/CN.4/506 and Add.1), but he had felt intellectually compelled to do so.

3. As far as article 2 was concerned, it had to be acknowledged that the use of force was construed by some States as the ultimate form of diplomatic protection. Support for that position was to be found in the literature both before and after the Second World War. It was a fact that States had, on a number of occasions, forcibly intervened to protect their nationals, arguing that they were exercising the right to diplomatic protection. It could be predicted that they would continue to do so in future. In all honesty, he could not, like his two predecessors, contend that the use of force was outlawed in all circumstances in the case of the protection of nationals. He had, however, attempted to subject such intervention to severe restrictions. Some members had rejected draft article 2 on the grounds that the Charter of the United Nations prohibited the use of force even to protect nationals and that such use was justified only in the event of an armed attack. However, most members of the Commission had not taken a firm position

on the Charter provisions, preferring to reject article 2 on the grounds that it simply did not belong to the subject of diplomatic protection. The debate had revealed that there was no unanimity on the meaning of the term “diplomatic protection”, but it had also shown that diplomatic protection did not include the use of force. It was thus quite clear that draft article 2 was not acceptable to the Commission.

4. As to article 4 on the obligation of States to protect their nationals, he recognized that he had introduced the proposal *de lege ferenda*. As already indicated, the proposal enjoyed the support of certain writers, as well as of representatives in the Sixth Committee and ILA; it even formed part of some constitutions. It was thus an exercise in the progressive development of international law. But the general view had been that the issue was not yet ripe for the attention of the Commission and that there was a need for more State practice and, particularly, more *opinio juris* before it could be considered. Again, it seemed quite clear that the Commission did not accept draft article 4.

5. Referring to the general philosophy behind draft articles 1 and 3, he noted that the members of the Commission agreed that the concept of diplomatic protection was not obsolete. There had been strong support for the view that diplomatic protection was an instrument for the protection of human rights, although some members had felt that too much emphasis had been placed on the human rights aspect, while others thought that diplomatic protection had nothing to do with human rights at all; that, however, was a minority view.

6. There had also been no strong objection to the idea that diplomatic protection was founded on a fiction. Most members of the Commission thought it a useful instrument for the protection, in the first instance, of nationals of a State and, in a wider perspective, of the whole of humanity. However, there was uncertainty about the general scope of diplomatic protection. The title itself had been criticized and some members had suggested that it should be made clear that the object of the exercise was not to protect diplomats, but nationals in foreign States. Views were also divided on the desirability of including functional protection in the exercise.

7. Article 1 had not given rise to any major objections. However, doubts had been expressed about the language employed, in particular the word “action”, which had been construed differently by different members. It had been suggested that the matter should be given closer attention. Some members had also suggested that the language of article 1 should be brought into line with that of the articles on State responsibility. In that connection, he pointed out that the complaints had, in large measure, arisen in connection with the translation of certain terms into French.

8. Interesting comments had been made about the need for a wrongful act to have been committed before diplomatic protection could be exercised. Mr. Brownlie and Mr. Gaja had drawn attention to the possibility of a potentially wrongful act, such as a draft law providing for measures which could constitute a wrongful act. That question, too, would have to be considered further.

9. In article 3, he had proposed that the Commission should adopt the traditional view deriving from the

* Resumed from the 2620th meeting.

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

judgment of PCIJ in the *Mavrommatis* case, according to which diplomatic protection was a right of the State, which did not act as the agent of its national. Some members had said that the State's claim should be more strongly emphasized. Others had taken the view that greater emphasis should be placed on the fact that the injury to the national was the consequence of a breach of international law. He believed that the idea was implicit in the draft article, but agreed that it could be made more explicit.

10. Article 3 also provided that, subject to article 4, the State of nationality had a discretion in the exercise of diplomatic protection. A number of members had appealed to him not to stress the discretionary power of the State, as that might discredit current constitutional attempts to assert the obligation of States to protect their nationals. Other members had gone so far as to suggest that some of the provisions of article 4 might be included in article 3 in order to attempt to curb the discretionary power of States.

11. To sum up, it appeared that there was considerable support for articles 1 and 3 and that a clear majority of members were in favour of referring them directly to the Drafting Committee. However, in view of the difficulties which had arisen, particularly in respect of article 1, he thought that such action would be premature and that it would be preferable to look at the articles in the context of an informal consultation and to reconsider them in plenary before referring them to the Drafting Committee.

12. Mr. ROSENSTOCK recalled that, at the beginning of the debate, it had been suggested that the Commission would do well not to enter into a debate on Article 2, paragraph 4, and Article 51 of the Charter of the United Nations concerning the use of force, as that did not come within the framework of the topic under consideration. In that sense, it was not accurate to say that any particular view on the subject of draft article 2 had prevailed in the discussion. His impression was that the Commission had felt that the point did not need to be raised in the context of the draft articles on diplomatic protection. It would be unfortunate if the summary record of the meeting suggested that all members of the Commission had agreed on any particular view. What they had unanimously agreed upon was not to adopt a position on the question.

13. Mr. BROWNLIE said that he agreed. Many members had said that the question of the use of force was outside the Commission's mandate in relation to diplomatic protection. He hoped that attention would be given in the informal consultations to the question of exercise of diplomatic protection in respect of threatened injury.

14. Mr. ECONOMIDES said that the Commission had unanimously recognized that diplomatic protection was a peaceful international institution, but had then divided up into two schools of thought, the first in favour of having a provision ruling out the use of force, as well as interference in the internal or external affairs of a State, expressly included in the draft articles, and the second considering such a provision unnecessary.

15. Mr. DUGARD (Special Rapporteur) said that Mr. Rosenstock's comments correctly reflected the feeling in the Commission that the question of the use of force fell outside the scope of diplomatic protection. He had simply

wanted to indicate that a minority of members of the Commission had taken a stronger position.

16. Mr. KATEKA said that the summary records of meetings should speak for themselves and that no commentary by the Special Rapporteur was required. Mr. Economides was right in saying that the Commission as a whole held diplomatic protection to be a peaceful mechanism. However, some members, such as Mr. Candioti and others, had put forward other proposals. It could therefore not be concluded that there had been unanimity on any question.

17. Mr. PAMBOU-TCHIVOUNDA said that Mr. Economides was right to recall that two schools of thought existed on the subject of draft article 2. The first, based on a principle of contemporary general international law, considered that it was important to remove any trace of ambiguity and that the prohibition on the use of force should therefore be included in the draft articles. The second did not consider it necessary. Still others, such as Messrs Candioti, Galicki and Kamto, had proposed, in order to resolve the problem, that language reflecting the first of those two trends should be incorporated in draft article 1. In the end, the Commission had not taken any decision.

18. He noted with regret that the Special Rapporteur's summing up did not give an accurate picture of the debate. Mr. Dugard had failed to mention some essential matters of methodology and approach to the topic which had been raised several times. All members of the Commission had agreed about the need to delimit, clarify and redefine the topic more clearly than was done in the report. Article 1 was essential in that respect, since it determined the scope of diplomatic protection, from which all other provisions in the draft articles derived. All questions of substance raised by members had some relation to that article. Accordingly, he was in favour of holding informal consultations in order to determine whether the exercise should be resumed.

19. The CHAIRMAN recalled that the discussion on articles 1 to 4 had been concluded, that the Special Rapporteur had already summed it up and that it should not be reopened.

20. Mr. GOCO said that article 2 had been the subject of an in-depth debate which had shown that the question of the use of force did not fall within the scope of diplomatic protection. He therefore considered it essential that the draft should include an absolute prohibition on the use of force in the context of diplomatic protection.

21. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed that articles 1 and 3 should be reconsidered in informal consultations.

It was so decided.

22. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 5 to 8, contained in his first report.

23. Mr. DUGARD (Special Rapporteur) said that article 5 in essence examined the principle stated in the *Nottebohm* case, namely, that there should be an effective link

between the State of nationality and the individual for the purpose of the exercise of diplomatic protection. The question was whether that principle accurately reflected customary law and whether it should be codified.

24. The *Nottebohm* case was seen as authority for the position that there should be an effective link between the individual and the State of nationality, not only in the case of dual or plural nationality, but also where the national possessed only one nationality. Two factors might, however, limit the impact of the judgment in the case and make it atypical. First, doubts remained about the legality of Liechtenstein's conferral of nationality on Nottebohm under its domestic law. Secondly, Nottebohm had certainly had closer ties with Guatemala than with Liechtenstein. He therefore believed that ICJ had not purported to pronounce on the status of Nottebohm's Liechtenstein nationality vis-à-vis all States. It had carefully confined its judgment to the right of Liechtenstein to exercise diplomatic protection on behalf of Nottebohm vis-à-vis Guatemala and had therefore left unanswered the question whether Liechtenstein would have been able to protect Nottebohm against a State other than Guatemala.

25. With regard to the application of the principle, little information on State practice was available and academic opinion was divided. Acceptance of the principle would seriously undermine the scope of diplomatic protection, because, in the modern world, as a result of globalization and migration, many people who had acquired the nationality of a State by birth or descent had no effective link with that State. That was why he thought that the genuine link principle must not be applied strictly and that a general rule should not be inferred from it. His proposed draft article 5 therefore stated that "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual sought to be protected has acquired by birth, descent or by bona fide naturalization." It drew on two fundamental principles that governed the law of nationality. First, a State's right to exercise diplomatic protection was based on the link of nationality between it and the individual; secondly, it was for each State to determine under its own law who its nationals were. It also took account of the fact that, far from being absolute, the right was a relative one, as demonstrated, in paragraphs 95 to 105 of the report, by doctrine, case law, international custom and the general principles of law. For example, birth and descent were deemed to be satisfactory connecting factors for the conferment of nationality and the recognition of nationality for the purposes of diplomatic protection. The same was true, in principle, for the conferment of nationality through naturalization, whether automatically, by operation of law in the cases of marriage and adoption or on application by the individual after fulfilling a residence requirement. International law would not recognize fraudulently acquired naturalization, naturalization conferred in a discriminatory manner or naturalization conferred in the absence of any link whatsoever between the State of nationality and the individual. In that case, it was a question of abuse of right on the part of the State conferring nationality that would render the naturalization *mala fide*. There was, however, a presumption of good faith on the part of the State, which had a margin of appreciation in deciding upon the connecting factors that it considered necessary for the granting of its nationality.

26. Article 6 dealt with dual or multiple nationality, which was a fact of international life, even if all States did not recognize it. The question was whether one State of nationality could exercise diplomatic protection against another State of nationality on behalf of a dual or multiple national. Codification attempts, State practice, judicial decisions and scholarly writings were divided on the subject, as demonstrated in paragraphs 122 to 159 of the report. There was, however, support for the rule advocated in article 6: subject to certain conditions, a State of nationality could exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national where the individual's dominant nationality was that of the first State. The criterion of dominant or effective nationality was important and the courts had to consider carefully whether the person concerned had closer links with one State than with another.

27. Article 7, which dealt with the exercise of diplomatic protection on behalf of dual or multiple nationals against third States, namely, States of which the individual was not a national, provided that any State of nationality could exercise diplomatic protection without having to prove that there was an effective link between it and the individual—the link of nationality had merely to be demonstrated in accordance with article 5. It was a compromise rule, against a background of differing opinions, backed up by the decisions of the Iran–United States Claims Tribunal and the United Nations Compensation Commission.

28. The rule set out in article 8, which concerned the exercise of diplomatic protection on behalf of stateless persons and refugees, was an instance of the progressive development of international law. It clearly departed from the traditional position stated in the *Dickson Car Wheel Company* case. A number of conventions had been adopted on stateless persons and refugees, particularly since the Second World War, but they did not deal with the question of diplomatic protection. Many writers had suggested that that was an oversight which should be remedied because some State must be in a position to protect refugees and stateless persons and that State was the State of residence, given that residence was an important aspect of the individual's relationship with the State, as demonstrated by the jurisprudence of the Iran–United States Claims Tribunal. The question remained whether the Commission was ready to follow that course, even though practice and jurisprudence on the subject were non-existent.

29. Mr. BROWNLIE thanked the Special Rapporteur for his very useful research. The report contained a great deal of helpful material, especially on the relevant jurisprudence and the decisions adopted in specialized jurisdictions like the Iran–United States Claims Tribunal and the United Nations Compensation Commission (established after the Kuwait–Iraq conflict). Nevertheless, he did not always accept the Special Rapporteur's analysis and had serious criticisms concerning draft articles 5 to 8.

30. Article 5, which based the right of diplomatic protection on nationality, did not take account of certain political and social realities. Everyone knew that, in many traditional societies, no provision was made for the registration of births and that, in such societies, large numbers

of illiterate people would be hard pressed to prove their nationality. There was also the case of victims of war and refugees who crossed borders precipitately and generally without travel documents and who were able to say only where they came from. For such people, to demand proof of nationality, particularly documentary proof, was clearly meaningless. What mattered were the facts.

31. In that sense, the principle of “effective nationality” was useful in providing a basis for nationality that would otherwise not be available, but the position of the Special Rapporteur on that point seemed to be a little unclear. After taking the prudent position, in paragraph 117 of the report, in his comments on article 5 that the genuine link requirement proposed by the *Nottebohm* case seriously undermined the traditional doctrine of diplomatic protection if applied strictly, as it would exclude literally millions of people from the benefit of diplomatic protection, he then went back to that principle in the comments on articles 6 and 8, giving it a large and positive role.

32. The principle of effective or dominant nationality had not been established by the *Nottebohm* case. There was much francophone material, going back many years, on that principle. In State practice, there was constant reference to residence, not nationality, as the connecting factor that should be taken into consideration in the settlement of territorial disputes. In the real world, residence would provide a basis for diplomatic protection which would otherwise be impossible to prove by normal documentation.

33. Without wishing at the current stage to make a formal drafting proposal, he thought that, at the end of article 5, the words “or by” after the words “descent” should be deleted and that the words “or other connecting factors recognized by general international law” should be added after the words “naturalization in good faith”.

34. Mr. OPERTTI BADAN said that he entirely agreed with Mr. Brownlie and would go even further. To base the right of diplomatic protection on nationality was to forget not only the case of stateless persons and refugees but also the increasingly frequent instance of nationals who established their residence abroad. The place of residence created a real link with the host State that was just as effective as nationality. Even if that was a step beyond traditional notions, it was a fact of modern-day life that the Commission should take into account. In the consideration of articles 5 to 8, residence should be considered not just as an accessory factor, but as an actual linking factor.

Unilateral acts of States (A/CN.4/504, sect. C, A/CN.4/505,² A/CN.4/511³)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

35. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), introducing his third report on unilateral acts of States (A/CN.4/505), said that it consisted of a general introduc-

tion, in which he considered the possibility of basing the topic on the 1969 Vienna Convention and referred to the links between unilateral acts and estoppel, and a chapter in which he proposed reformulating articles 1 to 7 as contained in his second report.⁴ The new draft articles read as follows:

Article 1. Definition of unilateral acts

For the purposes of the present articles, “unilateral act of a State” means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organization.

Article 2. Capacity of States to formulate unilateral acts

Every State possesses capacity to formulate unilateral acts.

Article 3. Persons authorized to formulate unilateral acts on behalf of the State

1. Heads of State, heads of Government and ministers for foreign affairs are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf.

2. A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as authorized to act on behalf of the State for such purposes.

Article 4. Subsequent confirmation of an act formulated by a person not authorized for that purpose

A unilateral act formulated by a person who is not authorized under article 3 to act on behalf of a State is without legal effect unless expressly confirmed by that State.

Article 5. Invalidity of unilateral acts

A State may invoke the invalidity of a unilateral act:

(a) If the act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed by its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;

(b) If a State has been induced to formulate an act by the fraudulent conduct of another State;

(c) If the act has been formulated as a result of corruption of the person formulating it, through direct or indirect action by another State;

(d) If the act has been formulated as a result of coercion of the person formulating it, through acts or threats directed against him;

(e) If the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;

(f) If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;

(g) If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;

(h) If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.

² Ibid.

³ Ibid.

⁴ *Yearbook ... 1999*, vol. II (Part One), document A/CN.4/500 and Add.1. For the text of the draft articles proposed in his second report, *ibid.*, vol. I, 2593rd meeting, para. 24.

36. Unfortunately, when he had prepared the third report, he had not yet received any reply from Governments to the questionnaire, which had been circulated by the Secretariat to all Governments on 30 September 1999,⁵ on their practice in respect of unilateral acts, although some of them had replied since.

37. Everyone recognized the important role played by unilateral acts in international relations and the need to draw up precise rules to regulate their functioning. But such codification and progressive development was made more difficult by the fact that those acts were by nature very varied, so much so that several Governments had expressed doubts as to whether rules could be enacted that would be generally applicable to them. That view must be qualified, however, because it should be possible to pinpoint features common to all such acts and thus elaborate rules valid for all.

38. As to the possibility of using the 1969 Vienna Convention as a basis, he noted that the members of the Commission had expressed very differing and even contradictory views on that question at preceding sessions. To avoid reopening an endless discussion, he favoured an intermediate approach: although simply transposing the articles of the Convention to unilateral acts was obviously not conceivable, it was not possible to ignore that instrument and its *travaux préparatoires* either. The parts of the Convention which had to do, for example, with the preparation, implementation, legal effects, interpretation and duration of the act clearly provided a very useful model, although unilateral acts did, of course, have their own features.

39. The link between unilateral acts and estoppel was perfectly clear. However, as he pointed out in paragraph 27 of his report, it should be borne in mind that the precise objective of acts and conduct relating to estoppel was not to create a legal obligation on the State using it; moreover, the characteristic element of estoppel was not the State's conduct but the reliance of another State on that conduct.

40. In view of the comments made by the members of the Commission at the preceding session and by the Sixth Committee, he had taken special care in reformulating article 1 (former article 2) on the definition of unilateral acts, which was very important because it was the basis of all the draft articles. The issue was not so much to give the meaning of a term as to define a category of acts in order to be able to delimit the topic. A number of elements were decisive: the intention of the author State, the use of the term "act", the legal effects and the question of autonomy or, more exactly, the "non-dependence" of the acts. All unilateral acts, whether protests, waivers, recognitions, promises, declarations of war, etc., had in common that they were unilateral manifestations of will and had been formulated by a State for an addressee (whether a State, several States, the international community as a whole or one or more international organizations) with a view to producing certain legal effects. In practice, however, the fact that unilateral acts could take various forms did not simplify matters: for example, a protest could, like a promise, be formulated by means of a written or oral

declaration, but also by means of what might be called "conclusive" conduct, such as breaking off or suspending diplomatic relations or recalling an ambassador. The question was whether such acts were really unilateral acts within the meaning of the draft articles.

41. All unilateral acts nevertheless contained a fundamental element, the intention of the author State. It was on that basis that it could be determined whether or not a State intended to commit itself legally or politically at the international level. If the State did not enter into such a commitment, then, strictly speaking, there was no unilateral act.

42. It was worth noting that, in new draft article 1, the word "act" had replaced the words "act [declaration]" used in former article 2. It was usually by means of a written or oral declaration that States expressed waiver, protest, recognition, promise, etc., and, at first glance, it had appeared that that term could serve as a common denominator, but he had ultimately joined those who had considered that that approach was too restrictive and that the word "declaration" could not apply to certain unilateral acts. He therefore decided to use the word "act", which was more general and had the advantage of not excluding, a priori, any material act, although doubts remained as to whether certain acts or conclusive conduct, such as those envisaged in the context of a promise, could be considered unilateral acts.

43. Another question, which had already been raised, was that of legal effects, which would, of course, be dealt with in greater detail at a later stage. In the earlier version, legal effects had been confined to obligations which the State could enter into through a unilateral act, but, after the discussion in the Commission, it had appeared that the words "produce legal effects" had a much broader meaning and that the State could not only enter into obligations, but also reaffirm rights. According to the doctrine, although a State could not impose obligations on other States through a unilateral act, it could reaffirm that certain obligations were incumbent on those States under general international law or treaty law. That was the case, for example, with a unilateral act by which a State defined its exclusive economic zone. In so doing, the State reaffirmed the rights which general international law or treaty law conferred on it and rendered certain obligations operative which were incumbent on other States. Needless to say, that position was not contrary to the well-established principles of international law which were expressed in the sayings *pacta tertiis nec nocent nec prosunt* and *res inter alios acta* because it was clear that a State could not impose obligations on other States in any form without the consent of the latter.

44. The term "autonomous" used in former article 2 to characterize unilateral acts no longer appeared in the new draft article owing to the unfavourable reactions of several members of the Commission, which were summarized in paragraph 63 of the report. He nevertheless believed that a number of points would need to be added to the commentary to distinguish unilateral acts which depended on a treaty from unilateral acts in the strict sense. He had always considered that a dual dependence could be established: dependence vis-à-vis another act and dependence vis-à-vis the acceptance of the unilateral

⁵ See General Assembly resolution 54/111 of 9 December 1999, para. 4.

act by its addressee. That was what had prompted him to put forward the idea of dual autonomy in his first report,⁶ but he had not included it in the new draft, since the comments of the members of the Commission had been far from favourable. Although the word “autonomy” was not used, however, it must be understood that the unilateral acts in question did not depend on other pre-existing legal acts or on other legal norms. The question remained open and he looked forward with interest to learning the Commission’s majority opinion on the issue.

45. Another question considered in the report was that of the unequivocal character of unilateral acts. As already pointed out, the State’s manifestation of will must be unequivocal and that question was more closely linked to the intention of the State than to the actual content of the act. The manifestation of will must be clear, even if the content of the act was not necessarily so. “Unequivocal” meant “clear” because, as noted by the representative of one State in the Sixth Committee, it was obvious that there was no unilateral legal act if the author State did not clearly intend to produce a normative effect.

46. In a final point on new draft article 1, he said that the term “publicly”, which had to be understood in connection with the State to which the act in question was addressed, which must be aware of the act in order for it to produce effects, had been replaced by the words “and which is known to that State or international organization”. What was important was for the text to indicate that the act must be known to the addressee because the unilateral acts of the State bound it to the extent that it intended to commit itself legally and the other States concerned were aware of that commitment.

47. It was also suggested in the report that the draft should not include an article based on article 3 of the 1969 Vienna Convention because, unlike that instrument, the draft articles covered unilateral acts in the generic sense, which included all categories of unilateral acts. The Convention had to do with a type of treaty act, the treaty, which it defined without excluding other acts distinct from the treaty to which the Convention might also apply. Account had also been taken of the opinion of the members of the Sixth Committee who did not want an article on that question to be included in the draft.

48. New draft article 2 was by and large a repetition of former article 3 based on the drafting changes suggested by the members of the Commission at the preceding session. The report also contained a new draft article 3, which had been modelled on article 7 of the 1969 Vienna Convention and followed former article 4 with a few changes. Some States had indicated that the Convention might be closely followed in the case of the capacity of representatives or other persons to engage the State. He had said that paragraph 1 of the article should remain unchanged, since, during the consideration of his second report, the comments had been very similar to those made when the Commission had adopted its draft articles on the law of treaties and to those made at the United Nations Conference on the Law of Treaties. Paragraph 2 had been amended, however, and its scope expanded so as to permit persons other than those referred to in paragraph 1 to act on behalf of the State

and to engage it at the international level. That text was in keeping with the specificity of unilateral acts and departed from the corresponding provision of the Convention. The point was to take account of the need to build confidence and security in international relations, although it might be thought that, on the contrary, such a provision might have the opposite effect. In his view, enlarging authorization to other persons who could be regarded as acting on behalf of the State might very well build confidence, and that was precisely the aim of the Commission’s work on the topic. The paragraph used the word “person” instead of the word “representative” and, in the Spanish version, the word *habilitada* instead of the word *autorizada*, which had not been accepted at the preceding session for the reasons given in paragraphs 106 and 107 of the third report.

49. New draft article 4, which had been based on the 1969 Vienna Convention, adopted the wording of former article 5. That provision covered two different situations: either a person might act on behalf of the State without being authorized to do so or he could act on behalf of the State because he was authorized to do so, but either the action in question was not within the competencies accorded to that person or he acted outside the scope of such competencies. In such cases, the State could confirm the act in question. In the Convention, that confirmation by the State could be explicit or implicit, but it had been considered that, in that particular case, in view of the specificity of unilateral acts and the fact that, in certain instances, clarification must be restrictive, such confirmation should be explicit so as to give greater guarantees to the State formulating the unilateral act.

50. The second report had contained a specific provision, draft article 6, on expression of consent, that had been considered unduly reminiscent of treaty law, i.e. too close to the corresponding provision of the 1969 Vienna Convention and hence neither applicable nor justifiable in the context of unilateral acts. As indicated in paragraph 125 of the report, if it was considered that articles 3 and 4 could, in fact, cover the expression of consent, then a specific provision on the manifestation of will or expression of consent would not be necessary. The question of manifestation of will was closely connected with the coming into being of the act, i.e. the time at which the act produced its legal effect or, in the case of unilateral acts, the time of their formulation. Under treaty law, by contrast, the coming into being of a treaty, or the time at which it produced its legal effect, was connected with its entry into force. That was undoubtedly the most complex and important issue that the topic raised and it would be addressed at a later stage.

51. Silence, which was linked to expression of consent, was being omitted from the study because, as recognized by the majority of the members of the Commission, it did not constitute a legal act, even if it could not be said to produce no legal effect. On the other hand, the importance attached to silence in the shaping of wills and the forging of agreements and in relation to unilateral acts themselves was well known. Nevertheless, whether or not silence was a legal act and regardless of the fact that the current study dealt with acts formulated with the intention to produce legal effects, silence could not, in his view, be considered to be independent of another act. In remaining silent, a

⁶ *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/486.

State could accept a situation, even waive a right, but it could hardly make a promise. At all events, silence was basically reactive conduct that must perforce be linked to other conduct, an attitude or a previous legal act.

52. Lastly, the report examined the question of the invalidity of a unilateral act, an issue that had to be addressed in the light of the 1969 Vienna Convention and international law in general. New draft article 5 was broadly based on the provisions of the Convention and was similar to former article 7 proposed in the second report. In the new version, he had inserted an important cause of invalidity based on a comment Mr. Dugard had made at the preceding session⁷ on the invalidity of an act that conflicted with a decision adopted by the Security Council under Chapter VII of the Charter of the United Nations on the maintenance of international peace and security. Although the Council could also adopt decisions under Chapter VI on the establishment of commissions of enquiry, the cause of invalidity related solely to Council decisions adopted under Chapter VII.

53. In conclusion, he said that his report was a general introduction to the topic and that he intended to expand on different aspects, taking into account the guidance offered by members of the Commission in the working group to be established.

54. Mr. CANDIOTI thanked the Special Rapporteur for his efforts to bring order into a topic that presented many difficulties owing to its complexity and diversity and to come up with new ideas that helped demarcate and pinpoint the purpose of the study. He shared the Special Rapporteur's view of the importance of unilateral acts in day-to-day diplomatic practice and agreed that an attempt must be made to organize and clarify the general legal principles and customary rules governing such acts in order to promote stability in international relations. It was a pity that so few States had thus far responded to the questionnaire on the subject sent to them by the Secretariat. The information contained in replies to the questionnaire, particularly on specific practice in respect of unilateral acts, would be of invaluable assistance to the Special Rapporteur and the Commission in their work.

55. Like the Special Rapporteur, he thought that the treaty law norms codified in the 1969 Vienna Convention served as a useful frame of reference for an analysis of the rules governing unilateral acts of States. Treaties and unilateral acts were two species of the same genus, that of legal acts. It followed that the rules reflecting the parameters and characteristics shared by all categories of legal act should be applicable both to bilateral legal acts—treaties—and to unilateral legal acts. But the existence of parallel features did not warrant the automatic transplantation of the norms of the Convention for the purpose of codifying the rules governing unilateral acts of States. There were important differences and that was why the Special Rapporteur had wisely recommended “a flexible parallel approach”.

56. The comments by the Special Rapporteur on the question of estoppel and its possible connection with unilateral acts were pertinent. Obviously, estoppel was not, as

such, either a unilateral or a bilateral legal act, but a situation or an effect which was produced in certain circumstances in the context of both legal and ordinary acts and which had a specific impact on a legal relationship between two or more subjects of international law. It could therefore be omitted for the time being from the general study of unilateral acts and taken up later to determine its possible impact in particular contexts.

57. With regard to the definition of a unilateral act in new draft article 1, the new wording proposed by the Special Rapporteur, which was a simplified version of his previous proposals, was an improvement, although it could probably be further refined. The definition should set out the basic components of a unilateral act, namely, an expression or manifestation of will whereby a State, without requiring the assistance of one or more other subjects of international law, intended to produce legal effects at the international level. The definition therefore had two components, i.e. the unilateral expression of its will by a State and the intention to produce, by that means, legal effects at the international level. The Special Rapporteur had been right to leave out the notion of autonomy, which was ambiguous and could mean two different things at the same time, namely, the unilateral nature of the manifestation of will and the exclusion from the scope of the study of unilateral acts governed by other specific norms.

58. In his view, the word “unequivocal”, as a description of the manifestation of will, could be deleted. It should be understood that the expression of will in law must always be clear and comprehensible; if it was equivocal and could not be clarified by ordinary means of interpretation, it did not create a legal act. Moreover, the definition of the term “treaty” in the 1969 Vienna Convention did not require that the agreement of wills should be “unequivocal”, although it clearly should be in order genuinely to constitute an agreement.

59. The definition also did not have to deal in detail with the requirement that the addressee should know of the act of expression of will. That was already implicit in the terms “expression” or “manifestation” of will. A will that was not manifested or expressed in such a way as to come to the knowledge of its possible addressee could have no legal force whatsoever. Knowledge was thus a condition of validity rather than a part of the definition.

60. He endorsed the criteria invoked by the Special Rapporteur in support of the rules embodied in the two paragraphs of the new draft article 3. However, instead of mentioning “States concerned” in paragraph 2, it would be preferable to refer only to the practice and intention of the State formulating the unilateral act because it was, in principle, the only “State concerned” whose expression of will gave rise to the unilateral act through authorized persons, other than the head of State or Government or the minister for foreign affairs.

61. New draft article 5 concerning the invalidity of a unilateral act should probably be viewed as a preliminary approach to the issue, as the causes of invalidity called for more systematic and detailed analysis. The Special Rapporteur could perhaps try to specify the conditions determining the validity of unilateral acts in a subsequent

⁷ *Yearbook ... 1999*, vol. I, 2595th meeting, para. 24.

study, once the question of invalidity had been discussed. That would call for an examination of the possible material content of the act, the lawfulness of the act in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known and the production of effects at the international level. Once those conditions had been identified and described in detail, it would be easier to lay down appropriate rules governing invalidity.

62. He awaited with considerable interest the continuation of the Special Rapporteur's study of the topic, which would deal with extremely important issues such as the form, effects, binding character, interpretation, amendment, duration, suspension and revocation of unilateral acts. He had no doubt that, once the Special Rapporteur had submitted those components to the Commission, it would have a more comprehensive overview of the key components of the topic and would be better equipped to engage in a penetrating and mature discussion and to make headway in its work.

63. Mr. PAMBOU-TCHIVOUNDA paid tribute to the Special Rapporteur's fine achievement in reflecting the concerns of the members of the Commission and the representatives of States in the Sixth Committee. His third report was lively and well paced, although certain matters of substance, such as the reception of the manifestation of will by the addressee of the act, especially the form of reception, and the specification of the addressee or the whole circle of addressees, still had not been dealt with.

The meeting rose at 1 p.m.

2625th MEETING

Tuesday, 23 May 2000, at 10 .a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*) (A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its discussion of draft articles 5 to 8 contained in the first report of the Special Rapporteur (A/CN.4/506 and Add.1).

2. Mr. SIMMA said he wished to take issue with some of Mr. Brownlie's remarks (2624th meeting). In particular, he was unsure what Mr. Brownlie had in mind when he criticized the Special Rapporteur for failing to take due account of habitual residence in the list of factors connecting the State and the individual set forth in draft article 5. If he was referring to habitual residence as a means of acquiring nationality, it was an issue that had been discussed at length in the topic of nationality in relation to the succession of States and was out of place in the current discussion.

3. If, however, for argument's sake, habitual residence was examined in the context of diplomatic protection, two questions arose. First, did a person's habitual residence in a State give that State the right to exercise diplomatic protection? In his view, if the person concerned possessed another nationality acquired *jure soli* or *jure sanguinis* or through bona fide naturalization, the State whose sole connection with the individual consisted in his or her habitual residence there did not, by virtue of that fact alone, acquire the right to diplomatic protection. The situation would be different if the person concerned was stateless or a refugee, an issue that was addressed in article 8. The second question was whether a State whose nationality a natural person had acquired through *jus soli*, *jus sanguinis* or naturalization lost the right to diplomatic protection if the person concerned habitually resided in another country. Mr. Brownlie seemed to imply that it did. Habitual residence under those circumstances would become the natural enemy of diplomatic protection. He vehemently opposed that view, which at worst could lead to a revival of the Calvo clause,² and he strongly supported the Special Rapporteur's argument in paragraph 117 of the report, which had been severely criticized by Mr. Brownlie.

4. Again contrary to Mr. Brownlie, he considered that the Special Rapporteur's handling of the *Nottebohm* case was clever and appropriate. Given its status as the leading case of reference in the area of diplomatic protection, he could not agree that it had been overemphasized. He noted in passing that the words "and *jus soli* or *jus sanguinis*", in paragraph 112, should be altered to read "*jure soli* or *jure sanguinis*".

5. He urged the Special Rapporteur to expand on the subject of mala fide naturalization and its consequences in his comments on article 5 and would also welcome

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

² See *Yearbook . . . 1956*, vol. II, pp. 206–208, document A/CN.4/96.

further discussion of the distinction between bona fide and mala fide naturalization.

6. He agreed with the gist of article 6 and supported the inclusion of a reference to “dominant and effective” nationality. He also agreed with the suggestion that it be placed after article 7. The reference in paragraphs 155 and 156 to Bar-Yaacov’s treatise³ was somewhat misleading, since what was described as contemporary United States practice turned out to be nineteenth century practice. With reference to article 7, the Commission should make up its mind about how it wished to address the issue of gender-neutral language.

7. He supported article 8, although it clearly illustrated the overlap between State responsibility in respect of obligations *erga omnes* and diplomatic protection. The word “protection” in paragraph 181 was used in a loose sense which should be shunned in the context of diplomatic protection.

8. Mr. LUKASHUK informed the Commission that most of the members participating in the unofficial consultations which had taken place on the previous day had spoken in favour of the Special Rapporteur’s proposals.

9. While generally deferring to Mr. Simma’s views on Latin grammar, he remarked that the expressions *jus soli* and *jus sanguinis* were customarily used in the nominative case.

10. As to the substance of the report, too much attention was perhaps being given, both in the comments and in the draft articles themselves, to questions of nationality which related to a different area of international law. Article 5, for example, contained an attempt to define the lawful means of acquiring nationality “by birth, descent or ... naturalization”. In his view, it would be more correct to use the following wording: “... means the State whose nationality the individual seeking to be protected (lawfully) holds”.

11. While recognizing the relevance of questions of nationality to the topic of diplomatic protection and the desirability of resolving some of those questions in connection with the topic, he felt that the subject of diplomatic protection was complex enough in itself and that it would be appropriate to defer consideration of some of the nationality issues pending the completion of the draft as a whole. Article 5 would be acceptable if it was amended along the lines he had proposed.

12. Article 6 was designed to overturn a recognized standard of international law according to which the State of nationality could not exercise diplomatic protection against a State of which the injured person was also a national. Admittedly, some grounds did exist for introducing such a change, but the time was not yet ripe to do so. Clearly, the State of nationality could exercise some protection on behalf of a national in respect of a State of which that individual was also a national. However, that did not mean exercising the right of diplomatic protection to the full extent. He would therefore advocate that article 6, too, should also be held in abeyance.

13. While the substantial changes to existing practice proposed in article 7 were sufficiently well founded, they failed to take into account the rights of the third State on the territory of which the individual concerned was present. In his opinion, the article should be supplemented by a third paragraph making it clear that the third State was entitled to accord the right of diplomatic protection to only one of the States of nationality.

14. Lastly, article 8 represented progressive development of international law and it was warranted by international practice, as well as by instruments such as the European Convention on Consular Functions. The problem of the protection of stateless persons and refugees was extremely pertinent, for people in those categories numbered many millions worldwide. In his view, the expression “and/or” could be replaced by “or”. The passage in square brackets could be deleted, as legal residence in the claimant State was sufficient proof of an effective link.

15. Mr. HERDOCIA SACASA, thanking the Special Rapporteur for a well documented report, said that the topic of diplomatic protection presented the Commission with the formidable challenge of reaffirming the validity of an institution on which many complex decisions had been taken by arbitral tribunals, courts and special commissions, and of seeking to reflect in its proceedings not only established tradition but also recent developments such as the individual’s status as a subject of international law and a participant in the international legal order, especially in the areas of human rights and humanitarian law. A further challenge consisted in furthering the progressive development of diplomatic protection, especially on behalf of stateless persons and refugees.

16. Although article 5 went some way towards clarifying the term “State of nationality”, its scope might prove to be somewhat restrictive. The list of connecting factors could be extended to include other linkages recognized by international law, as noted by Mr. Brownlie. In particular, the case of stateless persons and refugees, mentioned in article 8, should be brought within the ambit of article 5. Some authors held that, in addition to nationals in the strict sense of the term, other persons could be represented or protected under special agreements by a State other than that of their nationality. For example, with reference to the advisory opinion of ICJ in the *Reparation* case, Oppenheim stated that there were cases in which protection might be exercised by a State on behalf of persons not having its nationality.⁴

17. Globalization and mass migration were contemporary phenomena that highlighted the need to adopt a practical approach to diplomatic protection. In paragraph 117, the Special Rapporteur recognized that the genuine link requirement proposed in the *Nottebohm* case could undermine the traditional doctrine of diplomatic protection if applied strictly, depriving large numbers of people who had been forced to leave their country and take up residence elsewhere of diplomatic protection. Therefore the door should be left open in article 5 to take account of the

³ N. Bar-Yaacov, *Dual Nationality* (London, Stevens and Sons, 1961).

⁴ See *Oppenheim's International Law* (2617th meeting, footnote 11), p. 515.

rights and aspirations of persons who had been uprooted and departed with only a tenuous link to a particular State. Circumstances had evolved since the *Nottebohm* case and its relevance should neither be overstated nor played down.

18. With regard to article 6, the Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, prepared by Harvard Law School,⁵ and the Convention on Certain Questions relating to the Conflict of Nationality Laws (hereinafter “1930 Hague Convention”) had carried great weight in establishing the principle that a State could not accord diplomatic protection to one of its nationals against a State whose nationality such person also possessed, a rule derived from the *Canevaro* case and restated in the judgment of ICJ in the *Reparation* case. While there was certainly a school of thought in favour of discarding the principle, leading publicists continued to view it as a rule of customary international law. Other writers such as Combacau denied that the jurisprudence in the *Mergé* case, which gave precedence to the principle of effective or dominant nationality over the equality of rights as between States, had really overturned the traditional rule, but nonetheless conceded that its scope had been reduced.⁶ Notwithstanding the *Nottebohm* case, which continued to be perceived as the fundamental frame of reference, the principle of the sovereign equality of States continued logically to enjoy strong support. In cases in which dual nationality was well established, any indiscriminate application of the principle of dominant or effective nationality could have absurd implications and might even undermine State sovereignty. As noted in the *Alexander* case, “no government would recognize the right of another to intervene thus in behalf of one whom it regarded as a subject of its own” [see p. 2531]. It might therefore prove necessary to amend article 6 to take account of cases of well established dual nationality. In paragraph 158, the Special Rapporteur himself stated that a tribunal should be cautious in applying the principle of preponderance of effectiveness where the links between the dual national and the two States were fairly evenly matched, as that would seriously undermine the equality of the two States of nationality. He would take that argument even further and submit—at least in general terms—that it did not seem reasonable for a person who had voluntarily accepted a State’s nationality to refuse to align his or her conduct with the order and internal procedures resulting from that choice. It followed that article 6 could not serve as a general rule and had to take account of the dictates of common sense and practical necessity.

19. Article 7 took a step in the right direction by permitting any State of a dual or multiple national to exercise diplomatic protection vis-à-vis a third party. As noted by the Special Rapporteur in paragraph 170, the only requirement in such circumstances was to demonstrate the existence of a bona fide link of nationality between the State and the injured person.

⁵ See article 16, subparagraph (a) (*Yearbook . . . 1956*, vol. II, p. 230, document A/CN.4/96, annex 9).

⁶ See J. Combacau and S. Sur, *Droit international public*, 4th ed. (Paris, Montchrestien, 1999) pp. 327–328.

20. Article 8 constituted an example of progressive development of international law inasmuch as it allowed diplomatic protection to be exercised on behalf of stateless persons and refugees residing in the claimant State. Mr. Lukashuk was right to say that it should not be necessary to demonstrate the existence of a link with the State concerned. The article reflected the humanitarian character of international law, which could not be indifferent to the plight of such persons. It also reaffirmed the role of the institution of diplomatic protection in achieving a basic goal of international law, that of civilized co-existence based on justice.

21. Mr. GOCO said that article 5 cited the three links of birth, descent and bona fide naturalization in defining the State of nationality. The well-known principles of *jus solis* and *jus sanguinis*, together with naturalization, were thus deemed to constitute the only acceptable links. In his view, it was an unduly restrictive approach, since other factors might effectively connect an individual to a given State and entitle him or her to diplomatic protection. Take, for example, the case of persons who sought repatriation to their country of origin, a country whose formal citizenship they had lost through force of circumstances. Habitual residence was another example: a person might be naturalized in another country because of the political circumstances in his or her country of origin. Other factors had been cited by the Special Rapporteur in paragraph 153 of his report.

22. It was acknowledged that every State had the power to determine under domestic law who its nationals were. But international law could set limits on that power in the context of diplomatic protection, since other States might have a valid reason to question its determination. While the State of nationality had the right, as recognized in article 3, to exercise diplomatic protection on behalf of a national unlawfully injured by another State, it might refrain from exercising that right for a variety of reasons. It might also take into account other links of nationality binding an individual to it, unless valid objections were raised by other States. It was therefore inappropriate to view the links mentioned in article 5 as exclusive.

23. He related an incident of special relevance to the draft articles of which he had personal knowledge. The ambitions of a well-known healer in the Philippines, who had run for the office of mayor and won, had been thwarted by the questioning of his eligibility on the grounds that he had left the country during a period of turmoil and obtained a naturalization decree from another country. The Supreme Court had endorsed the Solicitor General’s objection to his eligibility and rejected his defence on the basis of the necessity of seeking refuge during an unsettled period in his country of origin. Having later pursued his healing activities in the Russian Federation, he had been imprisoned on charges of malpractice and fraud. He had sought and obtained diplomatic protection from the Government of the Philippines. That was an illustration of the discretionary powers of the State in exercising diplomatic protection. Although the existence of *jus sanguinis* had not been in dispute, the requirement of citizenship for the holding of public office had been strictly applied but diplomatic protection at the very highest level had been granted without question when the person concerned was incarcerated abroad.

24. It was not inferred that the incarceration in the Russian Federation had constituted a wrongful act, or indeed that the individual had suffered any injury. He had been imprisoned due to a misapprehension of his activities and once that issue had been cleared up, the man had been set free. The fact remained, however, that he had been incarcerated for several months before eventually being released and allowed to return home. The right of the Philippines to exercise diplomatic protection could, of course, be seriously questioned because the link of nationality was in doubt. But if the individual's request for protection had been denied, he would have had to fend for himself; and as the previous Special Rapporteur, Mr. Benouna, had pointed out in his preliminary report,⁷ the exercise of diplomatic protection was more a moral duty than a legal obligation, provided it was in keeping with the overriding interests of the State of nationality.

25. For those reasons, he wished to propose, subject to drafting changes, the following addition to article 5: "... provided, however, that the State of nationality may consider other links or ties to nationality in the exercise of diplomatic protection, unless valid objections are raised by any other State or States at the international level". He would comment on other draft articles later.

26. Mr. DUGARD (Special Rapporteur) remarked that the case described by Mr. Goco would appear to square with article 7, paragraph 1.

27. The CHAIRMAN said that, under Japanese law, someone who was a Japanese national by birth did not lose his nationality as a result of acquiring another nationality abroad. He wondered whether the same was true of the Philippines.

28. Mr. TOMKA said he doubted whether diplomatic protection could be exercised in the absence of an allegation of an internationally wrongful act.

29. Mr. GOCO agreed with the Special Rapporteur that the Philippine Government's action on behalf of the individual in question fell squarely within the ambit of article 7. Replying to the Chairman and Mr. Tomka, he said that, since the Philippine Government's representations had been accepted by the then Government of the Russian Federation, neither the question of whether or not an internationally wrongful act had been committed nor the issue of dual nationality had been pursued further.

30. Mr. GALICKI said Mr. Goco's statement confirmed his impression that there was still some misunderstanding about article 5. As he understood it, the purpose of the article was simply to define the means or methods of acquisition of nationality. The Special Rapporteur himself had undeniably complicated the issue by referring to those methods as connecting factors in paragraphs 101 and 102 of the report. While the granting of nationality on the grounds of birth or descent was well described and recognized in international law, naturalization—even if qualified by the words "bona fide"—left a great deal of room for differentiation, depending on the background of each case, which might be adoption, marriage, or for example, habitual and lawful domicile. Those factors had to be

considered by the State in the process of granting nationality to an individual. If his understanding of the object of article 5 was correct, it would follow that adding other connecting factors recognized by general international law would merely spoil the construction of the article.

31. Mr. GAJA, noting Mr. Lukashuk's suggestion that consideration of the issues covered by article 5 should be postponed, said that he would be inclined to go a step further. Was there any need to lay down criteria for determining whether an individual did or did not possess a certain nationality? It seemed unnecessary in the context of the draft on diplomatic protection. Rather, the point was to ascertain whether a State that had endorsed a claim on the part of an individual was entitled to do so. Nationality played a role, but it was not necessary to go into the elements that substantiated it.

32. Article 5 did not anyway attempt to provide comprehensive coverage of the rules of international law concerning nationality. It said that birth, descent and naturalization were appropriate criteria, but did not take into account the possibility that, under international law, a State could in certain circumstances be under an obligation to grant nationality to individuals, or else to refrain from doing so. On the other hand, article 5 would provide some grounds on which a State could challenge another State's conferral of nationality on an individual. By claiming that naturalization had not been effected bona fide, a State would be contending that naturalization had been granted in bad faith. That would be an unusual step for a State to take, and the accusation of bad faith would not be taken lightly. The Special Rapporteur had recalled in his introductory statement (2617th meeting) how sensitive States were to any suggestion of impropriety in the exercise of what they regarded as their sovereign prerogative: that of granting nationality to individuals.

33. It would, accordingly, be advisable to follow the safer course taken by ICJ in the *Nottebohm* case and to assume that States were in principle free to grant nationality to individuals. The question of whether a given individual had or did not have the nationality of a certain State was one that implied the application of that State's legislation and was best left to the State's own determination. According to the judgment in the *Nottebohm* case, the way to approach the nationality requirement was to allow other States, if they so wished, to challenge the existence of an effective link between a State and its national. That solution was similar to the one suggested by Mr. Brownlie (2624th meeting): to replace nationality with effectiveness. Nevertheless, he thought nationality should be retained as a requirement and should in principle be a matter for the claimant State to assess. Lack of effectiveness would simply entitle other States to object to a claim.

34. It was true, as the Special Rapporteur had pointed out, that there were few examples in State practice of challenges to the effectiveness of nationality. There were even fewer examples, however, of States challenging the way in which nationality had been granted by another State. The number of cases that illustrated one or the other challenge was not decisive: rather, it had to be ascertained whether States to which a claim was presented felt entitled to use lack of effectiveness as an objection.

⁷ See 2617th meeting, footnote 2.

35. If the Commission retained the effectiveness test, it should introduce some restrictions so as to make it workable. It should consider whether the lack of effectiveness of an individual's nationality was open to challenge by any other State, or whether it was only for a State that had the most significant links to contend that there were no genuine links with the claimant State. In paragraph 109 of his report, the Special Rapporteur rightly pointed out that some passages of the judgment in the *Nottebohm* case supported the existence of a relative test—the idea that only the State with the most significant links could object that there was no genuine link between the individual and the claimant State. Yet there were other passages in which the test of effectiveness or genuine link was described in a more general way.

36. The *Barcelona Traction* case had concerned a corporation, not an individual, but ICJ had nonetheless referred to the *Nottebohm* test. Although it had not explicitly endorsed that test, the Court had looked into whether it worked with regard to Canada and had concluded that there were sufficient links between *Barcelona Traction* and Canada. It had not compared those links with those of Spain, where the subsidiary companies operated, or of Belgium, of which the company that held the *Barcelona Traction* shares was considered to be a national.

37. Aside from the support provided by those judgments of ICJ, the absolute test also seemed preferable for policy reasons. Diplomatic protection was based on the idea that the State of nationality was specially affected by the harm caused or likely to be caused to an individual. It was not an institution designed to allow States to assert claims on behalf of individuals, even though it could be used to protect human rights, namely, those of the State's nationals. The lack of a genuine link was an objection that a State could raise if it wanted to, irrespective of whether a stronger link existed with that State itself. If there was no genuine link, the State of nationality was not specially affected. That meant going back to the judgment in the *Nottebohm* case, and specifically, the words quoted by the Special Rapporteur in paragraph 106 of his report: "Conferred by a State, [nationality] only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national." [see p. 23].

38. As to article 8, there were perhaps alternatives to nationality that should be taken into account in particular circumstances, and the case of refugees and stateless persons was certainly one that demanded careful consideration. It was necessary to see whether a parallel with nationality could be drawn when habitual residence was involved. However, the Commission would not go very far if the exercise of diplomatic protection was admitted, because a refugee or stateless person had usually suffered an injury on the part of the State of residence, and that State was not likely to intervene. It was more a question of protecting human rights and trying to find out whether States other than the State of residence were entitled to bring a claim.

39. Mr. KAMTO, referring to Mr. Gaja's comment on the possibility of using diplomatic protection for the protection of human rights, asked whether an internationally

wrongful act alone could serve as a trigger for diplomatic protection, or whether an act that was merely likely to be internationally wrongful could do so.

40. Mr. GAJA said there was some division of views on that point. He himself thought that diplomatic protection should be linked with an internationally wrongful act, but that preventive action to stop a wrongful act from occurring might also be envisaged. Others believed that diplomatic protection could be exercised only after an internationally wrongful act had taken place.

41. Mr. ECONOMIDES said that article 5 was closely related to article 3 and set out the definition of a national, rather than of the State of nationality. The criteria for granting nationality—birth, descent or naturalization—were appropriate and generally accepted. Just one of those criteria was enough to establish an effective link between the State of nationality and its national, even if the national habitually resided in another State. He did not agree with the statement in paragraph 117 of the report that the genuine link requirement proposed by the judgment in the *Nottebohm* case seriously undermined the traditional doctrine of diplomatic protection. On the contrary, as long as an individual had the nationality of a State, on the basis of one of the criteria in question, the door was open for the exercise of diplomatic protection by that State.

42. The Special Rapporteur pointed out in paragraph 104 that nationality was not recognized in the case of forced naturalization. While that comment was pertinent, it appeared not to take account of State succession, an institution which accorded to the successor State the right to grant its nationality *en masse* and in an authoritarian manner, in particular to persons who held the nationality of the predecessor State and whose habitual residence was in the territory of the State that was the object of the succession. It was an important and recognized exception in international law to the rule of voluntary naturalization.

43. The use of the phrase *objet de la protection*, at least in the French version, should be avoided, owing to its pejorative connotation. The reference to "bona fide" naturalization was also dubious: it would be better to speak of "valid" naturalization.

44. Article 6, on dual nationality, represented a major innovation. The standard in such matters was that of the 1930 Hague Convention, which provided that a State could not afford diplomatic protection to one of its nationals against a State whose nationality that person also possessed. Article 6, on the other hand, gave the State of the individual's most effective or dominant nationality the right to exercise diplomatic protection against another State. Was the major modification proposed by the Special Rapporteur justified? He agreed with Mr. Herdocia Sacasa and Mr. Lukashuk that it was not. First, it would run counter to the principle of sovereign equality of States and would permit interference in the internal affairs of the respondent State in respect of a person who was legally a national of that State. Secondly, it would be hard to distinguish dominant from non-dominant or less dominant nationality. Thirdly, the cases in which a State of nationality brought a claim against another State of nationality

in exercising diplomatic protection for a person holding dual nationality were few and far between. Finally, dual nationality conferred a number of advantages on those who held it. Why should they not suffer a disadvantage as well?

45. Article 7 was also an innovation compared with article 5 of the 1930 Hague Convention which permitted a third State to apply the theory of the dominant nationality. Article 7 specified that a State of nationality could exercise diplomatic protection on behalf of a dual or multiple national against a third State. There the innovation was acceptable, since it involved a normal legal relationship between a State of nationality acting in the interest of its national and a third State to which an internationally wrongful act against that national was attributed. The concept of joint exercise of diplomatic protection by two or more States of nationality was likewise acceptable, as long as those States did not apply the solution of exclusive nationality. Nevertheless, provision should be made, in either article 7 or the commentary, for the possibility of two States of nationality exercising diplomatic protection simultaneously but separately against a third State on behalf of a dual national. In such a case, the third State must be able to use the traditional solution, namely to apply the dominant nationality principle in order to non-suit one of the claimant States.

46. He agreed with the general ideas set out in article 8, but in order to benefit from diplomatic protection, refugees must have been granted the right of asylum beforehand and must have had legal residence for a certain period of time—for example, at least five years. The effective link mentioned in square brackets was not a relevant criterion in the context of article 8.

47. Mr. MOMTAZ thanked the Special Rapporteur for the useful information in his report, which would surely help the Commission to pinpoint a very controversial topic. Article 5 presented no major problems, although a clearer distinction should be drawn between nationality that was granted automatically, by *jus soli* and *jus sanguinis* under existing domestic legislation, and nationality granted by naturalization. In the first instance, the absence of an effective link between the individual and the State of nationality could not be challenged and he therefore had difficulty in accepting the opposite view expressed by the writers mentioned in paragraph 112 of the report. True, in a certain number of cases, the lack of such a link rendered nationality granted on the basis of *jus soli* and *jus sanguinis* without practical effect. That was precisely why, in recent legislation a number of States required an individual whose nationality had been granted by *jus soli* to request confirmation of his or her nationality from the competent authorities, and in some cases such confirmation was subjected to certain conditions, including the existence of an effective link. In naturalization, however, the existence of an effective link between the individual and the State conferring nationality was essential. It was only in that context that one could speak of good faith, or rather that naturalization could be contested on the grounds of bad faith.

48. Article 6 posed some difficulties. He was grateful to the Special Rapporteur for his intellectual honesty in discussing the two schools of thought on dual nationality. The

codification efforts surveyed revealed a clear trend towards the rule of non-responsibility of States for claims brought by dual nationals. The literature was highly divided on that issue, despite the fact that many well-known modern writers cited in paragraph 145 of the report considered that diplomatic protection was applicable to cases of dual nationality. Court decisions, too, revealed no consensus on the issue.

49. The Special Rapporteur referred repeatedly to the precedents set by the Iran-United States Claims Tribunal, which had considered an impressive number of dual national cases and had clearly favoured the dominant nationality principle. Yet those precedents should be treated with caution. The Algiers Declarations of 1981, mentioned in paragraph 148, were in fact declarations by the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the Government of the United States and the Government of the Islamic Republic of Iran.⁸ The purpose of the Declarations was to resolve legal disputes between nationals of the United States and of the Islamic Republic of Iran. That fact was mentioned by the Tribunal itself in its award in the *Esphahanian* case, the first of many that were based on the principle of dominant nationality.

50. The Special Rapporteur referred in paragraph 148 to the institutional peculiarity of the Iran-United States Claims Tribunal and cited a passage from the award in the *Esphahanian* case which stated that it was not a typical exercise of diplomatic protection of nationals. The problem could be analysed further by a look at article III, paragraph 3, of the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran which stated that if the amount of the claims exceeded US\$ 250,000—as had been true in the *Esphahanian* case—the individual could resort directly to the Tribunal.⁹ It was interesting to note that, because of his Iranian nationality, Mr. Esphahanian had been able to become a shareholder, under extremely favourable conditions, in a United States company operating in Iran.

51. The question had arisen several times in the Iran-United States Claims Tribunal whether, in expropriating the property of its nationals without knowing that they had American nationality, Iran had committed an internationally wrongful act. The same issue had come up in other cases. He wished to point out that under Iranian law, only Iranian nationals had the right to own real estate. In other words, persons with dual nationality had greatly benefited from their Iranian nationality to acquire real estate and stocks.

52. For claims under US\$ 250,000, article III of the Declaration specified that in such cases the State of nationality could espouse the case of its national. In such instances, the procedure had greater similarities with diplomatic protection. Consequently, it might be preferable to develop the jurisprudence of the Iran-United States Claims Tribunal further, more particularly on the basis of

⁸ See ILM, vol. XX, No. 1 (January 1981), p. 223.

⁹ *Ibid.*, p. 231.

amounts of less than US\$ 250,000 for claims instituted by the State or States of the national concerned.

53. He had doubts about the relevance of the Iran-United States Claims Tribunal's jurisprudence. He noted in that connection that article 6 was not in conformity with customary international law, and he endorsed the points made on that question by Mr. Economides, Mr. Herdocia Sacasa and Mr. Lukashuk.

54. Article 7 moved in the right direction and article 8 was welcome. The only drawback was that article 8 called into question to some extent the fiction underlying the institution of diplomatic protection. He agreed with the argument set out by the Special Rapporteur in paragraph 178.

55. Lastly, he would point out that, pursuant to article 2 of the International Covenant on Civil and Political Rights, each State party undertook to respect and to ensure to all individuals within its territory the rights recognized in that instrument. Needless to say, that also covered refugees and stateless persons.

56. Mr. HE said that, while article 1 purported to be a description of the term "diplomatic protection" as understood in the language of international law, and article 3 worked on the assumption that the State of nationality had the right to exercise diplomatic protection on behalf of the national injured by the internationally wrongful act of another State, article 5 went on to expound the principle that it was the nationality link that provided the basis of a right to protection by the State. It was a recognized fact that each State had the right to determine under its own laws who its nationals were. Nevertheless, States had to comply with international standards in the granting of nationality. Birth, descent and naturalization were the generally accepted connections under international law, but in the case of naturalization, there must be a genuine and effective link between the State and the individual, not only in the case of dual or plural nationality, but also where the national had only one nationality. The conferment of nationality recognized for the purpose of diplomatic protection should be made in good faith. Thus, the conclusion drawn in paragraph 120 was logical and had enjoyed wide support.

57. However, questions might still be raised in connection with article 5. Paragraph 94 of the report, after pointing out that a State's right to exercise diplomatic protection was based on the link of nationality between the injured person and the State, stressed that except "in extraordinary circumstances", a State might not extend its protection to or espouse claims of non-nationals. That raised two questions. First, could stateless persons and refugees for whom diplomatic protection was provided in article 8 be included under "extraordinary circumstances"? He did not think so, as diplomatic protection could be exercised only at the discretion of a State on behalf of its own nationals. Secondly, could a State, by means of an international agreement, be vested with the right to represent another State and to act on behalf of the nationals of that State? It was a question which could not be answered without further study. Clarification was needed on both those issues.

58. Another question was whether the content of diplomatic protection should cover forms of protection other

than claims, since article 2, on the use of force, was to be deleted. It had been argued that diplomatic protection was by nature an international proceeding constituting an appeal by one State to another State for the performance of the obligations which the one owed to the other. In his preliminary report, the previous Special Rapporteur had also held that, in principle, the State retained the choice of means of action to defend its nationals, but could not resort to the threat or use of force in the exercise of diplomatic protection. Thus, the issue of whether other forms of protection could be available merited further consideration.

59. Article 6 contained the principle that in cases of dual nationality, the right to bring a claim was to be exercisable by the State to which the alien had stronger and more genuine legal or other ties. Although opinions were divided on that issue, the weight of authority supported the dominant nationality principle in matters involving dual nationals. The key words in article 6 were "dominant or effective" nationality, and in paragraph 153, a number of factors were cited from the jurisprudence of the Iran-United States Claims Tribunal. All those factors could be taken into account in determining the effectiveness of the individual's link with the State of nationality. Elucidation of those factors would be a major contribution to the implementation of article 6, and the Tribunal should be cautious in applying the principle of dominant nationality by balancing all the relevant factors so as to resolve that difficult issue in a satisfactory way.

60. Article 7, paragraph 2, was indisputable in principle, but it would be better if a specific case could be cited to substantiate its application. Article 8 as introduced by the Special Rapporteur was an exercise in progressive development, rather than codification, of the law. As a general rule, diplomatic protection was confined to nationals. Although human rights treaties afforded stateless persons and refugees some protection, most States did not intend to extend diplomatic protection to those two groups. A number of judicial decisions stressed that a State could not commit an internationally wrongful act against a stateless person, and consequently, no State was empowered to intervene or enter a claim on his behalf. The Convention relating to the Status of Refugees made it clear that the issue of travel documents did not in any way entitle the holder to the protection of the diplomatic and consular authorities of the country of issue, nor did it confer on those authorities the right of protection. The Convention on the Reduction of Statelessness was silent on the subject of protection. In spite of the developments in recent years relating to the protection of refugees and stateless persons, the time did not yet seem ripe to address the question of diplomatic protection for such persons.

61. Mr. KAMTO noted that two factors triggered diplomatic protection: an internationally wrongful act, and the link of nationality. It was therefore fully understandable that the Special Rapporteur, in a work involving impressive research, should proceed from the nationality link which must exist between the beneficiary of diplomatic protection and the State exercising that protection. But it was not for the Commission to consider, in the framework of the codification of diplomatic protection, the question of nationality or to enter into the methods for the acquisition of nationality. He fully agreed with Mr. Gaja's views

in that regard. The question should be left to States, for the matter was governed by national legislation and the principle of State sovereignty obviously applied.

62. He was of two minds about whether to retain article 5 and, if so, in what form. If it should be retained, it might be recast to read: "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual has or has acquired". It would then be left to national legislation to explain how the individual could acquire that nationality. But that was only satisfying at first glance, because the other hypotheses advanced, in particular by Mr. Herdocia Sacasa, were not fully covered by that definition. Mr. He had pointed to the situation of a State which, on the basis of an agreement, was led to ensure the interests of another State in another country. But if the Special Rapporteur wanted to rule out that case, perhaps he should also explain in the commentary to what extent that did not fall within the scope of diplomatic protection and clearly indicate that he was discarding it. If any part of article 5 was to be retained, the article should be recast as he had suggested.

63. Regarding the effective link, the judgment in the *Nottebohm* case could not be dismissed entirely. Mr. Momtaz had referred to diplomatic protection in respect of legal entities, but it could also be seen concerning individuals. In certain cases, the effective link would still be necessary to determine whether another State could exercise diplomatic protection. After all, the Special Rapporteur had himself reintroduced the concept of effective link when he spoke of the dominant nationality. What determined the dominant nationality, if not the effective link. Thus, in view of the judgment in the *Nottebohm* case, the concept of effective link should be tempered, but not wholly discarded.

64. As to article 6, the concept of dominant nationality should perhaps be retained. The question was whether the State of the dominant nationality could exercise diplomatic protection vis-à-vis the State of the other "weaker" nationality. Did the dominant State have the right to do so? The Special Rapporteur needed to clarify that point.

65. He had no objections to article 7 and article 8 was very appealing, because it concerned the progressive development of international law, which he supported. The Special Rapporteur had attempted to give a much sounder line of reasoning to article 8 than to some of those preceding it. He personally favoured retaining the words "effective link", because the advance was sufficiently important for it to be fenced in by a number of precautions. Diplomatic protection could not so easily be exercised on behalf of refugees without adding a number of extremely precise conditions, including the effective link. He was even inclined to include in the draft article or at least in the commentary the idea expressed by Mr. Economides, namely that a certain period of time must elapse before such protection was exercised. Of course, the Commission was aware of the humanitarian dimension to article 8. But one could not precisely in the name of protecting the rights of refugees, and hence of upholding humanitarian law or human rights, fail to lay down a number of conditions, especially since a well-established concept was at issue.

66. A more important question was whether, in the case of diplomatic protection exercised on behalf of refugees,

the State of refuge could exercise diplomatic protection vis-à-vis the refugee's State of nationality. The Special Rapporteur quite rightly pointed out, in paragraph 184, that it would be improper for the State of refuge to exercise diplomatic protection on behalf of the refugee when the refugee had fled to avoid persecution. In his opinion, not only the commentary, but also article 8 itself should include the idea that regardless of the circumstances contemplated, the State of refuge could not exercise diplomatic protection on behalf of a refugee vis-à-vis the refugee's State of nationality. But once that was said, the question then arose of the purpose of diplomatic protection, and he found it difficult to imagine in such a case that diplomatic protection could be exercised vis-à-vis another State other than the State of nationality, i.e. the State which the refugee had left—unless it was considered that the refugee in question was, for example, a businessman who could work internationally from the State of refuge. For one thing, the situation of refugees was generally regarded as temporary, and for another, refugees were subject to a number of restrictions which did not allow them to work elsewhere or to enjoy such protection. Thus, although the idea was unquestionably a move forward in the law it should be better illustrated and, if the idea was to be retained, it must emerge clearly from article 8 that such protection could not be exercised vis-à-vis the State of nationality of the refugee.

67. Mr. LUKASHUK said that he had doubts about one point. The beneficiaries of diplomatic protection were individuals, whereas the draft articles made no mention of the rights of the individual. When an individual resided in another State, he decided which of his two passports to present. In other words, he already determined his status. Did he have the right to do that? Did the individual have the right to refuse the diplomatic protection of a given State? He was not so certain about that, but it seemed to him that attention needed to be given to the rights of the individual.

The meeting rose at 12.45 p.m.

2626th MEETING

Wednesday, 24 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*)
(A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GALICKI noted that, in his first report (A/CN.4/506 and Add.1), the Special Rapporteur based the State's right to exercise diplomatic protection on the link of nationality between the injured individual and the State. That seemed to be the correct approach, since it provided a rather clear and quite exhaustive illustration of the impact of the institution of the nationality of individuals on the scope and practical extent of diplomatic protection.

2. In article 5, the Special Rapporteur's definition of the term "State of nationality" for the purposes of diplomatic protection was directly related to the methods of acquisition of its nationality by the individual to be protected. Three methods of acquisition were mentioned, birth, descent and bona fide naturalization, which were described by the Special Rapporteur in paragraph 101 of his report as connections generally recognized by international law. It had been suggested during the debate that other connecting factors recognized by general international law, such as habitual residence, should be included in article 5, but he thought that any such extension of the list was inadvisable. There were, in fact, many other ways of acquiring nationality, particularly naturalization, in respect of which legal writers drew a distinction between involuntary and voluntary naturalization, depending on whether a nationality was acquired by adoption, legitimation, recognition, marriage or some other means. Naturalization itself, even when limited by the Special Rapporteur to bona fide naturalization, remained a very broad concept, which assumed different forms based on different grounds. Among those grounds, habitual residence often played an important role, albeit generally in combination with other connecting factors. For instance, article 6, paragraph 4, of the European Convention on Nationality relating to categories of persons for whom a State party was to facilitate in its internal law the acquisition of its nationality specified seven categories, of which three were connected with lawful and habitual residence. In his view, however, aside from the exceptional situation provided for in article 8, habitual residence could not, under any circumstances, replace a link of nationality as a necessary factor connecting an injured person to a State entitled to exercise diplomatic protection on his or her behalf.

3. The Special Rapporteur attached a specific qualifier—"bona fide"—to the term "naturalization". As noted by Mr. Simma (2625th meeting), the "bona fide" formula required further consideration. The Special Rapporteur himself admitted that international law did not recognize naturalization in all circumstances. He had given examples of fraudulently acquired naturalization, naturalization conferred in a discriminatory way, forced naturalization and naturalization conferred in the absence of any link whatsoever. Those examples of "mala fide" naturalization did not, of course, exhaust the list of situations in which a

refusal to recognize naturalization could be justified. The grounds for the refusal could consist in the mala fides of the State concerned or in that of the individual. For example, article 7, paragraph 1 (b), of the European Convention on Nationality provided for loss of nationality in cases of "acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant". But despite the possibility of mala fide naturalization, it should be noted, as stated in paragraph 105 of the report, that there was, however, a presumption in favour of good faith on the part of the State. Moreover, he saw no good reason to limit the presumption of good faith exclusively to States and thought it should be extended to include individuals.

4. Although the bona fides requirement in article 5 referred only to naturalization, he found it hard to agree with Mr. Momtaz's view (*ibid.*) that it was impossible to contest nationality acquired on the basis of *jus soli* or *jus sanguinis*. In that case, the *raison d'être* of article 6 would be seriously threatened. Once again, he quoted the European Convention on Nationality, article 7, paragraph 1 (e), of which provided for the possibility of loss of nationality in the case of "lack of a genuine link between the State Party and a national habitually residing abroad".

5. Concluding his remarks on article 5, he said he was attracted by Mr. Kamto's proposal (*ibid.*) that the article should be shortened, ending with the word "acquired" and not referring to methods of acquiring nationality. In view of the differences of opinion expressed during the debate, including criticism of the omission of certain methods of acquisition of nationality such as repatriation, it seemed to be the best compromise solution. A shorter, more condensed version of article 5 should be sufficient to show the necessary linkage between the nationality of the injured person and the right of the State of nationality to exercise diplomatic protection on behalf of that person.

6. With regard to article 6, which dealt with the far more complex issue of the implications of multiple nationality for the right to exercise diplomatic protection, the Special Rapporteur was prepared to recognize the right of the State of nationality of an injured person to exercise diplomatic protection on his or her behalf vis-à-vis another State of nationality of the same person on condition that the nationality of the State exercising the protection was of a dominant or effective character. It had not been easy to reach that conclusion because the starting point for the analysis—article 4 of the 1930 Hague Convention—was somewhat discouraging, since it stated that "A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses". Even at the current time, that principle continued to have its supporters.

7. However, as shown by the Special Rapporteur, the development of the principle of dominant or effective nationality had been accompanied by a significant change in approach to the question of the exercise of diplomatic protection on behalf of persons with dual or multiple nationality. The Special Rapporteur had given many examples, mainly judicial decisions, ranging from the *Nottebohm* case to the jurisprudence of the Iran-United States Claims Tribunal, of the application of the principle

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

of dominant or effective nationality in cases of dual nationality. His conclusion in paragraph 160 of the report was that the principle contained in article 6 therefore reflected the current position in customary international law and was consistent with developments in international human rights law, which accorded legal protection to individuals even against the State of which they are nationals. However, the situation did not seem to be so simple. First, developments in international human rights law had thus far stemmed exclusively from treaty regulations and were of limited scope, since they concerned only States that were bound by those regulations and the rights and freedoms they established. Furthermore, the Special Rapporteur frankly admitted in paragraph 146 of his report that jurists were divided on the applicability of the principle of dominant nationality. He cited many practical instances of States refusing to exercise diplomatic protection on behalf of their nationals against another State of nationality, as well as the advisory opinion of ICJ in the *Reparation* case, which described States' practice of not protecting their nationals against another State of nationality as "the ordinary practice" [see p. 16].

8. The Special Rapporteur noted that the European Convention on Nationality failed to take sides on the issue. That was so, but he pointed out that the draft European Convention on Nationality, as it had stood in 1995, had contained a special provision allowing the State of nationality to exercise diplomatic protection on behalf of a given person against another State of nationality of the same person on humanitarian or other similar grounds. However, as a result of strong criticism and vigorous opposition from many States, including Poland, the provision had been deleted from the final text of the Convention. It should also be borne in mind that, while States were currently more tolerant of multiple nationality than 30 to 50 years before, many still incorporated in their internal legislation the rule contained in article 3 of the 1930 Hague Convention, namely, that "a person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses". And it seemed that States, even at the current time, were not so eager to waive that right.

9. Summing up his observations on article 6, he said it should be stressed that the principle of dominant or effective nationality had its place in cases of dual nationality when diplomatic protection was exercised by one of the States of nationality of the person concerned against a third State. However, when it came to applying the principle against another State of nationality of the person concerned, there was as yet insufficient support in customary international law for the codification of such a rule. Furthermore, if draft article 6 was to be addressed in the context of the progressive development of international law, the key factor in determining whether a State of nationality could exercise diplomatic protection against another State of nationality should not be the dominant nationality of the claimant State, but, rather, the lack of a genuine and effective link between the person concerned and the respondent State.

10. Article 7 on diplomatic protection exercised on behalf of a person with dual or multiple nationality against third States left him feeling somewhat confused. The Special Rapporteur seemed to reject the principle of dominant or effective nationality that he had sought to apply in arti-

cle 6. In paragraph 173 of his report, he recognized that the respondent State was entitled to raise objections where the nationality of the claimant State had been acquired in bad faith. As he saw it, the bona fide link of nationality could not totally supplant the principle of dominant or effective nationality as set forth in article 5 of the 1930 Hague Convention and confirmed by subsequent jurisprudence, including the judgment of ICJ in the *Nottebohm* case. Of course, the question arose as to whether the concept of bona fides should be interpreted in broad or narrow terms. Did it include the requirement, for example, of an effective link? In the text of article 7, the Special Rapporteur adopted a strictly formal approach to nationality, without considering whether an effective link existed between the person concerned and the States in question. On that point, he took the view that, while the principle of dominant nationality might well be left aside, an escape clause should nevertheless be inserted in article 7 to prevent the article from being used by a State to exercise diplomatic protection on behalf of a person of multiple nationality with whom it had no effective link.

11. Lastly, he fully supported article 8, which, as noted by many members of the Commission, had two unquestionable merits. First, it reflected the humanizing trend in contemporary international law and the tendency to take humanitarian factors into account. Secondly, it demonstrated in exemplary fashion how the Commission could, at the right time and in an appropriate context, fulfil one of its primary tasks, that of the progressive development of international law. Although article 8 required further refining, that did not detract from its value.

12. Mr. KABATSI, commending the Special Rapporteur on the great amount of work he had done in producing the proposed draft articles, as shown by the many legal decisions and scholarly works cited in the footnotes, said that, in principle, he had no problems with article 5, even if it seemed to him that the Special Rapporteur had taken unnecessary risks and had invited criticism by going too far into the subject of nationality. For the purposes of article 5, it was not necessary to know how nationality had been acquired or whether or not it was valid. Article 5 followed on well to article 1 on the scope of diplomatic protection and article 3 on the right of a State to exercise diplomatic protection in respect of its nationals. Subject to the limits set by international law, the idea that it was for each State to decide who its nationals were under its internal law was not in dispute. Normally there was always a presumption that, when a State asserted that an individual was its national, such was indeed the case. In order to exercise diplomatic protection, a State did not have to prove that the individual's nationality was valid. As stated in paragraph 118 of the report, the onus of proof was on the respondent State to produce evidence that the nationality was not valid for reasons such as those referred to in paragraph 104, to which could be added naturalization in violation of the provisions of the internal law of the claimant State. If the principle underlying article 5 was that, for the purposes of diplomatic protection of natural persons, a State of nationality was the State of which the individual sought to be protected was a national, why confuse the issue by indicating the circumstances that would disprove the validity of the nationality? To do so would be to stray into the area of primary rules in connection with a topic which was

supposed to be premised on secondary rules. He agreed with earlier speakers that article 5 should not indicate the methods by which nationality could be acquired.

13. Notwithstanding the classical rule of the non-responsibility of the State in respect of its own nationals, he endorsed article 6 for the reasons given by the Special Rapporteur in the report. Although, as pointed out in paragraph 153, there could be problems in determining the issue of effective or dominant nationality, it was nevertheless possible to do so. As between two States of nationality, the claimant State would in practice carry the day if the balance of the strength of the claims was manifestly in its favour. As indicated in paragraph 158, that was not an issue that had to be resolved, whether positively or negatively. Any doubt about the existence of effective or dominant nationality between the claimant State and the respondent State would have to be resolved in favour of the respondent State. That was a most useful provision *de lege ferenda* and he supported it.

14. He also supported article 7, with which he had no problems, and article 8, especially after the deletion—with which he agreed—of former article 4. He would not support article 8 if diplomatic protection were to be considered a right of an individual vis-à-vis the State which accorded him or her diplomatic protection, since that would impose an additional burden on States of asylum or States hosting refugees and stateless persons. But as the State would exercise diplomatic protection only as a matter of its own discretion, he saw the provision not as imposing an additional burden on the State in respect of refugees and stateless persons on its territory, but, rather, as a useful human rights provision which afforded protection to persons already in a difficult situation. It was tempting to reject the proposal as being outside the scope of the project as defined in articles 1, 3 and, possibly, also 5, but, since there was some support for it in certain conventions and writings, as well as for humanitarian reasons, that was an area that deserved progressive development. There was probably a third category of persons who might be accorded protection under the article, especially if the principle of permanent residence championed by some in connection with article 5 were accepted, namely, permanent residents who were neither refugees nor stateless persons, but who were habitual residents of the host State, possibly with permanent residence status. That State should be able to exercise diplomatic protection on their behalf—always, of course, against third States—especially where, for various reasons, the nominal State of nationality was unable to do so. The idea might be carrying the progressive development of international law too far, but it was worth thinking about.

15. Mr. KATEKA said that he agreed with the philosophy underlying article 5, which was based on a liberal application of the effective link principle laid down in the judgment in the *Nottebohm* case. However, the Commission should avoid adopting an open-ended provision which could lend itself to misinterpretation. Any addition to article 5 should be specific and vague formulations such as “any other connecting link recognized by international law” should be eschewed. The criterion of “habitual residence”, whose addition some members of the Commission had suggested would be a relevant factor only if habitual residence was based on the free choice and will of the

individual concerned. But that was not always the case and the Commission should exercise caution in that regard.

16. Article 6 codified the concept of dominant or effective nationality in the case of dual or multiple nationality. That was a controversial concept which had been a subject of dispute among international lawyers and tribunals. The idea that the State of active nationality should be able to exercise diplomatic protection against the State of inactive nationality seemed to undermine the principle of the equality of States. Article 6 therefore needed some reconsideration in order to reduce the possibility of conflict among the States of which the individual concerned was a national.

17. Article 8 came under the heading of the progressive development of international law and clearly departed from the traditional wisdom which limited the right to exercise diplomatic protection to the State of nationality. In that connection, it had been asked whether habitual residence would entitle an individual to diplomatic protection. The answer had been that, if the person concerned was stateless or a refugee, then the host country could exercise diplomatic protection, but, in the real world, the situation was less straightforward. For example, Tanzania was currently hosting close to 1 million refugees from neighbouring countries. Some of those refugees had been in Tanzania for over 30 years while technically still retaining the nationality of the country of origin, although, for practical purposes, they had lost contact with that country. UNHCR still protected them in the sense of the Convention relating to the Status of Refugees. If article 8 as proposed were adopted, the United Republic of Tanzania would be called upon to exercise diplomatic protection on behalf of such refugees, who were habitually resident on its territory. In such a case, it was legitimate to ask why an additional burden should be placed on a host country which was already suffering because of insufficient burden-sharing by the international community. He did not subscribe to the view that article 8 left the exercise of diplomatic protection to the discretion of the State. He also thought that the suggestion that a third State could exercise its diplomatic protection against the host State on behalf of refugees and stateless persons in the event of an internationally wrongful act went much too far. If there had been a breach of an obligation *erga omnes*, it would be up to UNHCR, as the “protecting” authority, to take the matter up with the Government of the country concerned. If international organizations could exercise functional protection in respect of their personnel, there was no reason why the United Nations or UNHCR could not do likewise for refugees under their “protection”. That would reduce the burden on host States, which were, for the most part, developing countries faced with acute problems affecting not only their economic life, but also the environment and public order. He urged the Commission to proceed with caution on that issue.

18. Mr. HAFNER said that he generally agreed with the Special Rapporteur’s approach to the issues covered in articles 5 to 8.

19. In addition to requiring a few drafting changes, article 5 also gave rise to another problem, already mentioned by previous speakers, that of “bona fide naturalization”.

The “bona fide” criterion was a subjective one and would be very difficult to apply. It was certainly not the point at issue in the current context and neither was the concept of “effective nationality”, which would restrict the right of a State to exercise diplomatic protection in a manner contrary to the object of the exercise, that of acting in the interest of the individuals concerned. He was therefore prepared to support Mr. Kamto’s proposal that the words “by birth, descent or by bona fide naturalization” should be deleted from article 5. However, as a compromise between Mr. Kamto’s position and that of the Special Rapporteur, he suggested that the useful *jus soli* and *jus sanguinis* criteria should be maintained, as should the criterion of naturalization accompanied by the words “in conformity with international law”, it being understood that naturalization covered all methods of acquiring nationality other than the first two.

20. Article 6 dealt with a special case in the context of the provision in article 7 and should therefore follow that article instead of preceding it. A formal problem arose in connection with the lack of clarity of the word “injured”, to which the Drafting Committee would probably have to give some attention. In the light of globalization and of frequent cross-border movement of persons, there was a need for a very precise definition of the conditions in which the right covered in article 6 could be exercised. The two criteria being envisaged were those of dominant nationality and effective nationality. The question was whether they were different or synonymous. Case law seemed to proceed on the assumption that they were equivalent. But if the conjunction “and” was incorporated between the adjectives “dominant” and “effective”, that would mean that the two concepts were different from one another. That would run counter to the findings of case law and would modify the right of a State to exercise diplomatic protection. He personally preferred the concept of “dominant nationality” because it implied that one of the two nationality links was stronger than the other. The expression “effective nationality”, on the other hand, could mean that neither of the links of nationality would suffice to establish the right of a State to exercise diplomatic protection; in the case of a person having dual nationality, for example, it could be maintained that neither of the links of nationality was effective. It would then follow that neither State could exercise diplomatic protection.

21. Article 7, paragraph 1, merely reflected the contents of article 5 without adding anything more. As for paragraph 2, the question that arose was not only whether cases to which it could be applicable actually existed in practice, but also what was the link between the diplomatic protection exercised by one State and that exercised by the other. For example, if a State of nationality waived its right to exercise diplomatic protection or if it declared itself satisfied by the response of the responding State, would that have an effect on the other State or States of nationality entitled to exercise diplomatic protection? Diplomatic protection could not be exercised jointly and there was no real need to provide for the particular case envisaged.

22. Agreeing that the rule embodied in article 8 came under the heading of the progressive development of international law, he said that he subscribed to the purpose it was designed to achieve, but the problem was a thorny one and he thought it would be more convenient to deal sepa-

rately with stateless persons, on the one hand, and refugees, on the other. The two cases were not the same. For example, was the condition of legal residence in the territory of the claimant State relevant in the case of refugees? Like other members of the Commission, he believed that it was the State which had granted refugee status, and not the State of residence, that should be empowered to exercise diplomatic protection. Supposing that a State member of the European Union, acting in conformity with the latter’s general policy, granted asylum or refugee status to an individual, that individual would enjoy the right to reside legally in another country of the European Union. In that case, there was no need to transfer the right to exercise diplomatic protection to the State of which the person in question was a legal resident; that right should be exercised by the State which had granted refugee status. The situation would, of course, be different if the criterion of dominant or effective link were added as an additional criterion to that of ordinary legal residence. It could and did happen that persons who had settled in another country and had acquired refugee status there, returned to their country of origin once the situation there had improved. In such a case, the State of origin alone should be empowered to exercise diplomatic protection. That problem should be dealt with in a separate provision of the draft articles. Lastly, consideration should also be given to cases where the refugee had suffered injury before leaving the country of origin.

23. Mr. SIMMA, referring to Mr. Hafner’s analysis of article 8 and the hypothetical case he had mentioned, said that it was not unusual for a person who had acquired refugee status in the first member State of the European Union he or she had entered to settle in another member country and to reside there for many years. In the event that such a person should require diplomatic protection, should the right to exercise it be limited, as Mr. Hafner suggested, to the country which the person had first entered and with which he or she perhaps no longer had an effective link?

24. Mr. HAFNER said he agreed that, in the case described by Mr. Simma, it would certainly be reasonable for the State of legal residence to be empowered to exercise diplomatic protection. The problem was to define the moment at which that right of the country of residence was to be recognized. How many years of residence would the refugee have to prove in order for the State of residence to have the right to exercise diplomatic protection on his or her behalf? The problem was insurmountable, and that was precisely why he had suggested that by analogy with the State of nationality, the right to exercise diplomatic protection should be conferred on the State which had granted refugee status. It should be understood that the right was only a right and not an obligation. The State in question could always decline to exercise it if it felt that it represented a burden for it, as Mr. Kateka had explained.

25. Mr. KUSUMA-ATMADJA said that he wondered whether the topic under consideration was diplomatic protection or nationality, whether single, dual or multiple.

26. While the problem might be easy to resolve within a well-integrated regional framework such as that of the European Union, it was less so in a less rigid regional

framework such as that of ASEAN, and still less on the world scale within the framework of an international community composed of sovereign States. The solution might consist, as had already been proposed, in carefully circumscribing the scope of diplomatic protection on the basis of the classical theory of the right of nationality.

27. He was convinced that, in his future work, the Special Rapporteur would take due note of the comments made.

28. Mr. KAMTO said that the compromise proposed in article 5 was surprising because it was not clear why some ways of acquiring nationality should be mentioned and others should not. It would be better if the words "by birth, descent or by bona fide naturalization" were replaced by the wording proposed by Mr. Hafner, with the addition of the words "in conformity with international law".

29. With respect to article 8, Mr. Hafner and other members had been right to say that the question of stateless persons should be separated from that of refugees. But the example of the European Union that he had given was not very convincing, since the rules which governed the movement of persons within the Union were not the same as those in other parts of the world. Any State member of the European Union where a person who held a passport from one of the Schengen countries and who had the status of refugee within the meaning of the Convention relating to the Status of Refugees resided could grant that person diplomatic protection. On the other hand, the idea that the State which had granted refugee status was entitled to offer diplomatic protection was a good one because it would at least create a link which was not only factual, but also legal. The State in question would thereby have acknowledged granting refugees a particular status.

30. He shared the legitimate concern that Mr. Kateka had expressed in his comments on countries which accepted large numbers of refugees. The proper legal response would be to stipulate that diplomatic protection was not an international obligation, but a subjective right of the State which the State was free to exercise or not.

31. Mr. CRAWFORD said that, in the context of functional protection, it would be reasonable to grant or to acknowledge to a State that had granted refugee status the right to exercise diplomatic protection in respect of losses arising after the refugee status had been granted. He saw that limitation as being built in to the debate, but it would mean that diplomatic protection would be wholly excluded with regard to events occurring prior to the granting of refugee status. At the risk of seeming reactionary, he was reticent to go even so far.

32. The problem in connection with the protection of refugees was that the better could become the enemy of the good. If States thought that the granting of refugee status was the first step towards the granting of nationality and that any exercise of diplomatic protection was in effect a statement to the individual that the granting of refugee status implied the granting of nationality, that would be yet another disincentive to the granting of refugee status. It seemed to him that refugee status in the classical definition of the term was an extremely important weapon for the protection of individuals against persecution or well-founded fear of persecution. If the Commission over-

loaded the boat, the serious difficulties that already existed in maintaining the classical system would be exacerbated.

33. Mr. GAJA, referring to article 6, said that he supported the views of those members who preferred the word "dominant" rather than the word "effective" because it was a question of comparing the respective links that an individual had with one State or another. However, he did not fully endorse the reasons given for that preference. Nationality acquired through birth might well be effective nationality: it depended on the meaning given to the word "effective". The prevailing view among members seemed to be that the word should be used in a way that would debar a State of nationality from exercising diplomatic protection only in extreme cases.

34. The Special Rapporteur and Mr. Hafner wanted to stretch the concept of diplomatic protection as far as possible because that was in the interests of the individual. The scope of the articles, which had not yet been defined, needed to be clarified. It had to be determined whether diplomatic protection was something that was intended solely to be part of the rules on the treatment of aliens or whether it was also designed for the protection of human rights and, if so, whether for that protection the State of nationality could put forward claims that other States were not entitled to advance. That was the root of the matter. If the answer was no, then the link of nationality was not relevant and there was no need to stretch diplomatic protection; if the answer was yes, that would mean reverting to the situation that had existed before the Second World War, when States only sought to protect the rights of their nationals.

35. Mr. SIMMA, referring to the comments made on article 8, which showed that some saw diplomatic protection as a discretionary right of the State, not an obligation, while others saw a trend in the Commission's deliberations to turn the right of a State into a right of an individual, said that a balance had to be struck between the work on diplomatic protection and that on State responsibility. The possibility of enforcing the rights of individuals could be considered in the context of State responsibility.

36. Mr. Kamto's proposal that article 5 should end after the words "sought to be protected" seemed to be endorsed by many members, but the proposed additional phrase, "in conformity with international law", had, in the Commission's practice, always referred to something which States had done. In the work on nationality of natural persons in relation to the succession of States, for example, it had been indicated that States could grant nationality "in conformity with international law".² If it was stated that an individual acquired nationality "in conformity with international law", that might create the impression that in choosing the wrong nationality, the individual was in breach of international law. That impression had to be avoided by careful drafting.

37. Mr. ECONOMIDES said that economic refugees who worked in a foreign country, but retained perfectly

² See paragraph (2) of the commentary to article 3 (*Yearbook . . . 1999*, vol. II (Part Two), p. 27).

normal relations with their own State should be excluded from the scope of article 8. The State of nationality was capable of exercising diplomatic protection on behalf of such individuals if that proved necessary. In his view, article 8 applied to political refugees. Unlike economic refugees, political refugees no longer had any relationship with the country of origin, were not seeking its protection and thus required the protection of a third country. To enjoy diplomatic protection, it was not enough for a refugee to reside in the country that exercised it. He must also have been legally recognized by the State in whose territory he resided as a refugee within the meaning of the Convention relating to the Status of Refugees. Although that solution was a bit more restrictive than the one provided for in article 8, he thought that the two conditions had to be met.

38. Mr. GALICKI drew attention to the humanitarian character of article 8 and expressed his general satisfaction with it, although he thought that its legal *raison d'être* was not connected with human rights. Its real purpose was to cover cases when a given person in a given situation was deprived of the possibility of seeking diplomatic protection. For a stateless person, who could appeal to no State at all, and for a refugee, who could not appeal to the States of which he was theoretically a national, article 8 provided a replacement for the State of nationality for the purpose of diplomatic protection. There was no competition or confusion with the protection of human rights. The basis of the draft article was something entirely different.

39. Mr. KAMTO said that he was sympathetic to the argument put forward by Mr. Crawford, whose viewpoint was in no way reactionary. The situation of refugees was however, by definition, a temporary one and must remain so. While political refugees could remain refugees for as long as the regime that had expelled them was in place, other categories of refugees—not economic refugees, who did not come within the scope of the topic and who were in a controversial category, but refugees displaced by war or disaster—could be expected to return rapidly to their homes. They kept the nationality of their country. A refugee stayed in a foreign country for two to five years, on average, and even if it were for a longer period, the length of time alone should not carry legal consequences without the will of the host State, and, while he or she was waiting to return and, if necessary, request diplomatic protection, the protection conferred by refugee status was sufficient. In any event, Mr. Crawford's comment deserved to be taken into account in the future consideration of article 8.

40. Mr. SIMMA said that, in article 8, the term "refugee" could not possibly be understood as comprising what Mr. Economides had called economic refugees. It referred only to refugees within the meaning of the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees. The term "economic refugee" should be avoided, as it was not a legal term proper.

41. Mr. MOMTAZ said that, although he was extremely sensitive to the concerns expressed by Mr. Kateka because, according to UNHCR statistics, his own country, the Islamic Republic of Iran, had the largest number of refugees, he did not share those concerns because article 8 simply accorded a State a right and established no obligation for it. The receiving State remained free to give or

not to give its diplomatic protection to persons who sought refuge there.

42. In addition to the political and economic refugees that had been mentioned, there was a third category of refugees which comprised those who had been displaced by armed conflict or natural disasters. It might be worth giving further thought to what Mr. Economides had proposed, namely, that diplomatic protection should be accorded under article 8 only to persons having acquired refugee status as such, for political or any other reasons.

43. Mr. HAFNER said that the concept of the interests of the individual went beyond that of human rights. He shared Mr. Simma's view that the concept of economic refugee did not exist and was a contradiction in terms. The term "refugee" must be used within the meaning given in the relevant international instruments.

44. Mr. Crawford's argument had its merits, but the problem was to decide precisely from which moment residence was legal. If the right to exercise diplomatic protection was accorded only to the State where the refugee had legal residence, the individual was being deprived of the right to enjoy diplomatic protection by another State. Cases in which the individual would be injured would certainly occur most often in the country where he had legal residence because that was where he was supposed to be. If only that State was given the right to exercise diplomatic protection, it would certainly not be entitled to exercise that right against itself. Another State must be accorded the possibility to exercise diplomatic protection and that certainly would be, in the first instance, the State which had granted refugee status. The issue was thus a complex one and justified making a distinction between the situation of stateless persons and that of refugees by devoting two different paragraphs to them, if not two separate articles.

45. Mr. SEPÚLVEDA, commenting on all the draft articles submitted, said that the Special Rapporteur had been able deftly to bring together a number of legal concepts that would help define the nature and scope of diplomatic protection in the modern-day world. In that regard, the Commission could help give a process that had created a great deal of hostility in Latin America some credibility and respectability. That antagonism was the result of nearly two centuries of bitter experiences in which armed intervention and pressures of every kind had distorted the very meaning of diplomatic protection. The Commission now had an opportunity to establish a new foundation for principles which had been negotiated and agreed on and which would serve the interests of all States. He would prefer not to take a position yet on whether there should be a chapter on general definitions, but he did think that the scope of diplomatic protection should be defined from the outset and proposed that a number of basic criteria should be borne in mind.

46. First of all, diplomatic protection must be regarded as a procedure, and not as a measure or an action, which a State adopted in respect of another State, thereby excluding proceedings which an individual might institute against a State in the case, for example, of an investment or commercial agreement to submit disputes to international arbitration. That protection originated in an

act or omission constituting an internationally wrongful act, which meant that it was exercised when a State breached its international obligations. Such protection also presupposed the existence of injury caused to the person or property of a foreigner and a causal link between the injury and the internationally wrongful act or omission. At issue was the principle of imputability or attribution which could trigger the diplomatic protection procedure. For an injury to be attributable to a State there must be denial of justice, i.e. there must be no further possibilities for obtaining reparation or satisfaction from the State to which the act was attributable. Once all local administrative and legal remedies had been exhausted and if the injury caused by the breach of the international obligation had not been repaired, the diplomatic protection procedure could be started. The exercise of that procedure was of a particular nature, in that the State of nationality had a discretionary power which did not give rise to an automatic and inevitable obligation in international law. It was also preferable for the draft articles to refer essentially to the treatment of nationals and, more particularly, natural persons. The notion of legal persons should be discarded, given obvious difficulties in determining their nationality, which might be that of the State where a legal person had its headquarters or was registered, that of its stockholders or perhaps even that of the main decision-making centre. Lastly, on no account could diplomatic protection include the threat or use of force. Only peaceful means could be used to obtain reparation of the injury caused to a foreign private individual who was the victim of an internationally wrongful act and who approached the State of his nationality to request diplomatic protection once all other available remedies had been exhausted.

47. Consequently, article 2 should be completely recast because the prohibition of the use of force in the context of diplomatic protection must be categorical and must not admit of any exception. The too generous interpretation of Article 2, paragraph 4, and Article 51 of the Charter of the United Nations had given rise to many abuses of power; often the facts had shown afterwards that self-defence had been improperly invoked. In an article of that kind, when the life or security of the nationals of a State were threatened, it would be more reasonable to allow the international community to take effective measures collectively than to authorize the unilateral use of force.

48. The key question raised by article 3 was: who was the holder of the rights claimed when the State of nationality held another State responsible for the injury caused to one of its nationals? It must be borne in mind that it was the individual, and not the State, who suffered the injury and that he had remedies other than diplomatic protection to obtain reparation. He could not only institute legal proceedings or bring the case before an administrative court, but could also turn to an international arbitral tribunal or a human rights body, depending on the nature of the dispute and the injury suffered. The State which submitted a claim on his behalf had only a residual function and not an exclusive or absolute right. What was more, it exercised that function in a discretionary manner and there was no automatic and necessary correlation between the injury caused to the national and diplomatic protection. Article 3 also gave rise to a problem of wording: when it said that “the State of nationality has the right to exercise diplomatic protection on behalf of a national unlawfully *injured** by

another State”, it must be remembered that article 1 provided that the injury in question must have been caused “by an internationally wrongful act or omission attributable to [another] State”. If the requirement for exercising the right of diplomatic protection was that the injury suffered should have resulted from an internationally wrongful act, perhaps that should also be specified in article 3 or in a chapter on definitions.

49. Article 4 raised several important questions, first and foremost whether a State really had the “legal obligation” to exercise diplomatic protection, as provided in paragraph 1. Although a State had a moral duty to protect the interests of its nationals on its own territory and abroad, that was more a political obligation of perhaps limited scope than a moral obligation in the strict sense. Presenting diplomatic protection as a way of reacting to a grave breach of a *jus cogens* norm was perhaps not a very good idea either. Such breaches called instead for the adoption by the community of States of coercive measures under Chapter VII of the Charter of the United Nations. Lastly, article 4 contained so many exceptions and escape clauses that it became inapplicable in practice.

50. He proposed that the end of article 5 should be amended to read: “ ‘... State of nationality’ means the State which has granted its nationality to a person whom it intends to protect on the basis of his place of birth, the nationality of one or the other of his parents or an effective naturalization”. He insisted on the words “of one or the other of his parents” because legislation varied in that regard. There seemed to be good reason to make it a precondition for a State exercising diplomatic protection to have effectively recognized that the person to be protected had its nationality. In the event of naturalization, the State would not agree to exercise diplomatic protection unless the applicant had a genuine and effective link to it.

51. The problem posed by article 6 was complex because many States allowed their nationals to retain their nationality of origin and considered that they could not lose it, even when they subsequently acquired another nationality. That implied that the State of origin (i.e. the first State of nationality) conserved in all cases the power to exercise its diplomatic protection on behalf of one of its nationals vis-à-vis the State whose nationality that national had acquired (the second State of nationality). It would be better for the Commission to confine itself to the principle set out in article 4 of the 1930 Hague Convention which provided that “A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses”. It was not legitimate for a dual national to be able to apply for a remedy (or have it applied for) against a State to which it owed loyalty and fidelity.

52. Another essential question to which it would be necessary to return was that of the denial of justice, which was of great importance in the framework of diplomatic protection.

53. He had appreciated the fact that the Special Rapporteur had referred in his report to the work of two great Latin American jurists, García Amador and Orrego Vicuña, but many other Latin American authors had also

written on the subject of diplomatic protection; apart from the ubiquitous Carlos Calvo, he was thinking of Podestá Costa, Jiménez de Aréchaga and César Sepúlveda. He would be delighted to provide the Special Rapporteur with a relevant bibliography.

54. Mr. LUKASHUK said that he was still concerned that the draft articles did not contain any provision on the rights of citizens or nationals. Although the right to exercise diplomatic protection was a right of the State and not of the individual, in speaking of the individual as the “object” of the protection, the Commission would end up, in spite of itself, establishing analogies with conventions such as those on the protection of migratory birds and other endangered species. As stressed by Mr. Simma, it was important for the draft to strike a balance between the rights of the State and those of citizens. With that in mind, he proposed the introduction of three provisions in the draft which might be worded in the following way: first “a citizen has the right to request a State of which he is a national to afford him diplomatic protection”; secondly, “a citizen has the right to refuse the diplomatic protection of a State of which he is a national”; and, thirdly, “all persons who are nationals of two or more States have the right, during their stay in the territory of another State, to express an opinion in declaring what their effective nationality is. This opinion must be taken into consideration by the other State”. Perhaps those provisions did not constitute a very remarkable step forward from the point of view of the progressive development of international law, but they were in step with a concrete reality and should be very well received by States.

55. Mr. HERDOCIA SACASA, referring to Mr. Sepúlveda’s comments, said that the question of the exhaustion of local remedies (or of the denial of justice) was in fact very important. Account must be taken of the fact that the means of and procedures for local remedies differed enormously from one country to another; diplomatic protection must not be automatic because it might encroach on the prerogatives of States in that area and violate their sovereignty.

56. He fully shared Mr. Sepúlveda’s view on the need to rule out the use or threat of the use of force categorically and in all cases. The Commission must attempt, through its codification work, to strengthen the credibility of the sometimes disputed principle of diplomatic protection, but it must also clearly establish that the right of diplomatic protection must be exercised only by peaceful means. That should be expressly stated in an article.

57. Mr. GOCO said that the question of the denial of justice raised by Mr. Sepúlveda was particularly troublesome in the context of diplomatic protection. As pointed out by Mr. Herdocia Sacasa, each court had its own rules of procedures, its own criteria of admissibility, etc., and, when a State considered that one of its nationals had been the victim of a denial of justice, the other party (i.e. the other State) might disagree entirely. What was done in such cases?

58. Denials of justice were very frequent and it was important to establish an international minimum standard which should be a moral standard observed by all civilized societies in terms of respect for the rights of the defence.

For the needs of the subject under consideration, however, the Commission should begin its reasoning from the moment the local remedies available to the injured national had already been exhausted. If it tried to go back further, it would automatically go beyond the scope of its mandate.

59. Mr. DUGARD (Special Rapporteur) warmly thanked Mr. Sepúlveda for offering to make available a bibliography of Latin American authors, which would certainly be very useful. As to the problem of the denial of justice, he pointed out that that fell within the domain of primary rules. If the Commission embarked on a study of the subject, it would probably take several decades to complete it. He would thus confine himself to considering further the question of the exhaustion of local remedies, which was a difficult subject in its own right.

60. Mr. TOMKA said that the main reason why the Commission had failed to codify the rules of State responsibility in the 1950s and 1960s had been that the Special Rapporteur had focused too heavily on the question of the treatment of aliens. In its consideration of diplomatic protection, the Commission must not stumble once again over the problem of the rights and obligations of States vis-à-vis aliens and should decide not to examine the denial of justice, which clearly constituted a primary rule.

61. Mr. ROSENSTOCK said that he fully agreed with Mr. Tomka. The Commission had decided not to venture onto the terrain of primary rules and should abide by that decision. The question of the denial of justice could not be addressed in the framework of the subject under consideration.

62. On the whole, articles 5 to 8 seemed satisfactory and he would merely make a few brief remarks. The words “bona fide naturalization” in article 5 were in fact debatable and the last part of the sentence could simply be deleted after the word “acquired”; it might very well be asked whether the enumeration that followed did not complicate rather than clarify matters. Mr. Brownlie’s comment on the need to take the real world into account by giving place of residence greater importance seemed relevant, but Mr. Kateka’s concerns should also be borne in mind in terms of placing additional burdens on host countries, which might be discouraged from granting asylum to refugees.

63. Article 6 was very much in keeping with the modern world, in which increased emphasis was placed on the individual, as seen for example in current efforts to eliminate the consequences of statelessness. The Special Rapporteur’s approach in that article was consistent with recent international court decisions.

64. Article 7 did not pose any problem and might be sent directly to the Drafting Committee. He agreed, however, with those members who had suggested reversing the order of articles 6 and 7. Paragraphs 175 et seq. of the report contained compelling arguments in favour of article 8, which should also be sent to the Drafting Committee.

65. He looked forward to the subsequent reports of the Special Rapporteur, whom he asked not to react too much like Pavlov’s dog to the concepts of “breach of a *jus*

cogens norm” or “breach of an *erga omnes* obligation”. Those two questions risked taking the Commission beyond the scope of its work and causing unnecessary confrontations.

The meeting rose at 1 p.m.

2627th MEETING

Thursday, 25 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Diplomatic protection (*continued*) (A/CN.4/506 and Add.1¹)

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. TOMKA said that article 5 was a definition of “State of nationality”. The need for such a definition was clear, for under article 3 the State of nationality had the right to exercise diplomatic protection on behalf of a national unlawfully injured by another State. But its placement in the draft was unusual, because a term used in article 3 was not defined until article 5. In actual fact, article 1, entitled “Scope”, was an attempt to define diplomatic protection, and it might therefore be useful, as was often done in such instances, to have an article exclusively on definitions of terms which would immediately follow upon article 1.

2. While the acquisition of nationality *jure sanguinis* or *jure soli* should not pose any particular problem in the context of diplomatic protection, the acquisition of nationality by naturalization might well do so. The Special Rapporteur rightly pointed out in paragraph 104 of his first report (A/CN.4/506 and Add.1) that international law would not

recognize naturalizations in all circumstances. It seemed to emerge from the Special Rapporteur’s work that, in the majority legal view, the case of conferring nationality by naturalization required a closer link of attachment between an individual and a State, usually formulated as a “genuine or effective link”. Yet the Special Rapporteur did not endorse that proposition, his main argument, in paragraph 117, being a concern for the millions of persons who would supposedly be excluded from the benefit of diplomatic protection if the genuine or effective link requirement proposed in the judgment of ICJ in the *Nottebohm* case was applied strictly, thereby undermining the traditional doctrine of diplomatic protection.

3. Personally, he was not fully convinced that, in today’s world of globalization and migration, there were millions of persons who had left their State of nationality and made their lives in States whose nationality they never acquired. If those people never acquired the nationality of a State to which they had moved, an article 5 that required bona fide naturalization would not provide them with any better protection, since they would never be naturalized.

4. Unfortunately, the Special Rapporteur had not elaborated on his assertion in paragraph 112 that it was difficult to limit the genuine link requirement to cases of naturalization. In his own view, the genuine link requirement had a role to play precisely in the case of naturalization. It was redundant to spell out the genuine link requirement in cases of acquisition of nationality *jure sanguinis* or *jure soli*, since the requisite attachment was contained, as generally recognized, in the principles of *jure sanguinis* and *jure soli*.

5. Instead of the requirement of a genuine link in cases of naturalization, the Special Rapporteur formulated the requirement of bona fide naturalization, which was to be assumed, and the onus of proof of bad faith lay with the respondent State. For his own part, he was unaware of any case in which a court had found that a sovereign State had acted in bad faith, and he would be grateful if the Special Rapporteur could provide examples from international judicial practice. The Special Rapporteur had himself acknowledged, in paragraph 108, the reluctance of ICJ to reach such a finding. Accordingly, it would be unjust to place an onus of proof of bad faith on the respondent State. It would be preferable in article 5 to use the words “valid naturalization”, as proposed by Mr. Economides (2625th meeting) and as had been done in the *Flegenheimer* case [see p. 377], cited in paragraph 111. The commentary could then explain what was meant by valid naturalization, i.e. naturalization in conformity with the requirements of international law, including the genuine link requirement.

6. Article 6 also raised a number of interesting issues. As pointed out by Mr. Galicki (2626th meeting) and other members, it departed from customary international law, which should form the basis of work on the topic. It was also the conclusion reached by the Institute of International Law at its Warsaw session, in 1965, at which it had adopted a resolution providing that the respondent State might reject an international claim presented by a State for injury suffered by an individual who possessed the nationalities of both the claimant and the respondent

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

States at the same time.² In the view of the Institute, such claims were inadmissible before the court seized of the claim. Mr. Galicki had usefully reminded members that the member States of the Council of Europe had taken a similar stance when they had adopted the European Convention on Nationality.

7. It was paradoxical that, in his comments on article 5, the Special Rapporteur rejected the genuine or effective link requirement and then, in article 6, introduced the notion of effectiveness in connection with nationality. If some countries, such as Switzerland and the United Kingdom, considered that the general rule was the non-exercise of diplomatic protection on behalf of dual nationals vis-à-vis the State of their second nationality and that the exercise of diplomatic protection was merely the exception in particular circumstances—in the case of the United Kingdom where the respondent State treated the claimant as a United Kingdom national, and consequently not as its own national, mentioned in paragraph 156—then that should be reflected in the language of article 6. The latter should be reformulated in negative terms to read: “The State of nationality may not exercise diplomatic protection on behalf of an injured national vis-à-vis a State of which the injured person is also a national unless that person was treated by the respondent State as a national of the former [or: claimant] State.”

8. In article 7, paragraph 1, there was no need to refer expressly to “the criteria listed in article 5” and the word “also” should be deleted.

9. Article 8, submitted as a proposal *de lege ferenda*, should be treated with caution. In the report of the Commission to the General Assembly on the work of the session, it might be wise to seek comments from States. To some extent, article 8 changed the nature of diplomatic protection as a right appertaining to a State, a right to ensure, in the person of its subjects, respect for the rules of international law. The draft recognized a State’s right to ensure respect for international law with regard to its non-nationals.

10. Mr. AL-BAHARNA said that article 5 required the acquisition of State nationality by birth, descent or naturalization in order for the State of nationality to extend diplomatic protection to a natural person. However, the way the article was drafted suggested that its purpose was to define the term “State of nationality”, although that was not the case. Instead, the Commission needed to set the basis on which a national could claim the diplomatic protection of his State of nationality, that basis being birth, descent or naturalization. Therefore, the principle to be embodied in article 5 should be set out so as to read: “For the purposes of diplomatic protection, natural persons who have acquired their nationality on the basis of birth, descent or naturalization may be afforded diplomatic protection by their State of nationality”. It was a much less complicated wording. In his proposal, he had deleted the words “individual” and “means”, as well as the superfluous words “bona fide”. Naturalization and nationality laws were a source of nationality without qualification, just like the other two sources, namely birth and descent. But when

the issue came before the court as a result of a claim filed by a naturalized person, the court could ask whether such naturalization was bona fide or not. That was in keeping with the *Nottebohm* case.

11. Those three sources constituted the link of nationality between the injured national and his State of nationality for the purpose of claiming diplomatic protection. That principle found support in a number of conventions and cases in international courts. Article 1 of the 1930 Hague Convention, referred to in the comments, stated that “It is for each State to determine under its own law who are its nationals”. The Special Rapporteur confirmed, in paragraph 100, that in the field of human rights States were required to comply with international standards in the granting of nationality, and he referred in the same paragraph to certain limits on the principle that the conferment of nationality fell within the State’s domestic jurisdiction. However, as far as article 5 was concerned, there seemed to be no question that the connecting factors of birth, descent and naturalization constituted the genuine or effective link that was generally recognized by international law for the purpose of diplomatic protection.

12. It might be asked whether there should be an additional genuine or effective link in the case of naturalization, as in the *Nottebohm* case. It appeared that it was not possible to generalize about the *Nottebohm* case, which should be limited in at least three respects. First, it applied to dual nationalities, one based on Nottebohm’s original Guatemalan nationality for a period of over 34 years, which had established for him an effective and genuine link with his State of nationality, and the other much weaker nationality based on his naturalization in Liechtenstein. According to ICJ, the facts had clearly established the absence of any bond of attachment between Nottebohm and Liechtenstein and the existence of a close long-standing connection between him and Guatemala, a link which his naturalization had in no way weakened. Hence the need to restrict the requirement of the principle of a genuine link to the special facts of the *Nottebohm* case and not to treat it as a general principle of international law that could apply to all cases of diplomatic protection without distinction. He therefore agreed with the Special Rapporteur, in paragraph 111, that the principle of an effective or genuine link could not be considered as a rule of customary international law applicable to cases not involving dual or multiple nationality. Secondly, the principle of an effective or genuine link seemed to be limited in its application to cases of dual or multiple nationality. The third issue to which the *Nottebohm* case could give rise was that, with the exception of birth and descent, naturalization was the only factor which led to confusion in diplomatic protection claims, because the nationality laws of States varied considerably in the conditions for conferring nationality by naturalization. Moreover, States might grant naturalization to an individual on the basis of abuse of right or for acting in bad faith, as the *Nottebohm* case had shown. The Court had found that Liechtenstein had waived some of its own rules on length of residence in order to accommodate the urgency of his naturalization application. Consequently, paragraph 104 of the report rightly stated that international law would not recognize naturalization in all circumstances. Fraudulently acquired naturalization and naturalization conferred in a manner that discriminated on grounds of race

² See 2617th meeting, para. 32 and footnote 12.

or sex were examples of naturalization that might not be recognized.

13. Article 6 dealt with dual nationality, which the Special Rapporteur regarded as a fact of international life, but agreed that dual or multiple nationality had given rise to difficulties in respect of military obligations and diplomatic protection. But in his comments in paragraph 122, the Special Rapporteur admitted that attempts by the Conference for the Codification of International Law, held at The Hague in 1930, and other international bodies to reduce or abolish dual and multiple nationality had failed. As a result, the 1930 Hague Convention had ended up by recognizing that a person having two or more nationalities could be regarded as its national by each of the States whose nationality he possessed. The principle of dual nationality would probably continue to gain ground as long as international law recognized it, despite the express prohibition under many national laws on simultaneously holding the nationality of another State.

14. According to the Special Rapporteur, in paragraph 123, the weight of legal authority seemed to support the rule advocated in article 6. Yet it was important to bear in mind that, pursuant to article 4 of the 1930 Hague Convention, a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. In proposing article 6, the Special Rapporteur had reversed the rule in the 1930 Hague Convention by couching it in an affirmative, rather than negative, form. Having done so, he had introduced the principle of the effective nationality as a solution. In other words, where diplomatic protection was exercised by a State of nationality against another State of nationality, the court should apply the effective nationality criterion, which meant that it should scrutinize the circumstances of the claim and try to find out with which State of nationality the injured national had an effective or genuine link.

15. Why should the principle in article 4 of the 1930 Hague Convention not be adopted instead of the reversed principle in article 6? If dual nationality caused conflicts and confusion in State practice, why should the Commission attempt to codify it in order to give it more credibility? The adoption of article 4 of the 1930 Hague Convention would be a useful step towards reducing the conflict arising from dual nationality in respect of diplomatic protection.

16. However, it might be cogently argued that that article found its basis in the *Nottebohm* case as well as in State practice. Accordingly, the Commission might take it that article 6 was acceptable. If it did, he wished to introduce some changes so that it would read: "Subject to article 9, paragraph 4, the State of nationality may afford diplomatic protection to an injured national in a State of which he is also a national where his effective nationality is that of the former State". Such a reformulation had the advantage of avoiding the use of the words "against" and "on behalf" as well as repeating the words "injured national", "injured person" and "individual", and of giving preference to the word "effective", which was more in line with the *Nottebohm* case than "dominant". The two words were synonymous. The words "effective or genuine link" were the ones used in the *Nottebohm* case.

17. He would suggest that article 7, paragraph 1, should be reworded in such a way as to avoid the words "on behalf of", "against a State", "he or she" and "also". It would then read:

"Any State of which a dual or multiple national is a national in accordance with article 5 may afford diplomatic protection to that national in respect of a claim of injury arising in another State of which he is not a national."

The phrase "in accordance with the criteria listed" was replaced by "in accordance with article 5" because the criteria in question were not listed exhaustively. He agreed with the Special Rapporteur that the effective or dominant nationality principle did not apply where one State of nationality sought to protect a dual national in another State of which he was not a national. He also concurred with the statement in paragraph 170 of the report that the conflict over the requirement of an effective link in cases of dual nationality involving third States was best resolved by requiring the claimant State only to show that a bona fide link of nationality existed between it and the injured person.

18. Article 7, paragraph 2, allowed two or more States of nationality to exercise diplomatic protection on behalf of a dual or multiple national. It would strengthen the claim of such a national in the respondent State if two or more States of nationality espoused his claim by exercising diplomatic protection jointly on his behalf. But paragraph 2 would no longer be applicable if one State declined to do so in the case of a dual national, and only two States could exercise diplomatic protection jointly where a third State of nationality declined. Paragraph 2 might be redrafted to read: "In accordance with article 5, two or more States may jointly afford diplomatic protection to a dual or multiple national for the purposes of these draft articles". He had avoided the words "within the meaning", which he felt were inaccurate, and also the words "on behalf of".

19. The Special Rapporteur was right to say that article 8 was in line with contemporary developments relating to the protection of stateless persons and refugees. It should also be welcomed as an exercise in the progressive development of international law. If adopted, it would reverse the principle, enunciated in the *Dixon Car Wheel Company* case cited in paragraph 175, that a State did not commit an international delinquency in inflicting an injury upon an individual lacking nationality. Such a harsh ruling ran counter to international norms and standards and equitable principles if it was applied to certain categories of political refugees and stateless persons. There was no reason to be concerned about the general principle set forth in the article because no obligation was imposed. The word "may" implied that the State had a choice in the matter and could examine each case on its merits. However, he suggested that the words "and/or" should be replaced by "or" and "legal resident" by "habitual resident". The word "legal" was irrelevant and would only complicate matters for the persons concerned. The words within square brackets should be deleted and the semicolon replaced by a comma. Lastly, he was opposed to the idea of splitting the article into two parts, one dealing with refugees and the other with stateless persons.

20. Mr. LUKASHUK, taking up a comment by Mr. Al-Baharna regarding the scope of the draft articles, said that article 1 omitted the important question of territorial scope. It assumed that the injury to the person or property of a national occurred in the territory of the State. But the person or property might actually be present in the territory of another State. Hence a paragraph should be inserted, similar to the one in the draft on State responsibility concerning the area of sovereignty, jurisdiction or control of the State. The reference in article 1 to “an injury to the person or property of a national” gave the impression that a physical injury was involved. It would be more accurate to speak of “an injury to the rights of the person, including property rights, of a national”.

21. Mr. Sreenivasa RAO said that the material presented by the Special Rapporteur in articles 5 to 8 laid the basis for a fruitful exercise in both the codification and the progressive development of international law. He had admirably covered all the ground and should not take it amiss when contrary views were occasionally expressed with considerable force.

22. With regard to article 5, he recommended that issues such as a State’s right to grant nationality should be omitted, since they tended to distract attention from the core issues. The presentation of the requirements for the acquisition of nationality in article 5 as opposed to article 1 gave the impression that a State’s right to grant nationality was being questioned and that States were not entitled to grant nationality on what were not bona fide grounds. But that was essentially an issue of opposability rather than nationality. What mattered was the purpose for which a State exercised its right in filing a claim against third States. Viewed in that light, the question of bona fide nationality, the *Nottebohm* case and other issues fell into place. The *Nottebohm* case was not about the right of a State to grant nationality but about the right of Liechtenstein to file a claim against Guatemala. In his view, international law imposed no restrictions on the right of States to grant nationality save perhaps those referred to in paragraph 100, i.e. human rights treaties outlawing legislation that would deny the granting of nationality to certain individuals. Hence paragraphs 97, 98, 101 and 102 referred to the issue of opposability rather than to a State’s right to grant nationality, which was virtually absolute. The conclusion drawn in paragraph 120 in the light of the *Nottebohm* case should be modified accordingly.

23. Article 6 sought to address the conflicts that sometimes arose when one State of nationality sponsored a claim against another, a highly sensitive area. In practice, for example in the case of the Iran-United States Claims Tribunal, they were handled on the basis of an agreement and not through the reconciliation of parallel principles of international law. He agreed with Mr. Economides that dual nationals who enjoyed certain benefits by virtue of that status should also be prepared to accept the possible denial of certain other extraordinary rights. In any case, States were more pragmatic than theoreticians of international law. They would only accept formulas that coincided with their interests in a particular context. Caution should therefore be exercised and the oddity of the implications of multiple nationality should not be reinforced. Wherever possible, the claims arising from such status should be handled on the basis of an agreement among

States. In the absence of agreement, certain principles could perhaps be proposed by way of progressive development.

24. The word “also” in the phrase “of which he or she is not also a national” in article 7, paragraph 1, should be deleted. Paragraph 2 recognized the right of two or more States of nationality to sponsor claims jointly, but the State against which such claims were asserted might in some cases be subjected to undue pressure, especially by States with greater political or economic clout. He was not sure to what extent such conduct should be encouraged.

25. Article 8 was an important attempt at progressive development and had given rise to difficult legal matters. He wondered whether primary rules came into play when issues involving stateless persons and refugees were addressed. He looked for guidance from those of his colleagues who were more skilled at distinguishing between primary and secondary rules.

26. Article 6 allowed the State of nationality to exercise diplomatic protection on behalf of an injured national against a State of which the injured person was also a national, but article 8 conferred on refugees and stateless persons virtually the same status as that of a national. It was therefore unclear whether the host State could raise claims on behalf of refugees with their State of nationality. That would create major practical problems. When refugees took flight, their property was usually left behind in the State of nationality and was liable to be confiscated. The host State would normally refrain from sponsoring claims not only for reasons of political expediency but also because it might harm the cause of the refugees themselves. Problems between refugees and third States, on the other hand, occurred very infrequently and need not be addressed.

27. When a host State felt compelled by moral or practical considerations to sponsor the claims of persons in its territory, within its jurisdiction or under its control vis-à-vis third States, such action should not be viewed as a legal duty but as a discretionary course of action. If the host State moved wisely, it would act in agreement with the other States concerned. He was sure that the Special Rapporteur had at no stage been suggesting that the granting of refugee status was the penultimate step in the process of granting a right of nationality. He had simply indicated that a State could, for humanitarian reasons, espouse certain claims of refugees, placing them on the same footing as nationals because there was no one else to take up their cause.

28. On the whole, article 8 dealt with human rights issues which should properly be handled on the basis of consent and through international forums such as UNHCR.

29. Mr. KATEKA said that it was currently fashionable to pay lip service to human rights, the rule of law and good governance. Anyone who failed to do so was viewed as a reactionary or an opponent of human rights. The Commission should not feel that it must follow the crowd on such an important issue. The host country had no legal duty to exercise diplomatic protection. In most cases, the recipients of refugees were developing countries that were heavily burdened with other problems and

hence unable, for practical reasons, to exercise diplomatic protection.

30. Mr. GOCO said Mr. Sreenivasa Rao's earlier remarks on the subject of denial of justice applied to refugees and stateless persons in their country of origin. From the practical standpoint, diplomatic protection was not an effective institution in such cases, since the responsiveness of the State of origin could not be assured. As to article 6, he failed to see why the State of nationality should want to exercise diplomatic protection on behalf of someone who was a national of another State.

31. Mr. KABATSI said that thanks were due to Mr. Sreenivasa Rao for raising the issue of the exercise of diplomatic protection in respect of stateless persons or refugees by the host State against the State of nationality. He would not wish to extend his support for article 8 if the provisions of that article were broadened to encompass the property rights of stateless persons or refugees in the home country. Such a reading of the article should be firmly ruled out and he hoped that the Special Rapporteur would include an appropriate clarification in the commentary.

32. Mr. ECONOMIDES said that Mr. Sreenivasa Rao should be congratulated on bringing out the points that articles 6 and 8 had in common. As already stated, he had doubts about granting the State of nationality the right to exercise diplomatic protection on behalf of a national who was also a national of the other country concerned. The provision contained in article 8, which went even further than did article 6, seemed still more open to doubt. It should be made quite clear that a host State could exercise diplomatic protection only when the refugee status of the individual concerned had been officially recognized. That was already the situation in practice and it should be spelled out clearly in the law.

33. Mr. ROSENSTOCK said that the point he had wished to make about the temporal limits to the right of host States to exercise diplomatic protection in respect of stateless persons or refugees on its territory had been covered by the remarks made by Mr. Economides. As to the comments by Mr. Kateka and other members who had expressed fears that the provision in article 8 might place an additional burden on host countries, he would point out that there was no question of host countries being under an obligation to exercise diplomatic protection; they simply had a discretionary capacity to do so.

34. Mr. SIMMA said he concurred. While sympathizing with members who had expressed fears that the option offered to host States might, in practice, turn into a burden, he nevertheless felt that States of residence should not be denied the right to exercise diplomatic protection on behalf of stateless persons or refugees on their territory. Such a right might not be exercised very frequently, but it should on no account be withheld. Subject to dividing article 8 into two separate provisions dealing with stateless persons and with refugees respectively, he was in favour of maintaining the Special Rapporteur's text. As for article 6, which he also supported, the principle it formulated was important enough not to be left to bilateral regimes or arrangements. Lastly, with reference to Mr. Sreenivasa Rao's remarks concerning article 5, he wondered whether the opposability aspect could be entirely excluded from

the topic under consideration. Whether the point at issue was opposability or invalidity, something had to be said about an issue which had played such an important role in, say, the *Nottebohm* case. He was not sure whether Mr. Sreenivasa Rao was suggesting that the point should be excluded altogether or given a more limited role.

35. Mr. RODRÍGUEZ CEDEÑO said that, in view of the vast numbers of displaced persons and refugees round the world, article 8 was important and should be maintained whether or not the provision it contained was a primary or a secondary rule. The status of refugees was clearly defined in the Convention relating to the Status of Refugees and the Protocol relating to the Status of Refugees, and the idea of extending diplomatic protection to stateless persons and refugees was obviously appropriate. He did not believe that granting host countries the right to exercise diplomatic protection in respect of stateless persons or refugees on their territory was tantamount to a first step towards the acquisition of nationality, and he agreed with those members who had emphasized that the provision did not impose an obligation but merely offered a right or a capacity to be exercised at the discretion of the host State. While conceding that such a capacity would not be easy to exercise in practice, he was convinced that the norm set forth in the article was an important one and formed part of the progressive development of international law.

36. Mr. HE said he recognized that the problem of protection of injured persons who were stateless and/or refugees was an important one that had to be tackled, but wondered whether the proper institutions for the purpose were not the existing human rights organizations, UNHCR and international agencies set up under human rights treaties. Countries, especially developing ones, which hosted hundreds of thousands of refugees might find that exercising diplomatic protection in respect of those persons merely increased the burden upon them.

37. Mr. SEPÚLVEDA, referring first to Mr. Sreenivasa Rao's remarks on article 5, said he was not sure that primary rules had to be excluded in all circumstances. Moreover, the question of denial of justice and exhaustion of local remedies had to be taken up, for they were indissolubly linked to diplomatic protection. As to article 8, he was inclined to press for separate treatment of stateless persons and of refugees, respectively. Moreover, the question of the diplomatic protection a State might or should give to refugees against the State of nationality or origin should be spelled out more specifically and linked to existing rules governing claims against States of origin. In that connection, he recalled that in 1981 and 1982, Mexico had taken in some 50,000 refugees fleeing the then political regime in Guatemala. Instead of exercising diplomatic protection against Guatemala, a step which would have been regarded as contentious, the Mexican Government had preferred to seek a diplomatic solution. Such a solution had eventually been found and the majority of the refugees had now returned home. Greater emphasis should be placed on ways in which countries faced with large refugee influxes could deal with the problem while avoiding the exercise of diplomatic protection. That question was briefly touched upon in paragraph 184 of the report.

38. Mr. AL-BAHARNA, noting that article 8 had given rise to considerable differences of opinion, said he continued to be in favour of the article but wondered whether a compromise might not be reached by amending the beginning of the text to read: "Without prejudice to article 5, a State may, in exceptional circumstances, exercise diplomatic protection ...". The addition of a second paragraph to article 5 might also be called for. With reference to Mr. Sreenivasa Rao's point that a host State might be reluctant to exercise diplomatic protection in respect of refugees, he drew attention to the last part of article 8, which read: "... provided the injury occurred after that person became a legal resident of the claimant State". It might be useful to have a separate article on refugees, who in some cases had left their country of origin as a result of the crime of genocide, but he pointed to the difficulty of distinguishing between refugees who had no papers to prove their nationality, on the one hand, and stateless persons, on the other.

39. Mr. GALICKI said that he supported the idea of dividing article 8 into two parts, one to deal with the slightly simpler issue of stateless persons and the other with the thornier problem of refugees. Article 8, as drafted, failed to resolve the problem of possible injury to the property of a refugee after he or she had left the country of origin. Article 6, if adopted, should also say something about the possibility of exercising diplomatic protection against a refugee's State of nationality. In that connection, it would be remembered that there was a tendency in contemporary international law to avoid situations involving loss of nationality or, where possible, to eliminate them. For example, the European Convention on Nationality contained a special provision imposing upon the State of residence the obligation to facilitate the acquisition of its nationality by refugees (art. 6, para. 4 (g)). It was the type of solution likely to be sought in the future, and the Commission should not close its eyes to possibilities of that kind.

40. Mr. SIMMA referring to Mr. Sepúlveda's point about the possible exclusion of the issue of denial of justice from the topic under consideration, said it was his hope that, in such a case, the issue of exhaustion of local remedies would be treated separately. As for the question of protection of persons fleeing from genocide raised by Mr. Al-Baharna, the problem was situated, as it were, on the interface between diplomatic protection and State responsibility, and could perhaps be considered more closely in connection with the latter topic. Lastly, regarding the point raised by Mr. He, UNHCR was undoubtedly the agency most directly concerned with refugees. However, to his knowledge it was concerned not with diplomatic protection in the technical sense but, rather, with more direct forms of assistance.

41. Mr. LUKASHUK said that he was prepared to endorse the main thrust of article 8, subject to some amendments. He was also in favour of Mr. Economides' proposal concerning the rights of the State of origin in respect of persons having ethnic, cultural or other ties with that State. The problem was likely to become increasingly important as time went on, and he believed that an appropriate provision should be formulated and included in the draft.

42. Mr. RODRÍGUEZ CEDEÑO said that the question of stateless persons, which was governed by the criterion of legal residence, was completely different from that of refugees, whose status had to be expressly granted. The two situations were not the same and should not be bracketed together in one article. He agreed with Mr. Simma that the work of UNHCR was in no way related to diplomatic protection.

43. Mr. Sreenivasa RAO thanked the members of the Commission who had formulated excellent ideas on the basis of his own modest contribution. He had described article 5 as posing essentially an issue of opposability, rather than of challenging the validity of nationality, and Mr. Simma had asked what the difference was. Opposability was a procedural device that enabled States to prevent claims being brought without going into the substantive question of the validity of the foundation for the claims. The basis upon which a State could grant nationality was not the question, and indeed, it was not part of the topic. What needed to be determined was for what purposes, once nationality was granted, it could be used in foreign countries in dealing with other States.

44. Mr. BAENA SOARES said that, as other members had pointed out, the wording of article 5 could be improved by deleting the last phrase, "by birth, descent or by bona fide naturalization". To list the methods of acquiring nationality seemed merely to complicate the text. A more concise version would be better suited to the purpose. He supported the proposal to add the words "holds or" before "has acquired", and Mr. Hafner's proposal for the last phrase was acceptable. The State retained the right to determine nationality, although it would be exercised within the limitations established by the rules of international law.

45. Article 6 was controversial and its fate would to some extent be determined by the decision to be taken on article 9, paragraph 4. He was in favour of retaining the idea conveyed in article 6, as long as the Drafting Committee kept in mind the circumstances to which he had drawn attention and accepted the possibility of reformulating the article.

46. He experienced difficulties with article 7, paragraph 2, which envisaged joint exercise of diplomatic protection by two or more States with which the person concerned had ties of nationality. The material merited further consideration because of the questions, including practical problems, it could raise, and because of its interrelationship with other provisions in the draft. Article 8 was a major step forward in the progressive development of international law, in keeping with the concerns of the international community, but its effectiveness and solidity would be enhanced if the situations envisaged were described in greater detail and the scope of the article was delineated more clearly. The realities, the practical circumstances and imperatives surrounding the application of the provision, must be kept in mind. The difficulties pointed to by Mr. Sreenivasa Rao must also be taken into account. Thought must be given to the need to fine-tune the distinction between stateless persons and refugees by tightening up the drafting of the article.

47. Lastly, the draft articles should explicitly mention the need for domestic remedies to have been exhausted before diplomatic protection was exercised. He did not see it as unnecessary duplication if the same principle was incorporated in work being done by the Commission under another topic. The draft should explicitly enunciate the principle that an injured person must have exhausted the domestic legal remedies of the State against which it had a claim before resorting to diplomatic protection by the State of nationality.

48. Mr. ROSENSTOCK said he agreed that exhaustion of domestic remedies was an essential part of the topic, but it should not be construed as meaning that, in all cases, nothing could be done until some non-useful process was exhausted: the effect of exhaustion of domestic remedies was inherently limited in instances when there was no internal process whereby injustice could be righted.

49. Mr. ECONOMIDES said he agreed with Mr. Baena Soares and Mr. Rosenstock that the exhaustion of domestic remedies was an essential part of the topic. Certainly, there must be exceptions to the requirement that domestic remedies be exhausted, including cases of denial of justice, mentioned by Mr. Sepúlveda. The Special Rapporteur had said that the issue might be covered under the topic of State responsibility, or alternatively, that he himself would take it up. The matter was important enough for the Commission to need to know exactly where and when it was to be addressed.

50. The CHAIRMAN, speaking as a member of the Commission, said he had conceptual difficulties with the reference in article 5 to nationality acquired by “birth, descent or bona fide naturalization”. In paragraph 102 of his report, the Special Rapporteur defined birth as being a case of *jus soli* and descent as being one of *jus sanguinis*. Yet nationality according to the principle of *jus sanguinis* was also conferred on the basis of and at the time of birth. Birth should thus be construed to include both *jus soli* and *jus sanguinis*.

51. In article 6, he preferred the term “dominant” to “effective”, since it carried the notion of prevailing over others. Further thought should be given to cases where an injured person made use of the benefits of the nationality of the wrongdoing State and when such use was of relevance to the injury suffered. He agreed that the concept of dominant nationality could also have a role to play in regard to article 7. Articles 6 and 7 must, in any event, be considered together to ensure that they covered all cases of multiple nationality.

52. As to article 8, diplomatic protection was traditionally limited to nationals and nationality was thought to be a strong bond linking the State and the individual. In recent times and in special cases, other factors like habitual residence had created much stronger ties than nationality. The discussion on refugees had revealed the complex nature of the issue. The existence of refugees was caused by political conflicts and each case presented special characteristics. It was not certain that a general rule would cover abnormal political situations.

53. One such political abnormality was represented by the 800,000 Koreans now in Japan. In 1910, Japan had annexed Korea and had made all the inhabitants Japanese

nationals.³ The 1943 Cairo Declaration⁴ by the leaders of Great Britain, China and the United States had indicated that the three great Powers, mindful of the enslavement of the people of Korea, were determined that in due course Korea would become free and independent. When the Allied Forces had occupied Japan in 1945, that principle had been implemented and, as a result, all of the 2,500,000 residents of Japan of Korean origin had lost Japanese nationality. Three quarters had opted to return to Korea but the remainder had stayed on in Japan because they had no livelihood on the Korean Peninsula.

54. Since Japan applied the *jus sanguinis* rule, there were six generations of Koreans in the country who did not have Japanese nationality. Technically, two Governments on the Korean peninsula claimed them as their nationals. As they had no passports, they travelled abroad using a Japanese travel document that guaranteed re-entry. Japanese consular assistance was provided to them in cases of need. Should Japan be given the right to exercise diplomatic protection on their behalf against a third State?

55. The question, he believed, could not be solved by a general rule such as the one being developed by the Commission. It had to be solved by the political normalization of the situation on the Korean Peninsula. So, while the question of diplomatic protection of refugees must be addressed, he was not sure that a general rule of diplomatic protection was the proper place to do that.

56. Mr. DUGARD (Special Rapporteur), summing up the debate, said that the question of whether denial of justice should be included in the study could be discussed in informal consultations. He agreed entirely that exhaustion of local remedies was a matter that must be dealt with in the work on diplomatic protection, even if it was also being addressed under the topic of State responsibility.

57. With regard to article 5, Mr. Kusuma-Atmadja had aptly pointed out that it was diplomatic protection, and not acquisition of nationality, that was the subject of the Commission’s study. Article 5 perhaps failed to make that distinction clearly enough. Mr. Simma had rightly said that the real issue was whether a State of nationality lost the right to protect an individual if that individual habitually resided elsewhere—in other words, what was involved was a challenge to the right of a State to protect a national, not the circumstances in which a State could grant nationality. As Mr. Sreenivasa Rao had pointed out, opposability came into play and that should be addressed in the redrafting of the article. Mr. Gaja and Mr. Kamto had made helpful drafting proposals which would remove from the articles the references to birth, descent and naturalization. Objections had been raised to the use of the term “bad faith”, and that, too, was a question of drafting.

58. Mr. Brownlie had made a more substantial attack on article 5, saying that it reflected a middle-class world by ignoring the fact that many people had no identity papers

³ See Treaty of Annexation by the Imperial Government of Japan of 22 August 1910.

⁴ United States, Department of State, *A Decade of American Foreign Policy: 1941–1949, Basic Documents* (Washington, D.C., United States Government Printing Office, 1950), p. 20.

or passports and had only residence or habitual residence to connect them with a particular country. That, of course, was correct, but surely, in such a case, if a State wished to exercise diplomatic protection on behalf of a person who habitually resided within its territory, it could grant that person nationality. Nationality was open to all persons when they could prove to the State of nationality that they habitually resided in it. Thus, although many suggestions had been made on how to improve article 5, no one had questioned the need for such a provision. No one had suggested that the *Nottebohm* rule was an absolute one that should be codified. He therefore thought the article could usefully be referred to the Drafting Committee.

59. Article 6 presented greater difficulties and had created a clear division of opinion. He agreed it would be more appropriately placed after article 7. He did not, unlike some members, see it as a clear case of progressive development of international law. Two points of view existed, both backed by strong authority, and it was for the Commission to make a choice between the competing principles. Mr. Momtaz had made a strong plea for the principle of non-responsibility on the part of the respondent State. On the other hand, Mr. Sepúlveda had made the cogent point that many States did not allow a national to denounce or lose his or her nationality. Cases might therefore occur in which a person had relinquished all ties with the original State of nationality and acquired the nationality of another State yet was formally bound by a link of nationality with the State of origin. That would mean that, if the individual was injured by the State of origin, the second State of nationality could not provide protection. Clearly, the draft must contain a provision covering the material in article 6. Since views were so divided, however, and it seemed unlikely that the division could be remedied in the Drafting Committee, he proposed that article 6 be discussed in informal consultations.

60. There was widespread support for article 7, some helpful drafting suggestions had been made and the principle set out in the article had not been seriously questioned. He was therefore proposing that it could be referred to the Drafting Committee.

61. Article 8 was clearly an exercise in the progressive development of international law and an overwhelming majority of members had expressed support for it. The objections raised were not really well founded. First, the State reserved the right to exercise diplomatic protection and thus had discretion in the matter. Secondly, there was no suggestion that the State in which the individual had obtained asylum could bring an action against the State of origin. That was made very plain in paragraphs 183 and 184 of the report, although it could perhaps be made clearer in the article itself. Thirdly, the provision was not likely to be abused: stateless persons and refugees residing within a particular State were unlikely to travel abroad very often, as the State of residence would be required to give them travel documents, something that in practice was not done frequently. Only when a person used such documents and had suffered injury in a third State other than the State of origin might diplomatic protection be exercised. Mr. Kabatsi had brought out that point with the example he had given. A number of suggestions for improvements had been made, including the suggestion that the article should be split into one part on stateless per-

sons and another on refugees. Such matters would best be dealt with by the Drafting Committee, and he proposed that the article be referred to it.

62. All in all, articles 5, 7 and 8 could be referred to the Drafting Committee, but only if, after hearing the report on the informal consultations on articles 1 to 3, the Commission so decided. Article 6, on the other hand, should be considered in informal consultations.

63. The CHAIRMAN announced that the Commission had concluded its discussion of articles 5 to 8. He said that, if he heard no objection, he took it that the Commission wished, as recommended by the Special Rapporteur, to discuss article 6 in informal consultations and would take a final decision on referral of the remaining articles to the Drafting Committee after the report on the informal consultations on articles 1 to 3.

It was so agreed.

The meeting rose at 1 p.m.

2628th MEETING

Friday, 26 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Candiotti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹ (A/CN.4/504, sect. D, A/CN.4/509,² A/CN.4/510³)

[Agenda item 4]

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Ibid.*

REPORT OF THE WORKING GROUP

1. The CHAIRMAN invited the Chairman of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) to report on the work of the Group.

2. Mr. Sreenivasa RAO (Chairman of the Working Group) said that, in order to have a better understanding of the Working Group's activities, it was worth briefly recalling the main stages of the consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law since the forty-ninth session of the Commission, in 1997. At that session, the Commission had decided to focus first on the question of prevention under the subtitle "Prevention of transboundary damage from hazardous activities"⁴ and had appointed him as Special Rapporteur for that part of the topic. At the fiftieth session, in 1998, he had submitted a first report on prevention of transboundary damage from hazardous activities,⁵ as well as 17 draft articles for a future convention on the prevention of significant transboundary harm. He had sought to map out the subject in those draft articles, which had been adopted by the Commission on first reading and sent to the General Assembly for consideration by the Sixth Committee at the end of the fiftieth session.

3. Article 1 (Activities to which the present draft articles apply) provided that the activities covered by the future convention were those which involved a risk of causing significant transboundary harm. Those activities were not only—as originally planned—those which could be called "ultrahazardous", such as nuclear activities, but all activities likely to cause significant harm as a result of their consequences for the population, property, the environment, etc., thereby enlarging somewhat the scope of the draft convention.

4. On the other hand, it had been decided to leave out a number of areas which had so far been regarded as coming within the framework of the topic. The future convention would not cover activities causing harm to the global commons, i.e. to resources or geographical regions which did not fall within the exclusive jurisdiction of a particular State. Activities which caused harm that was not significant in the short term and which could not be attributed to a well-defined source (such as pollution of various origins which had harmful cumulative effects in the long term) had also been excluded from the scope of application.

5. The Commission and the Sixth Committee had endorsed that approach, while stressing that it should not be interpreted as a lack of interest in the above-mentioned questions, which might be considered subsequently in other contexts.

6. The scope of the topic having thus been clearly delimited, the question had arisen whether the draft articles should include a list of the activities covered. That question had already been discussed by the Working Group

established at the forty-ninth session, which had concluded that, in view of developments in technology, it was not possible to draw up such a list. It had also appeared that that "crystallization" was neither useful nor desirable in a framework convention. Ultimately, it had thus been deemed preferable to leave it to the States parties to the future convention to decide for themselves to which activities the rules would apply, a solution which he endorsed wholeheartedly.

7. Was it also necessary for the draft to define what was meant by a "significant transboundary risk"? There was no satisfactory definition of that concept in the doctrine. In the context of the non-navigational uses of international watercourses, it had been considered that a significant risk was one which was not negligible or *de minimus* and which might be appreciable or detected or identified on the basis of agreed criteria or standards. Although there was a possibility that, in the context of the future convention on the prevention of significant transboundary harm, a permissible or tolerable "risk level" would be set, for example, by a relevant international organization or by negotiation, it had been considered that, given the uncertainty surrounding the question, it was better, there again, to leave it to the States parties to the convention to decide.

8. On that basis, the Working Group had undertaken to review the first 17 articles with a view to adopting them on second reading. Article 3 (Prevention) provided that States must take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm. Everyone agreed that States had the obligation in that respect to exercise due diligence. However, the question remained whether a State which had not exercised such diligence must be considered responsible. It had initially been argued that, if the absence of due diligence had not resulted in any harm, there was no reason for it to give rise to liability. That position had been abandoned in 1998. Since then, it had been considered that the State likely to be affected by the absence of the diligence of another State would at the very least have the possibility of seeking consultations. That solution, which he personally supported, had unfortunately caused another problem, that of the linkage between article 3 and article 12 (Factors involved in an equitable balance of interests) calling for an equitable balance of interests of concerned States. Achieving that equitable balance presupposed that States discussed and negotiated solutions which, it was apprehended, might be at variance with their obligation to exercise the due diligence required: it had been argued that, after imposing a mandatory rule in article 3, the Commission could not suggest in article 12 that the same was open to negotiation among concerned States to ensure the protection of a certain equitable balance of interests. After discussing the question at great length, the members of the Working Group had concluded that the possibility given to States in articles 10 to 13 of the future convention to consult and negotiate would in no way dilute the duty of diligence provided for in article 3; on the contrary, it would help the clarification of the obligation involved.

9. The Working Group had also focused on the title of the study of prevention and had suggested, although not unanimously, that the words "from hazardous activities" should be deleted, since an activity which caused significant harm was by definition hazardous. Some members of

⁴ *Yearbook* . . . 1997, vol. II (Part Two), p. 59, para. 168.

⁵ *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/487 and Add.1.

the Working Group had also gone back over the word “acts” in the English version of the title of the topic and said that they preferred “activities”. But most members of the Working Group had taken the view that that distinction, which was more of technical or intellectual than of practical interest, did not warrant amending a title which had not posed any problem for more than 20 years, especially as the discussions in the Sixth Committee had shown that States regarded the question as marginal.

10. The Working Group had carefully considered articles 1 to 17 and the proposed amendments. The proposals would be reflected in the third report on the topic (A/CN.4/510), which he would submit to the Commission at the beginning of the second part of its session.

Unilateral acts of States (*continued*)* (A/CN.4/504, sect. C, A/CN.4/505,⁶A/CN.4/511⁷)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR⁸ (*continued*)*

11. The CHAIRMAN said that, to assist the Commission in its work, the secretariat had distributed an informal paper in English containing the text, presented in the form of general observations and specific observations, of replies received to date to a questionnaire on the subject of unilateral acts of States sent to Governments pursuant to a decision taken by the Commission at its fifty-first session.⁹ Eleven States had thus far replied and the text of any replies received subsequently would also be distributed in the form of an informal paper and incorporated in the final version of the replies from Governments to the questionnaire (A/CN.4/511).

12. Mr. HERDOCIA SACASA said that the work the Special Rapporteur had done and his third report on unilateral acts of States (A/CN.4/505) deserved special praise in view of the fact that unilateral acts were more and more frequently used expressions of will for which no clear-cut normative framework yet existed. The writings of jurists and judicial decisions, however useful, were only beginning to describe the personality of that new actor which was coming forward, alone, on the international obligations scene, without knowing quite where it was going. The Special Rapporteur had succeeded in refining the terminology of unilateral acts, introducing elements of certainty, security, stability and confidence that served the interests not only of those who formulated them, but also those who invoked or rejected them.

13. He noted that at least 6 of the 11 Governments that had replied to the questionnaire had referred to the difficulty of answering certain questions because it seemed impossible to draft or define common rules governing all unilateral acts, which were very numerous, complex and diverse. One had the same impression from the discussion in the Sixth Committee at the fifty-fourth session of the

General Assembly, one group of States having advised the Commission to proceed on a step-by-step basis, beginning with declarations that created obligations rather than with those designed to obtain or preserve rights. The concerns thus expressed stemmed, perhaps with some justification, from two problems. First, was it possible to establish rules applicable to all categories of unilateral acts? Secondly, should the Commission decide at the outset whether only general rules or also specific rules should be formulated? In his view, those problems were not really insurmountable. The Commission must simply proceed cautiously, adopting a forward-looking approach.

14. The final solution might consist in falling back on the Commission’s tried and tested working methods and dividing the draft articles into two parts: the first would establish general provisions applicable to all unilateral acts and, the second, provisions applicable to specific categories of unilateral acts which, owing to their distinctive character, could not be regulated in a uniform way.

15. Like other members of the Commission, he considered that articles 1 to 5, which would constitute Part One of the draft articles, felicitously embodied a general set of rules applicable to all unilateral acts and posed no really fundamental problems.

16. Referring briefly to specific aspects of the report, he said he agreed with the Special Rapporteur, in paragraphs 19 and 20 of the report, that the provisions of the 1969 Vienna Convention could not be automatically transposed to unilateral acts of States: they could be applied only by analogy and serve as a flexible frame of reference.

17. With regard to new draft article 1 (Definition of unilateral acts), he noted with satisfaction that the Special Rapporteur had replaced the term “declaration” by the term “act”, which was much broader in scope. The concept of “intention” was welcome as a key ingredient of the subject, since the State should be aware that, when it formulated a unilateral act, it was entering into a legal commitment. Indeed, that was one of the main characteristics that differentiated political acts from unilateral acts. He also agreed with the use of the term “known to”, which was preferable to “publicly”. He also agreed that the adjective “unequivocal” describing the State’s expression of will should probably be deleted. He furthermore noted that the concept of autonomy of a unilateral act had not been included as such in the definition proposed by the Special Rapporteur despite the fact that it was an essential means of clarifying matters by establishing a distinction between treaty-based acts and unilateral acts.

18. He supported new draft article 2 (Capacity of States to formulate unilateral acts), according to which every State possessed that capacity, but suggested that the words “in accordance with international law” should be added at the end of the article. With regard to new draft article 3 (Persons authorized to formulate unilateral acts on behalf of the State), he expressed approval of paragraph 1. Paragraph 2 somewhat expanded the scope of article 7 of the 1969 Vienna Convention, doubtless in the light of precedents, such as the judgments of ICJ in the *Nuclear Tests* cases, and of practice. However, the Commission should be particularly prudent on this point. He accepted new

* Resumed from the 2624th meeting.

⁶ See footnote 2 above.

⁷ Ibid.

⁸ For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

⁹ See *Yearbook . . . 1999*, vol. II (Part Two), pp. 138–139, para. 594.

draft article 4 (Subsequent confirmation of an act formulated by a person not authorized for that purpose). With regard to new draft article 5 (Invalidity of unilateral acts), he suggested that the Spanish, English and French versions should include an introductory phrase indicating the cases in which a unilateral act was invalid. He agreed with the similarities to the corresponding provision of the Convention, to which had been added a supplementary ground of invalidity relating to the incompatibility of a unilateral act and a decision of the Security Council, in subparagraph (g). He proposed that the reference in subparagraph (a) to “consent” should be omitted because it tended to be associated with treaty terminology. He had some doubts about the relevance of subparagraph (h), which stated that a unilateral act was invalid if it conflicted with a norm of fundamental importance to the domestic law of the State formulating it. The provision referred to the constitutional law of States, but, in a democracy, unilateral acts did not necessarily have to be ratified by national parliaments. The unilateral acts covered by the study were acts which had been formulated in some cases by the executive and could have an impact on legislative acts or on coordination between the different branches of government.

19. Lastly, he thought that the Commission should be very careful in its use of terms such as “creation of rights” or “confirmation of rights”. In that connection, paragraph 49 of the report required some clarification. In any case, it should be borne in mind that the principle of the relativity of treaties was applicable to unilateral acts. Article 34 of the 1969 Vienna Convention clearly stated the principle that “[a] treaty does not create either obligations or rights for a third State without its consent”. It followed that the principle *res inter alios acta*, to which the Special Rapporteur had drawn special attention, was highly pertinent in the context: it ensured that international law was respected and, above all, that no rights were created vis-à-vis third States without their consent.

20. Mr. GAJA said that the Special Rapporteur’s third report made significant progress in its analysis of the topic and in proposing draft articles that could provide an adequate legal framework. However, he had hoped for greater progress and was somewhat disappointed. But the fault did not lie solely with the Special Rapporteur. The third report had been written prior to the receipt of the replies from the 11 States that had thus far responded to the Commission’s questionnaire. It should be noted that the purpose of the questionnaire was to request materials from Governments and inquire about their practice in the area of unilateral acts as well as their position on certain aspects of the Commission’s study of the topic.¹⁰ While the replies received thus far contained some interesting material for the Commission’s work, they said nothing about the practice of the States concerned in the area of unilateral acts. There seemed to have been a communication problem or perhaps a misunderstanding because the Commission had not received what it had asked for, namely, materials and information on the practice of States. As a result, the Special Rapporteur’s third report and the secretariat’s informal paper concerning the replies received from States contained very little information on State practice. That was a serious concern because, until such time as the Commis-

sion had collected and analysed sufficient data on State practice, it would be hard to identify the characteristic elements of different unilateral acts and to ascertain whether and to what extent common rules could be proposed.

21. The Working Group on unilateral acts of States re-established at the fifty-first session of the Commission¹¹ had tentatively adopted as a starting point for the gathering of State practice a definition of unilateral acts¹² which he viewed as preferable to that proposed by the Special Rapporteur in new draft article 1 on two counts. First, as noted by Mr. Candioti (2624th meeting) and Mr. Herdocia Sacasa, the adjective “unequivocal” was superfluous. Secondly, whereas in the initial definition the act was to be notified or otherwise made known to the State or international organization concerned, the only requirement now was that it should be known to the State or international organization. That wording was misleading because it could give the impression that the knowledge might have been acquired, for example, through espionage or the activities of intelligence services. But the State that was the author of the act must take some steps to make it known to its addressee(s) or to the international community. In his view, therefore, the definition adopted at the fifty-first session by the Working Group should be restored. The Commission must now try to identify the different types of unilateral acts to which the draft articles would be applicable, whether or not they were subject to common rules or to a special regime. It might be useful to give some indication in article 1, without, of course, attempting to be exhaustive, of the kinds of acts contemplated, including their effects, bearing in mind that opinions were divided about the character of unilateral acts such as consent or protests.

22. In his third report, the Special Rapporteur dealt with a number of issues relating to the formulation of unilateral acts and their validity. He had no firm views for the time being on many of those issues, given the need to collect and analyse State practice and to examine the extent to which rules modelled on the 1969 Vienna Convention were applicable to all or only some unilateral acts.

23. One issue that had been omitted but needed to be addressed was analogous to that dealt with in article 46 of the 1969 Vienna Convention, namely competence under internal law to conclude treaties. New draft article 3 (Persons authorized to formulate unilateral acts on behalf of the State), which corresponded to article 7 of the Convention, specified the persons who were authorized to formulate unilateral acts on behalf of the State, but said nothing about whether, under constitutional or statutory provisions, some other organs of State had to be involved for the act to be validly formulated. The fact that a head of State could ratify a treaty did not mean that there were no constitutional rules requiring prior authorization by parliament. It should therefore first be established whether there were constitutional rules applicable to unilateral acts and, if not, to what extent the constitutional rules applicable to treaties could be applied by analogy, under constitutional law, to some of the unilateral acts being dealt with by the Commission. It should then be estab-

¹⁰ Ibid., para. 593.

¹¹ Ibid., p. 137, paras. 577 et seq.

¹² Ibid., p. 138, para. 589.

lished whether infringement of the constitutional rules had implications for the validity of unilateral acts. Draft article 5, subparagraph (*h*), appeared to refer to the content of the act rather than to competence to formulate the act.

24. Mr PAMBOU-TCHIVOUNDA said that he would comment on some of the criteria adopted in the draft general definition of unilateral acts of States, not questioning their relevance, but merely considering their relative merits.

25. With regard to the criterion of intention, he wondered whether the decision to focus exclusively on the intention of the author State was not tantamount to adopting a purely doctrinal approach and overlooking practical considerations. A unilateral act was obviously an act motivated by self-interest and it was thus above all an act carried out in pursuit of a goal. It was a self-interested act from the point of view of its purpose and its context. By analysing the intention behind the act, it was no doubt possible to identify the nature of the interest and the goal to be achieved, but the fact that a State decided to perform an act invariably meant that it found some interest in doing so. The “expression of will” referred to in the draft definition was, in fact, an action. In formulating the expression of will, the State took the initiative to act—in other words, to contract obligations or reaffirm rights. In order to take such an initiative, however, the State had to believe it to be in its interest; otherwise, it would certainly not dare to do so. The idea of interest should therefore perhaps be incorporated in an objective definition of the unilateral act, not to replace the idea of intention, but as a way of giving meaning and content to that idea which was more difficult to define. Therefore, while the idea of interest could be implicit, as it were, “upstream” of the expression of will, it should be included as clearly as possible among the determining factors of the unilateral act rather than simply be hinted at. In the first place, if the interest was founded in law, it became a legal interest, and a legal interest of that kind was at the heart of the legal effects sought by the State in taking the initiative of formulating a unilateral act. Secondly, the inclusion of the concept of interest obviated the need for a debate on the idea of unequivocal expression of will; a well-defined interest was, of necessity, unequivocal; it necessarily corresponded to the legal effect of the decision or the act. The definition proposed by the Special Rapporteur was, of course, neither unintelligible nor inadmissible, but it would gain in clarity by being refocused on the idea of interest.

26. Turning to the criterion of autonomy, he said that it indisputably raised certain problems. In order to be a determining factor, a legal interest had to be derived from a legal regime. Certain legal interests were inherent in the very nature of a State without there necessarily having to be a treaty provision or legal rule to establish them as a source of obligations. For example, it was in the interest of a State to maintain good-neighbourly relations with another State because its very existence was at stake. In such a case, political interest bordered on legal interest. Such interests, inherent in the very nature of the State, did not necessarily derive from an international law regime; sometimes, indeed often, they stemmed from a domestic law regime. The problems underlying the dialectic between domestic law and international law generally arose, both in theory and in practice, in terms of validity or

international opposability. Once the prerequisite of validity or international opposability had been met, however, the borderline between the two regimes became more flexible or even permeable. The problem of the legal basis for the interest in question arose in terms of source rather than of regime, which, depending on the circumstances, might be customary law, treaty law or general international law. The obligation to maintain good-neighbourly relations could justify the formulation of an act. But that was an obligation in general international law. If autonomy were maintained as a criterion for the definition of a unilateral act of the State in relation to other regimes, it should be handled with a great deal of caution. As the Special Rapporteur said in paragraph 61 of his third report, such a criterion could not be interpreted “too broadly”; the point was to exclude, by means of that criterion, acts linked to other regimes, such as all acts linked to treaty law. Yet directly afterwards, in paragraph 62 of the report, the Special Rapporteur confirmed that the unilateral act arose at the time it was formulated. From what did it arise? For what reason? To what end? No attempt was made to answer those questions.

27. He would comment on the criterion of “publicity”, and especially the determination of methods of ensuring it, i.e. the way in which the act was brought to the knowledge of the addressee, and the form of a unilateral act, i.e. proof that the addressee was indeed aware of the act. Those questions did not appear to have been sufficiently taken into consideration in the proposed definition of unilateral acts. The Special Rapporteur had decided to concentrate on substance, but the formal aspects of the unilateral act would have gained from being highlighted in a comprehensive and complete picture of the unilateral act. Such a picture did not appear in the draft. A more balanced approach to the topic was desirable, particularly in view of the possible structuring of the regime that would necessarily have to be distinguished from the general provisions. Mr. Herdocia Sacasa had spoken of the possibility of following the approach adopted in the preparation of the draft articles on nationality of natural persons in relation to the succession of States¹³ by drafting some general provisions first and then some specific provisions. He was not opposed to the idea, but his own suggestion would rather be that the Special Rapporteur should, while maintaining his current approach, incorporate at least one set of general provisions in the draft, such as those that were rightly proposed in new draft article 1.

28. An article 1 on definition was undoubtedly needed, but the definition proposed by the Special Rapporteur had two drawbacks. The first had to do with the questions arising from the Special Rapporteur’s decision to ignore the formal aspects of unilateral acts and the second, with the uncertainty of a definition based on a criterion, that of “the intention of producing legal effects”, which could be described as tendentious. Intention was a tendency, a viewpoint. To draw up a definition on the basis of a viewpoint did not seem adequate because the rule thus obtained would be merely indicative rather than peremptory. He feared that preference was being given to “soft law” and that the need to produce “hard law” in the draft articles was being neglected.

¹³ For the text of the draft articles, *ibid.*, p. 20, para. 47.

29. New draft article 2 undoubtedly formed part of the set register of general provisions. The draft article recalled the inherent link between the State and the unilateral act. The expression of will reflected the legal personality of the State; it meant that, whatever its size or political importance, a State remained a State and that all States were each others' equals. The concept of legal personality was akin to the concept of equality of States. The capacity of the State to formulate unilateral acts was therefore inherent in the nature of the State and the Special Rapporteur was right not to make any specific comments on draft article 2 because they would have been superfluous.

30. The set of general provisions should perhaps include two new elements. First, a draft article designed to affirm the diversity of designations and forms of unilateral acts of States would be welcome. Such a draft article would supplement draft article 1, somewhat in the manner of article 2, paragraph 1 (a), of the 1969 Vienna Convention and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention"), which read: " 'Treaty' means an international agreement . . . whatever its particular designation". A reference to designation would reassure all those members who had rightly raised questions about the diversity of unilateral acts of States revealed by practice. The first set of general provisions could also include provisions relating not only to the designation but also to the scope of the draft articles. A typology of various categories of unilateral acts, not merely designated, but accompanied by their respective definitions, could be introduced at that point. The draft would then boast a first part which, instead of being rather skimpy, would have the substance that it could in all fairness be expected to possess.

31. Once that had been done, the draft would go on to the set of provisions devoted to the regime, the first of which would be new draft article 3. It should be entitled "Competence to formulate unilateral acts on behalf of a State" instead of "Persons authorized to formulate unilateral acts on behalf of a State" so that it would stay within the limits of fundamental concepts of law, in line with the concept of capacity. The draft article, which had two paragraphs, should be supplemented by a third consisting of new draft article 4, which actually belonged in draft article 3. The question of competence would thus be considered comprehensively, thereby doing justice to a general principle of law, that of lawfulness. The consequences of a unilateral act formulated by an incompetent authority would then be incorporated in a chapter on invalidity.

32. Draft article 3 should be reformulated, not just to include draft article 4, but also in the light of the following three principles. First, the transposition of the categories of authority identified by the law of treaties (head of State, prime minister, minister for foreign affairs) to the law of unilateral acts was acceptable. Secondly, if the set of authorities qualified to engage the State unilaterally was to be extended, that should not bring in to play certain techniques specific to the law of treaties, such as full powers, but should be based on the position of the author of the unilateral act within the State apparatus or, in other words, on the way political power was exercised within the State and on the specific technical field in which the author of the unilateral act operated, subject to confirmation in both

cases. Thirdly, the extension of the set of authorities to heads of diplomatic missions or permanent representatives of States to international organizations would be acceptable under the same conditions.

33. The reference to the concept of "other circumstances" in draft article 3, paragraph 2, might have some relevance on the basis of those differentiating factors, but, without them, it was hard to see what the concept meant. The concept of "practice of the States concerned" was accepted in international law, whereas that of "other circumstances" was relative in time and space.

34. In conclusion, he said that draft article 3 should be reformulated in the following way. The title should be amended as indicated previously. In paragraph 1, the phrase "are considered as representatives of the State for the purpose of formulating unilateral acts on its behalf" should be replaced by "are competent for the purpose of formulating unilateral acts on behalf of the State". Since no one could challenge the competence of the authorities referred to in that paragraph, the more direct wording would do away with a useless contortion. In the French text of paragraph 2, the phrase *Une personne est considérée comme habilitée par l'État pour accomplir en son nom un acte unilatéral* was unwieldy and should be replaced by *Une personne est présumée compétente pour accomplir au nom de l'État un acte unilatéral*. What was involved was a presumption of competence to formulate a particular act. Paragraph 2 should end with the words: "unless the practice of the States concerned or other circumstances make it impossible to establish his incompetence". In such cases, either the authority was competent or it was not and the paragraph indicated that, in the final analysis, States were free to have themselves represented by the authority of their choice. Someone who was neither a head of State, nor a head of Government nor a minister for foreign affairs was considered competent unless practice or other circumstances established his incompetence. To say that in such a simple, streamlined manner would make the paragraph more intelligible. It would then be followed by a third paragraph, reproducing the content of draft article 4.

35. Those drafting proposals would certainly be decided on in the Drafting Committee, to which the draft articles should be referred. He had deliberately refrained from taking up new draft article 5, which raised serious and complex issues that could not be addressed without a great deal of material on State practice. Those problems certainly did not detract from the quality of the work done by the Special Rapporteur in his third report.

36. Mr. GOCO, referring to the issue of intention, said he had taken note of what was stated in paragraph 34 of the report, but did not see how intention could be determined until the stage of arbitration had been reached. Even in the *Nuclear Tests* cases, when President Mitterrand had stated that nuclear tests by France would end, the intention had become clear only once ICJ had ruled that the statement had been made publicly and was unambiguous and therefore binding on President Mitterrand even if there had not really been any intention of halting the tests. The statement attributed to President Clinton that a part of the former Yugoslavia would not be entitled to any aid as long as President Milosevic remained in power fell into

the same category: a head of State in office was bound by his statements. Having served as Philippine ambassador to Canada, he distinctly remembered the problem brought about by General de Gaulle's famous cry, *Vive le Québec libre!*¹⁴ That, too, had been a statement attributed to a head of State in office. Until the matter reached arbitration or judicial decision, however, intention could not be determined because the statement could always be denied.

37. The distinction between political act and legal act was vague. An act was considered to be political as long as it remained within the territory of a particular State, but it became legal once it affected other States. In the modern-day world, however, any act had repercussions in other States. The definition of the national territory of a particular State had once posed a problem, as it had affected a portion of another State and it was difficult to know whether the issue was political or legal.

38. He reserved the right to speak later on other aspects of unilateral acts of States.

39. Mr. KUSUMA-ATMADJA said the Special Rapporteur had clearly taken account of the comments made by the members of the Commission when he had prepared his third report, which was much clearer on certain subjects.

40. One of the unilateral acts of States that had been mentioned in the second report¹⁵ related to declarations that some countries used when reservations were precluded under certain conventions. As far back as 1960, an article by Anand¹⁶ had made it clear that such declarations should be interpreted as amounting to reservations. In the third report, a proclamation had been cited as one example of a unilateral act having legal effect. The Truman Proclamation¹⁷ had been given as an example in paragraph 164. At that time, there had been a readiness among other States to follow that example because technological progress had made it possible to extend the exploration and exploitation of resources on the seabed. A unilateral act had thus become the basis for the progressive development of international law.

41. There was another example of a unilateral act which, at the time, had been contrary to international law. He was referring to the Indonesian declaration of independence of 17 August 1945. Japan had then occupied Indonesia and listening to news from abroad had been prohibited. Despite that measure, the news had come through that a ceasefire was to be signed by the Japanese forces on 16 August 1945. Japan had arranged to grant independence to Indonesia at a later date and a draft constitution had even been drawn up, but it would have meant that the Republic of Indonesia had been created by a foreign Power and that was unacceptable. The revolutionary youth had forced President Sukarno to declare independence even before a

peace treaty had been concluded. The demoralized Japanese forces had put up no resistance to the partisans of independence, who had disarmed them and been able to continue the struggle. That was a unilateral act which had been illegal at the time it had been committed, but had been motivated by a clear intent. It was not true that a unilateral act had to be legal to have a legal effect. Everything depended on the way in which the underlying intention was realized. Sometimes, an act which had been illegal at the outset could be justified if the force of the people was behind it. President Sukarno had explained his decision by saying that an opportunity had arisen that must not be missed. Indonesia had subsequently normalized its relations with its neighbours by concluding bilateral treaties on the seabed and the subsoil, thereby adding an economic aspect to the political act of declaring independence.

42. The CHAIRMAN said the Special Rapporteur had informed him that he wished to hold consultations in the framework of a working group that should be established at the current time.

43. Mr. RODRÍGUEZ CEDENO (Special Rapporteur) announced that the Working Group would be composed of Mr. Al-Baharna, Mr. Baena Soares, Mr. Galicki, Mr. Hafner, Mr. Herdocia Sacasa, Mr. Kabatsi, Mr. Kateka, Mr. Pambou-Tchivounda and Mr. Sepúlveda, but that all members were welcome to participate in its work.

The meeting rose at 1.05 p.m.

2629th MEETING

Tuesday, 30 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Unilateral acts of States (*continued*) (A/CN.4/504, sect. C, A/CN.4/505,¹ A/CN.4/511²)

[Agenda item 7]

¹⁴ See C. Rousseau, "Chronique des faits internationaux", RGDIP (Paris), vol. 72, No. 1 (January–March 1968), pp. 164 et seq.

¹⁵ See 2624th meeting, footnote 4.

¹⁶ R. P. Anand, "Reservations to multilateral conventions", *Indian Journal of International Law*, vol. I, No. 1 (July 1960), p. 84.

¹⁷ Proclamation on the "Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" of 28 September 1945 (M. M. Whiteman, *Digest of International Law*, vol. 4 (Washington, D.C., United States Government Printing Office, 1965), pp. 756–757).

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

² *Ibid.*

THIRD REPORT OF THE SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. LUKASHUK congratulated the Special Rapporteur on achieving progress in fulfilling an extremely difficult task. The third report (A/CN.4/505) revealed, however, that other difficulties lay ahead.
2. The draft articles did not adequately reflect the link between unilateral acts and international law. Referring to the judgment of ICJ in the *Nuclear Tests* cases, he said that the principle that the binding force of unilateral acts was determined by international law, and specifically, by the principle of good faith, had to be incorporated in a separate article.
3. Unilateral acts had legal effects in accordance with international law, and that idea must also find expression in the draft. Without making a formal proposal, he would suggest that the phrase “in accordance with international law” might be inserted in article 1, after the words “producing legal effects”.
4. The relationship between unilateral acts and peremptory norms of international law was important. Unlike the Special Rapporteur, he thought that a unilateral act that conflicted with a peremptory norm was in breach thereof. Only by mutual accord, and only in their interrelations, could States depart from such norms: unilateral departure was prohibited. The Special Rapporteur pointed to the existence of unilateral acts that had the aim of modifying peremptory norms, but they had no legal force. Such acts—offers, promises—acquired legal significance only when accepted by other States. The fact that States could make proposals to modify peremptory norms was illustrated by recent, highly unilateral interpretations of the principle of non-use of force.
5. A distinction must be drawn between unilateral acts that had legal effects immediately upon their formulation and irrespective of the action taken by other States, and unilateral acts that had legal effects only upon their acceptance by other States. Not all acts that put into effect the rules of law required the acceptance of other States—within the limits of the law, States could unilaterally realize their own rights.
6. The Special Rapporteur had been able to pinpoint the main issues that needed to be resolved at the initial stage of work, but the whole spectrum of unilateral acts could not be covered in general rules. He should identify those unilateral acts that deserved study and then determine the legal characteristics of each. An analysis of doctrine and State practice revealed that in most cases, promises, protests, recognition and renunciation were considered to be unilateral acts. It was not an exhaustive listing, but it could serve as a starting point.
7. Unilateral acts could, it seemed to him, be divided into a number of categories. First there were “pure” unilateral acts, those that truly implemented international law and required no reaction from other States. Then there were acts whereby States took on obligations. They were often called promises, although the term was a misnomer as it referred to moral, not legal, imperatives. When recognized by other States, such acts created a form of agreement and, as such, could give rise for other States not only to rights, but also obligations. The classic example of such acts was Egypt’s declaration in 1957 concerning the Suez Canal regime.⁴ Finally, there were acts corresponding to a State’s position on a specific situation or fact—recognition, renunciation, protest—which were also purely unilateral in that they required no recognition by other States.
8. He welcomed the reference in new draft article 1 to the “intention of” producing legal effects, because in some circumstances legal effects were produced indirectly, after the recognition of a unilateral act by other States. On the other hand, the deletion of the word “autonomous”, included in previous definitions of unilateral acts (former article 2), created certain difficulties. It would mean that unilateral acts included acts performed in connection with treaties. In view of the insistence of some members of the Commission on deleting the word, however, a compromise might be found by inserting the word “unilaterally” after “intention of”. It would be construed in that context to refer to the autonomous nature of the act. He was uncomfortable with the use of the word “formulated”, at least in the Russian version, as on the whole it described the generation of an act, not the result.
9. The Special Rapporteur rightly drew attention to the fact that States could produce unilateral acts by silent agreement. In modern times, silent agreement played a major role in the development of general international law, including *jus cogens*. In numerous instances the Security Council had adopted resolutions, including those establishing ad hoc international tribunals, in an exercise of powers that were not accorded to it under the Charter of the United Nations—and the States Members of the United Nations had given tacit recognition to those decisions, which had consequently acquired force.
10. As to new draft article 5, subparagraph (f), a unilateral act that conflicted with a peremptory norm of international law could not have legal force before it was recognized by another State. The paragraph might be interpreted as legalizing the breach, not only of customary rules, but also of treaty rules. In article 5, subparagraph (g), it should be made clear that a unilateral act was invalid not only if it conflicted with a decision of the Security Council but also, and all the more so, if it went against the Charter of the United Nations. He would like to see the addition, at the end of the subparagraph, of the phrase “and the rulings of international tribunals”. Subparagraph (h) might be supplemented by wording from the 1969 Vienna Convention concerning conflicts with domestic legislation in the context of the competence of a State to conclude an international treaty. Lastly, the *chapeau* of the article should be amended to make it clear that the State in question was one that had performed a unilateral act.
11. Mr. AL-BAHARNA, referring to paragraph 14 of the third report, said the Special Rapporteur did not seem

³ For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

⁴ Declaration (with letter of transmittal for 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, No. 3281, p. 299.

to doubt the relevance of the topic, but that question did not need to be raised, since the matter had already been decided when the Commission had adopted the topic.⁵ In paragraph 17, the Special Rapporteur underlined the relationship of the topic to the 1969 Vienna Convention, but in paragraph 18 pointed to the differences between the law applicable to unilateral acts and the law of treaties. It would be inadvisable to follow closely the Convention, since there were essential differences between treaty law and the law on unilateral acts. In fact, there was no parallelism between the two.

12. In the Sixth Committee, some delegations had expressed doubts that there was even a flexible parallelism, as mentioned in paragraph 22, and had held that the work on unilateral acts should be separated from treaty law. Although the character of a treaty, which required two or more parties, differed from that of a unilateral act, once a unilateral act was validly formulated and recognized as being enforceable, it could become subject to all or some of the legal consequences attributable to a treaty act in accordance with the 1969 Vienna Convention. Accordingly, all or some of the consequences of treaties relating, for example, to validity, capacity, nullity, revocation, reservation, good faith and interpretation could, by analogy, be applicable *mutatis mutandis* to a unilateral act formulated with the intention of producing legal effects.

13. In the replies from Governments to the questionnaire on unilateral acts requested by the Commission at its preceding session, the United Kingdom's reply, for example, was that inappropriate prominence was being given to the 1969 Vienna Convention and that it was not convinced that the provisions of the Convention could be applied *mutatis mutandis* to all categories of unilateral acts of States. Georgia had stated that the rules of the Convention could not be applied *mutatis mutandis* to unilateral acts because of the different character of such acts. The Special Rapporteur should take those views into consideration.

14. With reference to estoppel or preclusion, some representatives in the Sixth Committee had acknowledged the existence of a relationship between estoppel and unilateral acts, while others had denied it because the two were different in nature. The Special Rapporteur was right to affirm that estoppel had no relationship with unilateral acts, and in paragraph 27 of the report pointed to the striking differences between the two, including the fact that the characteristic element of estoppel was not the State's conduct but the reliance of another State on that conduct. The unilateral act was intended to create a legal obligation on the State making it, while estoppel did not create such a relationship on the State using it.

15. The Special Rapporteur indicated the difficulties involved in formulating a proper legal definition of "unilateral acts of States". A number of elements were listed in paragraph 31, all of which already figured in the draft, but the Special Rapporteur had attempted to improve the wording in the light of the discussions in the Sixth Committee and of the written comments provided by Governments. It was noted in paragraph 34 that the intention of the author State was fundamental to the topic, which

should be confined to unilateral acts formulated by States with the intention of producing legal effects, thus ruling out all political acts of States or unilateral acts or statements made with political intentions. The Commission should support the Special Rapporteur's position on that point.

16. The Special Rapporteur justified his use of the term "unilateral act" instead of "unilateral declaration" on the basis of the concerns expressed in the Sixth Committee, although in paragraph 40 he concurred that most if not all unilateral acts were formulated in declarations. All the examples cited in paragraphs 37 to 47 provided evidence that unilateral acts were in most cases formulated by means of declarations. In paragraph 41, it was stated that acts formulated by means of oral declarations or by means of written declarations could be seen in practice and the Special Rapporteur acknowledged in paragraph 47 that he had resorted to the term "acts" to satisfy an important body of opinion that considered the term broader and less restrictive.

17. The new definition of unilateral acts was silent about the form in which the act could be expressed; yet such acts had to be embodied in some form or other—they were not committed in a vacuum. While the complexity of establishing a comprehensive definition could not be overlooked, the new definition in article 1 was not a satisfactory solution. He would therefore suggest that the phrase "in the form of a declaration or otherwise in any other acceptable form" be inserted after "formulated by a State", or alternatively, that a second paragraph be added, reading: "A unilateral act of a State, as defined in paragraph 1, may take the form of a declaration or otherwise any other acceptable form." He would also suggest that article 1 should include a provision, perhaps in a separate paragraph, stating that a unilateral act of a State could be formulated orally or in written form.

18. Paragraphs 48 to 59 of the report cited examples based on precedents and State practice in support of the use of the expression "producing legal effects" in new draft article 1. He endorsed the proposed reformulation, for the reasons adduced in paragraph 48. The Special Rapporteur referred frequently to the generally accepted principle that the State could not, by means of a unilateral act, impose obligations on another State or international organization without that entity's consent. Yet many of the cases mentioned were relevant to the regime of treaties, rather than to that of unilateral acts.

19. In the section on the "autonomy" of unilateral acts, the Special Rapporteur dealt with an essential issue: the "characteristic of non-dependence" of such acts, as mentioned in paragraph 60. As stated in paragraph 61, the reason for including the expression "autonomous" in the definition of unilateral acts was to exclude acts linked to other regimes, such as all acts linked to treaty law. He was in favour of including the term, as "autonomy" was an important feature of a unilateral act. He therefore disagreed with the Special Rapporteur's apologetic tone and the sweeping statement in paragraph 69.

20. The term "unequivocal", included in the earlier definition of unilateral acts, was retained in new draft article 1. It was a basic and necessary element, since it was

⁵ See *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, para. 248, annex II and addendum 3.

hard to imagine how a unilateral act could be formulated in a manner that was unclear or contained implied conditions or restrictions, or how it could be easily and quickly revoked. The question raised in paragraph 71 was whether the unequivocal character of the act must be linked to the expression of will or to the content of the act.

21. "Publicity" was also an essential element of the definition, but the word carried broad connotations that could involve the use of the mass media, whereas what was meant was that the commitment contained in the unilateral act should be known at least to the addressee and to other States concerned. The expression "formulated publicly", used in former article 2 had been changed in the Working Group to "notified or otherwise made known to the State or organization concerned",⁶ which seemed acceptable. The new formulation suggested by the Special Rapporteur was "and which is known to that State or international organization", but it required elucidation. The reference to "State or international organization" failed to correspond to the words "one or more States or international organizations" used in the preceding clause, and it created confusion. The entities were cited in the plural in connection with legal effects but in the singular in relation to "publicity". Presumably that was unintentional. The last part of article 1 should therefore be recast to read: "organizations, and which is made known to that State or international organization or to those States or international organizations", or, simply: "and which is made known to them". On the other hand, he saw nothing wrong with the formulation contained in former article 2, which should be left unchanged. Accordingly, the words "is known to that State or international organization" should be replaced by the former wording "is notified or otherwise made known to the State or international organization concerned". Paragraph 131 of the topical summary of the discussion in the Sixth Committee (A/CN.4/504) stated that the latter expression had gained the support of delegations. If that was the case, why change it?

22. He agreed with the suggestion to delete former article 1 (Scope of the present draft articles). New draft article 1 contained the elements of the scope of application from the earlier version. Moreover, the draft did not require the addition of an article based on article 3 of the 1969 Vienna Convention. There did not seem to be any parallel between the two situations. As stated in paragraph 89 of the report, the term "unilateral" was broad enough to cover all expressions of will formulated by a State.

23. New draft article 2 was acceptable and he endorsed paragraph 1 of new draft article 3, since heads of State, heads of Government and ministers for foreign affairs could unquestionably bind their States by means of unilateral acts. In its replies to the Commission's questionnaire, the Government of the Netherlands had added heads of diplomatic missions to those three categories, but he doubted that the head of a diplomatic mission could undertake such an important task without specific authorization.

24. He was reluctant to support new draft article 3, paragraph 2, in its current form, for it was too broad. Surely nobody could investigate the practice and circumstances

of each State to decide whether a person who had formulated a unilateral act was authorized to act on behalf of his State. That left the door open for any junior official to formulate a unilateral act that would more than likely be invalidated subsequently. The Commission should restrict the category of persons who could formulate unilateral acts under paragraph 2 to heads of diplomatic missions and other State ministers who had full authorization to do so for specific purposes only. In that way, it could draw the line between the general authority attributed to the three categories of persons in paragraph 1 and more limited authority attributed to the category of persons in paragraph 2.

25. New draft article 4 did not command his support because it was not sufficiently restrictive. If a person formulated a unilateral act without authority to do so, how could his State subsequently approve his unlawful action? Under the law of obligations, such a person acted illegally, and his action was therefore void *ab initio*. Accordingly, a State could not give subsequent validity to conduct that was originally unauthorized. However, the article was related to new draft article 3, paragraph 2, which he had suggested replacing by a more specific provision. If his suggestion was accepted, the State would not need article 4 to invalidate acts formulated by unauthorized persons. The Special Rapporteur's attention should, however, be drawn to the fact that new draft article 4 referred to article 3 in general, whereas the reference should be made specifically to article 3, paragraph 2, because the unilateral acts of the persons in article 3, paragraph 1, could never be questioned.

26. As for silence and unilateral acts, in paragraphs 126 to 133 of the report, silence related to the principle of estoppel, which lay outside the scope of the topic. He endorsed new draft article 5, on the invalidity of unilateral acts, but it would be useful to include as another cause for invalidity an act formulated by an unauthorized person. The draft article closely followed the 1969 Vienna Convention, but it was questionable whether the rules of interpretation applicable to the causes giving rise to the invalidity of treaties under the treaty-law regime could be applied *mutatis mutandis* to the same factors listed in new draft article 5.

27. Mr. HE said that he agreed with the deletion of former article 1 and its incorporation in new draft article 1 which represented a great improvement and served as the starting point from which the draft articles could be elaborated.

28. It was not essential to retain the element of autonomy in the definition. On the one hand, unilateral acts should have links with earlier rules of international law, although acts linked to other regimes, such as to treaty law, might be excluded. On the other hand, although in some cases there was no need for the addressee State to accept the unilateral act, in others the interests of the addressee State were involved and a response was obligatory.

29. He noted that the words "expression of will" were followed by "with the intention". Such repetition should be avoided. New draft article 1 should be referred to

⁶ See *Yearbook . . . 1999*, vol. II (Part Two), para. 589.

the Drafting Committee for a more precise and elegant wording.

30. New draft article 3, paragraph 2, had been taken from the relevant provisions of the 1969 Vienna Convention. However, the meaning of the phrase “if it appears from the practice of the State concerned” was unclear. A more precise wording, such as “person authorized to represent a State for formulating unilateral acts” might be used so as to identify the qualifications of persons representing or acting on behalf of a State.

31. Former article 4, paragraph 3, which had been taken from article 7, paragraph 2 (c), of the 1969 Vienna Convention, was fully in line with the scope and meaning of new draft article 3 and should be retained. It was wise to delete former article 6, as the content was already included in new draft articles 3 and 4.

32. It was true that silence had a legal effect in some cases, such as matters involving waivers, protest or recognition. However, it could not be regarded as a unilateral act in the strict sense, since it lacked intention, which was one of the important elements of the definition of a unilateral act. Hence, there was no need to deal with silence in the draft.

33. Lastly, he agreed that new draft article 5 should be drafted in keeping with the main lines and methodology of the 1969 Vienna Convention.

34. Mr. SIMMA commended the Special Rapporteur for his courage in taking on a topic which in his view was not fit for codification.

35. In dealing with unilateral acts, the Commission was in a difficult situation. There was extensive State practice, and all agreed that States constantly had recourse to unilateral acts, but that wealth of practice did not seem readily accessible. Even States appeared to have problems explaining their actions, in which connection it was enough to read the replies to the questionnaire. Unilateral acts were attractive to States precisely because of the greater freedom States enjoyed in applying them, as compared with treaties. The question was how to “codify” such relative freedom of action. The Commission was faced with a dilemma: either it applied a straitjacket *à la* 1969 Vienna Convention to a wide range of unilateral acts, and the product would then be totally unacceptable to States, or it confined its work to unilateral acts for which there was at least some trace of an accepted legal regime. The outcome would then be of limited value, because it would mean prescribing something that States did anyway. However, if the Commission continued with the topic, that had to be its course of action.

36. Again, judicial precedent also displayed a peculiar feature: the Commission had been focusing solely on the *Nuclear Tests* and *Eastern Greenland* cases. In the *Nuclear Tests* cases, ICJ had found itself with a political “hot potato”, which it had dealt with by reaching rash conclusions on the binding nature of unilateral promises, whereas in other circumstances it might have been much more cautious. In the *Eastern Greenland* case, legal experts continued to doubt whether a unilateral act in the proper sense was at issue or whether it was a statement made in a treaty context.

37. The Commission must take a more inductive approach, namely, it must first look at specific unilateral acts in terms of a working definition—and article 1 should be no more than a working definition—and then try to pinpoint common problems and perhaps find solutions applicable to all cases. But it was dangerous for the Commission to carry on discussing the applicability of the 1969 Vienna Convention without a clear idea as to which unilateral acts it had in mind.

38. The Commission had not really known what States would accept on the topic, yet it had decided that the Secretariat should send out a questionnaire to help the Special Rapporteur compile State practice.⁷ The Special Rapporteur had then submitted his third report in February 2000, although the compilation of State practice had not been ready and no answers to the questionnaire had been received. Perhaps the time had come to wait for more replies.

39. As to the report itself, he had never come across a United Nations document with such flawed language. Paragraph 25, for example, was incomprehensible.

40. With regard to new draft article 1, the Special Rapporteur had shifted in some respects from the working definition on which the Working Group and the Commission as a whole had agreed at the end of the fifty-first session after considerable debate. He did not see why the Special Rapporteur had reverted to certain points on which the majority of members had had misgivings at that session. For example, in paragraphs 70 to 77, he again took up the word “unequivocal”, yet the term continued to be confusing, because it was not clear whether an unequivocal expression of will should apply in the sense that a State must clearly mean what it said. Paragraphs 71 and 73 seemed to go in that direction, while the definition also suggested that States made statements that were intentionally equivocal. To cite one example, the Palestine Liberation Organization had been recognized by a large number of States as the legitimate representative of the Palestinian people, but, at least in an international legal context, nobody knew what that meant. States had obviously wanted to keep their statement equivocal. Hence, it was perilous to use the term “unequivocal”, which should be deleted.

41. New draft article 1 was a marked improvement over the previous version (former article 2), but he saw no need to speak of an “express” confirmation in new draft article 4. Why should it not be possible for a State implicitly to confirm the validity of a unilateral act that had been expressed by someone not authorized to do so?

42. It was very strange to say, in paragraph 128, that it was worth asking whether a State could formulate a unilateral act through silence, for it was impossible to “formulate” a legal act through silence.

43. As to new draft article 5, he was shocked to read in paragraphs 142 and 143 that one State had been concerned, with regard to fraud, that the provision in subparagraph (b) of former article 7 might encroach on certain accepted ways whereby States led their foreign policy and

⁷ See 2624th meeting, footnote 5.

convinced other States to join in that policy. In his opinion, fraud should remain a ground of invalidity.

44. In the matter of force, the comment in paragraph 150 was misleading. In new draft article 5, subparagraph (e), the Special Rapporteur rightly said that if the act had been procured by the threat or use of force, then it was invalid. But this was entirely different from saying that an act which itself conflicted with the prohibition of the use of force was invalid.

45. Moreover, it was surprising to see that paragraph 153 made no reference to new draft article 5, subparagraph (h), which looked as though it had been added at a later stage. The absence of comments on that subparagraph must be remedied. He experienced the same difficulty as did Mr. Lukashuk with the introductory phrase of new draft article 5. Which State could invoke the invalidity of a unilateral act? Unlike Mr. Lukashuk, however, he was of the opinion that, at least as far as subparagraphs (f) and (g) were concerned, the State which formulated a unilateral act conflicting with *jus cogens* or with a decision of the Security Council was not the only one entitled to invoke such invalidity. The discussion of the impact of Council resolutions on the validity of legal acts was confusing. It was linked to a comment by Mr. Dugard, who was quoted in paragraph 156 as saying that article 7 should include Council resolutions among the factors that could be invoked to invalidate a unilateral act. For example, if a State made a declaration that conflicted with a Council resolution, particularly under Chapter VII of the Charter of the United Nations, that called on Members not to recognize a particular entity as a State, it could be argued that such a unilateral act was invalid.⁸ Obviously, a problem arose in that connection and it had to be tackled. The Special Rapporteur had done so, but then asserted that even Council resolutions adopted on the basis of Chapter VI of the Charter could be binding. That was true from a legal viewpoint, as stated in paragraph 160, but it was going too far to say that a Council resolution or decision based on Chapter VI could invalidate a unilateral legal act by a State.

46. In his view, the only possible scenario leading to something like the loss of the effect intended by unilateral acts was one in which the Security Council adopted a decision expressly based on Chapter VII of the Charter of the United Nations or expressly referring to Article 39 thereof. He was of course aware of the practice that had come about as a result of the cold war, during which the Council had in many instances only been able to arrive at any decision at all by obfuscating the legal basis of such decisions; and in the advisory opinion in the *Namibia* case, some members of ICJ had gone to considerable lengths to read binding force into a Council resolution which did not mention its legal basis. But the cold war was over, and he failed to see why a declaration made by a State should be automatically invalid merely because a Council decision, whose binding nature was unclear, stood in its way. He drew attention to Article 103 of the Charter, pursuant to which, in the event of a conflict between obligations under the Charter and obligations under any other international agreement, the obligations under the Charter prevailed.

But such prevalence did not necessarily imply that the legal act was to be invalid.

47. Mr. Sreenivasa RAO said that the impact of Security Council resolutions on the legal validity of unilateral acts was a very important issue. He broadly agreed that Council recommendations under Chapter VI of the Charter of the United Nations would not invalidate unilateral acts.

48. As an astute observer, Mr. Simma would certainly be aware that the Security Council was sometimes intentionally equivocal in terms of the implications of its resolutions for Member States, especially when it omitted any specific reference either to Chapter VI or to Chapter VII of the Charter of the United Nations. He wondered whether Mr. Simma considered that Article 25 could be invoked only in the case of Council resolutions that were absolutely unequivocal.

49. Even if unilateral legal acts were not invalidated by Security Council resolutions, he would submit that States Members of the United Nations were required to honour the obligations that such resolutions imposed, especially when they were adopted unanimously. It was even conceivable that States would be moved to reconsider unilateral acts that came into conflict with Council resolutions.

50. Mr. ELARABY noted that, although Mr. Simma disapproved of the use of the word "invalidate", he had referred to Article 103 of the Charter of the United Nations, which clearly stated that, in the event of a conflict between the obligations of Member States under the Charter and their obligations under any other international agreement, their obligations under the Charter would prevail. In his view, the provision set out in Article 103 implied that incompatible legal obligations, either under a treaty or pursuant to a unilateral act, were invalid.

51. Mr. SIMMA said he had no objection to equivocal action by the Security Council. His argument was that the invalidation of a treaty or unilateral act was the most far-reaching legal sanction available. There were other less extreme ways in which a legal system could condemn an act, for example through unopposability. If the Council imposed an arms embargo and certain States concluded an agreement or formulated a unilateral act to the contrary, the agreement or act would not be invalidated but would simply not be carried into effect. If rule A prevailed over rule B, it did not necessarily follow that rule B must be invalid. For instance, according to the jurisprudence of the European Court of Justice, where a rule of domestic law was incompatible with a rule of Community law, the domestic rule was not held to be invalid but was merely inapplicable in specific cases.

52. Mr. TOMKA said that he broadly shared Mr. Simma's views. The 1969 Vienna Convention did not stipulate that non-conformity with a Security Council resolution was a ground for the invalidity of a treaty. And it was not the intention of Article 103 of the Charter of the United Nations to invalidate obligations under other treaties. Those obligations might be suspended where a Charter obligation was activated by a Council decision, but the treaty remained in force and continued to be binding once the Council decision was revoked. The same applied to unilateral acts. If the term "decision of the Security Coun-

⁸ Ibid., footnote 7.

cil” in draft article 5, subparagraph (g), was intended to include decisions under Chapter VI, the Council was being given more powers than it had thus far sought to arrogate to itself.

53. Mr. SEPÚLVEDA said that, according to new draft article 5, a unilateral act could be invalidated if, at the time of its formulation, it conflicted with a decision of the Security Council. But a unilateral act could also be invalidated at a later stage. For example, Rhodesia’s unilateral declaration of independence in 1965 had been subsequently invalidated by the Council, in its resolution 217 (1965) of 20 November 1965, which had also applied coercive measures—chiefly economic sanctions—under Chapter VII of the Charter of the United Nations. In that instance, the Council’s decision had been taken after the unilateral act.

54. Mr. PELLET commended the Special Rapporteur on having come to grips again with a subject which, unlike Mr. Simma, he thought was capable of being codified. The third report contained useful clarifications and amendments but was still somewhat abstract and deficient in practical examples, a particularly regrettable shortcoming in the case of a topic whose acceptability depended on the Commission’s ability to use current State practice as the basis for its proposals.

55. With regard to the bearing on the current topic of the law of treaties, and of the 1986 Vienna Convention in particular, it was still unclear whether the draft covered the effects of unilateral acts by States vis-à-vis international organizations and of acts by international organizations when their conduct was comparable to that of States. International organizations were mentioned only in new draft article 1 and then only as the addressees, not the authors, of international acts. Although the Commission had wisely decided to exclude resolutions adopted by international organizations from the draft, the word “resolution” did not cover the whole range of acts by such organizations. International organizations, above all regional integration organizations, could also enter into unilateral commitments vis-à-vis States and other international organizations. The issues raised by such acts must therefore be addressed mutatis mutandis in the light of the Convention.

56. The addressees of unilateral acts of States could also be other entities such as national liberation movements and individuals. The question arose whether unilateral acts, like treaties, could give rise to integral obligations. He suspected that they might and urged the Special Rapporteur to look into the matter.

57. The Special Rapporteur had rightly adopted a flexible approach to the relationship between the draft articles and the law on treaties, given that their purpose was to highlight the distinctive characteristics of unilateral acts as opposed to those of treaties, one such characteristic being the problems of interpretation of unilateral acts. The Commission had engaged in a very interesting debate at the previous session on the interpretation of the particular unilateral acts formed by reservations to treaties.

58. Although he had never fully understood the subtleties of the rules governing estoppel in the United Kingdom and the United States, the basic idea in international law seemed to be that a State or international organization

must not vacillate in its conduct vis-à-vis its partners and thereby mislead them. He therefore queried the meaning of the phrase “acts pertaining to estoppel” in paragraph 25. Any unilateral act could probably give rise to estoppel. He was also somewhat perturbed by the statement in paragraph 27 that the characteristic element of estoppel was not the State’s conduct but the reliance of another State on that conduct. Would it not be preferable to say that estoppel could result from a unilateral act when that act had prompted the addressee to base itself on the position expressed by the State that was the author of the act? Estoppel formed part of the topic in that it constituted one of the possible consequences of a unilateral act. It should therefore be addressed when the Special Rapporteur dealt with the effects of unilateral acts.

59. New draft article 1 presented the largest number of difficulties because of its influence on all the other articles. While many aspects of the Special Rapporteur’s approach were convincing and the article was better than former article 2, he could not fully agree with the proposed wording. The omission of the word “declaration” was welcome, if only because its relationship with the expression “unilateral acts” was extremely ambiguous. He agreed with the Special Rapporteur that the form of the unilateral act was of little consequence but he was intrigued by his ambiguous position regarding silence. While his own views were not as strong as those of some members, he felt that the Commission must adopt a clear position on the matter, either in the articles or at least in the commentary.

60. The *Nuclear Tests* cases showed that, contrary to what was implied in paragraph 41 of the report, “lack of ambiguity” could result not from a formally identifiable act but from a combination of oral declarations that dispensed with the need for formal written confirmation. Furthermore, he was convinced that the plurilateral acts alluded to in paragraph 45 had the same effect as unilateral acts in terms of their addressee(s). For example, a joint declaration by victors vis-à-vis a vanquished party or a joint declaration on debt relief for a third country clearly constituted a plurilateral act that was experienced as a unilateral act by the addressee. It was not evident, however, how such acts could be distinguished from plurilateral treaties. In any case, the Special Rapporteur should take a clear stand on whether they fell within the scope of the draft articles.

61. He agreed with the Special Rapporteur that the intention of the author of the act was essential for the definition of a unilateral act and disagreed with Mr. He that the terms “expression of will” and “intention” overlapped. Yet if intention was a fundamental component of the definition of a unilateral act, silence could not in all cases fall within the definition. The silence of Siam in the *Temple of Preah Vihear* case had perhaps been a unilateral act but it had extended over a long period of time, whereas the idea of an act suggested immediacy. Furthermore, an inadvertent act certainly did not qualify as a unilateral act.

62. Assuming that intention was essential, the next question concerned the object of the intention. He shared the Special Rapporteur’s view that the object was to produce legal effects. But the crux of the matter, at the definition stage, was what legal effects the author of the act

intended to produce, regardless of whether those effects materialized. A unilateral act occurred if the author intended that certain legal effects should ensue. The report was ambiguous on that point. Paragraphs 48 to 59 were concerned not with the effects sought by the author but those achieved by the act. New draft article 1 itself, on the other hand, rightly confined itself to the author's intention.

63. The Special Rapporteur introduced unnecessary restrictions in the phrase "legal effects in relation to one or more other States or international organizations" in new draft article 1. The definition of treaties in article 2, paragraph 1 (a) of the 1969 Vienna Convention should serve as a guide in that regard. According to the Convention, a treaty was an international agreement governed by international law. It was essential, in his view, to apply the same terms to unilateral acts, stating that a unilateral act was first and foremost an act governed by international law and thus placing the author of the act squarely within the ambit of international law, although major problems could be expected to ensue in the area of domestic law. For instance, was it possible to speak of a unilateral act when a State imperturbably took up a position in its internal law and displayed complete indifference to international law, as the United States had done in the case of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act).⁹ Again, he wondered why the Special Rapporteur wished to limit the legal effects of unilateral acts to relations with other States and international organizations, since peoples, national liberation movements or individuals could also be the beneficiaries of unilaterally assumed obligations. The Drafting Committee should delete the phrase "in relation to one or more other States or international organizations" and insert the phrase "and governed by international law".

64. The addressee of a unilateral act must obviously know about it if the act was to produce legal effects. Yet there too, it was a matter not of the definition but of the legal regime to be applied. The idea of knowledge raised questions regarding the point at which knowledge existed and how to determine whether the addressee possessed such knowledge. A State might obtain knowledge of the act only after a certain period of time. In that case, the question arose whether the unilateral act came into being only from the time of acquisition of the knowledge or from the time when the addressee State indicated that it had obtained knowledge of the act. Notwithstanding the comment by the Swiss Federal Department of Foreign Affairs, cited in paragraph 78 of the report,¹⁰ knowledge was, in his view, a concept that raised many more problems than it solved. He saw no justification for eliminating the idea of the "public formulation" of the act. What counted, for both practical and theoretical reasons, was publicity of the formulation of the act rather than its reception.

65. He continued to be very puzzled by the notion of "autonomy" of unilateral acts. Apparently, the Special Rapporteur had decided not to mention the autonomous character of such acts in the definition and that was a welcome move. Nevertheless, he was not convinced by the argument

set out in paragraph 69, which suggested that the idea of autonomy subsisted beneath the surface of the definition. A unilateral act could not produce effects unless some form of authorization to do so existed under general international law. The authorization could be specific, for example where States were authorized to fix unilaterally the extent of their territorial waters within a limit of 12 nautical miles from the baseline. Or it could be more general, as States were on the whole authorized to unilaterally enter into commitments limiting their sovereign authority. But unilateral acts were never autonomous. Acts that had no basis in international law were invalid. It was a matter not of definition but of validity or lawfulness.

66. With regard to the deletion of former article 1 it was perfectly conceivable that some categories of unilateral acts should be excluded from the draft, for example those pertaining to the conclusion and application of treaties (ratification, reservations, etc.). A detailed list of acts to be excluded would therefore have to be compiled and that called for the reintroduction of a draft article concerning scope comparable to articles 1 and 3 of the 1969 Vienna Convention. It should be specified that the draft articles were applicable only to unilateral acts of States, and not to acts of international organizations. The 1986 Vienna Convention would then no longer be of any relevance. Secondly, unilateral acts pertaining to the conclusion and application of treaties should be excluded. Thirdly plurilateral acts should be excluded, without necessarily ruling out the possibility that they produced the same effects as unilateral acts *stricto sensu*.

67. If such was the wish of the majority of members of the Commission, it should perhaps be clearly indicated that the draft did not deal with the legal effects produced by unilateral acts in relation to entities other than States and, possibly, international organizations. As already explained, he personally would regret such a limitation of the draft's scope.

68. New draft article 2, corresponding to former article 3, did not pose any difficulties. New draft article 3 and especially the Special Rapporteur's observations on it were less convincing. The references in paragraphs 103 and 104 to pledging conferences—a subject on which the Special Rapporteur failed to reach any definite conclusion—would perhaps be more appropriate under the heading of the intention to be bound. Generally speaking the rather inconclusive character of many of the considerations accompanying the draft articles was to be regretted. It was also difficult to explain why, in paragraphs 105 and 106, the Special Rapporteur considered that technical ministers did not commit the State, whereas elsewhere he appeared to say that high-ranking officials could. If that was true of the latter, it was certainly true of technical ministers. While welcoming the Special Rapporteur's decision to modify the text of new draft article 3—which in its earlier form (former article 4) had perhaps been too closely modelled on the corresponding rules of the 1969 Vienna Convention—he questioned the drafting of paragraph 2. It should be made clear that "A person" meant another person. In addition, was it appropriate to speak of "the States concerned", in the plural? Surely, the State which formulated the unilateral act was the only one concerned, and the singular case alone should be used. The reference to "other circumstances" in the same paragraph

⁹ See ILM, vol. XXXV, No. 2 (March 1996), p. 359.

¹⁰ L. Caflisch, "La pratique suisse en matière de droit international public 1995", *Revue suisse de droit international et de droit européen*, 1996, No. 4, p. 593, at p. 596.

was very useful; assurances given by a State's agent or other authorized representative in the course of international court proceedings might perhaps be given specific mention in that regard in the commentary to article 3. An appropriate example was the *East Timor* case.

69. As to new draft article 4, he questioned the use of the adverb "expressly" in connection with the confirmation by a State of a unilateral act formulated by a person not authorized to act on its behalf. The confirmation of a unilateral act should be governed by the same rules as its formulation. He preferred the earlier wording, as it was less rigid. In the French version the words *effets juridiques* should be placed in the singular. On the subject of silence and unilateral acts, in paragraphs 126 to 133, he reiterated the view that, while some kinds of silence definitely did not and could not constitute a unilateral act, others might be described as an intentional "eloquent silence" expressive of acquiescence and therefore did constitute such an act. The *Temple of Preah Vihear* case was precisely a case in point.

70. With reference to new draft article 5, a separate article, accompanied by its own commentary, should be assigned to each of the grounds of invalidity of unilateral acts. He was strongly opposed to the inclusion of subparagraph (g) relating to unilateral acts which conflicted with a decision of the Security Council, and pointed out that the 1969 Vienna Convention maintained a prudent silence on that point. Aside from the fact that the provision could offend the sensibilities of States, a decision of the Council did not need to be singled out, as it simply formed part of law derived from the Charter of the United Nations and, consequently, from treaty law in general. While welcoming the Special Rapporteur's decision to base subparagraph (f) on article 53 of the Convention he wondered why article 64 of that Convention, on the emergence of a new peremptory norm of general international law, had not been similarly taken into account. Indeed, the definition of *jus cogens* could well be inserted in the draft.

71. Lastly, he suggested that, in referring the draft articles to the Drafting Committee, the Commission should invite the Committee to consider the differences between the Special Rapporteur's formulations and the provisions of the 1969 Vienna Convention, to reflect on the desirability of including an article defining the scope of the draft and on the question of unilateral acts not covered by the draft.

72. Mr. BAENA SOARES, congratulating the Special Rapporteur on the imaginative and conciliatory powers displayed in the preparation of his third report as well as on his serene acceptance of criticisms and suggestions made within the Commission and the Sixth Committee as well as in the replies from Governments to the questionnaire, said that more extensive information on State practice would have greatly facilitated the work on the topic. In its report to the General Assembly, the Commission should perhaps reiterate in more precise terms its appeal to States to provide such information.

73. Like most members, he recognized the relevance of the topic as a means of enhancing the stability and predictability of international relations. He endorsed the definition of "flexible parallelism" given by the Special Rapporteur to the relationship between the draft articles and the 1969 Vienna Convention and supported the Special Rapporteur's position on the question of estoppel.

74. New draft article 1 incorporated many of the suggestions made in the Commission and the Sixth Committee and was definitely an advance on the version considered at the previous session. The decision to maintain the idea of "unequivocal expression of will" as an essential element of the definition of unilateral acts was to be welcomed. Although a measure of ambiguity could, in some diplomatic negotiations, help to pave the way to a solution, it was not acceptable in the current context. Further discussion was needed of the idea of the non-independence of a unilateral act, so as to couch the matter in consensus wording. As for publicizing an act so that it was known to the State or international organization concerned, the Special Rapporteur could perhaps indicate in the commentary what forms of conveying such knowledge he had in mind.

75. New draft article 3 referred not only to the practice of the State but also to "other circumstances". He would prefer a more restrictive wording. Incidentally, with regard to the reference to "technical ministers" in paragraph 105 of the report, a cabinet was generally made up of politicians, some of whom might be more conversant with specific subjects than others, but none of them could be described as "technical ministers". The second of the two issues covered in paragraph 117, relating to new draft article 4, was that of a person authorized to formulate an act on behalf of the State but acting outside the scope of such competencies. Unfortunately, it was not reflected in the draft article.

76. As to new draft article 5, the Special Rapporteur was to be congratulated on the care taken to identify eight separate grounds for the invalidity of unilateral acts in order to reflect views expressed in the Commission and the Sixth Committee, but the reasons for including some of them might have been given more detailed treatment in the comments. The incorporation of corruption in subparagraph (c) was welcome. Corruption was being combated universally, by legal instruments such as the Inter-American Convention against Corruption. He wondered, however, whether it was necessary to narrow down the possibility of corruption to "direct or indirect action by another State". One could not rule out the possibility that the person formulating the unilateral act might be corrupted by another person or by an enterprise. Lastly, while commending the inclusion, in subparagraph (g), of unilateral acts in conflict with a decision of the Security Council, he noted that the Special Rapporteur had referred to Chapter VII of the Charter of the United Nations in his oral presentation of the report and regretted that a similar reference had not been incorporated in the text.

77. Mr. ROSENSTOCK said that, while less convinced than Mr. Simma that the topic under consideration was not susceptible to codification, he shared Mr. Simma's doubts and, in large measure, endorsed his views. In particular, he wished to urge the Special Rapporteur to place greater emphasis on State practice and, as a working method, to focus separately on each issue. With reference to subparagraph (g) of new draft article 5, it was not at all clear that Security Council resolution 221 (1966) of 9 April 1966 pursuant to which the vessel the *Joanna V* had been stopped in connection with the Rhodesian sanctions had been an action taken under Chapter VII of the Charter of the United Nations. Key elements to make it an action

under Chapter VII had been missing, but he had no doubt that the Council's action, if it had not obligated, had most assuredly empowered, the stopping of the tanker. The issue was a highly complex one situated on the interface between legal and political obligations, and he did not believe that mentioning it *en passant* was a responsible way of dealing with it.

78. Mr. Sreenivasa RAO, congratulating the Special Rapporteur on his positive approach to a complex and difficult subject, said that greater focus on what was missing in terms of State practice would perhaps have made the exercise even more useful. The point on which members would expect guidance from the Special Rapporteur were the circumstances and the general rules of international law which made unilateral acts different from political acts and produced legal effects.

79. As to the definition of unilateral acts in new draft article 1, the legal effect produced by an act did not necessarily, or always, indicate the original intention of the State formulating the act. A State was a political entity whose intentions could be equivocal or unequivocal, depending on the context. In his view, the criterion of the effect actually produced had always to be assessed in order to determine the nature of the intention. A contextual examination of policy considerations played a very important role in assessing the intention underlying an act. An inductive approach taking account of policy considerations was called for.

80. With reference to the Special Rapporteur's conclusions on the subject of estoppel, there again it was difficult to separate the conduct of the State formulating a unilateral act from the effect that the act produced on the target State, especially if it was agreed that unilateral acts did not have to be characterized as autonomous. That question, too, deserved to be carefully looked at. Lastly, while the issue covered in new draft article 5, subparagraph (h), was undoubtedly related to new draft article 3, it had important aspects which meant that it was not related to that article alone. Could a State utilize the provisions of its own national law to evade international obligations it had otherwise produced by a valid unilateral act? In other words, could a State, having formulated a unilateral act, claim that its domestic law did not provide for such an act although the act had produced an international obligation? Further reflection was needed on that point.

The meeting rose at 1.05 p.m.

2630th MEETING

Wednesday, 31 May 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides,

Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Unilateral acts of States (*continued*) (A/CN.4/504, sect. C, A/CN.4/505,¹ A/CN.4/511²)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. GOCO congratulated the Special Rapporteur for producing, despite the difficulties inherent in the subject, a coherent and detailed third report (A/CN.4/505) in which many sensitive questions were addressed and which took account of the various views expressed in the Commission and other bodies.

2. Commenting on the replies by a number of Governments to the questionnaire on unilateral acts of States that had been sent to them, which was circulated as an informal paper,⁴ he noted that, in their general comments on the issue, those States seemed to agree that unilateral acts were by nature very diverse, but they also acknowledged that they were frequently used by States in international relations. In the absence of a formal treaty, those acts were the means by which a State conveyed its wishes to another State, and that was a convenient way to conduct day-to-day diplomacy.

3. The replies also referred to specific questions. With regard to the applicability of the 1969 Vienna Convention, there seemed to be an emerging consensus that the Convention might not be applicable to unilateral acts, but could serve as a useful guide in that area. On the question of persons authorized to act on behalf of the State, the States replying to the questionnaire agreed that the Convention was relevant by analogy. With regard to the forms the unilateral act might take, both oral and written declarations were acceptable, depending on the type of act. As for the content of the unilateral act, it could be of various types and was not restricted to certain categories. However, one State, Italy, had cited three categories: that of acts referring to the possibility of invoking a legal situation, that of acts which created legal obligations and that of acts required for the exercise of a sovereign right. On the question of legal effects, the replies emphasized the creation and extinction of obligations and the creation and revocation of the rights of other States. Some States would draw a distinction between the different acts and the legal effects they purported to produce. One State, the

¹ Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

² *Ibid.*

³ For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

⁴ See 2628th meeting, para. 11.

Netherlands, held the view that unilateral acts could not produce effects that were incompatible with the general rules of international law. States appeared to agree on the importance and usefulness of unilateral acts. They also seemed to acknowledge the principle of reciprocity, particularly with regard to friendly States. On the question of which rules to apply, States accepted that the principles on interpretation in the Convention should be applied by analogy, after due account had been taken of the particular nature of unilateral acts. The question of the validity of unilateral acts could be referred to the relevant treaty bodies. On the duration of acts, States attached importance to the issue of revocability, holding that an act could be revoked if it was no longer convenient or terminated if a fundamental change had occurred. One State believed that its duration was unlimited, but that it could be ended if it was denounced by bilateral treaties. States unanimously accepted revocability, but thought that notice of revocation must be given and that the Convention could be applied by analogy after the particular circumstances of the case had been taken into account. Error, fraud, corruption, non-observance of the rules of international law and non-observance by States of a commitment under international treaties could be grounds for revocation. It was to be hoped that other States would be prepared to reply to the questionnaire. He understood that the replies had been received after the third report had been prepared. Nevertheless, they could perhaps be put to good use in further studies of the topic.

4. In paragraphs 30 to 36 of his report, the Special Rapporteur elaborated on the essential elements of a precise definition of unilateral acts of States, seeking a definitive agreement on that subject. The definition he proposed in new draft article 1 was well crafted and contained all the elements listed in paragraph 31. It included a reference to “an unequivocal expression of will which is formulated by a State with the intention of producing legal effects”. In his opinion, that meant that the declaration must be prepared, carefully studied, deliberate and calculated, as was to be expected from a sovereign State, especially in a declaration by a head of State. There was no doubt that protests, waivers, promises, recognition and any other such acts were and should be absolutely intentional. However, if unilateral declarations were limited to that kind of act, it might be asked whether the definition should include only declarations formulated by the will of the State and eliminate acts or declarations which had been formulated in a possibly incomplete way, but which were nevertheless intended to produce effects. It might also be asked whether those effects should be legal or political. Often, heads of State made public statements that departed from their prepared speeches. Public figures were exposed to the ambushes set for them by the media. It was not uncommon to hear leaders appearing on radio or television refer to threats of invasion or troop withdrawals, offer concessions or even assert claims. In that respect, the example of the Spratly Islands was striking: nobody had been interested in them until rich oil deposits had been discovered there. Since then, at least five countries had staked a claim to ownership, going so far as to threaten their competitors. Those declarations were unquestionably unilateral and produced effects, but it was open to question whether the claims and threats had legal effects as understood in the proposed definition. As clearly pointed out by one of the

States replying to the questionnaire, the effects of unilateral acts could not be incompatible with the general rules of international law. Threats, of course, were not sanctioned by international law. That point was dealt with in the context of the invalidity of unilateral acts in paragraphs 149 and 150 of the report. Another example that gave food for thought about the effects of unilateral acts was the declaration by President de Gaulle, *Vive le Québec libre*,⁵ which, years afterwards, still struck a chord with separatists in Quebec.

5. On the question of intention, he agreed with the Special Rapporteur that it was difficult to put the acts in different categories and determine whether they were purely political and therefore produced no legal effects. The intention of the author State was of course a decisive criterion, but how could it be determined? To be bound as a consequence of a unilateral act would depend ultimately on the facts obtaining and on how they were evaluated. In its rulings on the oft-quoted *Nuclear Tests* cases, ICJ had found that France was legally bound by the declaration that it would stop atmospheric nuclear testing because that declaration had been made in public, making it clear that France intended to abide by it. However, a court decision had been necessary to elicit that intention. In other words, it had been necessary for Australia and New Zealand to take the matter to court. He agreed that States might perform unilateral acts without realizing the consequences of their intentions. In the aforementioned cases, there had been some indications that President Mitterrand had not really intended to put an immediate stop to the nuclear tests. The problem with declarations that bore an obligation or commitment was that they were liable to be changed or even denied. In the meantime, their obligatory nature remained uncertain, leading to the refusal by the addressee State to take them seriously.

6. He noted the omission of the word “publicly”, as explained in paragraphs 78 and 79 of the report. It was important that the declaration should be known to the other State, and that was how he interpreted the meaning of the word “publicity”. In any event, anything declared by a head of State or Government could not but be public. It was apparent from the definition, which used the words “unequivocal expression of will”, that the underlying intention was to consider unilateral acts as official declarations which, in practice, should perhaps be made in writing. Perhaps the only case in which a State could address a non-written declaration to another State was in situations of conflict or burgeoning hostility. However, modern communication technology was such that any oral declaration was now immediately translated into writing, so that the distinction between written and spoken declarations no longer had any meaning.

7. He had no serious objections to the use of the terms “act”, “legal effects”, “autonomy” or “unequivocal” nature of the unilateral act. Perhaps the word “competence” could be added to new draft article 2 (Capacity of States to formulate unilateral acts). The discussion on silence in paragraph 126 was interesting, but it could be pointed out that silence could be tantamount to an admission in the area of the law of evidence. In a conflict

⁵ Ibid., footnote 14.

situation, if a State challenged another State to prove that it was making a false claim about an act of the other State and if the latter State remained silent, its silence could be taken as acquiescence. The article on the invalidity of unilateral acts would be better if it was entitled "Revocability of unilateral acts". The unilateral act was more flexible than a treaty and should therefore be more easily revocable, although on the same grounds as those for invalidity.

8. He believed that the five new draft articles proposed, together with the replies by Governments to the questionnaire, could be referred to the Drafting Committee or the Working Group for further consideration.

9. Mr. ECONOMIDES thanked the Special Rapporteur for his third report, which was a definite improvement over the previous one. Beginning with some general comments on the report, he said that the importance of studying the issue was self-evident. The unilateral act of a State, as it was understood in the draft, existed in international practice and was even a source of international law, although Article 38 of the Statute of ICJ did not refer to it. In certain circumstances, that source could, of course, create rights and obligations of a subjective nature for States, but it could not, in principle, create law or, in other words, generally applicable international rules. States could not legislate in a unilateral way. It was undeniably a difficult subject to deal with, in the first place because national constitutions and domestic laws generally had nothing, or very little, to say about the unilateral acts of States that might bind the latter at the international level, unlike, for example, the conventions and customary rules that were generally dealt with in the framework of the domestic legislation of States. Moreover, there was far from an abundance of international practice concerning those acts. Indeed, there were few acts by which States granted rights to other States while themselves assuming the obligations corresponding to those rights. It therefore fell to the Commission, with few tools or guidelines, to codify the rules of a little-known area with a double aim in mind: to protect States themselves from their own actions by offering them a coherent set of clear rules on the unilateral acts that could be binding on them at the international level and to serve the interests of the international community by deriving the core rules from that new source of law.

10. His second general comment concerned the relationship between unilateral acts of States and the 1969 Vienna Convention. As the Special Rapporteur had explained so well, that relationship was clear. If there was no Convention, it would be simply impossible to codify the unilateral acts of States that were binding on them under international law. The Convention had truly paved the way for the codification of the unilateral acts of States, as well as that of the acts of international organizations. However, the solutions in the Convention should not be reproduced word for word. It should be used sensibly and very carefully as a source of inspiration when the characteristics of a binding unilateral act coincided exactly with those of a treaty act. In other words, it was necessary to take the study of the unilateral act of a State as the starting point and turn to the Convention for solutions, if necessary, and not the other way round.

11. Thirdly, he would have preferred estoppel and silence, as unilateral conduct of States that might give rise

to legal effects at the international level, to be included in the draft. For the moment, however, he could agree that that question should be left aside for consideration at a later stage.

12. Referring to the new draft articles, he said there were three core elements in the definition of a unilateral act in article 1. The first was the State's willingness to commit itself through that act by creating rights and obligations. He preferred to talk of rights and obligations rather than legal effects, which was a broader and fairly vague concept. The second was the autonomous, non-dependent or "non-linked" nature of the act, i.e. the fact that it was not conditioned by other sources of international law, including international treaties or existing customary rules. It was preferable—and certainly easier and safer—to look no further than the autonomous nature of the act rather than to attempt to exclude from the scope of the draft all other unilateral acts of States which did not actually concern the draft articles and which were extremely numerous and varied. The third core element was the addressees of the act, who could be other States or international organizations. In that connection, it was particularly important to ask whether the international community as a whole could also be the beneficiary of a right arising from a unilateral act of a single State, several States or all States. He believed the answer to that question was yes. He could also go along with Mr. Pellet's suggestion (2629th meeting) that a unilateral act should be subject to international law and governed by the latter, like international treaties. He also agreed with Mr. Candioti, Mr. Herdocia Sacasa and other members that the unequivocal nature of the act and its publicity were elements that did not need to be dealt with in the definition. Those elements could be dealt with in the part on the conditions of validity of an international act. On the other hand, the autonomy of unilateral acts was not sufficiently emphasized in the definition in new draft article 1, whereas he saw it as a decisive element in distinguishing between unilateral acts that gave rise to rights and obligations at the international level and other unilateral acts of States.

13. New draft article 2 reflected the provision contained in article 6 of the 1969 Vienna Convention. That provision, which followed on logically from new draft article 1, should be completed in the following way: "Every State possesses capacity to formulate unilateral acts liable to create rights and obligations at the international level".

14. Paragraph 1 of new draft article 3 (Persons authorized to formulate unilateral acts on behalf of the State), met with his approval. However, he thought that that provision would benefit from stronger and more direct wording, as had been proposed by Mr. Pambou-Tchivounda. At the least, the words "are considered as representatives" should be replaced by the words "are representatives". The words "States concerned" in paragraph 2, were out of place in that provision. That paragraph could be worded in the following way:

"A person is also considered to be authorized to formulate unilateral acts on behalf of the State if it is established, on the basis of the practice of that State

and of the circumstances in which the act was carried out, that this person is authorized to act on its behalf.”

15. He had no objection to new draft article 4 (Subsequent confirmation of an act formulated by a person not authorized for that purpose), which might well become paragraph 3 of article 3, in accordance with Mr. Pambou-Tchivounda’s judicious proposal.

16. He had the impression that new draft article 5 (Invalidity of unilateral acts) had been proposed somewhat prematurely. That provision should be considered after the provisions on the validity of unilateral acts, and, in particular, after the article on the revocation of unilateral acts, had been drafted. The conditions for validity were closely linked to the causes of invalidity and it was also clear that, if unilateral acts could be revoked, it was in the interests of the State to use that method rather than invoke a cause of invalidity. The causes of invalidity should therefore essentially concern unilateral acts that were not revocable, in other words, those linking the State formulating the act to another entity.

17. He had no objection to sending the new draft articles to the Drafting Committee.

18. Mr. KATEKA congratulated the Special Rapporteur on his excellent third report, which took into account both the views of the members of the Commission and the comments made by Governments in the Sixth Committee of the General Assembly. The replies of Governments to the questionnaire, which had unfortunately arrived too late to be included in the report, revealed a great divergence of views on the possibility of laying down general rules applicable to all unilateral acts and on the kinds of acts that would be covered by such rules.

19. It was therefore up to the Commission to provide guidance to the international community by clearly demarcating the scope of the topic and by finding a compromise between the “maximalist” approach which would involve codifying all kinds of unilateral acts, and the “minimalist” approach, under which the various “acts creating obligations” would be studied one at a time.

20. Although he had once held the contrary view, he now agreed with those who argued that it was not possible to avoid referring to the 1969 Vienna Convention, even though some considered that to do so was to acknowledge the pre-eminence of the Vienna regime. The Special Rapporteur had decided to distance himself from it in new draft article 1 and not to include a provision based on article 3 of the Convention, thereby drawing a clear distinction between unilateral acts and treaties.

21. With regard to the definition of unilateral acts, he thought that it should encompass all the unilateral acts formulated by a State in any form whatsoever (in other words, in both oral and written form). On the other hand, he did not think it necessary to specify that an “unequivocal” expression of will was involved, as that could be difficult to evaluate in practice. The last phrase of new draft article 1, according to which the act would produce legal effects only as from the time when it was known to its “addressee” (in other words, one or more States or one or more international organizations), was perhaps not very apposite, as it was tantamount to giving the author of the

unilateral act an advantage over the addressee, who could be informed only after the event.

22. New draft article 2 posed no problems. However, the wording of new draft article 3, particularly in paragraph 2, was perhaps too restrictive. It was clear from diplomatic practice and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, especially from article 12 of that Convention, that certain State representatives were implicitly authorized, in their respective areas of competence, to formulate unilateral acts on behalf of the State they represented.

23. In paragraphs 103 and 104 of the report, the Special Rapporteur raised the question whether unilateral acts—in the event, commitments—formulated by a State at a pledging conference should be considered as simply political acts or as acts that were legally binding on the State making the declaration. In theory, the author State should be considered legally bound, as it was presumed to have made a promise in good faith that created expectations among the addressees. Unfortunately, practice showed that such commitments were often not honoured. The archives of the United Nations and other international organizations were full of such examples. It would therefore be better if the Special Rapporteur were to consider those declarations as political declarations rather than as acts producing legal effects.

24. New draft article 4 was acceptable. On the question whether a State could effectively formulate a unilateral act by remaining silent, the Special Rapporteur was quite right to say, in paragraph 129 of the report, that it would appear impossible for a State to promise or offer something by means of silence. Whereas it was useful to consider introducing concepts such as consent, protest, waiver or estoppel, a provision on silence and unilateral acts did not belong in the draft articles.

25. New draft article 5 was directly inspired by part V, section 2, of the 1969 Vienna Convention. According to subparagraph (g) of the article, a conflict between the unilateral act and a decision of the Security Council was one of the causes of invalidity. In the light of Mr. Lukashuk’s comments (2629th meeting), he wondered if it might not be better to delete that provision and deal with the issue in the commentary.

26. To conclude, he recalled that experience showed that unilateral acts which seemed a priori to be contrary to the prevailing norms of international law had in fact contributed to the development of that law. One could cite by way of example the “Nyerere doctrine”⁶—named after the former Tanzanian President—of rejecting, in the case of a succession of States, the principle of automatic succession to bilateral treaties concluded by the former colonial Power. That doctrine had been heavily criticized initially, but had finally been taken into account in part III, section 3, of the Vienna Convention on Succession of States in respect of Treaties (hereinafter “the 1978 Vienna Convention”).

⁶ See the Arusha Declaration of 1967 (J. K. Nyerere, *Ujamaa: Essays on Socialism* (London, Oxford University Press, 1968), p. 13).

27. Mr. HAFNER paid tribute to the Special Rapporteur for tackling a difficult and at times seemingly impossible task: some members, such as Mr. Simma (2629th meeting), had thought it was not possible to formulate general rules applicable to all unilateral acts, while others, such as Mr. Pellet, had emphasized that there was a real need for such codification. His own view was that the Commission should at the very least make an attempt, even if codification turned out to be impossible. The Special Rapporteur had not been able to take account of the comments of Governments, which had not reached him when he had prepared his report, but the Commission should now be working with their replies to the questionnaire in mind if it wanted the articles it would draft to be acceptable to States rather than remain a dead letter. It should also take more account of the practice of States. In that connection, he took the liberty of correcting a small mistake the Special Rapporteur had made in paragraph 53 of the report. The status of permanent neutrality could not be established by a unilateral act: at the very least, a bilateral act was necessary. On the other hand, a declaration of neutrality made in wartime was a purely unilateral act that did not depend on acceptance by the belligerents. The footnote which referred to the declaration formulated by the Government of Austria in paragraph 53 had nothing to do with neutrality. The example quoted in it concerned only the notifications sent by the Austrian Government to the four signatories of the State Treaty for the Re-establishment of an Independent and Democratic Austria. However, there was a rich history of practice in the area and the Special Rapporteur could, for example, have usefully referred to the declarations made during the conflict over the Falkland Islands (Malvinas) or the Gulf war.

28. Before considering the new draft articles one by one, he wished to point out that several members of the Commission were called “Mme” in two footnotes of the French version of the report. He would like the translations generally to be more careful and precise.

29. With regard to new draft article 1, he shared the doubts already expressed about the usefulness of requiring an “unequivocal” expression of will. If the same requirement applied to treaties, all treaties with “constructive ambiguities” would be beyond the scope of treaty law, although everyone knew that that had never been the case in practice. It did not therefore seem necessary to include that detail in article 1. That did not mean that the scope of the article should not be restricted. It should be clear that the acts referred to were autonomous unilateral acts, not acts carried out in connection with a treaty. It was true that unilateral acts were by nature very diverse: by means of such acts, States could simply “trigger” rights and obligations already established under a treaty regime or even under customary law, but they could also themselves “shape” the obligations they intended to assume. He suggested that attention should be limited for the moment to acts in the second category.

30. New draft article 1 also stated that the unilateral act was formulated with the intention of producing “legal effects”, but did not specify whether those effects would be produced in domestic law or in international law. As Mr. Pellet had emphasized, it should be made clear that the unilateral acts in question were subject to international law.

31. With regard to new draft article 2, although the English translation (“formulate unilateral acts”) corresponded to the Spanish original, he pointed out that anyone could “formulate” a unilateral act. In his opinion, the verb “issue” would have been more appropriate, but that was a question that could be dealt with by the Drafting Committee.

32. He found it difficult to form a judgement on new draft article 3 until it had been definitively determined, in article 1, which acts fell within the scope of the draft articles. However, he could not support the proposal by Mr. Economides that the words “are considered as representatives” should be replaced by the words “are representatives” in paragraph 1. Apart from the fact that doing so might raise problems of incompatibility with the constitutions of some countries, the presence of the words “are considered” created a rebuttable presumption which was necessary in that article.

33. New draft article 5, which Mr. Simma had first compared with a gold mine and then with a minefield, did indeed contain too many things. The various grounds for invalidity listed should have been dealt with in separate articles, as had quite rightly been done in the 1969 Vienna Convention, as the consequences were different every time. Subparagraph (g) on the invalidity of unilateral acts that conflicted with decisions of the Security Council, thus raised more problems than it solved: as quite rightly pointed out by Mr. Simma, obligations under the Charter of the United Nations prevailed over obligations under a treaty (Art. 103). An obligation under the Charter was understood to include obligations arising from resolutions or binding decisions taken by organs of the United Nations (and not only by the Council). Moreover, it was common for only parts of those decisions or those resolutions to be binding, and so that too would need to be clarified.

34. He also believed that there was no reason to differentiate, when looking at the question of the grounds for invalidity, between unilateral acts and treaties; there was no provision in the 1969 Vienna Convention stipulating that a treaty could be declared invalid if it contravened obligations under the Charter of the United Nations. For all those reasons, subparagraph (g) seemed to him to be unnecessary.

35. The ground for invalidity set out in subparagraph (h), namely, a conflict with a norm of fundamental importance to domestic law, also posed a problem. That norm of fundamental importance could result, for instance, from the constitution of the State formulating the unilateral act. Did that mean that if a State, in formulating a unilateral act, breached a constitutional obligation, it could declare a posteriori that the unilateral act was invalid? That would amount to giving priority to domestic law, something which was not acceptable.

36. He also shared Mr. Lukashuk’s reservations about the use of the indefinite article, “A”, in the phrase introducing the article. It must be made clear precisely which State was authorized to invoke the invalidity of a unilateral act. Logic required that that possibility should be reserved solely for the State formulating the act, to the

exclusion of all others, since otherwise one might be opening Pandora's box.

37. In that context, the proposal by Mr. Economides to focus initially on the conditions for "revoking" unilateral acts before turning to the question of invalidity was quite interesting, as such an approach would probably have the advantage of being more practical.

38. In view of all those comments, he believed that only new draft articles 1 to 4 as proposed by the Special Rapporteur could be sent to the Drafting Committee. New draft article 5 required a complete rethink.

39. Mr. KAMTO said that the Special Rapporteur's third report was a significant step forward as he had obviously been careful to take into account the discussions in the Commission and the views expressed by States in the Sixth Committee. As had been said more than once, the subject was a complex one, but that did not mean that it could not be codified. At issue was a category of acts which were very important in international relations, at least as old as treaties and, like the latter, a source of contemporary international law. It was the task of the Commission to urge the Special Rapporteur, who had not had the benefit of the comments by Governments in their replies to the questionnaire when he had drafted his report, to make further efforts to seek information on practice in the matter. That being the case, the Special Rapporteur was taking a broad approach in order to have an overall view of all the acts in question and that approach was relevant insofar as it allowed him to put his subject firmly into context and to define precisely the scope of unilateral acts. Proposals from various quarters, including the Sixth Committee, that the study should be limited to certain kinds of acts such as promises and recognition were overly restrictive, since their adoption would leave to one side a good proportion of the unilateral acts of States.

40. With regard to the preliminary questions considered by the Special Rapporteur, it was of course essential to avoid taking any analogy with treaty law too far because it might lead to confusion. As for estoppel, it was not itself a legal act, but, rather, a fact that produced legal effects and he agreed with Mr. Pellet that it should be considered within the framework of the effects of unilateral acts.

41. Those effects themselves should be studied in depth, and that could not be done without considering the attitude or reaction of the addressees of the act. Two comments were called for in that respect. First, in some cases, a unilateral act could become an essential element in an international agreement. It was logical, as borne out by practice, that, once there had been a meeting of two wills expressed simultaneously or successively, whether in a single document or in different documents, there was an international agreement as understood in the 1969 Vienna Convention. The Special Rapporteur should study the question in order to better define which acts fitted into the category of unilateral acts as such, as opposed to "treaty" unilateral acts. That question did not necessarily have to be dealt with in a draft article and could be addressed in the commentary.

42. Secondly, he was not convinced that silence should be excluded out of hand. Silence could indeed constitute a real legal act, as accepted by the doctrine. Silence indicat-

ing acquiescence could in some situations allow the initial unilateral act to produce all its legal effects, particularly when that act was intended to create obligations on the part of one or more other States. In some cases, a State could express its consent through silence, even though consent must be explicit in treaty law. In any case, it was worth studying the question of silence. With regard to the Special Rapporteur's proposal for new draft article 1, he would have preferred to keep the traditional definition of the unilateral legal act as an expression of will intended to produce legal effects. From the legal point of view, it was tautological to speak of intention as the Special Rapporteur did in draft article 1, since intention was inseparable from the expression of will and if there was an expression of will there was bound to be intention. As for the term "unequivocal", which had already been criticized by several members of the Commission, the Special Rapporteur was using the term to try to express the ideas of clarity and certainty developed in paragraphs 73 and 76 of his report. That was a question of judgement that was traditionally for the judge to decide and it did not belong in the definition of unilateral acts. The emphasis should rather be on the idea of the necessary precision of the unilateral act. He agreed with Mr. Economides that the final proposition in article 1, "and which is known to that State or international organization", was more of a condition for the validity of the unilateral act. He also supported Mr. Economides' proposal that a separate provision should be drafted on the conditions for the validity of a unilateral act to precede the one on the invalidity of a unilateral act.

43. Still on the question of new draft article 1, the Special Rapporteur made a distinction between political declarations and unilateral acts intended to produce legal effects. In that connection, he did not understand what the criterion for the distinction might be. Was it a formal criterion or a criterion involving the contents of the act, which could be linked to the *negotium*? While the nature of certain acts was clear from their form, that of other acts could be determined only through an analysis of the context. In that respect, it was unfortunate that the Special Rapporteur had not sufficiently stressed the idea of the context, on which, for example, ICJ had relied in the case concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* when it concluded that a joint communiqué constituted an international agreement. The context could be just as decisive a factor in determining the nature of a unilateral act.

44. He had no problems with new draft article 2, but new draft article 3 called for a comment. The Special Rapporteur had rightly brought up the example of domestic legislation having extraterritorial effects, in the shape of the Helms-Burton Act.⁷ Could one leave aside those internal acts having extraterritorial effects and, if so, on what grounds? If, on the other hand, they should be considered as falling within the scope of the study, draft article 3 should perhaps be revised to include parliament, for example, among the "persons authorized to formulate unilateral acts on behalf of the State". It was doubtful whether that category of authors of unilateral acts was covered by the current paragraph 2 of the draft article.

⁷ See 2629th meeting, footnote 10.

45. New draft article 4 did not call for any particular comment, but new draft article 5 could be looked at closely only once the conditions for the validity of the unilateral act had been studied.

46. In conclusion, he said that new draft articles 1 to 4 could be sent to the Drafting Committee.

47. Mr. PELLET said that the problem of domestic unilateral acts having extraterritorial effects mentioned by Mr. Kamto was extremely important and had certainly not been resolved at the current stage. He recalled that, concerning the Helms-Burton Act, in his opinion in that case, the United States Congress had not intended to move into the field of international law. He considered that for unilateral acts to fall within the scope of the study they must be governed by international law.

48. As to the idea of mentioning the necessary precision of unilateral acts, he disagreed totally with Mr. Kamto. Obligations could be precise or imprecise, but that did not stop them from being obligations, and the same was true of those arising from unilateral acts of States. To introduce the concept of precision in the definition seemed to jeopardize the outcome of the work.

49. Mr. KAMTO said he was afraid that he had not been properly understood: he would only like it to be said in the commentary that, in some cases, the degree of precision of a unilateral act could allow it to produce its full effects.

50. Mr. TOMKA said that the Special Rapporteur had been at pains to take into account the criticisms expressed at the previous session by members of the Commission by extending the scope of his study to all unilateral acts producing legal effects. However, he had not been able to take into account the written comments submitted by Governments in reply to the questionnaire and he pointed out in that connection that quite a few of the replies expressed doubts about the overall approach taken, considering in particular that it was not wise to try to subject different kinds of unilateral acts to a single set of general rules. For one State the exercise was pointless, while, for another, the best the Commission could do was to prepare an academic study on the characteristics of different unilateral acts.

51. The major problem with the definition proposed in new draft article 1 was the phrase "producing legal effects in relation to one or more other States". The result was a very broad definition of unilateral acts, making it impossible in practice to formulate common rules for a variety of acts as disparate as recognition, on the one hand, and an act establishing an exclusive economic zone, on the other. The latter example, which the Special Rapporteur looked at in paragraph 54 of his report, showed that, in the case in point, a unilateral act could be an instrument for activating the rights provided for in a treaty or under general international law. In that particular case, the legal consequences of the act in question were determined by the United Nations Convention on the Law of the Sea or, for States which were not parties to that Convention, by general international law, and not by the rules on unilateral acts being drafted by the Commission. What would be the relevance, for example, of new draft article 3 in the case of an act formulated by a parliament? What the Italian Government, in its reply to the questionnaire, called "unilateral acts required for the exercise of a sovereign right" should

therefore be excluded from the scope of the study. It seemed difficult to draft common rules for other acts such as recognition, protest or waiver. He recalled that the recognition of States and Governments was one of the possible topics submitted by the Secretariat to the Commission at its first session, in 1949,⁸ and that the latter had never seen fit to include it in its programme of work. The warnings by certain States had to be taken very seriously and a step-by-step approach seemed preferable. In that respect, the category of unilateral acts that created obligations was undoubtedly the most suitable for the identification and formulation of rules. When the Special Rapporteur studied such notions as the intention of the author State or the legal effects, he was almost always referring to obligations or commitments, as pointed out in paragraph 35 of his report.

52. As far as new draft article 1 was concerned, he preferred to refrain from commenting on it at the current stage, as its wording would depend on the scope of the draft articles and on a decision the Commission would have to take if it wished to make progress in its work and if the outcome of that work was to have a chance of not being rejected or "shelved" by States in the Sixth Committee.

53. New draft articles 2 and 3 posed no particular problems and were acceptable. As for new draft article 4, a unilateral act formulated by a person not authorized for that purpose could be confirmed not only expressly, as proposed by the Special Rapporteur, but also *per concludentiam*, when the State did not invoke the lack of authorization as grounds for invalidity of the act, but fulfilled the obligation it had assumed.

54. New draft article 5 was the provision that gave rise to the most problems and should probably be reformulated. A distinction should be drawn between cases where an act could be invalidated only if a ground for invalidity was invoked by a State (relative invalidity) and cases where the invalidity was a sanction imposed by law or stemmed directly from international law (absolute or *ex lege* invalidity). Error, fraud and corruption, which were the subjects of subparagraphs (a), (b) and (c) respectively of the draft article, could be invoked by States as causes of invalidity of unilateral acts formulated on their behalf. The same was true of the situation that subparagraph (h) was intended to cover, namely, that of the unilateral act conflicting with a norm of fundamental importance to the domestic law of the State formulating it, although that provision should not be interpreted as giving priority to domestic law over commitments under international law. In his view, subparagraph (h) should have been formulated differently, in such a way as to bring out the fact that, when the unilateral act had been formulated, a norm had been breached that was of fundamental importance to domestic or constitutional law concerning the capacity to assume international obligations or to formulate legal acts at the international level.

55. The threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations to obtain the formulation of the act and the

⁸ See *Yearbook* . . . 1949, p. 280, para. 15.

conflict between the unilateral act and a peremptory norm of international law, which were the subjects of, respectively, subparagraphs (e) and (f) of new draft article 5, were cases of absolute invalidity stemming directly from law, and those acts were invalid *ab initio*.

56. The use of coercion on the person formulating the act, provided for in subparagraph (d) of new draft article 5, was a special case, since, in those circumstances, the person involved was not expressing the will of the State he was supposed to represent, but that of the State using coercion. Without a will, there was no legal act and, if there was no act, there was nothing to be invalidated. Whereas previous cases had been cases of *negotium nullum*, the case in question was one of *non negotium*.

57. Lastly, with regard to subparagraph (g) of new draft article 5, he reiterated the doubts he had expressed (2629th meeting) and said that he shared the views on that subject expressed by Mr. Hafner.

Reservations to treaties⁹ (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,¹⁰ A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

58. Mr. PELLET (Special Rapporteur), introducing his fifth report on reservations to treaties (A/CN.4/508 and Add.1–4), said that it consisted of two parts: Part I which contained the introduction and a revised and updated version of the fourth report,¹¹ which he had submitted at the fifty-first session and which the Commission had been unable to consider for lack of time; a chapter which dealt with alternatives to reservations and interpretative declarations; and an annex containing the consolidated text of all draft guidelines dealing with definitions adopted on first reading or proposed in the fifth report, including nine new draft guidelines in italics and provisionally numbered 1.1.8, 1.4.6 to 1.4.8 and 1.7.1 to 1.7.5. Part I would be followed during the second part of the session by Part II on the procedure relating to reservations and interpretative declarations, which would be divided into two chapters on the formulation, modification and withdrawal of reservations and interpretative declarations and on the “reservations dialogue”, i.e. the formulation and withdrawal of acceptances of and objections to reservations and interpretative declarations.

59. In the introduction, he had briefly referred to the Commission’s earlier work on the topic and its outcome and had described some developments that had taken place since the consideration of the third report,¹² starting with a summary of the replies to the questionnaire sent to States and international organizations.¹³ Although the response

rate was satisfactory by comparison with the usual one, it was not entirely so because only 33 of the 188 States Members of the United Nations had replied and those which had not done so included many States with a national who was a member of the Commission. The response rate for international organizations was better, since it stood at 40 per cent, but international integration organizations, especially the European Communities, whose practice and positions would be extremely important to know, were conspicuous by their silence. It was regrettable that the European Communities, which were wealthy, well-endowed with competent staff and had no financial problems, had adopted such an attitude, whereas they increasingly frequently asked to be parties to multilateral treaties on an equal footing with States.

60. He drew the Commission’s attention to the decision of 2 November 1999 which the Human Rights Committee had taken in the *Rawle Kennedy v. Trinidad and Tobago* case,¹⁴ of which he had included lengthy excerpts in paragraph 12 of his report. To his knowledge, that was the first time that the Committee had applied the doctrine of its general comment No. 24, on issues relating to reservations made upon the ratification of or accession to the International Covenant on Civil and Political Rights or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant,¹⁵ in a specific case. The basic question in that case had been whether a reservation by Trinidad and Tobago which ruled out the possibility for persons under sentence of death to apply to the Committee was admissible. The Committee had decided, rightly or wrongly, that the reservation was not admissible and had concluded that: “The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol”.¹⁶ That position was in keeping with general comment No. 24, but it was obviously incompatible with paragraph 10 of the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, which the Commission had adopted at its forty-ninth session, in 1997¹⁷ and in which it had noted that it was up to the reserving State to draw the appropriate conclusions from the inadmissibility of a reservation determined by a human rights treaty monitoring body whose competence was recognized in paragraph 5 of the preliminary conclusions. In other words, in the case in question, the Committee had maintained its position by upholding its general comment No. 24, and as he mentioned in paragraphs 10 to 15 of his report, as had been done by most of the human rights treaty monitoring bodies which had commented on the preliminary conclusions. The Committee and the Commission thus seemed to agree on the possibility that human rights treaty monitoring bodies could appreciate the validity of a reservation, but disagreed on the consequences of the determination of the inadmissibility of a reservation. It therefore had to be decided what

⁹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

¹⁰ See footnote 1 above.

¹¹ *Yearbook . . . 1999*, vol. II (Part One), documents A/CN.4/499 and A/CN.4/478/Rev.1.

¹² *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/491 and Add.1–6.

¹³ See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, para. 489.

¹⁴ *Official Records of the General Assembly, Fifty-fifth session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, communication No. 845/1999, *Rawle Kennedy v. Trinidad and Tobago*, p. 258.

¹⁵ *Ibid.*, *Fiftieth session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

¹⁶ *Ibid.*, *Fifty-fifth session, Supplement No. 40 (A/55/40)*, vol. II, annex XI, p. 266, para. 6.7.

¹⁷ *Yearbook . . . 1997*, vol. II (Part Two), p. 56, para. 157.

fate the Commission should set aside for its preliminary conclusions, which it had adopted at its forty-ninth session. He gathered that some members of the Commission thought that the question should be discussed again at the current session or, in any event, at the next session at the latest. As he indicated in paragraph 18, he did not think that it should be discussed again; it had been wise for the Commission, as a body composed of general internationalists, to give what he regarded as the right solution in international law. However, he saw no point in again crossing swords with the human rights treaty monitoring bodies at the current stage. The conclusions were only preliminary in nature and the Commission would have to come back to them, but, for that purpose, two conditions would have to be met. The human rights treaty monitoring bodies and States first had to have reacted to the preliminary conclusions. However, as indicated in paragraph 16, the former had not done so seriously and only five of the latter had done so and the replies were not representative enough to be able to say that a meaningful trend was taking shape. Secondly, the Commission had to have completed its consideration of the core of the draft Guide to Practice, particularly in respect of the admissibility of reservations and the effects of reservations. Only then would it be able to test the soundness of the preliminary conclusions in terms of human rights. At best, however, it would be able to do so only at its forthcoming session, in 2001, or, more probably, at the fifty-fourth session, in 2002. He therefore believed that it would be better to see how things went. After all, the objective was not to win out over the human rights treaty monitoring bodies, but to try to find the most reasonable solution that was most in keeping with the general interest.

61. He drew attention to another major development in relation to the topic of which he had not been aware when he had prepared his fifth report. At its fiftieth session, the Sub-Commission on Prevention of Discrimination and Protection of Minorities had, in its decision 1998/113 of 26 August 1998, entitled "Reservations to human rights treaties", decided to request one of its members, Ms. Françoise Hampson, to prepare a working paper on the question of reservations to human rights treaties.¹⁸ Accordingly, Ms. Hampson had submitted a fairly brief working paper¹⁹ in paragraph 3 of which she had referred only to "some of the relevant issues", but which was interesting and could be distributed to the members of the Commission. She had apparently referred to the second report on reservations to treaties,²⁰ but not to the Commission's preliminary conclusions. Her starting point had been the principle of the "singularity" of human rights treaties and, after asking good questions that she had left unanswered, she concluded that a more in-depth study should be carried out primarily on the basis of replies to detailed questionnaires which would be sent to States. In paragraph 34 of her working paper, she stated that: "Such a study would have financial implications. The person undertaking the study would require research assistance, probably two full-time assistants to ensure comprehensive coverage". He could not help noticing that Sub-Commission Rapporteurs had more require-

ments than Commission Special Rapporteurs and referred in that regard to the footnote in paragraph 37 of his report. In its resolution 1999/27 of 26 August 1999, the Sub-Commission, which had become the Sub-Commission on the Promotion and Protection of Human Rights, had taken note of the working paper, decided to appoint Ms. Hampson as Special Rapporteur and requested the Secretary-General to provide her with all the assistance necessary to enable her to accomplish that task. By its decision 2000/108 of 26 April 2000, the Commission on Human Rights decided to request the Sub-Commission to request Ms. Hampson to submit to the Sub-Commission at its fifty-second session revised terms of reference for her proposed study on reservations to human rights treaties, further clarifying how the study would complement work already under way on that topic, in particular by the Commission. He therefore intended to contact Ms. Hampson, who had not thought to contact him, and wondered whether he should simply ask her what her intentions were or whether he should go further and suggest closer cooperation with her. Personally, he was convinced that it was entirely in the Commission's interests to remain open to a mutually beneficial dialogue with the human rights treaty monitoring bodies. For example, it might invite the Sub-Commission Special Rapporteur to one of its public or closed meetings at its next session in order to hold an exchange of views with her. There were, however, other possible types of cooperation and he would be grateful to the members of the Commission for letting him know what they thought and what suggestions they might like to make. In his view, that was yet another reason not to hurry to "lock up" the preliminary conclusions. It would be unfortunate if the Commission gave the impression of wanting to force the issue without waiting to see what human rights experts had to say about it.

62. Coming back to the introduction to the fifth report, he said that paragraphs 22 to 31 recalled the conditions in which the Commission had considered the third report. In paragraphs 31 to 49, he had described the Sixth Committee's consideration of the corresponding chapters of the Commission's reports. In so doing, he had tried to be sensitive to and to take account of the reactions of States, even though he did not intend to be servile in that regard. The Commission and the Sixth Committee had different functions, but they must listen to one another, and the Commission did not systematically have to give in without trying to put forward the law's point of view. He had thus also been able to draw attention to the most problematic or the most useful aspects of the reactions of States.

63. In paragraphs 51 to 56 of the report, he summed up the initiatives taken by other bodies, such as the Asian-African Legal Consultative Committee and the Group of Experts on Reservations to International Treaties (DI-E-RIT) of the Council of Europe, which was particularly active in that regard and had invited him to take part in September 2000 in a meeting of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) on reservations to treaties. Paragraphs 57 to 65 contained a brief general presentation of the fifth report, the main points of which he had referred to in his oral introduction. The annex to the introduction to the fifth report contained a table showing concordances between the draft guidelines he had proposed and those adopted by the Commission on first reading.

¹⁸ See E/CN.4/1999/4-E/CN.4/Sub.2/1998/45, p. 84.

¹⁹ E/CN.4/Sub.2/1999/28 and Corr. 1.

²⁰ *Yearbook . . . 1996*, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

64. Referring to the substance of Part I of the report, particularly alternatives to reservations and interpretative declarations, he said that, to his knowledge, no study on alternatives to reservations had ever been carried out systematically, except for a rather brief study submitted by Virally at a seminar held at the Catholic University of Louvain, Belgium, in 1978, on escape clauses in international human rights instruments.²¹ That was the idea on which the part of his report under consideration was based: reservations were one means of limiting the binding effect of a treaty on the State or international organization which formulated them. They were, however, not the only means and it was quite interesting and instructive to compare reservations with other means of achieving the same objectives, if only, moreover, in order to tell them apart and see whether there was a lesson to be learned from those other means as far as the legal regime of reservations was concerned. It was in that spirit that he was proposing nine new draft guidelines for the Commission's consideration.

65. He had, in paragraphs 71 to 103, first given a general idea of the different procedures for modifying or interpreting treaty obligations and had then dealt with each one more specifically. He recognized that that method was not very rigorous, but it had the advantage of highlighting an idea which seemed unimportant, but was quite basic: reservations were not the alpha and omega of the flexibility of treaty obligations. There were many other procedures which had the same or comparable effects as reservations and which were probably better and easier to use, at least in some cases. That idea was reflected quite straightforwardly in draft guideline 1.7.1, which was reproduced in paragraph 94 of the report and read:

1.7.1 Alternatives to reservations

In order to modify the effects of the provisions of a treaty in their application to the contracting parties, States and international organizations may have recourse to procedures other than reservations.

He was entirely aware that such a provision would be unusual and probably quite open to criticism if it appeared in a treaty, but the point was that the proposed Guide to Practice was not and did not claim to be a treaty. It was intended to provide States with general guidelines on which they could base their conduct. From that point of view, a guideline of that kind would be useful because it would have the advantage of drawing the attention of diplomats and leaders to the fact that there were other procedures which might have the same virtues as reservations without necessarily having the same drawbacks in a particular case. As it stood, the draft guideline was perhaps a bit elliptical, if not esoteric, and that was why he proposed draft guideline 1.7.2 by way of illustration, in paragraph 95. Of course, it might be considered that such a provision did not belong in a treaty, if only because it was quite likely that the proposed list was not and could not in any case be complete. It was naturally always possible for examples illustrating a general proposition to be included in the commentary, but he was rarely convinced by that procedure, the easy way out, and he was even less so in the

current case, since the Guide to Practice would then become much less "practically readable". Draft guideline 1.7.2 therefore non-exhaustively listed various procedures which permitted modification of the effects of the provisions of a treaty and which were grouped under two headings, one on procedures provided for in the treaty itself and the other on procedures not provided for in treaties. As indicated in paragraphs 86 to 92 of the report, that classification of the alternatives to reservations seemed to be the most logical and operational. The point was that, for practical purposes, negotiators who found it impossible to agree on a reservation had to be reminded that there might be escape clauses that could, for one reason or another, be easier to use, while, at the same time, producing similar results comparable to those of reservations. Those institutions, which existed side by side with reservations, might be combined under the single heading of "options", bearing in mind, however, that they were extremely varied and often operated in very different ways and that was why they were useful.

66. He proposed that the Commission's discussion should focus on general comments and on draft guidelines 1.7.1 and 1.7.2, in the hope that they would be referred to the Drafting Committee. Once the fate of those draft guidelines had been decided, he would introduce draft guidelines 1.7.3, 1.7.4 and 1.1.8 together, draft guidelines 1.4.6 to 1.4.8 and then draft guideline 1.7.5.

The meeting rose at 1.05 p.m.

2631st MEETING

Friday, 2 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Reservations to treaties¹ (continued) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4², A/CN.4/L.599)

[Agenda item 5]

²¹ M. Virally, "Des moyens utilisés dans la pratique pour limiter l'effet obligatoire des traités", *Les clauses échappatoires en matière d'instruments internationaux relatifs aux droits de l'homme* (Brussels, Bruylant, 1982), p. 5.

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KATEKA said that the introduction to the fifth report (A/CN.4/508 and Add.1–4) contained a useful summary of the Commission's earlier work on the topic. The information in paragraph 5 that only 33 Member States and 24 international organizations had answered the Commission's questionnaires on reservations to treaties was a matter for concern. The fact that no replies had been received to date from any African country was particularly disturbing. Such failure to respond was, in his view, due to lack of capacity rather than lack of interest. Urgent action was needed to strengthen the capacity of the legal departments of ministries of foreign affairs in developing countries. In the case of other topics, too, replies to questionnaires tended to be received from only one geographical region, which was not a healthy state of affairs.

2. As to the Special Rapporteur's view in paragraph 17, that it would be pointless at the current stage to reopen discussion on the preliminary conclusions adopted by the Commission at its forty-ninth session,³ some treaty bodies had apparently felt emboldened to request the Commission to adjust its preliminary conclusions in line with the approach reflected in general comment No. 24 of the Human Rights Committee. Endorsing the view reported in paragraph 16 that human rights treaty bodies should remain strictly within the framework of their mandate, he said that attempts were being made by treaty bodies to make use of the Special Rapporteur's reports in their efforts to persuade State parties to withdraw or modify their reservations, as evidenced in paragraph 15. It was an unusual procedure, to say the least.

3. With reference to the Special Rapporteur's views on the numbering system adopted for the provisions of the Guide to Practice, in paragraph 28—a system which some members, including himself, had criticized—he failed to understand the conclusion that, now the adjustment period was over, the numbering method no longer posed any particular problem. Mere passage of time did not make a faulty situation acceptable, and silence on the part of Sixth Committee members did not signify approval. He appealed to the Special Rapporteur to simplify the numbering format, adding that he found it particularly difficult to see the purpose of the “table of concordances” appearing in the annex to the introduction to the fifth report.

4. In paragraph 30, the Special Rapporteur recalled that the sole purpose of chapter I of the Guide to Practice was to define what was meant by the term “reservations”, by distinguishing them from other unilateral declarations. In the next paragraph, while admitting to initial hesitations, he expressed the view that in subsequent chapters of the Guide to Practice it would be appropriate to define the legal regime of reservations themselves as well as that of interpretative declarations. Surely, in order to avoid expanding the scope of the topic endlessly, would it not be better to finalize the question of definitions before elaborating on future chapters? In that connection, he endorsed the views of the United Kingdom, referred to in a footnote to paragraph 37, and also drew attention to the following footnote, which was unnecessary and in which the Special

Rapporteur himself described the topic as sprawling and complex.

5. As for paragraphs 57 to 65, on the general presentation of the fifth report and the chapter on alternatives to reservations and interpretative declarations, as he understood it, the object of reservations and other similar unilateral statements was to help a treaty to achieve universality by allowing some flexibility to States and international organizations having special concerns about certain provisions of the treaty. For that purpose, reservations and interpretative declarations would seem to be enough to safeguard the essential object of a treaty while allowing the greatest possible number of States to become parties thereto. He saw no need to consider the alternative procedures cited by the Special Rapporteur, which, far from adding clarity, merely confused the issue.

6. In paragraph 93 of the report the Special Rapporteur confessed to having hesitated for a long time before proposing the inclusion in the Guide to Practice of guidelines on alternatives to reservations. The decision eventually taken to include such guidelines was to be deprecated. Notwithstanding the arguments advanced in paragraph 95, it would have been more appropriate to mention the alternatives to reservations in the commentary. Furthermore, while it was stated in the same paragraph that the Guide to Practice was not intended to become an international treaty, paragraph 36 contained the observation that the Commission had never rejected the option of a draft convention. The Commission would be well advised to deal with the question of the final form of the Guide to Practice when it had completed the elaboration of all the guidelines.

7. While guideline 1.7.1 represented an unnecessary widening of the scope of the topic guideline 1.7.2 seemed misplaced, as some of its provisions were already covered by guidelines 1.4.1 and 1.4.2. Suspension, amendments and supplementary agreements were adequately encompassed in the Vienna regime. Lastly, he emphasized the need to produce a guide that was practical and user-friendly and reiterated the view that the discussion of possible alternatives to reservations and interpretative declarations should be consigned to the commentary.

8. Mr. ROSENSTOCK congratulated the Special Rapporteur on his interesting and impressive fifth report. While sharing some of Mr. Kateka's views on the numbering system, he had found the summary, the discussion and the proposals fascinating reading. It had to be recognized, however, that the project as a whole not only seemed no longer capable of completion within one quinquennium but was actually beginning to appear endless. There again, he found himself in sympathy with Mr. Kateka's views. The Commission would not win friends by promising one thing and doing another.

9. As to the proposed inclusion of guidelines on alternatives to reservations and interpretative declarations, aside from the question of whether such a step formed part of the Commission's mandate and considerations of time, there was a risk that the alternative procedures identified would constitute something like advice on how to make a treaty less effective. Nevertheless, the schemes identified in the report, like reservations themselves, did make it

³ See 2630th meeting, footnote 17.

possible to obtain a wider area of agreement among parties with varying interests. For that reason, as well as for the reasons set out in paragraph 93 of the report, he concurred with the Special Rapporteur's decision to elaborate such a guide as part of the Commission's exercise.

10. It was questionable whether some of the items included in guideline 1.7.3 were strictly necessary. In the absence of a paragraph or guideline making it explicit that they were not reservations, were final clauses to be regarded as reservations? Guideline 1.7.4 raised similar concerns, and it was gratifying to note that the Special Rapporteur would be prepared to omit it. The concessions indicated in paragraphs 168 and 178 of the report were also to be welcomed.

11. The only point in the report which he had found unclear lay in the discussion of exclusionary clauses and reservations in paragraphs 160 et seq. Why was there no mention of the fact that the capacity of a non-reserving State to decide not to be a treaty partner of a reserving State did not exist in the case of an exclusionary clause? That question aside, he was strongly in favour of referring the consolidated text to the Drafting Committee without delay.

12. As for the question of the Commission's provisional conclusions with regard to general comment No. 24 of the Human Rights Committee, he was inclined to sympathize with the Special Rapporteur's desire to avoid a fight. Unfortunately, such a responsible approach, based on the interest of all concerned rather than of a special interest group, might not be shared by those who would seem prepared to see the law of treaties disintegrate if that served their ends. By refusing to accord weight or consequence to expressions of will on the part of States, some seemed all too ready to imperil the consent on which the entire regime of treaties necessarily rested. At some point in the future, restraint in that context would come to constitute abdication of responsibility. There again, he had much sympathy with Mr. Kateka's views. Might it be possible, as an interim measure of protection and in order to instil habits of cooperation, to explore the possibility of embarking on a joint campaign with the proponents of general comment No. 24 to encourage States to assume their responsibilities by objecting to unacceptable reservations? The goal would be to eliminate or reduce the vacuum which its proponents abhorred and which they had tried to usurp the responsibility for combating. While such an approach would not resolve the problem, it might circumscribe it and lead to better cooperation in general.

13. Mr. LUKASHUK said that, on completing with genuine regret his reading of the Special Rapporteur's masterly fifth report, he could not help asking himself whether a direct connection existed between the topic of reservations to treaties and the more general issue of treaty drafting. The conclusion he had reached was that, if such a connection did exist, it was far from direct. The definitions proposed in the draft guidelines could be classified in two groups, the first consisting of guidelines 1.1.8, 1.4.6, 1.4.7 and 1.4.8 and the second of guidelines 1.7.2 to 1.7.5. Those in the first group could be useful for a discussion in the context of treaty drafting but had no direct relevance to the topic of reservations to treaties. Those in the second group were concerned with alternatives to reservations and interpretative declarations. Taking into account the Special

Rapporteur's own admission that the number of such alternative approaches was practically unlimited and in the light of arguments adduced by Mr. Kateka and Mr. Rosenstock, he was inclined to believe that no satisfactory result could be achieved by the inclusion of the definitions in question and appealed to the Rapporteur to keep his promise that the next part of his work would be strictly confined to reservations.

14. Mr. KAMTO expressed his appreciation for the summary of the Commission's earlier work on the topic provided in the introduction to the report, which was of particular value to relatively new members of the Commission. Referring to the section on the outcome of the second report,⁴ he asked whether, in the case of a topic already under consideration in the Commission which subsequently came up in the course of the work of a human rights treaty body, it would not be appropriate for that other body to defer its work on the subject pending the completion of the Commission's draft. He agreed with other members that the link between the subject of alternatives to reservations and interpretative declarations and the topic under consideration was at best indirect. While taking into account the considerations formulated in paragraphs 66 and 68 of the report, he doubted whether it was in the Commission's interest to adopt the approach advocated by the Special Rapporteur. In the first place, was it really the role or the duty of the Commission to suggest to States a multitude of techniques designed to weaken a treaty? In his introductory comments, the Special Rapporteur had stated that diplomats and statesmen regarded non-binding obligations as the ideal. Be that as it may, he doubted whether the Commission was called upon to help in attaining such an ideal. The task of discovering ways to escape from the constraints of a treaty could surely be left to the legal departments of ministries of foreign affairs. The treaty regime was already rendered heterogeneous by the existence of reservations. The introduction of alternative methods or escape clauses could only weaken it further.

15. The suggestion in paragraph 73 of the report that treaties were "voluntary traps" was an intriguing one, but did not accurately reflect the law of treaties. It implied that States were taken by surprise, yet they were entirely free to make their wishes known throughout the process of treaty negotiation and during the formulation of reservations. It was neither reservations nor alternatives thereto that could keep States out of "traps" but, rather, the right of all States parties to a treaty to suspend or withdraw from the treaty. In the *S.S. "Wimbledon"* case, PCIJ had referred to the right of entering into an international engagement as being an attribute of State sovereignty. Accordingly, when a State formulated a reservation and another State accepted it, the State expressed its will and did not fall into a trap.

16. Lastly, he would suggest that draft guideline 1.7.1 be retained and no more should be said about alternatives to reservations, or indeed that the material in both draft guidelines 1.7.1 and 1.7.2 be deleted altogether if it was considered that such alternatives did not come within the ambit of the draft.

⁴ Ibid., footnote 20.

17. Mr. SIMMA said the fifth report made extremely interesting reading and contained the element of intellectual challenge and suspense that the Commission had come to expect from the Special Rapporteur. Unlike other members, he thought the Special Rapporteur had been right to take up the alternatives to reservations. Those alternatives actually existed in State practice, and the question of whether the Commission was well advised to suggest to States ways that they could weaken treaty obligations was meaningless. Some of the alternatives were in fact much less destructive than reservations.

18. As for the working paper on reservations to human rights treaties submitted by Ms. Françoise Hampson to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which had become the Sub-Commission on the Promotion and Protection of Human Rights,⁵ it reflected what Mr. Brownlie, in another context, had called a “trade union attitude”, namely interest groups trying to preserve their own turf against incursions by other groups. If the Sub-Commission had been interested in the issue of reservations, it could simply have encouraged the Commission to continue its work in that area. Although Ms. Hampson had expressed great willingness to work with the Special Rapporteur, it was obvious that the Sub-Commission was trying to steer its own course and develop a human-rights oriented alternative to the work of the Commission. That went against any imperatives of cost-effectiveness and rationality, of course, but that was how things worked within the United Nations.

19. The approach taken by the Special Rapporteur in his fifth report was another example of the increased focus throughout the international community on the issue of reservations to human rights treaties. There was more and more concerted action on the part of States, perhaps partly in response to the principle adopted by the Commission that the responsibility for seeing whether a reserving State had gone too far when making a reservation should not be left solely to the human rights treaty bodies but must be shared by the reserving State itself and by the other States parties. In paragraph 55 of his report, the Special Rapporteur referred to efforts being coordinated by the Council of Europe, and there were other procedures in place within the European Union. The purpose of all of those methods was to guarantee greater homogeneity and enable States to overcome their hesitations about speaking out against other States. A more comprehensive description of the methods in use within European institutions could be found in the contribution by Cede to the essays in honour of Konrad Ginther.⁶

20. In addition, the so-called severability doctrine according to which, if a reservation was inadmissible, the reserving State could still be regarded as being bound by the entirety of a treaty without the benefit of the reservation, was now being applied not only by the treaty bodies of the United Nations and the European Union, but also by

States. It would be interesting to know whether there had been any reactions or protests by States to the application of the severability doctrine. In some cases, reservations deemed to be inadmissible had been withdrawn or modified, largely, he believed, in response to reactions by States. He had in mind a reservation made by the Syrian Arab Republic as well as one made by the Maldives upon accession to the Convention on the Elimination of All Forms of Discrimination against Women.⁷ Could one say that a change in the law was being observed? Was the severability doctrine now being applied by States as well as by treaty bodies? If so, the Commission might need to react to that development. He would like to hear the Special Rapporteur’s opinion on that point. In all likelihood, the Special Rapporteur would take the view, as did many in the Commission, that the severability doctrine contradicted the paramount principle in treaty-making—that of consent. Perhaps severability could be reconciled with consent, however, if reserving States became aware of the risk that other States might object to their reservations and react in a manner that paralleled the application of the severability doctrine.

21. In a footnote to paragraph 30, the Special Rapporteur described an article written by the Austrian international lawyer Karl Zemanek as “insulting” to him.⁸ Zemanek’s view that across-the-board reservations were not to be regarded as reservations at all certainly differed from that of the Special Rapporteur. However, it should be seen, not as “insulting”, but as an expression of intellectual disagreement. He himself sided with the Special Rapporteur, as Zemanek’s approach would leave the most dangerous kind of reservations untouched by any regime at all, compared with the relatively sophisticated regime that applied to reservations.

22. The report suggested that alternative approaches to reservations should be discussed separately from reservations. It was difficult to dissociate the two. A number of States had made statements under article 28 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which, according to draft guideline 1.1.8, were reservations, as they constituted exclusionary clauses. That Convention was subject to the general regime of the 1969 Vienna Convention, article 19 of which said that, if a treaty provided for only specific reservations to be made, other reservations were inadmissible. Accordingly, a declaration made under article 28 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, i.e. a declaration of non-acceptance of one of the procedures provided for in the Convention, was the only reservation that could be made in respect of the Convention. In fact, however, quite a number of the reservations made had nothing to do with such procedures. It might be worth reconsidering whether clauses in treaties that allowed States to opt out of certain procedures should in fact be deemed reservations.

⁵ Ibid., footnote 19.

⁶ F. Cede, “European responses to questionable reservations”, *Development and Developing International and European Law: Essays in Honour of Konrad Ginther on the Occasion of his 65th birthday*, W. Benedek, H. Isak and R. Kicker, eds. (Frankfurt am Main, Peter Lang, 1999), p. 21.

⁷ *Multilateral Treaties Deposited with the Secretary-General* (United Nations publication (Sales No. E.00.V.2), document ST/LEG/SER.E/18 (Vol. I)), p. 192.

⁸ K. Zemanek, “Alain Pellet’s definition of a reservation”, *Austrian Review of International and European Law*, vol. 3, No. 2 (1998), pp. 295–299.

23. Mr. HAFNER said that, as he understood Mr. Simma's solution to the problem of inadmissible reservations, if a State made a reservation that other States considered inadmissible, there were two choices: either the reserving State amended its reservation, or it withdrew from the treaty. But what if the treaty was an "eternal" one and there was no way the State could withdraw from it because the treaty said nothing about termination or withdrawal?

24. Mr. PAMBOU-TCHIVOUNDA said Mr. Simma's comments shed a great deal of light on the alternatives to reservations identified by the Special Rapporteur and led him to ask what was to be their fate. Were they to be incorporated in a new, supplementary regime for all such techniques, or were they simply being put forward for information purposes? Reservations were to some extent already covered and organized in the 1969 and 1986 Vienna Conventions. What of alternatives?

25. When the alternative procedures were restrictive or escape clauses, how could they be considered reservations, since by definition, they had given rise to negotiation, to the convergence or divergence of the will of States? If they gave rise to adverse reactions, which were the reservations—the reactions provoked by the clauses, or the clauses themselves?

26. Mr. SIMMA, replying to the question raised by Mr. Hafner, said he had not been speaking of withdrawal in a technical sense but had merely been pointing to the fact that the reserving State could be regarded as conditionally adhering to a treaty, and if responses to a reservation entered at the latest at the time of accession or ratification involved the severability doctrine, the State would in effect not have become a party to the treaty.

27. Mr. PELLET (Special Rapporteur) said that he was now preparing a further chapter of his report on the formulation, not of reservations, but of reactions to reservations and interpretative declarations. The provisional title was the "Reservational dialogue". He was not sure that the approaches taken by some European institutions and the Scandinavian countries could be construed as creating new legal rules, even if they challenged to some extent the principle of non-divisibility of treaties. He was bearing the problem in mind. It would prove necessary to consider whether to include draft guidelines on what remained, for the time being, a practice limited almost exclusively to European countries.

28. Mr. BROWNLIE congratulated the Special Rapporteur on the very high quality of the research that had gone into his report, which constituted a valuable addition to the literature, something that could not be said of all reports by any means. He agreed generally with the way the material was presented and the solutions offered. He did, however, sympathize with the warnings voiced by Mr. Kateka and Mr. Rosenstock about the need to keep in mind the actual scope of the topic and the Commission's relations with the General Assembly.

29. As to draft guidelines 1.7.1 and 1.7.2, he sympathized with the Special Rapporteur's methodology of specifying which practices did not constitute reservations, but was uneasy about the question of alternative strategies,

which departed from the Commission's mandate and should really be addressed in an introduction.

30. With reference to the Commission's difficult relations with the Human Rights Committee and other human rights monitoring bodies, there was a great need for caution. Mr. Simma had mentioned his analogy with demarcation disputes between trade unions, and of course there was also the general question of competition between the Commission and the human rights bodies. The human rights treaty monitoring bodies had not been set up to create law, although they might do so incidentally in the course of their duties.

31. A mild version of the same problem was the extent to which the Special Rapporteur took into account, *de jure*, so to speak, of the views of the Sub-Commission on the Promotion and Protection of Human Rights and other bodies. The Special Rapporteur could not ignore those views, nor was it his policy to do so. The real issue was one of classification: what was the nature of the problem when a monitoring body made a determination on that subject-matter? Were monitoring bodies exceeding their mandate? It was important not to treat the question as though it were an intra-United Nations constitutional issue. The Commission must look at the technicalities of the topic.

32. In considering the practices of the monitoring bodies, the Commission must bear in mind the political and diplomatic milieu in which those bodies functioned. From time to time, it must examine the policy issues that accompanied the functioning of bodies applying legal principles. For example, following the Human Rights Committee's decision on the *Rawle Kennedy v. Trinidad and Tobago* case,⁹ would States in future be much more conservative in accepting the competence of monitoring bodies? The attitude of the Council of Europe's Committee of Ministers in the context of implementing the European Convention on Human Rights was yet another matter. How those things worked in the general political and diplomatic context was a sensitive question. If the Commission was going to take a position on the attitude of the Human Rights Committee, it should not be merely a technical view: there were other relevant political and diplomatic questions to be taken into account.

33. Mr. LUKASHUK said that Mr. Simma had departed from the topic at hand. The Commission had decided to postpone consideration of reservations to international human rights instruments.

34. Mr. SIMMA reminded Mr. Lukashuk that it was entirely legitimate to discuss the substance of the introduction to the fifth report which was concerned with that very issue, as a number of members had already pointed out.

35. Mr. PELLET (Special Rapporteur) said that he had sought not only the reactions of the members of the Commission but also guidance on how to respond to the working paper of Ms. Hampson,¹⁰ whom he could approach if

⁹ See 2630th meeting, footnote 14.

¹⁰ *Ibid.*, footnote 19.

the Commission gave him the mandate to do so. He wondered why she had not tried to contact the Commission.

36. The CHAIRMAN, speaking as a member of the Commission, noted that, in paragraph 12 of the fifth report, the Special Rapporteur discussed the decision of the Human Rights Committee of 2 November 1999 in the *Rawle Kennedy v. Trinidad and Tobago* case declaring that a complaint from a Trinidad and Tobago national who had been sentenced to death had been receivable on the basis of general comment No. 24 despite the reservation excluding the admissibility of such communications entered by the Government of Trinidad and Tobago to the Optional Protocol to the International Covenant on Civil and Political Rights. He agreed with the Special Rapporteur that the Commission should not as yet review its preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. However, it would be useful for the Special Rapporteur to engage in close dialogue with the human rights bodies and with Ms. Hampson in particular.

37. On 26 May 1998, Trinidad and Tobago had denounced the Optional Protocol, re-acceding to it on the same date with the reservation explained in paragraph 12.¹¹ Guyana had followed suit on 5 January 1999.¹² Those actions were tantamount to the formulation of reservations after a State had accepted the binding effect of the treaty as a whole and were thus a breach of article 19 of the 1969 Vienna Convention. Technically speaking, however, those two Governments had not violated any rules of international law. The Commission might have to discuss that undesirable practice.

38. On the other hand, he had serious doubts about the decision of the Human Rights Committee. It ignored a basic principle of international law: the requirement of consent by the sovereign State to be bound by the treaty. The Committee's decision had backfired. Trinidad and Tobago had again denounced the Optional Protocol, effective 27 June 2000. The Committee would no longer be able to receive any complaint from Trinidad and Tobago nationals.

39. Regarding draft guidelines 1.7.1 and 1.7.2, he agreed that States might have recourse to procedures other than reservations in order to modify the legal effects of the provisions of a treaty. He therefore did not oppose the list of such procedures in draft guideline 1.7.2, but he was not certain whether they should be conceptualized as alternatives to reservations. A reservation regime must strike a balance between maintaining the unity of the treaty and securing universal participation in the treaty.

40. In guideline 1.7.2, the first three procedures followed from the provisions of the treaty. For example, article 309 of the United Nations Convention on the Law of the Sea stipulated that no reservations or exceptions could be made to the Convention unless expressly permitted by other articles of the Convention. Pursuant to article 92, paragraph 1, ships must sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in that Convention, must be

subject to its exclusive jurisdiction on the high seas. That confirmed the basic principle that only flag States had jurisdiction for ships on the high seas. But paragraph 1 also allowed for an exception. For instance, to combat drug trafficking, China, Japan and the Philippines could agree to exercise joint jurisdiction over each other's ships on the high seas. Such an arrangement was an integral part of the treaty. Perhaps the Drafting Committee could clarify whether that was a restrictive clause or an alternative to a reservation.

41. Mr. ELARABY said that, as everyone agreed, the Vienna regime did not include interpretative declarations. If it addressed that subject, the Commission must be very careful not to tilt the balance one way or the other, because that would create obstacles to the universality of treaties. It was also important to avoid making issues too complicated and detailed, and in that context he referred in passing to the numbering system.

42. As to draft guidelines 1.7.1 and 1.7.2, as a practitioner he thought that such proposals were most useful. He disagreed with Mr. Kamto's remark that such matters should be left to legal advisers. As Mr. Brownlie had noted, such guidelines could also be placed in the introduction. He endorsed the Special Rapporteur's offer to contact Ms. Hampson. It was not in the interest of the Commission for it to go in one direction and the human rights monitoring bodies to go in another.

43. Lastly, he had read Zemanek's article and he agreed with much of it, especially with regard to across-the-board reservations.

44. Mr. KAMTO said that, despite the views expressed, he had not changed his opinion about the thrust of the fifth report. One argument, presented by Mr. Simma, was that everything the Special Rapporteur tried to include in the alternatives to reservations existed in practice. A second argument, advanced by Mr. Elaraby, was that the proposals were useful. The real issue, however, was whether the subject, as addressed in that part of the report, fell within the Special Rapporteur's mandate, or in any case whether it was part of the topic of reservations. He did not think so. All the procedures listed in draft guideline 1.7.2 constituted treaty clauses. Apart from the third one, they all gave the impression of being negotiated matters that actually appeared in the final text of the treaty to be adopted, which suggested that the regime for those clauses would in fact be the treaty regime, because they were negotiated clauses accepted in the treaty. That made a legal obligation less rigorous, but did not aim to set a limit as to the scope of the effects that such an obligation could produce once the treaty was adopted. He failed to see how the Commission could mix restrictive clauses, which were treaty clauses, and reservations to treaties, which by nature were initially unilateral declarations or acts, and to which other parties to the treaty would reply in one way or another. The focus on alternatives to reservations might cause more problems than it resolved, something the Special Rapporteur himself was aware of, because he spoke of alternatives, i.e. something other than reservations. The first part already contained a guideline on statements other than reservations which partly addressed matters that did not fall within the scope of reservations. Draft

¹¹ *Multilateral Treaties . . .* (see footnote 7 above), p. 176 and p. 177, note 5.

¹² *Ibid.*, p. 174 and p. 177, note 4.

guideline 1.7.1 could be added to it and draft guideline 1.7.2 could then be deleted.

45. He had no objection if the Commission wanted to act as an advisory body that elaborated rules to help foreign ministries negotiate treaties, but that had nothing to do with the rules of reservations.

46. Mr. SIMMA wondered how much leeway a special rapporteur had in developing a topic. His impression was that the Special Rapporteur was free to explore certain alternatives.

47. Mr. ROSENSTOCK said that the Sixth Committee would not object to the Special Rapporteur stretching his mandate, but at some stage would probably point to the potential consequences of delaying the completion of the task and of confusing the issue. Hence the need for caution.

48. Mr. PELLET (Special Rapporteur), beginning with a comment by Mr. Elaraby, said that he was gratified to hear from a practitioner that his work was useful, notwithstanding its often theoretical nature. He had proposed the draft guidelines on alternatives to reservations in order to show legal advisers in foreign ministries that it was possible to make the treaty procedure more flexible in ways other than through reservations. He failed to see why that departed from the topic; on the contrary, it was at the very heart of the matter. The purpose of a reservation was to modulate the effect of a treaty. For various reasons, no agreement might be reached on reservations of a particular nature. In such cases, it was useful for legal advisers to have a set of guidelines on reservations which nonetheless told them that it was possible to achieve the same result by other means. To clear up a serious misunderstanding that seemed to have taken root among some members, he stressed that he had no intention of defining the legal regime applicable to such alternatives. In accordance with the broader mandate that he had proposed and that the Commission had approved, he would confine himself in the remainder of the draft to the subject of simple or conditional interpretative declarations. However, he was examining the alternatives at that stage because they were sometimes difficult to differentiate from reservations.

49. In response to the charge that he had included procedures in draft guideline 1.7.2 that were obviously neither reservations nor unilateral declarations but treaty clauses, he would point out that such eminent commentators on international law as Sir Gerald Fitzmaurice and Georges Scelle had called some of those procedures reservations. It was therefore worthwhile insisting that they were not, and he felt it would be a practical and intellectual error to omit the question of alternatives to reservations and interpretative declarations. He emphasized that, with draft guideline 1.7.5, on such alternatives, he had completed chapter I of the Guide to Practice, concerning definitions. It was to be hoped that the Commission would move on to consider the next chapter, on the formulation of reservations, before the end of the session.

50. He could not agree with Mr. Kamto's argument that alternative procedures tended to weaken treaties. He did defend reservations in themselves. In his opinion, reservations should not be viewed solely as a necessary evil but rather as a technique designed to make as much as possible

of a treaty acceptable, on the understanding that, owing to the 1951 Pan-American system, the treaty's core provisions remained intact. He did not think that the Commission's role consisted in strengthening binding law but rather in standardizing concepts and establishing reasonably acceptable general rules. As Mr. Simma had observed, some alternative procedures probably presented less of a threat to treaties than did reservations. In any case, alternative procedures, like reservations, were a fact of legal life and States should be in a position to weigh up their advantages and drawbacks.

51. When he described treaties as "voluntary traps", he meant that, once a State acceded to a treaty, it was trapped inside. Mr. Kamto had referred to the right of suspension or withdrawal under the 1969 Vienna Convention, but that right was severely circumscribed. The only real possibility of withdrawal recognized by the Convention was that of *rebus sic stantibus*, a fundamental change of circumstances. Reservations allowed a State to indicate that, while it broadly accepted the trap, it wished to retain an escape hatch because of certain problems presented by the treaty. Whilst he had already explained the scope of his proposals, Mr. Pambou-Tchivounda's comments nonetheless seemed to form a plea for the inclusion of alternative procedures in the draft.

52. Mr. Brownlie's idea of undertaking a socio-political study of the state of mind of diplomats and politicians when they entered reservations to a treaty was certainly very interesting but would require a whole army of research assistants.

53. The Chairman considered that the measures taken by Trinidad and Tobago constituted a violation of the spirit but not of the letter of article 19 of the 1969 Vienna Convention. His own approach was not quite so categorical since, in his view, the law of treaties contained certain loopholes that might be applicable in the case in point. The human rights treaty bodies, on the other hand, were playing with fire. The Human Rights Committee's decision in the *Rawle Kennedy v. Trinidad and Tobago* case had led to the State party's denunciation of the Optional Protocol and deprived its nationals of the possibility of submitting individual petitions. The Committee had adopted too rigid a position and the outcome had been an instance of human rights law being pushed too far in public international law. He would address issues of the kind raised by the Chairman in the next chapter, on the formulation of reservations.

54. In response to Mr. Elaraby, he said that he had not intended to be provocative but constructive. He had gone into considerable detail because the subject was very specific and, in his view, of major importance. It was not enough simply to restate the provisions of the 1969 Vienna Convention.

55. He was somewhat frustrated by the lack of suggestions as to how he should respond to Ms. Hampson, but he took it the Commission broadly agreed that some arrangement should be made for collaboration. He observed, however, that she had not yet been given the green light by the Commission on Human Rights, which had drawn attention to the fact that the International Law Commission was working on the topic. Perhaps the Commission

could arrange for some form of dialogue with Ms. Hampson in a working group at the next session or invite her to address the Commission so that the Special Rapporteur could ensure that her concerns were not neglected.

56. Mr. BROWNLIE said that the study he had in mind would not need to be particularly complex. The Chairman had provided an example of the kind of information that could be compiled: how States responded when monitoring bodies acted in a certain way.

57. Mr. DUGARD said that the Special Rapporteur's suggestion for a meeting with Ms. Hampson was so eminently reasonable that the Commission's silence should be interpreted as consent.

58. Mr. LUKASHUK said he thought the Special Rapporteur had misinterpreted the Commission's reaction to his report. His theoretical contribution to the subject was highly appreciated and the controversial provisions were of considerable practical value. However, the Commission was not preparing a textbook or even instructions for practitioners but something more like a standard-setting document. The alternative procedures should therefore be covered in the commentary and not in the draft guidelines.

59. Mr. PELLET (Special Rapporteur), introducing draft guidelines 1.7.3, 1.7.4 and 1.1.8, said that, as indicated in draft guideline 1.7.2 and the commentary thereto, a wide variety of procedures that were not reservations could be used to produce the same effects as reservations. Paragraphs 104 to 210 of the report examined those procedures, highlighting the characteristics they shared with reservations and those that set them apart, it being understood that the appellation they were given in a treaty was never sufficient to determine their nature. If a treaty provided for a procedure permitting modification of its effects, it was not possible to determine whether it was a reservation from the way in which it was designated because, in accordance with the 1969 Vienna Convention definition reflected in draft guideline 1.1, the phrasing or naming of a unilateral declaration was never sufficient to define the procedure. It could do little more than serve as a clue to the character of the procedure, as noted in some of the draft guidelines already adopted.

60. In some cases, however, the procedures whereby contracting parties modified the effects of a treaty were quite obviously not reservations as defined by draft guideline 1.1 or the 1969 and 1986 Vienna Conventions, for instance clauses in a treaty designed to modify its effects, in other words, treaty provisions that limited, on behalf of certain parties or categories of parties, the obligation resulting from the treaty. A number of examples were given in paragraphs 111 to 113 of the report and in the corresponding footnotes. It was clear from the 1969 Vienna Convention definition that such clauses were not reservations for the very obvious reason that they were not unilateral declarations but components of the treaty itself. He therefore proposed that they be addressed in draft guideline 1.7.3, set out in paragraph 116.

61. Some members had already charged him with stating the obvious in the draft guideline. However, it was a subject that had ensnared even the leading authors cited in paragraphs 114 and 115. In particular, Judge Zoricic, had

stated in his dissenting opinion to the judgment of ICJ in the *Ambatielos* case that a reservation was a provision agreed among the parties to a treaty with a view to restricting the application of one or more of its clauses. The authors in question were calling a reservation what was in reality a treaty clause. The notion of a reservation was commonly used in that sense, e.g. a national jurisdiction reservation, an exclusive jurisdiction reservation or a non-arbitrability reservation. He therefore strongly recommended the inclusion of draft guideline 1.7.3 in the Guide to Practice.

62. Amendments were another procedure that could be used to modify a treaty or diversify its effects, but they entered into effect only vis-à-vis certain parties. Unlike the restrictive clauses he had just mentioned, to his knowledge they had not given rise to confusion, so that a draft guideline was superfluous.

63. The same applied to declarations whereby a State or an international organization sought to suspend a treaty or some of its provisions. As indicated in article 65, paragraph 1, of the 1969 and 1986 Vienna Conventions, such procedures constituted unilateral declarations. When applied to the State making the declaration, they had an impact on the legal effect of the treaty or some of its provisions but left the treaty intact. Although such suspensive declarations thus seemed at first glance to resemble reservations, in fact they came into being when the treaty was already in force and not at the time of the expression of consent to be bound. They were therefore subject to a separate regime from that governing reservations under the Conventions. Moreover, nobody had ever suggested that a unilateral declaration made under an escape clause or a waiver could be assimilated to a reservation. Hence it was unnecessary to include a draft guideline on the subject and the guideline presented in paragraph 143 was merely intended to illustrate his argument or, if the Commission so wished, for inclusion in "catch-all" section 1.4, entitled "Unilateral statements other than reservations and interpretative declarations".

64. The same could not be said of the extremely interesting phenomenon of "bilateralization" of reservations described in paragraphs 120 to 130 of the report and addressed in draft guideline 1.7.4, of which two versions were proposed in paragraph 129. The more restrictive version of the draft guideline would read:

"An agreement, concluded under a specific provision of a treaty, by which two or more States purport to exclude or to modify the legal effect of certain provisions of the treaty or of the treaty as a whole in their application to their relations *inter se* does not constitute a reservation within the meaning of the present Guide to Practice."

65. The technique of bilateralized reservations had been given a theoretical basis and systematic form during the elaboration of the Convention on the recognition and enforcement of foreign judgements in civil and commercial matters at The Hague Conference on Private International Law. It involved the insertion in a treaty of clauses making the treaty's entry into force for two signatory States subject to the conclusion of a bilateral agreement

between those States. The parties to the bilateral agreement could introduce clarifications or amendments to the basic treaty applicable to relations between them. The subordination of the entry into force of the basic treaty to the conclusion of such an agreement was of no relevance to the study of reservations. On the other hand, the arrangement whereby two States could change the legal effect of a treaty bore a closer resemblance to the subject of the study. In reality, however, such bilateral agreements could not be viewed as reservations since they did not constitute unilateral declarations.

66. In view of its distinctive character, he felt that the bilateralization procedure should be mentioned in the Guide to Practice as falling outside the definition of a reservation. The broader wording of draft guideline 1.7.4 would cover not only the bilateralization phenomenon in the strict sense but also agreements among States that were not envisaged in the basic treaty and that had the same object as reservations. Obviously, as he had pointed out, such agreements did not qualify as reservations because they did not constitute unilateral declarations. The second version of the draft guideline would read:

“An agreement by which two or more States purport to exclude or to modify the legal effect of certain provisions of a treaty or of the treaty as a whole in their application to their relations *inter se* does not constitute a reservation within the meaning of the present Guide to Practice.”

67. As he had doubts about the desirability of addressing two different categories of procedure in a single guideline, he was inclined to opt for the narrower version of draft guideline 1.7.4 that focused on bilateralized reservations but would like to hear members' views in that regard.

The meeting rose at 1 p.m.

2632nd MEETING

Tuesday, 6 June 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Reservations to treaties¹ (*continued*) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,² A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. KABATSI joined other members in commending the Special Rapporteur on his excellent fifth report (A/CN.4/508 and Add.1–4) and thanked him in particular for his update on work carried out in various quarters on the subject under consideration, which had been useful in putting the subject into perspective. All of that work had helped the Special Rapporteur in his research and had allowed the Commission to adopt important preliminary conclusions on a number of key issues: for example, there was no question at the current stage of undermining the integrity of the Vienna regime on reservations to treaties or of amending the relevant provisions of the 1969, the 1978 or the 1986 Vienna Conventions. Moreover, a guide to practice would be prepared for States and international organizations, containing guidelines with commentaries and, if necessary, model clauses. It also seemed virtually certain that the title of the topic would remain “Reservations to treaties”.

2. Nonetheless, as far as the format was concerned, like other members of the Commission, he had trouble following the numbering system used by the Special Rapporteur. The two explanations given in paragraph 28 of the report were unconvincing.

3. With regard to the views, positions and work of other bodies, especially those established pursuant to United Nations human rights instruments, he thought that the Commission should take due note of them before reaching a definite decision. Those bodies did have expertise in their respective areas of competence and were generally well equipped to tackle the issues involved. Moreover, they were usually well placed to analyse and determine State practice in the matter. It would therefore be useful for the Special Rapporteur to continue to cooperate with them.

4. Turning to the proposed guidelines on alternatives to reservations and interpretative declarations, he said that the Special Rapporteur had been right to draw attention to the procedures sometimes used by States to modify the application of the provisions of treaties to which they were parties without necessarily referring to them as “reservations” and also to provide the necessary details on such procedures in paragraph 80. Noting that the Special Rapporteur admitted in paragraph 93 that he had hesitated for a long time before proposing the inclusion of draft guidelines on alternatives to reservations in the Guide to Practice under consideration, he said he assumed that the hesitation was basically due to the fact that it was not always easy to distinguish those alternatives from reservations and so he wondered how potential users of the Guide to Practice could be expected to follow them. A

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

guide to practice should be as clear and precise as possible. The options introduced should not be buried under a mass of obscure alternatives. States had the sovereign right to enter into international obligations or not, with or without reservations. He did not share the view expressed by the Special Rapporteur in paragraphs 73 and 74 of his report that alternatives to reservations allowed parties to avoid the “voluntary traps” of treaties, or at least to mitigate their severity, the ideal being, without any doubt, the non-binding obligation. He personally thought that reservations procedures were flexible enough to protect States. Moreover, alternatives were merely reservations in disguise, and that was possibly the reason why it was not always easy to distinguish between the two. In any case, whether the procedure was “surgical” or “therapeutic”, it led to the same result: modifying the application of the provisions of treaties to which States or international organizations were parties.

5. Since alternatives to reservations were a fact of life, he would not mind if they were mentioned in the commentaries to the guidelines on the definition of reservations or somewhere else in the report, but they were out of place in the main text of the Guide to Practice, where they were liable to cause confusion.

6. Mr. MOMTAZ said that he was grateful to the Special Rapporteur for submitting a report that dealt with alternatives to reservations and interpretative declarations, thereby following the work plan which he had announced at the appropriate time to the Commission and which had raised no objection.

7. However, he wondered whether States using those alternatives would really be able to overcome, if need be, some of the problems to which reservations gave rise, as the Special Rapporteur believed. It was not certain that implementing and monitoring bodies would be able to accept those alternatives and that they would not be obliged to question their validity on the same grounds as the reservations they had rejected. He therefore had doubts about the exercise undertaken by the Special Rapporteur, insofar as those alternatives had the great advantage of helping politicians achieve their ultimate goal of accepting an obligation that was preferably non-binding. Nevertheless, he would be glad to see the alternatives included in the commentary.

8. In any event, it was important not to lose sight of the fact that the Special Rapporteur’s highly relevant comments on alternatives to reservations were in line with the goal set in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993,³ which stressed the need to limit the number and scope of reservations to human rights treaties. That was what had led the Sub-Commission on Prevention of Discrimination and Protection of Minorities to request one of its members, Ms. Hampson, to prepare a working paper on the question of reservations to human rights treaties.⁴ That extremely stimulating document⁵ showed clearly that the author’s work, which she intended to pursue if the Commission on Human Rights gave her

the mandate, did not duplicate the mandate given by the General Assembly to the International Law Commission. In fact, Ms. Hampson had paid particular attention to the shortcomings of the 1969 Vienna Convention, including article 20, which set a deadline of 12 months after notification of the reservation for objections to be made. She also intended to contest that article and to challenge the deadline, which was not applicable to all treaties. As a result, cooperation between the Commission and the Commission on Human Rights could be fruitful, especially with regard to the study of the effects of decisions by monitoring bodies on the non-validity of reservations, which was a subject Ms. Hampson intended to study in depth. Such cooperation would also allow the two bodies to avoid coming to diametrically opposed conclusions, the risk of which was all the greater, since, in paragraph 13 of her report, Ms. Hampson described human rights norms as essential elements of an international legal order. For all those reasons, he was in favour of cooperation, on as permanent a footing as possible, between the two Special Rapporteurs.

9. Mr. PAMBOU-TCHIVOUNDA said that he had mixed feelings about chapter II of the fifth report, in that, while he did not underestimate the considerable work carried out by the Special Rapporteur, he did wonder about its usefulness in practice.

10. The significance of the Special Rapporteur’s fifth report lay primarily in the “hard core” of alternatives to reservations and interpretative declarations. That was the heart of the report and he found it quite interesting, especially from the point of view of legal theory: the Special Rapporteur had produced a work of erudition which was rich in detail and back-up information and a major contribution to the legal, especially French-language, literature. The report would inspire new studies that went beyond international treaties to deal with the general theory of the sources of general international law, as it referred to what had long been the essence of international law from the point of view of its sources, namely, the role of the will of States. Alternatives to reservations were the result of what the parties to the treaty would have liked and not what only one of the parties would have liked. They were “treaties within a treaty” or, in other words, a means to avoid one constraint or another. The question that arose in the circumstances was whether for all that they left the most important part intact.

11. He wondered how useful the alternatives to reservations would actually be in the preparation of a guide to practice. He noted that the study being carried out would be of no interest unless it resulted in the drafting of a minimum regime. Of course, it could be used to delimit the definition of reservations, but that was not enough. It was the scope of the procedures mentioned that needed to be determined. The Special Rapporteur spoke of procedures for modifying the effects of a treaty, whereas in fact they were procedures for limiting those effects, as was clear from the draft guidelines contained in the annex to the fifth report. He found it very difficult to imagine that modification involved only the flexibility of a legal act in a restrictive sense and not also in an expansive sense, but, if modification meant flexibility in the latter sense, was a “reservation” really involved?

³ A/CONF.157/24 (Part I), chap. III.

⁴ See 2630th meeting, footnote 18.

⁵ *Ibid.*, footnote 19.

12. He thought that the Special Rapporteur could have confined himself to draft guidelines 1.7.3 and 1.7.4 and to explaining to the Commission what he understood by “alternatives to reservations” with the help of illustrations. Draft guidelines 1.7.1 and 1.7.2 took up a disproportionate amount of space in relation to the function of alternatives to reservations, which was to help circumscribe the concept of a “reservation”. It would therefore be better to move the contents to either the commentary or to notes because, otherwise, people would be confused.

13. Mr. PELLET (Special Rapporteur), continuing his introduction to draft guideline 1.1.8, said that it referred to unilateral declarations that had the same objective as reservations, since they were intended to exclude or modify the legal effect of certain provisions of a treaty in their application to the State or international organization making the declaration, and that perfectly matched the definition of reservations given in article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions and draft guideline 1.1. In that connection, he pointed out for Mr. Pambou-Tchivounda’s benefit that the Commission had never defined reservations—to the regret, moreover, of some members, including Mr. Economides—as being exclusively aimed at limiting the effects of a treaty. That possibility was envisaged in draft guideline 1.1.5, but the word “limit” had carefully been avoided in the actual definition of reservations in the Vienna Conventions. The unilateral declarations addressed in draft guideline 1.1.8 were indeed reservations, and that justified including the draft in chapter I of the part of the Guide to Practice on definitions. They were nonetheless rather special reservations in that they were made pursuant to an express provision in the treaty authorizing the parties, or some of them, to exclude or modify the legal effect of some of its provisions. Such clauses authorizing the parties not to apply certain provisions of the treaty were called “reservation clauses” when the word “reservation” was used in them. When the word “reservation” was not used, they tended to be referred to as “opting-out” or “contracting-out” clauses. When he had begun writing that part of his report, he had not had very fixed ideas on the nature of those clauses or on that of the unilateral declarations made pursuant to them. He had been certain of only one thing: opting-out clauses were sufficiently similar to reservation clauses and declarations made pursuant to opting-out clauses were sufficiently similar to reservations themselves to require a closer look at their nature. That was basically why, in accordance with the promises he had made to the Commission in his first⁶ and second⁷ reports (as Mr. Momtaz had reminded him), he had come to the conclusion that it was essential that the Commission should concern itself with what he had called “alternatives to reservations”. The starting point for his argument, which seemed to have disconcerted some members, was therefore that opting-out clauses were very similar to reservation clauses, but were not generally presented as such. While studying that phenomenon, he had finally realized what now appeared to be self-evident: those exclusionary clauses were quite simply reservation clauses and the unilateral declarations they permitted were quite simply reservations authorized by treaty. That was

what he was trying to explain in paragraphs 148 to 178 of his fifth report.

14. The procedure of the opting-out clause was extremely common and, as shown in paragraphs 152 to 154, such clauses were found in all kinds of treaties. The strongest argument for not considering those provisions as reservation clauses probably stemmed from the position resolutely maintained by ILO since its inception, consisting of, on the one hand, including a generous supply of such opting-out clauses in its conventions and, on the other, flying in the face of all legal theory by maintaining that they were not reservation clauses, so that the declarations made pursuant to those provisions were also not reservations. He did not find that a tenable position. It had, moreover, been contested by every expert on reservations, for reasons that seemed to him difficult to refute. In particular, contrary to what ILO lawyers appeared to believe (at least officially), it was certainly not in conformity with the definition of reservations to see them as unilateral declarations necessarily and exclusively formulated under general international law. They might well take that form, and very often did, by virtue of an express provision in a treaty authorizing only certain specified reservations. That did not mean that, when a treaty authorized reservations, the unilateral declarations made pursuant to that authorization were not reservations. However, that appeared to be the view of ILO and was the only explanation given by its lawyers for the bizarre position they had held for so long despite everything. Besides, article 19, subparagraph (*b*), or article 20 of the 1969 Vienna Convention left no doubt that reservations could be expressly authorized by the treaty and that the result might be—although it did not necessarily have to be—that other reservations were prohibited. The only conclusion that could be drawn from ILO practice was that reservations which were not expressly authorized were prohibited. That did not mean that the unilateral declarations made under the opting-out clauses in ILO conventions were not reservations. For example, when article 17, paragraph 1, of ILO Convention (No. 119) concerning the guarding of machinery provided that “The provisions of this Convention apply to all branches of economic activity unless the Member ratifying the Convention specifies a more limited application by a declaration appended to its ratification”, it was difficult to see what distinguished the declaration concerned from a reservation and what distinguished such a provision from a reservation clause. It was true that, under ILO rules, which were no doubt of a customary nature, as ILO practice was considered as law, no reservations to the conventions adopted under the auspices of that organization were permitted unless they had been expressly authorized, but that was another question entirely.

15. Mr. Simma (2631st meeting) had brought up another more general argument against classifying the declarations made under an opting-out clause as reservations. He had asked whether the classification of declarations made under an opting-out clause as reservations was compatible with article 19, subparagraph (*b*), of the 1969 and 1986 Vienna Conventions, according to which a reservation could be formulated unless the treaty provided that “only specified reservations, which do not include the reservation in question, may be made”. He did not see that as a nullifying objection. Article 19, subparagraph (*b*), did

⁶ *Yearbook* . . . 1995, vol. II (Part One), document A/CN.4/470.

⁷ *Yearbook* . . . 1996, vol. II (Part One), document A/CN.4/477 and Add.1 and A/CN.4/478.

not say that all other reservations were prohibited if some were expressly provided for. It said something quite different—that other reservations were prohibited if the treaty stipulated that only specified reservations could be made, and that was obvious. Consequently, Mr. Simma's reasoning was not an argument for denying that declarations made under an opting-out clause were reservations. In fact, his objection applied only if the treaty specified that only those declarations were permitted. That was not so in the majority of cases.

16. Mr. Rosenstock had also expressed doubts on the subject, pointing out that a State party could not object to a declaration made under a contracting-out clause. That was no doubt true, but, in his view, it did not necessarily exclude that kind of declaration from the general category of reservations. For one thing, it was not a problem of definition, but one of legal regime. For another, and perhaps especially, it was no doubt true of every reservation formulated under a reservation clause and in any case of what was called a "negotiated reservation". Once a reservation was expressly provided for in a treaty, the contracting States knew what to expect: they had accepted in advance the reservation or reservations concerned in the treaty itself. A priori it thus appeared that the rules in article 20 of the 1969 and 1986 Vienna Conventions on both the acceptance of reservations and objections to them did not apply to reservations that were expressly provided for, including opting-out clauses or exclusionary provisions. Therefore, while he agreed with the substance of Mr. Rosenstock's comments, there was nothing in the latter to suggest there was anything wrong in considering opting-out declarations as reservations. Those declarations would generally be subject to the legal regime applicable to the reservations formulated under a reservation clause. That was why there appeared to be no serious argument against considering opting-out clauses as reservation clauses and declarations made in application of those clauses as reservations as long as they were made at the time of expression of consent to be bound.

17. However, it seemed more debatable whether those declarations could be considered as reservations when they were made, as authorized by some treaties, at any other time. He gave some examples of that in paragraph 173 of the fifth report. The problem was not so much with the timing as such, since the provisions of the 1969 and 1986 Vienna Conventions and, with all the more reason, the Guide to Practice were of a residual nature, but, rather, with the fact that declarations not made at the same time as the expression of consent to be bound were no longer linked in any way with the entry into force of the treaty for the State or international organization making them, whereas a reservation was closely linked to the process of the entry into force of a treaty, as provided for by article 19 et seq. of the Conventions dealing with reservations. Thus, although he had considered including a draft guideline to make all that clear, he did not think it was necessary specifically to say it in the Guide to Practice, as it was just the converse of what was said in draft guideline 1.1.8. Nevertheless, if the members of the Commission were of a different opinion, he would see no harm in including that draft guideline, which was outlined in paragraph 177 of the fifth report, in the Guide to Practice.

18. Similarly, as he had tried to explain in paragraphs 168 and 169, he did not think it was essential to devote a specific draft guideline to "negotiated reservations", which were basically only reservation clauses—not reservations—indicating in a precise and restrictive fashion the reservations that could be made to a treaty. That very misleading terminology was common in the legal writings in which negotiated reservations were discussed, but it was clear that they were not reservations within the meaning of article 2, paragraph 1 (*d*), of the 1969 Vienna Convention. He had nevertheless attempted to draft a text to show what might be included in a guideline defining negotiated reservations. The text was contained in paragraph 169 of the report and could also be included in the Guide to Practice, although he did not think that was necessary. On the other hand, it would certainly be necessary to define, perhaps in the final clauses of the Guide to Practice, what was more generally understood by "reservation clauses".

19. He introduced draft guidelines 1.4.6, 1.4.7 and 1.4.8, which were included in chapter I, section 4, of the Guide to Practice on unilateral statements other than reservations and interpretative declarations. Although they were unilateral statements, they were not reservations. They were not made under opting-out clauses but under contracting-in or opting-in clauses, or similar clauses offering a choice among treaty provisions.

20. A priori, there might appear to be little reason to treat the declarations made under those two kinds of clause (opting-in and opting-out clauses) differently, as they were very similar provisions. Nevertheless, the distinction between unilateral statements made under a contracting-in clause, on the one hand, and a contracting-out clause, on the other, appeared to be imposed by the very definition of reservations adopted in draft guideline 1.1, which followed the definition in the 1969 and 1986 Vienna Conventions. Opting-in clauses were very common. The first to come to mind was the famous Article 36, paragraph 2, of the Statute of ICJ. However, that procedure was certainly not limited to treaties dealing with arbitration or jurisdiction. He gave several examples of that in paragraph 183 and in footnotes to that paragraph of his report. Contrary to what was said, contracting-in clauses did not function at all in the same way as reservation clauses. First and foremost, declarations made under opting-in clauses did not aim to exclude or modify the legal effect of certain provisions of the treaty; they aimed to increase the obligations arising from the ratification of the treaty. Moreover, that did not affect in any way the entry into force of the treaty for the State or international organization making the declaration; in contrast, the opting-in declaration became effective only once the treaty was in force. Lastly, as a consequence of what he had just explained, those declarations could be formulated at any time.

21. Declarations made under contracting-in clauses were therefore not reservations, even though they were unilateral statements having the aim and effect of modifying the effects of the treaty. It seemed difficult to omit the draft guideline concerning them, if only to maintain the symmetry with the declarations made under opting-out clauses, which were indeed reservations. That was why he was proposing draft guideline 1.4.6.

22. Opting-in declarations could themselves be accompanied by what were commonly called reservations. Once again, the most well-known example (though far from the only one) took the form of the often numerous “reservations” accompanying voluntary declarations of acceptance of the compulsory jurisdiction of ICJ, which were opting-in declarations. In that case, too, it was only out of linguistic carelessness that those restrictions were called reservations. It was the purpose of draft guideline 1.4.7 to make that clear.

23. It was true that those conditions and restrictions were aimed, like reservations, at limiting the application of a treaty provision or, in other words, of the optional clause under which they were made. It was also true that those restrictions appeared in a unilateral statement. However, they were not the actual subject of it and it was not the effects of the treaty as such that they limited, but those of the optional declaration itself. They could be seen as clauses or provisions of a unilateral statement, but they were not unilateral statements. Therefore, they were certainly not reservations in the sense understood in both the 1969 and 1986 Vienna Conventions and the Guide to Practice.

24. The same was true of declarations formulated under complex clauses, which were not, strictly speaking, opting-in clauses and not really opting-out clauses, but which could no doubt be considered as being halfway between the two. They were “choice clauses”, which obliged a State or an international organization to make a choice between the provisions of a treaty. Those provisions operated as opting-in clauses with regard to what the State chose and as opting-out clauses with regard to what it excluded. It could be concluded, a priori, that the declarations by which the State excluded certain provisions were reservations, as he had proposed to say in draft guideline 1.1.8, whereas those by which the State expressed its consent to be bound by certain provisions were not reservations, in accordance with draft guideline 1.4.6. Unfortunately, that solution was not viable, since the dual action of inclusion and exclusion was expressed in a single declaration. A choice must therefore be made.

25. Three observations could be made. The first was that those clauses were more numerous than had been suspected and more numerous than stated by the Commission in its commentary to what had become article 17, paragraph 2, of the 1969 Vienna Convention, which dealt precisely with the situation where a treaty offered contracting parties a choice between its various provisions. He provided many examples of that in paragraphs 200, 201 and 206 of the fifth report. The second observation was that choice clauses were themselves subdivided into two categories. Some, following the system of the European Social Charter, for instance, led States to accept freely a number of basic provisions from among the provisions in the treaty. Those in the second category, which were less common, could be classified as alternative clauses in that they forced States to choose between one provision (or group of provisions) and another provision (or another group of provisions). The famous article XIV, section 1, of the Articles of Agreement of the International Monetary Fund, which was cited in the report, was a good example. The third observation, however, was that unilateral statements making a choice under either of those categories

could apparently not be classified as reservations even though they resembled them in certain respects, including the fact that they were declarations made as a general rule at the time of expression of consent to be bound. The similarities ended there and a major difference emerged: on the one hand, those choices were the condition for the State’s participation in the treaty and, on the other, that condition was set not by the State, but by the treaty. In the final analysis, they did not resemble reservations at all in that respect, and that explained the wording he was proposing for draft guideline 1.4.8.

26. He then introduced draft guideline 1.7.5, the only one in chapter II of the fifth report that related to interpretative declarations. The exclusionary, optional, alternative and other clauses he had just dealt with did not really pose any problems with regard to interpretative declarations. They only really gave rise to problems (of distinction or comparison) in relation to reservations. It did not seem superfluous to specify in the Guide to Practice—because the exercise was a practical one—that interpretative declarations as such existed side by side with other procedures that allowed States and international organizations that were parties to a treaty to specify or clarify the meaning or scope of the treaty or of some of its provisions. There were very few such procedures. He had unearthed only two, which were briefly described in paragraphs 96 to 100 of his report. On the one hand, there were the interpretative clauses included in the treaty itself and, on the other, the interpretative agreements concluded between the parties or between some of them, and in particular, what could be called “bilateralized interpretations”, which were to interpretative declarations what “bilateralized reservations” were to reservations. He was aware that those procedures were off the subject from an academic or intellectual viewpoint, but the Commission was not writing a university textbook. From a practical point of view, he thought, as Mr. Elaraby had put it so well, that it was not superfluous to remind States, or rather legal advisers in ministries of foreign affairs and diplomats, of the opportunities open to them.

27. He proposed that all the draft guidelines should be referred to the Drafting Committee, which he hoped would not have too much difficulty finalizing the proposed draft guidelines, which could undoubtedly be improved.

28. Mr. GAJA said that two specific examples had come to mind when he was studying the draft guidelines in section 1.7 as proposed by the Special Rapporteur. The first was the European Convention on the Adoption of Children, article 6 of which provided that a child could be adopted “by two persons married to each other . . . or by one person” wishing to adopt. A European State that became a party to that Convention was not forced to accept the two possibilities in its domestic legislation. It was free to do so. It was therefore the example of a clause which limited the object of an international obligation and for that reason came under draft guideline 1.7.2.

29. The second example was the Convention on the Law Applicable to Trusts and on Their Recognition, adopted by The Hague Conference on Private International Law. Article 13 of that Convention provided that: “No State shall be bound to recognize a trust the

significant elements of which . . . are more closely connected with States which do not have the institution of the trust or the category of trust involved". Once again, a State that did not have the institution was not bound to recognize the trust, but was free to do so. If it did, it could not thereby extend the scope of its obligations on the basis of the Convention, but limited itself to reproduce in its domestic law what was written in the treaty, the effects of which were in no way modified in scope for that State, unlike in the case of a reservation. Because the "restricted clause" was part of the Convention itself, that example came under either guideline 1.7.2 or guideline 1.7.3. That prompted him to ask whether it was really useful to include a guideline specifically on restrictive clauses in section 1.7. In his opinion, all "alternatives to reservations" could have been brought together in a single guideline. A restrictive clause affected the scope of the obligation and was in any case an alternative to reservations. If the Special Rapporteur wished to retain the distinction, he should at the very least have drafted guideline 1.7.3 along the same lines as guideline 1.7.2 and he should not have specified that the restrictive clause did not "constitute a reservation within the meaning of the present Guide to Practice" when that expression did not appear in guideline 1.7.2.

30. Mr. ROSENSTOCK said that, if he had rightly understood the Special Rapporteur's answer to his question, an opting-out clause and a reservation had identical effects, but was that really true in the case of effects vis-à-vis third parties? When a State formulated an opting-out clause, a third State had no power to express objections. The case of a reservation was different. If a third State had objections to a reservation by a signatory State, it could refuse to be bound by the treaty alongside a State which was trying to evade certain obligations. Mr. Pellet's answer would therefore not cover all aspects of the question.

31. Mr. HAFNER thanked the Special Rapporteur for having given the Commission a very rich report on a topic with which those who had not directly taken part in the drafting of international treaties were still not very familiar. He hoped that it would also draw the attention of doctrine to the issue of how States could shape their treaty relations without resorting to the instrument of reservations. Of course, those "alternatives to reservations", which enabled States to assume "made-to-measure" commitments, were not very conducive to the homogeneous application of treaties, but they were often needed in order to ensure a larger number of signatories.

32. Commenting generally on the report, he said that he shared the regrets expressed by the Special Rapporteur in paragraph 5 about the absence of any comment by the European Communities. Not only could they provide many examples which would be of great help in scrutinizing existing practice, but the fact that it frequently needed a particular legal status in order to become a party to international treaty showed that it had a direct interest in the question. Secondly, he very much supported the Special Rapporteur's comments on the need for more coordination with the work of United Nations human rights bodies such as the Human Rights Committee and the Sub-Commission on the Promotion and Protection of Human Rights. The lack of cooperation with those bodies might lead not only to costly duplication of work in the consideration of some

topics, but also to the fragmentation of international law as a result of the adoption of diverging solutions. He therefore suggested that the Commission should play the role of coordinator assigned to it in article 17, paragraph 1, of its statute. The Codification Division might draw the attention of the bodies in question to the issues being discussed by the Commission. The Commission might also take a closer look at the work being done at the European level and he wondered whether the Council of Europe document entitled "Practical issues regarding reservations to international treaties",⁸ referred to by the Special Rapporteur in a footnote to paragraph 56 of his report, could be made available to all members of the Commission.

33. Thirdly, the theory put forward by the Special Rapporteur in paragraph 30 of the report that reservations could be defined separately from their admissibility seemed to have an impact on how article 20 of the 1969 Vienna Convention should be interpreted. In that article, the word "reservations" was used without any further qualification. Must it be concluded that the very broad definition of reservations contained in draft guideline 1.1, which did not rule out inadmissible or impermissible reservations, would be automatically applicable? In his view, such a conclusion constituted a real danger. Perhaps the Special Rapporteur could come back to that question in his next report.

34. Referring to the draft guidelines, he said that he fully agreed with the Special Rapporteur that reservations were not the only means of modifying the effects of a treaty, but questioned whether there really had to be a whole set of guidelines on alternatives to reservations. It seemed to him that the Special Rapporteur had been carried away by his subject, and that might delay the Commission's work. The text of draft guideline 1.7.1 was, moreover, not very clear. In the phrase "in order to modify the effects of the provision of a treaty", did the word "treaty" include bilateral treaties as well? If so, what was the meaning of "treaties" in the remaining guidelines? That should be explained. In addition, the use of the words "may have recourse to procedures" gave the impression that recourse to other procedures was a possibility or a right derived from general international law, whereas, in some cases, that possibility existed only if it was specially provided for in the treaty itself. The problem lay in the use of the word "may", which could be interpreted in different ways.

35. He understood that the list of procedures permitting modification of the effects of the provisions of a treaty contained in draft guideline 1.7.2 was given only by way of example and was not exhaustive. However, he questioned whether there had been any need for the draft guidelines to include a list of acts which were obviously not reservations corresponding to the definition given in draft guideline 1.1. In his opinion, the list belonged in the commentary. Moreover, the examples given were not always very clear. For instance, he had difficulty in understanding what was meant by "Restrictive clauses that limit the object of the obligations imposed by the treaty". The Special Rapporteur was probably referring to clauses

⁸ See Council of Europe, CAHDI (2000) 12 rev., appendix V.

such as articles 296 and 297 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam), article 4 of the International Covenant on Civil and Political Rights or article 15 of the European Convention on Human Rights, which had sometimes been called “sovereignty reservations”, but that concept was not very technical in nature and should not be used as a justification for that guideline.

36. Draft guideline 1.7.3 on restrictive clauses could also be done without. Even if States could use such clauses to agree to alter the effects of a treaty, they could certainly not be confused with reservations as defined in guideline 1.1, at least not since the adoption of the 1969 Vienna Convention.

37. In terms of drafting, the words “more general rules contained in the treaty” were confusing. It would have been clearer to refer to “a different rule contained in the treaty”, unless the Special Rapporteur’s intention had really been to limit the scope of the guideline to provisions of a general nature.

38. In that context, he noted that the inclusion of the word “any” between the word “exclusion” and the word “clauses” in the penultimate phrase of paragraph 110 of the report made the sentence incomprehensible.

39. Referring to draft guideline 1.7.4, he agreed that there were some similarities between agreements *inter se* and reservations insofar as they must not interfere with the object and purpose of the treaty, but the major difference between them lay in the fact that a reservation was unilateral in nature. Consequently, that guideline was not necessary. The issue that might be discussed in that context was whether, in the case where a treaty provided for the possibility of reservations, a State would be entitled to exclude the legal effect of a particular provision of a treaty in its application to one or some other States parties and whether such a declaration would have to be characterized as a reservation even if the treaty did not explicitly provide for such a right. Since the Special Rapporteur excluded declarations ruling out the application of an obligation for a certain period of time from the scope of reservations, it might be thought that such declarations, which excluded obligations under a treaty in respect of certain States only, would also be outside the scope of reservations, but he was not entirely convinced of that conclusion.

40. Exclusionary clauses, as dealt with in draft guideline 1.1.8, were very frequently used in practice and gave rise to many problems. There seemed to be almost no difference between such clauses and clauses authorizing reservations. For example, if an article of a treaty such as the Convention on Early Notification of a Nuclear Accident entitled States parties to declare that they would not apply a certain article on liability, what was the difference between such a provision and an article which authorized States to make reservations concerning one particular provision of a treaty? In both cases, negotiations had taken place in order to define precisely which provision could be the subject of such a declaration, so that both amounted to “negotiated reservations”. The Special Rapporteur’s conclusion, in paragraph 168, that that term was “misleading” was thus correct and it should not be included in the guidelines. The question of those clauses must nevertheless be

considered because they were frequent and raised problems relating to the admissibility of other reservations. In that connection, he did not agree with the interpretation of article 19 of the 1969 Vienna Convention which the Special Rapporteur had given in reply to a question by Mr. Simma: States were hardly likely to agree on a list of articles to which reservations were allowed and to add the word “only” in order to exclude any other reservation.

41. During the drafting of the Rome Statute of the International Criminal Court, there had been lengthy discussions on reservations. The article 120 that had finally been adopted prohibited any reservation. Although the Statute did not explicitly define the provisions to which reservations could be made, it could be argued that some of those provisions authorized States to make declarations having an effect comparable to that of reservations. The first example which came to mind was the transitional provision of article 124, which entitled States parties to declare that they did not accept certain legal effects of article 8 relating to the jurisdiction of the Court. A declaration made by a State under article 124 was probably a declaration which purported to exclude or modify the legal effect of certain provisions of the treaty in their application to that State. If article 124 was understood in that sense and a declaration under that article was taken to be a reservation, no other reservations were admissible by virtue of article 19, subparagraph (b), of the 1969 Vienna Convention, even in the absence of a clause excluding reservations. In the light of those considerations, article 120 might be regarded as redundant. Of course, it could also be argued that a declaration under article 124 did not amount to a reservation in view of its restriction in time (seven years). If it was regarded as a reservation, however, article 120 and article 124 would be incompatible. It might also be considered that that was an example of the “terminological vagueness” to which the Special Rapporteur referred in paragraph 162 of his report.

42. In his final assessment, the Special Rapporteur concluded that declarations under such exclusionary clauses and reservations were identical. In his own view, however, a distinction was possible. Several years previously, when he had dealt with that problem in the context of the Convention on Early Notification of a Nuclear Accident, he had had the impression that there was a difference between the two in the sense that, according to article 21 of the 1969 Vienna Convention, a reservation would have a reciprocal effect, whereas, in the case of a clause excluding liability, the effect was only unilateral. He did not know whether that particularity was the result only of the object of that Convention, but it would be interesting to find out whether a similar distinction existed in other conventions. Of course, that question would lead to a further difficulty, since reservations to human rights treaties in general gave rise to the problem of reciprocal effect. That particular problem must undoubtedly be dealt with in the guidelines and he was still hesitant to agree that it could be explained by some “terminological vagueness”.

43. With regard to procedures for choosing between the provisions of a treaty by means of a unilateral declaration, he agreed with the view expressed in paragraph 177 of the report, namely, that unilateral declarations formulated under an exclusionary clause after the entry into force of the treaty did not fall within the ambit of reservations.

That conclusion followed from the definition contained in draft guideline 1.1 and could therefore only form part of the commentary.

44. With draft guideline 1.4.6, the Commission was again dealing with optional clauses. In that connection, it could be asked why the guidelines drew a distinction between declarations by which the State explicitly accepted obligations provided for in a treaty and declarations formulated under exclusionary clauses. In the drafting of the dispute settlement provisions contained in universal conventions, there was a kind of transition from inclusion to exclusion, i.e. from the clauses dealt with in draft guideline 1.4.6 to those referred to in draft guideline 1.1.8: whereas, formerly, States had been able to accept a compulsory judicial procedure by a declaration, there was now a tendency to provide for such a procedure and to allow States to exclude it by a unilateral declaration. Although the two types of clauses were politically very close, the distinction made in the guidelines nevertheless seemed correct, since they could be treated differently in domestic legislation. A guideline such as guideline 1.4.6 was thus undoubtedly necessary, since the declarations in question were unilateral in nature and did not come under guideline 1.4.1.

45. Referring to draft guideline 1.4.7, he shared the views expressed by the Special Rapporteur on the basis of the judgment in the *Fisheries Jurisdiction* case. It could nevertheless again be argued that the definition of reservations already excluded such declarations, since they did not relate directly to a treaty, but to a declaration under a treaty. That could be referred to in the commentary, although, in that particular case, he would accept a special guideline.

46. He doubted whether the clauses dealt with in draft guideline 1.4.8 needed a separate guideline; they might be associated with declarations under an optional clause, as dealt with in draft guideline 1.4.6, without, however, being merged with them. Those clauses were very similar, so much so that article 20 of the European Social Charter combined them in one provision. The example of the European Charter for Regional or Minority Languages was a little more complex than the report indicated, as shown by the voluminous declarations made by States under the clause in question. Thus, article 2, paragraph 2, and article 3, which had to be read in conjunction with article 2, contained different kinds of declarations: those discussed in paragraph 202 of the report and those covered by article 3 of the Charter, since, before making a declaration, States had to declare, under article 3, which he read out, to which language the Charter would apply. A declaration under article 3, paragraph 1, certainly did not come within the ambit of draft guideline 1.4.8, since that article did not offer the States parties a choice; it might be included under the clauses covered by draft guideline 1.4.6, but that too was open to question, since the article did not authorize States to accept an obligation, but obliged them to indicate the scope of application of the Charter. Hence, if all other clauses were dealt with in separate guidelines, it might be asked whether it would not also be necessary to refer to "unilateral declarations made in accordance with a clause obliging a State to define the scope of application of a treaty".

47. Draft guideline 1.7.5 was acceptable, but the second sentence was not necessary. He did not, however, share the view the Special Rapporteur had expressed in paragraph 99 of his report on article 31 of the 1969 and 1986 Vienna Conventions. The words "the parties" had always been interpreted as referring to all the parties to a treaty and, accordingly, if only some parties wanted to conclude an agreement on a particular interpretation of a treaty, it would then be an agreement *inter se* which did not come under article 31.

48. In conclusion, he recommended that draft guidelines 1.1.8, 1.4.6, 1.4.7, 1.4.8 (the latter being joined to, but not merged with, draft guideline 1.4.6), 1.7.1 and 1.7.5 should be referred to the Drafting Committee.

49. The CHAIRMAN suggested that, in order to make the best possible use of the Drafting Committee's time, draft guidelines 1.7.1, 1.7.2, 1.7.3 and 1.7.4, which were closely linked, should be referred to it provisionally, on the understanding that the members could still comment on them, and that the Drafting Committee should take due account of the observations made in the plenary. That solution would enable the Drafting Committee to begin its work. If he heard no objection, he would take it that the Commission agreed with his suggestion.

It was so agreed.

50. Mr. GAJA (Chairman of the Drafting Committee) announced that the Drafting Committee on reservations to treaties was composed of the following members: Mr. Pellet (Special Rapporteur), Mr. Baena Soares, Mr. Brownlie, Mr. Economides, Mr. Elaraby, Mr. Kamto, Mr. Pambou-Tchivounda, Mr. Rosenstock, Mr. Simma, Mr. Tomka and Mr. Rodríguez Cedeño as ex officio member.

51. Mr. BROWNLIE, referring to draft guideline 1.1.8, said he agreed with Mr. Hafner that reservations formulated under exclusionary clauses were very close to negotiated reservations.

52. Mr. HE said it was clear from the debate in the plenary that draft guidelines 1.7.1 and 1.7.2 belonged in the Guide to Practice. They and the commentaries which accompanied them in the body of the report would make a large number of complex issues clearer for practitioners, including diplomats and non-specialist lawyers.

53. With regard to draft guideline 1.7.2 on alternatives to reservations and paragraph 83 of the report, the first category of restrictive clauses corresponded to what Mrs. Higgins had called "clawback clauses".⁹ In his opinion, such derogations could also be included in the second category proposed by the Special Rapporteur, "escape clauses", if reference was made to the definition contained in draft guideline 1.7.2 and in paragraphs 83 and 140 of the report. In view, however, of the importance of derogation clauses, which were widely used in treaties, they should be made a separate category in procedures for modifying the effects of provisions of a treaty. Otherwise, in order to draw attention to their importance, the words "or to derogate from such obligations" might be added

⁹ R. Higgins, "Derogations under human rights treaties", *The British Year Book of International Law, 1976-1977*, p. 281.

after the words “general obligations” in the definition of escape clauses in draft guideline 1.7.2.

54. Noting that the Special Rapporteur proposed two alternatives for the title of guideline 1.7.4, he expressed the view that the second, “Agreements between States having the same object as reservations”, should be retained because it was more general, as it covered all agreements, including bilateralized reservations and amendments and protocols which might be concluded by certain parties to the treaty.

55. He agreed with the Special Rapporteur that the new guideline proposed in paragraph 143 of the report was not essential, but that, for the sake of exhaustiveness, the points it contained might be discussed in greater detail in the commentary.

56. Noting that draft guidelines 1.1.8, 1.4.6 and 1.4.7 were proposed in order to supplement the draft guidelines already provisionally adopted, he suggested that they should be referred to the Drafting Committee so that it might improve their wording and determine where they should be inserted in the Guide to Practice.

57. Mr. SIMMA, referring to declarations made under an opting-out clause, said that the reference to article 17 of the 1969 Vienna Convention in paragraph 148 of the report was misleading because that article related to accession to some parts of a treaty only and it was clear from the text of the article and from the Commission’s commentary that there was a difference under the Convention between a State which acceded only to a part of a treaty under article 17 and a State which in principle acceded to the treaty as a whole, but subject to certain reservations governed by articles 19 et seq.

58. Referring to his interpretation of article 19, subparagraph (b), of the 1969 Vienna Convention and the comment the Special Rapporteur had made in that regard, Mr. Hafner had given the interesting example of a multilateral convention which did not allow reservations, but did allow some declarations. If it was wrongly considered that such declarations were reservations, there would then be a contradiction between the various provisions of the treaty. In more general terms, he asked the Special Rapporteur what purpose it served to call a declaration a reservation if practically none of the provisions of the Convention on reservations applied to it. If the Special Rapporteur maintained his position, perhaps he could distinguish between declarations which excluded the application of some substantive provisions of a treaty and those which excluded the application of some procedures and would therefore be different from reservations.

59. Mr. PAMBOU-TCHIVOUNDA said that, unlike the Special Rapporteur, he was not sure that the fact that a treaty authorized only certain reservations meant that it prohibited all others.

The meeting rose at 1 p.m.

2633rd MEETING

Wednesday, 7 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Reservations to treaties¹ (*continued*) (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,² A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. ECONOMIDES said that chapter II of the Special Rapporteur’s fifth report (A/CN.4/508 and Add.1–4) dealing with alternatives to reservations and interpretative declarations deserved special praise. It was, to his knowledge, the first time that such a brilliant and comprehensive study of a difficult and unfamiliar subject had been undertaken and it would doubtless serve as an invaluable reference tool.

2. Referring to the preliminary conclusions on reservations to normative multilateral treaties including human rights treaties which the Commission had adopted at its forty-ninth session,³ he said he had always viewed the Commission’s initiative in that regard as premature, not to say hasty. But he agreed with the Special Rapporteur’s proposal in paragraph 18 of his report to re-examine the preliminary conclusions as soon as the Commission had completed consideration of all the substantive questions concerning the regime for reservations.

3. With regard to the objective of the draft guidelines, it was generally agreed that the reservations regime established by the 1969 and 1986 Vienna Conventions should not be modified. Nevertheless, any errors, ambiguities or omissions in that regime detected by the Commission should, in his view, be rectified by means of the draft guidelines, which should not only simply clarify and refine the subject matter, which was rapidly evolving, but also provide practical solutions to existing problems and make good any omissions.

¹ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), para. 470.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ See 2630th meeting, footnote 17.

4. A major problem that had not yet been satisfactorily resolved was that of the definition of reservations, especially in the light of certain new proposals by the Special Rapporteur. According to the definition in the 1969 and 1986 Vienna Conventions, a reservation was a unilateral statement that purported to exclude or modify the legal effect of certain provisions of a treaty. However, the verb "modify" could be understood in two ways, one restrictive and the other extensive, while a reservation was always viewed as restrictive, a characteristic emphasized in draft guidelines 1.1.5, 1.1.6, 1.4.1 and 1.4.2. The Special Rapporteur himself noted in paragraph 118 of his report that reservations could only limit their author's treaty obligations. He therefore believed that the definition in the Vienna Conventions should be altered to bring out more forcefully the fact that reservations were always restrictive.

5. The procedures described in draft guidelines 1.7.1 to 1.7.4 had nothing to do with reservations, although they sometimes played a similar role. Furthermore, most of the new guidelines did not concern unilateral statements but treaty clauses or supplementary agreements between the parties to treaties. Clearly, therefore, they were not covered by the Commission's terms of reference.

6. The question arose, however, whether they served a useful purpose. With regard to introductory guideline 1.7.1, entitled "Alternatives to reservations", he joined Mr. Pambou-Tchivounda in objecting to the verb "modify", which was open to several interpretations: restrictive, extensive or intermediary. It should be replaced by a verb with restrictive connotations such as "limit", "restrict", "reduce" or "diminish".

7. The third subparagraph of the first part of draft guideline 1.7.2 concerning optional clauses should be deleted. It contradicted the very notion of a reservation, since the parties concerned actually consented to be bound by obligations that were not imposed on them, thereby increasing rather than limiting their obligations. Such clauses could not, therefore, be described as alternatives to reservations.

8. The second part of draft guideline 1.7.2 was also too far removed from the accepted definition of a reservation, especially in terms of legal techniques. It was therefore preferable to omit the procedures listed, which were in any case well known to legal advisers of States and international organizations.

9. Draft guideline 1.7.3, concerning restrictive clauses, was superfluous, since the content was already covered by the first procedure mentioned in draft guideline 1.7.2. Again, draft guideline 1.7.4 should be deleted for the same reasons as the second part of draft guideline 1.7.2. He thus shared Mr. Hafner's view that draft guidelines 1.7.3 and 1.7.4 had no place in the Guide to Practice.

10. Lastly, he proposed combining draft guideline 1.7.1 and the first two subparagraphs of draft guideline 1.7.2 in the following composite guideline:

"In order to restrict the effects of provisions to a treaty in their application to the parties, States and international organizations may make use of procedures other than reservations, such as the inclusion in the treaty of:

"(a) Restrictive clauses purporting to limit the object, scope or application of the obligations imposed by the treaty;

"(b) Escape clauses that permit the non-application of treaty obligations in specific instances and for a specific period of time."

11. The proposed guideline would, of course, be accompanied by a substantive and well-argued commentary containing all the useful material set forth in the current comments to draft guidelines 1.7.1 to 1.7.4.

12. Mr. GALICKI said that the question of the exclusively restrictive character of reservations had been thoroughly discussed in the Drafting Committee, which had noted that there were cases in which reservations were intended to extend the meaning of certain provisions, for example the reservations made by some Eastern European countries to the Convention on the Prevention and Punishment of the Crime of Genocide. The wording proposed by the Special Rapporteur was therefore preferable in that it covered all possible situations.

13. Mr. BROWNLIE said that, while he agreed that a number of reservations were intended to restrict the ambit of provisions, in analytical terms the purpose of a reservation was to modify the provisions. The use of the physical metaphor of restricting or extending was superficial and failed to describe how States behaved or to identify their motivation, which was to change the meaning of instruments in line with State interests.

14. Mr. GOCO said he agreed with Mr. Economides that the decision to adopt preliminary conclusions on the topic of reservations to treaties had seemed somewhat premature at the time. The Government of the Philippines, in its response to the preliminary conclusions, had expressed a certain amount of apprehension but would withhold judgement pending submission of the final version of the Guide to Practice.

15. Mr. ROSENSTOCK suggested that Mr. Economides should amend the opening words of his proposed new guideline to read: "In order to facilitate restriction of the effects of the provisions of a treaty."

16. Mr. ECONOMIDES said he had always considered that reservations were to be understood in a restrictive sense, since States generally entered reservations in order to remove some element from a treaty clause. During his 35 years' service in the Legal Department of the Greek Ministry of Foreign Affairs, he had never come across a reservation that went beyond the obligation contained in a treaty. Procedures said to fall into that category were generally not reservations in the strict sense but unilateral statements that went beyond the obligations provided for in the treaty, as was stated, moreover, in draft guidelines 1.4.1 and 1.4.2. The concept of restrictive reservations was thus firmly established.

17. Mr. PELLET (Special Rapporteur) said that the debate on that issue had been closed by the Commission's decision regarding draft guidelines 1.1, 1.1.6, 1.4.1 and 1.4.2.

18. Mr. BAENA SOARES said he was deeply impressed by the painstaking research undertaken by the Special Rapporteur and by the scope of the guidelines proposed. The Guide to Practice was designed to offer advice and guidance to States and its effectiveness would be enhanced by the ease with which it could be understood by the reader.

19. He wondered whether, once reservations and interpretative declarations had been defined, it was appropriate to expand the text to include draft guidelines 1.7.1, 1.7.2 and 1.7.5. It was certainly useful to examine procedures other than reservations that could be used to modify the provisions of a treaty, but if the content of those guidelines was reflected in the commentaries, the continuity of the Guide to Practice and its “utilitarian purpose”, as the Special Rapporteur put it himself, would be preserved. The report firmly established the validity of the procedures in question, whose purpose, like that of reservations, was to strike a balance between preserving the object and purpose of the treaty and attracting the greatest possible number of States parties.

20. The arguments and examples provided by the Special Rapporteur fully justified the wording of draft guideline 1.1.8, concerning reservations formulated under exclusionary clauses, proposed in paragraph 167.

21. He agreed with the Special Rapporteur’s opinion, expressed in paragraph 168, about “negotiated reservations”, namely that it would be inappropriate to include a draft guideline on the subject. He took a similar view of the draft guideline contained in paragraph 177. The point it made regarding unilateral statements formulated under an exclusionary clause after the entry into force of the treaty could be amply dealt with in the commentary.

22. As to Ms. Françoise Hampson’s working paper on reservations to human rights treaties⁴ for the Sub-Commission on the Promotion and Protection of Human Rights, he was in favour of promoting dialogue on a subject of common interest to the two bodies, provided that their work was complementary and that there was no encroachment on the Commission’s mandate. Mutual information and coordination were essential, not only in the current case but whenever other international agencies, especially United Nations treaty monitoring bodies, were addressing issues that formed part of the Commission’s programme of work.

23. Mr. DUGARD suggested that the Special Rapporteur should clarify the distinction between limitations clauses and the clawback clauses referred to in the first footnote to paragraph 83 of the report. The fact that reservations could be used to restrict human rights obligations under multilateral treaties was a source of considerable concern and was the subject of Ms. Hampson’s working paper. But, as the Special Rapporteur had rightly pointed out, it was also possible to restrict such obligations by means of clauses within human rights treaties themselves. They were referred to either as limitations clauses or as clawback clauses. In that footnote, the Special Rapporteur tended to blur the two. In the case of a limitations clause, a monitoring body decided whether a party to a treaty was

entitled to restrict obligations in the interests of public health, national security, morals, etc. The clawback clause had been correctly defined not by Rosalyn Higgins⁵ but by Gittleman, who described them as provisions “that entitle a State to restrict the granted rights to the extent permitted by domestic law”.⁶ An example of such a clause, which differed fundamentally from a limitations clause, was article 6 of the African Charter on Human and Peoples’ Rights which stated that “No one may be deprived of his freedom except for reasons and conditions previously laid down by law”. It was a very serious restriction because it enabled the State itself to decide whether it was bound by the treaty obligations.

24. As reservations to human rights treaties were assuming an important role in the Commission’s debate, he thought more attention should be paid to such matters. For that reason, it was important to include draft guideline 1.7.3, which indicated that limitations clauses and clawback clauses were not reservations.

25. Mr. PELLET (Special Rapporteur), summing up the discussion, said that he would begin with a number of general points.

26. Mr. Kateka, and to some extent Mr. Lukashuk, had contended that the Commission had never taken a position on the final form of the draft. Strictly speaking, that was true. He had never wanted to force the Commission’s hand to take a formal decision on the final product. But he had always made clear his preference for a flexible codification instrument which could serve as a reference for States in their practice in the matter of reservations. That was what he had meant by a guide to practice. He had always interpreted the decision taken by the Commission at its forty-seventh session⁷ in that manner. It was not impossible that a draft protocol could be extracted from the Guide to Practice, although personally he was not in favour of such a course. In their current form, however, the draft guidelines were not suitable for inclusion in a treaty. The draft would have to be greatly revised if it was to lead to a treaty. The report of the Commission to the General Assembly on the work of its fifty-first session was clear in regard to the form the Guide to Practice would take.⁸

27. That brought him to a point, raised by Mr. Elaraby, and partly by Mr. Kabatsi, concerning the degree of detail. Given the nature of the subject-matter, the Commission was obliged to enter into more detail than in a draft convention. After all, conventions were already in force, above all the 1969 Vienna Convention, which contained provisions on reservations. His aim was to be more specific on the subject, which necessarily required a detailed treatment. Some draft guidelines merely repeated what was contained in the Convention, which seemed indispensable for practical reasons so that States could, with the

⁵ See 2632nd meeting, footnote 9.

⁶ R. Gittleman, “The African Charter on Human and Peoples’ Rights: A legal analysis”, *Virginia Journal of International Law*, vol. 22, No. 4 (Summer 1982), p. 667, at p. 691.

⁷ See *Yearbook . . . 1995*, vol. II (Part Two), p. 108, document A/50/10, para. 487 (b).

⁸ *Yearbook . . . 1999*, vol. II (Part Two), p. 89, document A/54/10, para. 457.

⁴ *Ibid.*, footnote 19.

Guide to Practice, have a complete panorama of law on reservations. But there was no point in remaining as general as the Convention. The situation was unique: the Commission had never gone back to a subject that it had already addressed in order to make it more specific. The *travaux préparatoires* of the Convention had already developed many ideas on reservations. He was simply endeavouring to develop them further. Otherwise, there seemed to be no value in the current exercise.

28. The question had been raised of cooperation with human rights bodies. As the Commission on Human Rights had not approved the decision of the Sub-Commission on the Promotion and Protection of Human Rights to appoint Ms. Françoise Hampson as Special Rapporteur,⁹ that posed a problem. He intended to ask her whether they could agree on a number of issues for discussion, although he had some doubts as to her status.

29. Regarding the state of work on the topic, he would provide more material at the second part of the session. The subject had proved much more complicated than he had initially thought. He hoped that at the fifty-third session, in 2001, he would be able to submit a complete report on the lawfulness of reservations, but it was out of the question for him to report at the next session on the effects of lawful reservations or of State succession. In other words, the topic was two years behind schedule, and it would not be possible to make up for lost time. It was worth noting that some of the problems posed by the law of reservations to treaties were not included in the list of his first report,¹⁰ in particular the question of the interpretation of reservations to treaties. He would need to find a way of including it, perhaps in the chapter on the effects of reservations.

30. A number of members had the impression that he was hostile to reservations, whereas others thought that he was their firm supporter. In actual fact, he was totally neutral on the question. Reservations represented a step forward for international law, because they enabled States to endorse a treaty as a whole while retaining a certain freedom of action. He disagreed with Mr. Kamto: it was not for the Commission to preserve the integrity of treaties; instead, it should promote reasonable solutions so that the law of reservations functioned as well as possible without doing harm to the essence of a treaty.

31. Mr. Lukashuk, Mr. Pambou-Tchivounda and Mr. Rosenstock had misinterpreted his proposals, all of which, apart from draft guideline 1.1.8, aimed to get rid of intriguing problems, of “things” that resembled reservations. Some of them, difficult to identify in international law, were unilateral statements that could have been addressed at the same time as the “catch-all” sections of the previous years. He had not done so, because he had had in mind the idea of the opting-in and opting-out clauses, and it was difficult to separate the two. Pursuant to those two clauses, States made unilateral statements. In his view, if those unilateral statements were reservations, they had to be placed in section 1.1 of the draft, hence draft guideline 1.1.8. If it

was thought that they were not reservations, they must be put in the “catch-all” section, that is to say, section 1.4. But procedures had remained which could not be entirely left out of the Guide to Practice and which were not unilateral statements. One, at least, was very similar indeed to reservations, namely bilateralized reservations (draft guideline 1.7.4). Actually, bilateralized reservations were agreements and had to be addressed somewhere in the Guide. He did not for one moment believe that those who would be using the Guide would systematically refer to the commentary, just as those who used the 1969 Vienna Convention did not systematically refer to the Commission’s commentary.¹¹ Hence, he was opposed to putting everything in the commentary.

32. The other reason why draft guideline 1.7.3 had been prepared on restrictive clauses was that such clauses, which aimed to limit the scope of the treaty, were included in the treaty and thus were obviously not reservations, had been called reservations in the past, for instance by Fitzmaurice, Scelle and Judge Zoricic. The current terminological usage was still very ambiguous; terms such as “national competence” or “non-arbitrability reservations” continued to be used, and so he had made provision for a special draft guideline in 1.7.3. That was why he had distinguished between restrictive clauses and bilateralized reservations, which were merely illustrations of draft guideline 1.7.2. For Mr. Gaja’s benefit, he would reiterate that the “strange animals” he had spoken of were simply restrictive clauses that came solely under draft guideline 1.7.3, which was a development of the first subparagraph of draft guideline 1.7.2. He assured members that the draft guidelines which began with 1.4 and with 1.7 were designed to rid the Commission of all that, once and for all. In the part of his fifth report which members would take up in the second part of the session, they would see that it was sometimes necessary to revert to those alternatives. For example, a State could not use an alternative in order to go back on the prohibition of a late reservation. Hence, the definition of those alternatives would be useful later on. The next part of his report included a draft guideline which said that a State could not, by means of certain alternatives to reservations or an interpretation of earlier reservations, go back on the rule whereby a reservation could not be made after the expression of final consent to be bound. That showed that the draft alternatives to reservations were not pointless, as they would be of value later.

33. With regard to comments by Mr. Simma and Mr. Rosenstock, he said that, pursuant to article 19, subparagraph (b), of the 1969 Vienna Convention, reservation clauses must exclude all other reservations apart from those permitted. It was very common for treaties to specify that certain reservations were allowed and that all others were prohibited. He was thinking in that context of many Council of Europe reservations. That clearly was a matter covered by article 19, subparagraph (b). Mr. Rosenstock seemed to think that it was possible to object to such reservations. He disagreed. Although it was not expressly specified in article 20 of the Convention, once a reservation was expressly allowed in a treaty, it could no longer be objected to. The matter might become clearer

⁹ See *Official Records of the Economic and Social Council, 2000, Supplement No. 3 (E/2000/23)*, chap. II, sect. B, decision 2000/108, and paras. 467–468.

¹⁰ See 2632nd meeting, footnote 6.

¹¹ *Yearbook . . . 1966*, vol. II, pp. 187 et seq.

when he came to consider the question of objections to reservations.

34. In response to a question by Mr. Hafner, he said that he excluded neither reservations *ratione personae* nor reservations *ratione temporis*. He was somewhat disturbed, however, because he had thought that reservations of non-recognition excluding application with a non-recognized entity were reservations, whereas Mr. Hafner had said that they were not. His proposal had been changed accordingly; thus, he did not quite know what to think for the time being.

35. Mr. Simma had wanted to introduce a distinction between exclusionary clauses by saying that unilateral statements made under an exclusionary clause concerning the substance were reservations, whereas unilateral statements under an exclusionary clause concerning procedure were not. He experienced difficulty in following Mr. Simma. The distinction could be made, but why conclude in the affirmative in one case and in the negative in another? What was the reasoning behind that proposal? He had nothing against compromises, provided they had a logical basis.

36. Ultimately, the only real opposition to his proposals had concerned draft guideline 1.1.8, but he had yet to hear a cogent objection, and he did not see how the Commission could say that a unilateral statement made by virtue of an exclusionary clause was not a reservation. Some might argue that, if they were reservations, they might be subject in certain respects to a particular legal regime; that was already the case in part in article 20 of the 1969 Vienna Convention, and he agreed on that point. Nevertheless, no member had offered a convincing argument to show why they were not reservations. Perhaps the Drafting Committee could tone down draft guideline 1.1.8.

37. The CHAIRMAN noted that the Commission had completed its debate on the Special Rapporteur's fifth report. As there were divergent views on how to treat some of the draft guidelines, he suggested that all of them should be referred to the Drafting Committee.

38. Mr. ROSENSTOCK said he took it that such a decision would be without prejudice to members' positions on whether particular guidelines should be included.

39. The CHAIRMAN confirmed that Mr. Rosenstock's understanding was correct. If he heard no objection, he would take it that the Commission wished to refer all the draft guidelines to the Drafting Committee.

It was so agreed.

Unilateral acts of States (concluded)* (A/CN.4/504, sect. C, A/CN.4/505,¹² A/CN.4/511¹³)

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR¹⁴
(concluded)*

40. Mr. GALICKI, after congratulating the Special Rapporteur on his efforts to take into account as many as possible of the different views expressed by members of the Commission and of the Sixth Committee, said that it was regrettable that the third report (A/CN.4/505) could not reflect the replies to the questionnaire sent to Governments in September 1999.¹⁵ The relatively small number of replies received was also a matter for regret.

41. As to the observations and proposals contained in the third report, the main difference between the previous and the new definition of unilateral acts consisted of the deletion of the requirement that such acts should be "autonomous". Furthermore, the requirement of "the intention of acquiring international legal obligations" was replaced by "the intention of producing legal effects" and the requirement of "public formulation" by the condition that the act had to be known to the State or international organization concerned. Lastly, the concept of "multilateral" unilateral acts had been abandoned, which was a step in the right direction. He approved of the deletion of paragraph 3 of former article 4 from the text of new draft article 3; the inclusion of a formula taken from article 7 of the 1969 Vienna Convention did not seem appropriate in that context. The decision to delete former article 6 on expression of consent, as explained in paragraph 125 of the report, seemed entirely acceptable, although it left aside the question of silence as a means of formulating a unilateral legal act.

42. The approach adopted in reformulating articles 1 to 7 proposed in the second report¹⁶ had the serious drawback that, in almost every case, the Special Rapporteur had felt obliged to side with only one group of views expressed in the Commission and the Sixth Committee. That difficulty was already apparent in connection with the proposed definition of unilateral acts. Neither in State practice nor in the doctrine was a precise and unified definition to be found of unilateral acts, and international judicial decisions on the matter were limited in number and not particularly helpful. The main reason for that situation seemed to be a tendency, likewise reflected in some of the replies to the questionnaire, to lump together too many categories of different acts under the same heading. The replies by El Salvador and Italy, in particular, covered too wide a spectrum to be of any practical help. The truth of the matter, as the Special Rapporteur recognized in paragraph 41 of his third report, was that unilateral acts could take a variety of forms. Accordingly, a definition of the scope of the draft articles seemed absolutely necessary and he could not agree with the Special Rapporteur's decision simply to replace it by an article purporting to contain a definition of unilateral acts. Such a definition placed at the beginning of the draft and containing a full list of acts excluded from its scope, for instance, acts of international organizations, plurilateral

* Resumed from the 2630th meeting.

¹² See footnote 2 above.

¹³ Ibid.

¹⁴ For the text of the draft articles contained in his third report, see 2624th meeting, para. 35.

¹⁵ See 2624th meeting, para. 36, and 2628th meeting, para. 11.

¹⁶ See 2624th meeting, footnote 4.

acts and acts under treaty regimes, would eventually make it easier to define what unilateral acts of States actually were.

43. A variety of conflicting opinions had been expressed about the desirability of retaining the concept of “autonomy” in the definition of unilateral acts. While the term “autonomy” might not be entirely satisfactory, the idea of non-dependence as a characteristic of unilateral acts did not, in his view, deserve to be dismissed altogether. That problem, too, could perhaps be resolved by the inclusion of an appropriate provision defining the scope of the draft articles.

44. The difficulties in connection with the definition of unilateral acts and with the formulation of the subsequent articles were not incidental. As Mr. Simma had pointed out (2629th meeting), they stemmed from the fact that by using unilateral acts States hoped to achieve a greater measure of freedom than they would enjoy under the more rigid and well-established rules of international treaty law. If such were indeed the intention — if the attraction of unilateral acts lay precisely in their relative flexibility and informality—then the question as to whether there was a need and a legal background for the codification of rules governing unilateral acts called for reconsideration. In his view, a definitive answer to that question was still outstanding.

45. The questionnaire had invited Governments to indicate to what extent they believed that the rules of the 1969 Vienna Convention could be adapted *mutatis mutandis* to unilateral acts. The most well-balanced reply to that question, recognizing that many of the rules of the Convention could be so adapted but also warning against their automatic transferral, had come from Argentina. The changes made to former article 4 (new article 3), on persons authorized to formulate unilateral acts on behalf of the State, were consistent with such an approach and he therefore accepted the article.

46. On the other hand, new draft article 5 required further careful consideration as regards the extent to which existing rules on invalidity of treaties were applicable to unilateral acts. For example, should an error, traditionally included among the grounds for invalidity of treaties, be treated in the same way in the case of unilateral acts? As illustrated by the debate in the Commission at the current session, the introduction of subparagraph (g), concerning unilateral acts conflicting with a decision of the Security Council, called for more detailed elaboration. In any event, it should be made clear that the provision related only to decisions taken under Chapter VII of the Charter of the United Nations. He had serious doubts about subparagraph (h) of new draft article 5; in the context of article 46, paragraph 1, of the 1969 Vienna Convention, the expression “a rule of its internal law of fundamental importance” had an entirely different meaning.

47. In conclusion, he said that both the draft articles and the report would have been greatly improved by an in-depth analysis of existing State practice with regard to unilateral acts. The Special Rapporteur’s future work would benefit from further efforts to research that area, possibly with some external assistance. In short, he had no objection to referring new draft articles 1 to 4 to the Drafting

Committee, but felt that new draft article 5 required further work, preferably in the Working Group.

48. Mr. BROWNLIE, while acknowledging the Special Rapporteur’s efforts to adapt his original approach to the views expressed in the Commission, said that the major problem with the methodology adopted thus far arose from the fact that non-dependent or autonomous acts could not be legally effective in the absence of a reaction on the part of other States, even if that reaction was only silence. The reaction could take the form of acceptance—either express or by implication—or rejection. Another problem, which he did not propose to pursue at the current stage, was the possibility of an overlap with the case where the conduct of States constituted an informal agreement. For example, the *Eastern Greenland* case, which some authors saw as a classic example of a unilateral act, could also be described as a case of an informal agreement between Norway and Denmark. Such problems of classification could generally be solved by a saving clause.

49. The subject of estoppel also involved the reaction of other States to the original unilateral act. In the *Temple of Preah Vihear* case, for example, Thailand had been held by her conduct to have adopted the line on the annex I map. Whilst the episode undoubtedly involved a unilateral act or conduct on the part of Thailand, that country’s conduct had been considered opposable to Cambodia. In other words, there had been a framework of relations between the two States.

50. Those considerations brought him to a general point concerning the definition of the topic and, in particular, the nature of the precipitating conduct or connecting factor. The concept of declarations had now been discarded, but the very expression “unilateral acts” was also probably too narrow. Everything depended on the conduct of both the precipitating State and other States—in other words, on the relationship between one State and others. The related general issue of the evidence of intention was a further reason for defining the connecting factor or precipitating conduct in fairly broad terms. The concept of “act” was too restrictive. The legal situation could not be seen simply in terms of a single “act”. The context and the antecedents of the so-called “unilateral act” would often be legally significant.

51. In that context, the references made to the effect of silence might also involve a failure to classify the problem efficiently. What had to be evaluated was silence in a particular context and in relation to a certain precipitating act, not silence *per se* or in isolation.

52. A general difference between the topic under consideration and the law of treaties was that, in the case of treaties, there was a reasonably clear distinction between the precipitating conduct—the treaty—and the legal analysis of the consequences. In the case of unilateral acts or conduct, it was often very difficult to separate the precipitating act or conduct and the process of constructing the legal results. That observation, too, could be illustrated by the *Temple of Preah Vihear* case.

53. Mr. MOMTAZ, after congratulating the Special Rapporteur on his readiness to grapple with the extremely complex topic under consideration, said that the difficulty

experienced by many countries in replying to the questionnaire arose from the great variety of universal acts and from the fact that State practice in that field had never yet formed the subject of systematic review. In that connection, he suggested that States which had not yet replied to the questionnaire might be invited to give more examples of their own practice. There could be no doubt that such information, especially from addressee States, would be of great value to the Special Rapporteur in his future work.

54. With reference to the substance of the third report, in his references to doctrine the Special Rapporteur might perhaps have given greater attention to the views of authors writing in French, and in that connection he mentioned an article by Mr. Economides.¹⁷

55. The unilateral act was an instrument of day-to-day diplomacy which served as a useful substitute to commitment under a treaty. As a means of circumventing the ideological and political obstacles which often stood in the way of the conclusion of treaties between States, it was irreplaceable. That being so, it was both opportune and judicious to identify the customary rules governing State practice and to advocate them with a view to ensuring greater stability in international relations.

56. Replies to the questionnaire so far received confirmed the existence of a strong relationship between the draft articles under consideration and the 1969 Vienna Convention. In particular, that Convention could serve as a basis for provisions relating to the interpretation of unilateral acts and to their validity. At the same time, as the Special Rapporteur rightly pointed out, there was a difference between the nature of a treaty and that of a unilateral act. In that connection, it was appropriate to recall that ICJ in the *Nuclear Tests* cases had given up the idea that a unilateral act had a consensual basis. That being so, with the exception of the interpretation and the validity of unilateral acts any reference to the Convention should be made with great caution and flexibility. With regard to the subject of estoppel, he referred to the view expressed by Jacqué to the effect that, contrary to a unilateral act, the fundamental factor in the case of estoppel was the conduct of the addressee. Conversely, in the case of a unilateral act the addressee's conduct added nothing, save in exceptions, to the binding force of the act.¹⁸ The same author developed the issue of third party stipulations, a point which deserved further attention.

57. The Special Rapporteur was right to distinguish between a simple legal event and a legal act. An international legal event was something to which the international order attached legal consequences, whereas a legal act, or unilateral act, was an expression of the will of a subject of international law, whether a State or an international organization. As for the definition of unilateral acts in new draft article 1, he entirely agreed with the view expressed in paragraph 36 of the report concerning the validity of the criterion of the intention of the author State. In that con-

nection, he again referred to the judgments of ICJ in the *Nuclear Tests* cases, in which the Court emphasized the intention of the author of the act to be bound.

58. In a study, Charpentier pointed out that when one spoke of the autonomy of a unilateral act or commitment, what was meant was that the juridical value could be determined only by reference to the normative intention of the author.¹⁹ In other words, the author of a unilateral act must have the intention to make a commitment and impose on itself a certain line of obligatory conduct. In the *Nuclear Tests* cases, ICJ had identified autonomy as an important component of unilateral acts, and in paragraph 63 of his report the Special Rapporteur did so as well. The existence of intention on the part of the author of the unilateral act thus sufficed for an act to produce legal effects, and the binding character of commitments made under a unilateral act was based on the autonomy of the author's will. It seemed unnecessary to rely on concepts like estoppel and good faith to justify the binding force of unilateral acts.

59. He agreed with the Special Rapporteur that the author of a unilateral act could not impose obligations on another State. The example given in paragraph 58, that of the Helms-Burton Act,²⁰ was very apposite, and the Iran and Libya Sanctions Act of 1996 (D'Amato-Kennedy Act)²¹ could also be cited in that context. As the Special Rapporteur pointed out in quoting from a study by Skubiszewski in paragraph 52 of his report, a unilateral act merely activated certain duties incumbent on States under international law.²² Examples included a declaration of war or an act whereby a State announced the start of an international armed conflict, following which neutral States were obliged to permit warships of the belligerent State to inspect their commercial vessels on the high seas in order to verify that they were not carrying war contraband for delivery to enemy territory.

60. He experienced no difficulty with new draft articles 1 and 2. He agreed with Mr. Kamto's comments (2630th meeting) on new draft article 3 and wished again to ask why governmental institutions, especially plenary bodies and legislative organs, should not be entitled to formulate unilateral acts. He had in mind parliaments, and bodies and councils that sprang up spontaneously following periods of domestic instability, which consolidated power in their own hands and were capable of exercising sovereignty pending the establishment of permanent institutions. The Revolutionary Council had played such a role in the Islamic Republic of Iran after the fall of the old regime and had formulated numerous unilateral acts during the interim period.

¹⁹ J. Charpentier, "Engagements unilatéraux et engagements conventionnels: différences et convergences", in *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski*, J. Makarczyk, ed. (The Hague, Kluwer Law International, 1996), pp. 367–380, at p. 371.

²⁰ See 2629th meeting, footnote 9.

²¹ ILM, vol. XXXV, No. 5 (September 1996), p. 1274.

²² K. Skubiszewski, "Unilateral acts of States", *International Law: Achievements and Prospects*, M. Bedjaoui, ed. (Dordrecht, M. Nijhoff, 1991), p. 233.

¹⁷ C. Economides, "Les actes institutionnels internationaux et les sources du droit international", *Annuaire français de droit international*, vol. 34 (1988), p. 131.

¹⁸ See J.-P. Jacqué, *Éléments pour une théorie de l'acte juridique en droit international public* (Paris, Librairie générale de droit et de jurisprudence, 1972).

61. With reference to new draft article 5, he endorsed Mr. Economides's idea that it should be preceded by a provision specifying the conditions under which unilateral acts were valid. In addition, a provision should be introduced on the incapacity of the State formulating a unilateral act. Any unilateral commitment of a State that was incompatible with the objective status of that State would obviously be devoid of legal validity. For example, if a neutral State formulated a unilateral act that was not consistent with its international obligations concerning neutrality, the act would be invalid.

62. Mr. PAMBOU-TCHIVOUNDA said he admired Mr. Momtaz's remarkable description of the unilateral act as an instrument of day-to-day diplomacy, but was uncomfortable when he went on to say that it could take the place of a treaty commitment. The two techniques were entirely unrelated in terms of efficacy, practical utility and even chronology. They existed in tandem, but one did not condition the other in any way or in any sense replace it.

63. Mr. MOMTAZ said a unilateral act could be considered a substitute for a treaty commitment when the prevailing political environment prevented two States from concluding a treaty.

64. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur), summing up the discussion, thanked members for their comments. The importance of the topic had been clearly reaffirmed and the fact that unilateral acts were being used more and more frequently in international relations had been generally acknowledged. Some doubt had been expressed, however, both in the Commission and in Government replies to the questionnaire, about whether common rules could be elaborated for all unilateral acts. To some degree he shared those doubts. Yet the definition and general rules on the formulation of unilateral acts contained in the report applied to all unilateral acts of States. He would attempt to categorize specific rules for the various unilateral acts in his next report. One category might be acts whereby States assumed obligations, while another would be acts in which States acquired, rejected or reaffirmed a right. Such categorization of acts had been suggested by one member. As another had said, after the acts had been categorized, the legal effects and all matters pertaining to the application, interpretation and duration of acts whereby States contracted obligations could be considered.

65. Draft articles 1 to 4 should be referred to the Drafting Committee for consideration in the light of the comments made on each article, whereas the Working Group should continue its in-depth study of new draft article 5, including the idea that it should be preceded by provisions on the conditions for validity.

66. As to new draft article 1, some saw that there had been an evolution from the restrictive approach taken in the first report²³ to the current, much broader formulation. It had been a necessary transition, but because of it, the reaction of States to the article might differ from the position they had taken in the questionnaire. It had been suggested that he was hewing too closely to the Commission's

line of thinking. Naturally, he had had his own ideas from the outset, but to try to impose them would be unrealistic. The effort to achieve consensus, no matter what he himself thought, was what counted. For example, in deference to the majority opinion, he had removed certain terms from the definition that he had seen as worth keeping.

67. Some members had pointed to the possible tautology of "expression of will" and "intention" in new draft article 1, but there was a clear-cut difference between the first term, which was the actual performance of the act, and the second, which was the sense given by the State to the performance of that act. The two were complementary and should be retained.

68. "Legal effects" was a broader concept than the "obligations", referred to in his first report, which failed to cover some unilateral acts. Some members had stated, however, that the concept was too broad and that the words "rights and obligations" should be used. That could be discussed in the Drafting Committee.

69. The draft articles referred to the formulation of unilateral acts by States, but that did not signify it was impossible to direct them, not only at other States or the international community as a whole, but also at international organizations. It had consequently been asked why they could not be directed at other entities. It was an interesting question, though he was somewhat concerned by the tendency throughout the United Nations system, and not just in the Commission, to include entities other than States in international relations. In reality, the responsibility regime applied solely to States, and it was perhaps not appropriate for entities other than States and international organizations to enjoy certain rights pursuant to obligations undertaken by a State. That point could be examined by the Working Group in the second part of the session.

70. Although a majority of members had suggested that the word "unequivocal" should be deleted, he continued to believe it was useful and should be retained, if only in the commentary, to explain the clarity with which the expression of will must be made.

71. The phrase "which is known to", used in preference to the earlier reference to publicity, was broader and more appropriate, but it had been challenged on the grounds that it was difficult to determine at what point something was known to a State. It had been suggested that the final clause containing that phrase should be replaced by wording drawn from the 1969 Vienna Convention to indicate that the act was governed by international law.

72. Some members had mentioned the possibility of reinserting an article on the scope of the draft, as he had proposed in the second report, and if the majority of members so agreed, such an article would have to be elaborated by the Drafting Committee in full conformity with article 1, on the definition of unilateral acts. It had also been suggested that the saving clause in former article 3, which had been intended to prevent the exclusion of other unilateral acts, could be reincorporated. He believed, however, that the current definition of unilateral acts was sufficiently broad.

73. There had been no substantive criticisms of new draft article 2. New draft article 3, paragraph 2, was an

²³ See 2624th meeting, footnote 6.

innovation, representing some progressive development of international law, in that it spoke of persons other than heads of State, heads of Government and ministers for foreign affairs, who could be considered authorized to act on behalf of the State. It seemed to have been generally accepted, although the Drafting Committee could look into the queries raised about the phrases “the practice of the States concerned” and “other circumstances”.

74. The use of the word “expressly” in new draft article 4 made it more restrictive than its equivalent in the 1969 Vienna Convention. It had led to some comments, the majority of members being in favour of a realignment with that instrument. That point, too, could be examined in the Working Group.

75. New draft article 5 would be considered in depth by the Working Group. One member had made the very interesting suggestion that subparagraph (g) of the article should refer not just to a decision of the Security Council but to a decision taken by that body under Chapter VII of the Charter of the United Nations. He had deliberately avoided including that specification because, without it, the subparagraph also covered decisions by the Council when it established committees of enquiry under Chapter VI. That, too, could be discussed. One member had referred to the need to indicate who could invoke the invalidity of an act and therefore to distinguish between the various causes of invalidity.

76. A number of comments had been made about estoppel and silence. While there was perhaps little cause to include them in the materials on the formulation of unilateral acts, he believed they had to be covered in the context of State conduct and should therefore be included in a future report when he would cover the legal effects of acts.

77. Without entering into detail about the coverage in his next report, he wished to say that the Working Group had carefully examined unilateral declarations in which States offered negative security guarantees, some of which were considered by some States to be legal acts and by others to be political acts. While many such acts were documented, it was hard to know how States interpreted them. State practice was therefore difficult to analyse. It had been said that State practice had not been adequately collected and catalogued, and an effort would be made in future to do so, so that it could be used for reference purposes in the next report.

78. Mr. GOCO, noting that about 10 States had responded to the questionnaire and that those replies would assist in refining the work on the topic, asked whether any pattern could be discerned from them.

79. Mr. RODRÍGUEZ CEDEÑO (Special Rapporteur) said that some of the replies had been critical of the treatment of the topic. That was due to the current stage of consideration; as the topic was developed, States might find it easier to accept. In some replies, States, reflecting their own practice, recognized the existence of such acts. Other replies had been more doctrinal and academic, referring to the various categories of unilateral acts. In any case, the replies had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account at a later stage.

80. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission agreed to the Special Rapporteur’s proposal.

It was so agreed.

The meeting rose at 1.05 p.m.

2634th MEETING

Thursday, 8 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

State responsibility¹ (continued)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. The CHAIRMAN invited the members of the Commission to resume their consideration of the topic of State responsibility on the basis of chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that, in accordance with the approach agreed upon by the Commission, chapter II of Part Two of the draft articles dealt with the different forms of reparation from the point of view of the obligations of the State which had committed the internationally wrongful act. In the text adopted on first reading, in addition to assurances and guarantees against repetition, three forms of reparation had been envisaged, namely, restitution in kind, compensation and

* Resumed from the 2623rd meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

satisfaction. He had also considered that the provisions of article 42, paragraph 2, on contributory fault and the mitigation of responsibility, as adopted on first reading, belonged in chapter II rather than in chapter I, since they were restrictions on the forms of reparation. Moreover, in his second report, the Special Rapporteur at the time, Mr. Arangio-Ruiz, had proposed a separate article on interest,³ which had been strongly criticized and eventually dropped because it focused on non-essential elements rather than on interest as such. It was clear from the discussions at the time that most members of the Commission accepted as a general principle that interest should be paid and that, if a suitable provision had been submitted to the Commission at the time, it would have been adopted. That was why the Special Rapporteur was proposing a new article on interest. At the same time, he had deleted the reference to interest in the new article 44 he was proposing.

3. No State had proposed the deletion of the provisions in articles 42 and 43. There had certainly been criticism of their wording, particularly with regard to the exceptions in article 43, and States had also requested that the provisions on certain issues such as compensation should be more detailed, but they had accepted the idea that restitution, compensation and satisfaction were three distinct forms of reparation and had generally agreed with the position taken on first reading regarding the relationship between them. He had nevertheless looked into the question of that relationship in his third report, particularly the relationship between restitution and compensation, as legal opinion was still divided on the matter.

4. Article 43 as adopted on first reading asserted the principle of the priority of restitution in kind and provided for four exceptions. Restitution was considered as the primary form of reparation and compensation as an additional form to be used where restitution did not fully compensate for the injury. He pointed out in passing that he preferred to use “restitution” rather than “restitution in kind” in the English version in order to avoid any misunderstanding, but he would not of course object to the continued use of *restitution en nature* in the French version. In fact, given the context and content of article 43, there was no possibility of confusion on the subject.

5. On the question of substance, the relationship between restitution and cessation was a complex problem concerning the content of the obligation of restitution in cases where the primary obligation was no longer effective. That problem had arisen in several recent cases. For example, in the “*Rainbow Warrior*” case, restitution would have been pointless if the underlying obligation had not been a continuing one. On the other hand, in the *Great Belt* case, the problem of restitution had arisen in the context of a continuing obligation to respect freedom of transit through the Great Belt, so that, if there had been any unlawful impediment to such transit—that point was of course in dispute—restitution would have been substantial. The relationship between cessation and reparation was dealt with in chapter I and was a suitable question for theoretical analysis, but not for inclusion in the draft article, even though it could be further developed in the commentary.

The relationship between restitution and compensation was, however, more important as far as the wording of the article was concerned. Mr. Arangio-Ruiz had forcefully defended the idea that restitution was the form of reparation par excellence and that the other forms of reparation were merely substitutes in cases where it was not feasible. The problem with that position was that, in the great majority of cases, the form of reparation actually used was compensation. Whatever the theoretical standpoint, individual cases could be settled only by taking into account the particular circumstances of each case and especially the primary rules, as, by doing so, the State requesting restitution was often trying to obtain something to which it might not be entitled. Thus, in the case of the Iran-United States Claims Tribunal, the United States was under the obligation to discontinue certain judicial bodies, but not to make provision to ensure that no new bodies could be set up later as a result of a further amendment to its legislation. In the same way, a State obliged to carry out an environmental impact study or to provide notification before undertaking an activity could avoid doing so, but nevertheless had every right to carry out the activity in question. In such cases, the link between the violation and what one wished to obtain through restitution was indirect and contingent, and that affected the analysis of the court hearing the case. The reservations to which the priority given to restitution had led resulted from the fear that States would be requested to “undo” everything they had done within the framework of a lawful activity by invoking an incidental breach of international law. In his opinion, the problems posed by such situations could be resolved without denying the priority of restitution. In the context of inter-State relations, restitution was still the primary form of reparation, particularly when it was associated with a continuing obligation, and that needed to be brought out clearly in article 43 and in the commentary, since, otherwise, States would be able to avoid performing their international obligations by offering payment. He believed that the confusion among legal experts on the matter originated in a tendency to confuse restitution in inter-State relations and restitution in cases of expropriation. In such cases, the receiving State did indeed have a right of eminent domain over its territory and its resources which affected the way the principle of restitution was applied. The only decision in favour of a full-scale restitution in that context was the one handed down in the *Texaco* case and it had been much criticized; in practice, it meant that a higher level of compensation had to be paid. In his view, those questions could be left to one side because they related to the content of the substantive primary obligation in the field of expropriation and affected the relationship between investors and capital-importing States; they were not concerned with responsibility as dealt with in Part Two of the draft articles and gave no reason to modify the position taken on first reading, namely, that restitution had priority as a means of reparation.

6. The exceptions to restitution listed in article 43, subparagraphs (a) to (d), adopted on first reading had been criticized by Governments on the grounds that they made nonsense of the rule stated in the article’s introductory paragraph. He proposed that two of the four exceptions should be deleted.

³ See 2616th meeting, footnote 5.

7. The first exception, material impossibility, which was the subject of subparagraph (a), was universally accepted: even international law did not ask the impossible and that subparagraph had been considered satisfactory.

8. The second exception, which applied to cases where restitution would involve breaching an obligation stemming from a peremptory norm of general international law (subparagraph (b)), had been criticized for various reasons. For example, when it had made its comments, France had not accepted the concept of a peremptory norm.⁴ Nevertheless, the most telling criticism was that it was almost impossible to imagine a situation in which restitution would involve the breach of an obligation stemming from a peremptory norm of general international law, especially when restitution was viewed in relation to cessation and a continuing obligation. In his view, the circumstances precluding wrongfulness provided for in chapter V of Part One applied to Part Two and one of those circumstances related to the performance of peremptory norms. Therefore, even if a situation such as the one envisaged in article 43, subparagraph (b), could arise, it would be covered by the provisions of chapter V. For that reason, he proposed that subparagraph (b) should be deleted.

9. The third exception concerned cases in which restitution would impose costs wholly out of proportion with the benefit the injured State could gain from restitution in kind rather than compensation and followed from a reasonable principle adopted in national legal systems. In fact, when a return to the status quo ante, though not impossible, would be so expensive and inconvenient that it would be wholly out of proportion with the benefit the injured party would gain, it was reasonable not to provide restitution and to allow compensation, which must of course be full compensation. By and large, such situations did not involve continuing wrongful acts. Mr. Brownlie had often made the point that the principle concerned should be applied in the context of the primary obligation and by reference to the way in which that obligation worked out in the particular case. He believed that subparagraph (c) should be retained and he proposed a wording for it that was very close to the text adopted on first reading.

10. The fourth exception related to cases where restitution would seriously jeopardize the political independence or economic stability of the State responsible for the wrongful act, whereas the injured State would not be affected to the same extent if it did not obtain restitution in kind. There had been an enormous amount of controversy over the word “whereas”, which did not appear in the initial version by Mr. Arangio-Ruiz, where the emphasis had been firmly on the situation of the responsible State. In some situations, however, it was the very existence of the injured State that was at stake. Subparagraph (d) was certainly the most heavily criticized provision in the articles under consideration. According to most States, the situation referred to had never arisen and the subparagraph was therefore unrealistic; moreover, its wording was so broad and vague that it was in any case unclear to which situations it would apply. In his opinion, the situation was covered by subparagraph (c) anyway and he therefore proposed the deletion of subparagraph (d). He noted that

the wording he was proposing for the whole article on restitution could be found in paragraph 146 and again at the end of the report. It was essentially the provision adopted on first reading with a few simplifications in the language and with the deletion of subparagraphs (b) and (d).

11. Article 44, as adopted on first reading, consisted of two paragraphs. In paragraph 1, compensation completed the reparation picture as far as material damage was concerned, while immaterial injury was covered by satisfaction. In paragraph 2, the Commission had sought to define compensation, but the paragraph contained vague references to interest and loss of profits in terms which gave no practical guidance and which suggested they were optional extras. Leaving to one side the question of interest, for which he proposed a separate article, he said that there was no doubt that compensation should cover any economically assessable damage sustained by the injured State and that that notion fitted into paragraph 1. The essential question in the debate on the draft article was whether the relatively simple statement of general principles in paragraph 1, with the addition of certain elements from paragraph 2, should be retained or whether a more detailed definition of compensation was required. In the view of some Governments and also some members of the Commission, that provision was too brief; the quantification of compensation did indeed pose many problems, but there was a wealth of practice in the matter and the Commission should further develop the concept. In comparison with articles 43 and 45, article 44 was too brief.

12. There was reason to be cautious before trying to elaborate more detailed principles of compensation. Efforts to do that had been made in recent years in the field of compensation in cases of expropriation and OECD had tried to do so as part of its more general work on the protection of investments. The difficulty in matters of expropriation had to do with the content of the primary rule requiring compensation. Generally speaking, States were entitled to expropriate property belonging to foreigners as long as they did so for a public purpose and in a non-discriminatory way. There was no question of a breach unless the State failed to pay compensation when it was required to do so by international law. Questions might then arise, but not at the stage when the level of compensation was being set. That important distinction had been formulated in the *Chorzów Factory* case and was still valid. The Commission should steer clear of spelling out the content of a particular primary rule or elaborating on the distinction between lawful expropriation and unlawful expropriation. If it wished to do that, it should do so in the context of the topic of diplomatic protection.

13. The second reason for caution was that compensation was an extremely dynamic concept. The human rights courts had actually started out with very modest aims in that field and the amounts of compensation awarded by, for example, the European Court of Human Rights had initially been very small. More recently, both the European Court of Human Rights and the Inter-American Court of Human Rights had become more ambitious in the field of compensation. In paragraph 157 of his report, he cited the key decision of each of those systems, which had both been influenced by the judgment in the *Chorzów Factory* case and the Commission's work

⁴ See 2613th meeting, footnote 3.

on State responsibility. For those reasons, a rather general formulation seemed to be justified and any further guidance considered necessary could be included in the commentary in a form that did not tie down the law on the subject.

14. With regard to the limits of compensation, the arguments put forward in favour of paragraph 3 of article 42 as adopted on first reading, concerning means of subsistence, were more persuasive in respect of compensation as it was possible for a State to cause catastrophic damage in another State that could not have been foreseen at the time when the wrongful act had been committed. National legal systems dealt with the problem in a variety of ways, first of all by invoking the notion of proximate cause, which the Commission had agreed should be embodied in the draft articles on reparation and compensation in particular. Certain acts were just too distant from the damage to give rise to compensation. Secondly, national legal systems took into account the kinds of damage covered by the primary rule and, thirdly, they set up limitation-of-liability regimes for certain activities. Whether or not the Commission decided to take the robust approach formulated in paragraph 163 of his report, it seemed that the matter should be settled on a case-by-case basis either by the court dealing with the case or by States themselves through their legislation.

15. The mention of loss of profits in the main text of the article without further clarification would be like “waving a red rag”. He therefore proposed a simplified version of article 44 in paragraph 165, on the understanding that it could be explained in the commentary that the loss of profits in certain circumstances could be compensable, depending on the content of the primary rule in question and the circumstances of the particular case. Should the Commission wish to have a more detailed provision on compensation, he would be happy to produce one, provided that he received very specific instructions.

16. Mr. BROWNLIE said that the Commission still had a great deal to do before it exhausted a subject which was of enormous importance, but was not very suitable for regulation. He was generally sceptical about rule-making activities, but thought that, in most cases, the best way to assess and take advantage of past experience was to compile *indicia* rather than fall back on supposedly general rules. That was why he was not very happy with methods that produced series of apparently general propositions. However, the Commission had a mandate to fulfil. In the case in point, it therefore had to devise some useful rules with appropriate provisos attached in order to avoid the generalities that appeared to characterize the part of the report under consideration.

17. He noted with satisfaction that the Special Rapporteur had acknowledged the importance of primary rules, but he regretted that he had not taken that acknowledgement to its logical conclusion. It was not enough simply to accept the principle that primary rules played an important role in determining whether compensation was justified and what form it should take or whether interest was justified. The cases in which they applied also had to be classified.

18. With regard to the connected question of sources, he said that the report should have relied less on legal writings and more on jurisprudence, particularly arbitration decisions. In particular, he regretted that there was no mention of the award in the *Aminoil-Kuwait Arbitration* concerning a series of connected agreements, from which it emerged that the applicable law was the agreements themselves. It was true that reparation depended on the relevant area of law. The same also applied to restitution.

19. He was not convinced that restitution was the primary form of reparation. There was a great deal of uncertainty on the subject. In fact, if primary rules were accorded the practical importance they deserved, there would be no need to determine whether or not restitution was the generally applicable, primary form of reparation. The problem could be solved in another way. It was quite possible to avoid generalities by including some provisos along the lines of “unless the relevant primary rules indicate a different solution”. With regard to sources, it would also be better to rely more on the decisions of tribunals, although caution was necessary because the applicable law was not always clearly stated, as shown in the case of the claims brought before the Iran-United States Claims Tribunal. He also thought it did not matter much if the applicable law was general international law or not. It should perhaps be pointed out in the commentary that some cases could be settled by means of a declaration of rights or declaratory judgement by a court without giving rise to restitution as such, as in the case, for example, of a withdrawal from a territory in a territorial dispute.

20. Lastly, he did not agree that punitive damages and moral damage should be discussed under the heading “Satisfaction”.

21. Mr. GAJA said that he found the Special Rapporteur’s proposals generally persuasive and, in any case, they were an improvement over the corresponding text adopted on first reading. In his opinion, the Commission had no option but to state the rules that stemmed from judicial decisions and arbitral awards. The problem was that those rules were applied only occasionally.

22. He would like to know to whom the expression “those injured” referred in subparagraph (c) of the proposed new article 43. Did it refer to the State, as intended in the earlier version of the provision? Did it also cover individuals, for instance, when the breach of the obligation concerned the treatment of foreigners or fundamental rights? If so, was restitution owed to another State or to the injured individual or to the State for the benefit of the latter? The wording of subparagraph (c) should be changed so as not to include any reference to the injured entity. However, was it possible to limit State responsibility to inter-State relations and ignore individuals?

23. On the question of material impossibility, he was not persuaded by the explanations given by the Special Rapporteur in paragraph 141, especially with regard to the death penalty cases. Nor was he persuaded by the argument in paragraph 142 that restitution could be excluded in cases where the respondent State could have lawfully achieved the same or a similar result in practice without breaching the obligation; that referred essentially to procedural obligations. It could be argued that, if there was a

lawful way to achieve a given result, the fact that the respondent State had not taken advantage of that way did not in itself exonerate it from the obligation of restitution. The State must put that procedure in motion; restitution was possible and the question of disproportion did not arise. The question was not what constituted restitution—which depended on the content of the relevant primary rules—but, rather, whether the breach of an obligation warranted restitution.

24. Mr. HAFNER said that the two draft articles proposed, especially article 43 on restitution, gave rise to several problems. It appeared that restitution was an obligation and therefore all the provisions of the draft articles being prepared, even those dealing with circumstances precluding wrongfulness, were applicable to it. The question that arose was what the consequences of that were. If a circumstance precluding wrongfulness arose, the State was then relieved of the duty of restitution, but not of the obligation to pay compensation, for example, because the original obligation clearly remained. What then was the relation between the provisions on circumstances precluding wrongfulness and the provisions on restitution in relation to compensation? What was the relationship between the material impossibility referred to in article 43 and force majeure, for example? Did the exceptions to restitution replace circumstances precluding wrongfulness as a *lex specialis* or were the provisions on circumstances precluding wrongfulness in addition to those exceptions?

25. Mr. CRAWFORD (Special Rapporteur), replying to the last point, said that, if one of the conditions set forth in article 43 was met, there was no obligation to provide restitution; the problem of compensation arose only in relation to the circumstances precluding wrongfulness listed in Part One of the draft articles, assuming that they were applicable in all cases. One of the effects of those circumstances was to suspend compliance with the obligation under consideration for a period of time. Distress and state of necessity would therefore have such an effect. However, it was also possible that the temporary effect could last long enough for the obligation to be superseded. The courts had always made a distinction between the continued existence of the underlying obligation and the exemption from performance of the obligation at a given time.

26. In his view, circumstances precluding wrongfulness were generally speaking supplementary to the exceptions given in article 43. It followed that the impossibility of proceeding with restitution referred to a permanent impossibility rather than a temporary one.

27. Mr. LUKASHUK thanked the Special Rapporteur for submitting a detailed report. He agreed with its general approach and thought that the proposed articles 43 and 44 would be easier to apply than those adopted on first reading, as they corresponded more closely to reality.

28. He reserved the right to make more detailed comments on the Special Rapporteur's proposals at a later stage.

29. Mr. ECONOMIDES said that the question of reparation could be settled only in a general way and with a great deal of caution, leaving it to practice, particularly international and internal jurisprudence, to work out the details. He had not been convinced by the inadequate arguments

the Special Rapporteur had put forward in favour of the deletion of the words “in kind” after the word “restitution”. The new provisions that the Special Rapporteur was proposing were less precise than those already adopted on first reading. Article 43, for example, did not say to whom restitution must be made. Implicitly, of course, it was to the injured State, but, in such an important text, precision was necessary. Article 44 had the same flaw, since the bilateral relationship between the responsible State and the injured States, which had been clear-cut in the old provisions, had been abandoned. He doubted whether circumstances precluding the wrongfulness of an act also applied in the part of the draft articles under consideration and was of the opinion that that question should be looked at carefully. The concept of “responsible State” was also not used in that part. It was, of course, known that a State was responsible because it had committed an internationally wrongful act, but the concepts of international responsibility and responsible State should be given pride of place in that context. He reserved his position on the fact that two exceptions had been eliminated in article 43. It was not that he was in favour of those exceptions, but he had still not been able to form a definitive opinion and reserved the right to come back to that issue later.

30. The CHAIRMAN noted that the articles were drafted to guarantee the right of the injured State to choose a mode of reparation. It might be considered that the wrongdoer also had a choice to make. He asked the Special Rapporteur whether it could be concluded from paragraph 123 of his report that he intended to include a specific article along those lines in Part Two bis.

31. Mr. CRAWFORD (Special Rapporteur) said that the answer to the Chairman's question was “yes”. The reason the articles were formulated in terms of the obligation of the responsible State was that the question was thus left open of who was entitled to invoke responsibility, as was the question of the choices which could be made at the time it was invoked. It must not be forgotten that the Commission was dealing with obligations towards different entities and even non-entities. For example, the international community as a whole was not a legal person, but there were obligations towards it. In some situations, several States were injured. Referring to an obligation “to the injured State” implied a purely bilateral form of responsibility, and that was not what was involved. There had been no attempt to find a solution to that problem on first reading. The Commission was coming back to it now in Part Two bis, which drew a distinction between the obligation of the responsible State to make reparation in one of the forms referred to and the invocation of that responsibility by other States which could choose the form of reparation. Obviously, an injured State might prefer compensation to restitution, except in extraordinary circumstances. Those provisions would be part of a framework in which it would be indicated what the responsibilities of the State that had committed the breach were and then what States could do to invoke those responsibilities. The reason why the earlier articles had been regarded as involving a choice between, for example, compensation and restitution, was quite simply that they had referred to a right and that right had been thought to imply the right to choose. It was clear that, in a bilateral context, an injured State was entitled to make a choice and it would be better to say so explicitly rather than implying it.

32. Mr. SIMMA said it was not to be ruled out a priori that a State not belonging to the category of injured State might ask for restitution, but the distinction between cessation and restitution gave rise to a difficult problem, for example, with regard to human rights violations. Accordingly, the text of the commentary as it stood should be regarded as provisional.

33. Mr. CRAWFORD (Special Rapporteur) said it was clear that the injured State, which was the one that had suffered the damage, would have the right to choose the mode of reparation. In some circumstances, other States would be able to invoke responsibility. Mr. Gaja had rightly referred to the possibility that those States might substitute for the injured State. They would obviously not be compensated themselves, but they would be entitled to insist not just on cessation, but on restitution as well. It was because of that possibility that he had drafted the relevant provision of article 43 in the way he had. The disadvantages for the State which became involved must be balanced against the damage suffered by the victims, the persons actually affected by the wrongful act. The way in which the draft articles were formulated left open the possibility that the injured State would claim its rights for itself and the possibility that other States would be claiming those rights, as it were, on a broader basis.

34. Mr. PAMBOU-TCHIVOUNDA, referring to the question by Mr. Hafner, who had asked where circumstances precluding wrongfulness belonged in the various forms of reparation, said that there were two possible answers. The first was that chapter II was based on the assumption that wrongfulness was not precluded. The various examples of compensation for wrongful acts would be dealt with accordingly. The second was to approach the question from the viewpoint of the mitigation of responsibility—and it was perhaps in that context that an echo could be given to that concern, which was one that he shared.

35. With regard to articles 43 and 44, he preferred the wording suggested by Roberto Ago. The articles proposed by the Special Rapporteur were, of course, more concise, but it could be asked whether he was not sacrificing some questions that were not secondary, but essential. For example, the exception in subparagraph (d) of article 43 adopted on first reading was being sacrificed. Accordingly, the question whether there might be more than one State “concerned” by the commission of an internationally wrongful act found practically no reply in the new version, even though that question was a substantive one.

36. Similarly, in the overall treatment of reparation, the Special Rapporteur opted for inversion. In the Ago draft, it had been the State which had committed the internationally wrongful act which had been in the hot seat in Part One, with the spotlight on the injured State in Part Two. Now, the approach was the reverse: the draft articles began with the words “A State which has committed an internationally wrongful act”.

37. In Part One, the point had been to establish principles. It appeared that, in stating the rules dealt with in Part Two, the Commission would have to go beyond principles. For that purpose, it would have been better to keep the

injured State in a more active role in order to show that it was the driving force behind reparation.

38. There was one point on which he fully agreed with the Special Rapporteur, and that was the deletion of the words “in kind”. Either reference was made to restitution or it was made to reparation in kind. Restitution could be made only for the totality of what had been wrongfully expropriated. That was not only a question of semantics, but also one of substance. To the extent that the construction of the system was based on the breach of an international obligation, the whole question was how to restore what would in a way be a right, the reverse of an obligation. There was a material aspect of the thing to be restored that did not come across in the edifice which the Commission had agreed on and which consisted in basing the entire system of the law of responsibility on the breach of an international obligation, i.e. the commission of an internationally wrongful act.

39. The question of compensation did not lend itself to treatment that was as compact as that given it by the Special Rapporteur in his third report. It might be asked why he was reintroducing restitution in the provision he proposed in paragraph 165. Compensation was a mode of reparation which derived from restitution, but the impression was that the general principle was restitution, and nothing less, and that, in technical terms, compensation came into play if there had not been any restitution. The same would be true of satisfaction. As sober as they were, those draft articles gave rise to questions which had to be dealt with by the Drafting Committee.

40. Mr. CRAWFORD (Special Rapporteur) reminded Mr. Pambou-Tchivounda that Part Two of the draft articles had been prepared not by Mr. Ago, but by Mr. Riphagen and by Mr. Arangio-Ruiz, and it could therefore not be known whether Mr. Ago would have assigned the “active role” to the injured State or to the responsible State in the articles on restitution and compensation. As Special Rapporteur, he had tried mainly to disentangle the issues without claiming to have settled them satisfactorily. His objective was to give effect, in a chapter dealing with the implementation of responsibility, to what he took to be the set of values implicit in articles 1 and 3, thereby going back to an approach which he thought had been wrongly abandoned by the preceding Special Rapporteurs.

41. Mr. ROSENSTOCK said that it was very difficult to take a position on the articles proposed by the Special Rapporteur without situating them in the general context of the draft. It was essential, for example, to have a clear idea of the links between article 40 and the rest of the regime. The content of article 44 could be assessed only on the basis of what would be stated in the commentary. His comments on articles 43 and 44 could therefore be only preliminary in nature.

42. He nonetheless endorsed the Special Rapporteur’s proposal that the title of chapter II, “Rights of the injured State and obligations of the State which has committed an internationally wrongful act”, should be replaced by the shorter title, “The forms of reparation”. That title was not only shorter and simpler, but it would, as the Special Rapporteur had stressed in paragraph 120, avoid the

implication that the rights of “injured States” were in all cases the strict correlative of the obligations of the responsible State.

43. The wording of article 43 proposed by the Special Rapporteur would be acceptable, provided that the proposed new version of article 45 was also accepted.

44. The new wording of article 44 caused him more problems because he was not sure that the deletion of the reference to loss of profits might not be misunderstood. Of course, as the Special Rapporteur had noted in paragraph 149 of his report, that reference had perhaps been too “lukewarm” in the old version, but that was not a reason for deleting it. Loss of profits absolutely had to be mentioned, either in the form of an explicit reference in article 44, the solution he preferred, or at least in a separate article or in the commentary.

45. Mr. CRAWFORD (Special Rapporteur) said that there appeared to be a misunderstanding about loss of profits. The adoption of Part Two bis on the implementation of responsibility would, of course, affect the content of article 44. Mr. Arangio-Ruiz had already proposed two versions of that article (former article 8), a short one and a long one in his second report.⁵ There had been some problems with the long one because it had not actually said much more than the short one and it had contained some contentious issues. The Commission and the Drafting Committee had thus opted for the short version,⁶ but it had ultimately been deemed inadequate by Governments and by some members.

46. The Commission now had a choice between two solutions: it could either draft article 44 concisely, stating a very general principle in flexible terms, or it could go into some detail and try to be exhaustive. An intermediate solution would hardly be possible in that case. If the Commission opted for the long version—a change of strategy compared to the solution adopted on first reading—that version would have to include a reference to loss of profits. That was, however, a matter for the Commission to decide and he was counting on the members for guidance in that regard.

47. Mr. GALICKI said that, like the speakers who had preceded him, he would simply make preliminary comments because chapter I, section B, of the third report which had just been distributed warranted closer study.

48. With regard to the wording of article 44, the Special Rapporteur seemed to reject a priori any intermediate solution between the current shorter version, which did not mention loss of profits, and a longer and analytical version based on the one adopted on first reading. In the light of the comments by Governments and the position taken by some members, however, unanimity could perhaps be reached on such a compromise solution. He had no specific proposal to make at the current stage, but he did not think that it was impossible to refer to loss of profits even in a concise version of article 44. There were sometimes

very simple solutions for very complicated problems, as shown by the new title of article 43, in which the deletion of the words “in kind” had solved the problem of whether reference should be made to restitution in kind or restitution *in integrum*.

49. Mr. ROSENSTOCK said that he fully shared Mr. Galicki’s view. Reference could perfectly well be made to loss of profits in an article 44 to be drafted concisely, provided that additional explanations were given in the commentary.

50. Mr. CRAWFORD (Special Rapporteur) said that he did not object to that solution, but wished to provide a clarification. In his opinion, the Commission would not, as Mr. Galicki had said, have to choose between article 44 adopted on first reading and the proposed new version, but between that new version and the detailed article submitted by Mr. Arangio-Ruiz in his second report. He did not think that he had changed the substance of the article 44 adopted on first reading. He had, of course, removed the idea of “interest”, which had been dealt with and expanded on separately, but he had deleted the reference to loss of profits only because some Governments had been of the opinion that it had been formulated in such a weak way that it had the effect of “decodifying” international law. He had therefore preferred to deal with that question in the commentary.

51. The article proposed by Mr. Arangio-Ruiz in his second report had been much more analytical and had explained the various methods of compensation in five paragraphs.

52. Mr. GALICKI said that he did not object to the Special Rapporteur’s decision to delete the reference to “interest”, which did not have to be mentioned in article 44, but he continued to believe that the problem of loss of profits had still not been solved.

53. Mr. ELARABY said that he shared the view of the preceding speakers and, in particular, that of Mr. Rosenstock. Article 44 should contain a reference to loss of profits, even if it was desirable that that article should be drafted concisely.

54. Mr. CRAWFORD (Special Rapporteur), referring to the comments by Mr. Brownlie, said it was obvious that the problem of the relationship between primary rules and secondary rules arose in the field of reparation. Contrary to what people sometimes tended to think, secondary rules did not “operate” autonomously and independently of primary rules. That was not sufficiently taken into account by *lex specialis*.

55. However important primary rules might be, it was difficult to draw the appropriate conclusions in the drafting of the articles themselves. That was why he had preferred to deal with that question in the commentary. He pointed out, moreover, that reference was usually not made to the content of primary obligations in the text of articles themselves. An attempt along those lines had been made in articles 19 and 40 adopted on first reading, but it had proved to be disastrous.

56. As to whether moral and punitive damages belonged in article 44, he recalled that Mr. Arangio-Ruiz

⁵ See *Yearbook . . . 1989*, vol. II (Part One), p. 56, document A/CN.4/425 and Add.1, para. 191.

⁶ See article 8 and the commentary thereto (*Yearbook . . . 1993*, vol. II (Part Two), pp. 67–75).

had solved the problem by saying that the article (former article 8) covered moral damage to individuals and article 45 (former article 10) covered moral damage to States. That solution had been controversial because the term “moral damage” could apply to things so disparate as the suffering of an individual subjected to torture and an affront to a State as a result of a breach of a treaty. It would probably be necessary to come back to that question following the consideration of article 45.

57. Mr. Gaja’s comment was very pertinent: a return to the status quo ante was obviously not the only kind of restitution, although it was in a way the prototype. Everything was basically a matter of degree. In fact, the main problem with article 43 was once again the relationship between primary rules and secondary rules. In the theory of State responsibility, restitution was a well-established form of reparation, but, in practice, it was not, as shown by the examples given in paragraph 143. The problem was thus to reconcile theory and practice.

58. He thanked Mr. Economides for having drawn his attention to the lack of precision of some elements, which he would try to remedy.

59. He recognized that the problem of a plurality of injured States to which Mr. Pambou-Tchivounda had referred was a real one. Two “injured States” could not, for example, simultaneously obtain the extradition of one and the same person. That problem would be greatly reduced, however, if a distinction was made between the underlying obligation of reparation and its invocation by injured or other States. That was what he had tried to show in the first part of the text.

60. On the basis of the members’ first reactions, it seemed to him that, leaving aside the problem of loss of profits for the time being, the majority of the members of the Commission were in favour of a concise article 44 accompanied by detailed explanations in the commentary.

61. Mr. GOCO said that he too was in favour of that solution. In his opinion, the discussion should continue on the basis of the new version of article 44 contained in paragraph 165 of the report, the text of which could be elaborated on by the Drafting Committee. The comments made by Governments on that question could, of course, not be overlooked. In paragraph 152, it was stated, for example, that, on the basis of the decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission, the United States had held that the current drafting of paragraph 2 (of the old version of article 44) went counter not only to the overwhelming majority of case law on the subject but also undermined the “full reparation” principle.⁷

62. Must it be considered that, in the new version, the words “any economically assessable damage”, which were also used in the old version, implicitly covered loss of profits and interest? That question must be taken into account by the Drafting Committee.

63. Mr. ROSENSTOCK said that he fully endorsed the solution which the Special Rapporteur had just suggested,

namely, that article 44 should be drafted concisely, while nevertheless including a reference to loss of profits and giving detailed explanations in the commentary.

64. Mr. HE said that, in his view, the main problem which arose in article 44 was the definition of the scope of compensation. That article should therefore be further developed in order to cover all cases in which a State which had committed an internationally wrongful act owed compensation.

65. In the article itself, it would be necessary to define what was meant by “economically assessable damage” by specifying that such damage was linked to the internationally wrongful act. That causal link should be clearly spelled out. The reference to loss of profits should also be introduced in the text.

The meeting rose at 1 p.m.

2635th MEETING

Friday, 9 June 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of chapter I, section B, of his third report (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that, in introducing the remainder of chapter I, section B, he was not trying to pre-empt further debate on articles 43 and 44. He suggested that the beginning of the first plenary meet-

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

⁷ See 2613th meeting, footnote 3.

ing of the second part of the session should be set aside for any member wishing to comment on those two articles before they were referred to the Drafting Committee and that discussions should then continue on the other three articles proposed in his third report, articles 45 (Satisfaction), 45 bis (Interest) and 46 bis (Mitigation of responsibility), which he would introduce at the current time.

3. Starting with article 45, he said that the crucial phrase in paragraph 1 of the draft article adopted on first reading and set out in paragraph 167 was “satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation”. Hence, the words “moral damage” were used in association with satisfaction. There was then a list in paragraph 2 of the forms that satisfaction might take.

4. Despite an underlying core of agreement, article 45 gave rise to a number of difficulties. The reference in paragraph 1 to satisfaction for moral damage was problematic. First, the term “moral damage” had a reasonably well-established meaning in the context of individuals. As the former Special Rapporteur on the topic, Mr. Arangio-Ruiz, had repeatedly stressed, claims for compensation on behalf of individuals, for example, for pain and suffering or egregious violations of their rights, would come under the heading of compensation rather than of satisfaction. There was thus some difficulty in talking about moral damage in connection with both article 44 and article 45. Secondly, it was awkward to speak of moral damage in relation to States because to do so was to attribute all sorts of feelings, sentiments, affronts and dignity to them. That language reflected a real concern and there had certainly been cases in which States or Governments of States had, for example, felt humiliated by a wrong. It would nevertheless be wise to keep the use of emotive language for States within reasonable limits and to avoid confusion with moral damage to individuals. He agreed with Dominicé that the term “non-material injury” (*préjudice immatériel*) should be used as the subject matter of satisfaction instead of the term “moral damage”.³

5. The purpose of the words “to the extent necessary to provide full reparation” was to indicate that there might be circumstances in which no question of satisfaction arose. The question was simply one of distributing losses in the event that harm was being caused, in which case articles 43 and 44 would be sufficient.

6. It was unclear from the *travaux préparatoires* whether paragraph 2 was intended as an exhaustive list of forms of satisfaction. One paragraph of the commentary said that it was exhaustive and another said that it was not.⁴ In introducing the provision, the Chairman of the Drafting Committee had said that it was exhaustive, but the *chapeau* of paragraph 2 implied that it was not. In any case, it ought not to be exhaustive.

7. The main form of satisfaction in judicial practice was the declaration, which was well established as a result of the *Corfu Channel*, the “*Rainbow Warrior*” and many other cases. In the *Corfu Channel* case, ICJ had made it very clear that the declaration of the illegality of the mine-sweeping operation had been sufficient satisfaction. That language had been repeated in many cases since. Thus, if paragraph 2 was meant to be exhaustive, it left out what in judicial practice was the most common remedy and that point had been made by Mr. Arangio-Ruiz himself, who had proposed that a declaration was a form of satisfaction⁵ as had a number of Governments, including that of France.⁶ The problem with the declaration, however, was that, by definition, it was granted by a third party; it could not be granted in respect of oneself. Yet the articles were being drafted on the assumption that they applied directly to State-to-State relations and that judicial processes were subsequent to those relations. In other words, the articles proceeded in the declaratory tradition—and he used the word “declaratory” in a different sense—namely, on the basis that the function of a court was to declare an existing legal relation between the States parties to the dispute. Of course, those decisions might well have binding effect under the *res judicata* principle, but that was a separate issue. So there was some difficulty, from the point of view of drafting technique, in fitting the declaration into paragraph 2. It seemed unarguable that it ought to be there, but the problem was that paragraph 2 was concerned with what one State should do in response to a well-founded claim of a breach of international law by another State.

8. He therefore proposed the notion of an acknowledgement by a State, of which there were examples in State practice: in the *LaGrand* case and in the *Paraguay v. United States* case, the United States had acknowledged that there had been a breach of article 36, paragraph 1, of the Vienna Convention on Consular Relations. Obviously, it had not declared that there had been such a breach because it had been talking about its own conduct, but it had acknowledged that there had been such a breach. If it was assumed, hypothetically, that there had been a failure to acknowledge that a dispute had arisen over whether there had been a breach, but that no material damage had occurred and that the individual concerned had subsequently been released: it was clear that a tribunal in those circumstances would do nothing more than grant a declaration. In such a case, the breach would have been relatively minor and it would have been sufficient to say that one had occurred. Thus, acknowledgement by the responsible State seemed to be the equivalent, in terms of State-to-State conduct, of the declaration granted by a tribunal. It was the lowest form of satisfaction, but it was a useful and frequently granted remedy. Consequently, he proposed an acknowledgement of the breach as the first form of satisfaction. The commentary would then explain that, where a State declined to acknowledge that it had committed a breach, the corresponding remedy obtained in any subsequent third-party proceedings would be a declaration.

³ C. Dominicé, “De la réparation constructive du préjudice immatériel souffert par un État”, *L'ordre juridique international entre tradition et innovation : recueil d'études* (Paris, Presses Universitaires de France, 1997), p. 349, at p. 354.

⁴ See paragraphs (9) and (16) of the commentary to article 10 (*Yearbook ... 1993*, vol. II (Part Two), pp. 78 and 80, respectively).

⁵ See article 10, paragraph 3 (*Yearbook ... 1989*, vol. II (Part One), p. 56, document A/CN.4/425 and Add.1, para. 191).

⁶ See *Yearbook ... 1998*, vol. II (Part One), document A/CN.4/488 and Add.1-3.

9. Paragraph 2 also contained a reference to an apology, which was frequently given by States to other States. Just as a State could not make a declaration in respect of itself, so a tribunal could not make an apology on behalf of a State; only the State could apologize for its own conduct. There had, however, been examples in which tribunals or other third parties had even required, and certainly proposed, that an apology was in order. The Secretary-General, in his award in the "*Rainbow Warrior*" case, had indicated that France should apologize for the breach. Of course, that had in effect been an award on agreed terms, but it was nonetheless a third-party award indicating that an apology was appropriate. An apology, or an expression of regret, to use the wording suggested by France, was slightly more elevated than an acknowledgement, which was more neutral. It seemed, however, that an apology should also be included.

10. He proposed that acknowledgement or apology should be treated separately from the other forms of satisfaction in a new paragraph 2, since it was the basis on which any other form of satisfaction would be granted. It was also the minimum form of satisfaction. It was useful to emphasize the value of declaratory remedies and the sources cited in the report did so. Singling that out had the value of distinguishing between the minimum form of satisfaction and those other forms which might be exceptional, but might be appropriate in certain cases and would be contained in a new paragraph 3.

11. Referring to the other forms of satisfaction, he said that the first listed in paragraph 2 was nominal damages. Although there was some practice in international law of the award of nominal damages, it was not clear that it was useful. He preferred the view taken by the Permanent Court of Arbitration in the "*Carthage*" and the "*Manouba*" cases that, when a tribunal awarded a declaration that there had been a breach, there was no point in awarding one franc by way of damages. Nominal damages, at least in the common law system, had three functions. One was to acknowledge that there had been a breach; that had been before the courts in the Commonwealth countries had developed the remedy of the declaration. Hence, it had been an earlier equivalent of declaratory relief. The second function was to serve as a peg on which to hang costs, because, if a farthing of nominal damages was awarded, costs would be awarded as well and they might be very substantial indeed. A third function of nominal damages was to insult the plaintiff. The classic example was a libel action in which someone claimed to have been defamed. In awarding one shilling, the jury showed just how much it thought the plaintiff's reputation was worth. Hence, nominal damages were also used to demonstrate that, although technically the plaintiff might have a cause of action, his case had no substantial merit.

12. Those three reasons for nominal damages in the common law system were inapplicable in international litigation. The declaratory remedy was sufficient, as the Permanent Court of Arbitration had noted, in lieu of nominal damages. There was no practice by which costs were generally awarded; costs did not follow the event in international litigation, and, if they did, they certainly did not do

so to that extent; and the third reason was another reason not to mention nominal damages.

13. He was not suggesting that small damages might not be appropriate and there had been recent examples of such awards, such as 100 Dutch florins. There had also been cases in which small amounts of money had been awarded by way of what might be described as general damages, without distinguishing between compensation and satisfaction. But they were not nominal damages in the sense in which that term was used in national legal systems. In his view, paragraph 3 should be non-exhaustive because examples could be cited of things done by way of satisfaction which certainly did not fall within existing categories, such as some of the more imaginative remedies proposed in the "*Rainbow Warrior*" case. If the provision was non-exhaustive, there was no need to list nominal damages. There were relatively few modern cases in which they had been granted and they were referred to in a footnote to paragraph 188. The last State-to-State case in which nominal damages had been awarded had been in the "*Lighthouses*" case. More recently, there had been a case in which a tribunal had awarded three French francs for loss of profit, and that suggested that profits had not been very high in the first place. He proposed that the words "nominal damages" should be deleted from article 45 and he had placed them in square brackets for the time being, not because there might not be occasions where they might be appropriate, but because they did not deserve to be highlighted.

14. The third category referred to in paragraph 2 and the first category for potential inclusion in his paragraph 3 was "damages reflecting the gravity of the infringement". However, in the draft article adopted on first reading, that was limited to cases of gross infringement of the rights of the injured State. The problem was not just the difficulty in defining what "gross" meant, but that, in State practice, damages had been awarded by way of satisfaction in cases which, in his view, had not amounted to gross infringement and the damages awarded had not been spectacularly high. The award by way of satisfaction in the first phase of the "*Rainbow Warrior*" case might be regarded as being in response to a gross infringement and it had certainly been a spectacular award at the time—US\$ 7 million in 1986. In the "*I'm Alone*" case, US\$ 25,000 had been awarded to Canada by way of satisfaction. No compensation had been awarded because the boat in question had in fact been owned by United States nationals trying to beat prohibition by running alcohol, but damages had been awarded as an affront to Canada for the sinking of a Canadian registered vessel. In the context, it would be an exaggeration to describe that as a gross infringement. It had clearly been a breach, but not a gross one, and the damages had not been spectacularly high. There were other examples in international practice where moderate awards had been granted by way of satisfaction in respect of moderate breaches. Thus, the words "in cases of gross infringement" unduly limited the normal function of satisfaction in respect of normal breaches.

15. That raised the question of the function of paragraph 3 (c). Was it concerned with establishing the rule of punitive damages in international law or with something else? In the first version of article 10 proposed by the

former Special Rapporteur in his second report, he had specifically included the words “punitive damages” in paragraph 1.⁷ The Drafting Committee had rejected that view at the forty-fourth session of the Commission, adopting instead the notion of “exemplary damages”,⁸ a term which also came from a particular tradition in relation to damages. Exemplary damages were not punitive damages. They were not intended as a penalty, but as an example. It was true that the distinctions could be rather refined, but, when there had been an egregious breach and a real affront to the respondent, exemplary damages could be awarded. For example, if there was a gross violation of privacy or the home in the context of a search and seizure or a gross affront to someone in the context of defamation, exemplary damages might be awarded, even though they were not punitive. The classic mark of punitive damages was that they were awarded by reference to some multiplier, such as the treble damages awards in United States anti-trust law. The Commission and the Drafting Committee had intended to reject the notion of punitive damages and the wording of paragraph 3 (c) had been meant to reflect the notion of exemplary damages. That raised two problems. The first was what to do about punitive damages and the second was what to do about paragraph 3 (c). As to punitive damages, there was much authority, going back to the “*Lusitania*” case, for the proposition that punitive damages were unknown in international law; if they were known, they were limited to the case of egregious breach. “Gross infringement” might be the term, but he thought that the Commission needed something more carefully defined and stronger if it wanted to have it as a separate category. It seemed uncontroversial that, beyond that category, if it was retained, there was no place for punitive damages.

16. He therefore agreed with the Commission’s decision on first reading that paragraph 3 (c) should not provide for punitive damages. The question arose, however, whether it should provide for exemplary damages. In his view, it would be more consistent with decisions in general international law to delete the words “in cases of gross infringement of the rights of the injured State” and simply to provide for the award of damages in general, where appropriate, by way of satisfaction, in accordance with decisions such as that in the “*I’m Alone*” case. That would leave open the possibility of providing for what might be described as expressive or exemplary damages, where appropriate, and excluding punitive damages, a subject that would be taken up later in the context of a possible special category of “egregious breach”, to which special conditions needed to be attached. If the Commission decided to retain anything approximating to the language used in article 19, it would be contradictory not to allow punitive damages in that context. However, if a reference to “crimes” was included, punitive damages could not be excluded. He was suspicious of commentators and others who were in favour of the category of crimes, but rejected that of punitive damages. If penal language was to be avoided, it should be consistently avoided.

17. The fourth form of satisfaction was disciplinary action or punishment of the persons responsible, who might be officials or private individuals. France had rightly objected that the word “punishment” implied individual guilt.⁹ As in extradition treaties, provision should be made for the proper referral of the matter to the prosecuting authorities, who would deal with it as a criminal case. The Commission had intended that the form of action referred to in article 45, paragraph 2 (d), as adopted on first reading should be available only in exceptional cases, but there were cases in which such action was appropriate quite apart from any primary obligation to which a State might be subject, for example, under an international criminal law treaty. He therefore proposed that it should be retained, with some rewording based largely on the French proposals.

18. There were clearly other procedures that could appropriately be described as forms of satisfaction, such as a joint inquiry into an incident that had caused damage. However, if paragraph 2, as adopted on first reading, was understood to be non-exhaustive, it did not need to cover all the possible permutations which satisfaction might take. It would be sufficient to give examples in the commentary.

19. The issue of limitations on satisfaction was dealt with in the paragraph 3 as adopted on first reading. A number of States had complained that they did not understand what was meant by the word “dignity”. They viewed the paragraph either as a possible avenue for evasion of satisfaction or as totally meaningless and proposed that it should be deleted. There were, however, concerns about excessive demands for various kinds of symbolic acts. The two cases cited by Mr. Arangio-Ruiz had both involved collective demands of a humiliating character.¹⁰ He therefore proposed that paragraph 3 should be retained, with slightly different wording.

20. Paragraph 1 of the proposed new article 45 contained the introductory provision that a State “was obliged to offer satisfaction for any non-material injury” occasioned by an internationally wrongful act. The notion of causality in respect of satisfaction was, of course, different from that used in respect of compensation. New paragraph 2 stated that “In the first place, satisfaction should take the form of an acknowledgement of the breach, accompanied, as appropriate, by an expression of regret or a formal apology.” New paragraph 3 listed other forms of satisfaction that might ensure full reparation in particular cases, though, in his view, only two specific cases should be mentioned. New paragraph 4 provided a guarantee against satisfaction that was disproportionate to the injury and took a form humiliating to the responsible State.

21. Turning to the question of interest, he noted that the Commission had rejected Mr. Arangio-Ruiz’s proposal for reasons which, in his view, had not gone to the core of the issue. That proposal had focused on two questions: compound interest and the starting and finishing dates for

⁷ See footnote 5 above.

⁸ See *Yearbook* . . . 1992, vol. I, 2288th meeting, p. 221, para. 57.

⁹ See footnote 6 above.

¹⁰ See *Yearbook* . . . 1989, vol. II (Part One), p. 37, document A/CN.4/425 and Add.1, para. 124.

the calculation of interest. The former, in particular, was a highly controversial issue and very limited practice existed in respect of the award of compound interest in international tribunals. ICJ and PCIJ had awarded or considered the possibility of simple interest on every occasion on which the question of quantification had arisen, e.g. in the *S. S. "Wimbledon"* case, the *Corfu Channel* case (Assessment of Amount of Compensation) and the *Chorzów Factory* case (Merits). Considerable authority could therefore be invoked against the award of compound interest. When Mr. Arangio-Ruiz had proposed, *de lege ferenda*, an article dealing with the subject, he had omitted the basic proposition that, where a sum owed by way of compensation had not been paid, interest fell due on that sum until such time as it was, a proposition that no one had denied in the debate at the forty-third session of the Commission. As a result, the draft article had been rejected. In response to the many comments made by Governments, he proposed that the draft should include an article which would not focus on compound interest, but deal simply with the general question of entitlement to interest.

22. He had also tried, in somewhat more flexible terms, to deal with the second of the issues contained in the article proposed by the former Special Rapporteur, namely, the question of the time period affected by the award of interest. A decision had to be made as to when the amount of compensation on which interest was due should have been paid. There was a major discrepancy in the jurisprudence and the literature on the subject. In some legal traditions, the sum was payable on the day on which the cause of action arose. In others, it was not payable until a demand for payment had been filed by the injured State. Both of those rules were defensible in particular contexts. In other situations, the interest might date from the point at which payment would have fallen due in the normal course of relations between the parties. In order to accommodate the need for flexibility between the different possible starting dates for payment of interest, he proposed a more general formula in article 45 bis, paragraph 2, than that proposed by the former Special Rapporteur, who had favoured the date on which the cause of action had arisen. The question when compensation should be paid would be a matter for the tribunal to determine: immediately upon the cause of action arising, within a reasonable time after a demand had been made or at some other point. He submitted that the new formula solved some of the problems created by the unduly rigid wording of Mr. Arangio-Ruiz's previous proposal. There was broader agreement on the final date on which interest was payable, namely, that on which the obligation to pay had been satisfied, whether by waiver or otherwise. He saw no reason to differ with Mr. Arangio-Ruiz's conclusion on that score.

23. Some Governments thought that the article should cover compound interest and Mann had written vehemently in its favour.¹¹ Courts, however, had remained very cautious in that regard. For instance, the Iran-United States Claims Tribunal had argued that there was no need for any provision expressly conferring on it the power to award compound interest, since it held such power as part of its

general jurisdiction. However, it would not do so save in extraordinary cases. His own view was that, if a claim was based on an underlying contract providing for compound interest, there should be no objection to the award of such interest. But, even in that context, international tribunals had been extremely cautious. He therefore proposed, in the light of international jurisprudence, that the possibility of compound interest in particular cases should not be ruled out, but that it did not need to be specifically mentioned.

24. He drew attention to a decision by an ICSID tribunal, in which some allowance for compound interest had been made in respect of unpaid compensation for expropriation over a period of some 20 years.¹² As some measure of discretion generally existed as to the interest rate imposed and the mode of its calculation, that principle should be extended to the special cases in which some form of compound interest was allowed. That point could be made clear in the commentary. If the Commission tried to deal in too great detail with the issue of compound interest in the light of the available authorities on compound interest, there was a risk of losing the entire article.

25. Reading out his proposed article 45 bis, he said that the second sentence of paragraph 1, based on that of the former Special Rapporteur, was somewhat loose, but, in the light of the writings of the authorities, it was difficult to be more precise. In paragraph 2 concerning dates, he had used the wording "Unless otherwise agreed or decided" because States could agree that there should be no award of interest and also because tribunals had in some cases exercised levels of flexibility about interest that were inconsistent with the idea that there was a simple right to interest covering any fixed period. For instance, they had allowed interest in respect of shorter periods of time than were strictly applicable or at a lower level than the market rate. That wording was used in some of the draft articles in respect of State succession and although it was somewhat vague, he thought that it was an area in which some degree of flexibility was necessary.

26. One of the issues dealt with in the final provision of chapter II of Part Two, article 46 bis proposed in his third report, on the mitigation of responsibility, had not been covered in the previous draft articles and the other had been dealt with in article 42, paragraph 2, as adopted on first reading, relating to contributory fault. The paragraph in question dealt with a case in which an injured State, or a person on behalf of whom a State was claiming, contributed to the loss by negligence or wilful act or omission, for which various terms such as "contributory negligence" and "comparative negligence" were used by different legal systems. There was well-established jurisprudence that the fault of the victim, where the victim was an individual, could be taken into account in the context of reparation. No State comment had taken issue with that principle. In extending it to injured States, however, the Commission had taken a step by way of progressive development. One or two Governments had queried that step on the ground that the principle of contributory fault

¹¹ F. A. Mann, "Compound interest as an item of damage in international law", *Further Studies in International Law* (Oxford, Clarendon Press, 1990), pp. 377 et seq., in particular, p. 383.

¹² *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (Case No. ARB/96/1), award of 17 February 2000, paras. 103–105 (*ICSID Review, Foreign Investment Law Journal*, vol. 15, No. 1 (Spring 2000), pp. 167 et seq., at p. 202).

should not apply in State-to-State cases. He saw no reason why it should not. Otherwise, a situation could arise in which a responsible State was made to pay for damage or loss suffered by reason of the conduct of the injured State.

27. He therefore proposed that paragraph 2 should be retained, with minor changes in the wording. His motive for doing so had nothing to do with causation. The former Special Rapporteur had originally proposed that reparation should be reduced where there were multiple causes for the loss.¹³ The Drafting Committee had rejected that theory¹⁴ and he had followed suit in his report. He was retaining paragraph 2 rather for considerations of equity, which seemed to apply equally to cases in which the comparative fault was that of the State or a national of the State. He noted, moreover, that, in most cases where a State brought a claim on behalf of a national, it was doing so in its own right.

28. One of the concerns referred to in chapter I, section B, was that injured States should not be over-compensated for losses which might have been caused for complex reasons. He did not think that the principle of the division of causation used by the previous Special Rapporteur as his main vehicle for addressing that problem was the right one. An effort should be made to strike a balance in terms of compensation between the responsible State and the injured State. He was therefore proposing a new provision dealing with mitigation of damage based essentially on the formulation of that principle by ICJ in the *Gab Ž kovo-Nagymaros Project* case.

29. He also intended, in the context of Part Two bis, to propose a principle against double recovery that was not a principle of quantification of reparation. For example, where there were multiple tortfeasors in the case of a plurality of States, a claimant might be awarded the same amount of damages against two States, since they were both equally responsible for the wrong. In all legal systems, however, a plaintiff was not entitled to recover more than the amount of the damage suffered. In the context of the invocation of responsibility, that principle should be reaffirmed. In his view, it related not to quantification, but to invocation. Mitigation of damage, on the other hand, related to the attenuation of the primary amount. A State that unreasonably refused to mitigate damage might find that it was unable to recover all of its losses. The simple principle involved was recognized by legal systems generally and by ICJ. It was therefore appropriate for it to be stated in the draft articles and he proposed a new article 46 bis to that effect.

30. The CHAIRMAN said that the debate on the draft articles on State responsibility would be resumed at the beginning of the second part of the session. A decision would also be taken then on the referral of articles 43 and 44 to the Drafting Committee.

Diplomatic protection (*concluded*)* (A/CN.4/506 and Add.1¹⁵)

[Agenda item 6]

31. Mr. DUGARD (Special Rapporteur), introducing the report of the informal consultations concerning the draft articles on diplomatic protection (ILC(LII)/IC/DP/WP.1), said that, while there had been considerable support during the debate in the Commission for the referral of draft articles 5, 7 and 8 to the Drafting Committee, it had been decided that a decision on the matter should be deferred until informal consultations had been held on draft articles 1, 3 and 6.

32. Three such consultations had taken place. They had focused on article 1, which sought to define the scope of diplomatic protection. It had been suggested, especially by Mr. Sepúlveda (2626th meeting), that the study should include the topic of denial of justice and that article 1 should indicate that it was the intention of the Commission to consider the matter. The Special Rapporteur and others had opposed that view chiefly on the ground that it was a primary rule and that the whole purpose of the topic was to focus on secondary rules.

33. It had, however, been generally agreed that the issue of denial of justice could not be completely avoided and would have to be referred to in the commentary. Elements of the concept would be an essential feature of the provision dealing with exhaustion of local remedies. It had also been agreed that no attempt should be made to deal with denial of justice substantively in the report or in the draft articles and that, accordingly, article 1 should not include any reference to that issue.

34. In the course of the debate, suggestions had been made that certain topics should not be included in the study. Those suggestions had been considered by the informal consultations and it had been agreed that the draft articles should not attempt to deal with the issues listed in paragraph 2, subparagraphs (a) to (d), of the report of the informal consultations. No exclusionary clause would be attached to article 1, but the commentary would make it clear that the draft articles would not cover the issues in question.

35. There had been some debate on whether the scope of the articles should be limited to injury to natural persons. The majority view had been that, at the current stage at least, such a limitation would be unwise and that the articles should deal with both natural and legal persons. Accordingly, the term “national”, as used in article 1, encompassed both categories of persons. There had also been some debate on the question of the inclusion of a reference to “peaceful” procedures. That suggestion would be taken up by the Drafting Committee when considering the three options referred to in the report of the informal consultations.

36. Article 3 had given rise to very little debate, the only question raised being whether the State of nationality had the right to exercise the right provided for in the article, or

¹³ See article 8, paragraph 5 (*Yearbook . . . 1989*, vol. II (Part One), p. 56, document A/CN.4/425 and Add.1, para. 191).

¹⁴ See *Yearbook . . . 1992*, vol. I, 2288th meeting, p. 217, paras. 20–26.

* Resumed from the 2627th meeting.

¹⁵ See footnote 2 above.

was merely entitled to do so. That was a matter for the Drafting Committee to decide.

37. It would be recalled that article 6 had proved rather controversial in the Commission. While recognizing that opinions were divided on the substance of the article, the informal consultations had nevertheless agreed that it should be referred to the Drafting Committee, on the understanding that it would consider including safeguards against abuses of the principle embodied in the article. Three possible ways of providing such safeguards were described in section C of the report of the informal consultations.

38. No objection having been raised to the referral of draft articles 5, 7 and 8, he therefore recommended, in the light of the informal consultations, that draft articles 1, 3, 5, 6, 7 and 8 should be referred to the Drafting Committee.

39. Mr. ECONOMIDES said that none of the three options proposed for article 1 was sufficient in itself; a satisfactory result could be achieved only by combining all three options. He would agree to the referral of article 1 only on the understanding that the Drafting Committee would consider combining the proposed options. He nevertheless feared that such consideration would mean that much of the Committee's time would be lost. Care should also be taken to formulate the article in such a way as to make it clear that diplomatic protection did not mean "a procedure" or "a process" in the sense of "any" procedure or process; it meant a very specific and precise procedure or process in each case. The article obviously required more work.

40. He had still more serious reservations on article 6. Members would recall that he was personally against its inclusion in the draft articles as being contrary to the principle of the equality of States and as having no basis in State practice. In the absence of stronger criteria, how could the Drafting Committee formulate the provisions suggested in section C of the document? In his view, the article should be reconsidered when the Special Rapporteur had put forward more solid arguments in its favour.

41. Mr. CRAWFORD said that he had no difficulty supporting the recommendation that article 6, controversial as it was, should be referred to the Drafting Committee, since that was the Commission's normal practice in such cases once a full debate in the Commission had taken place. Referring to article 1, he expressed the hope that the Drafting Committee would be careful not to infer that the principle of diplomatic protection was applicable in respect of injury to a person occurring outside the territory of the responsible State. As to the use of the term "national" to cover both individuals and corporations, he would be concerned if the last sentence of paragraph 3 of the report of the informal consultations raised any expectation that the Commission was likely to exclude corporations from the scope of the articles in future.

42. Mr. GALICKI said that he shared Mr. Economides' doubts about article 6. In his view, the time had not yet come to refer the article to the Drafting Committee. Many differences of opinion remained to be resolved. Should the article be treated as a reflection of current customary international law? He personally had grave doubts on that score. Or was it an instance of the progressive develop-

ment of international law? If so, it had to gain a greater measure of support from the members of the Commission than would appear to be forthcoming at present. While agreeing to the suggestion that the other articles should be referred to the Drafting Committee, he felt that the Commission should continue its discussion on article 6 during the second part of its current session, preferably within the framework of informal consultations.

43. Mr. ROSENSTOCK said that, in his view, there was sufficient State practice in support of article 6. The contrary opinion reflected a lack of awareness of present-day realities. As was well known, the Drafting Committee was not limited strictly to word polishing; it also looked at the overall balance and, to some extent, at the substance of proposals. On that basis, he strongly supported the recommendation of the informal consultations and thought that a resumption of the debate in the Commission would be most unfortunate.

44. Mr. SIMMA said that he, too, was strongly in favour of referring article 6 to the Drafting Committee. True, only a very few members had attended the informal consultations, but those present had been almost unanimous in supporting the principle embodied in article 6. If the article was an exercise in the progressive development of international law, then that was the course the Commission should take.

45. Mr. GOCO said that, if article 6 were referred to the Drafting Committee, he hoped that the reservations he had expressed during the debate in the Commission would be duly taken into consideration. Referring to article 1, he said it should be made clear in the commentary that the only reason for not including a reference to the concept of denial of justice was that it belonged to the realm of primary rules.

46. Mr. HAFNER said that he shared the views expressed by Mr. Crawford, Mr. Rosenstock and Mr. Simma on the referral of article 6 to the Drafting Committee. When dealing with reservations to treaties, the Commission had decided to refer all the draft guidelines to the Drafting Committee, although not all of them had been endorsed by all members. He saw no reason why the draft articles on diplomatic protection should be treated differently.

47. Mr. Sreenivasa RAO said that article 6 was a very difficult provision involving important questions of policy in bilateral relations. His own view was that the terms "dominant" or "effective" nationality were far from clear and that the article did not allow of an unambiguous interpretation. Since the debate in the Commission had been inconclusive, he agreed with previous speakers that further discussion would help clarify the issue. As to the parallel with the draft guidelines on reservations to treaties drawn by Mr. Hafner, he noted that a more central policy issue was involved in the current case.

48. Mr. DUGARD (Special Rapporteur) said that there was no problem with referral of draft articles 1, 3, 5, 7 and 8, as Mr. Economides had conceded that outstanding issues relating to article 1 could be dealt with by the Drafting Committee. With regard to article 6, he said that the comments in his first report (A/CN.4/506 and Add.1) reflected both positions on the issue. A full debate in the

Commission had shown that opinions continued to be divided and informal consultations on article 6 had therefore been held. The consultations had not been very well attended, but a good discussion had taken place and it had been unanimously agreed that article 6 should be referred to the Drafting Committee, accompanied by the suggestion that consideration should be given to the inclusion of safeguards to prevent abuses. If the Commission now decided not to refer article 6 to the Drafting Committee, he was not sure what purpose would be achieved by another full debate or further informal consultations.

49. Mr. Sreenivasa RAO suggested that it would be helpful if the Special Rapporteur could prepare a short note proposing a definition of the concept of “dominant” or “effective” nationality. If agreement could be reached on that crucial point, he would have no further objection to referring article 6 to the Drafting Committee.

50. Mr. ECONOMIDES said that he endorsed those comments. A note by the Special Rapporteur summing up the debate on article 6 would be useful. Section C of the report of the informal consultations suggested three areas for further work on article 6 and that work could be done only by the Special Rapporteur, not by the Drafting Committee. The Special Rapporteur should look into those matters and submit his findings to the Commission, where additional debate might perhaps take place before the article was referred to the Drafting Committee. Such an additional effort had to be made by the Commission because of the delicate and controversial nature of article 6.

51. Mr. GOCO said that he had reservations about substantive aspects of article 6 and was not sure that the Commission should refer it to the Drafting Committee, although the proper procedural approach would be to do so. If that would not create too many difficulties, the best course might be to resume the discussion of article 6 in plenary.

52. Mr. ROSENSTOCK said the matter had been discussed in plenary and informal consultations, from which no one had been barred, had been held. In reporting back to the Commission, the informal consultations had unanimously recommended that article 6 should be referred to the Drafting Committee. It would be very poor practice at best, and was unlikely to advance the work on article 6, for the Commission to send it back to informal consultations. Even if the Commission referred the article to the Drafting Committee, that did not mean it was approving it. The questions raised could be legitimately discussed while getting on with the work if the Special Rapporteur were to produce a few paragraphs indicating, on the basis of existing practice, which criteria had been used to determine dominant nationality and which were relevant in the context of article 6.

53. Mr. RODRÍGUEZ CEDEÑO said it was true that the question of procedure was closely linked to one of substance. A useful exchange of views had taken place, revealing a lack of agreement on substance which gave rise to doubts as to whether the Drafting Committee should discuss article 6. If the Drafting Committee was to consider the article, however, it must do so with a view to including safeguards, as suggested in section C of the report of the informal consultations.

54. Mr. GALICKI said that his comments on article 6 had been aimed at avoiding problems at a later stage. The Drafting Committee had a narrower field of manoeuvre than working groups or informal consultations did and, if the article was returned to the Commission, but was strongly opposed there, there would be no possible outcome other than rejection.

55. It would be wiser for the Commission to request the Special Rapporteur to prepare some additional materials on the problem of dominant nationality, which he himself saw as crucial, and to discuss the problem again during the second part of the session. He had opposed the article as originally drafted and believed that additional consideration in informal consultations would be useful.

56. The CHAIRMAN, summing up the discussion, recalled that the substance had already been extensively debated in the Commission and all views were reflected in the summary records and in the report of the Commission to the General Assembly. It was the Commission's prerogative to accept or reject the unanimous recommendation by the informal consultations that article 6 should be referred to the Drafting Committee, but, if, contrary to established practice, the issue was reopened, that would create difficulties.

57. He suggested that the Commission should follow the traditional approach of requesting the Drafting Committee to consider all the articles, taking into account all the views expressed, the report of the informal consultations and an additional contribution to be made by the Special Rapporteur. If the Drafting Committee arrived at a point where further progress on article 6 was impossible, the Chairman of the Drafting Committee could always request a plenary debate on the specific problem involved.

58. Mr. CRAWFORD said that he supported that approach. He pointed out that the Commission did not merely rubber stamp the output of the Drafting Committee. When the Drafting Committee had submitted article 6, it had been entirely open to the possibility that the large number of members who had problems with that article might propose its deletion or amendment. He believed it was important to maintain regular procedures, on the understanding that article 6 would probably be amended in some respect.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the approach he had just suggested.

It was so agreed.

Organization of work of the session (concluded)*

[Agenda item 2]

60. The CHAIRMAN announced that the Planning Group had met to discuss the date and place of the Commission's fifty-third session, in 2001, but the discussions had been inconclusive, although there was an emerging

* Resumed from the 2622nd meeting.

consensus in favour of holding a split session. As a decision had to be taken in the Commission in mid-July if the necessary meeting facilities were to be secured, the Bureau had decided that the working group on split sessions should be re-established. At the preceding session, Mr. Rosenstock had chaired the group and he had agreed to do so again. He had also agreed to conduct extensive informal consultations on the date and place of the next session at the very start of the second part of the current session, and members who wished to express their views on those points should contact him.

Gilberto Amado Memorial Lecture

61. Mr. BAENA SOARES recalled that, every two years, the Commission held a commemorative lecture in

honour of Gilberto Amado, a founding member who had made valuable contributions to the Commission's work for many years. The practice would be continued at the current session, as Mr. Pellet had agreed to give the lecture, which would be entitled "Human rightism and international law" (*Droits de l'hommisme et droit international*) and be held on Tuesday, 18 July 2000, at 5 p.m.

62. The CHAIRMAN announced that the Commission had completed its work for the first part of its session. He thanked the secretariat staff for their cooperation and assistance.

The meeting rose at 11.45 a.m.

SUMMARY RECORDS OF THE SECOND PART OF THE FIFTY-SECOND SESSION

Held at Geneva from 10 July to 18 August 2000

2636th MEETING

Monday, 10 July 2000 at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to resume their consideration of draft articles 43 and 44, contained in chapter I, section B, of the third report on State responsibility (A/CN.4/507 and Add.1-4) which had been introduced by the Special Rapporteur (2634th meeting) during the first part of the session.

2. Mr. CRAWFORD (Special Rapporteur) said that the debate during the first part of the session had raised a number of questions, for example, on the relationship between restitution and compensation and the usefulness of devoting an entire article to compensation. In response

to a comment by Mr. Rosenstock (*ibid.*), he had provided a commentary on article 44 in the light of which members of the Commission could decide whether the article itself should be expanded or whether the relatively simple version that he was proposing was sufficient.

3. Mr. ECONOMIDES said that he would refer to articles 43 and 44, but would also make a few remarks on article 45 bis, which he saw as being inextricably linked to article 44.

4. With regard to article 43, he fully shared the view that restitution must be considered as the primary form of reparation, even though compensation was in fact the form most often used. In each case of responsibility, the objective was to wipe out as fully as possible all traces of the internationally wrongful act by restoring the prior situation, in other words, the status quo ante, through restitution in kind. He could agree to the deletion of the exception provided for in article 43, subparagraph (*d*), as adopted on first reading, namely, serious jeopardy to the political independence or economic stability of the responsible State, for two fundamental reasons which the Special Rapporteur mentioned in his third report, namely, that the case was extremely rare and was in any event largely covered by article 43, subparagraph (*c*). He could likewise agree to the deletion of the exception mentioned in subparagraph (*b*)—breach of an obligation arising from a peremptory norm of *jus cogens*—as long as article 29 bis would definitely apply; that was something which the Drafting Committee should consider carefully.

5. A number of drafting changes would be desirable. The phrase “which has committed an internationally wrongful act” should be replaced by the word “responsible”, as had already been done in many instances; in the French text, the word *obligé* should be replaced by the word *tenu*, which was a stronger term more in line with legal usage; and the provision could be made more precise if the words “in kind” were used to modify the reference to restitution. The French text of the *chapeau* of article 43 would thus read: *Tout État responsable est tenu de restituer en nature, c'est-à-dire de rétablir la situation qui existait avant qu'il n'ait commis le fait internationalement illicite, dès lors et pour autant que cette restitution en nature* The words *ceux qui sont lésés* (those

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

injured) in subparagraph (c) could be replaced by the words *l'État ou les États lésés* (the State or States injured).

6. With regard to article 44, he favoured wording that was flexible, but as precise as possible, similar to that adopted on first reading. He could agree to a limitation on compensation in a provision such as the one contained in article 42, paragraph 3. He also thought that interest, which was a key element of compensation, should be covered in article 44, paragraph 2 of which could perhaps be expanded for that purpose. The questions of loss of profits and compound interest should be treated with great care in the draft article itself and not only in the commentary. Article 44 should therefore read:

“1. A responsible State is obliged to compensate for the damage caused by the internationally wrongful act that it has committed, to the extent that such damage is not made good by restitution in kind.

“2. For the purposes of the present article, compensation covers any economically assessable damage, interest on any principal sum payable, to the extent necessary to ensure full reparation and, possibly, in certain cases, loss of profits or compound interest.”

Lastly, the part of the Special Rapporteur's proposed article 45 bis relating to the interest rate and mode of calculation, as well as the time period for the payment of interest, could be the subject of a paragraph 3 to be added to article 44.

7. Mr. HE said that chapter II of Part Two, entitled “The forms of reparation”, as proposed by the Special Rapporteur, was based on the fundamental principle of international law that any breach of an engagement involved an obligation to make reparation. That principle, formulated by PCIJ in the *Chorzów Factory* case, had been confirmed by decisions of ICJ and was applied by various international courts and tribunals to the breach of any engagement capable of giving rise to international responsibility. The content of the obligation of reparation could be seen from many angles. In its general sense, it must wipe out as far as possible all the consequences of the internationally wrongful act and re-establish the situation which would have existed if that act had not been committed. Hence the general objective of “full reparation” at which the provisions of chapter II were aimed. Secondly, the obligation of reparation, as the main legal consequence of an internationally wrongful act by a State, did not extend to the indirect or remote results of a breach, as distinct from those flowing directly or immediately. The customary requirement of a sufficient causal link should be clearly spelled out in the relevant provisions on reparation or compensation, or at least in the commentary. Thirdly, there were different views on the issue, but “full reparation” must include *lucrum cessans* and interest because, if it did not, that would run counter to the majority of case law, as well as to the principle of full reparation. Lastly, the relevant text should express or reflect the necessary proportionality between reparation and the loss suffered. The idea that a penalty should be superimposed on full reparation was unacceptable and would be rejected, since the duty of reparation implied in the notion of responsibility should go no further than to wipe out all the consequences of the wrongful act. That was in agreement with the proposition

that, where no damage, material or moral, was proved, no indemnity could be awarded.

8. With regard to restitution dealt with in article 43 proposed by the Special Rapporteur, he said that one approach under which restitution should take precedence over any other form of reparation, including compensation, had been criticized as too rigid and inconsistent with practice by the advocates of a more flexible relationship between restitution and compensation ensuring that the injured State was free to choose whatever forms of remedy it deemed appropriate. The Special Rapporteur, while upholding the primacy of restitution, had endorsed a qualified priority for it, particularly in cases involving legally seized territory or persons or historically or culturally valuable property. The principle of priority would thus be retained in the proposed article 43, subject to certain defined exceptions. In article 43 adopted on first reading, if restitution amounting to full reparation was possible, the author State must not be able to opt for compensation, but was it possible in such cases for the injured State to opt for compensation?

9. With regard to article 44 proposed by the Special Rapporteur, the main question, as the Special Rapporteur indicated in paragraph 166 of the third report, was whether a more detailed formulation of the principle of compensation was required. In view of the importance of compensation as a main method of reparation and the fact that the function of article 44 was to define the scope of compensation, it seemed necessary for the main elements and conditions relating to compensation to be specified, so that the amount thereof could be better assessed. A mere mention of “any economically assessable damage” was not sufficient in the absence of some determining factors. Among them, the customary requirement of a causal link between harm and the internationally wrongful act should be specified and loss of profit should also be indicated, even though there was a separate article on interest which related mainly to the method of calculation. In the light of the unsettled state of law and the divergence of State practice, it would be difficult to draft a more detailed rule on compensation, but article 44 as it now stood was too simplistic to do justice. Although flexible wording could be found for the modalities of reparation, the basic principle of full reparation in the form of compensation should be fully respected and embodied in more detail in the article itself. At the same time, in order to avoid possible abuses, it might be useful to stipulate that no compensation should go beyond the damage caused by the wrongful conduct.

10. Mr. HAFNER pointed out that any comments on articles 43 and 44 depended very much on the outcome of the deliberations on articles 40 and 40 bis. The comments he would now make were based on the assumption that the draft articles related first of all, if not exclusively, to those injured States, in the narrow sense, which could claim the full set of reparations arising from an internationally wrongful act. Secondly, since the final wording of the draft articles depended to a certain extent on the final version of the commentary, he reserved the right to adjust his views on the basis of the commentary if the need arose.

11. On the whole, he endorsed the general approach adopted by the Special Rapporteur to the part of State responsibility under consideration. He favoured a general formulation of the draft articles, since too much detail would make it extremely difficult, if not impossible, to reach general agreement on the text and would create new areas of conflict among States. The most important issue in the field of State responsibility was the acknowledgment of responsibility, not the assessment of damages. That view had been confirmed by ICJ in the *Gab Ž kovo-Nagymaros Project* case, where, as indicated in paragraph 155 of the report, the Court did not regard issues of compensation as being at the heart of the case. Hence, in quite a number of cases, the amount of damages was left to negotiation. In that connection, he expressed reservations about the idea of resorting more frequently to arbitration awards, which undoubtedly constituted a major source for the ascertainment of existing law. In the first place, arbitral awards did not take account of the fact that State responsibility was often decided directly by the States concerned or national courts and, in the second, they were very often kept secret as one of the conditions of the settlement of disputes.

12. Turning to article 43, he said that *restitutio in integrum* was certainly the preferred reaction to a wrongful act, subject to the choice of the injured State. If it was not as frequent as, for instance, compensation, that was because of its limitations, not because restitution was of a subsidiary nature. Paragraph 142 made it clear that the duty of restitution amounted to the re-establishment of the situation which would have existed without the wrongful act, not to the mere re-establishment of the status quo ante. He had certain problems with the text of the article itself in that connection: account must be taken of the fact that everything was in a state of flux. As to the limitations on the duty of restitution, reference to material impossibility also raised certain problems. It must be asked whether it included legal impossibility. The various theories on the relationship between international and national law gave different answers to that question. The dualistic view seemed to include legal impossibility within material impossibility, contrary to the monistic view, which gave priority to international law. In that context, the Commission must also consider the relationship of article 43 to article 4 of the draft, which excluded resort to national law. In other words, it could be argued that the responsible State could not avoid the duty of re-establishment by reference to its domestic legal order. That would, for instance, be the consequence of a formulation similar to that of article 27 of the 1969 Vienna Convention. However, the formulation of article 4 was not such as to produce the same effect. Hence the question remained as to whether or not material impossibility included legal impossibility and it would be helpful if the commentary at least could address the issue. As to the limitation under article 43, subparagraph (c), the words “those injured” could cause problems if they referred back to article 40 bis. The question was whether the benefits in question were those gained by the individuals suffering from the wrongful act or by the relevant State. Since article 40 bis spoke only of States as the injured entities, that might give the impression that only States were meant in the context of article 43, subparagraph (c), as well. Some clarification in the commentary would therefore be welcome.

13. The new, short and more general form of article 44 proposed by the Special Rapporteur was preferable to the version adopted on first reading, contrary to the views expressed by Mr. Economides. The quantification of damages was not an issue to be dealt with under diplomatic protection, as suggested in paragraph 158. It was certainly impossible to describe the quantification of compensation in more detail. The various decisions adopted in that area prescribed a certain amount of compensation without indicating the criteria used to calculate it. In the “*Rainbow Warrior*” case, for example, no one had been able to discover the criteria considered decisive for the determination of the exact amount of compensation. In the more recent case of the shelling of the Chinese embassy in Belgrade, instead of compensation *stricto sensu*, a sum more or less equivalent to the damage had been paid *ex gratia* and it would certainly be difficult to find out precisely what criteria had been used to determine the amount paid. The principle should be that the compensation offered should ensure that the victim of the wrongful act considered the matter settled.

14. As to the wording of the article, questions could be raised as to whether the term “economically” should be retained, since it might create certain problems. Would it apply, for example, to the consequences of the wrongful extinction by man of an endangered species? The term seemed to have been used so far in a very loose way. Of course, the answer to the question also depended on the meaning of “moral damage” in article 45. Perhaps the solution might be to use the expression “material damage” in article 44 and the phrase “non-material damage” in article 45. The qualifier “material” would certainly be broader than “economically assessable”. Such a choice of terminology would also be justified by the following considerations. Since article 44 spoke of compensation for economically assessable damage, it could be concluded that other forms of damage fell into the ambit of article 45, which spoke of non-material damage. Hence article 44 was obviously intended to cover material damage. There remained a problem resulting from a comparison of article 43 with article 44. The proposed new article 43 spoke of the benefit that those injured would gain from obtaining restitution. Article 44 did not say on whom the damage was inflicted: the injured in the sense of article 40 or 40 bis, or the real injured, such as individuals. It seemed to him that, in both cases, the same subject was meant, namely, the State or individual having suffered from the wrongful act. Some clarification, at least in the commentary, would be helpful. A further question in that context was to whom the compensation was due? To the real victim? Did that mean that the State exercising diplomatic protection had the duty to transfer the compensation to the victim? It seemed to him that, before answering those questions, the Commission must first decide whether the matter came within the scope of diplomatic protection or that of State responsibility. In any case, he would not object to spelling out, at least in the commentary, the duty of compensation as derived from the ordinary meaning of “compensation”. As to the limitations on compensation discussed in paragraphs 161 to 164 of the report, the question had usually been raised in the context of liability, where a wrongful act was not required for compensation. There was a general tendency to limit the amount of compensation, since it would otherwise be

impossible to obtain an insurance contract for certain activities. That situation, referred to in paragraph 163 of the report, did not exist in the context of State responsibility, however. Although he generally agreed with the Special Rapporteur's views on that issue, he thought that the example of ultra-hazardous activity was not an appropriate one in the context. Other considerations could apply. It could be asked whether a State which was required to pay a huge amount of compensation could be led to infringe its human rights obligation to protect the lives and health of its population. Consequently, certain limitations on compensation which the obliged State could invoke in relation to the other State could be derived from such duties under human rights. Another question was whether a State obliged to make compensation could resort to article 33 on state of necessity in order to limit its obligations. That question could perhaps be dealt with in the commentary.

15. Mr. GOCO said that he got the impression from the statements by Mr. Economides and Mr. He that they envisaged a hierarchy in the forms of reparation, in that a State must first seek restitution before it could seek compensation. Restitution, however, was an entitlement, which meant that the injured State was free to exercise it or not. He hoped that the Special Rapporteur could clarify the situation in that regard. According to some statements, the injured State might prefer to seek outright compensation, without going through the process of restitution. He wondered whether seeking restitution should be considered a precondition, whether it had to be proved that restitution was impossible before compensation could be sought and, in other words, whether there was an analogy with civil law, under which restitution had to be sought before action was taken against the guarantor.

16. Mr. CRAWFORD (Special Rapporteur) said that, obviously, in cases where the injured State had the choice to prefer compensation, the election to seek compensation rather than restitution would be legally effective. There was certainly no requirement that all attempts to secure restitution must first be exhausted. In ordinary situations, that was a matter for the injured State. It was possible to think of situations in which the injured State might have no choice and restitution was the only possible outcome, but those were extreme cases. They were better covered under the notion of cessation rather than restitution. The draft articles, particularly in Part Two bis, would make it clear that the injured State—defined in the narrow sense, as Mr. Hafner had said—had the right to elect. That right would be effective in ordinary circumstances and restitution would then become irrelevant, as it often was in practice. There would, of course, be other situations in which it was absolutely clear that restitution was excluded, for example because a loss had definitively occurred, as in the case of a death or a serious and irreversible injury. As for the question of guarantee, mentioned by Mr. Goco, chapter II of Part Two did not deal with the law of guarantee or with situations in which two different States were responsible for different aspects of wrongful conduct. It was concerned only with a single State and the relationship between different forms of reparation in relation to that State. Cases involving a plurality of States would be dealt with during the consideration of chapter III, section B, of his report.

17. Mr. MOMTAZ said that, according to his understanding, the Special Rapporteur would be considering the

question of a plurality of injured States, which he mentioned in paragraph 126 and which the Commission had decided to reconsider at its forty-fifth session, in 1993. He looked forward to seeing how the Special Rapporteur would develop the theme.

18. With regard to article 43, restitution was generally acknowledged to be the form of reparation that conformed most closely to the general principle of responsibility, whereby a State which was the author of an internationally wrongful act was bound to eradicate all the legal and material consequences of that act by re-establishing the situation which had existed before the act had been committed. There also existed an approach to restitution that could be termed "purely restitutive". That seemed to be the approach for which the Special Rapporteur had opted, since the draft article he proposed stated that a State that had committed an internationally wrongful act was "obliged to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed". Such restitution was, of course, without prejudice to any compensation.

19. In the new draft article, the Special Rapporteur reduced the number of exceptions to the obligation to make restitution from four to two. The first exception, material impossibility, raised little difficulty, since it followed from the saying "no one is bound to do what is impossible". The same applied to the second of the exceptions appearing in the text adopted on first reading, which the Special Rapporteur had retained: it went without saying that the wrongdoing State did not have to make restitution if that would involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution instead of compensation.

20. The deletion of the other two exceptions gave rise to some difficulty. The deletion of the exception concerning a breach of an obligation arising from a preemptory norm of general international law seemed to have been based on two arguments. The first was that formulated by France in its observations³ in the form of a question, and seemingly adopted by the Special Rapporteur, namely, how a reversion to legality could be contrary to a preemptory norm. The second was the fact that no example of a situation in which restitution would breach such a norm had been provided by the previous Special Rapporteur. It seemed that it was the reference to *jus cogens* which had been the real problem and had been the reason for deleting the exception. The fact remained that, in certain cases, restitution risked coming up against insurmountable legal obstacles, and not in some simple, hypothetical instance. In his preliminary report,⁴ the previous Special Rapporteur had indicated that situations could be imagined in which restitution would be contrary to some provisions of the Charter of the United Nations, particularly Article 103, or to the rules of treaty law or customary law. He had given the example of nationalizations whose legality was no longer in question. It was indisputable that a State which carried out a lawful nationalization could not be bound by an obligation of restitution. He therefore thought that it

³ See 2613th meeting, footnote 3.

⁴ *Yearbook . . . 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

might be appropriate to add a third exception to the obligation of restitution, to cover cases where restitution would come up against an insurmountable legal obstacle without necessarily involving a breach of a peremptory norm of general international law. Such an exception would also cover the exception involving a serious threat to the political independence of the wrongdoing State, which appeared in subparagraph (d) of the text adopted on first reading and which could then be deleted.

21. The text proposed by the Special Rapporteur for article 44, relating to compensation, provided for compensation for “any economically assessable damage”, a formula which encompassed at once material damage, moral damage and loss of profits. The need for compensation for material damage arising out of an internationally wrongful act was unanimously agreed and posed no difficulty. As for moral damage, a distinction should be drawn between the moral damage suffered by the person of a national or an agent of the injured State and the moral damage suffered by the State itself. He considered that satisfaction should be the compensation for the latter form of damage, while the compensation for moral damage provided for under article 44 should be restricted to the damage suffered by physical persons. That would be in accordance with current practice. In that regard, reference could be made to the ruling handed down by ICJ in the *Corfu Channel* case, in which compensation had been granted as reparation for psychological damage, and to the decision in the *McNeill* case by the Anglo-Mexican Special Claims Commission.

22. As for loss of profits (*lucrum cessans*), there could be nothing but approval for the conclusion which the Commission had reached at its forty-fifth session and to which the Special Rapporteur referred in the report.⁵ The compensation of loss of profits was not universally accepted either in principle or in practice and, since legal authorities were extremely divided in that regard, it was hard to isolate precise rules that would enjoy wide support. Nonetheless, the wording put forward by the Special Rapporteur—“any economically assessable damage”—should be interpreted in an extensive sense, to cover loss of profits, as well. It might be appropriate to say as much in the commentary.

23. With regard to limitations on compensation, the Special Rapporteur himself recognized in paragraph 162 of the report that the issue of crippling compensation claims—those which could deprive a population of its own means of subsistence—merited consideration. Such a problem might well be placed in the category of massive and systematic human rights violations and, without advocating a special regime for human rights, he believed that the Commission should focus on the issue and indicate in the commentary that compensation might be limited in such cases.

24. Mr. GOCO said that the Special Rapporteur’s commentaries on restitution were extremely instructive and the remarks appearing at the end of paragraph 124 and at the beginning of paragraph 126 of the report deserved to be emphasized. The injured State had a choice and it could

very well ask for compensation outright rather than restitution. In the case of a plurality of injured States, the wrongdoing State could be faced with a variety of demands for reparation, some States opting for restitution and others for compensation.

25. One of the wrongful acts that gave rise to an obligation of reparation was the illegal occupation or annexation of territories in a conflict situation, with the accompanying suffering and damage. Thus, the Philippines had undergone enormous suffering during the Second World War, from which it had taken years to recover economically. Manila had been reduced to rubble and had undoubtedly been one of the cities to be most devastated by the war. In cases of war, restitution in kind was not possible, and that was why the Philippines had concluded the Reparations Agreement.⁶ Shortly afterwards, the Philippines Congress had adopted Republic Act No. 1789, on the establishment of a reparations commission to utilize all reparations payments to ensure the maximum possible benefits for the people. There was no question of a return to the status quo ante; only compensation had been possible. While article 43 might be helpful, it did not prevent injured States from making agreements on the form of reparation. If the draft article was to be retained, it should therefore be made inapplicable in cases of major upheavals or wars resulting in the total destruction of a country and the loss of thousands of lives. The new version proposed by the Special Rapporteur was clearer than the original wording and had the merit of pointing directly at the obligation of the wrongdoing State rather than at the entitlement of the injured State.

26. He subscribed to the reformulation of article 44 proposed by the Special Rapporteur; it was simpler, clearer and more concise than that adopted on first reading.

27. With regard to remarks that he had made earlier, he had, in speaking of the concept of a guarantee, simply meant that the submission of a demand for restitution was not a precondition for recovery from the guarantor. The Special Rapporteur’s phrase “any economically assessable damage” had the advantage of being broad enough to comprehend all kinds of damages, including *lucrum cessans* and, indeed, interest.

28. Mr. ROSENSTOCK, referring to a remark by an earlier speaker, said that the question at issue was only restitution by the responsible State and hence a situation in which an illegality had occurred. Whether a nationalization or a transfer of territory was involved, the fact that it could have occurred legally did not mean that there need be any bar to restitution.

29. The CHAIRMAN, speaking as a member of the Commission, noted that, in paragraphs 136 to 143 of the report, the Special Rapporteur cited the *Great Belt* case and dealt fairly extensively with the question of indication of provisional measures. He believed that injunction was outside the classic concept of restitution and wished to know how the Special Rapporteur intended to proceed in that regard.

⁵ See paragraph (27) of the commentary to article 8 (*Yearbook . . . 1993*, vol. II (Part Two), p. 73).

⁶ Signed at Manila on 9 May 1956 (United Nations, *Treaty Series*, vol. 285, No. 4148, p. 3).

30. As to compensation, he noted that paragraph 155 referred to the *Gabčovo-Nagymaros Project* case, stating that the ICJ had suggested a zero-sum agreement. Moreover, in the *Klöckner* case, the Arbitral Tribunal had found that both parties had equally violated their contracts. He asked whether the Special Rapporteur was contemplating introducing the concept into the draft articles.

31. Mr. CRAWFORD (Special Rapporteur), replying to the Chairman's remarks, said that he did not consider the indication of provisional measures to be within the scope of reparation. He had cited the *Great Belt* case because, at the provisional measures stage, one party had argued that, if the bridge was to be built, the disadvantage of demolishing it would outweigh the loss to Finland. There had therefore been no case for provisional measures. Although the preparations for the bridge had been in a reasonably advanced state, it had not yet been built and the ICJ had not been prepared to accept the argument at that stage, stating that it could not exclude the possibility that it would order the demolition of the bridge if it considered it an impediment of a right of passage.

32. As for the second question raised by the Chairman, he said that he had been trying to grapple with a problem raised by Mr. Arangio-Ruiz and other writers, namely, the sharp contrast between the theory and the practice. Everyone said that restitution was the first means of reparation, but, in practice, that was rare. As for the issue of offsetting one party's violations by another, that related, in part, to a procedural issue, sometimes known as set-off, which was not really part of the law of responsibility.

33. Lastly, he recalled that another issue had arisen in the *Klöckner* case mentioned by the Chairman, namely, the exception of non-performance. He would discuss the issue in chapter III, after considering the issues relating to countermeasures. He thought, however, that the application of the exception was virtually limited to obligations arising by virtue of treaties. There was therefore no need for it in the draft articles.

The meeting rose at 4.40 p.m.

2637th MEETING

Tuesday, 11 July 2000, at 10 a.m.

Chairman: Mr. Peter TOMKA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodriguez Cedeño, Mr. Rosenstock, Mr. Simma.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of chapter I, section B, of the third report (A/CN.4/507 and Add.1-4), and specifically, articles 43 and 44, with a view to referring them to the Drafting Committee.

2. Mr. SIMMA said the Special Rapporteur deserved high praise not only for the sheer volume of material he had provided but above all for his special talent, which lay in his ability to make constant improvements on earlier work.

3. In his view, the discussion still suffered from a certain lack of clarity about other parts of the draft that were of relevance to the current discussion. Thus, Mr. Hafner had mentioned (2636th meeting), that there was a close relationship between remedies themselves and the question of who could invoke which specific ones, a relationship expressed in article 40 bis. For example, in the event of an egregious breach of human rights, according to the Special Rapporteur, a State other than the directly injured State was to have the right to take countermeasures for the purpose of effecting cessation. He fully agreed with that. But could such countermeasures on the part of not directly injured States also be taken in order to gain compensation or other forms of reparation for the victim? In a case of violations by a State of the human rights of people living in that State, there was a need for such compensation, and the question was who could act, and in what way, to secure it. All that was not yet clear from the provisions so far elaborated by the Special Rapporteur.

4. The distinction between cessation and restitution played an important role in that context. According to the Special Rapporteur, restitution concerned the wiping out of past injury, whereas cessation had to do with stopping an ongoing injury. He would like clarification, however, of certain instances of an obligation of restitution mentioned in the third report. For example, if a person was illegally detained, as a matter of course restitution had to take precedence over compensation. A State could not simply demand compensation, then take the money and run, leaving the person to languish in prison. But how could one speak of restitution—in that case wiping out past injury, if the person was still in prison illegally?

5. In the matter of the priority of restitution over compensation, if a choice could indeed be made between the two, only the injured State could do it. Recalling comments made by Mr. Momtaz (*ibid.*), he said the view that, in expropriation cases, the responsible State had a choice between restitution of the property taken illegally or compensation of the victim was highly questionable. He was, of course speaking in that context of compensation under

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

secondary rules, not the duty of compensation required under the primary rules on the taking of foreign property.

6. Both restitution and compensation were subject to limitations: those for restitution were mentioned in article 43, subparagraphs (a) and (c), and those on compensation were outlined in the commentary. In view of those limitations, it was difficult to establish priorities. The tension between the civil law approach and the common law approach was perhaps creeping into the discussion. The common law tradition could be more easily accommodated if compensation was placed on the same level as restitution, whereas civil law practitioners tended to seek restitution first and to fall back on compensation only if restitution was not possible.

7. The *Chorzów Factory* case loomed large in the literature and in the earlier work of the Commission, yet the formula for reparation used in that case was different from the one adopted by the Commission. The judgment of PCIJ in the *Chorzów Factory* case stated that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. The question thus was what would be the situation if the breach had never occurred. The Commission's approach to restitution, reflected in article 43 adopted on first reading, limited itself to the re-establishment of the situation that had existed before the wrongful act had been committed, the implicit objective being to turn the clock back, as it were. However, if the *Chorzów* formula on integral reparation was followed faithfully, *lucrum cessans* would then have to be compensated, whereas according to the Special Rapporteur's proposal the fate of *lucrum cessans* remained unresolved, although it might be decided on a case-by-case basis.

8. The first exception to restitution, outlined in subparagraph (a) of new article 43 proposed by the Special Rapporteur, related to material impossibility. Mr. Hafner had asked (ibid.) whether legal impossibility should not be included, e.g. when State A, the victim of a breach, asked State B for restitution but State B replied that it could not give it because internal law did not allow for it. That was not a case of legal impossibility, however, because there was nothing in international law to preclude internal laws from being changed. Former article 50, currently article 41, of the European Convention on Human Rights said that, if full restitution could not be obtained, compensation must be paid. But that provision and others like it constituted a voluntary agreement by States not to go as far as general international law would allow them to, a recognition that it would in many instances be extremely difficult to ask a State to repeal legislation. The difficulty involved was nonetheless very different from impossibility, and the two must not be confused.

9. He concurred with others that the words "those injured" in new article 43, subparagraph (c), was infelicitous, for it might be construed as covering entities other than States. Article 40 bis, paragraph 3, should be applied in that context. However: its scope should be interpreted broadly throughout the entire draft, so that the Commission would not have to include ambiguous clauses on remedies available to non-State entities.

10. As to the Special Rapporteur's discussion of restitution in the context of the *Great Belt* and death penalty cases (*Paraguay v. United States* and *LaGrand*), he agreed with Mr. Yamada that a distinction should be drawn between restitution in the context of injunctive relief and restitution in the context of the subsequent proceedings on the merits.

11. With reference to article 44, on compensation, many members and the Special Rapporteur had recognized the difficulty involved in constructing a meaningful formula, as in many instances States reached agreement on compensation for an internationally wrongful act but the responsible State insisted that payment be *ex gratia*. A second difficulty was that, particularly in world trade and environmental issues, States created special, custom-tailored regimes for compensation which for practical purposes excluded the application of general principles. The report mentioned treaties on liability in environmental law, but those regimes all related to limitations on operator liability. As far as he knew, there was no State responsibility regime that set out such limitations. He agreed with the Special Rapporteur that all the Commission could do for the time being was to devise a flexible formula, perhaps incorporating some of the amendments proposed by Mr. Economides (ibid.). Any attempt at developing rules on the quantification of compensation should be left for the Commission's work in future years.

12. Mr. Hafner had pointed to problems with the phrase "economically assessable damage" in article 44 and asked whether "material damage" would not be a better formulation. In paragraph 148, the Special Rapporteur described "economically assessable damage" as including both material and moral damage. He would be interested to learn how moral damage could be economically assessed. Perhaps satisfaction or the payment of nominal damages would be a more appropriate approach. Finally, as he had mentioned earlier, if the *Chorzów* dictum on full reparation was applied faithfully, compensation would have to be given for *lucrum cessans*, whereas if the formula now in article 44 was followed, *lucrum cessans* could be decided on a case-by-case basis.

13. Mr. HAFNER said the problem of legal impossibility was a genuine one. Under the primary rules of international law, States had to adopt certain types of legislation. But what happened if the parliament did not do so? Perhaps only compensation to the victim was then possible. Limitations on changes to legal regimes certainly existed: a supreme court decision could not be overturned, for example, and restitution in such cases was truly impossible.

14. Mr. SIMMA, illustrating the difficulties involved in the idea of legal impossibility, gave the example of a parliament that enacted legislation found to be in breach of international law, which the Government tried in vain to have repealed. In other words, an international legal prescription shifted to an executive branch which was unable to induce parliament to do what was necessary to effect a return to legality. That, however, was not the way a State should be viewed for the purposes of State responsibility. It should rather be seen as a "black box", and no governmental organ should be able to escape the duty to rectify any violation of international law that might occur.

15. On the subject of supreme court decisions that could not be overturned, according to a decision by the Supreme Court of Greece, the Federal Republic of Germany, as the successor State to the Third Reich, did not enjoy immunity for crimes against humanity committed in Greece during the Second World War.³ More than 50 million German marks were to be paid to the claimants if forcible execution involving State property in Greece was to be avoided. The Federal Republic of Germany considered that the decision was not in conformity with international law on sovereign immunity. But what could a country do when it considered that a final judgement, not subject to appeal, was illegal? Pay first and then claim compensation for damages? Surely that bordered on the absurd.

16. Mr. GAJA said that, although there might be no legal remedy within the domestic system for a final judgement not subject to appeal, that did not mean the domestic legal situation could not be changed. Reversal of the results of judgements had occurred on issues concerning international law in various countries. A series of bilateral agreements on judicial or arbitral settlement concluded between the two world wars had contained clauses designed to avoid a reversal of final judgements. This confirms that an obligation to reverse judgements could otherwise result from the application of international law. There was no such thing as legal, as opposed to material, impossibility: the only possible exception might be the very marginal case that an obligation under international law needed to be breached in order to achieve restitution. From the practical point of view, material impossibility was the only thing with which the Commission should be concerned. Difficulties under internal law could only be one of the various elements to be taken into account in deciding whether restitution or compensation was appropriate.

17. He took issue with another point made by Mr. Simma. Even if, as had been agreed, the Commission was dealing only with relations between States, it could not ignore the reality that lay behind any infringement of the State's rights that affected an individual. It could not solve the problem with an escape clause like the one described by Mr. Simma. It had to consider in depth the matter of who could invoke responsibility and who could make the choice between compensation and restitution. It must bring in the individual, even though it was only considering the individual's role in the context of inter-State relations.

18. Mr. PAMBOU-TCHIVOUNDA said the difficulties involved in drafting article 44 were understandable in view of its objective: to cover any and all economically assessable damage. Mr. Simma seemed to take a minimalist approach to such assessment, construing it as relating solely to material, as opposed to moral, damage. He did not agree with that approach and preferred the position taken by the Commission in adopting the draft articles on first reading, namely, that any damage could lend itself to compensation and financial assessment. That position was borne out by case law as well; judges or arbitrators had ruled that financial compensation or indemnification was payable for moral damage.

19. Mr. GOCO said the phrase "economically assessable damage" had to refer to damage that could be assessed from the pecuniary standpoint. Some damages were incapable of pecuniary estimation, however. Punitive damages, for example, fell into an entirely different category.

20. Mr. KABATSI asked for clarification as to what happened if, under the separation of State powers, a piece of legislation sailed through parliament and subsequently constituted the basis for a wrongful act. Compensation could be paid, but the wrongful act might be perpetuated if the executive branch was unable to do away with the legislation involved. In such circumstances, compensation would not provide a meaningful remedy.

21. Mr. ECONOMIDES said that the Commission would have to decide whether it supported the principle cited by Mr. Simma that loss of profits must be compensated in all cases or whether it would adopt the approach suggested by the Special Rapporteur, whereby loss of profits should be evaluated on a case-by-case basis. He was inclined to the latter approach. If adopted, however, the principle—and any exceptions thereto—should be spelled out in the draft articles themselves. The commentary should be used to explain the reasoning behind both the principle and the exceptions. With regard to the possibility of execution, and any material or legal impediments thereto, in his view "material impossibility" should be given an extensive interpretation; it should include any legal obstacles arising out of internal law. As for the question of separation of powers, it was a concept that applied only to internal, not to international, law. The State was responsible for the actions of its executive, legislative and judicial arms. The case referred to by Mr. Simma came into that category.

22. Mr. CRAWFORD (Special Rapporteur) said the discussion had confirmed his suspicion that the Drafting Committee should reconsider article 42, paragraph 4, as adopted on first reading, namely the affirmation of the underlying principle that a State should not rely on its internal law as an excuse for not fulfilling its international obligations. It could not claim that its legislation could not be changed if international law required a change. In principle, international law should prevail. In practice, it was indeed easier to change legislation in some countries than in others, but the Commission could not legislate with that consideration in mind. He was therefore wary of the phrase "legal impossibility", which could be a way of reintroducing a revision of the basic principle he had mentioned earlier. Sometimes, however, the relevant legal position had changed, resulting in actual impossibility. For example, property seized from one person could not be restored if it had already been validly sold to another. The situation was more complicated where the rights of an individual were involved and international law acted as a sort of secondary standard, as it did in the human rights field. For instance a legal system existing in accordance with the requirements of international law might yet fail in an individual case. There might be international legal constraints on reconstructing the system; but in any case the individual problem remained. Article 41 of the European Convention on Human Rights addressed the problem by giving preference to compensation over restitution, although whether that constituted *lex specialis* was

³ See I. Bantekas, "Prefecture of Voioitia v. Federal Republic of Germany", *AJIL*, vol. 92, No. 4 (October 1998), p. 765.

an open question. He broadly concurred with the interpretation of “material impossibility” put forward by Mr. Economides: he was unhappy with the potential for a false dichotomy between material and legal impossibility.

23. Mr. PAMBOU-TCHIVOUNDA expressed concern at the Special Rapporteur’s approach to the respective roles of the author of the internationally wrongful act and the injured State in relation to forms of reparation. He still preferred the wording of article 43 as adopted on first reading, which had placed the emphasis on the right of the injured State to determine the question of international obligations, in the sense of identifying the State responsible. The draft articles relating to forms of reparation, in the version proposed by the Special Rapporteur, endorsed the cardinal principle embodied in the *Chorzów Factory* case, but that approach was excessively academic. A more practical line would have been more effective.

24. It was right that, in its new form, article 43 was not restricted to restitution in kind. The problem was that restitution implied a transfer in time and space; yet, within those parameters, there was no certainty that territory, for example, retained its original qualities. The issue was particularly germane on a day when the Middle East peace process was due to continue with a discussion of the future of the Golan Heights. Restitution in kind should therefore be seen in relative terms. It was also important to establish the scope of restitution. For example, the question arose as to whether “material damage” included moral damage. Article 43, as adopted on first reading, was not particularly illuminating on that point. Indeed, the very word “restitution” was not necessarily appropriate. In some instances, “restoration” or even “reparation” would be more precise. The terminology in the draft article was too vague. It failed to cover all possible ramifications and thus undermined the point of the article.

25. Article 44 proposed by the Special Rapporteur raised fewer concerns. He queried only the use of the phrase “economically assessable damage”, given that many of the activities that had given rise to the arbitration of the 1970s and 1980s—with the exception of those relating to hydrocarbons or nationalization—did not fall into that category. Removing the reference to the “injured State” was a logical progression from the text adopted on first reading. Equally, any reference to restitution in kind would have considerably reduced the specificity of compensation as a form of reparation. It was better not to specify the form of compensation involved; otherwise, it would need to be similarly specified in every other relevant article. Lastly, with regard to the suggestion by Mr. Economides, he thought that article 44 should include a reference, in general terms, to loss of profits and to interest.

26. Mr. ADDO said that the purpose of restitution in kind was to re-establish the situation which had existed before the internationally wrongful act or omission had taken place. Tribunals invariably took into consideration the practical difficulties involved, however, and, where appropriate, opted for monetary compensation. ICJ was vested with the same discretion under Article 36, paragraph 2, of its Statute. Restitution in kind had not commonly been awarded in recent times, although in the *Temple of Preah Vihear* case the Court had ordered Thailand to return all of the sculptures and other items that had

been removed from the Temple. In his view, restitution should be retained in the draft articles as the basic form of reparation. He endorsed the reformulation of article 43 by the Special Rapporteur, including the deletion of subparagraph (b)—which was unnecessary—and subparagraph (d), the provisions of which were adequately covered by subparagraph (c). He also endorsed, so cogent was the Special Rapporteur’s reasoning, the single paragraph proposal for article 44.

27. He was concerned, however, about the proper measure of compensation, which article 44 did not address. The issue had been a fertile source of conflict between developing nations and the industrialized countries of the West. The classic Western position was the Hull formula of “prompt, adequate and effective compensation”.⁴ In other words, there should be payment for the full value of the property, usually the “fair market value”, where that could be determined, taking into account the “going concern value”, if any. Compensation was to be based on value at the time of taking and it should be made in convertible currency, without restrictions on repatriation.

28. The foreign exchange implications of that formula, however, would virtually impose an embargo on any significant restructuring of the economy by a developing country that faced balance-of-payments difficulties. In the case of his own country, the Hull formula would have prevented Ghana from participating in the extractive industry in 1973 until it could mobilize enough foreign exchange resources to ensure immediate repatriation of the entire compensation payable to the mining and timber companies. Obviously, however, if Ghana had had such surplus foreign exchange, most probably it would not have been anxious to participate in the industry.

29. In his opinion, a newly independent African Government should not be required to pay the fair market value for a mine acquired by a metropolitan company at little or no cost under the protection of the imperial Power. He questioned the very meaning of “fair market price” in those circumstances, taking into account the inordinately high returns over as much as 50 or 100 years from a resource that had been exploited for a nominal consideration. He also questioned whether the liberal concessions granted to a company in colonial days should be ignored when the current market value was computed or, indeed, whether a market value existed at all. A good example was whether the Government of Ghana, in 1972, should have paid Lonrho (London and Rhodesia Mining and Land Company) compensation fully reflecting the soaring gold prices, in respect of the Ashanti goldfields which had been exploited by British concerns since 1892 under highly liberal concession terms.

30. Those were not merely rhetorical questions. Current international practice revealed that considerable inroads had been made into the traditional formulation. Moreover, in paragraph 4 of General Assembly resolution 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources, the Assembly had prescribed the

⁴ See G. H. Hackworth, *Digest of International Law* (Washington, D.C., United States Government Printing Office, 1942), vol. III, p. 659.

payment of “appropriate compensation” in the event of nationalization, expropriation or requisitioning. The term “appropriate” was a significant departure from the phrase “prompt, adequate and effective”, although the Assembly had failed to define it. The Charter of Economic Rights and Duties of States⁵ had also stipulated “appropriate compensation” (chap. II, art. 2 (c)) but had dropped all references to international law in that regard.

31. In raising the issue he was not proposing a more detailed formulation of the principle of compensation in the text of article 44. He trusted, however, that the Special Rapporteur would consider the issue when he came to the more discursive treatment in the commentary. All concerns should be taken into account in developing the law. Doubts that the Hull formula reflected customary international law were to be found even among Western jurists, including Schachter⁶ and the late Sir Hersch Lauterpacht, one-time member of the Commission, who had written of the matter in 1948. The relevant passage was to be found in Oppenheim.⁷

32. Mr. PELLET said that Mr. Addo was correct in every way, except that the concerns that he had raised did not relate to the contents of article 44. Nationalization was a lawful act, whereas article 44 dealt with internationally wrongful acts. Compensation for nationalization was therefore irrelevant. The Special Rapporteur had added to the confusion with his long footnote, concerning nationalization, to paragraph 158 of his report.

33. Mr. BROWNLIE said that even those who did not agree with Mr. Addo’s account of the law would admit that Governments such as that of Ghana faced serious problems in dealing with the standard formula. He reiterated his view that much depended on the context of an act. Thus, nationalization in connection with economic restructuring was quite different from expropriation or confiscation that formed part of a policy of racial discrimination or ethnic cleansing. The Commission must guard against perpetrating excessive generalizations. He would add that Lauterpacht had expressed his opinion as early as 1936.

34. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Pellet. Indeed, paragraph 158 of his report specifically stated that it was not the Commission’s function to develop the substantive distinction between lawful and unlawful takings or to specify the content of any primary obligation. His reason for including the footnote was to take account of the substantial literature on the issue. Secondly, he would point out that expropriated property did sometimes have to be valued in the context of State responsibility, as demonstrated by the *Chorzów Factory* case.

35. Mr. LUKASHUK commended the third report, which like its predecessor was solidly based on the provisions of international law, mostly “hard” law. Its realistic

approach was admirable, providing a proper reflection of existing law. The Special Rapporteur had been right to avoid excessive detail, especially where the relevant provisions were not fully reflected in domestic legislation. The Commission could take considerable credit for formulating the law of State responsibility; indeed, he understood that the latest edition of Mr. Brownlie’s course on international law included a chapter on the topic. The Commission must, however, press on with its work and fulfil its mandate by completing its second reading at its next session. State responsibility was a crucial issue, yet different States had different interests, as could be seen even with the Commission. If the Commission accepted the approach proposed by the Special Rapporteur, the draft articles would be accepted all the more readily by Governments.

36. Turning to specifics, he said that the new title of chapter II, “The forms of reparation”, clearly and concisely reflected the substance. On the other hand, it seemed that in many cases the concept of responsibility was implied rather than clearly spelled out in the draft articles. Such was the case in articles 43 and 44. Article 43, for example, would be improved if it was redrafted to read: “A State which is responsible” (or “A State which bears responsibility”) “for the commission of an internationally wrongful act is obliged to make restitution in kind.” It could be objected that such a reformulation added little to the actual content of the article. However, it must be borne in mind that law was a strict logical system. Thus, in certain circumstances the absence of any reference to responsibility might have adverse legal consequences. Furthermore, the obligation to provide compensation arose directly not from the wrongful act but from the legal relationship of responsibility. Such was the legal construction and it should not be overlooked.

37. He favoured the deletion of article 43, subparagraph (b), concerning peremptory norms. As the comments by Governments confirmed, such questions were resolved by the general rules of international law. Article 43, subparagraph (d), also, was better omitted, as it was of too general a character and could be interpreted extremely broadly so as to avoid triggering responsibility.

38. As for the correlation between the concepts of cessation and restitution, to describe cessation as “restitution of performance” was not quite correct. Cessation of the wrongful act was the first and often the most important obligation, sometimes more important than compensation. Thus, cessation must be given its due place in the draft, as Mr. Kabatsi had already pointed out.

39. He was in favour of a general and flexible formulation of article 44, as proposed by the Special Rapporteur. At the same time, he had some doubts about the comments on article 43, which appeared to separate the topics of diplomatic protection and responsibility. In paragraph 158 of the report, the Special Rapporteur rightly pointed out that diplomatic protection was a topic within the general field of responsibility. That should be explicitly spelled out in the draft, thereby emphasizing the link between the two topics. He also wished to emphasize that point because, as others had observed, the problem of State responsibility in connection with violations of the rights of natural and legal persons was not reflected

⁵ General Assembly resolution 3281 (XXIX) of 12 December 1974.

⁶ See O. Schachter, “Compensation for Expropriation”, AJIL, vol. 78, No. 1 (January 1984), p. 121.

⁷ See L. Oppenheim, *International Law: A Treatise*, 8th ed., H. Lauterpacht, ed. (London, Longmans, Green, 1955), vol. I, *Peace*, p. 352.

clearly enough in the draft articles. It was a matter of fundamental importance to which the Special Rapporteur should devote more attention. That being said, articles 43 and 44 could, in his view, now be referred to the Drafting Committee.

40. Mr. PELLET said that, by and large, Part One of the draft, and also chapter I of Part Two, had required only minor adjustments. Matters were very different when it came to chapter II of Part Two. As adopted on first reading, that chapter was barely more than an outline, and an unconvincing one at that. He had mixed feelings, not only about the changes proposed by the Special Rapporteur, but also, more generally, about the whole approach adopted. The superficial, albeit necessary, tidying up of Part One had been legitimate, but was altogether more debatable when it came to the substance of the topic, addressed in Part Two. That was particularly true in the case of article 44, on compensation, which was largely devoid of content, though admittedly currently complemented by article 45 bis, on interest.

41. He was well aware that the Special Rapporteur was working under pressure to meet the rigid deadlines the Commission had set itself. Nonetheless, he seriously wondered whether the Commission was right to agree to the “homeopathic” approach proposed by the Special Rapporteur. He was not calling the Special Rapporteur’s work into question: it was the basis on which that work was conducted that he was criticizing. In his view, it was not possible to improve a bad set of draft articles without subjecting them to thoroughgoing reconsideration. While it was not for him to put himself in the place of the Special Rapporteur, he would attempt to outline the main features of such a reconsideration, which it was still not too late to carry out.

42. The starting point for any in-depth consideration of the forms of reparation—a title that might, incidentally, be better formulated as “Forms and modalities of reparation”—should be article 42 as adopted on first reading, or article 37 bis as proposed in the report. Reparation must be full, and must wipe out all the consequences of the internationally wrongful act. Where a State had committed an internationally wrongful act, it was responsible and it must make reparation for the harmful consequences of the breach of international law. Yet many of the provisions adopted on first reading, and of those now proposed by the Special Rapporteur—which, he conceded, represented some slight improvement on the previous draft—appeared to be designed to protect the interests, not of the injured State, but of the responsible State. Why, for example, was it necessary to specify in article 45, paragraph 4, that satisfaction “should not take a form humiliating to the responsible State”? Quite apart from the fact that a conditional tense was never entirely convincing in a legal text, he saw no need to avoid humiliating a responsible State that had itself humiliated the injured State. The requirement of proportionality was alone sufficient, and there was no need for the additional stipulation, which fell wide of the mark.

43. It was very disappointing that the Special Rapporteur confined himself to referring only cursorily, in paragraph 125 of his report, to the fundamental question whether restitution in kind should re-establish the situation

that had existed before the commission of the wrongful act, or the situation that would have existed if the wrongful act had not been committed. As Mr. Simma had stressed, that question was linked to another fundamental issue not addressed in the report, namely, whether compensation should be made for *lucrum cessans*. While that problem had not truly been resolved by article 44, paragraph 2, adopted on first reading, at least that provision had had the merit of drawing attention to the problem, whereas the new formulation of article 44 proposed by the Special Rapporteur made absolutely no reference to it. His own first impression was that, pursuant to the principle of full reparation already adopted by the Commission, what should be re-established was the situation that would have existed if the internationally wrongful act had not been committed, and that compensation should be made for *lucrum cessans*. Those, however, were not the solutions currently reflected in the draft articles.

44. The second discussion missing was, obviously, the discussion of crimes. Regrettably, the Special Rapporteur had in that regard learned nothing from the unfortunate example of his predecessor, Mr. Arangio-Ruiz, who had postponed a debate on that question until the eleventh hour. The result had been a muddle, which had led the Commission to include in the part referring to delicts consequences that it would have been wiser to reserve for crimes, thereby depriving articles 51 to 53, on the consequences of crimes, of much of what might otherwise have been their substance. The Special Rapporteur was now following the same road, which would surely lead to the same impasse. Yet the concept of crimes still lurked in paragraph 126 of the report, in which the Special Rapporteur was compelled to draw a distinction between acts contrary to a simple rule of international law and a breach of a peremptory norm of general international law—a distinction which constituted perhaps an acceptable definition of “crime”. A State could waive restitution in the first case, but not in the second. That was just one of a number of consequences of the distinction between crimes and delicts, as the Special Rapporteur appeared to acknowledge. But, because that fundamental question had not been settled, the draft articles made not the slightest allusion thereto, and indeed, the deletion of former article 43, subparagraph (b) was actually a step backwards. That provision should be retained, but relocated in article 44, so as to stress that in no case could compensation be used as a means to buy off the consequences of a crime.

45. The concept of crimes was also detectable in article 45, paragraph 3 (b), as proposed by the Special Rapporteur. In paragraph 174 of the report the Special Rapporteur cited at length the convincing views of the Czech Republic on the problem. Subsequently, in paragraph 190, he imperturbably stated, without discussion, that there was no authority and very little justification for the award of punitive damages. Yet article 45, paragraph 3 (b), still provided for “damages reflecting the gravity of the injury”, while eliminating the proviso referring to “gross infringement of the rights of the injured State”.

46. In response to a point of order raised by Mr. CRAWFORD (Special Rapporteur), the CHAIRMAN requested Mr. Pellet, in the interests of concluding consideration of articles 43 and 44 for referral to the Drafting

Committee that same day, to confine his remarks at the current meeting to those two articles.

47. Mr. PELLET said the point he had wished to make was that, by stubbornly refusing to enter into a debate on crimes, the Special Rapporteur was preventing the Commission from engaging in a global consideration of the question of reparation. Provision should have been made for a general debate on articles 43, 44, 45, 45 bis and 46 bis as a cluster.

48. Like Mr. Hafner, he was surprised that, apart from the plural “those” to be found in article 43, subparagraph (c), there was no reflection whatsoever in the draft articles of the Special Rapporteur’s important views on the question of the injured State. That omission constituted a third missed opportunity. In his view, the Special Rapporteur had accorded too much deference to the existing draft articles, thereby failing to propose the sort of radical recasting that was called for. In any case, the Drafting Committee must examine articles 43, 44 and 45 in the light of its decisions on article 40 and the new definition of the injured State and of the injury.

49. In general, then, the Special Rapporteur’s proposed new articles differed little from the articles adopted on first reading, and when they did so it was not always in the right direction. Thus, in article 43, which he wished to address in detail, he was not sure that the new title “Restitution” was an improvement on “Restitution in kind”. A better option, acceptable both in French and in English, might be “*Restitutio in integrum*”, a perfect reflection of the intended meaning. Moreover, in the French the expression *est obligé de* should be replaced by *a l’obligation de*, and the bizarre expression “make restitution, that is, to” omitted in both languages. More importantly, as Mr. Lukashuk had pointed out, it would be sufficient to begin articles 43, 44 and 45 with the expression “the State responsible”, for the State obliged to make reparation was not necessarily the State that had committed the internationally wrongful act.

50. Furthermore, he wished to reiterate that he was not ready to accept without more convincing explanations, that the purpose of the restitution was to re-establish the situation that had existed prior to the commission of the wrongful act. If restitution was to be *in integrum*, it seemed, at least a priori, much more logical to reconstitute what would have happened in the interim if the wrongful act had not been committed. In that regard, the commentary to the draft article adopted on first reading⁸ cited in paragraph 125 of the third report was astoundingly confusing because it lumped together two fundamentally distinct approaches.

51. On article 43, subparagraph (a), he agreed with Mr. Simma and took issue with Mr. Economides and the Special Rapporteur. Contrary to what was sometimes asserted, internal law was never and should not be a pretext for refusing restitution and thus did not constitute a case of material impossibility.

52. He had no other problem with article 43, subparagraph (a), nor with the proposed deletion of subparagraph (b), provided it was spelled out somewhere in the draft, and not just in the commentary, that if a crime had been committed, or in other terms, a norm of *jus cogens* had been violated, restitution could not be waived in favour of compensation. There was an excellent reason for the preference accorded by international law to restitution, namely, that it must not be possible to buy off a breach of international law; nor should the injured State be entitled to waive reparation in favour of compensation when the vital interests of the international community as a whole were at stake. Lastly, he had no problem with subparagraph (c) and the deletion of subparagraph (d).

53. Article 44 was, in effect, a “non-article”, which, as amended, had even less substance than the corresponding provision adopted on first reading. Now that its paragraph 2 had been deleted, little substance remained, other than the priority accorded to restitution in the last phrase, i.e. “to the extent that such damage is not made good by restitution”. Like Mr. Economides and Mr. He, however, he felt that the point should be made much more clearly. He also had doubts about the use of the word “economically”: “financially” would be a better term, as the damage needed to be evaluated in financial and monetary terms. Mr. Hafner appeared to believe that “economically assessable damage” amounted to material damage—which was true of direct immediate damage to the State. However, Aristotle’s maxim that “money is the common measure of valuable things” was also applicable to moral damage suffered by individuals, as was clearly established in constant jurisprudence since the “*Lusitania*” case of 1923. Those points should be spelled out in article 44. As it stood, the article was little more than a *chapeau* for a much more detailed article that remained to be drafted, and which would come to grips with the problems posed.

54. He had carefully read the Special Rapporteur’s arguments in support of his “minimalist” or “homeopathic” approach, but remained convinced that it was the task of the Commission to provide States and the courts with guidelines with regard to compensation, as had been clearly requested by a number of States—a point conceded in paragraph 150 of the report. In paragraphs 154 to 160, the Special Rapporteur invoked two main arguments in favour of a minimalist approach: first, that little settled practice existed, and secondly, the fact that Governments often settled matters amicably. He noted, however, that in the *Gab Ž kovo-Nagyvaros Project* case, ICJ had taken no position on the question of compensation, merely encouraging the parties to settle matters amicably. Such settlements did not always result in full reparation, contrary to the basic principles of international law, for the simple reason that non-legal considerations intervened. Regardless of the draft’s future form, the rules it set forth would always be residual in nature and could always be set aside by States in cases where they thought fit. That, however, did not relieve the Commission of its duty of codifying and progressively developing existing rules, especially where there was a need for such work and where the rules were not clear. He was in any case not sure that those rules were as unclear as the Special Rapporteur claimed, despite his reference to a work by

⁸ See the commentary to article 7 (*Yearbook ... 1993*, vol. II (Part Two), pp. 62–67).

Brownlie in a footnote to paragraph 159.⁹ Important work had been done on those rules, by Lillich, and in France by Personnaz between the wars, and more recently by Brigitte Stern. While it would not be possible to enter into much detail at the current late juncture, a middle way could nonetheless surely be found.

55. After the current text, which was merely the *chapeau* of what was necessary, at the very least five points should be made. First, it should state that compensation should constitute the effective equivalent of the damage sustained. That was the approach adopted in article 37 bis, and there was no reason not to proceed in the same way in article 43, as was already done in article 44. Secondly, it should be stated that compensation should compensate both material damage and moral damage when the moral damage was suffered by an individual. Thirdly, it should be stated that compensation must compensate *damnum emergens* and *lucrum cessans* at least when both were certain. The idea of certainty regarding damage should appear somewhere in article 43. Fourthly, it should be stated that only “transitive” damage—that which resulted from a necessary and certain link of causality with the internationally wrongful act—should be liable for compensation. Fifthly, it should be stated that the damage should be assessed on the date of commission of the internationally wrongful act subject to article 45 bis—which should perhaps come immediately after article 44. Those five points were the barest minimum without which the Commission would not be doing its job of progressive development and codification of international law.

56. Mr. GALICKI said he supported those who had spoken in favour of the term “*restitutio in integrum*”, rather than “restitution in kind”, because it was more applicable to the text of article 43. The formula covering exceptions to restitution was expressed in article 43, subparagraph (a), in the form of a double negative (“not materially impossible”), and in his view consideration should be given to reformulating it in an affirmative manner. Both points should be taken up by the Drafting Committee.

57. Mr. LUKASHUK said that, while sharing Mr. Pellet’s views regarding aggression and the incorporation of corresponding provisions, his own experience and experience of discussions in the Sixth Committee had shown that it was far from easy to reach agreement on questions of wrongful acts and that their consequences should be dealt with first, before reverting to the question of aggression. Mr. Pellet’s advice should not be followed, for as both he and the Special Rapporteur surely realized, it would be impossible to draft detailed provisions at the current stage.

58. Mr. ILLUECA said that in paragraph 146 of the report the Special Rapporteur proposed that article 43 should be couched in such a way that sections of the previous text were deleted. Basically, the Special Rapporteur equated restitution with re-establishment of the situation which existed before the wrongful act was committed, but the exceptions listed in article 43 detracted from the concept of *restitutio in integrum* referred to by Mr. Pellet.

In paragraph 128, the Special Rapporteur referred to the commentary justifying the four exceptions to restitution provided for in article 43 as adopted on first reading, and in that respect major concerns arose. The use of the phrase “not materially impossible” could give rise to a situation where the State responsible for the internationally wrongful act was presented with a situation in which restitution was materially impossible. It was essential to ensure that sound international legislation left no margin for the more powerful States to advance unilateral interpretations, such as arguing that, unfortunately, international obligations they wished to fulfil were not compatible with domestic criteria.

59. As to paragraph 128 (a) of the report, a situation could arise in which, for example, a State sustained damage of a very serious nature in parts of its territory as a result of an internationally wrongful act by a neighbouring State which had dumped toxic waste that had filtered down to the watertable; in such a case it was impossible to re-establish the situation which had existed previously.

60. In that connection, the Special Rapporteur and the Drafting Committee should bear in mind that material impossibility must not be allowed to mean that a state of affairs was to be perpetuated in which a part of a population was deprived of its fundamental human rights. It was essential to make clear in the commentaries that the phrase “not materially impossible” did not detract from the obligation of responsible States to eliminate all the consequences of the internationally wrongful act in question. It was a requirement for the protection of the fundamental human rights involved.

61. With reference to the question of proportionality between the onus to be sustained by the responsible State in order to provide restitution in kind and the benefit which the injured State would gain from obtaining reparation in that specific form rather than compensation, mentioned in paragraph 128 (c), he said that when dealing with restitution disproportionately onerous (para. 144 (c)) the Special Rapporteur had rightly stated that one useful clarification might be to stress that the notion of proportionality not only concerned cost and expense but also required that the significance of the gravity or otherwise of the breach be taken into account, for instance, if it involved the violation of fundamental human rights. In his opinion, articles 43 and 44 could be referred to the Drafting Committee.

62. Mr. HERDOCIA SACASA said that article 43 should certainly refer to *restitutio in integrum*, since no consequence of an internationally wrongful act could be more logical than restoration of the *status quo ante*. The form of reparation should be considered as an obligation upon the responsible State rather than as a right on the part of the injured State. As to the question of material impossibility, and the distinction sometimes drawn between material and juridical restitution, mentioned in paragraph 127 of the report, it ought to be possible for a commentary to address the question of legal impossibility, which was an entirely different matter. The general phrase employed in the *Chorzów Factory* case was that restitution should so far as possible wipe out all the consequences of the wrongful act, and he would point out that it was more general in application than if it had been

⁹ I. Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford, Clarendon Press, 1983), pp. 223–227.

confined to “material” or “legal” restitution. It was right to omit the exception regarding a breach of an obligation arising from a peremptory norm of general international law. It would be remembered that the draft formed an indissoluble whole, and it was unnecessary to reiterate principles already enunciated, in the current case in article 29 bis.

63. Commenting on the ruling of the Central American Court of Justice in the *El Salvador v. Nicaragua* case¹⁰ mentioned in paragraph 128 (b) of the report—and noting the error in the English text, which spoke of the “Inter-American” Court of Justice—he said the Court had avoided addressing the nullity of a treaty between Nicaragua and a third State (the United States) but had not considered that restitution was necessarily impossible. On the contrary, it had held that Nicaragua was obliged to use all means available under international law to restore and maintain the rule of law which had existed before the conclusion of the treaty. It should also be emphasized that it had not been a bilateral matter between Nicaragua and El Salvador; it had involved the 1907 General Treaty of Peace and Amity, a regional friendship treaty. Consideration might be given to a number of other very interesting cases upon which the Court had ruled, more particularly the *Nicaragua v. Honduras* case on 17 January 2000.

64. Finally, the third exception, concerning disproportionality, was absolutely necessary and encompassed subparagraph (d) of article 43 as adopted on first reading, regarding the jeopardizing of the political independence and economic stability of the author State. Subparagraph (d) could therefore be deleted, provided the commentary made clear that its provisions were covered by the principle of proportionality.

65. A proper balance had to be struck regarding article 44. It was necessary to ensure that as a minimum a general text addressing financially assessable economic injury and at least the commentary, if not the article, should be more comprehensive and explicit, extending to matters like loss of profits, interest, specific circumstances, moral and material damage and the concept of compensation.

66. Mr. CRAWFORD (Special Rapporteur) said he would perforce be brief, as it should be borne in mind that the aim was still to produce a complete text of the draft articles at the current session. If Mr. Pellet had expressed his views about article 44 and if they had been endorsed by the Commission at the end of the previous session, when there had been an opportunity, he himself might have spent more time formulating new articles rather than drafting a 20-page commentary.

67. The question of expropriation was predominantly a matter of the content of the primary obligation in the case of lawful expropriations, but there could be cases of unlawful expropriations where questions of valuation arose.

68. He agreed with those members who preferred the “responsible State” formula or some equivalent. The title of chapter II could include a reference to modalities,

although it had been his view that they were more a matter for Part Two bis. What was involved was the basic forms of reparation, in other words the content, so far as the responsible State was concerned, of the basic obligation set out in chapter I.

69. With regard to article 43, Mr. Brownlie had made the very serious point that the extent of the obligation of restitution depended on the primary rules at stake. Those primary rules were not merely passengers on the vehicle of the secondary rules of responsibility. The debate had demonstrated the differences of approach between those in the common law tradition and those in the civil law tradition. Primary rules did matter, and that point had been raised by the exception which Mr. Momtaz had proposed to replace subparagraph (b). It involved the question of the role of the rules of law as a basis for non-restitution, and there had been general agreement that, provided it was made clear that article 29 bis applied to Part Two, subparagraph (b) was unnecessary. There were also situations where restitution was obviously inappropriate, without the need to go so far as to say that the relevant rules were rules of *jus cogens*. The real question was whether it was possible to formulate such matters in language which did not create more problems than it resolved. Mr. Momtaz’s formula seemed to do just that, and in particular raised the spectre of States arguing that restitution was impossible for them for legal reasons of their own, and hence they would not undertake it. Those legal reasons did not constitute justifications as a matter of international law, but it was clear that the primary rules of international law could come into play at that stage. It was for the Drafting Committee to consider whether a formula existed to resolve such problems.

70. As to the question of the narrow as opposed to the broad conception of restitution, he was unabashedly in favour of the narrow conception in the context of article 43. The *Chorzów Factory* dictum was about reparation in the general sense, and was therefore about *restitutio in integrum* in the general sense; it was not about restitution in the article 43 sense, which had already been excluded by the time PCIJ had issued its dictum because it had been disavowed by Germany, as the Court had recorded at an earlier phase of the case. The issue had simply not arisen: general reparation must be full, as was already stated in chapter I. If restitution was not addressed in its narrow conception a completely intolerable overlap would occur between article 43 and other forms of reparation. Despite some ambiguity in the second report of the previous Special Rapporteur,¹¹ the Commission had been very clear on first reading in adopting the narrow conception, and it had not been criticized for that by Governments. The broad conception of reparation was that contained in chapter I, and it must be full. He agreed with everything Mr. Pellet had said about full reparation as long as it was understood in that way.

71. Mr. Economides and Mr. Pambou-Tchivounda had raised the question as to whom restitution should be made. The problem was that an attempt was being made to cover a whole range of situations, and to some extent it was necessary to be proleptic in looking at the articles

¹⁰ See AJIL, vol. 11 (1917), p. 674.

¹¹ See 2634th meeting, footnote 5.

concerned because it was clear from the debate on article 40 what lay ahead. The articles had to be drafted so that they could be invoked by the injured State in a bilateral context, by one of several States injured in a multilateral context, or indeed by States which were in the position of Ethiopia and Liberia in the *South West Africa* case. Restitution could be sought by different States, and compensation could be sought on behalf of a variety of interests. The continued tendency to treat everything as if it was bilateral lay at the heart of the restructuring of Part Two. Mr. Pellet had accused him of not taking the detail of article 44 sufficiently seriously, but the issue was still open and if the Commission wished he would be happy to propose more detailed articles dealing with more specific issues at the next session.

72. The point was that each of the articles could be invoked by different States. If Germany, having won the *Chorzów Factory* case had then sought double recovery because money had already been paid to the factory owners, that would have been excluded. It was essential to take account of the different legal relations involved, including legal relations with non-State entities. It was not possible to reduce everything to the State-to-State bilateral context. If there was any virtue in his third report, it was in the re-conception of responsibility in that multi-layered way, which was the only way to achieve a responsive, modern conception of responsibility.

73. In terms of the formulation of restitution, Mr. Economides had agreed with him that the words “in kind” were unnecessary, but that was a matter for the Drafting Committee. Personally, he was irrevocably opposed to introducing Latin into the draft articles. Efforts should always be made to find vernacular expressions, and reference to a dead language in order to paper over difficulties could not be tolerated.

74. On the question of *lucrum cessans*, loss of profits, there was a majority view in the Commission that the reference to it should be reintroduced. However, the difficulty with that in regard to article 44 was that it decodified the existing law on loss of profits. If the Commission thought that the reference should indeed be reintroduced, then a further article was required. He had sought to address the various issues involved by means of the commentary, drafted with considerable effort. The issues would also be raised in connection with article 45 bis, and, they could be dealt with when that article came to be discussed. His own strong preference was to retain the separate identity of article 45 bis and not to subsume it into article 44. The tendency to subsume everything into article 44, which had certainly been evident on first reading, was one of the reasons why only general formulations were possible. A specific formulation on interest was possible, and a specific treatment of loss of profits might also be possible. Neither of them, however, should involve vague formulations in general articles that were quite different in scope.

75. It was perfectly plain that article 44 covered moral damage to individuals, whereas what was called moral damage to States was intended to be dealt with in article 45. The use of the term “moral damage” was itself confusing for reasons he explained in relation to article 45. The content of the position should be made clear, and

questionable terms like “moral” should be left to the commentaries.

76. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer draft articles 43 and 44 to the Drafting Committee.

It was so agreed.

77. Mr. ROSENSTOCK, speaking on a point of order, asked whether the specific proposals made by Mr. Economides in relation to articles 43 and 44 would also be forwarded to the Drafting Committee.

78. The CHAIRMAN said that indeed they would. Furthermore, several members had refrained from speaking in the debate on the understanding that they would make their views known in the Drafting Committee.

The meeting rose at 1.15 p.m.

2638th MEETING

Wednesday, 12 July 2000, at 10 a.m.

Chairman: Mr. Peter TOMKA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to continue its consideration of articles 45, 45 bis and 46 bis proposed by the Special Rapporteur in chapter I, section B, of his third report (A/CN.4/507 and Add.1–4).

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

2. Mr. HAFNER said that he would devote the first part of his statement to article 45, which he saw as the thorniest of the draft articles. He endorsed the proposal to replace “moral damage” by “non-material injury”, not only for the reasons given by the Special Rapporteur, but also because the adjective “moral” seemed to connote the concept of morality. Satisfaction was designed to cover all damage that could not be covered either by reparation or by compensation and thus certainly involved more than a breach of morality. On the other hand, it was clear that even loss of life could give rise to the duty of compensation rather than of satisfaction. Thus, when, during an official hunting party in the then Yugoslavia, the Austrian ambassador had accidentally killed the French ambassador, his widow had sued the Austrian State, seeking financial compensation. The Austrian courts had precisely calculated the losses suffered. The amount paid would certainly constitute compensation, not satisfaction. What, in such a context, should be covered by satisfaction would be reparation for the moral or emotional damage caused by the loss. Incidentally, he saw no reason why paragraph 1 should refer to the injury “occasioned” by the act, rather than “caused”, the formulation used in the other articles.

3. Generally, he considered that the list of measures enumerated in paragraph 3 should be non-exhaustive. He was not convinced that acknowledgement of the breach must be the first step, unless the injured State insisted on that form of satisfaction. It was often very important for the wrongdoing State to save face, for instance, by expressing its regret without expressly acknowledging the breach. In such a situation the question whether an internationally wrongful act had or had not been committed remained pending, but a court to which the victim might subsequently have recourse would have to recognize that expression of regret as part of the satisfaction offered by the other State. On the other hand, the victim was certainly entitled to declare itself satisfied only in certain circumstances, which could include explicit acknowledgement of the breach.

4. As to nominal damages, there was no need to include them in the article in view of the non-exhaustive nature of the list and the rather exceptional nature of the case. As to punitive damages, it must be acknowledged that they were not recognized in international law. In that connection it might be interesting to refer to great philosophers such as Kant, who had rejected the concept of punitive damages because they could exist only in a system based on subordination, whereas international law was governed by the principle of equality.

5. Paragraph 3 (b) referred to “damages reflecting the gravity of the injury”, an expression that gave rise to some problems. The text implied that those damages were a component of full reparation, in other words, that they were necessary in order to eliminate all the consequences of the wrongful act. The expression “gravity of the injury” could be interpreted in two ways: it might refer either to the gravity of the wrongful act or to the gravity of the harm suffered. Normal usage seemed to favour the first sense, in which case the question arose whether elimination of all the consequences of the wrongful act was the real purpose of damages of that kind, since it could be inferred from the text that the extent of the consequences of the wrongful act depended on the gravity of the offence. Hence, it

was not the damage suffered by the victim that determined the consequences of the wrongful act, but the wrongful act itself and the circumstances in which it had been committed.

6. If the word “gravity” was taken in the second sense, that of the gravity of the damage suffered by the victim, one might ask what circumstances defined that gravity. The determining factor could not be the amount of the damage, since that aspect was already covered by the definition of reparation, which was to re-establish the situation which had existed before the wrongful act was committed. Hence, the gravity could be defined only on the basis of a subjective assessment by the victim, who might be tempted to make exorbitant claims, the justification for which could not be assessed in the absence of an appropriate procedure for so doing. Did the gravity of the injury depend, then, on the particular nature of the primary rule breached or on the manner in which the wrongful act had been committed?

7. It seemed preferable to restrict the scope of damages to cases of “gross infringement of the rights of the injured State”, the formulation used in article 45, paragraph 2 (c), as adopted on first reading. In paragraph 191 of his report, the Special Rapporteur explained his reasons for excluding that restriction, but it would be interesting to know why damages had been awarded in the cases he had cited: was it because of the gravity of the injury or for some other reason? There were also cases where the damages awarded, while not nominal, had also not been excessive. Yet the formulation proposed established no quantitative limitation and gave the impression that damages could always be claimed and were subject only to a general limitation. He would thus prefer a tighter formulation of that provision.

8. Paragraph 3 (c) raised the question of the meaning of the expression “serious misconduct”. Whether a State initiated proceedings against one of its officials only in cases of serious misconduct or also in cases of, for example, negligence would depend on its internal law. As the introductory phrase of the paragraph restricted its scope to cases where “circumstances so require”, the adjective “serious” could be deleted. Moreover, if the primary rule already required action to be taken against State officials in cases of misconduct, that qualifier would encroach on the primary rule.

9. As to article 45, paragraph 4, the words “should not” needed to be taken as not necessarily excluding humiliating acts, for instance, where the initial wrongful act had itself been extremely humiliating. Furthermore, the very act of acknowledging the breach might be considered as humiliating by certain States and it must thus be clearly indicated that the rule in paragraph 4 must not be understood as applicable *in extenso*.

10. Turning to the other proposed articles, he said that interest, dealt with in article 45 bis, might be regarded as already covered by the duty to compensate in respect of *lucrum cessans* under article 44. Accordingly, that provision could be dispensed with. If there was nevertheless a need to refer explicitly to interest, one could delete the second sentence of paragraph 1, and also the whole of

paragraph 2, whose content was already covered by the concept of full compensation.

11. Article 46 bis was based on two ideas, contributory fault and the duty to mitigate the damage. With regard to the former, he wondered to what extent article 27, on aid or assistance, applied to the situation envisaged. It could be argued that the State contributing to the damage within the meaning of article 46 bis, subparagraph (a), was in the situation of a State aiding or assisting another State in the commission of a wrongful act as envisaged in article 27. It could of course also be argued that the victim State could not commit a wrongful act against itself; but, as formulated, article 27 did not require the contributing State to have committed an independent delict; it spoke only of a fiction. It could also be argued, to the contrary, that article 46 bis referred only to a contribution to the damage, and not to a contribution to the wrongful act. Some clarification in that regard would be helpful.

12. The reference to different degrees of fault, or to *mens rea*, raised another problem: would “negligence” refer only to gross negligence or also to slight negligence? That concept was referred to in the Convention on International Liability for Damage Caused by Space Objects. In his view, only “gross” negligence or serious misconduct could be regarded as limiting the extent of reparation.

13. The second issue addressed in that article was certainly connected with the first. It was to be noted that subparagraph (a) referred to “any State, person or entity”, whereas subparagraph (b) referred, according to paragraph 222 of the report, only to the injured State. Thus, if a private company suffered an injury, could one not proceed from the assumption that it had taken measures to mitigate the damage? Of course, it could be argued that one could not impose a duty on private entities; however, neither ICJ in the *Gabčikovo-Nagymaros Project* case nor subparagraph (b) presupposed a legal duty to mitigate the damage: the subparagraph simply stated that account must be taken of whether measures to mitigate the damage had been taken. What was the reason for that different approach?

14. The economic calculation entailed by such a rule had the result that, if a wrongful act had caused damage and the victim State had taken protective measures, that State was entitled to full reparation, including, it was to be hoped, the cost of those measures. Where it had taken no such measures, its entitlement to reparation would be reduced. Consequently, each and every State must always reckon with the possibility that a wrongful act might be committed and must take precautionary measures against that eventuality. In the worst case, a State would be obliged to maintain an army in order to defend itself and to make use of it, for, if the aggressor State met with no resistance, the State attacked could not demand full reparation. In his view, the duty to take mitigating measures applied only in the field of environmental law. It could be deduced from the primary rules and there was no need to include it in the general context of that provision.

15. Lastly, the question arose whether conditions for mitigation of responsibility also applied to restitution. If so, the object of the restitution could be restricted. Would it then be for the wrongdoing State to decide on the extent of the restitution?

16. Mr. GAJA noted that, whereas the responsible State was “obliged to make restitution” and “obliged to compensate” in articles 43 and 44, respectively, under article 45 it was obliged simply to “offer” satisfaction for any non-material injury occasioned. That concept of “offering” was probably due to the perception that satisfaction could hardly be defined in the abstract. Admittedly, the other terms were also vague: the word “restitution” covered a concept that was to some extent controversial, but which implied re-establishment of the situation existing before the commission of the wrongful act; and the word “compensation” was not fully defined either, but always implied the payment of a sum of money. “Satisfaction” was much vaguer because its modalities could be very heterogeneous. Moreover, the wrongdoing State would generally be reluctant to give satisfaction, unless it was certain that to do so would settle a claim against it.

17. Generally, satisfaction was given only on the basis of an agreement specifying the form it would take. Examples of the various possible modalities could be given in the commentary. If that course were to be adopted, the drafting of article 45 could be greatly simplified, so as to read: “The wrongdoing State has a duty to give satisfaction. The specific modalities of satisfaction are to be agreed by the States concerned”. It would then be easier to include in the concept of satisfaction the case of a declaration of wrongfulness made by judgement of an international court or by an arbitral award. That type of reparation, to which the Special Rapporteur drew attention in paragraphs 183 to 185 of his report, had been awarded also by the International Tribunal for the Law of the Sea in *The M.V. “Saiga” (No. 2)* judgement. The agreement of the parties could be to the effect of empowering a tribunal to define what form reparation, if any, should take. In way of satisfaction, the tribunal might order disciplinary action to be taken against the State officials guilty of misconduct or decide that the mere fact that it had found that a wrongful act had been committed constituted sufficient satisfaction. That case would be much more difficult to comprehend if the idea that satisfaction must be “offered” by the wrongdoing State was retained.

18. Mr. GOCO said that he wondered why Mr. Hafner endorsed the Special Rapporteur’s wish to replace the term “moral damage” by the term “non-material injury”. The concept of moral damage existed in internal law, where it gave rise to no confusion.

19. Referring to the version of article 45 adopted on first reading, he said it was his understanding that satisfaction was by definition necessary in order for full reparation to be made. Yet it seemed that reparation could follow the claim for satisfaction: for instance, the aborigines of Australia had requested the Australian head of Government to apologize to their people for its past actions. The head of State was refusing to apologize, apparently for fear that an official expression of apology might result in an inundation of claims for reparation.

20. Mr. CRAWFORD (Special Rapporteur) replied that the “moral damage” provided for in some internal legislation was already covered by article 44: compensation could make reparation for pain and suffering to individuals. Using the same term in a different sense in article 45 would give rise to confusion. The latter article was

concerned with the very vague concept of *injuria*, namely, harm that was not readily economically assessable. One of the experts in that field, Dominicé, also proposed the term “non-material injury”.³

21. As for the requirement to offer apologies, that was a very well attested concept. In paragraph 2, the requirement was qualified by the proviso “as appropriate”. It would be rather odd if a State that had obtained restitution and compensation were also to demand satisfaction and, having not obtained it, were to take countermeasures.

22. Mr. Gaja had made an interesting proposal which would make it possible to include the role of an international court or international arbitral award in the context of satisfaction. But the Commission could not formulate its draft articles from the perspective of an international court because it could not assume that such a court would one day exist. If one could be sure of that, many of the drafting difficulties would disappear, for instance, with regard to the calculation of interest.

23. Mr. HAFNER, responding to Mr. Goco’s remarks, said that the law also used the term “moral person”, without any confusion arising. That being said, in addition to the reasons given by the Special Rapporteur to justify the choice of the term “non-material”, it had also to be borne in mind that the proposed change allowed for a symmetrical contrast between article 44, concerning material injury, and article 45, concerning non-material injury. That format made it very clear that the two forms of reparation, namely, compensation and satisfaction, did not overlap.

24. Mr. PELLET, continuing with the general comments he had begun to make (2637th meeting) about the approach adopted by the Special Rapporteur, said he thought that the idea of deferring the discussion on crime or at least its conclusion would not only complicate the Commission’s life and work but could also place the Special Rapporteur in the same position as his predecessor, namely, discovering too late that certain phenomena he had found anomalous could be explained by bringing in the notion of crime. Thus, while the victim State usually had a choice between *restitutio in integrum* and compensation, that choice no longer existed when the internationally wrongful act constituted a crime, i.e. at least a breach of a peremptory norm of general international law, because it could not refrain alone from applying a norm that the international community as a whole was concerned to see respected. Moreover, the Czech Republic, cited in paragraph 174 of the report, had rightly suggested in connection with paragraph 2 (c) of article 45 adopted on first reading (which had become paragraph 3 (b) in the text proposed by the Special Rapporteur) that damages on a more than nominal scale were conceivable in the case of crimes, but not in the case of lesser offences (*délits*) or mere internationally wrongful acts.⁴ It was for that reason too that he was opposed to the deletion of the reference to the gravity of the infringement, a step that he feared was due to the Special Rapporteur’s opposition to the notion of a crime rather than to any rational considerations. Paragraph 2 (d) of article 45 adopted on first reading, which had become

paragraph 3 (c) of proposed new article 45, would have benefited from consideration in the light of the notion of a State “crime” and it would have been instructive to draw a parallel between “the serious misconduct of officials or ... the criminal conduct of any person” and article 19, on crimes, and to examine the possible relationship between the two—or three—concepts involved. He stressed that the other general comments he had made (*ibid.*) were also applicable to article 45, above all the idea that the Commission should adopt as a guiding principle and an iron law the need for full reparation, i.e. that, on the one hand, the damage caused by the internationally wrongful act must be fully repaired and, on the other, that the reparation should not exceed the actual compensation for the damage.

25. Given his views on those points, he had serious reservations about both the old version of article 45 and the new version proposed by the Special Rapporteur.

26. The wording of paragraph 1 should clearly be brought into line with the drafting changes to be made to the articles on *restitutio in integrum* and compensation. In particular, the term “non-material injury” was unconvincing for two reasons. First, while the term “moral damage—or injury” was well established, that of “non-material injury” was considerably more innovative, although it meant exactly the same thing. What the Special Rapporteur was referring to—and he agreed with him in substance—was the moral damage suffered directly or immediately by the State itself as opposed to the moral damage suffered by its nationals on behalf of whom it exercised diplomatic protection. The problem—and the second point on which he disagreed with the proposed wording—was that it omitted the crucial detail that the purpose—and doubtless the sole purpose—of satisfaction was to repair the moral damage suffered by the State itself. In a footnote to paragraph 181 of the report, the Special Rapporteur mentioned that he had taken the term “non-material injury” from an article by Dominicé. After thinking that it might be sufficient to reflect that detail in article 45, paragraph 1, by referring to the “moral injury suffered by the State”, he agreed that it failed to solve the problem because, when a State exercised diplomatic protection “on behalf of one of its own”, it was supposed to be exercising its own right. The notion of “immediate moral damage”—a familiar term in French legal scholarship—should perhaps therefore be included in paragraph 1, with a definition in the commentary. In any case, it was a detail that could not be omitted.

27. Turning to paragraph 2, he said that the expression “In the first place” was totally redundant. He also had serious reservations about the use of the conditional “*devrait prendre*” in a legal text. As a declaration was, in his view, the minimum form of satisfaction, the precautionary use of the conditional was uncalled for. On the other hand, he agreed with the Special Rapporteur that a court’s findings of wrongfulness should not be mentioned, not so much for the reasons set forth in paragraphs 183 and 184 of the report as for that contained in paragraph 185, namely, that the Commission’s draft articles concerned relations between States and not the powers of international tribunals and arbitrators. And it was just as unnecessary, in his view, to mention declaratory judgments as it was to mention judicial or arbitral awards of

³ See 2635th meeting, footnote 3.

⁴ See 2613th meeting, footnote 3.

compensation. Lastly, he expressed disapproval of the expression “as appropriate”, which he was inclined to view as a means of evading the issues, but he was willing to accept it if the Commission did not wish to be more precise and if the “cases” referred to were explained in the commentary and illustrated by examples.

28. He had five comments to make on paragraph 3. First, the phrase “where circumstances so require” could be criticized on the same grounds as “as appropriate” because what was interesting and useful for States, courts and arbitrators to know was in precisely what cases and circumstances a particular step should be taken, but there again he was willing to accept the phrase if the omissions were partly offset in the commentary. Secondly, he approved of the renewed reference to “full reparation” in the *chapeau* of paragraph 3. Thirdly, the words “inter alia” duplicated, to say the least, the words *telles que* in the French version and “including” in the English version.

29. Fourthly, while admitting, in principle, that damages could replace satisfaction, he strongly disagreed with the Special Rapporteur’s analysis of damages. On the one hand, damages could not be anything but nominal (it being understood that their symbolic nature could be modified) in cases where there had been no crime; however, if punitive or aggravated damages, i.e. not purely nominal damages (a subtle difference that did not exist in civil law), were acceptable, the only possible ground for such acceptance was the commission of a crime. While that therefore constituted one of the consequences of a crime that should be added to article 52, it had no place in article 45. He rejected the idea that a State could be “punished” in such a way for a “mere” infringement of international law because he was still convinced that the notion of fault was out of place in the international law of responsibility save in cases of crime. In other words, aggravated or non-nominal damages were acceptable only in cases of “gross infringement”—a term that the Special Rapporteur unfortunately proposed to delete—of a rule of fundamental importance, not only for the injured State, but also for the international community as a whole, i.e. what was called—or what should be called—a crime, constituting, in fact, one of its consequences. Furthermore, the damages reflected the gravity of the infringement because the latter could be assessed in financial terms, so that what was involved was no longer satisfaction, but compensation. It followed that, in the case of the first two subparagraphs of paragraph 3, he was in favour of retaining subparagraph (a) on nominal damages and of deleting subparagraph (b) from article 45 and transferring it to the chapter on the consequences of crimes, i.e. the consequences of gross infringements of rules of fundamental importance for the international community as a whole.

30. Fifthly, subparagraph (c) seemed somewhat inconsequential, despite the existence of precedents such as in the case of the “*Rainbow Warrior*”, and gave rise to many problems. Thus, if breaches were not due to the serious misconduct of persons acting in their official capacity, they did not entail State responsibility and therefore had no place in the draft articles. On the other hand, if they were committed by persons acting in their official capacity, it could be asked whether such “transparency” of the State was appropriate. In his view, an affirmative answer could be given only in the case of an international crime and the

question of State transparency should therefore be addressed in the chapter on crimes or any equivalent concept. In any case, subparagraph (c) could be omitted from article 45, especially if the list in paragraph 3 was not exhaustive.

31. With regard to paragraph 4, the principle of proportionality obviously presented no problem, but he thought that, as it did not relate specifically to satisfaction, it might be placed more appropriately either in article 37 bis or in the overall *chapeau* of chapter II. At all events, he restated his opposition to the last phrase of paragraph 4 because he saw no reason to show consideration for the dignity of a State that had humiliated another State. In any case, the types of satisfaction mentioned in paragraphs 2 and 3 were in no way “humiliating”: in the case of a State, it was only a matter of acknowledging that it had failed to respect a rule of international law—a failure that could perhaps be described as “humiliating” rather than its acknowledgement.

32. As to article 45 bis, on interest, first of all, he agreed in principle that an article on the subject should be included in the draft articles. Moreover, he noted that the Special Rapporteur, after observing that the rules of positive law were vague, proceeded undeterred to sketch at least a few broad guidelines that represented a solid advance compared with the silence of the existing draft articles. He had adopted a slightly different approach, however, to compound interest. No matter how cautious previous judicial opinion had been on that score, if compound interest was necessary for full reparation, there was no reason to rule it out and the commentary should adopt a less negative approach to the issue.

33. As to the actual wording of article 45 bis, he was surprised at the complication introduced by the phrase “on any principal sum payable under these draft articles”. Surely it would be far simpler to speak of the compensation due, where appropriate, under article 44. Although no such statement was made in the report, the Special Rapporteur seemed to think that the “principal sums payable” included both compensation in terms of article 44 and damages in terms of article 45. But as damages should only be nominal, as already noted, save in the case of a crime, they should not lead to the payment of interest. Moreover, as damages always consisted of a lump sum, they could not give rise to the payment of interest save in the case of moratory interest, which the Special Rapporteur proposed to omit. He therefore suggested that article 45 bis should become article 44 bis and deal only with interest due on compensation payable under article 44. Furthermore, the Drafting Committee should reconsider the wording of the second sentence of paragraph 1, which contained an idea that seemed to be sound.

34. The first phrase of paragraph 2, which read “[u]nless otherwise agreed or decided” was unnecessary because it was a precaution applicable to all the provisions of chapter II and indeed to the whole of the draft articles. Introducing the phrase in that context rather than elsewhere might encourage inappropriate arguments *a contrario*.

35. The remainder of paragraph 2 seemed clear in terms of fixing the *dies ad quem*, but unclear in terms of the *dies*

a quo because the French and English versions diverged, although both drafts had the status of original texts. The French version was difficult to understand, but once the meaning was grasped, the underlying idea seemed preferable to that expressed in the English version, whose surface simplicity seemed to be due to an error. It was unsatisfactory to say “interest runs from the date when compensation should have been paid” because that was the regime applicable to moratory interest, which the Special Rapporteur had rightly excluded on the grounds that it was a matter of international procedure and hence outside the scope of the law of responsibility. In practice, interest seemed to be payable from the date of the wrongful act or, more precisely, from the date on which the damage had occurred or, even more precisely, from the date with effect from which the compensation no longer fully covered the damage; that was certainly the idea underlying the French text, although it was poorly formulated.

36. In the French version of article 46 bis, he proposed adding the word *de* after the word *ou* in subparagraph (a) so as not to give the impression that the negligence must be deliberate. Secondly, he asked for assurance that subparagraph (a) included, but was not limited to, the “clean hands” principle because he was puzzled by the fact that there was no mention of the principle in the brief introductory section.

37. With regard to subparagraph (b), he wondered whether it implied that the victim State had a duty to mitigate the damage. The reply to that question had major practical implications which would have to be specified, preferably in the article itself, at least by allusion, rather than in the commentary. An affirmative reply would mean that a State that had been in a position to mitigate the damage and had not done so should be penalized in terms of reparation; a negative reply would risk encouraging States to pursue the worst possible policies to achieve their aims. In that connection, the pleadings in the *Gab Ž kovo-Nagy-nyaros Project* case before ICJ, especially that of Sir Arthur Watts, contained interesting developments. In his view, there was scope for progressive development in that area; the Commission could and should adopt a stance on the matter. At all events, the question was on the table, as indicated in paragraph 222 of the report, which failed to provide a clear answer, and the commentary ought to adopt a less enigmatic approach.

38. Mr. CRAWFORD (Special Rapporteur) acknowledged that the definition of the *dies a quo* in the French version of article 45 bis, paragraph 2, was unsatisfactory. It was a point that needed to be taken up later in the discussion. He also acknowledged the contradiction in the English version and noted that the word “compensation” in paragraph 2 should read “principal sum”. Although the principal sum on which interest was payable would normally be equivalent to compensation under article 44, circumstances could be envisaged in which that was not the case, but interest was nonetheless payable.

39. With regard to article 46 bis, subparagraph (a) was not limited to the “clean hands” doctrine. He thought that ICJ in the *Gab Ž kovo-Nagy-nyaros Project* case had established the “duty” to mitigate damage, in the paragraph of its judgment cited in paragraph 30 of the report. That stance provided authority for the proposition that it was

possible, in determining the amount of reparation, to take into account the question whether the injured State had taken reasonable action to mitigate the damage. Mr. Pellet’s comment on the policy of the worst possible scenario was certainly pertinent in that regard.

40. Mr. ADDO asked Mr. Pellet whether he thought that only nominal damages could be awarded in all cases involving satisfaction and, in particular, whether he viewed the US\$ 7 million that France had been required to pay into a fund in the “*Rainbow Warrior*” case as a nominal sum. Would he not consider that full reparation could include damages that were not necessarily nominal?

41. Mr. PELLET offered three explanations for the “*Rainbow Warrior*” case. First, the Secretary-General had not acted as an arbiter in the strict sense of the term, as he had merely proposed a solution that had been accepted. The outcome could therefore be viewed as an amicable settlement. Secondly, France had, after all, been guilty of a serious breach of a fundamental principle of international law that could be described as a crime. The third explanation, and the one he preferred, consisted in an affirmative reply to Mr. Addo’s question, namely, that there had been an award of nominal damages in the case in point, but on a substantial scale so that the symbolism struck home. It had actually been quite an exceptional settlement based on the understanding that the sum paid would be used to develop friendly relations between France and New Zealand. It was thus not a straightforward application of a rule of general international law, but an ad hoc settlement that was less embarrassing than Mr. Addo seemed to think.

42. Mr. ROSENSTOCK said he agreed with Mr. Pellet that the phrase “Unless otherwise agreed or decided” in paragraph 2 of proposed article 45 bis should be deleted. On the other hand, he was extremely puzzled by Mr. Pellet’s question and the Special Rapporteur’s reply about the date from which interest fell due. As he saw it, interest should fall due from the date on which the incident or damage had occurred and not from the date of the arbitral decision, which might be far removed in time from the former date.

43. Mr. CRAWFORD (Special Rapporteur) said that the wording “the principal sum should have been paid” had been used solely in order to allow some flexibility. The date on which damage had been caused could be later than that on which the breach had occurred. Various situations could arise in which a brief period elapsed and a certain amount of flexibility was discernible in court decisions. In principle, however, the decisive date was that on which the damage had occurred and certainly not that of the judgement.

44. With regard to nominal damages, he took it that Mr. Pellet used the word “symbolic” to mean “nominal” (a negligible sum) and not to mean “having the force of a symbol” because all satisfaction was by definition symbolic.

45. Mr. BROWNLIE said that the discussion of the problem of interest confirmed him in his view that it was unwise to generalize in the matter of remedies because all depended on the legal context. Once one entered into spe-

cifics, the rules of international law were set aside and replaced by the primary rules governing the payment of interest in specific cases.

46. Mr. ADDO said he inferred from Mr. Pellet's answer to his question that the words "where circumstances so require" and "as are appropriate" in article 45, paragraph 3, on satisfaction should be retained. But Mr. Pellet seemed to have previously suggested that they should be deleted.

47. Mr. PELLET said that he had not understood Mr. Addo's position on that point. With regard to Mr. Brownlie's point, it was all very well to oppose codification, but, if one decided to codify, it should be done on the basis of progressive development of international law. He thought that the extent of generalization in both article 45 and article 45 bis was very reasonable.

48. Replying to the Special Rapporteur, who seemed to imply that he was talking through his hat because he used the word "symbolic" to describe damages that were not nominal, he said that he was simply reading from the report. The Special Rapporteur did not draw a distinction between nominal damages and damages that would be more than nominal. He referred to nominal damages and there was no reason why the symbol should be expressed solely in nominal terms. If he had changed the report and jettisoned "symbolic" in favour of "nominal", he should let it be known so that the point could be discussed. He himself would not be in favour of dropping "symbolic" in favour of "nominal". In his view, it was not he who was playing with words, but the Special Rapporteur.

49. Mr. CRAWFORD (Special Rapporteur) recalled that it had not been possible on first reading to decide whether article 45, paragraph 3, should be inclusive, or not. On the basis that it was inclusive, nominal damages were clearly included in the damages reflecting the gravity of the injury and there was no need to retain paragraph 3 (a). If it was not inclusive, the position was different.

50. He was not trying to foist common law conceptions on the Commission in the field of State responsibility. He was simply recording the fact that the civil law Chairman of the Drafting Committee which had adopted article 45 had said that the article introduced the notion of exemplary damages. He himself had thus not done so and it was on record that paragraph 3 (b) was intended to deal with that question.

51. He invited the Commission to do away with all analogies with national law. The notion of moral damage of the State in international law was a rather problematic form of analogy. As it was formulated, article 45 brought out the fact that there were situations where it was necessary to express the gravity of a wrong. Those situations could not be artificially limited to grave breaches of obligations in international law. In the "*Rainbow Warrior*" case, which for him did not fall within the proper scope of article 19, there had been expressions of grave concern of that kind, as there had been in the "*I'm Alone*" and other cases. There was a function of satisfaction in that respect, and that was why paragraph 3 (b) was entirely appropriate. He would be dealing with the article 19 issue in chapter IV of his report. If article 19 were taken seriously, there was no alternative but to propose punitive damages for

breaches in that category. Paragraph 3 (b) did not concern punitive damages.

52. Mr. ECONOMIDES pointed out that, in his reply to Mr. Addo, Mr. Pellet had not ruled out the possibility of payment of punitive damages in the case which had been cited.

53. Mr. BROWNLIE said that, in his perception, article 45 contained three sectors which were not very happily related one to another. In the first place, paragraph 3, in his opinion, referred to the notion of reparation in its normal legal sense. Secondly, there was an element which, although important, belonged to the category of consequences of an internationally wrongful act, namely, paragraph 3 (c) and paragraph 2, which dealt with the topics of cessation and non-repetition and did not truly belong in that part of the draft. Lastly, there was an element of a political nature which dealt with apology.

54. Reference had been made by several members to the existence of two types of sources of law. The first was the law in operation in international courts governing State responsibility, and especially in the current context of remedies. The second was what might be called the political context, in which settlements were arranged between States without the intervention of a judicial process. The literature tended to mingle the two levels together. It simply adopted an empirical approach of looking at the sources of international law and treating the two areas as being the same. That might seem to be unthinking, but it was very difficult to find an alternative approach.

55. Listening to the Special Rapporteur and other members of the Commission, he had had the impression that the choice which the Commission had made—perhaps in a not very well thought out way—was that the judicial level of operation was too rarefied and that it was going to rely on diplomatic practice. That was a dangerous choice because it went without saying that it was precisely in the context of bilateral relations between States that the majority of differences were settled not by the application of precise legal rules, but by agreement or negotiation.

56. It seemed that there was an unfortunate overlap between the way the question of damages was dealt with in article 44 and its treatment in article 45. He did not understand why the notion of moral damage created so many problems. But that aspect of article 45 more properly belonged with compensation in article 44. As for punitive damages, that was a form of punishment reserved for weak States in bygone days. Logically, the article on satisfaction in its old sense should be removed and its various elements partitioned off between the articles on the consequences of an internationally wrongful act and the ordinary forms of reparation. Otherwise, one would be importing into a technical and legal draft a piece of historical baggage which had no business there.

57. In his experience, it was not the case that States customarily made apologies. In fact, they often regarded apologies that were freely given as an admission. As had been pointed out, apology often formed part of an overall deal where it was a subject of negotiation.

58. It might be worth making explicit the fact that satisfaction was not exclusive of other remedies, including

compensation. In fact, the content of article 45 was a rather unhappy melange of the law relating to the quantitative assessment of damage and measures of satisfaction in the strict sense. The latter, which really were a form of political punishment of States, were no longer current. In the last analysis, satisfaction could not be considered a normal form of reparation and it was possibly not a form of reparation at all.

59. Mr. CRAWFORD (Special Rapporteur) said it was obvious that States did not offer apologies in advance of a settlement because that would be an admission of liability. Satisfaction was constituted either by acceptance of the offer referred to in article 45, paragraph 1, which was taken as a final settlement of the issue, or by a judicial decision which was the surrogate for that offer. In that sense, he did not think he was expressing a point of view that was different from that expressed by Mr. Gaja.

60. Mr. PELLET said that he agreed with Mr. Brownlie about documentary sources and the fact that diplomatic practice was much less interesting than judicial practice. Clearly, the draft articles should not consist of proposing minor settlements between States, but of drawing up legal rules which applied in the absence of a settlement.

61. On the other hand, he had some difficulty in going along with the distinction Mr. Brownlie had made between old and new forms of satisfaction, between remedy in general and satisfaction in the strict sense, and especially the idea that satisfaction was not a normal form of reparation. On the contrary, satisfaction was an absolutely normal form of reparation and the fact that courts so decided and considered that a statement made by them constituted sufficient satisfaction bore that out. The finding of a court was a substitute for the absence of a spontaneous declaration on the part of the State.

62. In practice, it was not true to say that States did not make apologies. In the "*Rainbow Warrior*" case, France had made formal apologies in acknowledgement of its responsibility. There was therefore nothing obsolete about that. It was a modern and convincing form of reparation. In the case in question, New Zealand had had reparation for the moral aspect of the damage it had suffered.

63. Mr. DUGARD said that, like Mr. Pellet, he had been troubled by Mr. Brownlie's observation that States did not make apologies. In recent practice, there had been a number of cases in which States had apologized for their conduct, but without admitting having breached international law. The Rwandan genocide case was interesting in that respect. The United States had apologized not for having breached international law, but for having committed an error of judgement in its conduct in the Security Council. France had remained silent, probably because apologies would have been construed as an admission of responsibility in the affair.

64. Mr. BROWNLIE said that judicial declarations of responsibility constituted a form of satisfaction that was in a different category, and that gave rise to a difficulty which the Drafting Committee had encountered. It seemed that there was a missing remedy, which was declarations by way of injunction or otherwise of rights. The problem was that they were not accepted as a diplomatic form of reparation and there was to some extent a gap in the system.

Mr. Pellet's version of satisfaction was another example not of satisfaction, as envisaged in article 45, but of its judicial versions. It seemed that there was a divorce between the diplomatic and judicial levels of operation.

65. He had not said that States never made apologies. They did, but nearly always as part of a deal. Most measures of satisfaction taken recently had been part of a negotiated deal. In many cases where one might have thought that States would apologize, they had not done so.

66. Mr. SIMMA said that, in the *Paraguay v. United States* case, after Paraguay had submitted its memorandum to ICJ, the United States had issued an official, solemn apology and, a few weeks later, Paraguay had withdrawn its request. In another case, on which he could not go into detail because it was still pending, apologies had been issued without being part of a negotiated settlement.

67. Mr. CRAWFORD (Special Rapporteur) said that he was somewhat troubled by the distinction some were making between the diplomatic and legal spheres. He had tried to explain his position on the question in paragraph 240 of his report because the point related to certain questions about admissibility which had been raised in the context of chapter I of Part Two bis. International courts had a declaratory function and determined what the rights and obligations of the parties before them were and, although their decisions could have *res judicata* effect, it was not the courts which shaped legal relations between States; in the first place, international law applied directly to the relations between States. Although it was true that the focus of the draft articles was relations between States, the Commission was still concerned to determine the rules that were applicable to those relations. In other words, it was a question of specifying the legal relations upon which a court would be ruling in granting what would properly then be described as judicial remedies. The rules of responsibility could therefore not be formulated in terms of the powers of courts. That created a problem which Mr. Brownlie had called the "missing remedies", but he insisted that the problem had not passed him by, and that was why he had drawn a distinction between the "normal" method of satisfaction, i.e. the legal statement that a breach existed, and the forms referred to in article 45, paragraph 3, which were exceptional or at least unusual.

68. Mr. GOCO, returning to the question of apologies, said that States were most reticent in making them because there was the likelihood that they would be considered as an admission of guilt and would trigger the submission of a claim for reparation.

69. Mr. MOMTAZ asked Mr. Brownlie whether it was because the moral damage to a State was not identifiable that he considered that satisfaction was not a form of reparation.

70. Mr. BROWNLIE said he feared that Mr. Momtaz was a victim of the inherent confusion in article 45. With regard to damages or compensation in the legal context, he admitted that a State could suffer moral damage and the "*I'm Alone*" case was a good example of it in that there had been no threat of force to obtain compensation in reparation for the moral damage and no element of

power had intervened. That aspect of moral damage really belonged in article 44. But if one considered the standard cases of satisfaction, most of them were precisely intended to humiliate States and many of the historical examples would not satisfy the conditions laid down in article 45, paragraph 4. Furthermore, with regard to apologies, the question should be asked—and no one had yet done so—whether apologies were provided as a matter of *opinio juris*.

71. Mr. LUKASHUK, noting that article 45 was giving rise to an animated discussion and was provoking a number of criticisms, said that he shared most of the views that had been expressed about it. The article proposed by the Special Rapporteur did not sufficiently define the notion of satisfaction. It could be interpreted as stipulating that acknowledgement of a breach was essential only when there had been moral damage, whereas such acknowledgement was necessary in all cases because it was the first obligation that stemmed from responsibility. Furthermore, the proposed text seemed to associate moral damage with the existence of non-material damage, whereas any wrongful act, whether material or non-material, could cause moral damage. For those reasons, he proposed two variants for article 45, the first of which was of very general scope and covered all cases of satisfaction, while the second was limited to moral damage. They read:

“The State responsible for an internationally wrongful act having caused moral damage is obliged to offer satisfaction, that is, moral reparation.”

or

“In the case where an internationally wrongful act has caused only non-material damage, the State responsible for committing it is obliged to offer satisfaction, that is, moral reparation.”

72. Furthermore, like Mr. Pellet, he considered that the expression “moral damage” was preferable to the expression “non-material damage” because it was attested in many legal systems and also because the word “moral” defined the damage while “non-material”, which was a negative term, did not.

73. He considered that the provision on nominal damages could be retained.

74. As for the risk that the separation of powers, referred to in paragraph 192 of the report, might prevent an individual’s criminal responsibility from being engaged, the Commission had already debated the question, albeit in a different context, and had reached the conclusion that a State could not invoke domestic law in order to avoid its international obligations, particularly in the area of responsibility. In the current case, it would not be domestic law in general which would impede prosecution, but principles of criminal law such as *nulla poena sine lege*. That obstacle was not, however, insurmountable.

75. In conclusion, he considered that article 45 could be transmitted to the Drafting Committee.

76. Mr. ECONOMIDES said that article 45, paragraph 1, called for no particular comments apart from the one on form which he had already made on articles 43 and 44.

Article 45, paragraph 1, should therefore read: “The State responsible for an internationally wrongful act has the obligation to give satisfaction to make good the non-material/moral damage occasioned by that act”. Provisions must be worded in legal terms and there had to be a reference to an obligation and not to an offer which might or might not be accepted.

77. As for paragraphs 2 and 3, he did not think that it was necessary to distinguish between the statement of reparation and other forms of satisfaction. A single paragraph would suffice in which all forms of satisfaction would be mentioned in a non-exhaustive manner, beginning with acknowledgement of the breach. In the same way, Article 33 of the Charter of the United Nations, when it enumerated the modes of pacific settlement of international disputes, did not state that the parties must have recourse in the first instance to negotiation, even if in practice negotiation was in fact the first mode of settlement used. It could be indicated in the commentary to article 45 that acknowledgement of the breach was in general the first form of satisfaction. The proposed paragraph would begin with the following phrase, which resembled the phrase in the article adopted on first reading: “Satisfaction may take one or more of the following forms”, and would be followed by the enumeration of the various forms of satisfaction. He further considered that, in the current paragraph 2, the various forms of satisfaction should be presented separately and preceded by dashes. The solution he was proposing would also enable less frequent use to be made of expressions such as “as appropriate” and “where circumstances so require”, which made the text unnecessarily cumbersome.

78. As for nominal damages, he was not against their being mentioned in the draft even though their significance was very limited by virtue of the fact that the enumeration of forms of satisfaction was purely indicative. He did insist, however, that punitive damages should be set for grave breaches, particularly the international crimes covered by article 19. On that point, he shared the opinion of the Czech Republic, reproduced in paragraph 174 of the report, which stated that introducing the concept of punitive damages in the draft articles would make it possible to attribute to the regime of responsibility for “crimes” a valuable a priori deterrent function. As Mr. Pellet had said, the possibility of imposing punitive damages on States responsible for international crimes should be a specific consequence of the commission of such acts. He therefore proposed that paragraph 3 (b) should be amended to read: “For grave breaches, and particularly those covered by article 19, paragraph 2, damages reflecting the gravity of the infringement”. In that regard, reluctance about punitive damages was not really logical: if injured States were capable of seeing themselves awarded damages for moral damage, there was no reason why the guilty State would not be capable of paying punitive damages if it had committed very grave infringements. In order to be precise, the words “under its jurisdiction” should be added after the word “person” in paragraph 3 (c). Paragraph 4 should be strengthened by replacing the words “should not” by the words “must not”.

79. With regard to article 45 bis, he thought that the question of interest should be dealt with in article 44,

which should also mention loss of profits and compound interest.

80. Subparagraph (a) of article 46 bis should speak of “any injured State or any person or entity”; that was a purely drafting change. As for subparagraph (b), its current wording had a flaw in that it implied that reference was being made to deliberate negligence or omission.

81. Mr. CRAWFORD (Special Rapporteur) said that subparagraph (a) of article 46 bis referred to “any State” in order to cover situations in which another State acted on behalf of the injured State in the context of chapter II of Part Two bis.

The meeting rose at 1 p.m.

2639th MEETING

Thursday, 13 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited members to continue their consideration of articles 45, 45 bis and 46 bis, contained in chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

2. Mr. RODRÍGUEZ CEDEÑO, confining his remarks to article 45, said that the title should really be “Satisfaction in the context of the forms and modalities of reparation”. Expressing his general appreciation for the third report and acknowledging that article 45 was a complex provision, he said it was highly appropriate that paragraph 1 had been inverted, referring first to the obligation of the State which had committed an internationally wrongful act to offer satisfaction, rather than to the entitlement of the injured State to obtain satisfaction from the responsible State, formulated in the article adopted on first reading. The sense was not changed, but it brought the article into line with the articles on restitution and compensation. In general, paragraph 1 was acceptable, although in the Spanish version “injury” should be rendered by *perjuicio* rather than *daño*. The explanations given by the Special Rapporteur in paragraphs 180 and 181 of the report were convincing. The term “non-material injury” was broader and encompassed legal and moral and even political damage: in the decision in the “*Rainbow Warrior*” case, the tribunal had established non-material injury because it was considered that the honour, dignity and prestige of New Zealand had been harmed.

3. Paragraph 2 introduced useful elements for the definition of satisfaction, namely an acknowledgement of the breach and an expression of regret or a formal apology. Paragraphs 1 and 2 could be combined in order to provide a clearer and more precise draft, but, as far as the substance of paragraph 2 was concerned, an acknowledgement of the breach should not be interpreted in such a way as to exclude subsequent expression of regret or formal apology, although in the event of the latter taking place, such an acknowledgement would be implied and might therefore not prove necessary. Nevertheless, as the Special Rapporteur had proposed, both elements should be retained.

4. Like its predecessor, the new draft article proposed by the Special Rapporteur incorporated modalities, and paragraph 3 presented an exemplary, though not exhaustive, list. He welcomed the inclusion of the concept of “full reparation”, which should read *reparación íntegra* in Spanish, and was led to wonder whether satisfaction was autonomous or complementary to restitution and/or compensation. He believed it could be either. In the *Corfu Channel* case it was autonomous in that ICJ said that the statement by the United Kingdom regarding the action of its Navy constituted per se appropriate satisfaction. Satisfaction might be accompanied by or preceded by the payment of damages, even if there was no material damage, the whole being considered punitive. The paragraph covered that within the ambit of “full reparation”. He agreed with those members who had stated that the declaration acknowledging a breach should be incorporated in the relationship between States, but that did not mean that the judicial and arbitral declaration acknowledging the breach and the statement of reparations were not important, and did not have consequences of various kinds, including legal consequences. Statements by jurisdictional bodies should not be regarded as a substitute for those of the State committing the internationally wrongful act.

5. Paragraph 3 (a) should be kept as it was, the payment of nominal damages being a proper mode of satisfaction,

but paragraph 3 (b) gave rise to some doubts since determination of the gravity of an injury raised the issue of assessment and subjectivity, with the possibility that the content of satisfaction would vary and be less than precise. Paragraph 3 (c) was acceptable, especially with Mr. Economides' suggestion that reference be made to internal jurisdiction of States.

6. Paragraph 4 covered the same ground as paragraphs 2 (c) and 3 of the article adopted on first reading, and it should be made clear that the injured State could not require satisfaction when it was humiliating to the responsible State. Another term could perhaps be used to reflect the concept of impairment of dignity. In his opinion, the version adopted on first reading had been clearer in referring to the right of the injured State to obtain satisfaction not justifying demands which would impair the dignity of the responsible State. That principle should be retained in the proposed new text of the draft article.

7. Mr. DUGARD, congratulating the Special Rapporteur on an excellent report, said there was no reference to negligence as a form of misconduct either in the commentary to article 45 as adopted on first reading or in the comments by the Special Rapporteur on proposed new article 45, but he presumed that the word "misconduct" in paragraph 3 (c) did include negligence. In any event, the matter could be dealt with in the commentary, if it was not self-evident.

8. The reference to penal action in the same subparagraph was based on an article which had preceded recent developments in the field of international criminal law. It was important to take cognizance of those developments. To illustrate his point, he invited members to assume that the military dictatorship of a State was engaged in the torture of aliens belonging to another State in a discriminatory manner. The military dictatorship was then overthrown and replaced by a civilian Government that wished to make satisfaction for the moral damage suffered. The successor Government might decide to pay compensation for the suffering of the nationals in question or make some satisfaction for the moral damage suffered. The obvious satisfaction would take the form of prosecution of the torturers concerned, but that might be politically difficult for the new regime, which could be under pressure to grant an amnesty and it might prefer to send the persons concerned to an international criminal tribunal or to extradite them either to the claimant State or to another State which wished to exercise criminal jurisdiction. He proposed that a clause be added at the end of paragraph 3 (c) to the effect that the disciplinary or penal action should be taken by the respondent State itself or that there should be extradition to another State or transfer to an international criminal tribunal with jurisdiction. It was not a major change, but it would take account of developments in the field of international criminal law.

9. Mr. PAMBOU-TCHIVOUNDA said that the three new draft articles taken together posed problems in terms of their interrelationship and construction. Article 45 bis caused no great difficulties regarding substance, but it would be more consistent and rational for it to be placed immediately after the article on compensation, namely article 44.

10. As for article 45, his preference lay with the text adopted on first reading because it was clearer. The new version was richer but, for that very reason, had a basic fault resulting from the juxtaposition of quite different situations and hypotheses. The structure adopted on first reading was better because the emphasis was placed on the injured State both in the text itself and, more important, in the distribution of roles. The absence of any mention of the injured party until subparagraph (b) of article 46 bis caused him considerable anxiety. Such marked indifference to the main addressee should be made good, if only at the level of the Drafting Committee.

11. He wondered whether the term "non-material injury" in article 45 was received terminology and, in order to stay within the spirit of the text adopted on first reading, he would prefer the term "moral injury" or "moral damage".

12. As Mr. Economides had said, the *Chorzów Factory* case imposed an obligation to make reparation according to a specific modality, and the *chapeau* of the article should state the principle that the responsible State was required to provide satisfaction for an internationally wrongful act to the injured State. That principle would be better rendered by a text that was closer to article 45 as adopted on first reading.

13. He was also concerned by the fact that paragraph 2 was in the conditional, rather than present, tense. Paragraph 1 set out the principle affirmatively; paragraph 2 should likewise be in the present indicative.

14. As to the content of paragraph 2, the matter of acknowledgement of a breach was open to debate and polemic. In his opinion, attempting to clarify in the body of the text the distinction between a bilateral breach and intervention by a third body would have very little effect regarding acknowledgement of one of the modalities of satisfaction. Again, the use of the parenthetical "as appropriate", followed by two modalities of satisfaction posed a problem. He would wish to add a reference to nominal damages.

15. Paragraph 3 also involved some difficulties, such as removing the words "inter alia", but his main concern was that subparagraph (a) should be moved to paragraph 2. Subparagraph (b), subject to the agreement of the Special Rapporteur and the Drafting Committee, should be moved to article 44, for it related to damages that were economically assessable. On the other hand, it might form the subject of a specific provision concerning damages in terms of the gravity of the injury and also the different interests affected, including the interests of the international community as a whole.

16. Subparagraph (c) should also be deleted, but for a different reason: it addressed a problem that was properly the concern of domestic law, not international law. Essentially, it was for the wrongdoing State to cope with the misconduct of its officials. The efficacy of disciplinary or penal action in such instances was not within the ambit of international law. Penalties were not imposed in a vacuum: they were conditioned by the legal arsenal of the State concerned. In keeping with the primacy of international law over domestic law, international law

could not be concerned with the specific penalties in national legislation.

17. Paragraph 4 had provoked a storm of misplaced criticism. He was in favour of keeping it, provided the last part, namely, “in question and should not take a form humiliating to the responsible State”, was deleted or simply replaced by “caused to the injured State”. Humiliation was simply one of the disagreeable aspects of making reparation, along with payment of a debt.

18. In conclusion, he congratulated the Special Rapporteur on having proposed a very open formulation for satisfaction that the Drafting Committee could now reshape so as to emphasize the essential aspects.

19. Mr. HE said that satisfaction, covered in article 45, was an important and well-grounded form of reparation in international law. The proposed formulation of the article was richer and incorporated improvements on article 45 as adopted on first reading. However, a number of points could be made for further consideration.

20. The term “non-material injury” was acceptable as a substitute for “moral injury or damage”, but paragraph 1, the *chapeau* of article 45, seemed to have been drafted on the assumption that satisfaction was intended to cover only non-material damage. Satisfaction would not be applied in every case, but it should come into play in a great many instances of both material and non-material damage, in accordance with article 37 bis, which provided that satisfaction could be applied singly or in combination with other forms of reparation such as restitution and compensation. Thus, satisfaction could apply not only for non-material damage but also for other kinds of damage. Accordingly, the phrase “satisfaction for any non-material injury”, in article 45, paragraph 1, should be replaced by “satisfaction for the injury, including non-material injury” or “satisfaction for the injury, in particular non-material injury”.

21. He agreed with Mr. Economides that paragraphs 2 and 3 could be amalgamated. The new paragraph could start with the phrase “Satisfaction may take the form of one or more of the following to ensure full reparation:”. Subparagraph (a) would consist of the words “an apology”, to replace the bracketed phrase “nominal damages”, the award of which was very rare in modern practice. Subparagraphs (b) and (c) would remain unchanged, while paragraph 4 would be renumbered. It was an important provision, since there was no justification for the award of punitive damages in the absence of any special regime for their imposition.

22. The Special Rapporteur had proposed “inquiry” as part of the second tier of the forms of satisfaction. Since a proper inquiry into the causes of an accident causing injury was closely related to other forms of reparation such as compensation and disciplinary or penal action, inquiry might have a place in the article on satisfaction, or should at least be mentioned in the commentary.

23. The prevailing view regarding article 45 bis was that there should indeed be a separate article on interest. The article enunciated the general principle that interest on the principal sum must be paid in order to ensure full reparation. Although the date when interest payments must begin

was not specified, it was clearly indicated that the interest rate and modes of calculation should be the most suitable to achieve full reparation. The award of interest should cover loss of profits. In the commentary to article 44, quoted in paragraph 149 of the report, it was noted that the main objective was to avoid “double recovery”.³ In accordance with that stricture, the sum of the interest had to be limited to the equivalent of the loss of profits, and that point should be made in the commentary.

24. As to article 46 bis, mitigation of responsibility should indeed have its place in chapter II. Contributory fault was now generally recognized as being relevant to the determination of reparation such as that provided for in the Convention on International Liability for Damage caused by Space Objects. Again, under the general principle of international law relating to mitigation of damages, a State was not only permitted, but indeed obliged, to take reasonable steps to mitigate the loss, damage or injuries caused. Failure to mitigate could even preclude recovery, a point clearly made in the *Gabčovo-Nagymaros Project* case. The duty of an injured State to mitigate damage was not an independent obligation, but a limit on the damages which the injured State could claim. In that sense, article 46 bis contained some elements of progressive development. There could be no serious objection to its inclusion in the draft articles.

25. Mr. MOMTAZ said the controversy raised by article 45 stemmed from the fact that satisfaction, which was intended to compensate for or wipe out moral damage suffered by the injured State, was an institution to which States did not frequently have recourse. Practice and case law were not abundant in that domain, perhaps because honour and prestige, quintessential aspects of moral damage, were of lesser importance to States nowadays than their desire to expunge the material consequences of an internationally wrongful act of which they were the victims. Because satisfaction was not proving amenable to codification, the generally faithful picture of existing practice furnished by the Special Rapporteur was all the more welcome.

26. The first question that arose was whether legal rules on satisfaction really existed, whether the wrongdoing State really had an obligation to offer satisfaction to the injured State. In many cases, the wrongdoing State had no choice other than to present an apology, especially when the injured State was a powerful country. In such instances one might be tempted to speak of political opportuneness. Sometimes it was an agreement, tacit or otherwise, that gave rise to the apology by the wrongdoing State. Two examples frequently cited in the literature were the *Kellett* case, when a Vice-Consul General of the United States had been harassed by Siamese soldiers, and the more well known “*I’m Alone*” case. In both cases it had been agreed that apologies were owed to the injured State. That was why he tended to prefer the wording in article 45 adopted on first reading (“The injured State is entitled to obtain ... satisfaction”), rather than to the version proposed by the Special Rapporteur (“The State

³ See paragraph (27) of the commentary to article 8 (*Yearbook ... 1993*, vol. II (Part Two), pp. 75–76).

which has committed an internationally wrongful act is obliged to offer satisfaction”), as it was less binding.

27. As for the various forms of satisfaction, it was gratifying that the first, mentioned in paragraph 2 of the new article 45, was acknowledgement of the breach. It was in keeping with the ruling of ICJ in the *Corfu Channel* case to the effect that the acknowledgement itself was an appropriate form of satisfaction. Paragraph 2 went on to refer to the expression of regret or a formal apology. However, States were demanding such gestures much less frequently. For example, after the hostage incident with the Islamic Republic of Iran, a typical case of dishonour or moral injury for a State, the United States had not called for an apology. Another example was when an aeroplane of Iran’s national airline had been shot down. Iran had not called upon the United States for an apology, but it had requested that the commander of the warship which had done the shooting be subjected to disciplinary action by the American authorities. Excessive recourse under article 45, paragraph 3 (c), to disciplinary action as a type of satisfaction must nonetheless be prevented, as it might amount to interference in the internal affairs of the wrongdoing State. That was why the scope of the provision should perhaps be restricted solely to criminal acts of State agents. He endorsed the pertinent remarks made in that context by Mr. Pambou-Tchivounda.

28. He experienced serious doubts as to whether article 45, paragraph 3 (b), should be retained. Damages reflecting the gravity of the injury, which could be described as punitive damages, had not been designated as a form of satisfaction by the Institute of International Law in its draft on the subject in 1927.⁴ The simple acknowledgement of a breach and the accompanying publicity often constituted elements that were sufficiently punitive to preclude the need for any other punitive action. Diverging views had been expressed about whether satisfaction was compensatory or punitive in nature. He himself considered it to be compensatory. It would hardly be acceptable for an injured State, above and beyond the payment of material damages, to be able to demand an additional sum by way of satisfaction. The best course might be to delete paragraph 3 (b).

29. Paragraph 4 of new article 45 was a timely and acceptable provision which would counteract the imbalances that had often in the past enabled powerful States to impose humiliating forms of satisfaction on weaker ones, in violation of the dignity and equality of States.

30. Lastly, he wished to draw attention to an inaccuracy in a footnote to paragraph 206 of the report, where the reference to “Guardian Council” should be replaced by “Council of the Guardians of the Constitution”.

31. Mr. BROWNLIE said the comments he had heard reinforced his desire to see article 45 broken down into three sections. One section would be the article on compensation, reparation in the legal sense, damages being simply nothing more than quantum problems. Another section formed part of the consequences of an internation-

ally wrongful act: there was a strong relationship between paragraph 4 and the concepts of cessation and non-repetition. Finally, a section would be included on purely political measures such as requiring an apology. In that regard, he was not convinced that the practice relating to regrets and apologies had an *opinio juris* behind it.

32. Thanks to the statements made in the course of the meeting, he could now see that paragraph 3 (c) should be placed in the section on the consequences of an internationally wrongful act. Mr. He had been absolutely right to point out the need for an inquiry in that context. Cases of State responsibility as a result of negligence or breaches of international standards could occur without there clearly being any responsibility, let alone criminal responsibility, on the part of individual officials. Contrary to the interesting remark made by Mr. Dugard, in the case of international crimes, especially those that were the subject of multilateral conventions, there was an independent duty under international law to prosecute the individuals concerned.

33. Many of the steps taken by Western States in the late nineteenth century to impose indemnities and punish officials had had nothing to do with justice but had been aimed purely at political punishment and humiliation of the State through the requirement that its officials be punished even though they had not necessarily committed a crime. Such political vengeance was the subject of subparagraph (c), and more thought should be given to whether it was worthy of inclusion in the draft. The more acceptable parts of article 45, on the other hand, should be partitioned off to other articles.

34. The institution of State responsibility was like a classic vintage car, and rather than tinker with it, the Commission should give it a proper tune-up. More in-depth analysis was needed of both the issues and the literature.

35. Mr. KABATSI said that the third report of the Special Rapporteur would enable the Commission to improve greatly on its previous attempts at the codification and progressive development of the law on State responsibility. Further precision and clarity had been brought to a monumentally complex topic. He broadly welcomed the amendments suggested by the Special Rapporteur and other members over the past few days. Articles 45 bis and 46 bis presented no difficulties and should be referred to the Drafting Committee.

36. Article 45 was more problematic. In the first place, the term “satisfaction” was not defined within the context of the article. It was unclear whether it referred to contentment of the injured State, after the State responsible for the commission of the internationally wrongful act had paid full reparation, in the context of paragraph 3, acknowledged the breach and, where appropriate, expressed regret, or whether it could have other meanings. The word “restitution” had been defined in article 43 and a definition of “satisfaction” would also have been useful in the current instance. Regarding paragraph 1, he would have had no objection to the word “moral”, as opposed to “non-material”, but the latter was marginally better. It was also better to retain the word “occasioned” rather than “caused”, as suggested by some members. “Caused” to his mind implied *mens rea* or direct

⁴ Draft on “International responsibility of States for injuries on their territory to the person or property of foreigners” (*Yearbook* . . . 1956, vol. II, p. 227, document A/CN.4/96, annex 8).

wilfulness. Paragraph 3, subparagraphs (a) and (b), had given rise to considerable criticism, largely because the provisions therein might carry different meanings for different people. He was more concerned by the punitive import, especially in subparagraph (b). It might have been preferable to include it under article 19 and articles 51 and the following, as suggested by Mr. Pellet.

37. Although satisfaction was admittedly a long-established practice of States and resorted to by international courts as a remedy or form of reparation, it should be handled with great care to avoid adding any taint of humiliation to the facility of satisfaction. He was therefore strongly opposed to deleting the second half of paragraph 4, as some had suggested. Indeed, he concurred with Mr. Economides in the view that the word “should” ought to be replaced by “must” or “shall”; he himself favoured the latter. With the Special Rapporteur, he hoped that the days when the requirement to salute a foreign flag, as a form of satisfaction, were gone. Humiliation should be discouraged, even if it was by way of being a *quid pro quo*, since it would not restore public order or achieve reconciliation between States. Any such aggravation on the part of the responsible State would, in any case, have been adequately dealt with under the provisions of paragraph 3 (b), in the form of damages reflecting the gravity of the injury.

38. Mr. ROSENSTOCK said the only changes that he would favour to an excellent draft were largely of an editing nature or could be covered by suitable material in the commentary. The point that should dominate the draft articles—or at least Part Two—and the relevant commentary was that a State that had been injured by a wrongful act of another State was entitled to full reparation and to obtain it from the wrongdoing State. If the Commission failed to provide for compound interest from the date of the injury or lost profits, the wrongdoing State was benefited at the expense of the injured State. He did not advocate payment of interest on the capital and payment for lost profits in the same case, but no one had called for double recovery and there was no suggestion of such a provision in the text. The same did not, however, apply to the payment of moratory interest, for long delays could give rise to much suffering. In stipulating that satisfaction must be proportionate but should not take a humiliating form, the Commission risked being understood to say that, although the injured or victim State might have been humiliated, the sensibilities of the wrongdoing State must be safeguarded. It was, admittedly, hard to imagine a specific example of a situation in which such conditions would apply, but that should not affect concern for an injured State that had been humiliated and the potentially superior deterrent effect of a simple proportionality criterion.

39. With regard to article 45, he understood the desire of some members to change “offer” in paragraph 1 to “provide”, but questioned the advantage, since it was clear from the current text that the wrongdoing State was being obligated to offer satisfaction and the situation of a reasonable offer unreasonably rejected was clearly untenable. Perhaps the commentary was the place to deal with such an eventuality. As for the word “should” in paragraph 4, it was not unacceptable in context but he saw the value of avoiding its use. The rest of the draft article should be accepted as it stood. There was no need to create qualitative distinctions with no basis in positive law. He would

add that nineteenth-century instances of political vengeance did not invalidate paragraph 3 (c); they merely acted as a warning to avoid abuse.

40. The central thrust of article 45 bis was welcome. Some redrafting and some commentary were necessary if it was to be consistent with the fundamental function of Part Two, which was to ensure that the injured State was made whole, by the wrongdoing State. Article 46 bis, while in some ways an improvement on article 42, paragraph 2, as adopted on first reading, nonetheless raised various concerns relating to the possible—albeit unintended—mixing of the measure of damages with the primary rule establishing responsibility and the principle of *expressio unius est exclusio alterius*, which had been cited by the United Kingdom in its comments.⁵ He would not object to the deletion of the draft article and wondered whether anyone else would. Conversely, so long as the commentary made it clear that the point at issue was not the primary rules but a factor that might be taken into account in determining the magnitude of the damages owed, the draft article would not do irreparable harm. It was not totally unacceptable if its inclusion was important to other members of the Commission.

41. Mr. SIMMA said that the most important aspect of article 45 was the guiding principle according to which the injured State had a choice as to forms of satisfaction, which implied flexibility in accommodating the particular features of each case. In his view, however, there was a tension—far greater than in the other draft articles—between that principle and the hierarchy expressed in the text, particularly paragraph 2.

42. With reference to paragraph 1, he concurred with those who would replace “offer” by, for example, “provide”. The phrase “non-material injury” was an improvement on “moral damage”. On the other hand, the word “caused”, which had been used in the article adopted on first reading, was preferable to “occasioned”: it was surely right to show the causality between the harm inflicted and the breach. As for the word “obliged”, it stood in strange contrast to the other paragraphs of the article—especially paragraph 3—which were hedged about by so many provisos that there was a danger of vitiating the article’s intention.

43. The difficulties raised by paragraph 2 were more fundamental. He was concerned about the Special Rapporteur’s emphasis on the fact that a judicial pronouncement of illegality was the most natural form of satisfaction. As the phrase “in the first place” in paragraph 2 showed, the injured State’s first request, if a third party settlement procedure was available, would be a statement that international law had been breached. As paragraph 185 of the report showed, however, the Special Rapporteur recognized the rarity of such third party settlements and therefore advocated the replacement of a pronouncement by an acknowledgement of the breach. He nonetheless questioned whether acknowledgement really deserved its “first place”, at the State-to-State level. In practice, States tended not to rub salt into a wound. An acknowledgement might well be implied by an expres-

⁵ See 2613th meeting, footnote 3.

sion of regret or an apology. He noted that, by contrast, some States offered apologies freely, without acknowledging the breach, rather in the manner of an *ex gratia* payment. In yet other instances, apologies were offered to avoid any further consequences of a breach. For those reasons, he considered that paragraph 2 sat uneasily in article 45.

44. In addition, the Special Rapporteur seemed to have downgraded the status of apologies. In the draft adopted on first reading, apologies had figured as one, self-contained form of satisfaction. In the proposed new draft articles, they were mentioned only as possible accompaniments of an acknowledgement of a breach. The fact that apologies were historically charged—like those forced on China after the Boxer Rebellion—and had often been abused did not invalidate the remedy as such. In that context, he pointed out that it was not always weak States that apologized to powerful ones, as Mr. Momtaz had suggested. The United States had recently apologized, fully and unequivocally, to Paraguay.

45. With regard to paragraph 3, he agreed with Mr. Pellet that “damages reflecting the gravity of the injury” were particularly appropriate in relation to crimes. However, paragraph 3 (b) should not be restricted to crimes and should be retained unchanged, particularly if a case such as the “*Rainbow Warrior*” incident fell into the category of a crime, as Mr. Pellet seemed courageously to have suggested. In that connection, he noted that paragraph 170 of the report referred to former article 19, which he suggested was a case of wishful thinking.

46. With regard to paragraph 3 (c), it should be clarified that the criminal conduct of private persons related to State responsibility only qualify a State’s breach of the duty of prevention. Any penal action against private individuals was merely the belated performance of a primary obligation. As for paragraph 4, the proportionality of satisfaction was difficult to determine or implement. An extreme example had been the beheading of a Swiss citizen in the seventeenth century in front of the embassy whose Government he had criticized. He would strongly support replacing the word “should” by “shall”. The purpose of reparation, after all, was to establish a legal peace, yet humiliation might breed the conditions for a further breach.

47. As to article 45 bis and Mr. Hafner’s reference (2638th meeting) to the relationship between *lucrum cessans* and interest, that problem was under consideration by the Drafting Committee, which was pursuing a line of thought proposed by Mr. Pellet. He also agreed with Mr. Hafner that the second sentence of paragraph 1 was unnecessary and should be deleted. He would, however, retain paragraph 2, with the substitution of the phrase “principal sum” for “compensation”, as the Special Rapporteur had suggested.

48. With reference to article 46 bis, he recalled that Mr. Pellet had asked (ibid.) the Special Rapporteur whether subparagraph (a) was an aspect of “clean hands” and the answer had been in the negative. Nevertheless, the notion of “clean hands” was extremely unclear. If considered in its broadest sense as a number of connections between

graph (a) as an expression of the “clean hands” doctrine. In that context, even if one favoured the inclusion of fault in secondary rules, the reference to fault as a subjective element in subparagraph (a) should, in the interests of consistency, be excluded at the current stage of drafting, since, even in the context of subparagraph (a), it could be found within the primary rules.

49. As for mitigation, he saw no obligation to mitigate under article 46 bis, subparagraph (b), in the sense that if that obligation was violated, secondary rules applied and reparation had to be made. Rather, failure to mitigate should lead to a limitation on recoverable damages. The principle was an expression of good faith, or *venire contra factum proprium*.

50. Mr. BROWNLIE said, in response to the statements by Mr. Rosenstock and Mr. Simma, that his views on satisfaction could not be dismissed as being based on out-of-date history. Strange though it might seem, present texts on the subject, to which he himself referred on points of damages, had retained the mindset of the past. The matter presented a severe analytical and structural problem, which was particularly apparent in article 45, paragraph 3 (c). There was not necessarily a link between the existence of international responsibility and the consequence of a duty to make full reparation, on the one hand, and the trial of individuals for actions that might not constitute crimes, on the other. It was essential to think the problem through.

51. Mr. PELLET said he found Mr. Brownlie’s position intriguing. Apologies were by no means obsolete; they were in many instances an appropriate form of reparation and, as he and Mr. Simma had pointed out, continued to be made. As for the question of “clean hands”, he had found the Special Rapporteur’s reply to his question unconvincing. He had expected the Special Rapporteur to say that the general formula used was not confined to “clean hands” but covered the clean hands doctrine in the sense that, if a private individual had contributed to the damage, that contribution reduced the amount of the reparation. The point at issue, however, was mitigation of the reparation, not of the responsibility, which was still full responsibility.

52. Responding to a remark by Mr. Simma, he said he saw nothing courageous about a member adopting a severe stance vis-à-vis the country of which he was a national. Members were independent of their Governments, and he for one had nothing to fear from his own administration. That being said, he wished to clarify the remarks he had made regarding the “*Rainbow Warrior*” case (ibid.). In response to a remark by Mr. Addo, he had said that there were three possible interpretations of the payment of a relatively substantial sum by France to New Zealand in connection with that case. The payment could be regarded as a token payment; as the consequence of a crime; or—his preferred interpretation—as an ad hoc diplomatic arrangement stemming from the ruling by the Secretary-General of the United Nations. France had patently incurred international responsibility by breaching a rule of international law, one of fundamental importance to the international community as a whole since it had concerned New Zealand’s territorial sovereignty. However, the breach could not in his view be regarded as a

“crime”, as it had been neither “massive” nor “systematic” in character. Both those elements were, in his opinion, integral to the definition of crimes, although he conceded that, as now worded, article 19—which he did not regard as obsolete, but which certainly warranted further serious debate—contained neither element, except as implied in the examples cited in its paragraph 3.

53. Mr. GOCO said he welcomed the more prominent role accorded to apology as a form of satisfaction in the proposed new article 45. *Pace* Mr. Simma’s reservations in that regard, apology could serve as a valuable tool in the volatile world of international diplomatic relations.

54. Mr. Sreenivasa RAO said that, more often than not, States attempting to resolve a protracted dispute would be seeking reconciliation, rapprochement and new forms of cooperation, and would thus show flexibility in choosing from a range of available options in the light of a political assessment of the situation. The object of the current exercise should thus be to set out a range of political options and entitlements open to States, rather than a rigid sequence of consequences and obligations that would inevitably follow the commission of an internationally wrongful act. In its current over-schematic formulation, however, chapter II took no account of such political niceties, instead giving the misleading impression that an internationally wrongful act automatically triggered just such a rigid sequence of consequences, one that must be followed mechanically. Yet apology, for example, was just one of a number of options open to States, not an indispensable component in a package of measures together amounting to full reparation, as the proposed new article 45 implied.

55. Turning to specifics, he said he had no difficulty in accepting the Special Rapporteur’s proposal to replace the term “moral damage” by “non-material injury”. In his view, article 45, paragraph 3 (a), referring to nominal damages, should be retained, as a useful additional option for States, perhaps as an alternative to a formal apology. The commentary should, however, stress that the forms of satisfaction set out in paragraph 3 were alternatives, not mandatory consequences.

56. If the opening phrase of article 45, paragraph 3 (b), were to be deleted, the deletion should be without prejudice to future consideration by the Commission of the issue of punitive damages. As reformulated, paragraph 3 (b) seemed to relate to the sphere of compensation rather than satisfaction. The Drafting Committee should consider the question further. He had few problems with article 45 bis, or with article 46 bis, which should be retained and further refined if necessary. Many of the problems relating to interest should be left to the discretion of the courts. Injury was not always so easily quantifiable as Mr. Rosenstock asserted, nor was it necessarily helpful, in the broader context of satisfaction, to insist on compensation to the last penny. Lastly, in any consideration of the consequences of an internationally wrongful act, due weight must be given to the rights of the accused.

57. Mr. ROSENSTOCK said that in domestic societies most disputes were settled by negotiation, and were thus compromises. Doubtless that was also true at the international level—perhaps more so. That being the case, there was still a need for vigorous criteria with which to measure the loss. The absence of such criteria was bound, in the

long run, to place the injured State at a disadvantage with regard to compensation for the damage suffered. That was why it was useful to have a rigorous format within which negotiations could be conducted.

58. Mr. KUSUMA-ATMADJA thanked colleagues for their enlightening contributions to the debate. In particular, he endorsed Mr. He’s view that inquiry had its place in the article on satisfaction; Mr. Pellet’s remarks concerning the independence of members of the Commission; and Mr. Sreenivasa Rao’s comments on the need for a more flexible procedure in article 45. He also expressed doubts as to whether the arrangement proposed in article 45 bis, paragraph 2, was workable in practice.

59. The CHAIRMAN said that a decision on referring articles 45, 45 bis and 46 bis to the Drafting Committee would be taken following the conclusion of the debate on those articles at the next plenary meeting. Meanwhile, if he heard no objection, he would take it that the Commission agreed to authorize the Chairman of the Drafting Committee to take informal account of the contributions made to the plenary debate thus far when the Committee considered those articles at its meeting that same afternoon.

It was so agreed.

The meeting rose at 1 p.m.

2640th MEETING

Friday, 14 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (continued) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of articles 45, 45 bis and 46 bis, contained in chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1-4).
2. Mr. HERDOCIA SACASA welcomed the fact that the Special Rapporteur had considered it useful on a number of occasions to quote judgements of courts on the American continent, including the Inter-American Court of Human Rights and the Central American Court of Justice.
3. Latin American experience had not been uniformly good when it came to satisfaction. At the previous meeting, two members of the Commission had already requested the retention of article 45, paragraph 4, which stated that satisfaction must not take a form humiliating to the responsible State. The truth of the matter was that weak countries had had to bow down before foreign flags and offer satisfaction without having the opportunity, even for the most serious of reasons, of having their own colours saluted in turn. At that level, the law must operate as an instrument for ensuring balance and equality between strong and weak countries. He illustrated the point by referring to the Eisenstuck-Leal case, which stemmed from an incident that had taken place in 1878 between a Nicaraguan citizen and his wife, who was the daughter of the consul of a great Power. As a result of the incident, the great Power had lodged protests, supported by a number of gunboats. One day, which the historians had dubbed a day of shame and humiliation, Nicaragua had had to parade a regiment before the foreign flag in question. It therefore seemed all the more necessary for the draft to contain a provision on the principle of the sovereign equality of States, whether in paragraph 4 of new article 45 or in a more general article.
4. Consideration of satisfaction must be based on the fundamental distinction between non-material damage caused to the State and moral injury caused to private individuals. As the Special Rapporteur advised in paragraph 181 of his report, the term “non-material” proposed by Dominicé should be used.³ Moral injury must come under article 44, dealing with compensation. As the Inter-American Court of Human Rights had said in the *Velásquez Rodríguez* case, moral injury was also entitled to compensation, especially where it involved a violation of human rights. Non-material damage was of a quite different order.
5. The wording of article 45, paragraph 1, should be amended, as Mr. Gaja had said, so that the State was obliged not to “offer”, but to “give” satisfaction.
6. Paragraphs 2 and 3 should be merged into a single provision, which would not be of an exhaustive nature and would deal with the modalities of satisfaction. Paragraph 3 (*b*) on damages reflecting the gravity of the injury should be in article 44, dealing with compensation, and refer to article 19, which defined a State crime. It would be better if paragraph 3 (*c*) referred not to disciplinary or penal action against those responsible, but to opening an inquiry to determine responsibilities for the wrongful act and to communicating the results of such an inquiry. In fact, the opening of an inquiry could in itself be a form of reparation.
7. Turning to the question of the autonomy of satisfaction, he said that, while autonomy certainly existed, it was relative. The principle of full reparation could be expressed by a single form of satisfaction or by several, which could supplement other forms of reparation or be sufficient in themselves according to whether or not they ensured full reparation, met conditions which might have been agreed between the parties or corresponded to the request of the injured State, as made by France in the “*Carthage*” and the “*Manouba*” cases and by New Zealand in the “*Rainbow Warrior*” case. As Dominicé had said, satisfaction was autonomous in the sense that, depending on the circumstances, it could either constitute the entire reparation or be additional to another form of reparation.
8. In general, he thought that the text under consideration, like the other draft articles on which the Commission was working, must make a distinction between general principles and rules which applied specifically to the subject-matter in question, avoiding useless repetition. It was enough to establish the rules once and for all so that they functioned together rather than repeating them in some cases and omitting them in others. For example, full reparation, proportionality of reparation and other aspects which had appeared during the debate—such as taking account of the primary rule, the causal link between reparation and the internationally wrongful act, the fixing of the date at which the injury must be redressed and the sovereign equality of States in respect of the various forms of reparation—must be considered, if possible, as general principles and treated separately. In that way, the various forms of reparation could be presented in their most refined form, with their constituent elements and substantial content.
9. Mr. GALICKI said that, on a few questions, he was not satisfied with some rules proposed in article 45 on satisfaction. The text of article 45 as proposed by the Special Rapporteur, although appearing to be much longer and more exhaustive than the previous version, suffered from one serious shortcoming in that it limited the application of the institution of satisfaction to non-material or moral injury, whereas, previously, it had been applicable to all injury, and particularly moral injury. That narrow approach might create problems. Did it mean, for example, that the injured State was not entitled to satisfaction in a case of material injury? Must there be a simultaneous non-material injury in order to justify the existence of a right to satisfaction on the part of the injured State? Such an approach would be somewhat artificial.
10. That narrow approach was in fact identical to the one adopted in article 44. At first, compensation was limited to economically assessable damage sustained by States and individuals and understood as being only material damage. Later, however, in the Drafting Committee, a proposal had been made to extend compensation to moral injury sustained by private individuals and, lastly—and on that point provisional agreement seemed to have been reached—compensation should now apply

³ See 2635th meeting, footnote 3.

to all economically assessable damage, whether material or moral, sustained by a State or an individual. That development seemed fully justified in that it reflected what was fairly clearly recognized in the “*Rainbow Warrior*” case, i.e. that satisfaction could not be considered as the only form of reparation for non-material injury.

11. If the Commission had decided not to limit compensation to material injury, should it not also accept that a State which had sustained not only a moral injury, but also a material injury should have the right to demand satisfaction? An affirmative answer to that question would create the desired balance between compensation and satisfaction, giving both forms of reparation the same scope and flexibility in application. They could therefore apply just as much to material damage as to moral injury, through measures that were specific to each of them. In connection with that specificity, careful consideration should be given to the question whether so-called “punitive damages” should remain in the realm of satisfaction, should be placed within the sphere of compensation or should figure in the provisions dealing with crimes.

12. In conclusion, he said that the critical remarks he had made did not detract from the admiration and respect he had for the excellent work the Special Rapporteur had done on the topic.

13. Mr. GOCO said that article 45 should be seen in the light of the articles that went before it and that satisfaction was necessary to obtain full reparation for injury, in addition to restitution or compensation.

14. Mr. CRAWFORD (Special Rapporteur), summing up the debate on chapter I, section B, of his report, said that he would deal first with articles 45 bis and 46 bis, which raised fewer problems than did the others.

15. Article 45 bis was concerned with interest. Some members saw the need for a separate article on interest, while others regarded interest as an aspect of compensation. The previous Special Rapporteur had proposed a separate article on interest, and all the members of the Commission who had spoken on the article at the time had agreed that interest would have to be payable. The problem had been that the article proposed had not stated that principle: it had set out secondary principles about such matters as compound interest and the calculation of interest. The article had accordingly not been adopted. He believed it could be concluded from the current debate that a majority of the members of the Commission considered that there should be a separate article on interest, though interest was merely an adjectival form of reparation. In his own view, the provisions on interest must not be incorporated into the article on compensation because there might be circumstances when, for example, interest was payable in respect of principal amounts that were due, not by way of damages in the context of compensation, but under primary rules. There had been relatively little disagreement with the first sentence of paragraph 1 of article 45 bis, while some doubts had been expressed about the other parts of the article. They were all drafting issues, however, and he had nothing to add on those points.

16. Turning to article 46 bis, on the mitigation of responsibility, he said the point had been made that the title did not correspond to the content of the article and the Draft-

ing Committee could well consider some other title. Although the primary function of the propositions contained in the article was to mitigate the amount of compensation payable, circumstances could be imagined in which they would have some other effect. For example, cases had occurred when, because of a delay in making a demand for payment, a tribunal had said that interest should not be payable. Factors such as the conduct of the responsible State or of the person on whose behalf the State was submitting a claim could thus be relevant in relation to aspects of reparation other than compensation.

17. Article 46 bis, subparagraph (a), was essentially the same as the text adopted on first reading and as accepted by Governments in their comments. It embodied a well-established principle, namely, that account could be taken of the conduct of a person on whose behalf a State was submitting a claim in determining the amount of reparation. It was true that the principle was sometimes associated with the “clean hands” doctrine, but whether that doctrine was autonomous in international law was open to question. On balance, the majority of the members of the Commission seemed to be in favour of the retention of subparagraph (a).

18. There had been a certain tension in the debate, reflecting the tension between civil law and common law, between those who wished the provisions to be fairly extensive and those who wanted them to be as concise as possible, and he had tried to steer a middle course. The propositions set out in both of the subparagraphs of article 46 bis were well enough established in the literature and in judicial decisions to be worth including in the draft articles. A balance must be struck between the injured State’s desire to achieve full reparation and the need for the amount of reparation not to be excessive.

19. The question had been asked whether article 46 bis, subparagraph (b), reflected a positive duty to mitigate damage. The Commission did not need to take a position on that point because that would depend on the circumstances in each case.

20. To sum up on articles 45 bis and 46 bis, he had heard no opposition to their being referred to the Drafting Committee, where the comments made on them could be considered.

21. Unlike the other two articles, article 45 had given rise to a major difference of opinion, and almost a divergence of philosophies, on the role of reparation. There was also a major question of method. It was clear that the notion of satisfaction existed in the literature and in case law. To remove satisfaction as a form of reparation and to redistribute its functions to other forms of reparation would be a significant change, but there was no reason not to do that if there were good analytical reasons for it. The elimination of an unnecessary or confusing concept could, after all, be an appropriate form of progressive development of the law.

22. The first point to note was that satisfaction was a hybrid concept. In the eighteenth century, the term had been practically synonymous with reparation. There were traces of that equivalence in article 41 of the European Convention on Human Rights and in the phrase “accord and satisfaction” used in the common law. He accepted

the point made by some members of the Commission that he had not analysed that problem in sufficient detail. On the other hand, satisfaction was well established in the literature and had been put to use in recent practice.

23. Moreover, States were rather special entities in some respects. They represented communities and the values at stake in many international conflicts could simply not be quantified. The immaterial aspects of international disputes were often the most important aspects and one of the functions of third parties was to permit a dispute to be settled in a way that gave a measure of satisfaction to both sides. Mr. Gaja had thus been entirely correct in saying that satisfaction had to result from some form of an agreement; that aspect of satisfaction was implicit in the use of the term “offer” in article 45.

24. As Mr. Herdocia Sacasa had said, the notion of satisfaction had been used in the past to inflict grave abuse. That was not sufficient reason to abolish the concept, but it must be carefully re-examined to ensure that it performed appropriate functions in the modern world.

25. The main problem with article 44 as adopted on first reading was that it made no provision for the quintessential form of satisfaction, namely, the acknowledgement by a State that it had committed a breach and, in judicial proceedings, the declaration that there had been a breach. Indeed, in contemporary practice, the standard form of satisfaction was the declaration that there had been a breach of international law and the best example thereof was the *Corfu Channel* case. Satisfaction could play a role in the settlement of a dispute alongside compensation for material injury and moral damage and restitution. Expressions of regret and formal apologies could imply an acknowledgement of a breach and could have the same function. It was clear that those forms of satisfaction continued to exist: there were recent and important examples. That was why he had tried to “partition” satisfaction by drawing a distinction between what he regarded as its “standard” form, namely, an acknowledgement by the responsible State or a declaration by a tribunal, and exceptional forms. He would therefore regret a decision to merge article 45, paragraphs 2 and 3, as some members wished, because he thought the distinction should be preserved.

26. The forms of satisfaction outlined in paragraph 3 had essentially an “expressive”, and thus symbolic, role. There were cases, of which the “*I’m Alone*” was the best example, when a tribunal had awarded substantial sums by way of satisfaction. If a category equivalent to that defined in article 19 was recognized, punitive damages could be imposed, but the subject at hand was “expressive” damages in relation to serious affronts to a State, which were not limited to any conceivable category of crime. Deplorable though it was, the “*Rainbow Warrior*” incident had not involved a crime as defined in article 19 and yet substantial damages still had a role to play, the question being whether it was to be under article 44, as Mr. Brownlie and some others had suggested, or under article 45. On first reading, the Commission had decided in favour of the second solution, but had limited it in a manner that was unsatisfactory and inconsistent with the literature and case law by rejecting the comparison with moral damage to private individuals. One way of responding to concerns about the

repetition of past abuses of satisfaction would be to acknowledge that that form of non-material injury could also be compensated in the context of article 44. “Expressive” damages for *injuria* could be awarded under that article. Practitioners of the common law would be happy to do that because they had a relatively undifferentiated concept of damages. That would mean that article 45 was concerned solely with the non-monetary and “expressive” elements of dispute settlement.

27. He had no strong views as to whether the reference to nominal damages should be retained.

28. Inquiry, another form of satisfaction brought up by Mr. He, was well worth mentioning because actually finding out what happened could be an important aspect of the settlement of a dispute.

29. The question was whether the provisions in article 45, paragraph 3 (c), should be retained. It could be argued that the situations it addressed were essentially covered by the primary rules and were not a major function of satisfaction. A non-exhaustive list of the forms of satisfaction could be included in paragraph 3.

30. With regard to article 45, paragraph 4, some members of the Commission had criticized the first part and others, the second. Some had been emphatic about the need to avoid humiliating States, as had been the case in the past, but there had been general agreement about the notion of proportionality, an aspect of which was linked to each of the forms of satisfaction and to countermeasures. Paragraph 4 was aimed at ensuring that demands for satisfaction were not excessive, with the underlying spectre that the State which had received restitution and compensation would nonetheless take countermeasures because it had not received satisfaction.

31. The Drafting Committee had a major task ahead of it with article 45; a moderate version of that article nevertheless had a role to play in the modern law of reparation.

32. Mr. PELLET said that the discussion had convinced him that certain positions he had adopted had not been well founded, and he wished to rectify them.

33. With regard to interest, the Special Rapporteur had convinced him that, in cases when the principal sum was payable by way of restitution, interest was payable. Since the words “moral damage” were used only for individuals, he had no objection to using the words “non-material damage” to refer to what was traditionally known as “moral damage to the State”, as long as the Commission spelled that out in the commentary.

34. He had taken a fairly rigid stance with regard to the last part of article 45, paragraph 4, but had been surprised to discover during the discussion that the practices of the past had left deep marks in the collective unconscious of the nationals of States that had been victims of those practices. Although that provision was hardly rational, it was perhaps useful, especially as the list of forms of reparation towards which the Commission was heading would not be exhaustive. On the other hand, he thought it was incorrect to state that the very fact of acknowledging a breach of international law was a humiliation, as some members had contended.

35. He still disagreed with the Special Rapporteur on the first part of paragraph 4, relating to proportionality.

36. He was concerned to see that, like Mr. He, the Special Rapporteur seemed to believe that inquiry was in itself a form of satisfaction. Certainly, an inquiry could be part of a process that resulted in satisfaction, as could recourse to some third party, but that was not in itself satisfaction. Institutional machinery should not be introduced into provisions that were intended to be prescriptive.

37. He was also concerned about the position taken by the Special Rapporteur, mirroring that of Mr. Gaja, according to whom satisfaction was given in the context of an agreement. The element of agreement was no more present in satisfaction than in the other forms of reparation, to which it would then have to be added, something that would completely change the very nature of the entire exercise. In any case, that element was by no means exclusive to satisfaction.

38. Mr. BROWNLIE said that the idea of partitioning article 45 was justified, in his view, by the fact that separating out the different elements made it possible to examine them properly. There were three elements: the moral damage to the State, in the legal sense, which related to compensation; the consequences of the internationally wrongful act, which related to cessation and non-repetition; and what might be termed political measures.

39. There were three such measures constituting satisfaction: first, symbolic damages, which seemed anomalous and perhaps unimportant. Secondly, there was apology, although in that regard there was no consistent practice or *opinio juris*. There were cases in which no apology had been given or asked for. There had, of course, been some dramatic instances where powerful States had expressed their apologies to weaker States. That might, however, have been an act of good conduct; it did not follow that it was a matter of law. The third of the political measures was the requirement of the trial of individuals responsible for the original wrongful act. Such trials, however, were not necessarily connected with any question of State responsibility. For example, there might be a situation where aliens were mistreated, but there had been no brutality or abuse of power on the part of the officials involved; no crime had been committed under domestic law. The demanding State would, nevertheless, require the disciplining of those responsible, but for political rather than legal reasons, since there had been no crime.

40. Paragraph 4 presented a particular difficulty. It seemed to suggest that, if humiliation was applied, it should be proportionate to the wrongful act, as though it were possible for humiliation to be relative. In his view, the measures that he had described as political had precisely that aim, to humiliate the wrongdoing State. More generally, he thought that the Commission paid more attention to what it believed to be the case than to reality itself and to tend to convert every subject into a human rights issue.

41. Mr. ECONOMIDES, referring to the Special Rapporteur's suggestion that satisfaction might not be a unilateral act, said that, in his view, the very opposite was the case. Admittedly, satisfaction often resulted from consultations or even a formal agreement between the States con-

cerned, but in itself it officially remained a unilateral act, certainly to a greater extent than restitution and compensation, which necessarily implied an agreement between the parties. In any case, the Commission's role was not to settle such a minor point, but, rather, to establish the rights of the victim State and the obligations of the responsible State in order to facilitate the arrangements made between them.

42. As for paragraph 4, if the humiliation in question resulted from the use of a generally recognized form of satisfaction, it should be accepted: that was how the rules of the game worked. If, however, the satisfaction was simply intended to be offensive to the other State, it became intolerable.

43. Mr. LUKASHUK said that satisfaction was such a specific form of reparation that its relationship with the other forms—compensation and restitution—should be determined. Indeed, it should be given a precise definition to indicate that it was equivalent to moral reparation.

44. One member had said that satisfaction was applicable only if the damage which had given rise to it was immaterial in nature. Satisfaction could constitute only an acknowledgement of a breach. That was an interesting point of view which should be reflected in the commentary, where satisfaction should be treated as a separate topic.

45. Mr. SIMMA said that he wondered whether, contrary to what some other members had said, satisfaction was not always based on a deal between the parties. All reparations, whatever form they took, were founded on negotiations and, in that regard, satisfaction was no exception. The Israeli attack on United States personnel during the 1967 Six Day War, and the attack on the Chinese Embassy in Belgrade, for example, had given rise to intensive discussions. On the other hand, there were instances where satisfaction had been given or offered without any underlying agreement.

46. As for disciplinary action or punishment of those guilty of the internationally wrongful act, it was wrong to become fixated on cases where such demands had been made in an abusive or humiliating way. There were many instances where such demands had been made in an entirely proportionate way, when the conduct had been egregious. It was perfectly possible for satisfaction to take an appropriate form.

47. Mr. GAJA said that, in his statement (2638th meeting) in relation to article 45, paragraph 1, he had pointed out that, whereas in articles 43 and 44 a State was obliged to "make restitution" and "compensate", in article 45, it only had to "offer" satisfaction. He had suggested that in article 45 the obligation to give satisfaction should be stated.

48. It was not, in his view, satisfaction itself that depended on agreement between the parties, but rather the modalities of that satisfaction, which, unlike compensation and restitution, the content of which was known in advance, were a matter for negotiation. There were grounds for negotiation because apologies, to take just one example, could take many forms.

49. Mr. KABATSI, referring to article 45, paragraph 3 (c), said that Mr. Pellet had been right to say that it was the results of the inquiry that might lead to satisfaction, not the inquiry itself. There was nothing more satisfactory than a demonstration of good faith at the very beginning of a dispute. It prepared the ground for the settlement of that dispute and, by leaving the parties free to invoke the other provisions of paragraphs 2 and 3, might be sufficient in itself to resolve the dispute.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 45, 45 bis and 46 bis to the Drafting Committee.

It was so agreed.

51. The CHAIRMAN invited the Special Rapporteur to introduce chapters II and III of his third report.

52. Mr. CRAWFORD (Special Rapporteur) said that, during the discussion on the structure of the draft articles, the Commission had provisionally agreed that there should be a separate segment dealing with the rights of an injured State to invoke responsibility and, in that context, it had accepted the distinction for which he had argued between the injured State, or State victim of the breach, and those States with a legitimate juridical concern in invoking responsibility, even though they were not themselves specifically affected by the breach. He had attempted to define the two categories of State in article 40 bis. Chapter III contained a series of proposals in respect of the invocation of responsibility by the injured State, as defined in article 40 bis, paragraph 1, without prejudice to a further set of provisions dealing with the right of those States falling within the category of paragraph 2, to invoke responsibility. He looked forward to hearing the reaction of members of the Commission, once they had read the chapter. Meanwhile, he wished to highlight certain aspects.

53. With regard to the right of the injured State to elect the form of reparation, contained in chapter III, section A, entitled “General considerations”, it was clear that, in ordinary circumstances, the injured State could choose between restitution and compensation. That said, he did not entirely agree with the proposition that the injured State could elect the form of satisfaction, although it was entitled to insist on the basic form of satisfaction in terms of a declaration. As for the real point—the choice between restitution and compensation—there might in certain cases be limits on the right of the injured State to choose the form of reparation and he had briefly considered those cases in the report. They were exceptional in nature and were dealt with in the context of the continuing performance of the primary obligation rather than of the choice of reparation. By analogy with article 29 of Part One, dealing with consent, the problem could be settled by referring to a “valid” choice by the injured State.

54. With regard to formal requirements for the invocation of responsibility, which were considered in paragraphs 234 to 238, the basic theme was that it was important not to over formalize the procedure. Nonetheless, on the analogy of article 65 of the 1969 Vienna Convention, a provision—article 46 ter—had been inserted, which simply required notice of the claim. Certain consequences arose from not giving such notice; for example,

the State might, if it persisted in that position, be deemed to have waived the claim.

55. The admissibility of claims, which was covered in paragraphs 239 to 242 relating to the exhaustion of local remedies and the nationality of claims, was a question not of judicial admissibility but of the admissibility of the claim in the first place. The provisions concerned therefore took the form of a kind of checklist of the relevant considerations.

56. As for the limits on recovery of reparation, which were covered in paragraphs 243 to 249, the first dealt with the *non ultra petita* principle, which had been broadly recognized by the courts, whereby, in relation to an international claim, a court could not give a State more than it had claimed. He considered that, since the principle was really a manifestation of the underlying doctrine of election, there was no need for a specific recognition of the principle in the text. The second issue related to the rule prohibiting double recovery, which had been recognized by courts and tribunals. The issue arose largely in cases where the same claim, or essentially the same injury, was complained of by the injured State against several States, although other situations could be envisaged. Bearing in mind, however, that the Commission did not intend to deal with all the procedural ramifications of cases of responsibility, it had seemed sufficient that the rule prohibiting double recovery should be mentioned in the context of the provision relating to a plurality of responsible States, namely article 46 sexies.

57. Turning to the question of the loss of the right to invoke responsibility, contained in paragraphs 250 to 262, he said that, although such a provision might be deemed superfluous, it had seemed appropriate at least to make a proposal, on the analogy of the provisions of article 45 of the 1969 Vienna Convention. Having considered a series of possible grounds for the loss of the right to invoke responsibility—waiver, delay, settlement and termination or suspension of the obligation breached—he had definitively retained only two of those grounds in article 46 quater, whereby responsibility might not be invoked if the claim had been waived—including by such means as the conclusion of a settlement—and if there had been an unreasonable delay in notifying, amounting to a form of acquiescence with a loss of the claim.

58. With regard to the question of a plurality of States and the vexed issue of the character of responsibility when more than one State was involved, he stressed the frequent tendency for people to use terminology with which they were familiar, especially in relation to “joint and several responsibility” or “solidary responsibility”. Indeed, such phrases were sometimes incorporated in treaties. For example, the Convention on International Liability for Damage Caused by Space Objects expressly used the phrase “joint and several liability” (art. IV, para. 2), spelling out its exact meaning in the context of the launching of space objects. Apart from such cases, however, bearing in mind the many different regimes of solidary responsibility, it was important to be extremely cautious about the use of national law analogies.

59. With regard to a plurality of injured States, he had put forward a relatively simple proposal in article 46

quinquies, given that the definition of an injured State was that contained in draft article 40 bis, paragraph 1, and the expression “State which has committed the internationally wrongful act” might later be replaced by “responsible State”.

60. The case of a plurality of States responsible for the same internationally wrongful act was obviously different from a case in which a series of States had separately done damage to a given State or in which each of them was responsible for the damage it had caused. Only the first instance—of which the classic example was the *Corfu Channel* case—was addressed, in another relatively simple provision under article 46 sexies, paragraph 1. The principle embodied therein was qualified, however, in two ways by the provisions of paragraph 2, first, by the principle prohibiting double recovery and, secondly, by the fact that the question of the contribution among the responsible States should be settled among them. In his view, the proposed provisions in article 46 sexies were in line with the judgment of ICJ in the *Corfu Channel* case and in any event were supported both by the general principles of law and by considerations of fairness.

Reservations to treaties⁴ (continued)* (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,⁵ A/CN.4/L.599)

[Agenda item 5]

DRAFT GUIDELINES PROPOSED BY THE
DRAFTING COMMITTEE

61. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft guidelines adopted by the Drafting Committee (A/CN.4/L.599), the titles and texts of which read:

1.1.8 Reservations made under exclusionary clauses

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

* Resumed from the 2633rd meeting.

⁴ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook* . . . 1999, vol. II (Part Two), p. 91 et seq., para. 470.

⁵ See footnote 2 above.

1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty

A unilateral statement made by a State or an international organization, in accordance with a clause contained in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

1.7 Alternatives to reservations and interpretative declarations

1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(b) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

1.7.2 [1.7.5] Alternatives to interpretative declarations

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) The insertion in the treaty of provisions purporting to interpret the same treaty;

(b) The conclusion of a supplementary agreement to the same end.

62. Mr. GAJA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had devoted three meetings to the topic during the last week of the first part of the current session, during which, largely thanks to the cooperation of the Special Rapporteur and of members of the Committee, it had been able to complete its consideration of draft guidelines 1.1.8, 1.4.6 to 1.4.8 and 1.7.1 to 1.7.5. Accordingly, the Committee was submitting to the Commission, for adoption, the texts of the five draft guidelines it had adopted. They were organized in accordance with the structure of the guidelines already adopted by the Commission, but had been renumbered. For purposes of clarity, the numbering of the draft guidelines initially proposed by the Special Rapporteur was, as usual, given in square brackets.

63. With regard to draft guideline 1.1.8, the Drafting Committee had concluded that it was better to retain the idea that exclusionary clauses comprised clauses intended to enable the parties or some of them to exclude certain provisions of a treaty in their application to those parties and also clauses enabling them to modify the legal effect of the provisions of a treaty. The title remained more all-encompassing, as it referred to “reservations made under exclusionary clauses”; the replacement of the word *formulées* in the Special Rapporteur’s draft by the word *faites* had been intended to bring the French text into line with the English text, which seemed more appropriate. As for the wording of the draft guideline, the Committee had considered the phrase “when expressing its consent to be bound”, which had appeared in the Special Rapporteur’s draft. It had studied a proposal to make that phrase more

precise by enumerating the various ways in which States could express their consent to be bound, but had not deemed such an enumeration to be necessary. The Committee had preferred to use a slightly different formulation from that proposed, the new formulation being borrowed from draft guidelines 1.1.5 and 1.1.6 which had been provisionally adopted at the fifty-first session of the Commission. For the same reason, the Committee had also decided to delete the phrase “or by a State when making a notification of succession” from the original draft guideline, as that situation was not expressly envisaged in draft guidelines 1.1.5 and 1.1.6. As the expression “in the treaty”, found in the original draft guideline, was superfluous, it had been deleted, thereby yielding a tighter text.

64. Draft guideline 1.4.6 merged draft guidelines 1.4.6 and 1.4.7 proposed by the Special Rapporteur, combining their content in a single draft guideline devoted to optional clauses. The Drafting Committee had decided to adopt that course in order to simplify the text, with the first paragraph of the new text referring to unilateral statements made under what was generally known as an optional clause and its second paragraph referring to the restrictions States could impose on those statements, restrictions generally known as “reservations”. The paradigm was that of the declarations made by States under Article 36, paragraph 2, of the Statute of ICJ and of reservations to those declarations. The title “Unilateral statements made under an optional clause” reproduced the title proposed for draft guideline 1.4.6, with the word “adopted” replaced by the word “made”, for the same reasons that applied to draft guideline 1.1.8.

65. With regard to the first paragraph and the description of the effects of statements, the Drafting Committee had decided to delete the reference to “entry into force” of the treaty, to be found in original draft guideline 1.4.6, because it was likely to prove ambiguous. Proposals had also been made to refer to “optional obligations” or “additional obligations”, but the Committee had finally opted for a formulation it had considered more precise, namely, “an obligation that is not otherwise imposed by the treaty”. The second paragraph reproduced the wording of original draft guideline 1.4.7, linking it to the text of the first paragraph.

66. Draft guideline 1.4.7 concerned unilateral statements providing for a choice between the provisions of a treaty. It corresponded to former draft guideline 1.4.8 proposed by the Special Rapporteur. The Drafting Committee had considered a proposal that reference should also be made to a choice between “parts” or “chapters” of a treaty. It had, however, considered that the reference to “provisions” was sufficient to cover all contingencies and that in consequence the text should be retained as proposed, with an appropriate explanation in the commentary. The Committee had also decided to leave the title unchanged. It had added two commas to the text of the original draft guideline and had brought the French text, which referred to a *clause expresse*, into line with the English text, which used the adverb “expressly”.

67. With regard to section 1.7, dealing with alternatives to reservations and interpretative declarations, as proposed by the Special Rapporteur, the Drafting Committee had first considered the draft guidelines concerning alternatives to reservations. Since it had been agreed that the draft

guidelines proposed by the Special Rapporteur could be considered too detailed, as noted by the Commission, the Committee had endeavoured to tighten the text. Two possible approaches had been considered: the first, which could be described as the “minimalist” approach, was to retain only draft guideline 1.7.1 proposed by the Special Rapporteur or a variant of that draft guideline, referring the reader to the commentary for a consideration of the hypotheses envisaged in draft guidelines 1.7.2, 1.7.3 and 1.7.4. The other approach was to combine the texts of the four draft guidelines into a single draft guideline, limiting the cases expressly cited to an essential minimum.

68. As the text of draft guideline 1.7.1, if retained in isolation, would have conveyed little, the Drafting Committee had preferred to adopt the other approach, which had resulted in the formulation of new draft guideline 1.7.1. That draft guideline had been adopted by the Committee, not without some hesitation, as some members would have preferred a shorter text.

69. The *chapeau* to the provision reproduced elements of original draft guideline 1.7.1. The new draft guideline went on to mention, for illustrative purposes, two alternative procedures to which States or international organizations might have recourse. They had been chosen because they were often wrongly treated as reservations in practice or defined as such. The idea had been to make it clear that to qualify them in such a manner was incorrect. The first procedure cited, namely, the insertion of restrictive clauses, corresponded to one of the procedures mentioned in original draft guideline 1.7.2, as developed in draft guideline 1.7.3. The second procedure was a version of original draft guideline 1.7.4.

70. The Drafting Committee had begun by considering a proposal concerning the *chapeau*, to replace the word “modify” (*moduler*), proposed by the Special Rapporteur, by the word “restrict” (*restreindre*). The Committee had considered using other variants, such as “attenuating” (*atténuer*) or “rendering more flexible” (*assouplir*). It had also studied the possibility of reproducing the formulation of draft guideline 1.1.1, namely, the phrase “modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects”. But doubts had been expressed as to the wisdom of reproducing that formulation in the context of the draft guideline under consideration. Other formulations had been suggested, among them the achievement of “equivalent effects” (*effets équivalents*), “similar effects” (*effets similaires*), “analogous effects” (*effets analogues*) or “results of a broadly similar character” (*résultats essentiellement de même nature*). Finally, it had been decided to adopt a more general, but more appropriate wording, namely, “achieve results comparable to those effected by reservations”.

71. The Drafting Committee had decided to use the words “alternative procedures” so as to make it quite clear that it was alternatives to reservations that were being referred to. The Committee had also considered the need for the word “also” (*également* in French), implicit in the adjective “alternative”, but had decided to retain it in order to emphasize the subject matter of the draft guideline. The expression “may make use of”, found in the original English version, had been replaced by the

expression “may also have recourse to”, thereby bringing it into line with the French text.

72. With regard to the two examples given in the subparagraphs of the draft guideline, the Drafting Committee had used the expression “such as” at the end of the *chapeau* so as to indicate that the list was far from exhaustive. The text of the first example was based on the wording of original draft guideline 1.7.3, but had been tightened somewhat. The new wording was: “The insertion in the treaty of restrictive clauses purporting to limit its scope or application”. As for the second example, the Committee had decided to retain a provision on so-called “bilateralized” reservations, basically so as to make it clear that the procedures referred to were not in fact reservations. Original draft guideline 1.7.4 had served as the basis for the wording of the text of the second subparagraph currently proposed. Doubts had been expressed concerning the expression “under a specific provision of a treaty”, which some regarded as too restrictive, but the Committee had decided to retain it, as it referred to the most commonly encountered hypothetical situation. With a view to simplifying the wording and avoiding needless recourse to Latin tags, the expression “in their application to their relations *inter se*”, to be found in draft guideline 1.7.4, had been replaced by the words “as between themselves”.

73. The last draft guideline, draft guideline 1.7.2, was based on draft guideline 1.7.5 proposed by the Special Rapporteur. Drawing on experience gained from working on draft guidelines 1.7.1 to 1.7.4, the Drafting Committee had embarked on consideration of the draft guideline in question on the basis of a new proposal drafted on the model of new draft guideline 1.7.1. In the first part of the text, it had followed a formulation close to that proposed by the Special Rapporteur for his draft guideline 1.7.5 and had given two illustrative examples. It had retained the title of draft guideline 1.7.5.

74. As for the text, a comparison of the new draft guideline with the one proposed by the Special Rapporteur would reveal that the Drafting Committee had replaced the expression “the contracting parties”, which had seemed inappropriate, by the words “States or international organizations”, thereby also bringing the provision into line with other draft guidelines already adopted.

75. With regard to the first subparagraph, namely, the example of insertion in the treaty of provisions purporting to interpret it, a procedure that the Special Rapporteur had already referred to in his draft guideline, a consensus had emerged in favour of retaining a provision drafted on the model of the first subparagraph of new draft guideline 1.7.1. The Drafting Committee had also deleted the adjective “express” qualifying the word “provisions” and had added the words “the same treaty” at the end of the English version.

76. In the second subparagraph, the Drafting Committee had agreed to retain the reference to “supplementary agreements”, to be found in the original version, but in the singular. It had also considered several variants to replace the word “supplementary”, for instance the adjective “specific”, but had finally decided to retain the word “supplementary”. It had also made a minor amendment to the

English version of the text, replacing the original expression “to that end” with the words “to the same end”.

77. The Drafting Committee recommended that the Commission should adopt the draft guidelines appearing in its report so as to enable the Special Rapporteur to prepare the commentaries thereto.

78. Mr. ECONOMIDES said that, in draft guideline 1.1.8, instead of the words “in accordance with a clause”, the text should read “in accordance with one of its clauses”: in other words, with one of the clauses of the treaty. That change would make the text clearer.

79. At the end of the second subparagraph of draft guideline 1.7.1, the words “of the treaty” should be replaced by the words “of that treaty”, again in the interests of clarity and to stress the fact that the treaties referred to in the subparagraph were one and the same treaty.

80. Mr. HAFNER said he still had doubts as to the applicability of draft guideline 1.1.8 to the case of certain international treaties providing for exceptions without thereby affecting the status of other reservations. However, he would not insist, given the general feeling in favour of adopting the draft guideline as now formulated.

81. As to draft guideline 1.7.1, it was his understanding that the second subparagraph did not go against what was already prescribed in treaty law, namely, that restrictions applied to the treaty in question. That meant that the right to conclude such agreements must be understood as abiding by the limits established by general international law applicable to such instances. That related in particular to the restriction whereby States could not conclude agreements incompatible with the object and purpose of the treaty.

82. Mr. GAJA (Chairman of the Drafting Committee) said that, subject to the agreement of the Special Rapporteur, the two proposals made by Mr. Economides were acceptable.

83. In response to Mr. Hafner, he said that the draft guidelines under consideration did not refer to the question of the validity of reservations and interpretative declarations. The point at issue was not whether the agreements referred to were valid within the meaning of article 41 of the 1969 Vienna Convention or under other principles set forth in that Convention.

84. Mr. HAFNER said he agreed, but stressed that the question of the validity of reservations would still have to be tackled. He feared that, if the Commission were to adopt the current text of the draft guidelines concerning so-called *inter se* treaties or agreements, it would fail to deal with the validity of those instruments in the guidelines to follow. As currently worded, the draft guidelines gave the impression that there was an unlimited right to conclude such treaties and he wished it to be clearly understood that the interpretation to be adopted was that of treaty law.

85. Mr. ROSENSTOCK said that the proposal by Mr. Economides that the words “a clause” should be replaced by the words “one of its clauses” in the English version of

draft guideline 1.1.8 was much less elegant than the current version and might lead to confusion. The clause or clauses in question could be grammatically linked to “a unilateral statement”. He would thus prefer the current wording of the draft guideline to be retained, but he had no problem with the other change proposed.

86. Mr. TOMKA said that the proposal by Mr. Economides was likely to lead to problems of interpretation, as the question might arise whether a single clause was sufficient to exclude or modify a legal effect or whether several were necessary. For his own part, he firmly supported the text proposed by the Drafting Committee.

87. Mr. SIMMA said he thought what Mr. Economides intended was to make it clear that the clause in question must be a clause contained in the same treaty with regard to which a unilateral statement might be made.

88. As for Mr. Hafner’s concerns, in his view, they were covered by the phrase “the conclusion of an agreement, under a specific provision of a treaty”, in draft guideline 1.7.1, which essentially eliminated the risk to which he had referred. He could not imagine that, if an *inter se* agreement could be concluded under specific provisions of a treaty, such specific provisions could authorize the conclusion of agreements contrary to the object and purpose of the treaty.

89. Mr. PAMBOU-TCHIVOUNDA reminded the Commission that the set of draft guidelines had given rise to considerable controversy. He wondered whether, even though considerable effort had been expended on the drafting exercise, the debate on the desirability of including draft guidelines 1.7.1 and 1.7.2 in the Guide to Practice should not be considered closed. A reading of those provisions might create the impression that they constituted an invitation to States and international organizations parties to a treaty to stray from the path they had initially thought they must follow in order to implement a legal instrument. Given that such possibilities ultimately militated against the system whose implementation had initially been sought, he had some reservations as to the desirability of the two draft guidelines.

90. A reading of the text of draft guideline 1.4.6 revealed that its provisions did not fall within the scope of the Guide to Practice. That cast immediate doubt on the value and purpose of its second paragraph, as the guideline itself did not fall within the scope of the Guide. The second paragraph added little and did not constitute a guideline.

91. Mr. PELLET (Special Rapporteur) said that, with regard to alternatives, Mr. Pambou-Tchivounda had merely repeated what he had already said. Now was not the time to reopen the debate. Despite some members’ reservations, it had been agreed that, where a Guide to Practice was concerned, anything was better than nothing.

92. He was, however, a little surprised at Mr. Pambou-Tchivounda’s stance on draft guideline 1.4.6. Mr. Pambou-Tchivounda seemed surprised that the Drafting Committee’s formulation, identical to the one he himself proposed, did not fall within the scope of the Guide to Practice. All the guidelines contained in section 1.4 deal-

ing with definitions were drafted along those lines and, if he wished to get rid of that guideline, it would be necessary to delete the whole of section 1.4, comprising the so-called “zoo”, in other words, the guidelines excluding everything that did not constitute a reservation and that consequently did not fall within the scope of the Guide. On the other hand, interpretative declarations, though not reservations, did indeed fall within the scope of the Guide. Those two clarifications seemed essential, for, otherwise, the entire architecture of the first part would be called into question, and that was unacceptable.

93. With regard to Mr. Economides’s proposal on draft guideline 1.1.8 and Mr. Rosenstock’s reservations about its English version, if the Commission were to adopt the formulation “one of its clauses”, the idea that an exclusionary clause might exist in a different treaty would be lost. A situation could be envisaged in which States concluded a treaty and in which, some years later, those same States then concluded another treaty providing for the possibility of excluding the effect of the first treaty. That problem had perhaps never arisen, but the wording proposed by Mr. Economides had the disadvantage of not taking account of the possibility of a clause appearing in a different treaty. There was also the hypothetical situation in which a State might accede belatedly to treaty A when treaty B was already in force and might make that declaration. That being said, it was not the type of hypothesis that had been envisaged and, in order to satisfy Mr. Economides, he could accept the introduction of an element of rigidity which did not seem indispensable. It would, however, be preferable to use a customary formulation encountered elsewhere in the draft guidelines, such as “a clause in the treaty”.

94. The same was true of draft guideline 1.7.1, where “certain provisions appearing in that treaty” would be preferable to “certain provisions of the treaty”. If that wording was retained, whether in draft guideline 1.1.8 or in draft guideline 1.7.1, the problem raised by Mr. Rosenstock would in any case be resolved or eliminated.

95. As for Mr. Hafner, he too had restated the position he had taken in the Commission, which was that of a very small minority. There was thus no need to return to it, particularly as Mr. Simma had provided a very good answer with regard to the second subparagraph of draft guideline 1.7.1. As the agreement was concluded under a specific provision of the treaty, it was hard to see how it could be impermissible. In that instance, but as was ever his wont, Mr. Hafner confused problems of definition and problems of permissibility.

96. Mr. ECONOMIDES said that, in his draft guideline 1.1.8, the Special Rapporteur expressly provided that the statement must be made in accordance with the treaty in question, not in accordance with another treaty. What was referred to were exclusionary clauses interpreted in a very narrow sense and it was not envisaged that another treaty might be taken into account. It was simply necessary to link the treaty with one of its provisions. The wording mattered little and that proposed by the Special Rapporteur (“appearing in that treaty”) was satisfactory.

97. Mr. TOMKA said that, in the interests of uniformity, care should be taken to ensure that the vocabulary used was consistent throughout the draft guidelines. The expression *du traité* could be found not only in draft guideline 1.7.1, but also in draft guidelines 1.4.6 and 1.4.7. He was therefore inclined to favour leaving the text of draft guideline 1.7.1 unchanged.

98. Mr. GAJA (Chairman of the Drafting Committee) added that that formulation appeared in some of the draft guidelines already adopted (1.1.4, 1.1.5 and 1.1.6). The problem raised by Mr. Economides was a general one and it would be advisable to reconsider the draft guidelines as a whole in order to ensure that the formulations were homogeneous and, if necessary, to amend them. Meanwhile, the Commission might adopt the text of the guidelines now proposed without change, subject to verification at a later stage.

99. With regard to the proposal by Mr. Economides on draft guideline 1.1.8, he noted that, if the Commission were to adopt the formulation “with a clause appearing in that treaty”, the word “and” would need to be added before the words “expressly authorizing the parties”, thereby making the text somewhat cumbersome.

100. The CHAIRMAN said it was difficult to deal with drafting matters in a plenary meeting. He proposed that, as the Chairman of the Drafting Committee had suggested, the Commission should endorse the Committee’s recommendation that the draft guidelines under consideration should be adopted in their current form, on the understanding that the finishing touches would be put to them when the remaining draft guidelines had been adopted. If he heard no objection, he would take it that the Commission wished to proceed in that fashion.

It was so agreed.

The meeting rose at 1.05 p.m.

2641st MEETING

Tuesday, 18 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹ (*continued*)* (A/CN.4/504, sect. D, A/CN.4/509,² A/CN.4/510³)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. Sreenivasa RAO (Special Rapporteur), introducing his third report (A/CN.4/510) on the subtopic of prevention of transboundary damage from hazardous activities under the broader topic of international liability for injurious consequences arising out of acts not prohibited by international law, began by giving a brief overview of the background against which the Commission was embarking on a second reading of the draft articles on prevention. The topic had originally emerged from the Commission’s consideration of the question of State responsibility arising out of the commission of an internationally wrongful act. The question had arisen of international liability in the event of damage caused by an activity not otherwise wrongful—“wrongful” being, in that context, the antonym not of “lawful”, but of “not prohibited”. The Commission had taken the view that such situations merited consideration from a slightly different angle and, accordingly, had appointed a special rapporteur to consider the new topic. Initially, the Commission had wrestled simultaneously with the topics of liability and prevention. By the forty-fourth session, however, the feeling had emerged that it should deal first with prevention, so as to capture an emerging consensus regarding the duty of due diligence embodied in that concept, before subsequently deciding on the most appropriate course of action with regard to international liability.⁴ While that decision had been appreciated as a means of facilitating progress on the topic, concern had been expressed by States in the Sixth Committee about the desirability of a separation of the two topics that might lead to their eventual divorce—an approach which, furthermore, overlooked the main objective of the Commission’s mandate. At its fifty-first session, the Commission had nonetheless taken the decision first to complete its second reading of the draft articles on prevention,⁵ and only then to decide whether—and, if so, how and when—to deal with the topic of liability.

2. As the Special Rapporteur on the topic of prevention of transboundary damage from hazardous activities, he had been faced with a number of policy questions. Thus, he had had to consider, for instance, what activities fell within the scope of the topic; what the components of the duty of due diligence were; and what the consequences of failure to perform obligations of due diligence would be. They were difficult matters, on which no consensus had

* Resumed from the 2628th meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Ibid.*

⁴ See *Yearbook . . . 1992*, vol. II (Part Two), p. 51, paras. 344–349.

⁵ See *Yearbook . . . 1999*, vol. II (Part Two), p. 141, paras. 607–608.

emerged over the years, either in the Commission, in doctrine or in State practice.

3. Nor could the subject be divorced from the broad theme of promotion of sustainable development, one which meant according equal weight to the environment and to development in policy-making; or from capacity-building, which involved the formulation and enhancement of standards aimed at minimizing the risk associated with inherently hazardous technologies. The question of how to deal with situations in which compliance with the best available standards and use of the best available technologies failed to avert damage was one that could best be addressed at a later stage—perhaps during consideration of the topic of liability—but one which in any case need not detain the Commission at the current juncture.

4. In the light of those considerations, the Commission should deal with prevention in the strictest and narrowest terms possible, confining its scope to those activities that involved a physical connection between the State of origin and States likely to be affected, where the activity involved a risk of “significant transboundary harm”—“significant” being not so ambiguous a term as it might seem, since States could bilaterally prescribe the levels applicable in the context of a regime constructed to serve a particular purpose. In thus facilitating its task, the Commission would exclude from consideration such phenomena as creeping pollution, actual harm, harm resulting from the cumulative effect of several activities (as in the case of air pollution), or harm to areas not falling within any one State’s jurisdiction—the so-called “global commons”. Nevertheless, those proposals had met with very broad support in the Sixth Committee and had provoked no outright opposition. Those four or five areas whose exclusion from the current scope had given rise to some concern remained promising candidates for progressive development at a later stage—more so than such components of prevention as the precautionary principle and the “polluter pays” principle, which could not be dealt with in isolation—a point to which he would return if necessary.

5. Most of the work on prevention placed before the Commission and the international community in the form of 17 draft articles had essentially constituted progressive development, for no one set of universally accepted procedures was applicable in the sphere of prevention. His work, and that of the Commission, was guided by the need to evolve procedures enabling States to act in a concerted manner rather than in isolation.

6. One question that had arisen during consideration of the draft articles in the Sixth Committee was whether the duty of due diligence was in any way diluted by the requirement for States to negotiate a regime taking account of an equitable balance of interests where a risk of significant transboundary harm existed. In his opinion, article 12 adopted on first reading merely defined the obligation in a mutually acceptable manner and did not subtract from it. That view was reflected in his third report. Another question that had arisen concerned the exact nature of due diligence. His conclusions on that question, set out in his second report,⁶ were recapitulated in paragraph 20 of his

third report. The question of the consequences of a failure to comply with the duty of due diligence was dealt with in paragraphs 35 to 49 of the second report. His conclusion in that regard, set forth in paragraph 49 of the same report, was that the matter of compliance fell outside the realm of the preparation of the draft articles on prevention.

7. The most important point addressed in the third report was the question whether—now that it had agreed to shelve the topic of international liability for injurious consequences arising out of acts not prohibited by international law for the time being and to focus on the duty of due diligence—the Commission still needed to address the subtopic of prevention of transboundary damage from hazardous activities within the broader categorization of “acts not prohibited by international law”. What would be the implications of retaining that categorization, or the consequences of eliminating it? It was a question that had rightly exercised some members of the Commission and had also been raised in other forums.

8. The question could not be avoided, and was dealt with in chapter V of his third report. While State responsibility dealt with wrongful acts, international liability dealt with compensation for damage arising out of acts which were not necessarily prohibited by international law. So if prevention was essentially a question of the management of risk, the phrase “acts not prohibited by international law”, originally intended to distinguish them from wrongful acts, might not be necessary or, indeed, appropriate. However, the concept could not be dispensed with easily because it had come to be associated with the expectation that, if certain obligations of due diligence were prescribed by way of prevention and certain failures occurred, then the intended activity would be automatically prohibited because the duty of due diligence was not being complied with, or that the activity would still be treated as permissible because the State was only required to fulfil its due diligence obligation as effectively as possible. In other words, the question was whether, if it was not emphasized that the activity was not prohibited, it would become prohibited as a result of the failure of due diligence obligations. It was a fear that lay at the heart of deciding whether or not to delete the reference to “acts not prohibited by international law”. Although the fear was a genuine one, none of the authorities he had surveyed had indicated to him that non-compliance with the obligation of due diligence made the activity prohibited. It did, however, give rise to a right of engagement between those who were likely to be affected and those who were promoting the activity, which was built into the entire concept of due diligence. In his opinion, deleting the reference would not create further problems, and might even secure a greater consensus within the Commission behind the draft articles.

9. A number of large States had expressed great concern that emphasizing the principle of prevention in isolation, rather than linking it to international cooperation, capacity-building and the broader themes of sustainable development, would discourage them from adopting the regime now being elaborated. The views that had been expressed were very serious, and he had sought to deal with them as far as possible in chapter IV.

⁶ Ibid., vol. II (Part One), document A/CN.4/501.

10. In order to encourage a broader consensus and universal endorsement of the articles, the Commission should pay some attention to what was said in the preamble; such a preamble was essential to securing general support for the draft.

11. During the first part of the current session all the changes suggested to the draft articles adopted on first reading, except the preamble, had been considered in the Working Group, which had held five meetings and examined comments made by States. A consensus had been reached on all the draft articles now being submitted to the Commission. A number of essentially drafting changes had been made. The numbering in square brackets corresponds to that of the articles adopted on first reading.

12. Article 2, subparagraph (a), had been redrafted in the light of comments made, so as to eliminate possible confusion because of the conjunction “and” used in the version adopted on first reading. The idea that the risk involved for the purpose of the draft articles was within a particular range from a high probability to a low probability of causing significant harm had been made more explicit.

13. Article 2, subparagraph (f), was new, but it had been deemed necessary because of the frequent occurrence of the term “States concerned” in the draft articles.

14. Article 4 contained the additional word “competent” in order to highlight that not all international organizations in general were involved.

15. Article 6 [7], paragraph 1, was a redrafted version of the principle of prior authorization, but the changes were of a purely drafting nature in the light of comments made. The changes made in article 6, paragraph 2, were also essentially of a drafting nature, but, even with those changes, paragraph 2 could still face problems in its implementation, as Chile had pointed out, with respect to acquired rights and foreign investment which could even lead to international claims. However, those were matters which could and should be sorted out by States in accordance with domestic law requirements and their international obligations. It was hoped that they would not pose insurmountable problems because State regulations governing hazardous activities were generally bound to change from time to time as experience was gained with their operation and in the light of scientific and technological developments.

16. Article 7 [8] contained the word “environmental” in the title and emphasized that any assessment of the environmental impact must, in particular, be based on the transboundary harm likely to be caused by the hazardous activity.

17. Article 8 [9] simply introduced the term “States concerned”, so as to indicate that both the State of origin and the States likely to be affected had a duty to provide their public with relevant information relating to the hazardous activity.

18. Article 9 [10], without attempting to alter the substance of the previous article, brought out the requirement of suspending any final decision on prior authorization of the hazardous activity until a response from the States likely to be affected was received within a reasonable

time, which in any case should not exceed a period of six months.

19. Article 10 [11] left it open to States concerned to fix the time-frame for the duration of the consultations. A new paragraph had been added to the revised draft article, reproducing article 13, paragraph 3, as adopted on first reading, with only one change. The new article emphasized that the State of origin might agree to suspend the activity in question for a reasonable period of time instead of the period of six months which had been suggested under the former article 13, paragraph 3. Moving that paragraph was considered necessary as reference to article 10 [11] was made under article 12 [13]. The procedure to be followed would be the same, even if it was initiated at the request of States likely to be affected, but in that case, to the extent that it was applicable, such a procedure would have to deal with operations already authorized by the State of origin and in progress.

20. Articles 11 [12], 12 [13] (apart from the removal of paragraph 3), 13 [14], 15 [16] and 19 [17] remained the same. Article 14 [15] was essentially the same as the former article except for the addition of the words “or concerning intellectual property” in accordance with a useful suggestion that had been made.

21. New articles 16 and 17 had been added in response to suggestions made by States. Their addition in the framework of prevention had been considered reasonable since contingency measures or measures of preparedness were required to be put in place by every State as a measure of prevention or precaution. The content of the articles was essentially based on similar articles contained in the Convention on the Law of the Non-Navigational Uses of International Watercourses. Article 18 [6] was former article 6 which had been moved in the interest of better presentation.

22. Lastly, the preamble was considered essential in order to accommodate, at least partially, the views of several States which had emphasized the right to development, a balanced approach to deal with the environment and development, the importance of international cooperation and the limits to freedom of States. They were ideas which pervaded the draft articles, and it was hoped that such a preamble, rather than specific articles dealing with those principles, as had been suggested by some States, would offer a reasonable basis for most States to accept the set of articles proposed. Such a preamble was also appropriate to a framework convention, which was the form in which the articles could be recommended for adoption.

23. Mr. LUKASHUK congratulated the Special Rapporteur and the Commission as a whole for completing work on the draft on prevention of transboundary damage, observing that in his opinion it was ready for adoption. The Special Rapporteur had managed to overcome a large number of obstacles, to take account of the various positions of States and to prepare a draft which enabled many very complex and important questions to be resolved.

24. While the Special Rapporteur had rightly drawn attention to the importance of the preamble, there was a doubt in his own mind because it contained references only to General Assembly resolutions, which were

important documents but “soft” law. There was a whole series of conventions which contained provisions with a direct bearing on the draft articles, and it was very important to show that the articles had a sound basis not only in “soft” law but also in positive international law.

25. Article 5, on implementation, rightly imposed an obligation on States to take all necessary measures, and national law had a very important, indeed decisive, role to play in implementation of the future convention. It was not merely an organizational matter but also one of how such a convention was interpreted. In many cases the corresponding provisions in national law were more developed and more detailed.

26. One example was a law entitled “Atmospheric Air Protection”, adopted by the Russian Federation, in April 1999, on the protection of air quality, which was directed towards implementing the constitutional rights of citizens to a favourable environment and to reliable information on the environment. Its stated basic principle was the priority of protecting the life and health of current and future generations and it provided for the creation of a developed system for managing the protection of air quality, including monitoring, just as the draft article in question also required. The Russian law contained a separate chapter on citizens’ rights in regard to the protection of air quality. They had the right not only to relevant information but also to participate in taking relevant decisions. Persons guilty of violating the law bore civil, administrative and criminal responsibility, and full compensation was provided to victims. What was of interest was that the law devoted considerable attention to transboundary pollution and obliged all operators to take the necessary measures to reduce it. The law contained a specific chapter on international cooperation which stated that the Russian Federation would undertake such cooperation in accordance with international treaties, noting that the provisions of international treaties took priority over national law, which could be used to interpret a future convention. The Russian law contained a very detailed definition of transboundary air pollution. His example gave grounds for concluding that the draft under consideration was entirely realistic from the point of view of national law, and its implementation should encounter no legal obstacles on the part of States.

27. Mr. GOCO drew the Special Rapporteur’s attention to an article entitled “Sun, sand and toxic waste”,⁷ in which it was stated that for the first time the European Court of Justice (in the case of *Commission of the European Communities v. Hellenic Republic*) had levied a fine on a member of the European Union. Greece was having to pay US\$ 19,000 a day until its authorities cleaned up a toxic waste dump in a waterless ravine not far from the tourist beaches of western Crete. The article stated that the local authorities responsible for Crete’s waste management had resisted State plans to close the dump and replace it with a hi-tech recycling plant closer to an inhabited area. The article quoted Greece’s Environment Minister as saying that, every time he had moved to solve the crisis, locals had blocked State workers from beginning the construction of an interim waste storage site.

28. He hoped that the Special Rapporteur would agree that it was a situation in which the State had exercised due diligence but had been prevented from implementing its plans because of circumstances beyond its control. Such a situation was applicable to the topic under consideration.

29. Mr. GAJA commended the Special Rapporteur for his persistent efforts to improve the text and have it adopted by the Commission, and particularly for having moved the draft articles from the elusive subject of international liability for injurious consequences arising from acts not prohibited by international law to the more solid topic of prevention of transboundary harm from hazardous activities.

30. As to the question of retaining the phrase “activities not prohibited by international law” in article 1, he wondered whether it might not be preferable to refer to obligations to prevent significant risks irrespective of whether the activities in question were or were not prohibited by international law. If an obligation was imposed because a significant risk was involved, why should it matter whether the activity was prohibited, and for reasons which might be totally unrelated to the risk? Moreover, an activity might be prohibited under international law but not necessarily in relation to the State which might suffer the harm. Why should an obligation undertaken by the State of origin towards third States have an influence on the application of the draft articles when it came to procedures designed to prevent significant harm being caused to another State? He supported the view that article 1 should no longer make reference to activities that were not prohibited under international law as a condition for the applicability of the draft articles.

31. The Special Rapporteur had referred to criticism voiced by some States concerning the fact that the draft articles as adopted on first reading related solely to inter-State transboundary harm and did not address the question of harm caused to areas beyond national jurisdiction or to the global commons. At the current stage it would be difficult to attempt to cover that question, but something could be said about it in the preamble or in a “without prejudice” provision, if only to show that the Commission was aware of the issue and was concerned about industrial activities which might be hazardous to the ozone layer, for example, and could consequently affect all mankind.

32. The core of the draft articles, in his view, was the triggering for the State of origin of a duty of notification and consultation. Under article 9 [10], the obligation to notify arose only when the State of origin had made an assessment that significant risk was involved. Under article 7 [8], the State of origin had an obligation to make such an assessment in the case of possible transboundary harm, but it might be inclined not to carry out the assessment very thoroughly—partly because, if a risk of significant harm was detected, then further obligations would arise. The draft thus gave an incentive to the State of origin not to do precisely what was intended, namely, that there should be advance notice when there was a risk of significant harm.

33. Under article 3 of the Convention on Environmental Impact Assessment in a Transboundary Context, notification by the State of origin was mandatory in the case of

⁷ *Time*, 17 July 2000, p. 23.

activities that could even potentially have substantial transboundary impact. The draft articles were not intended to impinge on that obligation, but they set out weaker ones, and that might affect the correct implementation of the Convention.

34. States that were likely to suffer harm had a genuine interest in becoming involved in the assessment of risk. It should be possible for them not only to request, but also to receive, prior notification so that they could contribute to the assessment, thereby making it undoubtedly more thorough than it would otherwise have been.

35. Lastly, there was the matter of the obligations incumbent on the State concerned once the risk of significant harm had been assessed. Under article 10 [11], those obligations were intended to lead to an agreed solution. Little was said about the possible contents of an agreement, but some indication thereof might help States in reaching an agreement that responded to the concerns behind the draft articles. One approach might be to suggest that States agree to establish a joint monitoring body to be entrusted with activities such as ensuring that the balance of interest was correctly maintained, that the level of risk did not substantially increase and that contingency plans were properly prepared. Such an approach, as had been seen in agreements on watercourses and in other areas, was often the best way of ensuring cooperation among States.

36. Mr. BROWNLIE said he supported Mr. Gaja's criticisms of the phrase "activities not prohibited by international law". He commended the Special Rapporteur's policy, as outlined in paragraphs 27, 32 and 33 of the third report, of emphasizing that the topic of prevention was concerned with the management of risks.

37. The only difficulty he experienced with regard to the general conceptual apparatus was the emphasis, particularly in paragraphs 18 to 49 of the second report,⁸ on the duty of due diligence. Caution was needed, since reliance on that concept could create the very confusion with issues of State responsibility that the Special Rapporteur was trying to avoid. In the context of the draft on prevention, the operational value of the duty of due diligence was limited. Due diligence as a concept had no autonomy, for it depended on the context. It was merely a reference to the relevant legal standard. It might be confused with negligence or the breach of a duty of care, whereas the standard should not be confined to non-intentional creation of risk.

38. On the whole, the Special Rapporteur had succeeded in delimiting his subject from that of State responsibility. The topic of prevention must be seen as constituting part of environmental law, and that should be taken into account in reaching a final decision on the long-term programme of work.

39. Mr. HAFNER asked for clarification of Mr. Gaja's comment on the need, as one of the results of negotiations, for States to agree on the establishment of joint monitoring bodies: should that be a duty incumbent on the State or only a possibility it could envisage?

40. Mr. GAJA said he saw it as a possibility that could be mentioned, but that it would be for the States concerned to decide whether they wished to establish such bodies.

41. Mr. SIMMA commended the Special Rapporteur on his able and exhaustive presentation of the report and proposed draft convention. Over time the topic had been gradually pruned of the most controversial issues. Liability, the "polluter pays" principle and the precautionary principle had all been lopped off, and what was left was a rump project the content of which was almost over-ripe for codification. He shared the Special Rapporteur's preference for a convention instead of a declaration as envisaged earlier. A set of draft articles in soft law format would only add to the catalogues of principles already developed over the past 25 years. In addition, since the work on State responsibility was likely to result in a declaration, that was all the more reason for the draft on prevention to take the form of a convention. It was the only product of the current quinquennium that could do so.

42. As an introduction to a set of articles on prevention in environmental law, the preamble came down too heavily on the side of freedom of action. The second and third instruments that it mentioned concerned natural resources and development, but they should be preceded by a reference to the fourth one listed, the Rio Declaration on Environment and Development (Rio Declaration),⁹ which was squarely within the field of environmental law. In line with Mr. Lukashuk's advice, mention might be made of the obligation under general international law to look after the territory of one's neighbour: *sic utere tuo ut alienum non laedas*.

43. From the start of the debate on prevention there had been considerable confusion about the legal nature of the principles, and the Special Rapporteur had done much to dispel it. The draft articles, in his own view, were a self-contained set of primary rules on risk management or prevention, and the work on the topic mainly entailed codification of the primary obligations of due diligence in essentially procedural form. The future convention would be without prejudice to higher standards and more specific obligations under other environmental treaties. The reference to customary international law in article 18 [6] should be construed as relating solely to "obligations" under customary international law, not to the freedom of action that was very much a part of customary international law. Non-compliance with the future convention would entail State responsibility unless procedures were developed as *leges speciales* under treaties on specific cases of pollution. The Special Rapporteur was right to say that there was no negative overlap with State responsibility.

44. He endorsed Mr. Gaja's comments about deleting the phrase "activities not prohibited by international law",

⁸ See footnote 6 above.

⁹ 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.

in article 1. When the draft had been concerned not only with prevention but also with damage, the phrase might have been necessary to prevent juridical and intellectual overlap with State responsibility, but now that liability had been detached, it could be deleted. Accordingly, the duty of prevention applied to prohibited activities as well, a more open approach that he welcomed. A distinction must be drawn, however, between activities prohibited under international environmental law, very few of which involved risk creation, and those prohibited by entirely different rules of international law such as those on disarmament.

45. Since the draft was opened up to cover activities not prohibited by international law, perhaps the entire text should be reviewed. For example, article 6 [7], requiring prior authorization, was now problematic in that it stated that authorization would have to be given for an activity prohibited by the rules of international law, in other words, one that was entirely illegal. Perhaps a fourth paragraph should be included in article 6 [7] to indicate that illegal activities, prohibited by international law, could not be authorized.

46. Mr. BROWNLIE said his preference would be for the *sic utere tuo* maxim to be inserted, not in the preamble, but in a saving clause like article 18 [6]. The careful demarcation established by the Special Rapporteur between prevention and other areas of international law had to be maintained.

47. References to due diligence carried the implication that the draft would not apply to intentional or reckless conduct, something that was wholly unrealistic and indeed retrograde. The range of sources of risk could certainly include activities that were intentional or completely reckless in that they took absolutely no account of the risks to other States. There was a strange tendency in the literature to ignore *dolus*. The “*Rainbow Warrior*” materials were a case in point in that, on the whole, they failed to refer to intentional conduct. He would like to hear the Special Rapporteur’s views on that subject.

48. Mr. SIMMA said that he found it hard to incorporate malicious or intentionally harmful conduct in the content of the draft. In the context of article 6 [7], for example, it would mean that, if a State intended to harm another by environmental pollution of some kind, it would have to engage in prior authorization, impact assessment, and so on. The entire draft was premised on activities undertaken in fundamentally good faith but for which a considerable degree of due diligence had to be exercised.

49. Mr. ROSENSTOCK said he did not see why, in the cases discussed, the failure of prior authorization could not be regarded as compounding the sin, as another breach of an obligation. The modern origin of the due diligence obligation was to be found in the “*Alabama*” case, in which the activities had gone above and beyond checking whether improper action was being undertaken. From that model, the obligation of due diligence could certainly be seen as applying to activities that were malicious and intentional.

50. Mr. HAFNER said he did not agree with Mr. Simma that the requirement of prior authorization was incompat-

ible with removing the restriction concerning activities not prohibited by international law. As he read article 6 [7] and the others relating to prior authorization, they did not confer a right to prior authorization, but merely said that if an activity was carried out, authorization was required. He saw no need to review the draft to accommodate the change in the activities envisaged.

51. Mr. Sreenivasa RAO (Special Rapporteur) said that the thrust of the draft articles was clear. If a State undertook an activity that risked causing transboundary harm, that State was expected to make the necessary assessments, arrange authorization and subsequently review the project to ensure that it conformed to a certain standard. The kind of project envisaged was generally on a large scale, such as an atomic energy plant or a hydroelectric project, and might involve the risk of dumping toxic waste. At every stage of the process, however, the State carrying out such activities was answerable to the other State or States involved. The element of *dolus* or the intention or legality of the activity was not relevant to the purposes of the draft articles. If the activity was prohibited, other consequences would inevitably ensue and a State continuing such activity would have to take full responsibility for the consequences. Deleting the phrase “activities not prohibited by international law” would therefore make little difference, if the activities were illegal and were seen as such by States. Nor would deletion of the phrase make it imperative to review the provisions of the draft articles. If an activity was illegal, the draft articles ceased to apply; it became a matter of State responsibility. In his view, the draft articles were concerned rather with mismanagement and the need for vigilance by all the States involved. He welcomed the reference by Mr. Rosenstock to the concept of due diligence arising from the “*Alabama*” case, which to a certain extent illustrated his point. He would not oppose deletion of the phrase but thought it unnecessary.

52. Mr. TOMKA said that the question before the Commission was prevention, within the larger topic of injurious consequences arising out of acts not prohibited by international law. If, therefore, the Commission wished to broaden the scope of the draft articles to include acts prohibited by international law, it should seek the approval of States in the Sixth Committee. Secondly, the effect of the recommendation in paragraph 33 of the report might be to weaken the notion of prohibition. He questioned whether States engaging in prohibited activities would notify the other countries concerned, even if they were aware that their activities could cause harm. States should therefore not be invited to ignore the provisions of the draft articles, if the Commission considered that they should apply to all activities. In his view, the draft articles should apply only to activities not prohibited by international law.

53. Mr. BROWNLIE said the drawback to citing the “*Alabama*” case was that it concerned not due diligence but a deliberate breach of the standards of neutrality applicable during the American Civil War period. As for article 6 [7], he understood the point raised by Mr. Simma, but the article was not conclusive on the issue of intentional conduct; if the draft became a convention, there would presumably be cases in which States had not properly applied the provisions. The Commission must

therefore ensure that the draft articles covered intentional conduct. There was often no clear distinction between *dolus* and negligence; as in the “Alabama” case, it might not be clear to what extent a Government was guilty of negligence or worse. The difficulty he had noted, however, might be a matter more of language than of substance.

54. Mr. GAJA said that his main concern regarding the draft articles was the provisions concerning notification, information and consultation. The draft articles should make it clear that they applied to all sorts of activities. The question was not whether an activity was prohibited per se but whether it would involve a breach of an obligation by the State of origin towards the State where the harmful consequences of the activity would be felt. He therefore advocated wording articles 6 [7] and 11 [12] in such a way as to provide for authorization to be given for any kind of risky activity.

55. Mr. SIMMA said that the view put forward by the Special Rapporteur was not unknown in international law, as the principles *jus in bello* and *jus ad bellum* illustrated. It was, however, hard to understand. It was as though, before being stabbed, the victim asked for the dagger to be disinfected so as to prevent blood poisoning. With regard to the draft articles singled out in paragraph 33 of the report, article 3 was a *chapeau* article from which other articles followed. Its inclusion seemed to reaffirm that the articles referred only to activities not prohibited under international law.

56. Mr. Sreenivasa RAO (Special Rapporteur) said that, in considering various drafts over the years, the Commission had concentrated not on the nature of various activities but on the content of prevention. Confusion had therefore arisen simply because that aspect of the topic had not been discussed before. To his mind, the Commission had succeeded in setting out the principles on which prevention should be based. Some members maintained that by retaining the phrase “activities not prohibited by international law” there was a danger of distracting the reader from the content of prevention by discussing which activities were prohibited and which were not. He himself, like a predecessor as Special Rapporteur, Robert Q. Quentin-Baxter, had been concerned not with settling all aspects of acts prohibited by international law but with explaining and demarcating the concept of prevention. Scholars, however, as was their wont, had lit and fanned the flames of controversy as to what was or was not prohibited. In order to avoid such a needless, doctrinaire debate, he had made the recommendation contained in paragraph 33, with which he had attempted to reassure colleagues who were concerned about retaining the phrase “activities not prohibited by international law”. Such activities would, however, still have to be subject to the provisions of articles 10 [11], 11 [12] and 12 [13]. If, on the other hand, an activity was clearly prohibited by international law, it was not for the draft articles to deal with the consequences. There was no need for duplication.

57. Mr. ILLUECA asked the Special Rapporteur to elucidate two matters. First, he wondered whether, as some States had asserted, military activities lay outside the scope of the articles. He meant military activities in the

broadest sense, covering both peace and war, and including military occupations, the siting of military bases in foreign countries and the deployment of United Nations peacekeeping forces. If the environment or natural resources were harmed in the course of such activities, the articles should have more to say on that score. Secondly, he would welcome more details on the scope of the definition of transboundary harm in articles 1 and 2. In particular, he wondered how they would apply to harm caused by a State which was the author or sponsor of activities within a territory controlled by it but not belonging to it. A pertinent example was the phosphate mines in Nauru, when it had been a protectorate of Australia, the United Kingdom and New Zealand. Australia had caused serious harm by the intensive phosphate mining. It had carried out rehabilitation work, but the case concerning *Certain Phosphate Lands in Nauru* had gone to ICJ and a peaceful settlement had finally been reached. As a recent study suggested, however, the question of harm caused in such a case—by a State whose boundaries were not contiguous with the territory in which the harm had been caused—should be covered by the articles on prevention.

58. Mr. Sreenivasa RAO (Special Rapporteur), referring to the question of military activities, said that the matter had been considered by the Working Group, which had come to the conclusion that all activities, whether military or not, would, if they caused transboundary harm, be covered by the prevention regime, assuming that they were fully permissible under international law. If their permissibility was doubtful, they should still be covered. If, however, they were prohibited, the articles would not apply; remedies under State responsibility would be available. A State affected by such activities as the operation of munitions factories or tests that involved cordoning off certain areas for security reasons had the right to be involved, to the extent that such operations had a transboundary effect. The State conducting the operations had a corresponding obligation to the State likely to be affected. The issue was briefly addressed in the commentary, but further elucidation could be added.

59. With regard to the phosphate mines in Nauru, Mr. Illueca had raised an important point. A similar situation had arisen in Namibia. In the *Namibia* case, ICJ had ruled that the State controlling a territory, whether legally or not, was responsible for all activities in that territory. The articles, however, might not provide the right formula to deal with harm caused in such circumstances; trust territory law, for example, might be more appropriate. In the case of the Nauru phosphate mines, the settlement by Australia had been a reasonable way of dealing with the matter. The situation with regard to certain other activities, such as nuclear testing, was not so clear-cut. He fully accepted, however, that the prevention articles should apply when one side considered an activity to be prohibited and the other did not.

The meeting rose at 1 p.m.

2642nd MEETING

Wednesday, 19 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹ (continued) (A/CN.4/504, sect. D, A/CN.4/509,² A/CN.4/510³)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA thanked the Special Rapporteur for submitting a clear, summary, sober yet complete third report (A/CN.4/510) on the subtopic of prevention of transboundary damage from hazardous activities, which was both scholarly and informative.

2. It was scholarly because it defined the fundamental concepts and the scope of the subject (in paras. 14 and 16, *inter alia*) and opened up new vistas in relation to liability based on an internationally wrongful act and also in relation to the concept of prevention and the future treatment of the specific regime of reparation, thus offering a global reading of the entire regime of international liability for injurious consequences arising out of acts not prohibited by international law.

3. It was informative because the Special Rapporteur had manipulated the dialectical link between the principle of due diligence and permitted acts so as to reveal to the reader both the meaning and the purpose of the concept of prevention and so as to suggest a structure for the regime proposed in the draft articles.

4. According to the Special Rapporteur, the obligation of due diligence could be reduced to an obligation incumbent on concerned States to manage risks in a concerted way. Those risks were inherent in activities conducted in the territory of one of the States or in activities likely to cause harm in the territory of the other States. The general rule requiring prevention of the risks of damage from activities not prohibited by international law clashed with the traditional image of the function of territory as the material basis for the exercise of the State's jurisdiction. The option to legislate was transformed into an obligation to acquire an adequate and efficient normative, legislative and administrative tool. From that moment on, it was international law that determined, guided and imposed conditionalities on internal law. Thenceforth, the problem of the relationship between the internal and international legal orders was posed in concrete rather than theoretical terms. The linkage established between territorial jurisdiction and the risk of damage arising out of activities not prohibited by international law revealed the existence of a general obligation imposed on States by international law and of a consequent obligation to make reparation in the event of a breach of the former obligation. Accordingly, the obligation of prevention as it were objectivized a primary rule which had, in previous reports on the topic, been regarded as implicit in any activity not prohibited by international law. Thus, the relationship between State responsibility and international liability, to which paragraphs 25 to 30 of the third report were devoted, did indeed exist and the Special Rapporteur would ultimately have to come to grips with the task of elucidating it.

5. He wished to draw attention to the scope of the re-emerging and evolving function of territory in the context of the current trend towards the relocation of industry and the globalization of the economy. Scarcely more than 20 years previously, when calling for the transfer of technology, the countries of the third world, victims of the prevailing fashion, had undoubtedly not been aware, as they currently were, of the adverse effects of the technology of the North. They had certainly not been aware that they would themselves one day cease to be merely sites for turnkey plants and would instead become risk generators, in the sense of States of origin or concerned States within the meaning of the draft articles. Hence the need for the international community to provide itself with a generally accepted normative and conceptual instrument to safeguard the overlapping or complementary interests of the tangle of partnerships currently in vogue. Therein, in his view, lay the current and future value of the draft articles relating to prevention of significant transboundary harm, annexed to the third report.

6. He shared the Special Rapporteur's view that the draft articles should take the form of a convention rather than of a declaration.

7. As Mr. Lukashuk had pointed out (2641st meeting), the draft General Assembly resolution forming the preamble to the draft articles lacked substance in terms of normative references and he endorsed Mr. Lukashuk's criticisms in that regard. The draft resolution should be fleshed out so as to take account of the general rules of international law, the specific principles of environmental law and the right to development, as well as the principles

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Ibid.*

of Agenda 21⁴ adopted by the United Nations Conference on Environment and Development.

8. On the substance, however, the fifth preambular paragraph contained an innovative formulation which provided a serious ideological and conceptual basis for the structure of the draft articles and which, in his view, constituted the cornerstone of the entire system, both in its section dealing with prevention and in the future section to deal with reparation. It was the latter section that States were awaiting and the principle embodied in that paragraph would serve as an introductory norm, both for the set of provisions on prevention and for the set of provisions on reparation which the Commission would have to draft if the system was not to remain incomplete. Consequently, that paragraph should be relocated so as to appear in the main body of the draft articles and should be reformulated in terms making it worthy of its role as a guiding principle for the system as a whole.

9. With regard to article 1, he favoured retaining the explicit reference to “activities not prohibited by international law”, an expression that should also appear in the title, so as to bring it into line with the text. As for the object of that provision, it was not clear whether the Special Rapporteur wished to refer to activities or to damage or whether it was the cause or the consequence in which he was interested. The draft articles were applicable not to activities, but to the risk of significant transboundary harm, prevention of which was the core of the topic. One idea underlying article 1 was the concept of risk inherent in any human activity, an expression that did not appear in the third report. That, however, was what was at issue and that idea seemed to be the driving force behind the system which was being advocated and which involved concerted management by the State of origin and the States likely to be affected. That system was itself driven by the idea of solidarity. The relationship between the State of origin and the States likely to be affected might be reversed overnight if it was found necessary to relocate an activity.

10. That latter idea should have appeared in article 1, which suffered from its unduly abstract nature. A simple formulation, referring, for example, to industrial, commercial or agricultural activities, would have provided a newcomer to the topic with helpful guidance. Some such clarification would make the draft article more useful and precise and might be provided in the commentary.

11. With regard to article 2, he proposed that subparagraph (a) should be redrafted to read: “‘Risk of causing significant transboundary harm’ means the risk of significant and foreseeable harm arising, regardless of its gravity”. That reference to the idea of gravity, which must appear in the explanation of the expression “risk of causing significant transboundary harm”, would enable account to be taken of the question of the threshold for “significant” harm, a matter discussed in paragraph 16 of the third report.

12. In subparagraph (c), the expression *États concernés* in the French version should be replaced by *États intéressés* to bring that subparagraph into line with proposed subparagraph (f), which should be relocated after subparagraph (c).

13. The fifth paragraph of the preamble of the draft resolution preceding the draft articles should be relocated to follow article 2. It would thus become article 2 bis, entitled “Obligation of prevention”, and would read:

“1. The freedom of all States to carry on or permit non-prohibited activities in their territory or territory otherwise under their jurisdiction or control is not unlimited.

“2. That freedom entails the obligation for the State to prevent any risk of significant damage to other States, particularly bordering States, arising from such activities.”

14. The text of article 3 would remain unchanged, subject to any amendment to its content. It should, however, be entitled “Prevention measures”, not “Prevention”.

15. With regard to article 6 [7], an oversight should be rectified by inserting the words “in its territory” immediately after the words “carried out” in paragraph 1 (a), so as to show that there was a link between the State referred to in the *chapeau* and its territory referred to in paragraph 1 (a).

16. In the French version of article 10 [11], the expression *les États fixent ensemble* (the States concerned shall agree) was a clumsy formulation which should be replaced by *les États fixent d’un commun accord*.

17. Lastly, in article 10 [11], paragraph 2 bis, drafted along “soft” law lines, the expression *fait en sorte* (shall ... arrange to introduce) was also unfortunate, for the State of origin could easily use it as a pretext for claiming that it was not obliged to introduce such measures, but only to arrange to introduce them. It would be more directive to use the formulation “the State of origin shall ... introduce appropriate and feasible measures” (*prend les mesures pratiques ...*).

18. Mr. KATEKA said that Mr. Pambou-Tchivounda’s proposal that the fifth preambular paragraph should be moved to the main body of the text of the draft convention so as to make it a new article 2 bis on the obligation of prevention was an interesting one, but it had the disadvantage of disturbing the balance of the preamble, whose second and third paragraphs drew attention to the important principles of permanent sovereignty over natural resources and the right to development. If that proposal was adopted, those two principles should, if possible, be mentioned in the new article 2 bis.

19. Mr. TOMKA said he agreed with Mr. Kateka that the adoption of Mr. Pambou-Tchivounda’s proposal would upset the balance of the preamble; however, it would also change the whole thrust of the text of the draft convention. Consequently, the utmost caution was called for in that regard.

20. Mr. GOCO asked whether Mr. Pambou-Tchivounda thought that, when an activity was undertaken in the

⁴ 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 II.

State of origin and harm seemed inevitable, a temporary interruption of the activity could be ordered under article 19 [17].

21. Mr. PAMBOU-TCHIVOUNDA, replying to Mr. Kateka and Mr. Tomka, said that the fifth preambular paragraph could very easily be retained and its substance developed in the text of the draft convention. As for Mr. Goco's very interesting question, the Special Rapporteur was undoubtedly best placed to answer it and to clarify the matter for the benefit of all the members of the Commission.

22. Mr. ECONOMIDES said that the Special Rapporteur had performed a remarkable task in a very short space of time and the draft articles he was submitting could virtually be adopted as they stood on second reading. However, they could be improved.

23. First, like Mr. Brownlie, Mr. Gaja and Mr. Simma, he thought that it would be judicious in article 1 to delete the words "not prohibited by international law", which did not add a great deal and might even be misleading. As the Special Rapporteur himself had said in paragraph 28 of his third report, few activities were per se generally prohibited under international law. If those words were deleted, the draft would apply in all cases unless a *lex specialis* provided for another regime of prevention or the implementation of the draft articles was contrary to a rule of *jus cogens*.

24. Secondly, it could legitimately be said that, at the current time, in transboundary relations, the rule that a State should refrain from causing significant transboundary damage to another State was a customary norm of international environmental law. For some time, that rule had been confirmed by international practice and article 7 of the Convention on the Law of Non-Navigational Uses of International Watercourses was a noteworthy example. Article 3 therefore corroborated that customary rule, and, following its example, must apply to any activity that could cause significant transboundary damage and not only to dangerous activities. Article 1 could be recast to make that clearer.

25. Furthermore, the draft was contrary to a well-established principle of international dispute settlement law. According to article 9 [10], an international dispute could arise when the State of origin provided notification that an activity it was planning to carry out in its territory could cause significant transboundary damage to another State likely to be affected by that activity. Under international law, when an international dispute arose, the parties to that dispute must refrain from any unilateral act which could extend the dispute or make its settlement more difficult. However, instead of taking account of that fundamental rule of international law which ICJ had recalled on a number of occasions, the draft articles authorized the State of origin, following notification, unilaterally to engage in the activity in question even if a dispute existed with a State likely to be affected. In order to achieve a satisfactory and equitable balance in that regard, it would also be necessary to rule out any "right of veto"—to take the expression used by the Special Rapporteur in paragraph 34 of his report—of the State likely to be affected, as well as unilateral action by the State of origin when there was a dispute

regarding the activity and until that dispute had been settled. That equitable balance was currently lacking and, in their current form, the draft articles favoured the State of origin and left the States likely to be affected somewhat defenceless.

26. Article 19 [17], paragraph 2, had serious shortcomings. It should be supplemented, possibly in the Drafting Committee, by drawing on the provisions of article 33 of the Convention on the Non-Navigational Uses of International Watercourses.

27. He supported Mr. Gaja's proposal that the system of notification provided for in the draft articles should be strengthened and Mr. Pambou-Tchivounda's proposal for the inclusion of a new article 2 bis on the obligation of prevention.

28. The draft articles prompted other comments, but they were not so important. There was a problem with article 2, subparagraph (a): it was not clear and should be clarified or even deleted. The words "a State of origin" in article 6 [7], paragraph 1, should be replaced by the words "the State of origin". Article 9 [10], paragraph 2, did not indicate at what point the six-month period referred to would begin. Article 10 [11] did not make it clear what would happen if the States concerned did not manage to agree on the time frame for the duration of consultations. In article 11 [12], subparagraph (c), the word *et* in the last sentence of the French text should be replaced by the word *ou*. As for article 18 [6], he wondered whether it should not expressly mention the rules enacted by international organizations and, in particular, by the European Union. Lastly, the preamble should refer to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,⁵ which provided for a duty of cooperation and dealt with other questions of relevance to the draft articles. In conclusion, he said that he too considered that the draft articles should take the form of an international convention.

29. Mr. LUKASHUK said that, unlike Mr. Economides, he thought that the expression "not prohibited by international law" qualifying the word "activities" in article 1 must be retained because it helped to define the scope of the draft articles and prevented any overlap with the area of State responsibility. He did, however, agree with Mr. Economides that there was a certain imbalance between the interests of States of origin and those of States likely to be affected and that, when it came to a draft convention, in other words, a text which it was hoped would be ratified by the largest possible number of States, it would be realistic to re-establish that balance.

30. Mr. HAFNER, commenting on the Special Rapporteur's analysis of the questions under consideration, said that, unlike the Special Rapporteur, he did not think that the question whether or not the words "not prohibited by international law" should be retained was closely linked with the relationship between the topic of State responsibility and that of international liability for injurious consequences arising out of acts not prohibited by international law. It was certainly linked with the scope of

⁵ See 2617th meeting, footnote 19.

the draft articles, but, beyond that and if it was agreed that international liability related to the obligation of a State to compensate for damage caused by its non-wrongful act, the words in question affected only whether the prohibited nature of the activities concerned was a condition for the applicability of the articles. In the case of non-compliance with the articles, responsibility would necessarily arise.

31. In paragraphs 17 to 20 of his report, the Special Rapporteur had discussed the question of the relationship between prevention and international liability and it was difficult to understand why he brought up the problem of due diligence under that heading. As Mr. Simma had explained (2641st meeting), it had to be assumed that a breach of the duty of prevention entailed State responsibility. In that context, reference could be made to due diligence and he shared the view expressed on that in the report insofar as it reflected a certain standard of respect for the rules of international law. As Mr. Brownlie had emphasized (*ibid.*), it constituted only one aspect of the question of State responsibility and was not synonymous with State responsibility itself. Nevertheless, the question remained as to whether the duty of care was of a relative or absolute nature. It was certainly relative insofar as it depended on the degree of dangerousness of the activity in question; however, to make it dependent on the level of economic development of the State concerned did pose certain problems. The Rio Declaration⁶ and other international instruments did, of course, speak of relative obligations in the field of environmental law. But who was to decide when a State was not in a position to establish and maintain an adequate administrative apparatus? The problem was knowing precisely when responsibility occurred. Why then was it not possible to argue that a small State had fewer obligations than a powerful State if one compared their budgets? Would it be possible to argue that a State with a budget deficit was under less of an obligation than a State with a budget surplus? Did that also mean that an affected developing State had fewer rights to assert if the State of origin was at a comparable level of development to itself than if it was an industrialized State? Without denying the needs of developing countries in terms of environment rights, the Commission should not lose sight of the fact that it was not dealing with conflict relations in the context of the North-South conflict; such a type of conflict would be the exception. It might therefore be asked whether the reference to the different levels of development was well chosen in the context.

32. Paragraph 20 (*d*) of the report stated that, in view of the duty of due diligence, a State of origin would have to shoulder a greater degree of the burden of proof. What was meant by "greater degree"? Did it entail a shift of the burden of proof?

33. In paragraph 22 of his report, the Special Rapporteur referred to questions of sustainable development, capacity-building and international funding mechanisms. That again had to do with what was called differentiated responsibility. But the following sentence seemed to introduce an inconsistency: on the one hand, the report referred to differentiated responsibility and, on the other hand, it stated that the distinction could not discharge a State from its

obligation of prevention. To what extent did differentiated responsibility reduce the obligation of prevention? The classical legal tradition demanded precise limits. Returning to the question of differences in levels of development, he asked how the question of capacity-building and international funding mechanisms could influence relations between States of equal or comparable levels of development. It was not a question of relations between a State and the community of States where those principles could apply, since the community of States necessarily included States with different levels of development. He doubted that States would contribute to the funding in question if they were not likely to be affected. He did not see why the Special Rapporteur placed such emphasis on those issues. Fortunately, the draft articles reflected a more balanced position in that regard.

34. Turning to the draft articles, he said that he would propose only minor drafting changes because it was too late to suggest major ones, as Mr. Pambou-Tchivounda had done.

35. As he had said at the previous session, he supported the deletion of the words "not prohibited by international law". Whether non-compliance with the draft articles made an activity a prohibited one or whether an activity became lawful only if those provisions were respected was open to discussion. It was quite clear that, if an activity was carried out in breach of the articles on prevention, that would give rise to State responsibility, so that the performance of the activity could be described as unlawful, not directly, on account of the intrinsically lawful nature of the activity, but rather because of the non-observance of the articles. In order to avoid discussion on such points, the Special Rapporteur quite rightly proposed the deletion of the words "not prohibited by international law", as suggested by a number of States. He was not convinced that that deletion required the revision of the other draft articles, in particular article 6 [7]. That provision did not give operators the right to authorization and the State was thus not bound to authorize prohibited activities. The only thing required under article 6 [7] was that the commencement of the activity should be dependent on authorization. It did not limit the right of the State to deny authorization. That remained a discretionary right of the State and the only consequence of the denial of authorization was that the activity could not commence.

36. It had been argued that a State would never inform another State about its planned activities if they were prohibited, but he thought States would take the view that an activity was lawful, so as to trigger the duty of information. He shared the Special Rapporteur's view that the Commission should deal only with prevention and not with collateral issues such as whether or not an activity was prohibited. That line of thinking was in full conformity with the approach taken by the Commission in other matters. Similar international instruments, such as the Convention on Environmental Impact Assessment in a Transboundary Context, referred only to planned activities, not to activities not prohibited under international law. If those words were retained, it would always be necessary to prove that an activity was lawful in order to ascertain whether the draft articles were applicable and that would be an impediment to the instrument's effectiveness.

⁶ See 2641st meeting, footnote 9.

37. The Commission had intentionally excluded from the draft articles any reference to the global commons and similar issues. It would be a good idea to follow Mr. Gaja's suggestion that those issues should be mentioned in the preamble in order to signal clearly the Commission's intentions. Mr. Gaja had also criticized article 9 [10], which required an indication of an actual risk for the duty of notification to be triggered. In order to meet that concern, the wording could be changed to read: "indicates that a risk ... cannot reasonably be excluded ..." or "indicates a possible risk ...".

38. As to the *sic utere tuo ut alienum non laedas* principle whose inclusion in the text had been proposed, he shared Mr. Brownlie's view that it was already covered in article 18 [6].

39. As to whether joint monitoring bodies should be mentioned, he felt that that would be unwelcome, since it could be seen as contributing to the proliferation of international bodies, international bureaucracy and costs. The idea should be retained, but an appropriate place to express it would be in the commentary. He could not support the idea put forward by Mr. Lukashuk and Mr. Simma that certain other instruments should be mentioned in the preamble.

40. With regard to article 5, he wondered whether the addition of the word "concerned" was appropriate. According to the definition in article 2, subparagraph (f), that would mean that the duty to take the necessary legislative, administrative or other action would arise only if the activity was at least already planned. At that stage, it would certainly be too late to take legislative measures. Hence, the word "concerned" should not be inserted.

41. He drew attention to the *nota bene* which appeared at the end of the report and contained interesting observations, even if its status was not clear. The members of the Commission knew, and States had stressed, that there was an extremely sensitive relationship between article 3 and articles 11 [12] and 12 [13]. The analogy with article 7 of the Convention on the Law of the Non-Navigational Uses of International Watercourses was misleading, however, because the draft articles in question and article 7 of the Convention said two entirely different things. In article 7, the balancing of factors came into play only if the necessary prevention measures had been taken and harm nevertheless occurred, whereas, in the draft articles, the sum total of preventive measures was subject to balancing factors. It nevertheless seemed that States were prepared to go along with that idea.

42. The relationship between article 3 and articles 11 [12] and 12 [13] raised another question: if a State was bound to apply less stringent measures of prevention than those required in other circumstances only after negotiation with the State that might be affected, did that State forgo any claim of responsibility on the part of the first State if damage which could have been avoided by using more stringent preventive measures nevertheless occurred? Whatever the answer was, the question merely highlighted some of the implications of the special relationship between the three articles mentioned above and cast doubt on the appropriateness of the last sentence of the *nota bene*. The solution might be to draw inspiration from the Convention on Long-

Range Transboundary Air Pollution, which contained a note stating that the provisions of the Convention were without prejudice to questions of responsibility.

43. He supported the idea suggested by Mr. Pellet of including, either in the preamble or in the draft articles themselves, a reference to the principle of precaution, which played an increasingly important role in environmental law.

44. With regard to the comment by Mr. Economides on article 18 [6], he said that, if the words "under relevant treaties" was given a broad interpretation, the rules established by international organizations, including the European Union, would be covered and it would be unnecessary to amend the provision.

45. In conclusion, he said the Commission should not hesitate to refer the draft articles to the Drafting Committee or, if the Special Rapporteur so wished, to a working group.

46. Mr. MOMTAZ congratulated the Special Rapporteur on having revived a moribund and somewhat neglected topic. Once the 19 draft articles that he had proposed had been adopted as a framework convention, they would offer excellent guidance to States facing the harmful consequences of transboundary pollution.

47. Referring to the preamble, he endorsed the comments made by Mr. Gaja and Mr. Lukashuk on the instruments which were cited and which were part of "soft" law. It was true that the preambular paragraphs did not refer to positive law, and that should be stated expressly and clearly. They did, however, refer to the Rio Declaration, which could be considered "hard" law because principle 2, which was corroborated by principle 21 of the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁷ had been found by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, to express "the common conviction of the States concerned" and to form "part of the corpus of international law relating to the environment" [see pp. 241–242, paras. 27 and 29]. As positive law was thus well and truly involved, that should be mentioned in the preamble. It was also necessary, in line with the suggestion made by Mr. Pambou-Tchivounda, to refer to Agenda 21.

48. ICJ had also referred to respect for the environment in the global commons. The idea was one that warranted further attention, even if a decision had been taken not to deal with it at the current stage. It was difficult to know for certain at the current time to what extent man's activities created significant damage to human health in the atmosphere. For example, the global warming of the planet through the greenhouse effect might turn out to be the result of climatic variations that were merely temporary, but, in any event, the danger it represented was serious and fundamental. It was a field different from that generally covered in the law: potential damage that

⁷ 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.

seemed to be a definite threat. That was the reason why a reference to the question, which was of concern to the international community, would be welcome in the preamble. In that connection, reference should also be made to the fundamental right to a clean and healthy environment.

49. The last preambular paragraph referred to “regional economic integration organizations”, whereas articles 4 and 16 spoke of “competent international organizations”. In his opinion, the second expression should be used.

50. Turning to the draft articles, and beginning with article 1, he said that, as Mr. Gaja had advised, it would be better to delete the phrase “not prohibited by international law” in reference to activities which involved a risk of causing harm. The Special Rapporteur had referred to nuclear testing (2641st meeting), which he deemed to be prohibited by international law. The question was a highly controversial one, despite the advisory opinion of ICJ on the *Legality of the Threat or Use of Nuclear Weapons*, but the proposed deletion would have the advantage of extending the scope of the future convention to nuclear testing, which was undoubtedly an activity that could involve a risk of, and, in some cases, cause significant trans-boundary harm.

51. In article 5, the words “and follow-up” should be inserted between the word “monitoring” and the word “mechanisms”, since it was necessary not only to monitor, but also to follow up the implementation of legislative, administrative and other measures adopted by States.

52. In article 7 [8], he wondered whether the words “impact assessment” were appropriate, given that the concept of an impact “study” was well established in international environmental law.

53. Articles 8 [9] and 9 [10] raised a question of positioning because the States likely to be affected deserved to be warned of the risk of transboundary harm on a priority basis. It was only later that the States concerned would have to inform the public of the risks to which it was subjected. The order of the two articles should therefore be reversed.

54. Article 11 [12] was of capital importance but among the factors that had to be taken into account in order to achieve an equitable balance of interests, it failed to mention the importance of the economic activity in question for the economy of the State of origin. That issue deserved further consideration.

55. Article 15 [16] did not sufficiently highlight the fact that the citizens of the States likely to be affected by significant transboundary harm were entitled to have access to the courts of the State of origin. It would be wise to bring the text into line with the provision of the Convention on the Law of the Non-Navigational Uses of International Watercourses on access to the courts of the State of origin.

56. Article 19 [17], on the settlement of disputes, should be more detailed. Inspiration could be drawn from the Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and

Security⁸ which contained a whole series of relevant formulations. It should be noted that no distinction was made between fact-finding commissions and conciliation commissions and that left fact-finding commissions the option to settle disputes by becoming conciliation commissions, where necessary. That formula could prove useful for the topic under consideration.

57. Mr. HE said that the draft articles managed to balance the interests of the State of origin with those of the States likely to be affected by transboundary damage. He would nevertheless comment on some important issues raised in the report.

58. First, it was generally recognized that liability and prevention were two separate issues which should be treated separately. The Working Group established by the Commission at its forty-eighth session had dealt with both issues, but had been criticized in the Sixth Committee for thereby undermining the basic conception of a liability regime. It had been pointed out that jurisdictional control or sovereignty over a territory did not in itself constitute a basis for international liability of the State and that the crucial consideration was the actual control over the activity that took place within the State’s territory. Liability for transboundary damage should thus be placed on the operator rather than on the State. It had been suggested that the Commission should approach the draft articles as an environmental regime rather than from the standpoint of international liability. As a result, the Commission had decided to set aside the issue of liability until it had completed the second reading of the draft articles on prevention. In view of the nature of the topic and the considerations set out in paragraphs 31 to 34 of the report, he accordingly considered that it was quite appropriate to delete the words “not prohibited by international law” in article 1.

59. Secondly, with regard to the duty of due diligence, the Special Rapporteur listed a number of elements of that duty in paragraph 20 of the report, indicating in paragraph 20 (b) that the required degree of care was proportional to the degree of hazardousness of the activity involved. The procedural obligations (prior authorization, environmental impact assessment, precautionary measures) should thus be more important and more stringent if the activities were more hazardous. On the other hand, the level of diligence demanded should depend on a State’s capacity and its stage of economic growth. The State’s economic level should be one of the factors used for determining the standard of diligence to be applied in respect of a particular State. That would be in line with principle 11 of the Rio Declaration. Thus, the implementation of the principle of prevention and the duty of due diligence could not be isolated or divorced from the broader context of sustainable development and consideration of the needs and practices of developing countries and countries in economic transition. In the absence of provisions embodying the need to take account of the special conditions of developing countries, he would suggest that all those points should be emphasized in the commentary.

⁸ General Assembly resolution 46/59 of 9 December 1991, annex.

60. Thirdly, referring to article 3, then to articles 4, 10 [11] and 11 [12], and to the fears expressed that those provisions might lead to a dilution of the obligation of due diligence, he said that what should be stressed was that the balancing of interests achieved through consultation and cooperation must not be used to discharge a State from its obligation. Instead, the balancing of interests could result only in a regime which would enable the States concerned to implement their duty of prevention in a more satisfactory way.

61. Lastly, he agreed with the Special Rapporteur and other members of the Commission that the draft articles should take the form of a convention.

62. Mr. TOMKA said that the approach adopted by the Special Rapporteur in his third report was somewhat unusual, since he had not dealt with the articles one by one, but, rather, provided a general overview, highlighting a certain number of issues. He noted, moreover, that only five Governments—representing less than 3 per cent of the United Nations membership—had submitted written comments.

63. In paragraph 36 of the report, the Special Rapporteur recommended that the draft articles should be adopted as a framework convention, even though the current title envisaged only a convention. Presumably, the addition of the word “framework” was not to be construed as making the instrument less binding and was not intended to induce States to accept the text more readily, but simply signified that other instruments would subsequently have to be negotiated between States or within the international community in the United Nations.

64. With regard to the preamble, the Special Rapporteur proposed a combination of two elements. The first—that constituting the paragraphs of the preamble referring to the relevant existing instruments—should be positioned after the title and should open with the words “the States parties”, not “the General Assembly”. The other element, particularly the last three of the proposed paragraphs, should simply be deleted, since it was not the Commission’s role to elaborate draft resolutions of the General Assembly.

65. As for the body of the draft articles, he had not been fully convinced by the arguments in favour of the deletion of the phrase “activities not prohibited by international law” in article 1, even if it was true that few activities were strictly prohibited by international law. In any case, it was unlikely that States would apply the draft articles to activities that were clearly prohibited. Even if there was some doubt as to whether some activities were prohibited or not, such as nuclear testing, it was not to be expected that States which considered such activities not to be prohibited and might thus in the future embark on such testing would become parties to the proposed convention, if their adherence could be interpreted as signifying that the convention should also apply to such an activity.

66. He wished to draw the attention of the Drafting Committee and the Special Rapporteur to the comment made by the United Kingdom in relation to article 1, which appeared in the report of the Secretary-General containing the comments and observations received from Governments (A/CN.4/509). In particular, he wondered whether the plural word “activities” was appropriate or whether it should not appear in the singular, as in article 17. As for

article 3, he noted that the suggestion by the Netherlands had not been addressed in the third report and thought that it should at least be mentioned in the commentary to the draft articles.

67. With regard to article 5, he concurred with the proposal that the word “concerned” should be deleted, since it was unnecessary: the kind of measures envisaged by the draft article might come too late if there was already a risk of significant transboundary harm. Lastly, with regard to the *nota bene* and in response to the point raised by the United Kingdom in its general comments contained in the report of the Secretary-General, he thought that, in the final text, the matter should be dealt with either in the commentary to the appropriate articles or in the report of the Commission, but not at the end of the text of the draft convention.

68. Mr. BAENA SOARES expressed his satisfaction at seeing the Commission’s work on the topic under consideration reaching its conclusion in the spirit of cooperation and with a readiness to harmonize sometimes contradictory points of view, largely thanks to the wisdom of the Special Rapporteur, who, moreover, took a constant interest in the practical aspects and consequences of his proposed text. He welcomed the preamble included by the Special Rapporteur in the annex to his third report, for it was of intrinsic importance. He commended the proposed text, although he also supported the proposal that, without prejudice to its structure, existing conventions on development and the environment should be mentioned. That would help provide a balanced consideration of both those areas of activity.

69. In paragraph 34 of his report, the Special Rapporteur stated that, under the draft articles, a right of veto was not given to States likely to be affected by the potentially hazardous activities of other States. That right did not exist. The objective was rather to guarantee cooperation so that the States concerned could participate in the design and application of a system of management of risk in a form and with mechanisms chosen by themselves. That seemed reasonable. With regard to the possibility mentioned in paragraph 35 that the phrase “activities not prohibited by international law” should be deleted from article 1, he had not been convinced by the arguments in favour of such a deletion and would prefer the current wording to be retained. He was, however, in favour of the Special Rapporteur’s recommendation in paragraph 36 that the draft articles should be adopted as a framework convention.

70. The changes in the wording of some of the draft articles, resulting from discussions by the Working Group, of which he had been a member, or from comments by Governments, were, on the whole, improvements. He was, however, grateful to the Special Rapporteur for his efforts to find a clearer and more precise wording for article 2, subparagraph (a). Article 14 [15], on the other hand, could give rise to some concern, in that it listed three categories which would give the State of origin extremely broad latitude for withholding data and information “vital” to its “national security” or “to the protection of industrial secrets or concerning intellectual property”. That allowed vast scope for exceptions, even if somewhat reduced by the requirement that the State of origin should

cooperate in good faith with the other States concerned. Without wishing to reopen the debate, he said that the implementation of the draft article would require particular care and caution. He was in favour of referring the draft articles to the Drafting Committee.

71. Mr. RODRÍGUEZ CEDEÑO emphasized the importance of drawing a distinction between the issues of prevention and responsibility, which would be extremely useful in dealing appropriately with the topic of prevention and would thus bring the draft articles to a successful conclusion on second reading, without losing sight of the main objective of the Commission's mandate, which was international liability for injurious consequences arising out of acts not prohibited by international law.

72. It was appropriate that the preamble mentioned basic principles, such as those relating to permanent sovereignty over natural resources, the right to development and the Rio Declaration, and listed the limits to the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction. It would even be worthwhile making explicit reference to certain universally accepted legal instruments, in the form of material law relating to the environment. He also endorsed the idea of adding a reference to Agenda 21 or at least to some of the principles contained therein. In particular, the reference to the right to development—in the form of the resolution adopted by the General Assembly—was crucial, for it would enable the necessary link, which must be retained, between article 3, relating to prevention, and articles 10 [11] and 11 [12], which—especially the latter—related to the balance of interests, to be maintained. As the Special Rapporteur indicated in paragraph 22, the principle of prevention and the duty of due diligence were broadly related to questions of sustainable development, capacity-building and international funding mechanisms.

73. The text ought to reflect the close relationship between the duty of prevention, the elements of which had been presented in a detailed and extremely complete way in paragraph 20 of the report, and the level of economic development, which, however, should by no means be interpreted as justifying an exception clause. Although it was sometimes difficult to determine levels of development, that was a useful concept to apply in the context of the draft articles.

74. In his view, it was also important to establish clearly that the draft articles applied to hazardous activities which were capable of causing serious transboundary harm. Liability applied simply to the management of the risk of such transboundary harm. With regard to harm caused by activities contrary to international law, or internationally wrongful acts, on the other hand, the issue was one of State responsibility. In that regard, he was concerned about the suggestion that the phrase “activities not prohibited by international law” in article 1 should be deleted, since the phrase drew the necessary distinction between the two categories of activities which gave rise to the twin regimes of liability and responsibility. He noted that, whereas in paragraph 31 of the report, the Special Rapporteur justified the use of the phrase, in paragraph 35, he proposed that it should be deleted. Meanwhile, the phrase had been retained in article 1. He would be in favour of retaining the phrase in order to define the scope of liability, which was

the point at issue, and believed that the question should be examined with the greatest caution.

75. In general, he endorsed the amendments the Special Rapporteur had proposed to the Commission on the basis of the comments made by Governments. In his view, the draft articles could take the form of a framework convention within the meaning of that expression under international law. The addition of subparagraph (f) to article 2, defining the expression “States concerned”, was particularly useful, but the reference in article 14 [15] to intellectual property ran the risk of affecting the exchange of information, as well as the aim of preventing and reducing harm to a minimum. Lastly, in relation to article 19 [17], he noted that, since the entire draft aimed to establish a system of prevention that would prevent disputes arising, article 19 [17] was not the only provision relating to the settlement of disputes, but should be seen as one element in a general dispute settlement system. He therefore thought that the Drafting Committee could make some improvements to the draft article, taking as its example article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses, and particularly by incorporating in paragraph 1 the concept of direct negotiations relating not only to the interpretation and implementation of the draft articles, but also to the prevention and reduction of risk to a minimum.

76. Mr. ELARABY endorsed the view that a legally binding convention was needed, particularly since a considerable body of soft law on the topic already existed.

77. The scope of the draft articles should be broadened by deleting, as had been proposed, the expression “activities not prohibited by international law” in article 1. Such an enlargement would also be consistent with the general goals listed in the preamble, as well as being in accordance with the Special Rapporteur's comment in paragraph 16 of his second report,⁹ which stated that China, Cuba, Egypt and India were of the view that the concept of prevention as proposed by the Commission did not place it sufficiently within the broader realm of sustainable development.

78. Secondly, he noted that, although the second and third reports were largely concerned with due diligence, there was no draft article dealing specifically with that concept. Article 3 would be the appropriate place for the concept to be mentioned, if not defined.

79. With regard to the dispute settlement procedure dealt with in article 19 [17], he said that the two paragraphs comprising the article lacked substance. Paragraph 1 mirrored, albeit in a truncated way, Article 33 of the Charter of the United Nations, with the sole addition of the word “expeditiously”. Paragraph 2 had more substance, but the provision that the report of the fact-finding commission should be considered by the parties in good faith was clearly not adequate for what might be expected from a convention. He therefore suggested that paragraphs 1 and 2 could be either redrafted or reversed to provide for a judicial settlement mechanism, in one form or another, as a last resort. In the context of such a judicial settlement or indeed of dispute settlement as a whole, pro-

⁹ See 2641st meeting, footnote 6.

vision could be made for the possibility of injunctions or preventive measures.

80. Lastly, he too thought that article 2, subparagraph (b) should contain a reference to the global commons, thus reflecting the concept of “regions over which no State had sovereignty” adopted by ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.

The meeting rose at 1 p.m.

2643rd MEETING

Thursday, 20 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹ (concluded) (A/CN.4/504, sect. D, A/CN.4/509,² A/CN.4/510³)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. GALICKI said that the Commission had come to the final stage of its work on the topic. A courageous proposal had been made to adopt the draft articles contained in the annex to the third report of the Special Rapporteur (A/CN.4/510) as a framework convention on the prevention of significant transboundary harm, which seemed fully justified, since the articles were well elaborated and carefully balanced, covering all matters of prevention. One advantage of the draft was its precise scope, which took into account two important factors: the separation of the

topic of prevention from the general subject of liability and recognition of the duality of regimes in relation to liability and responsibility. As a result of that approach, the articles were mainly directed at the management of risk, as part of the prevention of significant transboundary harm. It seemed the right choice. The attempt to avoid imprecise concepts was also clear from the definitions of the terms used, especially “transboundary harm” and the phrase “risk of causing significant transboundary harm”, and the various categories of States engaged in prevention procedures. The precise definitions made it possible to elaborate equally precise rules.

2. The main problem regarding the scope of the proposed draft convention appeared to be whether to retain the reference to “activities not prohibited by international law” in a regime that distinguished the duty of prevention from the broader concept of international liability. Opinions were divided within the Commission. He was in favour of retaining the phrase in article 1, for several reasons. First, it appeared in the title of the draft and, although aware of the differences between the rules governing the duty of prevention and those governing the matter of international liability as a whole, he believed that there should be some link between the two systems. The phrase in question seemed to provide that link. Secondly, as correctly noted in paragraph 31 of the third report, the use of the phrase released a potential victim from any necessity to prove that the loss arose out of wrongful or unlawful conduct. Lastly, the reference to “activities not prohibited by international law” marked a significant dividing line between the topic of State responsibility and that of international liability, of which the principle of prevention was a sub-topic.

3. The duality of regimes for responsibility and liability seemed to be confirmed by international conventions governing various kinds of so-called ultra-hazardous activities, such as space activities. Rather exceptionally, the draft articles might be found to link certain aspects of international liability with aspects of international responsibility. Article VI, paragraph 2, of the Convention on International Liability for Damage Caused by Space Objects, for example, provided that no exoneration from absolute liability “shall be granted in cases where the damage has resulted from activities conducted by a launching State which are not in conformity with international law”. That conjunction of international responsibility and liability was, however, rather an exception, since it applied to the final stage of the application of rules governing international liability. In that context, conduct “not in conformity with international law”, as an element intensifying the liability, could be justified.

4. On the other hand, any attempt to extend the duty of prevention to activities prohibited by international law would be anomalous. The duty of prevention, as it derived from the draft articles, was of a pre-activity nature. It would be highly unrealistic to demand of a State that intended to commit an internationally wrongful act to comply in advance with all the prevention procedures contained in the articles. It thus seemed that limiting the application of the articles to activities not prohibited by international law was actually an advantage, since their future application would be easier and the tricky issue of responsibility would be avoided.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Ibid.*

5. Similarly, it would be wise to avoid the temptation of including too many new provisions dealing with additional matters, which could spoil the existing balance and proportions, both in form and in substance, of the articles. A further reason for adopting such a realistic approach was that the Commission was operating on the soft terrain of progressive development and not along the lines of well-established customary rules, which might be ready for codification. It would be much more useful for States to have compact but precise and effective articles, in keeping with the principle that “small is beautiful”.

6. The same applied to the preamble, which, of course, could refer almost endlessly to treaties and documents. The choice made by the Special Rapporteur, however, quite sufficiently indicated the most important origins of the articles. Before its final adoption, consideration might be given to reflecting in the preamble some of the leading legal principles on which the draft was based. Some of those principles, such as those of due diligence or sustainable development, had already been suggested by other members.

7. As a member of the Working Group, he was convinced that the articles, although substantially limited, could provide a basis for further development, in the field of both environmental law and the law on international liability in general. He hoped that the Commission would be able to finalize the work at the current session, so that the draft could be submitted to the Sixth Committee at the fifty-fifth session of the General Assembly.

8. Mr. BROWNLIE said that he found himself, unusually, disagreeing with Mr. Galicki. Members of the Commission made supportive statements about the articles but then sought to recruit them to other areas of international law. The most valuable aspect of the articles was that they broke new ground: they did not concern State responsibility or liability—whatever that might be—nor did they constitute soft law. They were functionally specialized to deal with a specific set of problems, namely the management of risk. It was therefore not helpful to draw parallels with standard conventions on liability, compensation or peaceful settlement. The Special Rapporteur had addressed non-dispute, pre-dispute situations. In those circumstances, the mode of settlement naturally had to be different from the normal modalities of arbitration and adjudication, which in most cases were not appropriate. In the environmental context, fact-finding—which was specified in article 19 [17]—would be the most important element.

9. There was perhaps no harm in keeping the phrase “activities not prohibited by international law”; there was an almost total division of views within the Commission on whether to retain it. His concern, however, was that the phrase gave rise to considerable misunderstanding. Many appeared to want it retained because they saw a link between the draft articles and one of the other areas of liability or responsibility. There was no such link. He favoured deleting the phrase, since it was the source of all the misunderstanding.

10. Mr. GALICKI said that he and Mr. Brownlie differed only on the one point: he favoured retaining the phrase “activities not prohibited by international law” and Mr.

Brownlie did not. Otherwise, however, their views coincided. He had specifically pointed to the difference between the draft articles and the issues of responsibility and liability. He had quoted the Convention on International Liability for Damage Caused by Space Objects to show that, by contrast with the draft articles, it contained a relationship between responsibility and liability, albeit only in exceptional cases. He had stressed that the draft articles on prevention dealt with pre-activity situations. It would, however, be wrong to say that there was no link between prevention and liability: prevention derived from the main topic of international liability for injurious consequences arising out of acts not prohibited by international law, after all, and the report also stressed the connection.

11. Mr. GOCO asked for clarification on how the articles could be used by a Government in a situation such as that facing his own country. While the Philippines were nuclear free, there were a number of nuclear power plants on the southern tip of Taiwan, which was very close to the north of the Philippines. It was, of course, a matter of great concern that in the event of an accident the Philippines would be affected. He wondered what course the Philippines Government should pursue when the draft articles were adopted, and whether it should issue any notifications or warnings when, for example, the wind was blowing in a particular direction.

12. Mr. ROSENSTOCK said that the topic had been under consideration by the Commission for well over a decade, graced by three Special Rapporteurs whose reports had clarified the issues and illuminated possible analytical frameworks. The difficulty had always been to transform the many ideas put forward into a concrete result. The Special Rapporteur and the Working Group deserved great credit for producing an excellent text. Eventually, more ambitious results might be possible. In the meantime, he concurred with Mr. Lukashuk in believing that the useful draft on prevention represented the maximum that could be done. It should be sent to the Drafting Committee and adopted at the current session. As far as the form of the instrument was concerned, he believed a convention to be the most appropriate.

13. He was inclined to leave the text as it stood. So long as there was an appropriate commentary to avoid any misunderstanding or misreading of the underlying intent, the phrase “activities not prohibited by international law” could be retained or deleted without undue consequences, although his own preference would be to remove it, for the reasons given by Mr. Hafner (2642nd meeting). There were also, as Mr. Tomka had pointed out, technical problems with the preamble. Indeed, he questioned whether a preamble was useful or necessary. If the Commission decided to include one, he would prefer one less militant than the current version, which gratuitously recalled controversial material, while failing to mention, for example, the seminal United Nations Conference on the Human Environment, held in Stockholm in 1972. Having come thus far with the draft articles, however, it would be tragic if the Commission allowed itself to get bogged down over a preamble. It was not a North-South issue and any attempt to make it so would create unnecessary problems. He trusted that the Commission would not let perfection

be the enemy of the good and would be able to transmit the draft articles to the General Assembly for adoption at its fifty-fifth session.

14. Mr. PELLET said that, although he found them slightly “limp”, he was broadly in favour of the draft articles, because he believed that prevention constituted the only part of the initial draft that was ripe for codification and progressive development. He could not, however, agree with Mr. Rosenstock that they represented the maximum attainable result. On the contrary, it was disappointing that there was hardly a trace of progressive development. Even with regard to codification, the Commission had not gone as far as even a cautious appreciation of positive law would warrant. The draft articles were not intended to be restricted to international environmental law, but the Commission could not escape from the fact that they were principally directed at the prevention of significant environmental damage. There was no need to be a specialist in the fast expanding branch of international environmental law—he certainly did not claim to be one—to realize that the articles followed developments in the field rather than accompanying them, let alone preceding them.

15. As he had said, two years previously, he greatly regretted that article 3 had ultimately been worded less strictly than principle 2 of the Rio Declaration⁴ or even principle 21 of the Stockholm Declaration,⁵ particularly with regard to the territorial application of the obligation of prevention. Article 6 [7], paragraph 1 (a), was no compensation in that regard. He concurred with those who had urged that, at least, explicit mention should be made of the obligation of due diligence. He also regretted that the principle of precaution, even in the incomplete sense accorded to it in principle 15 of the Rio Declaration was absent from the articles. Article 7 [8], too, lagged behind principle 17 of the Rio Declaration, not to mention the Convention on Environmental Impact Assessment in a Transboundary Context. The latter had been adopted as long ago as 1991: ten years in which many changes had taken place and the rules on the obligation of prevention had grown much stricter. The draft articles, by contrast, seemed to move in the other direction.

16. New draft article 16 also seemed to him vitiated by the use of the phrase “where appropriate”, which afforded States an escape clause that was both dangerous and useless. He would therefore favour deletion of the phrase. Moreover, he failed to understand the significance—and even the meaning—of the new sentence that had been added to article 6 [7], paragraph 2. On the other hand, he fully endorsed the general thrust of article 9 [10], paragraph 2, which was a great improvement on the previous version. He also thought it right to have transferred former article 6 to article 18 [6]; it was a wise precaution. In that context, he was no more convinced than Mr. Galicki, Mr. Rodríguez Cedeño, Mr. Tomka and other members that the phrase “activities not prohibited by international law” should be deleted. If it were, the Commission might seem to be legitimizing unlawful activities, putting them in the same basket as activities that were not prohibited. *Pace*

Mr. Brownlie, he believed that no harm would be done by retaining the phrase. He also noted, in regard to textual changes, that the French version of article 6 [7], paragraph 1 (a), and article 8 [9], among others, left much to be desired and he hoped that the Drafting Committee would attend to the matter.

17. As to the more general question of the future of the draft and of the topic as a whole, he wondered whether the time was in fact right to refer the draft articles to the Drafting Committee. The quinquennium was not entirely at an end and he wondered whether the remaining time should not be used in asking the Special Rapporteur to revise and fill out the draft articles, taking into account and incorporating new developments in international environmental law, placing special emphasis on the principle of precaution, on issues relating to impact studies and, perhaps, also on the prevention of disputes. He drew attention to the observations made in that regard by the working group chaired by Mr. Yamada on topics susceptible to the codification and progressive development of environmental law. The aim of his proposal was not simply to improve the existing draft articles, which he found acceptable, even if they would benefit from some additional muscle. He also wished to anticipate the wishes of other members of the Commission who wanted to make some contribution to environmental law. The topic of prevention was best suited to that purpose. It would, however, be absurd to take up the topic from the environmental point of view alone, after the draft articles had been adopted. He therefore suggested giving further consideration of prevention, with a view to making it more specific in the light of developments in environmental law.

18. As for the title of the topic, at the fiftieth session, Mr. Brownlie had urged the Commission to take up a definitive position on the matter of international liability for injurious consequences arising out of acts not prohibited by international law and to decide on the recommendations that it should make. There had been general agreement that a position should be taken, but there the matter still rested. It was essential for the Commission to assume its responsibilities and it should devote at least one meeting, whether in plenary or in the Planning Group, to discussing the matter, perhaps on the basis of a note by the Special Rapporteur and by other members of the Commission. His own position was clear. In his opinion, the topic should not be pursued: it lent itself neither to the codification nor to the progressive development of international law. On the contrary, it should be and could only be the object of negotiations between States. The Commission should not get involved any further. At the legal level, its only firm contribution could be to say that, if a State did not fulfil its obligations with regard to prevention, it was responsible, as opposed to liable; and there was no need to devote a whole set of draft articles to the topic. If it needed saying, an article could be added to the draft articles on prevention. In any event, the Commission should decide one way or the other. If it did not, it would be, if not liable, at least responsible.

19. Mr. KUSUMA-ATMADJA commended the Special Rapporteur for coming up with an excellent set of draft articles, irrespective of what form they would ultimately take, and expressed confidence in Mr. Gaja’s ability, as Chairman of the Drafting Committee, to resolve any

⁴ See 2641st meeting, footnote 9.

⁵ See 2642nd meeting, footnote 7.

remaining problems to the satisfaction of all concerned. He sided with Mr. Galicki in his debate with Mr. Brownlie, albeit with due deference to the latter. He favoured referral of the draft articles to the Drafting Committee, for adoption no later than the next session of the Commission.

20. Mr. AL-BAHARNA said that the Special Rapporteur was to be congratulated on his precise and succinct third report, and should be supported in his desire to finalize work on the subtopic before the end of the quinquennium.

21. The major issues arising in the consideration of the draft articles appeared to be: activities not prohibited by international law (art. 1); the meaning and the nature of significant harm (art. 2); the concept of due diligence (art. 3); other articles relating to obligations of States to cooperate on the question of prevention, and the procedures relating thereto; the question of the relationship between the topic of liability and that of prevention; dispute settlement; and, lastly, the form that the draft articles should ultimately take. That list of contentious issues was by no means exhaustive. However, thanks to the decision taken by the Commission at its forty-ninth session to concentrate on the subtopic of prevention,⁶ and under the able guidance of the Special Rapporteur, good progress had been made in trimming the draft articles, which, in his view, were now ready for finalization on second reading.

22. He took issue with the Special Rapporteur's recommendation that the phrase "not prohibited by international law" should be deleted from article 1. It was essential to retain the phrase, so as to maintain the legal distinction between the topics of State responsibility and of international liability, which, as the Special Rapporteur conceded in paragraph 26 of his third report, the Commission had many years ago recognized the need to separate. Consequently, that unwarranted eleventh-hour proposal was surprising, particularly in view of the Special Rapporteur's categorical statement in paragraph 5 of the report that no State questioned the use of the phrase "acts not prohibited by international law" employed in draft article 1.

23. As for the expression "significant harm", the controversy on that issue appeared—to cite the comment on the matter by the Czech Republic—to have exhausted its potential. Especially in view of the fact that it was now enshrined in the Convention on the Law of the Non-Navigational Uses of International Watercourses, use of the term in the draft articles on prevention was more than justified. As for the expression "risk of causing significant transboundary harm", while he agreed with those States that found the definition in article 2, subparagraph (a), confusing, he could nevertheless live with it. However, in the interests of consistency, the term "disastrous" should be replaced by "significant".

24. As for the applicability of the much debated concept of "due diligence" in the context of article 3, a matter comprehensively discussed in chapter III of the Special Rapporteur's second report,⁷ notably in paragraph 24, some States were of the view that a breach of the duty of due dili-

gence could give rise to consequences only in the field of State responsibility. In that connection, he was impressed by China's argument, as mentioned in paragraph 3 of the second report, that failure to comply with the duty of due diligence in the absence of damage would not entail any liability, but that once damage occurred, State responsibility or civil liability or both might come into play. Where a State complied with its duties of due diligence and damage occurred despite such compliance, the operator must pay and accept the liability.⁸ On the whole, article 3 was acceptable, on the understanding that the duty set forth therein was one of due diligence. There was, however, no need to make specific reference to that concept in article 3.

25. Articles 4 to 17 had also been comprehensively debated and should thus give rise to no further controversy. As to the topic of international liability, he continued to be of the view that, if it was to discharge its mandate to the full, the Commission should revert to that topic as soon as the articles on prevention had passed through the Sixth Committee following their adoption by the Commission on second reading in the form of a framework convention. As the Special Rapporteur rightly pointed out in paragraph 3 of the third report, the Commission had a duty to deal with liability. There was now an abundance of material in State practice and international agreements, as well as a wealth of valuable material bequeathed by the previous Special Rapporteur, Mr. Julio Barboza.

26. Lastly, it was his view that article 19 [17], on settlement of disputes, was incomplete as currently drafted and required some improvement. Arguably, there was in any case no need for a provision on dispute settlement in a framework convention dealing only with the question of prevention. That, however, was without prejudice to possible further consideration of article 19 [17] by the Commission when it reverted to the topic of international liability.

27. Mr. Sreenivasa RAO (Special Rapporteur), summing up the debate, said he would try to resist the temptation to become embroiled in any further ideological or other confrontations. The Commission was faced with a seemingly irreconcilable conflict between environmental idealism and the desire to reap the full benefits of scientific and technological innovations proceeding at break-neck pace. In response to Mr. Pellet, he said he had chosen not to become involved in issues of environmental law, but instead to distil from the draft articles and commentaries he had inherited at the forty-eighth session of the Commission what was most practicable—albeit in the form of what some might dub a "rump" set of draft articles. He took comfort from the fact that, to his great surprise, the draft articles adopted on first reading had proved acceptable to most States. As Special Rapporteur, he had no agenda of his own: whether to go along with Mr. Pellet's proposal, thereby further protracting a process of which States were already tired, or to endorse States' expressed preferences, was entirely a matter for the Commission's own conscience. As Special

⁶ See 2628th meeting, footnote 4.

⁷ See 2641st meeting, footnote 6.

⁸ See *Official Records of the General Assembly, Fifty-third Session, Sixth Committee*, 14th meeting (A/C.6/53/SR.14), and corrigendum, para. 43.

Rapporteur, he recommended that the Commission should reduce the scope of the articles to manageable proportions, for otherwise there was a risk that work on the topic would never be completed.

28. Accordingly, he was not persuaded by the arguments of Mr. Pellet and others that the Commission should look at the precautionary principle. He had dealt with that principle in chapter VI of his first report,⁹ and his conclusion on the question was set forth in paragraph 72 of that report. The principle that, where there were threats of serious or irreversible harm, a lack of full scientific certainty about the causes and effects of environmental harm must not be used as a reason for postponing measures to prevent environmental degradation made good sense. To the extent that guidance was available, he was confident that States would have recourse to it. In his view, the precautionary principle was already included in the principles of prevention and prior authorization, and in the environmental impact assessment, and could not be divorced therefrom.

29. As for settlement of disputes, article 19 [17] had generally met with States' approval in the Sixth Committee. States would have a further opportunity to consider the article following its adoption by the Commission on second reading. Consequently, any decision taken at the current session was not graven in stone. In any case, he saw no need to send article 19 [17] back to the drawing board.

30. There had been a number of other suggestions regarding various articles, and he urged those who had made them to be available to the Drafting Committee. He had been encouraged by Mr. Rosenstock's comment that the draft articles were the best that could be achieved and that the current time was the most opportune to refer them to the Drafting Committee. It was his recommendation that they be so referred and that they should return to the Commission as soon as possible.

31. The question had been raised as to whether direct reference should be made within the terms of article 3 to the concept of due diligence or whether article 3 should be left as it was and an explanation placed in the commentary. While he acknowledged Mr. Al-Baharna's reasoning, he still believed that "all appropriate measures" and "due diligence" were synonymous and that leaving the former was more flexible and less likely to create confusion than inserting a reference to the latter. Explanation in the commentary would be a better way of communicating what was involved to States. It was prudent to follow the guidance provided by tried and tested conventions, and his recommendation was to leave article 3 as it stood, with an explanation in the commentary that "all appropriate measures" was nothing but "due diligence".

32. The division of opinion within the Commission over whether to remove or retain the reference in article 1 to "activities not prohibited by international law" was roughly equal. Many authorities he had consulted over time favoured retaining the phrase, which had come to signify a major dividing line between the topic of State responsibility and the broader topic of international liability, of which the principle of prevention was only a

sub-topic. The ideological debate between liability and responsibility was not going to be solved because of the phrase in question. Whether it was retained or not, the real purpose of the article was risk management and to encourage States of origin and States likely to be affected to come together and engage themselves. Emphasizing the principle of engagement at the earliest possible stage was the main value of the draft.

33. The CHAIRMAN said that, if he heard no objection he would take it that the Commission wished to refer the draft preamble and revised draft articles 1 to 19 to the Drafting Committee.

It was so agreed.

State responsibility¹⁰ (continued)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,¹¹ A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

34. The CHAIRMAN invited members to begin their consideration of chapters II and III of the Special Rapporteur's third report (A/CN.4/507 and Add.1–4).

35. Mr. GAJA said that chapter III was remarkable because of the novelty of the questions addressed therein and the appropriateness of the solutions generally offered. He would confine his remarks to a few problems which, in his view, had not yet been adequately resolved.

36. If the Special Rapporteur's proposal to place the new article 40 bis in Part Two bis was adopted, Part Two would then not contain any indication of the States to which the obligations described in Part Two were owed. The gap created by the removal from Part Two of the only provision concerning injured States needed to be filled if only by a provision making a general reference to Part Two bis. While the draft articles were intended to regulate only inter-State relations, those relations might be affected by the fact that individuals or entities other than States were the beneficiaries of reparation. In that case, there should be some possibility for individuals or entities to have a say as to the choice of the form of reparation. Similarly, with regard to waivers of claims brought for the benefit of individuals or other entities it would be reasonable to assume that they had some kind of role. That concern was obliquely, though somewhat obscurely, reflected in the requirement that the claim be "validly waived", and the commentary might make it less obscure. The text of the articles did not use similar language with regard to election of the form of reparation, despite what was said in paragraph 233 of the third report.

37. Article 40 bis, as proposed by the Special Rapporteur, made a distinction between injured States and States having a legal interest. However, article 40 bis did not say

* Resumed from the 2640th meeting.

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

¹¹ See footnote 2 above.

⁹ See 2628th meeting, footnote 5.

what the implications were for those States that had a legal interest. Article 46 ter made it clear that an injured State might invoke responsibility and choose the form of reparation, but nothing was said about the other States. Although it was plain that they could request what was in chapter I, namely cessation and assurance of non-repetition, that should be stated in article 40 bis. Moreover, the text should also state whether they could do anything about reparation. However, if it was said that the latter category of States could not claim restitution or compensation because they were not injured, that had significant consequences. Article 40, as adopted on first reading, said that, if an obligation concerning human rights was imposed either by a customary rule or by a multilateral treaty, all States in the case of a customary rule and all States parties to the treaty could claim reparation. That might have been excessive—and it would be wise to reconsider it—but there was the risk of going too far in the opposite direction by saying that States which were not injured could not claim reparation. When, in a case of violation of human rights, there would be no specially affected States, obligations relating to human rights could be infringed with remarkably little consequence. The concern was even greater regarding what used to be called international State crimes and were now termed serious breaches of obligations *erga omnes*. There was a need to find some kind of solution whereby the State that had infringed an obligation could not simply argue that, since no one had been injured, it had no obligation to provide reparation.

38. In his view, paragraph 239 seemed to stretch too far the analogy between invoking the invalidity, termination or suspension of the operation of a treaty under article 65 of the 1969 Vienna Convention, on the one hand, and invoking a State's responsibility on the other. In the latter case, there was no reason why a State should first have to make a protest or give notice of its intention to invoke responsibility. It could do so straightaway. There should not be any preliminary requirement of the type envisaged in article 65 of the Convention.

39. The article on a plurality of injured States should be "article 46 quinquies", not "quinque", in the French version of the report, but, on a more serious note, he would find it useful if the text of the article in question said something about the election of the form of reparation when many States were injured. The commentary would no doubt have something to say about it, but guidance could be given to States in the article itself.

40. Article 46 sexies raised some difficulties in that it was not always easy to determine situations in which there was the same internationally wrongful act and there was a plurality of responsible States for that act. The *Corfu Channel* case involved one State responsible for laying mines and another State responsible for not using its powers as a sovereign State to prevent the laying of the mines and to warn passing ships; there had been two different obligations and therefore two wrongful acts. Damage might be caused by a plurality of wrongful acts but there might not be a plurality of States responsible for the same wrongful act. The various cases and questions involved should be discussed in the commentary. Paragraph 2 (b) (i) was correct, but there was no need for a subparagraph going into matters of procedure.

41. Mr. CRAWFORD (Special Rapporteur) said that he agreed with most of what Mr. Gaja had said and was happy to inform him that chapter III, section D, of the report would shortly be available and would contain the deliberately missing provision.

42. Mr. SIMMA said that he and Mr. Gaja shared a special interest in the issue of the implementation and enforcement of obligations *erga omnes*, and he was concerned, after reading paragraph 226, that there might be a danger, even after the issue of a further section of chapter III of the report, of there still being no apportionment of access to remedies in the case of States not directly injured. In general, though, he was in agreement with the philosophy behind the document under discussion and the economy of the draft articles.

43. In paragraph 238, the Special Rapporteur said that, since the normal mode of inter-State communication was in writing, it seemed appropriate to require that the notice of claim be in writing. However, article 46 ter—fortunately—made no mention of a claim having to be in writing. In his view, reference to the 1969 Vienna Convention was of some value but invocation of the right to terminate or suspend a treaty was much narrower and occurred much less frequently than invocation of State responsibility. In any event the Convention dealt only with treaties that were concluded in writing. Again, article 46 ter rightly used the mandatory "shall", not "should", in paragraph 1. It was where the meat of the provision lay and "shall" ought to be used throughout.

44. Paragraph 1, after indicating that an injured State must give notice of its claim, said it "should" specify the form reparation was to take (para. 1 (b)). On the other hand, those actions might take place in two different stages: first notice was given, and later there were discussions on the form of reparation that would be owed. That possibility should be taken into consideration.

45. The content of article 46 ter, paragraph 2 (b), tended to prejudge the decision on which approach would be followed in regard to exhaustion of local remedies: that of former Special Rapporteur Ago, who had seen it as a substantive issue, or that of the current Special Rapporteur, who viewed it as procedural. He himself considered that the provision was without prejudice to the resolution of the question. Similarly, the reference to the nationality of claims rule (para. 2 (a)) seemed to anticipate decisions to be taken in the context of diplomatic protection.

46. The term "waiver", dealt with in paragraphs 250 to 256, seemed out of place in connection with loss of the right to invoke responsibility. It was part of the vocabulary of international trade and implied intentional action, renunciation. Moreover, it was much narrower in meaning than the term "acquiescence" used in the 1969 Vienna Convention, which was preferable.

47. As to paragraphs 257 to 259, on delay, he welcomed the view that a lapse of time as such did not make a claim to reparation inadmissible and that great flexibility had to be applied, as recognized by international courts. The reference in paragraph 258 to the *LaGrand* case—one currently pending before ICJ—was unwelcome, as it placed members of the Commission who were involved in the case in a difficult situation. The last sentence of that para-

graph was inaccurate: Germany had taken legal action, not six and a half years after the breach had occurred, but much later; it had not learned of the breach of the right to counsel until 1992, although the breach had occurred in 1982.

48. He was in full agreement with the commentary to article 46 quater, but thought the wording of subparagraph (b) could be improved. Instead of referring to the responsible State, the guilty party, it should speak of the action taken by the claimant party. He much preferred the way the same idea was expressed in article 45 of the 1969 Vienna Convention, namely, a State “must by reason of its conduct be considered as having acquiesced in the validity of the treaty”. Reference to what the responsible State might or might not have believed, would lead to great difficulties regarding proof.

49. The analysis in paragraphs 267 to 283 of the question of a plurality of responsible States, and the proposed article, article 46 quinquies, appeared somewhat simplistic, especially in view of the involvement of international organizations in the actions of a plurality of States. There was a very complicated interrelationship in NATO, for example, between the responsibilities of the organization itself and the military integration and operations undertaken by States members. Admittedly, the responsibility of international organizations fell outside the scope of the draft, but something should be said about the implications for States members of an organization if they failed to act on the basis of joint and several responsibility.

50. Article 46 sexes, paragraph 2 (a), was of value. It was difficult for someone not involved in the *Monetary Gold* case to understand all the fine points of the principle of the indispensable third party, and it was therefore worth emphasizing that that principle related to the admissibility of proceedings and could not be regarded as a substantive principle.

51. The categorical statement in the first sentence of paragraph 275 about the sources of international law might need to be reconsidered. He would also like to know whether there was any case law relating to the application of the maxim *ex turpi causa non oritur actio* cited in paragraph 276 (d).

52. Lastly, he supported the idea of referring the draft articles under consideration to the Drafting Committee.

53. Mr. CRAWFORD (Special Rapporteur) said the reference to the *LaGrand* case had been included simply because one of the separate opinions had seemed pertinent, and had certainly not been aimed at prejudging the outcome of the case. A corrigendum would be issued to his report to correct the factual errors Mr. Simma had mentioned concerning the *LaGrand* case.

54. Mr. ROSENSTOCK said he thought the basic thrust of Mr. Simma’s comment on the *LaGrand* case was to urge caution in discussing ongoing cases. It would be most appropriate to honour that request.

55. Mr. DUGARD said he agreed that the *sub judice* rule was important, but if it was applied strictly, it could definitively stifle debate. Many cases, particularly ones before ICJ, continued over years and years—witness the *Locker-*

bie case. Certainly, discretion should be exercised, but flexibility should also be used.

56. Mr. KABATSI endorsed those remarks. The *sub judice* rule was important, but some cases were decided in stages, and it should be possible to refer to matters that had already been resolved, even if the case itself was still pending.

57. Mr. TOMKA said the Commission should not be prevented from discussing judgments or orders already rendered. In the *Gab Ž kovo-Nagymaros Project* case, judgment had been handed down, but the case was formally still on the general list, pending an agreement on implementation. Provisional measures and orders had already come out in the *Lockerbie* case. Such materials should be usable, but members of the Commission should refrain from siding with one or another of the parties and from taking positions on current or future proceedings.

58. Mr. ROSENSTOCK said that no one was suggesting that a hard and fast rule should be applied. Rather, an argument was being made for discretion, caution and sensitivity to the problems that could be created.

59. Mr. HAFNER said that chapter III of the report dealt with quite a number of new topics in the field of State responsibility. He endorsed its general structure and philosophy, but a few minor points should be mentioned.

60. He agreed with Mr. Simma’s comments on paragraph 238, for he was not convinced that the claim need be in written form in all circumstances. Paragraph 242 described the nationality of claims rule as a “general” condition for the invocation of responsibility, but was “general” to be understood as permitting exceptions? The subject fell under the topic of diplomatic protection, and a draft article that did not rely on the rule had already been submitted under that topic.

61. He had doubts about whether the *LaGrand* case mentioned in paragraph 258 was appropriate to demonstrate loss of the right to invoke responsibility. The last sentence of that paragraph gave a false impression by saying that Germany had taken legal action literally at the last minute. Action had been taken at the last minute, not before the right was lost, but before the execution was carried out. Accordingly, the phrase referred to loss of a right, not because of the expiry of a time-limit, but because of the impossibility of averting the execution.

62. The Convention on International Liability for Damage Caused by Space Objects, mentioned in paragraph 272, could serve as a practical example, but it had been a unique experiment, had had no successor—nor would it, in his view—and could not be used as evidence of any tendency in international law. He likewise had doubts about whether the “mixed agreements” between the European Union and its member States, referred to in paragraph 274, could serve as an example of joint responsibility. They actually had two parts, a Community part and a national part which fell exclusively within the competence of the member State. Theoretically, responsibility for performance was distributed a priori between the international organizations and the member States. Annex IX to the United Nations Convention on the Law of the Sea was predicated on a division of competences

between Member States and the international organization. The joint and several responsibility mentioned in article 6, paragraph 2, of that annex was an exceptional case and, he thought, was envisaged as some form of sanction for cases where no indication of competence was given. Thus, only in a doubly exceptional situation did that kind of responsibility apply: it could hardly be generalized.

63. It was difficult to understand, in connection with article 46 ter, paragraph 1 (a), why the injured State had to indicate what conduct on the part of the responsible State was required. Would it not be sufficient to say that State A had breached a given article? The current text created the impression that the injured State could decide on the conduct required, but that was not the case. If the injured State proposed conduct different from that required by the rule that had been breached, then the responsible State was fully entitled to object. The reference to article 36 bis seemed to indicate that such a departure from the norm breached was inadmissible; hence there was no need for the definition of that conduct by the injured State. Nor was there any need to go into the details of diplomatic protection, as it would suffice to say that local remedies had to be exhausted in accordance with the applicable rules of international law. The Commission should not create difficulties for itself by dealing with issues covered in the topic of diplomatic protection. Article 46 ter could therefore be kept relatively short.

64. Although very much in favour of the substance of article 46 quater, he thought that subparagraph (a) called for a great deal of clarification in the commentary, since neither “unqualified” nor “unequivocal” was explicated in the text. The wording of subparagraph (b) should be changed, for what was meant was that the injured State could no longer reasonably be expected to pursue or raise a claim. It might be worth considering whether that rule could be subject to certain exceptions—for instance, for egregious acts. Even the 1969 Vienna Convention set out exceptions to article 45. In addition, if the right to invoke responsibility was lost, what happened to the wrongful act itself, and to the duty to cease and make reparation for the wrongful act? Would the wrongful act become legal because nobody could invoke the consequences of its wrongfulness? One consequence could be that the duty to make reparation remained valid, as the wrongful act did not become legal simply because the right to invoke responsibility had been lost. It could become legal only if the waiver of the right amounted to some form of consent *ex post*. The creation of a relevant *opinio juris* could change the relevant norm, but it would not have retroactive effect and the act itself would therefore remain wrongful. If the responsible State performed the act a second time and there had been no change in the relevant norm, the injured State could again consider itself injured and invoke responsibility, despite the fact that it had lost that right earlier. It was something that could give rise to misunderstandings.

65. By and large, he had no problems with article 46 quinquies, but the issue was more complicated than the article indicated. Indeed, the article, if it was to stand alone, could even be deleted, as its result could be derived from other provisions. To illustrate the complexities involved, one could cite the example of foreigners, nationals of a non-European State, whose human rights were

massively violated by a State A, a party to the European Convention on Human Rights. As a consequence, the individuals had the right to invoke responsibility in the form of an individual complaint under the Convention system. At the same time, any other State party also had the right to bring a complaint before the European Court of Human Rights. The home State had the right to invoke the responsibility of State A under the State responsibility regime the Commission was now establishing. Furthermore, any other State also had the right to invoke responsibility in the restricted sense, since a gross and massive violation of an *erga omnes* obligation had been committed. Thus, there were four different types of consequences for one and the same wrongful act. The relationship between State A and the individual’s home State and complaints under the Convention would be discussed further, and he doubted whether a simple reference to a *lex specialis* rule would suffice. What was needed was an analogy to a *lis alibi pendens* situation in a very broad sense. Interestingly enough, reference to such a rule was made in the context of a plurality of responsible States, but not in the context of a plurality of injured States.

66. A second example would be that of a river that crossed several countries. If the upper riparian State built a dam and shut off the water, several lower riparian States were injured, by one and the same act, in their right to use the waters. Substantial problems would arise if they did not agree on the form of reparation—if one wanted restitution, for example, and others compensation. Both forms of reparation could not be given. If restitution was offered by the upper riparian State to the first lower riparian State, it would automatically extend to the next lower riparian State, whether or not the latter preferred that form. Hence, a provision dealing with incompatibility of forms of reparation was needed. One option would be to give priority to restitution unless the injured States agreed otherwise. Another would be to rely on agreement among the injured States, but the problem would arise of what to do if the injured States could not agree on a common form of reparation. Would it amount to a waiver of the right to invoke responsibility, enabling the responsible State to go free? That question needed to be addressed.

67. He supported article 46 sexies insofar as it did not specify any particular kind of common responsibility, but he agreed with Mr. Gaja that the issue was more complex, and that the *Corfu Channel* case was not the most appropriate example. Paragraph 2 (a) might lead to an *argumentum e contrario*, which was certainly not desirable. Why should such a rule apply only in cases of plurality of responsible States, and not in general?

68. On the whole, he was of the view that the draft articles should be referred to the Drafting Committee.

69. Mr. CRAWFORD (Special Rapporteur) said he agreed entirely with Mr. Hafner’s analysis of the Convention on International Liability for Damage Caused by Space Objects and the “mixed agreements” of the European Union. The detailed treatment in the Convention of joint and several liability was extremely unusual, and he had mentioned it because it was the most detailed provision in the field, not because he thought it reflected general international law. True, the process of inferring general principles of international law operated on the

basis of analogy, but one could not leap straight from a national legal system into international law without going through the necessary intermediary of finding a common basis in the different legal systems from which to infer that something was a general principle of law. With regard to “mixed agreements”, annex IX of the United Nations Convention on the Law of the Sea mandated special treatment of a particular situation, but the legal position under all “mixed agreements” was not the same, contrary to the prevailing assumption.

The meeting rose at 1 p.m.

2644th MEETING

Friday, 21 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapters II and III of the Special Rapporteur’s third report (A/CN.4/507 and Add.1–4).

2. Mr. MOMTAZ said it was unfortunate that he had not had more time to study chapters II and III closely, as it dealt for the first time with some very sensitive issues that were of crucial importance to the Commission’s future work. As a general comment, he said that the distinction between a crime and a delict made in article 19 of the draft

articles as adopted on first reading was relevant in respect of a number of the articles proposed, particularly article 46 quater, on loss of the right to invoke responsibility, and article 46 quinquies on a plurality of injured States. In those two cases, the questions raised were quite different if a violation of a fundamental rule of general international law was involved. The validity of that argument was confirmed in paragraph 233 of the report, where the Special Rapporteur said that an injured State might not be able on its own to absolve the responsible State from its continuing obligations. The question was whether that statement implied that, in cases of a violation of fundamental or *erga omnes* rules, the State that was directly injured could not on its own take the decision to absolve the responsible State from its obligations, as the interests of the international community as a whole were at stake. If the answer to that question was yes, it could only be concluded that, once again, the Special Rapporteur’s refusal to take account of the debate on the distinction in article 19 posed a problem for the Commission.

3. As far as the contents of chapters II and III were concerned and with regard to paragraph 237 on the form which an invocation of responsibility should take, he wondered whether the injured State’s claim could not be made in the framework of the political organs of an international or regional organization to which that State had referred the conflict between itself and the State responsible for the wrongful act. In some cases, the injured State had no intention of submitting a claim to those organs, which were anyway not competent to examine it. Nonetheless, the positions taken within those organs, by calling into question the responsibility of the State responsible for the allegedly wrongful act, might be considered as a somewhat informal way to invoke responsibility. The question had been raised in the case concerning the *Aerial Incident of 3 July 1988* without ICJ being called upon to give a decision. On the other hand, in the *Oil Platforms* case, which was still pending before the Court, the quite lengthy period of time between the destruction of the Islamic Republic of Iran’s oil platforms in the Persian Gulf and the referral of the matter to the Court by the Islamic Republic of Iran had not prevented the Court from declaring itself competent. Indeed, in those two cases, the Islamic Republic of Iran had invoked the positions it had taken within the framework of the political organs of international organizations.

4. With regard to paragraph 241, the question of the exhaustion of local remedies should be considered as a rule relating to the admissibility of claims in the area of diplomatic protection and, in any case, the rule did not apply to cases of massive and systematic violations of human rights, including, obviously, those involving aliens living in the territory of the State responsible for the internationally wrongful act.

5. Mr. CRAWFORD (Special Rapporteur) said that paragraph 233 of the report actually referred to a slightly different distinction between peremptory and other norms. Unquestionably, in cases of the continuing violation of a peremptory norm, unless provided for by the norm itself, the injured State could not absolve the responsible State from its continuing obligations, as that was a matter of more general interest. In fact, that paragraph drew attention to the possible consequences of that

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

situation with respect to questions of restitution. He had been grappling with the issues surrounding article 19 since the beginning of his mandate and intended to tackle them squarely in chapter IV of his report.

6. Mr. LUKASHUK said that he approved of the Special Rapporteur's intention to study the question of gross and serious breaches of obligations towards the entire international community and he hoped that he would be able to settle that extremely complex question with the help of all the members of the Commission. One extremely important aspect of that question concerned countermeasures in cases of breaches of obligations towards the international community as a whole. A more specific and practical question was raised in paragraph 232 of the report, where the Special Rapporteur referred to the freedom of the injured State to choose between the available forms of reparation, without, however, mentioning the right of the responsible State in that respect. In his opinion, the form of reparation should always be the subject of agreement between the parties.

7. With regard to the formal requirements for the invocation of responsibility, the Special Rapporteur's conclusions on the judgment handed down by ICJ in the case concerning *Certain Phosphate Lands in Nauru* needed to be qualified. While it was true that the Court did not seem to have attached much significance to formalities in that case, it had also expressly stated that such an approach was justified by the particular and exceptional nature of the relationship between Australia and Nauru. A general rule could not therefore be drawn from it and, consequently, it should be specified in article 46 ter, paragraph 1, that the injured State should "officially" give notice of its claim. That point seemed all the more justified as in paragraph 238 the Special Rapporteur stated that it seemed appropriate to require that notice of the claim should be in writing.

8. As to the question of the exhaustion of local remedies, paragraph 241 referred to the "minimum standard of treatment of aliens", an expression used by the Special Rapporteur without prejudice, but one which had unfortunate connotations at the international level. It was actually an expression used by the major Powers when they were demanding that other countries should apply to their nationals a legal regime in conformity with the standards established by those Powers themselves—in other words, a privileged regime. Such an approach had certainly provoked a storm of protest. As the Commission would undoubtedly come up against that expression again when it considered the topic of diplomatic protection, it would be sufficient, in the framework of the topic under consideration, to refer to generally accepted human rights.

9. He did not think that the *non ultra petita* principle limited the competence of the body dealing with the claim to award, on the basis of all the circumstances of the case, reparation that was higher than that requested. To do that would of course be the exception, but it was not unthinkable, for example, in the case of an action to which developing countries were parties. The Special Rapporteur was therefore right to recommend that a separate article should not be devoted to that principle.

10. Draft articles 46 quinquies and 46 sexies, on cases of a plurality of States, reflected the need, in the framework

of contemporary international relations, to take an increasingly multilateral approach and those articles should certainly be referred to the Drafting Committee. In the comments on those articles, it was stated, in paragraph 267, that the conduct of a State organ did not lose that quality simply because it was in conformity with a decision of an international organization. It was therefore questionable whether, in cases where the Security Council took a decision on sanctions and where the implementation of that decision would require the suspension of bilateral agreements, the State refusing to fulfil its obligations under the treaty, in applying the decision of the Council, was nevertheless held responsible.

11. With regard to the plurality of injured States, he agreed with paragraph 279, which seemed to him to be in line with the principles of law whereby it was recognized that the State which had been injured the most had the right to use unilaterally the whole defensive arsenal available to it as countermeasures. Thus, in cases of massive violations of human rights in a given State, all other States might of course be considered injured, but the State whose nationals had been particularly injured as a result of those violations was entitled to exercise diplomatic protection on their behalf.

12. With regard to article 46 quater, subparagraph (b), the phrase "and the circumstances are such that the responsible State could reasonably have believed that the claim would no longer be pursued" was too subjective and the first part of subparagraph (b) adequately dealt with the problem referred to there.

13. Lastly, with regard to the relationship between the concepts of responsibility and opposability or non-opposability of a wrongful act, in principle there was no direct relationship between opposability and responsibility. Opposability was not linked to a violation. In his opinion, it would take a great deal of effort and a great deal of time to settle that question, which was not even posed clearly in legal practice. It could only therefore be dealt with in the commentary.

14. In conclusion, he supported the proposed draft articles and was in favour of referring them to the Drafting Committee.

15. Mr. BROWNLIE said that the questions referred to in chapter III had been treated very substantially and that any remaining difficulties would be better left to the Drafting Committee, to which the draft articles should be referred as soon as possible. His remarks would therefore be limited to a few technical points.

16. Turning to the issue raised by the Special Rapporteur in paragraph 238, namely, a minimum requirement of notification by one State against another of a claim of responsibility, so that the responsible State was aware of the allegation and in a position to respond, he personally thought that the answer offered at the end of that paragraph was too narrow. Moreover, the analogy drawn, in the footnote to that paragraph, with article 23 of the 1969 Vienna Convention, which dealt with reservations, was not particularly cogent. The Special Rapporteur had not cited any jurisprudence or authority in support of that solution. It was not certain that, in practice, States always communicated in writing. Furthermore, since "writing"

had not been defined, did it mean a note verbale, an informal, but contemporaneous and reliable record of talks between two diplomats or a subsequent report? In the case concerning *Certain Phosphate Lands in Nauru*, for example, where the questions of waiver and delay had arisen, as the Special Rapporteur had pointed out in the commentary, ICJ had adopted a fairly flexible general approach, in that it had accepted an affidavit from the Nauruan Head Chief stating that he had raised the question of the claims with the Australian authorities on several occasions. Although he himself was unwilling to proffer a solution, the Drafting Committee might re-examine the Special Rapporteur's proposal, which did not appear to reflect existing experience or the standards adopted by international courts.

17. The treatment of the question of delay raised in paragraphs 257–to 259 of the report might be improved in the commentary, although it had not been completely settled in the draft article either. The dilemma stemmed from the fact that, although delay, as such, was not a ground of inadmissibility, all the text books tended to be lazy and generally gave the impression that a principle of extinctive prescription existed and the commentary had wrongly taken the same view. Admittedly, as a general principle of comparative law, a general concept of extinctive prescription of action did exist, but, on analysis, that notion broke down into two elements: waiver implied from the conduct of the parties and, secondly, the fact that because of the ancient character of a claim, the allegedly responsible State was seriously disadvantaged in the sphere of evidence and procedural fairness. Those matters had been attended to in the commentary, but the distinction was not reflected in the draft articles.

18. In some rare cases, extinctive prescription arose when, for example, a special agreement laid down a particular period of years after which any claim would be automatically excluded, but it should not be regarded as forming part of general international law and the commentary made no claim that it did.

19. Mr. CRAWFORD (Special Rapporteur) said he feared that the members of the Commission might be somewhat baffled by the contrast between the proposed article 46 ter, which stated that the responsible State must have notice from the injured State, whereas the corresponding commentary specified that notice must be in writing. Having looked at the source materials, he had come to the conclusion that a requirement of notice in writing was too categorical. He therefore accepted the criticism, but noted that a debate had started and that some members, like Mr. Lukashuk, favoured notification in writing. In his own opinion, the formula “to require notice” was more flexible and, at the same time, it struck a balance because there were certain things that the allegedly responsible State could not be expected to know and needed to be told if a claim was to be brought. In other situations, however, it was obvious that a claim existed and the idea that someone had to present himself and recite the claim would not seem to be attractive. The reason for a discrepancy between the commentary and the draft article was that he had changed the text of the latter without amending the commentary, for which he apologized. Nevertheless, the issue was before the Commission by reason of the commentary and other members might well have differing views on the subject. Personally he was in

favour of the more flexible formula stating that a claim had to be notified, but without stipulating that it had to be submitted in writing.

20. Mr. LUKASHUK said that he understood the Special Rapporteur's doubts and the stance he had taken. As a compromise which would satisfy him, he therefore proposed that the words “shall officially notify” should be used instead of the words “must notify in writing”.

21. Mr. DUGARD, commenting on some questions which were of particular interest to him as Special Rapporteur on diplomatic protection and therefore on article 46 ter, paragraph 2, said that, on the whole, he was satisfied with that provision. The draft article adopted on first reading had not included any provision on the nationality of claims, and that was perfectly normal, since it had been decided to drop the subject and to depart from the approach of the first Special Rapporteur on the topic of State responsibility, Francisco García Amador. Having read chapters IV and V of the report, which had been unofficially circulated, he was delighted to see that, in paragraph 428, the Special Rapporteur had discussed the question of a saving clause on the subject of diplomatic protection and the nationality of claims and had taken the view that there was no need for any saving clause other than that embodied in article 46 ter, paragraph 2 (a). Obviously, the whole question of the nationality of claims would be dealt with in the report on diplomatic protection and much time had already been devoted to the subject at the current session. Nevertheless, he had some reservations about the wording of the draft provision; the double negative in the introductory paragraph and subparagraph (a) (“The responsibility of a State may not be invoked ... if ... the claim is not brought ...”) was infelicitous, but it was a matter for the Drafting Committee.

22. The principle of the exhaustion of local remedies was a more difficult issue. Article 22 adopted on first reading had included a provision on that subject and it had been discussed at previous sessions. That article was essentially the brainchild of Special Rapporteur Ago and reflected the view he had argued unsuccessfully in the *Phosphates in Morocco* case. Incidentally, it would be interesting to know whether he had disclosed his own interest in the case, when that matter had been debated in the Commission. In his own opinion, it was a healthy sign that members of the Commission did clearly indicate the cases in which they had acted as counsel, so that everyone knew what their professional interests were. At all events, if a provision like article 22 were to be included, it would tie the hands of the Special Rapporteur on diplomatic protection. He frankly had an open mind on the subject and did not strongly support either the substantive or the procedural view. Like former Special Rapporteur García Amador, he found merit in both approaches. The context in which the rule of the exhaustion of local remedies was invoked was very important. He would like to be able to consider the matter more fully. If the report on diplomatic protection was to deal with the subject, it would be wrong to discuss it in any detail in the draft articles under consideration.

23. For that reason, he approved of the way the rule had been handled in article 46 ter: a mere reference, but no taking of a position on the approach to be adopted and no

attempt to deal in detail with the matter. As it had been decided by the Commission that the matter should be referred to in the study on diplomatic protection, it would be wrong to go any further. Mr Hafner had suggested that article 46 ter, paragraph 2, could be dispensed with completely. Perhaps he had made that suggestion in anticipation of a saving clause being incorporated at a later stage. His own view was that paragraph 2, as it stood, would be preferable to a saving clause and he was very happy with that provision.

24. Mr. HAFNER explained that he had not proposed the deletion of the whole of paragraph 2, but only that it should be shortened.

25. Mr. GAJA said that he endorsed Mr. Hafner's view that the text of the provision could be shorter. The current text certainly leaned towards the procedural theory because it assumed that responsibility had already occurred. Perhaps a vaguer formulation could be found. Mr. Dugard's comments had embarrassed him, because he wondered whether he had to disclose that he had taken the procedural approach when pleading in the *ELSI* case after writing a book which had been a defence of the substantive view. As for Mr. Dugard's allusion to Ago's interests, the latter had never made a secret of the fact that he had appeared in the *Phosphates in Morocco* case which anyway dated back to the time of the League of Nations.

26. Mr. CRAWFORD (Special Rapporteur) drew attention to the fact that he had dealt with article 22 in detail in his second report on State responsibility.³ It had emerged from the debate on the subject that the Commission wished to leave both possibilities open. In some cases, it was clear that a breach had already occurred and the exhaustion of local remedies was a procedural prerequisite which could be waived. In other cases, the denial of justice formed the substance of the claim, but there might be some cases in between, which were difficult to classify.

27. The formulation of article 46 was not intended to prejudice that, but it was clear that in that context it was a matter not of judicial admissibility, but of the admissibility of claims at the State-to-State level and it therefore belonged in the draft articles. It should, however, be presented in such a way that it left the substantial questions open to examination within the framework of the topic of diplomatic protection. Similarly, it was necessary to leave open the possibility that the rule of the exhaustion of local remedies applied to individual human rights claims under general international law as distinct from claims of mass violations. It was significant that the articles in the human rights treaties which applied the exhaustion of local remedies rule referred to general international law and did not simply apply a rule taken from another context. The implication was that the rule was generally applicable. Although the position he had personally adopted in the second report had tended towards the procedural view, he thought that the Commission could leave the point relatively open.

28. Mr. DUGARD said Mr. Gaja had stated that article 46 ter, paragraph 2 (b), inclined towards the proce-

dural position, perhaps because it was placed in the chapter which was generally concerned with procedural matters. He agreed with Mr. Gaja and the Special Rapporteur that, at the current stage, the Commission should not decide whether it was substantive, procedural or something in between. When the matter was referred to the Drafting Committee, the latter should pay special attention to keeping the range of possibilities open.

29. Mr. PELLET said he acknowledged that the draft articles submitted by the Special Rapporteur in paragraph 284 of his third report were extremely opportune.

30. It was interesting to ponder on the spirit in which those proposals were formulated. Setting aside the "prehistoric" period presided over by García Amador, four successive special rapporteurs had been entrusted with that important topic. First, Ago, whose genius for unifying and theorizing—and perhaps also a spirit of vengeance—had profoundly altered the traditional conception of the topic of State responsibility. Then, after the Riphagen interlude, which had exerted no real influence on account of its excessive abstraction and rigidity, the more moralizing and insufficiently technical approach adopted by Mr. Arangio-Ruiz. Currently, with Mr. Crawford, while he did not depart from very strict doctrinal precedents, except on the question of crimes, it was pragmatism in the best sense of the word that prevailed. He had the impression that the Special Rapporteur's chief concern was to complete the draft articles and to make them fully functional, particularly by filling the many lacunae that had characterized Part Two in particular of the earlier draft. Chapter I of Part Two bis was a happy illustration of that excellent programme, although he remained perplexed at the curious terminology used by the Special Rapporteur to explain his intentions, particularly in paragraph 227 of the report, in which he used and abused the word "secondary" to describe both the consequences of the internationally wrongful act (namely, responsibility alone, the consequence of the internationally wrongful act) the consequences of responsibility (which was, one might say, a "tertiary" consequence of the wrongful act) and perhaps even the "quaternary" procedural consequences of the wrongful act.

31. That being said, the overall scheme was clear, even if the vocabulary was not: the task was to ascertain, as the title of chapter I indicated, in what circumstances a State could invoke the responsibility of another State to which an internationally wrongful act could be attributed. More specifically, the question was what consequences the injured State could draw from that responsibility. In his view, the first of those conditions appeared to be that the State had suffered an injury, but that belonged to the discussion of article 40 bis, at least in the broad sense, and there would certainly be an opportunity to refer to the question again during the consideration of the text by the Drafting Committee.

32. Turning to the articles proposed by the Special Rapporteur, he noted that article 46 ter raised the largest number of questions of principle, not so much because of what it said as because of what it omitted to say. The Special Rapporteur had proposed changing the drafting of the articles in Part Two by shifting the emphasis from the rights of injured States to the obligations of responsible

³ See 2614th meeting, footnote 5.

States, as was noted in paragraph 232 of his report. Like most members of the Commission, he had supported that change, but his approval was clearly subject to a clear presentation in Part Two bis of the corresponding rights of the injured State or States, for that seemed to be the underlying spirit of the new structure proposed by the Special Rapporteur: Part Two was concerned with the obligations of the responsible State, whereas Part Two bis stressed the rights (or obligations) of the injured State.

33. One of the main problems in that regard was whether, and, if so, to what extent, the injured State could elect as between the various forms of reparation. That crucial problem was dealt with in paragraphs 227, 231, subparagraph (a), 232 and 233 of the report (and had already been discussed in paragraphs 25 and 26). The Special Rapporteur's clear and categorical reply to that question was that the injured State had the right to elect the form of reparation. That position had the merit of firmness—it was perhaps a little too categorical—but it also had one major drawback: despite the statement in paragraph 233 that the election must be “valid”, it was not taken up in article 46 ter. The latter article dealt only with the form and the procedure (in the broad sense), not with the actual content of the possible subject of the claim.

34. It thus seemed that, before article 46 ter, there should be another article, clearly setting forth the principle of election residing with the injured State, regarding which there seemed to have been broad agreement among members of the Commission, to judge from the debate on articles 43 and 44. That agreement seemed to him to concern only the principle of the freedom of the injured State to elect as between restitution and compensation. The Commission had seemed to agree that the injured State could require restitution pursuant to the provisions of article 43, in other words, whenever that was materially possible and would not involve a disproportionate burden on the responsible State. The fundamental reason for that was that the wrongdoing State must not be accorded the possibility of “buying off” a violation of international law—something that would in any case be contrary to the principle of equality among States, as some States had the resources to buy off a wrongful act, whereas others did not. That explanation should also appear somewhere in the commentary, for it was the only truly convincing explanation of the right of the injured State to require restitution rather than compensation. But it also seemed to him that the members of the Commission had agreed in considering that the injured State could not waive restitution (at least, of course, where it was possible) in the case of a crime or, perhaps more generally, in the case of a violation of a peremptory norm of general international law, for, in that case, compliance with the obligation concerned not only the injured State, but the international community as a whole.

35. The problem of satisfaction also arose. In his view, nothing prevented a State from waiving restitution or compensation in favour of satisfaction. It also seemed to him that the Special Rapporteur admitted as much, at least implicitly, in his comments devoted to the waiver of reparation. But, there again, nothing was said on the question in the draft article itself. And that, in turn, raised another problem: it seemed to be accepted that the injured State was entitled to satisfaction if that was a necessary compo-

nent of full reparation for the harm. But could it require a specific form of satisfaction? Article 46 ter, paragraph 1 (b), seemed to provide for that, but article 45, on the other hand, was very vague on that point. If there was no clear answer to that question, it might be possible to avoid referring to that difficulty in the draft articles and merely to point to the problem in the commentary. But in any case it should not simply be passed over in silence, as was currently the case, as the report did not deal with the problem in that form.

36. On the other hand, he considered it indispensable to state explicitly, somewhere in the draft articles themselves—probably between article 40 bis and article 46 ter—that “the injured State is entitled to require restitution rather than compensation in the circumstances set forth in article 43” and he thus wished to make a formal proposal to that effect.

37. Once that prior condition of control, subject to certain limitations, by the injured State over the form reparation should take was established, article 46 ter did not raise any very great difficulties, even though it could probably be considerably simplified. Paragraph 1 could be reduced to the current *chapeau*, as its subparagraphs (a) and (b) posed problems to which other members of the Commission had drawn attention and were in any case probably not exhaustive. Any attempt to supplement them would require entering into the sort of details that were best left to diplomatic practice to work out. With regard to the *chapeau*, he proposed two changes: first, instead of “which seeks to invoke”, one could simply say “which invokes”. That was the point at issue; the words “seeks to” were ambiguous and added nothing. Secondly, instead of *doit notifier*, the French text could simply read *notifie*, so that the text would then read: “An injured State which invokes the responsibility of another State shall give notice of its claim to that State”—the words “under these articles” also being dispensable. Moreover, like Mr. Brownlie and Mr. Simma, and for the reasons they had given, he thought it unnecessary to specify that the claim should be “in writing”, despite the argument set forth in paragraph 238 of the report, which was in any case not taken up in the text of the draft article. At all events, the form was unimportant: what mattered was that the State whose responsibility was invoked should be aware that there was a problem.

38. As for paragraph 2, it had to be acknowledged that it encroached on the preserve of the Special Rapporteur on diplomatic protection, for it dealt, on the one hand, with the nationality of the individual who had suffered the initial injury and, on the other, with the exhaustion of local remedies; in other words, the two conditions to which diplomatic protection was traditionally subordinated. He therefore wondered whether it was right to be so specific and whether it would not be better simply to refer to diplomatic protection. That could fairly easily be done, but probably elsewhere than in article 46 ter, perhaps in the *chapeau* to article 40 bis, which might be drafted so as to read: “Subject to the rules applicable to diplomatic protection, a State has the right to invoke the responsibility of another State ...”. Another possibility would be to include in the future Part Four a provision stating that: “These draft articles are without prejudice to the rules applicable to diplomatic protection”. A third

possibility would be to devote a new article 46 ter (bis) to the question, perhaps worded: "The responsibility of a State may be invoked in the case of injury to an individual by an internationally wrongful act only if the conditions necessary to the application of diplomatic protection are fulfilled". In any event, two things in the current paragraph 2 of article 46 ter troubled him: first, it was somewhat inconsistent that it should appear in the same article as paragraph 1, dealing with the formal conditions for invocation of responsibility, which was a very different matter; and secondly, that it was too specific, yet at the same time perhaps incomplete, as the Commission had decided to separate diplomatic protection from responsibility.

39. With regard to article 46 quater, noting that Mr. Simma had criticized the word "waiver" in the English text, he said he had no very definite proposal for a more suitable word, but that he had considerable doubts as to the suitability of the word "acquiescence", which risked referring not to the consequences of responsibility, but to the engagement of responsibility, a danger against which the Special Rapporteur warned in paragraph 254 of his report. Consent to the wrongfulness was different from a waiver of reparation. In any case, the word *renonciation*, used in the French text, was perfectly correct. Noting, moreover, that Mr. Hafner had criticized the expression "or in some other unequivocal manner" at the end of subparagraph (a) of article 46 quater, he said that he found the expression entirely appropriate and very well justified in paragraph 256 of the report.

40. Subparagraph (b) also demonstrated almost all the virtues and, once again, he could not join Mr. Lukashuk and Mr. Simma in their criticisms of the flexible and appropriate formulation that appeared to allude discretely to estoppel by conduct, conditions for which were more flexible in international law than in common law and which did not refer exclusively to the conduct of one of the protagonists, but rather to the interaction between the parties as they reacted to one another's conduct. In the French text of the same subparagraph, the word *lésion* should be replaced by *préjudice*.

41. Although he approved of article 46 quater, he nevertheless felt that it lacked some element, to which a second paragraph or a separate article should be devoted and to which he had already alluded, namely, the case of a partial waiver, not of the right to invoke responsibility, but of those most frequently manifested forms of reparation, restitution and/or compensation, in favour of satisfaction alone. Perhaps it would be sufficient to say: "The injured State may partially waive the full reparation that is due", with the proviso that a waiver of restitution was impossible where a rule of *jus cogens* had been violated.

42. With regard to articles 46 quinquies and sexies, he agreed with Mr. Hafner and Mr. Simma, both of whom had dwelled on the fact that the problems raised by a plurality of injured States and of responsible States were more complex than those two articles might lead one to believe, although he was reluctant to go along with Mr. Simma or Mr. Lukashuk, both of whom seemed to advocate the Commission taking up the case of a plurality of States, whether in respect of active or of passive responsibility, in the context of the question of international organizations. In any case, the Commission had decided, rightly or

wrongly, to exclude all problems closely or distantly relating to international organizations and he thought it best, at the current juncture, to stand by that decision, as was firmly advocated by the Special Rapporteur in paragraphs 276 (a) and 282 of his report. That being said, he entirely agreed with the Special Rapporteur's view, to be found in paragraph 283, that questions relating to a plurality of injured and responsible States must, as far as was possible, be clarified in the actual text of the draft articles.

43. Turning to article 46 sexies, he said that, as to the substance, although he had had occasion to plead in several cases before ICJ in which the problem had arisen, he had no clearly formulated ideas on the question, except that it was extremely risky to draw analogies with internal law in that area. That being said, it was not accurate, as the Special Rapporteur stated far too categorically in paragraph 275 of his report, that the sources of international law as reflected in Article 38, paragraph 1, of the Statute of the Court did not include analogy from national legal systems. In his view, that was precisely the object and purpose of "the general principles of law" cited in subparagraph (c) of that provision, which applied to the principles common to States *in foro domestico*. But, in the case in point, where joint and several liability mechanisms were involved, national systems differed widely, again contrary to the impression one might gain from paragraph 272 of the report. Thus, though for a reason totally different from that adduced by the Special Rapporteur, he joined him in believing that little could be derived from an analogy with national legal systems. There was thus no choice but to make do with international law and the Special Rapporteur conclusively demonstrated that practice in that area was scanty and not absolutely decisive. He thought, however, that the few examples the Special Rapporteur had found were fairly convincing, except for that of the Convention on International Liability for Damage Caused by Space Objects, which established a treaty regime of objective responsibility, and thus one covering acts not internationally wrongful, so that consequently that Convention proved absolutely nothing in the sphere of interest to the Commission. But, for the rest, the examples given by the Special Rapporteur, including that of the *Corfu Channel* case, the relevance of which some members had questioned, seemed to show that international law inclined towards joint and several liability, as opposed to joint liability. That meant that, if internationally wrongful acts of several States had contributed to the same damage, each of those States was obliged to make reparation for the harm as a whole, although it could also have recourse to the other responsible States. That seemed to be the conclusion reached by Judge Shahabuddeen in his separate opinion in the case concerning *Certain Phosphate Lands in Nauru* cited by the Special Rapporteur in paragraph 277 of his report, and which he appeared to endorse, although the end of that paragraph was extremely cryptic. Moreover, it was also the "scenario" actually adhered to by the litigant States in that case. He readily conceded that that was not an absolutely clear conclusion, in the light of the scanty practice in that area, but it was the most plausible and also the most convenient for the victim. Thus, in the absence of clear customary law to be codified, the Commission might take up that principle in the context of the progressive development of international law, which was actually nothing more than the con-

solidation of trends that could be discerned from an unbiased analysis of practice. However, the drafting of article 46 *sexies* was somewhat surprising: while the Special Rapporteur had engaged in that objective analysis and seemed to have reached the same conclusions as himself, the text of article 46 *sexies* seemed to strike out in the diametrically opposite direction. It was incontestable that “the responsibility of each State [responsible for one and the same unlawful act] is to be determined in accordance with the present draft articles”, but that was not at all what was at issue: the determination of responsibility was the subject of Part One of the draft and what was important in the current context were the consequences of responsibility. Yet paragraph 1 made no reference thereto, whereas paragraph 2 added to or subtracted from a principle not set forth in paragraph 1. In his view, paragraph 1 should be drafted quite differently, so as to read, for example: “When two or more States are responsible for one and the same internationally wrongful act, each of them is obliged”—or to err on the side of caution, “may be obliged”—“to make reparation for all damage caused by that act”.

44. Once that principle was stated, paragraph 2 became comprehensible. The principle did not permit a State to recover more than the damage suffered (para. 2 (a)) and was without prejudice to the possibility for a State from which total reparation was claimed to require a contribution from the other responsible States (para. 2 (b) (ii)). Paragraph 2 (b) (i), meanwhile, did not belong in the draft article; there should be a more general provision stating that the whole of Part Two of the draft was without prejudice to current rules of procedure and competence before international courts and tribunals.

45. The wording of article 46 *sexies* also called for a number of comments. In paragraph 2 (a), it did not seem appropriate to mention persons or entities other than States, since such matters related to the law of diplomatic protection or indeed to national legislation. He also wondered whether that paragraph should be limited to compensation; he had in mind particularly the restitution of a sum of money. “Reparation” would be perhaps more comprehensive and certainly more accurate than “compensation”. Lastly, in paragraph 2 (b) (ii), the French translation of “requirement for contribution”—*exigence de contribution*—was a common law phrase. It would be preferable to use a more neutral expression, simply stating that paragraph 1 was without prejudice to the possibility of any State that might be required to provide full reparation to take action against the other responsible States. It might be worth adding the words “with a view to recovering a sum proportional to the contribution of each of those States to the wrongful act” or “to the harm”.

46. He had fewer comments to make about article 46 *quinquies*, not because it seemed free of problems but because there was no way of resolving them. All things considered and without full knowledge of the relevant practice (perhaps there was none, aside from the *Forests of Central Rhodopia* case), it seemed to state a sensible rule, although so obvious that it could be asked whether it needed to be included at all. In his view, the answer should be in the affirmative, if only for the sake of balance with the crucial article 46 *sexies*. He only wondered whether the Commission should not decide between the position adopted by the Special Rapporteur in paragraph 281 of the

report—which he was inclined to favour—and that taken by the arbitrator in the *Forests of Central Rhodopia* case, Östen Undén. The Special Rapporteur had made no specific proposal. The Drafting Committee might wish to consider the matter.

47. Lastly, he reiterated his view that, despite his critical comments, most notably with regard to some lingering flaws, the articles proposed by the Special Rapporteur were, in intention at least, extremely useful and undoubtedly added to the value of the draft articles as a whole. They should therefore be examined and finalized by the Drafting Committee.

48. Mr. ROSENSTOCK said that, if memory served, Mr. Pellet had been among those who thought that not enough emphasis had been given to the idea that the injured State should be able to choose the form of reparation. In those circumstances, he wondered why Mr. Pellet was in favour of deleting article 46 *ter*, paragraph 1 (b).

49. Mr. GALICKI considered that, contrary to what Mr. Pellet had said, it had been perfectly legitimate for the Special Rapporteur to cite, in paragraph 272 of the report, the example of the Convention on International Liability for Damage Caused by Space Objects. Indeed, in his view, article VI of the Convention, which brought together the elements of liability and responsibility, should also be cited.

50. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Rosenstock’s comment, said that his intention had indeed been, in article 46 *ter*, paragraph 1 (b), to emphasize that the injured State had a choice as to what form reparation should take. In reply to Mr. Pellet’s comment, he said that the word “responsibility” in article 46 *sexies*, paragraph 1, referred to Parts One and Two of the draft in their entirety. It seemed to him that Mr. Pellet was in agreement with him on the principle, if not the wording.

51. Mr. PELLET, replying to the Special Rapporteur, said that, for him, the problematic word was “determined”, since it referred to the origin of the responsibility.

52. Further, he was in total disagreement with Mr. Galicki. It was risky to invoke conventions laying down special regimes of responsibility, since that would obliterate the distinction between liability and responsibility.

53. As for Mr. Rosenstock’s remark, article 46 *ter*, paragraph 1 (b) was, as it stood, simply a procedural provision indicating that the State should specify what form reparation should take. It had nothing to do with the right of the injured State to choose the form of such reparation.

54. Mr. ECONOMIDES said he regretted that there had not been enough time to study the French version of the text, owing to its having been issued late. His remarks on the draft articles before the Commission could therefore be only preliminary.

55. Article 46 *ter* did not seem to cover the situation of a State which was not injured but was nonetheless entitled to invoke the responsibility of another State. Since that situation arose in particular when the fundamental interests of the international community as a whole had been seriously affected, that factor should be taken into

account, as Mr. Gaja had said. More specifically, he pointed out, with regard to paragraph 1 (b), that the injured State did not have an absolute right to choose the form of reparation, particularly when restitution in kind was possible. Otherwise, the principle according to which restitution took priority over reparation, except where otherwise agreed between the parties, would make no sense. Moreover, the choice of the form that reparation should take depended on the basic provisions already adopted regarding restitution, compensation and satisfaction. Article 46 ter was certainly not the right place to deal with the issue.

56. Moreover, the article was not complete. The injured State could claim for much more than mere cessation, yet the proposed text did not so provide. If the provision had to be retained, it should specify that the list of elements to be included in the claim was meant to be purely indicative, not restrictive. Furthermore, the form reparation should take was often determined as the result of a long-term process; it could not be defined immediately or unilaterally. In fact, the only useful aspect of article 46 ter was the requirement of written notice of the claim by the injured State. That aspect should therefore be retained in a special provision, along the lines proposed by Mr. Pellet, or else the question of giving notice of a claim should be mentioned in the commentary.

57. Article 46 ter, paragraph 2, should contain a completely separate provision, which might be entitled "Conditions for the exercise of diplomatic protection". It was, incidentally, naïve to refer to responsibility "invoked under paragraph 1", since a State's responsibility did not arise out of paragraph 1, but rather out of the regime established under the draft articles as a whole. Paragraph 2 did not, therefore, concern direct responsibility between States, since it dealt with the case of a State acting on behalf of one of its nationals, whether a physical or a moral person. Such a situation should be covered in some way and he would propose the following text:

"A State may invoke the responsibility of another State on the grounds of diplomatic protection only:

"(a) If its request is in conformity with the rules regarding nationality of claims;

"(b) If any effective local remedies available to the person or entity on whose behalf the diplomatic protection is exercised have been exhausted."

If it was thought unwise to enter into detail, the text could be made even more concise, with the following wording: "A State may not invoke the responsibility of another State on the grounds of diplomatic protection when the conditions for exercising such protection are not fulfilled."

58. With regard to article 46 quater, subparagraph (a), he agreed with Mr. Simma that the term "waived" was not used in its technical sense. The phrase "unqualified acceptance of an offer of reparation" simply meant settlement of the dispute, not through waiver, but, rather, because the injured party had received satisfaction. Moreover, the phrase "or in some other unequivocal manner" could include waiver and any other modality of the loss of the right to invoke responsibility. It should therefore be reviewed by the Drafting Committee.

59. Article 46 quater, subparagraph (b), was considerably more problematic, since it dealt with the issue of prescription. If prescription was to be provided for at all, it came under primary rules. Introducing it into the draft articles by means of a secondary rule was what he would qualify as getting into contortions. First of all, the rule relating to "reasonable time" did not apply to all offences: it applied to delicts, but not to crimes, as defined in article 19. In today's world, it was considered that the most serious breaches affecting the international community as a whole were imprescriptible. Secondly, the provision was incomplete. It contained no clear statement of what was expected of States and it was too vague. It should be deleted in its entirety.

60. Article 46 quinquies, by contrast, seemed most useful. He regretted that it did not present all the possible variations: it dealt with the situation of an injured State or several injured States, but not with the situation in which all States were injured by an extremely serious breach affecting the interests of the international community as a whole. That was a flaw, but he acknowledged that he did not know how to fix it.

61. With regard to article 46 sexies, it would be better, as Mr. Pellet had recommended, to restrict it to the invocation of the responsibility of each State, rather than referring to "determining" such responsibility, as the current wording of paragraph 1 had it. The determination of responsibility came under a different part of the draft articles. Moreover, paragraph 2 (b) (i) was in the wrong place, unlike paragraph 2 (b) (ii). The wording of the latter, however, should be improved, especially in the French text. Paragraph 2 (a) constituted a useful provision, but it would be preferable to delete the reference to "person or entity". There should simply be an explanation in the commentary that, in some cases, the provision applied not to a State, but to institutions or private persons.

62. Mr. ADDO said that article 46 ter made provision for an obvious situation: the only way of invoking the responsibility of a State was to give it notice of a claim and to specify what conduct was required to ensure cessation of the wrongful act and what form reparation should take. In that regard, in paragraph 1 the words "should specify" should, as previous speakers had said, be replaced by "shall specify", which would carry more weight. Paragraph 2 (a) dealt with the rule on the nationality of claims, which limited the right accorded to States under international law to exercise diplomatic protection. That right was also limited by the rule on the exhaustion of local remedies contained in paragraph 2 (b). It was clear from that subparagraph that, if the available local remedies were not effective, there was no point in resorting to them. It was equally clear that, where remedies existed, but the authorities of the State of origin prevented access to them, the rule on the exhaustion of local remedies might be considered to have been complied with. That had been confirmed by ICJ in, for example, the *Barcelona Traction* case (*Preliminary Objections*). The wording proposed by the Special Rapporteur for the draft article was therefore adequate.

63. He also favoured proposed article 46 quater, if it was understood that the "reasonable time" mentioned in

subparagraph (b) was assessed on a case-by-case basis and in the light of the particular circumstances. Articles 46 quinquies and sexies were also acceptable. He therefore considered that chapter I of Part Two bis, as proposed by the Special Rapporteur, should be referred to the Drafting Committee.

64. Mr. LUKASHUK, referring to article 46 ter, paragraph 1, said that the word “should” ought to be retained and not, as some members had suggested, replaced by the word “shall”, which implied obligation. If an injured State were obliged to specify in its claim what form reparation should take, that might be interpreted as meaning that an injured State which did not request compensation, for example, was subsequently not entitled to make such a claim.

The meeting rose at 12.40 p.m.

2645th MEETING

Tuesday, 25 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HE said the Special Rapporteur was to be congratulated on his initiative in putting together the new Part Two bis on implementation of State responsibility, which was marked by its comprehensive nature and well rea-

soned and balanced argumentation. It would undoubtedly occupy an irreplaceable position in the draft articles.

2. Article 46 ter, paragraph 1, contained a crucial element in the invocation of responsibility: the need for the injured State to give notice to the responsible State of its claim. Paragraphs 234 and 236 of the third report (A/CN.4/507 and Add.1–4) stressed the need for the injured or interested State to respond to the breach, the first step being for it to call the attention of the responsible State to the situation so that it would cease the breach and provide redress. According to paragraphs 236 and 237, care should be taken not to over-formalize the notification procedure, as ICJ did not attach much significance to formalities. The various forms of notification, from an unofficial or confidential reminder to a public statement or formal protest, could be taken as suitable means of notification, as circumstances required, but failure to make such notification to the responsible State could entail serious legal consequences, including loss of the right to invoke responsibility.

3. With all those requirements specified for notification of a claim of responsibility, one thing might appear to be missing: the time factor. Was there any time limit for notification? The answer lay in article 46 quater, subparagraph (b), which indicated that the claim had to be made known to the responsible State “within a reasonable time” after the injured State had notice of the injury. Accordingly, the time factor should be mentioned in the commentary.

4. He agreed with the Special Rapporteur that paragraph 2, subparagraphs (a) and (b), of article 46 ter, referring to nationality of claims and exhaustion of local remedies, set out general legal principles whose coverage was not confined to cases of diplomatic protection, i.e. those concerning treatment of foreign nationals and corporations, and that the principles should be treated as general conditions for the invocation of State responsibility. Like other members, however, he thought that paragraph 2 should be incorporated in a separate article, since it dealt with the conditions under which a State’s responsibility could not be invoked, whereas paragraph 1 concerned the need to give notice.

5. He welcomed the adoption of the traditional distinction between waiver and delay in article 46 quater and especially liked the wording of subparagraph (b), which struck a fair balance between the interests of the injured State and those of the responsible State. Some difficulties arose, however, with regard to settlement. Admittedly, under subparagraph (a), unqualified acceptance by the injured State of reparation tendered by the responsible State could be regarded as a type of waiver. Nevertheless, in most circumstances unilateral action by one State was not enough: settlement had to be reached through the actions of both States with a view to achieving a solution that benefited both. In general terms, settlement could not therefore be categorized as a kind of waiver and must be treated separately.

6. In the absence of a specific solution with regard to a plurality of injured States (art. 46 quinquies) and a plurality of States responsible for the same internationally wrongful act (art. 46 sexies), it was desirable to follow the

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

proposed general principle that each State was responsible for its own conduct in respect of its own international obligations and that each injured State was entitled to claim reparations from any responsible State for losses flowing from and attributable to an act of that State, subject to the proviso in article 46 *sexies*, paragraph 2. As pointed out in the report, situations in which there were several injured States or responsible States in regard to one and the same wrongful act did not seem to have caused any difficulties in practice that required specific regulation in the draft over and above what was set out in article 46 *quinquies*.

7. Mr. TOMKA said the Special Rapporteur was to be congratulated on his suggestion to draft a new Part Two bis, since it was a big improvement over the text adopted on first reading, especially as far as countermeasures were concerned.

8. The first issue that called for attention was the so-called “right” of the injured State to choose the form of reparation. Although article 46 *ter* did not speak expressly of such a right, paragraph 1 (*b*) appeared to imply it. During the discussion, the Special Rapporteur seemed to have confirmed that interpretation. In paragraph 232 of the report, the Special Rapporteur stated much more clearly that it was desirable to spell out the right of election expressly. In paragraph 233, he suggested that it was sufficient to refer to a “valid” election of one of the forms of reparation leaving the conditions of validity to be determined by general international law. Was the right of election to be construed as a subjective right of an injured State, to which corresponded an obligation on the part of the responsible State to provide the form of reparation that had been “validly” elected by the injured State? Apparently yes, according to the statement in paragraph 233 that under the draft articles, such an election should be given effect. But was that conclusion in harmony with the Special Rapporteur’s criticism, in paragraph 227 of the report, that Part Two as adopted on first reading allowed for no element of choice or response on the part of other States, or indeed on the part of the responsible State itself?

9. Two cases had been cited with reference to the “right” of election: the *Chorzów Factory* and the *Great Belt* cases. In the first, Germany had preferred compensation to the possibility of restitution. In the second, Finland had eventually chosen compensation, although the settlement had been reached before an internationally wrongful act had actually been committed, for in 1992 the bridge had not yet been built and the right of free passage of oil rigs and drill ships had not been impeded. It was a situation analogous to that of the *Gab Ž kovo-Nagyymaros Project* case, when one of the parties had started construction in its territory in 1991 that had had no impact at that time on the other State, although the possibility of modifying the works or reaching an agreement on them had then existed. In the *Great Belt* case, it had still been possible to modify the project to build a bridge or reach an agreement on it. With no internationally wrongful act committed at the time, the issue of Denmark’s responsibility would not have arisen, nor would the duty of restitution or compensation within the meaning of articles 43 and 44. Finland, in exchange for a sum of money to be paid to its shipyards, had agreed to the continuation of construction of the bridge, which had in fact been put into operation in 2000.

10. In practice, election was most frequently between restitution and compensation. In paragraph 143 of his report, the Special Rapporteur rightly concluded that the principle of the priority of restitution should be retained. Article 44 expressed that priority by providing that a State which had committed an internationally wrongful act had an obligation to compensate for damage “to the extent that such damage is not made good by restitution”. Accordingly, article 46 *ter* could not be construed as confirmation of a subjective right of an injured State to elect the form of reparation. Such election should be an option for the injured State. If the injured State was seeking restitution and the restitution was not materially impossible or would not involve a burden out of all proportion to the benefit gained from obtaining restitution instead of compensation, then the responsible State had the obligation to provide such restitution. If the injured State was seeking compensation, instead of restitution, although restitution was not materially impossible or would not involve a disproportionate burden, then two basic scenarios were possible. Either the responsible State agreed to compensation instead of restitution and, by such agreement, the priority of restitution was set aside *ad casum*; or the responsible State did not agree to paying compensation and expressed its willingness to provide restitution. In such a case the injured State should not have the right to refuse to accept restitution and insist on compensation, yet if article 46 *ter* was construed as providing for a right of the injured State to elect the form of reparation, that would be the result. Since the so-called “right” of election was not expressly spelled out in that provision, his criticisms were directed against the relevant paragraphs of the report, which would apparently serve as the basis for the preparation of the commentary to article 46 *ter*.

11. For article 46 *ter*, paragraph 1 (*b*), he would prefer the wording “what form of reparation it seeks” to “what form reparation should take”. He had doubts about the conclusion in paragraph 247 that the *non ultra petita* rule was the procedural complement of the more basic principle that an injured State was entitled to elect from among the remedies available to it in the context of full reparation. He himself viewed the *non ultra petita* principle as a principle of the law of judicial proceedings, or a general principle of law, applicable not only to issues of State responsibility but in a much broader context—for instance, to claims in matters relating to maritime or territorial delimitations. Since the Commission was not concerned with codification of the law of judicial proceedings, there was no need for it to enunciate that principle.

12. The phrase “nationality of claims” in paragraph 2 (*a*) of article 46 *ter*, was imprecise, even though it was sometimes used in the doctrine and in the practice of the United Kingdom and other States. “Nationality” described a special relationship between a person and a State, not between a claim and a State. What was really meant was the nationality of a person on whose behalf a claim was put forward by a State. In its future work, the Commission should seek to improve on the phrase “nationality of claims”. The rule on exhaustion of local remedies also fell under the separate topic of diplomatic protection. There was no room for applying the two rules in the area of State responsibility for an internationally wrongful act that injured a State directly, and not through

its nationals. Paragraph 2 was therefore unnecessary. Such matters would better be left for the Commission's further work on the topic of diplomatic protection, and it might be sufficient to include in Part Four a saving clause with respect to the rules on diplomatic protection.

13. As for article 46 quater, he agreed that when a State waived a claim it could no longer invoke responsibility, but it was doubtful whether unqualified acceptance of an offer of reparation could be subsumed under the category of waiver. Either a State proposed a form of reparation and it was accepted, in which case agreement, not waiver, was involved, or, if a form of reparation was actually provided, there was no justification for the invocation of responsibility, since the obligation of reparation had been fulfilled.

14. The word "reparation" would be preferable to "compensation" in article 46 sexes, paragraph 2 (a). He also wondered whether the phrase "admissibility of proceedings", in paragraph 2 (b) (i), was correct. Should it not be replaced by "admissibility of a claim" or "admissibility of an application"?

15. Mr. KABATSI said he had no reason to disagree with the recommendation, generally endorsed by members, that draft articles 46 ter, quater, quinquies and sexes should be referred to the Drafting Committee. They followed from the well-researched reasoning set out in chapters II and III of the third report. The Special Rapporteur deserved the praise he had already received for his outstanding work, in which praise he himself wished to join.

16. He accepted in principle the provisions in article 46 ter, which would undoubtedly be further refined by the Drafting Committee. Paragraph 1 dealt with the way notice of a claim should be given. The Special Rapporteur had pointed out that it should be in writing, which was the normal mode of inter-State communication, but recognized that care should be taken not to over-formalize the procedure. Judicial attitudes suggested that no formality was required for transmission of notice. On the other hand, the Special Rapporteur underlined the importance of giving effective notice to the respondent State if the claim was to be successfully entertained. In order to maintain the requisite flexibility, the word "notice" in paragraph 1 should not be modified by words such as "officially" or "in writing", as some members had suggested. He would prefer the wording proposed by the Special Rapporteur. In addition, paragraph 2 was sufficiently clear about the limitations on the invocation of responsibility and no further detail was required. Further treatment of the issue was, in any event, the subject of another topic, diplomatic protection.

17. In the main, he could accept article 46 quater, although he could not see the need for subparagraph (b), on delay. The subparagraph could be deleted and delay could be mentioned in subparagraph (a), as could termination or suspension of the obligation breached.

18. Mr. GOCO commended chapter III, which was not only comprehensive and cogent but had also brought out contemporary legal principles and rules. The Special Rapporteur's work was undoubtedly what the Sixth Committee had envisaged when, after the first reading of the draft articles, it had approved the approach of updating and streamlining it.

19. Chapter I of Part Two bis, entitled "Invocation of the responsibility of a State", combined substantive rights and procedural rules. The former pointed to the right of the injured State to invoke the responsibility of another State, while the procedural rules related to the modalities of that invocation. There was no question about the right of the injured State to elect the form of reparation, although there was nothing to prevent the States parties, injured and responsible, from entering into an agreement vis-à-vis reparation payments. Such agreements had been common as an aftermath of the Second World War. The Special Rapporteur had got the balance right and he therefore registered no objection to the formulation of article 46 ter, paragraph 1.

20. The admissibility rule in article 46 ter, paragraph 2, ran the risk of raising a plethora of other issues. A simple provision on the nationality of claims might suffice. The premise behind the nationality of claims was the existence of the legal interest of a State when nationals and entities with a sufficient connection with that State suffered injury in another State. Moreover, there were many refinements to the concept, including such instances as continuity of nationality, change of nationality, international agreement or internal legislation. All that tended to suggest, that, as stated in paragraph 242, the topic of diplomatic protection would deal with the matter more appropriately. He was similarly persuaded by the argument in paragraph 241 that a saving clause should be inserted, in lieu of article 22, reserving cases covered by the exhaustion of local remedies rule. Some local laws, after all, were intrinsically defective or there might be laxity or arbitrariness in their enforcement. In that context he looked forward to further discussion of the Calvo clause,³ whereby an alien waived the right of appeal to his own State in contracts entered into in another State.

21. The *non ultra petita* principle was sensible when applied to international litigation. It was not novel: domestic courts invariably applied it. Even if the evidence tended to support a larger claim, the court was generally constrained to limit the award to the one asserted. He therefore agreed with the Special Rapporteur's conclusion, in paragraph 247, that there was no need for the principle to be spelled out in further detail, lest it limit the flexibility of international tribunals in deciding on the appropriate combination of remedies. Similarly, the rule against double recovery could indeed be subsumed in the general principle of full, equitable reparation, although as pointed out in paragraph 248 there was a possibility of different persons being entitled to bring the same claim before different forums. That raised the issue of identity of parties, claims or relief that might lead to a bar to the claim. There was also the danger of "forum shopping", whereby the parties presented claims in different forums. That, however, was basically a procedural point that should be taken into consideration by tribunals or by an alert respondent.

22. In article 46 quater, the use of the word "validly" to describe waiver ruled out any vitiated consent to the waiver. Equivocation might exist when the relationship was between individuals, but perhaps not between States

³ See 2625th meeting, footnote 2.

parties when decisions were formulated by office bearers. He suggested, however, that “renounce” might be a useful improvement on “waiver”, despite the Special Rapporteur’s cogent explanation of his choice of the latter. To renounce implied a formal declaration that a right was being relinquished. In that context the application of “laches” might be appropriate, perhaps under subparagraph (b), in cases where a claim was not brought to the attention of the responsible State within a reasonable time. Estoppel was another possibility.

23. As stated in paragraph 259, there were no clear-cut limits in measuring the lapse of time, in the practice of international courts. It was hard to measure a reasonable expectation that a claim could not be pursued. Sometimes circumstances prevented a State from bringing its claim seasonably. Such a problem had faced the Philippines at a time when the Sultan of Sulu had enjoyed proprietary rights over Sabah, Borneo, which he had then ceded to the Philippine Government, even when it was part of a commonwealth. Only when independence had been gained in 1946 had the Government asserted its claim over the territory, by which time a British company—and later Malaysia—had consolidated their hold over that territory. The issue of delay had been ventilated during the diplomatic negotiations between the Philippines and Malaysia. Malaysia had, however, refused to be a party before ICJ.

24. He had no quarrel with the question of settlement: to be reached, it must have the concurrence of both parties and unilateral action was not enough. The reference to the 1969 Vienna Convention was appropriate, given the proviso in the Convention that the termination of a treaty did not impair or affect any obligation or right to reparation. Articles 46 quinquies and sexies were well served by the commentary, particularly paragraph 282, which provided a summary. It was his understanding that the summary set out the responsibility of each State for its conduct and the entitlement of any injured State; the latter could not recover more compensation than its loss and where more than one State was responsible, questions of contribution might arise between them. Such situations had often occurred. OAU had identified several States and entities responsible for the 1994 genocide in Rwanda. The same might apply in the case of mutual defence pacts, where an attack against one State constituted an attack against its partners. Moreover, any State involved in the pact could be responsible for the implementation of the mutual defence. The States comprising NATO could become liable severally and the cases before ICJ on *Legality of Use of Force*, relating to the bombing of Belgrade, could have triggered the issue of plurality. In that context, the peculiarity of joint and solidary obligations was the concurrence of several parties; the plaintiff could seek relief from any one of the parties, which in turn had a right of recourse for contribution from the others. The principle was well laid out in article 46 sexies and in paragraph 282 of the report.

25. Rosalyn Higgins, a judge at ICJ had written that there seemed to be no topic that was not embraced by State responsibility.⁴ In his view, however, the tendency to make State responsibility the “law of everything” had led to con-

siderable problems in concluding the Commission’s work on the topic. The wide coverage of State responsibility was clear from the variety of articles debated and scrutinized, which showed clearly that, far from being unrealistic, international law was relevant, timely and vibrant. The topic of reparation was a shining example of that. The draft articles should be referred to the Drafting Committee.

26. Mr. KUSUMA-ATMADJA congratulated the Special Rapporteur on his third report. In view of the illuminating comments by other members and, in particular, by Mr. Goco, there was little he could add to the discussion.

27. Mr. AL-BAHARNA said that the Special Rapporteur had been right to insert article 40 bis in chapter I of Part Two bis, since it contained the definition of an “injured State”. He questioned, however, the wisdom of numbering the new draft articles as 46 ter to 46 sexies, which could give rise to confusion and even misunderstandings. The effect was to overload article 46, which would in any case eventually have to be split up into several articles. A simpler method of numbering could surely have been found.

28. He drew particular attention to paragraphs 227 and 228 of the report, which showed up the distinction between the secondary consequences of an internationally wrongful act and the ways in which those consequences could be dealt with. In paragraph 232, the Special Rapporteur discussed election between forms of reparation, which could include compensation, restitution or cessation. That approach to the problems posed in the text of Part Two as adopted on first reading provided certain necessary improvements by reflecting the element of choice or response on the part of both the injured and the responsible State.

29. The wording of the proposed draft articles could, however, have been tightened up in some instances. The word “seeks”, in article 46 ter, paragraph 1, tended to weaken the provision. Moreover, the word “notice” should be replaced by the words “a written notification” and the words “shall” and “should” required coordination. Lastly, the phrase “under these articles” should be replaced by the phrase “under this Part”. The paragraph would thus read:

“1. An injured State which invokes the responsibility of another State should give written notification of its claim to that State, in which it should specify:

“(a) What conduct on the part of the responsible State is required to ensure cessation of any continuing wrongful act, in accordance with the provisions of article 36 bis;

“(b) What form reparation should take.”

30. Such a reformulation had a number of advantages. First, the omission of the word “seeks” would strengthen the thrust of the paragraph. Secondly, the substitution of “a written notification” for the word “notice” was in line with articles 23 and 67 of the 1969 Vienna Convention, both of which referred to notification in writing. It was also in accord with the Special Rapporteur’s own thinking, as reflected in paragraph 238 of the report and in the

⁴ R. Higgins, *Problems and Process: International Law and How We Use It* (New York, Oxford University Press, 1994).

footnote thereto. The word “notification” was preferable to the word “notice” because it was less formal and would thus correspond with the judgment of ICJ in the case concerning *Certain Phosphate Lands in Nauru*, referred to in paragraph 237. The draft article should be made more flexible, in order not to give the responsible State an excuse for not complying with its obligations by claiming that no formal notice had been given. A written notification could take any form. As for the replacement of “shall” by “should”, it too could be justified on the implied basis of the judgment of the Court in that case, since the word “should” would leave room for the flexibility required in the form of communication addressed by the injured State to the responsible State. The Special Rapporteur himself had said, in paragraph 238, that there must be at least some minimum requirement of notification by one State against another of a claim of responsibility.

31. The necessity for a written notification or communication was confirmed by the analogy with the 1969 Vienna Convention, and also by the Special Rapporteur when he said in paragraph 238 of the report that it seemed appropriate to require that the notice of claim be in writing. That being said, there was no excuse for the Special Rapporteur’s failure explicitly to reflect that requirement in the text of paragraph 1 of the proposed article.

32. The words “in its view”, in paragraph 1 (a), should be omitted as having no place in the language of legal drafting. With regard to paragraph 1 (b), it should be noted, first, that restitution should have priority over any other form of reparation; and secondly, that the right of the injured State to elect or choose the form of reparation was not absolute, but was subject to certain limitations. Those limitations were discussed by the Special Rapporteur in paragraph 134 of his report, which stated that no option might exist for an injured State to renounce restitution if the continued performance of the obligation breached was incumbent upon the responsible State and the former State was not (or not alone) competent to release it from such performance. It thus seemed necessary to reflect those views in paragraph 1 (b).

33. Moreover, the wording of paragraph 1 (b) should be qualified so as to reflect the fact that, in practice, the form of reparation to be provided by the responsible State was usually negotiated, through diplomatic channels, by the injured and the responsible States. Consequently, the States concerned might reach a resolution of the claim by means of a settlement agreement achieved through bilateral negotiations. In so doing, they might settle for compensation instead of restitution. Furthermore, following bilateral negotiations, the injured State might agree to waive its claim altogether, or to accept satisfaction as a form of reparation. Therefore, it was not for the injured State alone to elect the form of reparation. All those possibilities could allow for a resolution of the claim of responsibility on the basis of the joint conduct of both the injured and the responsible States, which, acting together, might choose any form of reparation, or give preference to one specific form of reparation over another. Paragraph 1 (b) should, consequently, reflect those possibilities.

34. Paragraph 2 of article 46 ter should be reformulated so as to comprise a new, separate article entitled “Conditions for the invocation of responsibility”. The new article

should be formulated in positive rather than negative terms, and should read:

“Article X

“The invocation of the claim of responsibility by an injured State under article 46 ter shall conform to:

“(a) Any applicable rule relating to the nationality of claims;

“(b) Any rule of the exhaustion of local remedies, where the claim of responsibility is one to which such a rule effectively applies.”

35. The advantage of formulating the provision as a separate article was to present it as a purely procedural article required in the context of article 46 ter alone in order to render that article comprehensive, for article 46 ter would be incomplete if no reference was made to nationality of claims and the exhaustion of the local remedies rule. At the same time, he had avoided reference to the second phrase of paragraph 2 (b), so as not to avoid substantive issues relating to the rule of exhaustion of local remedies, which properly belonged under another topic, that of diplomatic protection.

36. Moreover, any simplification of that rule or principle in the context of Part Two bis of the draft would seem to be in line with the objective mentioned in paragraph 241 of the report, which said that the saving clause should be in quite general terms: it should cover any case to which the exhaustion of local remedies rule applies. Of course, the commentary would need to mention the exceptional cases to which the exhaustion of local remedies rule might not apply in the context of claims of responsibility. Paragraph 241 of the report cited examples of human rights violations to which the rule should not apply. Needless to say, there would now be no need for the detailed substantive article 22 on exhaustion of local remedies, contained in Part One. That article should accordingly be deleted. In any case the Special Rapporteur on the topic of diplomatic protection, Mr. Dugard, could rest assured that, in adopting a harmless procedural article to complement article 46 ter, the Special Rapporteur on State responsibility would not be trespassing on his preserve.

37. In general terms, he had no problem with article 46 quater. Subparagraphs (a) and (b) should, however, be renumbered paragraphs 1 and 2. In subparagraph (a), the words “validly waived” should reflect all cases or modes of waiver to which the Special Rapporteur referred in paragraphs 253 to 256 of the report, in which he rightly described waiver as a manifestation of the general principle of consent. It was also interesting to note from paragraph 256 that a waiver might exceptionally be inferred from the conduct of the State concerned, although Australia’s argument to that effect in the case concerning *Certain Phosphate Lands in Nauru* had been rejected by ICJ.

38. The other problem in subparagraph (a) concerned the phrase “or in some other unequivocal manner”. It was ambiguous and should be reformulated so as to reflect the intended meaning more clearly. The other circumstances that might lead to loss of the right to invoke responsibility, such as delay, settlement and termination or suspension of

the obligation breached should be specifically mentioned in the paragraph itself, or at least in the commentary thereto.

39. The word “notice” in subparagraph (b) should be replaced by “knowledge”. The words “within a reasonable time” served a useful purpose, as they would leave it to the court to decide, on the merits of each claim, whether the delay in notification constituted grounds for loss of the right to invoke responsibility. It was doubtful whether what was referred to in the third report as “extinctive prescription” would operate, in the strict sense, in such claims of responsibility. ICJ was inclined to adopt a flexible position on the question of the time limit for each claim, on a case-by-case basis.

40. The principle set forth in article 46 quinquies, reflected the prevailing practice whereby each injured State was permitted to make a separate claim. In order to emphasize that principle, it might be advisable to replace the phrase “on its own account” by “in its own right”. The article should also reflect the various problems arising where there was disagreement between the injured States concerning the forms of reparation claimed.

41. Article 46 sexies, paragraph 1, posed a problem, for the words “to be determined” seemed inappropriate, as Mr. Economides had already pointed out. Paragraph 1 should be redrafted to read: “Where two or more States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to the internationally wrongful act committed by that State.” That reformulation would bring the terminology into line with that of article 46 quinquies, and with the title of chapter I of Part Two bis. His preference for the verb “may”, and his omission of the words “in accordance with the present draft articles”, were also motivated by a desire for consistency.

42. Paragraph 2 of article 46 sexies had drawn criticism from other members. It appeared to be out of place in the article. First, it bore no direct relation to paragraph 1 and secondly, it should properly refer, not to compensation, but to reparation. Furthermore, it should apply to States only, omitting the reference to persons or entities. However, he could not agree with Mr. Pellet that an analogy with internal law was dangerous or irrelevant in the context of paragraph 2 of the article. Judgments of ICJ provided a number of instances of recourse to such an analogy. However, if the Special Rapporteur envisaged codifying the principles referred to in paragraphs 243 to 249 of his report relating to the limits on the recovery of reparation, and the problems arising therefrom, paragraph 2 of article 46 sexies, with its reference to compensation alone, did not appear to exhaust those principles. In short, paragraph 2 should be redrafted, and placed elsewhere in the draft articles, perhaps in chapter II, on the forms of reparation, in the section on compensation.

43. Mr. KAMTO, referring first to article 46 ter, paragraph 1 (b), said that in paragraph 232 of his third report, the Special Rapporteur stated that an injured State was entitled to elect as between the available forms of reparation. Given that the form reparation would take was a matter negotiated between the States or, failing that, decided by an impartial third party, it seemed to him that that

choice was not so much an entitlement (*un droit*) as a claim (*une prétention*)—a reading that paragraph 1 (b) seemed to confirm by its use of the word “should”.

44. His second remark concerned the concept of acquisitive prescription. In article 46 quater, subparagraph (b), loss of the right to invoke responsibility was made conditional upon failure by the injured State to notify the responsible State within a reasonable time after it had notice of the injury. That condition, while faithfully reflecting current jurisprudence, might have to be tempered in the light of the realities of inter-State relations, for the concept of acquisitive prescription needed also to be considered in the context of States that had undergone a process of decolonization. In many cases, the evidence that would enable such States to invoke the responsibility of another State had not been made available to them on independence. One example was that of the events in the newly independent former Belgian Congo in 1960. Furthermore, it sometimes happened that newly independent States were prevented by civil war or protracted domestic strife from invoking the responsibility of another State. Somalia was an example, Sierra Leone a likely candidate. Consequently, a phrase to the effect that the injured State must “be in a position to establish the responsibility of the respondent State” should be inserted in article 46 quater, subparagraph (b), or at least in the commentary.

45. Mr. GALICKI said he fully understood Mr. Kamto’s fears concerning the plight of States emerging from colonization, but believed that the expression “within a reasonable time after the injured State had notice of the injury” could be interpreted in such a way as to obviate those concerns. That point could be brought out in the commentary.

46. On another question, he noted that article 46 quater should logically address, first claims, then waivers thereto. Consequently, there was a case for reversing the order of subparagraphs (a) and (b).

47. Mr. CRAWFORD (Special Rapporteur), summing up the debate, said there appeared to be universal agreement that the draft articles discussed should be referred to the Drafting Committee. Many of the comments had related to, or raised points that could be accommodated in, the drafting of the articles. However, a few points of substance needed to be dealt with. He had taken careful note of all such points raised, and wished to apologize in advance to any members whose points he was unable to respond to individually in the very brief time currently available.

48. There had been general agreement that the draft articles should include a chapter on invocation, as distinct from the chapters dealing with the immediate consequences of an internationally wrongful act. It was of course implicit, if not explicit, in chapter III of the report that the rights of the injured State and of other States to invoke responsibility would find a place in Part Two bis. In that connection, he noted that the rather odd numbering of draft articles 46 ter to 46 sexies was explained by the need to locate them between articles 46 and 47. It was to be hoped that, at the end of its work on the topic at the current session, the Drafting Committee would renumber all

the articles, from article 1 through to the end, thereby obviating the need for recourse to Latin.

49. The first point of substance in relation to article 46 ter related to “notice”—a term Mr. Al-Baharna felt was more formal than “notification”, but one he himself had intended to be less formal. There had been a divergence of views as to how formal the notification should be, and as to whether it should be in writing—a divergence reflected in the report, which said that the notification should be in writing, whereas the article itself did not. He tentatively favoured the latter view, one apparently shared by the majority within the Commission. That would be a matter for the Drafting Committee to consider.

50. A more substantial question was that of the election as between the forms of reparation. The first point to make was that the situation was clearly different where the question of reparation, including restitution, was implicated with the question of the continued performance of the obligation. It might well be that the injured State was not alone competent to release the responsible State from the continued performance of the obligation. No doctrine of election could override that situation. Thus, in the framework of election, the Commission was concerned only with a situation where restitution as to the past was at stake, and where no requirement of continued compliance arose. The question was whether, in those circumstances, the injured State could freely elect the form of reparation, or whether—where restitution was possible and compensation would be unduly burdensome—the responsible State could insist on restitution rather than compensation. Obviously, if the injured State had already suffered financially assessable loss, that must be compensated for in addition to restitution. He was not aware that that situation had ever arisen, and the problem was not an easy one to resolve in the abstract. That was why, in what was undoubtedly a defectively drafted article, he had chosen to use the word “validly”, at least in relation to waiver; but the same applied, at least by implication, in relation to article 46 ter.

51. An example had been given, in a related context in which several injured States disagreed on the form of reparation, of two downstream co-riparian States, one of which was prepared to accept compensation in lieu of a proper flow of water, whereas the other was not. In that situation, the first downstream State would of course have an obligation to the second downstream State to ensure an appropriate supply of water. Consequently, an agreement between two upper riparian States might involve a breach of the rights of the lower riparian State to continued performance, not just of its rights in relation to past events. In any case, the question had been raised whether the articles should enter into detail, both on the matter of the validity of an election and on that of the problem arising where there was more than one injured State and disagreement between them. He had—instinctively rather than as a result of a conscious decision—not gone into detail on those points, partly because of the absence of guidance from State practice, and also because so much would depend on the particular circumstances. The inference to be drawn from chapter II of Part Two was probably that, in circumstances where restitution was available, each injured State had a right to restitution. It could be that that right prevailed over an election by another injured State—at least if that election had the effect of denying the right.

If that was the correct answer, it should perhaps be spelled out in the article; or perhaps it could be adequately dealt with in the commentary. In any event, it was a point that went beyond the existing state of doctrine and practice, as Mr. Tomka had made clear in his thoughtful analysis. Mr. Tomka had rightly pointed out that the *Great Belt* case had not been one involving responsibility, because there had been no breach up to the moment of settlement, but merely a possible apprehended future breach. The *Chorzów Factory* case had, of course, involved a claim on behalf of a national in respect of compensation for property, where no one would deny that there was obviously a right to elect. Whether that right existed in all cases, even apart from questions relating to future performance, was a difficult question.

52. He agreed with the majority view that paragraph 2 of article 46 ter should be retained, but as a separate article. It raised the more general question of the relationship between the draft on State responsibility and the draft on diplomatic protection. For him diplomatic protection was not separate from State responsibility; it was a compartment of State responsibility. He agreed in essence with Mr. Al-Baharna and others who had argued that paragraph 2 should not go into much detail, but he did feel that it had its place and he would not be happy with a general saving clause with regard to diplomatic protection which would simply fail to say things that were of concern to States. If the exhaustion of local remedies rule were omitted there would be very significant concern among Governments, especially in view of its place in the articles adopted on first reading. He therefore favoured a separate article incorporating the substance of paragraph 2, taking the various drafting points into account, but not going into detail. The article, which should be placed in Part Two bis, should be drafted in such a way as not to prejudice the debate between the substantive and procedural theories of the exhaustion of local remedies. Another, and in his opinion decisive, consideration in retaining the exhaustion of local remedies rule was that it was applicable not only to diplomatic protection but also in the context of individual breaches of human rights, which did not form part of the law of diplomatic protection but did form part of the law of State responsibility.

53. As to loss of the right to invoke responsibility, there had on balance been general support for article 46 quater, subparagraph (a), although there had been suggestions that the notion of settlement should be treated as distinct from the notion of waiver. That might be right. With regard to subparagraph (b), the point had been made that there was a distinction between a case of unconscionable delay amounting to laches or *mora* and a case where a State’s delay caused actual prejudice to the responsible State. The Drafting Committee should perhaps consider a bifurcation of subparagraph (b), although that was an open question in view of the opinions expressed.

54. With regard to a plurality of injured States and of responsible States, the rather modest approach adopted in the articles had attracted general support. Certainly there had been no strong support for a more categorical approach in favour of doctrines of joint and several responsibility. The point had been made that one interpretation of the facts of the *Corfu Channel* case was that it had been two separate wrongful acts involving the same

damage. Another interpretation, of course, had been that two States had colluded in a single wrongful act. In any event, the Drafting Committee might wish to consider whether article 46 *sexies* should apply in situations where there were several wrongful acts each causing the same damage.

55. As for article 46 *sexies*, paragraph 2 (a), he would strongly resist the idea of deleting the reference to “person or entity”. The situation clearly arose where the individual entity injured recovered even in domestic proceedings let alone in others. The principle of double recovery certainly needed to be taken into account, and he agreed with Mr. Al-Baharna that the principle was not exhausted by the subparagraph, though it raised a special case which in his view and that of the majority should be included.

56. As for paragraph 2 (b), he agreed with Mr. Pellet and others that subparagraph (i) was a rule of judicial admissibility and should not be included in the article. It should be the subject of a general saving clause in Part Four. He had not made provision for that, and it was for the Drafting Committee to consider. It was a valuable distinction to be made between the admissibility of a claim in the context of State-to-State relations and the admissibility of a case before an international court. It was clear that the matter referred to in subparagraph (i) related to the latter and not the former.

57. There had been no disagreement regarding the substance of paragraph 2 (b) (ii), but he had been asked whether there was any authority for application of the *ex turpi causa* principle as between co-responsible States. He was not aware of any, and had merely raised it as a possibility. The subparagraph left the issue to be decided on merit, and he would be happy for the Drafting Committee to consider a suitable form of words.

58. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the draft articles to the Drafting Committee.

It was so agreed.

59. The CHAIRMAN invited the Special Rapporteur to introduce chapter III, section D, of his third report.

60. Mr. CRAWFORD (Special Rapporteur) said that chapter III, section D, dealt with part of the general topic of countermeasures, and was the second of three instalments on the subject. Members would recall that, at its fifty-first session, the Commission had discussed, in chapter I, section D, of his second report,⁵ some general issues about countermeasures, and in particular the linkage which the articles adopted on first reading made between the taking of countermeasures and dispute settlement. The outcome of that debate was summarized in paragraph 286. The majority view had been that the unilateral right of the responsible State to invoke dispute settlement was indefensible. It had certainly been and remained his own view, and it had been broadly endorsed in debates in the Sixth Committee. In any event, the Commission’s provisional agreement had been that the Commission would proceed

to draft the substantive articles on countermeasures irrespective of questions of dispute settlement, and that it would continue to questions of dispute settlement at the next session in light of the text as a whole. Chapter III, section D, proceeded on that assumption.

61. Chapter III, section D, did not deal with the third instalment of countermeasures—collective countermeasures and countermeasures by individual States in the context of the invocation of responsibility to the international community as a whole—which was dealt with in chapter IV of the report. Chapter III, section D, was concerned only with the narrower question of the taking of countermeasures by an injured State, as provisionally defined in paragraph 2 of article 40 bis. It dealt with the comparatively straightforward situation where State A injured State B and State B, having failed to obtain reparation, sought to take countermeasures against State A.

62. Articles 47 to 50 adopted on first reading dealt with that situation, and a substantial account of those articles and of the very detailed comments of Governments on them was to be found in paragraphs 292 to 319.⁶ The comments had been carefully made and had been fully taken into account. He wished to express particular gratitude to the Government of France, several of whose comments he had adopted almost verbatim.

63. The articles he was proposing had the intended effect of articles 47 to 50, on countermeasures, adopted on first reading, but were a reconfiguration of them to solve a number of conceptual and other difficulties. Article 47 had been a hybrid in that it purported to define countermeasures at the same time as trying to limit them, thereby creating problems. Article 48 had created the great problem of the relationship between the procedure of seeking reparation and the taking of countermeasures, which was the most controversial issue of the entire text; he had tried to solve it by making a verbally, and perhaps substantively, rather unsatisfactory distinction between interim and other measures. Article 49 had been drafted rather loosely, and he was proposing a tighter formulation in the light of the guidance given by ICJ in the *Gab Ž kovo-Nagymaros Project* case. Article 50 had confused two different matters: the question as to which obligations could be suspended by way of the taking of countermeasures, and the question as to what effects countermeasures could not have in terms of, for example, a breach of human rights and a breach of the rights of third States. Analytical clarity depended on making that distinction.

64. The result was that a larger number of articles were being proposed so as to respond to the quite widespread concerns on countermeasures, while maintaining much of the substance of what the Commission had tried to do on first reading.

65. Proposed new article 47 defined the purpose and content of countermeasures, adopting the instrumental view of them, and dealing with obligations the performance of which might not be suspended by way of countermeasures. Article 48 dealt with the procedural conditions of resort to countermeasures, article 49 with proportional-

⁵ See 2614th meeting, footnote 5.

⁶ See 2615th meeting, footnotes 5 and 6.

ity, and article 50 with prohibited countermeasures. Article 50 bis, responding to suggestions made especially by the Government of France, dealt with the suspension and termination of countermeasures.

66. There was a fundamental distinction between suspension of the performance of an obligation and suspension of an obligation, one that was not made clear in much of the discussion on countermeasures. The 1969 Vienna Convention dealt with the suspension of treaty obligations, basically saying that where a State was entitled to terminate a bilateral treaty it could also suspend it. It did not say anything at all about how treaty obligations were to be re-instituted, in other words, how or when the suspension was to be terminated. The point was that quite high thresholds were set on suspension: the breach had to be material, for example. The effect of suspension was to release both parties from the obligation to perform and the effect of suspension was to put the obligation suspended into cold storage. It was true that the suspending State must not do anything to prevent the suspended treaty from being able to come back into force later on, but presumably if the suspending State could have terminated the treaty it could also at a later stage exercise that right unless it had waived it.

67. The question was to determine what were to be considered as countermeasures. Partly to avoid the confusion with the suspension of treaties, the draft articles adopted on first reading had not used the word “suspension”. Instead, article 47 had simply said that countermeasures occurred when a State did not comply with its obligations, but that seemed to raise a very serious problem, because a State “not complying with its obligations” covered all sorts of things, including some which could in effect be irreparable and permanent.

68. ICJ in the *Gab Ć kovo-Nagymaros Project* case had said that countermeasures should be reversible, but there was nothing in the draft articles adopted on first reading that responded to that important element of the concept of countermeasures. By definition, countermeasures were taken in order to encourage, induce or possibly coerce the responsible State to comply with its obligations of cessation and reparation. They were proportionate to the breach, and it followed that once the responsible State had complied with its obligations the countermeasures had to be terminated. It further followed that countermeasures should not be taken that would imply a continuing breach by the injured State of its obligations even after the occasion for countermeasures had passed. It was in that sense that the Court had identified a very substantial element of the notion of countermeasures. Reversibility really meant that it must be possible to revert to a situation of legality on both sides. There were certain actions that could be taken by way of not complying with international obligations as defined in article 47 which would be inconsistent with reversibility. On the other hand, there were some obstacles to saying that countermeasures should be reversible because, after all, the countermeasures had been taken and produced effects while they were being taken.

69. Sometimes the consequences of countermeasures were irreversible, something that was difficult to formulate. He had therefore chosen to revert to the term “suspension” of the performance of obligations, used previously

by former Special Rapporteur Riphagen.⁷ It might be that article 47 bis should also use that form of language. The right of the responsible State to the performance of obligations if the responsible State complied with its obligations of cessation and reparation was one of the rights to be taken into account in determining the proportionality of countermeasures. It was for the Drafting Committee to consider how to formulate it, but an important element missing from the draft articles adopted on first reading had been the complete failure to cover the question of reversion to a situation of legality if the countermeasures had their proper effect. He had endeavoured to deal with it through the notion of suspension of the performance of an obligation, and not suspension of the obligation itself. The obligation remained in force, and there was no situation of abeyance. The obligation was there as something by reference to which the countermeasures could be assessed.

70. A further question needed to be considered in regard to article 47. The countermeasures that could be taken were not reciprocal countermeasures, in the sense of that concept as used by Special Rapporteur Riphagen. Reciprocal countermeasures were taken in relation to the same or a related obligation. The question was whether the notion of reciprocal countermeasures should be introduced either exclusively or at least in part as the basis for a distinction in the field of countermeasures. On first reading, the Commission had rejected that distinction, because limiting countermeasures to the taking of reciprocal countermeasures would create a situation in which the more heinous the conduct of the responsible State, the less likely countermeasures were to be available, because the more heinous the conduct the more likely it was to infringe, for example, human rights. In the context of breaches of human rights, or breaches of an egregious character, it was perfectly obvious that considerations of humanity told against the taking of countermeasures.

71. The kinds of action that had characteristically been the subject of countermeasures had been the freezing of assets, the suspension of permits or licences or operations. They were actions that could, relatively readily, be reversed. The draft articles should encourage the taking of countermeasures in respect of reversible conduct, and for those reasons, as well as the practical non-availability of reciprocal countermeasures in many cases, the Commission had decided on first reading not to adopt a regime of such countermeasures. He agreed with that decision and with the reasons for it.

72. The formulation of article 47 had seemed to be a hybrid because it had introduced questions about the effects of countermeasures on third States, which were really separate from the definition of countermeasures. The basic concept of a countermeasure was that it should be the suspension by the injured State of the performance of an obligation towards the responsible State with the intention of inducing the latter to comply with its obligations of cessation and reparation. That basic concept was incorporated in the new article 47, subject of course to the limitations specified in chapter II.

⁷ See the sixth report (*Yearbook . . . 1985*, vol. II (Part One), p. 3, document A/CN.4/389), pp. 10–11.

73. The draft articles also drew a distinction between obligations the suspension of which was not subject to the regime of countermeasures and obligations that may not be infringed in the course of taking countermeasures. The first was dealt with in article 47 bis, the second in article 50. The content of article 50 as adopted on first reading was split into those two provisions. It was important because a State, even in the course of taking countermeasures which were legitimate under chapter II, must not do the things referred to in article 50. Article 47 bis covered obligations the performance of which must not be suspended as countermeasures in the first place. It was an important distinction if one considered the impact of countermeasures on human rights. No one was suggesting that a human rights obligation could be suspended as a countermeasure. A countermeasure was taken against a State and not a human being. Problems nevertheless arose with regard to the impact of countermeasures on human rights, a matter dealt with in article 50.

74. Subject to that, he had broadly followed the content of article 50. The obligations the suspension of which were not subject to the taking of countermeasures in article 50 included, first and foremost, the obligation relating to the threat or use of force embodied in the Charter of the United Nations. On first reading, the Commission had been very clear the article was not dealing with forcible reprisals, belligerent reprisals or the use of force, something which was reflected in subparagraph (a) of article 47 bis.

75. There had been little criticism on first reading of the provision now in subparagraph (b) of article 47 bis and it was generally endorsed by Governments in their comments. As obligations the performance of which could not be suspended by way of countermeasures, he had included obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents.

76. Subparagraph (c) of article 47 bis pertaining to obligations concerning the third party settlement of disputes, had clearly been implied in article 48, but it was quite obvious that a State could not suspend an obligation as a peaceful settlement of a dispute. In the context of countermeasures, the peaceful settlement of disputes was about containing and dealing with the situation created by countermeasures.

77. Article 50 had then gone on to deal with human rights, saying that they could not be subject to the taking of countermeasures. Two separate problems arose in that regard. It was perfectly obvious from the definition of countermeasures in article 47 that human rights obligations themselves could not be suspended, and subparagraph (d) of article 47 bis was concerned with the separate and narrower point about humanitarian reprisals which constituted part of general international law in the aftermath of the discussion of those issues in the context both of the 1969 Vienna Convention and of the 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

78. He had retained the provision now in subparagraph (e) of article 47 bis because it was plain that performance of obligations under peremptory norms of general international law could not be suspended under any circumstances other than as provided for in those obligations.

79. Again even though lawful under the draft articles, countermeasures must not impair the rights of third parties, and there too, the performance of third party rights could not be suspended. If third parties had a right as against the injured State, then the injured State was responsible to them for any breach of that right. Third parties included human beings, the addressees of basic human rights, so human rights were also covered by new article 50, subparagraph (b).

80. Article 50, subparagraph (b), as adopted on first reading, had referred to extreme economic or political coercion designed to endanger the territorial integrity or political independence of the responsible State, and had been the subject of much comment. States had obviously been concerned that extreme measures of coercion might be taken by way of countermeasures. However, at one level, countermeasures were coercive by their very nature, since they were calculated to induce a State to comply with its international obligations. There was some contradiction in saying that countermeasures, provided they were proportionate, induced a State to comply with its international obligations and, on the other hand, to complain about their being coercive. There were further concerns which he had tried to formulate in new article 50. It stated in subparagraph (a) that countermeasures must not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State. It had of course to be borne in mind that calling on a State to comply with its obligations and the taking of countermeasures per se were by definition not matters within the domestic jurisdiction of that State but there were other things that could be done by way of countermeasures that would infringe that. The article was intended to be a more acceptable formulation of the article 50, subparagraph (b), adopted on first reading, which had attracted so much criticism.

81. As to the question of the conditions for resorting to countermeasures, he had adopted the substance of the proposal by the French Government dealing with that matter. It was generally agreed that, before a State took countermeasures, it must invoke the responsibility of the responsible State by calling on it to comply. The problem was what happened if the responsible State did not comply. The draft articles drew a distinction between interim measures of protection and other measures. His proposal avoided the “interim measures of protection” formula, which was the language of judicial procedures, and dealt with the notion of provisional implementation of countermeasures in paragraph 2 of article 48. Adopting the notion of countermeasures as involving the suspension of entitlements—for instance, the freezing of assets—the countermeasures had to be taken straight away or they would not be able to be taken at all and there would be an inducement to take more extreme measures. Hence the injured State needed to take provisional measures to protect itself while negotiations were going on. That had been the underlying idea of article 48 adopted on first reading, although it was badly implemented.

82. His new article 48 set out in paragraph 1 the basic obligation to make the demand on the responsible State, and then said in paragraph 2 that in the meantime provisional measures might be taken where necessary to pre-

serve the injured State's rights. Paragraph 3 included the further requirement that, if the negotiations did not lead to a resolution of the dispute within a reasonable time, the injured State might take full-scale countermeasures. One example might be that, if those countermeasures took the form of the sequestration of assets, there could be a prohibition on the removal of those assets from the jurisdiction straight away in order to preserve the rights of the injured State eventually to sequester them. The sequestration itself would be the more substantial form of countermeasure. Of course, the confiscation of the assets would be excluded entirely as a countermeasure because it would be irreversible. The new article 48 therefore embodied in a slightly different form the compromise which had inspired the Commission on first reading. There were strong views on the issue, and if the Commission decided not to adopt the intermediate position, he had proposed a simpler provision in the footnote to new article 48.

The meeting rose at 1.15 p.m.

2646th MEETING

Wednesday, 26 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of chapter III, section D, of his third report (A/CN.4/507 and Add.1–4).

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

2. Mr. CRAWFORD (Special Rapporteur) said that he had first discussed (2645th meeting) the definition of countermeasures and, secondly, the conditions attached to the taking of countermeasures, the procedural conditions.

3. There were, however, also some essential conditions which had to be observed by the State resorting to countermeasures, the first being, of course, the principle of proportionality embodied in article 49. No State had cast any doubts on that principle in the comments which had been received, although some had expressed concern about its crucial role in determining the legality of countermeasures. Others had been worried about the rather lax way in which the situation was viewed in article 49 adopted on first reading, as it employed a sort of double negative: "Countermeasures . . . shall not be out of proportion to . . .". ICJ in the *Gab Ž kovo-Nagymaros Project* case had expressed the same idea in a positive manner by stating that countermeasures had to be commensurate with the injury suffered. Article 49 had to be more clearly worded to bring out the fact that proportionality was a key requirement of lawfulness; it should not be a vague definition of principle like the previous article.

4. The third and last aspect of the issue of countermeasures was the suspension and termination of the measures adopted. The articles adopted on first reading were silent on the matter, but a number of Governments, including the French Government,³ had urged that it be dealt with in the draft text. ICJ had referred to it indirectly in the *Gab Ž kovo-Nagymaros Project* case, but from the angle of reversibility. If a countermeasure could not be suspended or terminated, it was not reversible and, if it was not reversible, the Court held that it was unlawful.

5. The draft articles adopted on first reading had provided for the suspension of countermeasures if the wrongful act had ceased and the dispute had been submitted to third-party adjudication by a body whose decisions were binding on both States. That seemed satisfactory because the countermeasures pertained to a situation where, in the absence of an authoritative third party, the injured State had no choice but to act on its own account. Article 48 adopted on first reading had therefore assumed that the necessity for countermeasures would disappear once a compulsory settlement procedure had been instituted. That provision had been generally welcomed by States, subject to some drafting improvements. In fact, it was partly based on the arbitrament in the case concerning the *Air Service Agreement*. That aspect of article 48 had been embodied in new article 50 bis. A third paragraph had been added to that article stating: "Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act". That paragraph operated irrespective of whether countermeasures had been suspended.

6. The eventuality of there being a plurality of injured States still had to be dealt with. In the light of the proposal made in chapter I of Part Two bis, each injured State should have the right to take countermeasures proportionate to the injury it had suffered, independently of the

³ See 2613th meeting, footnote 3.

position with respect to collective countermeasures. That would form the subject matter of another chapter.

7. Mr. LUKASHUK said that the right to take countermeasures was the consequence not of a breach of international law, but of the refusal of the State which had committed it to comply with the obligations incumbent on it as a result of its relations with the injured State. Countermeasures were not therefore an intrinsic part of the subject of responsibility; they were simply a means of getting a State to fulfil its obligations. In other words, the mere existence of a breach did not create the right to resort to countermeasures. The Special Rapporteur had understood that very well and had spelled out the specific circumstances in which countermeasures were lawful, i.e. in which they might induce the wrongdoing State to fulfil its secondary obligations of cessation, suspension and reparation. Some States, such as the Czech Republic,⁴ had also emphasized in their comments that countermeasures were not a direct, automatic means of responding to the breach of an obligation. All that pointed towards making countermeasures an independent international law institution, that would come into play only when a State refused to fulfil its obligations.

8. In point of fact, the Special Rapporteur did not give a definition of countermeasures. In his own opinion, it was such an important institution that it was absolutely essential to work out a very clear legal definition. The Special Rapporteur had stated in paragraph 322 of his report that he preferred to formulate article 47 as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles. New article 47 did not solve the problem and defined nothing, yet the Special Rapporteur's analyses contained enough elements to build a definition which might read: "Countermeasures are measures which are not in conformity with the obligations of the injured State taking them in respect of the responsible State, but which the injured State is entitled to apply to the responsible State to induce it to fulfil its obligations under international law".

9. Article 47, paragraph 2, also gave rise to problems. Limiting countermeasures to the suspension of compliance with one or more international obligations was a departure from current legal standards. Article 60 of the 1969 Vienna Convention stated that a material breach of a bilateral treaty by one of the parties entitled the other to invoke the breach as a ground for terminating the treaty or suspending its operation. In the event of such a breach of a multilateral treaty, the other parties were entitled by unanimous agreement to suspend the operation of the treaty in whole or in part. Article 47 should be brought into line with that provision. The Special Rapporteur was quite right to make it plain in paragraph 331 that the feature distinguishing countermeasures from sanctions was that they were not coercive.

10. A clear distinction had to be drawn between countermeasures and sanctions, for they were two quite different things. As the previous Special Rapporteur had noted, the idea that a State was entitled to resort solely to counter-

measures was based on practice and *opinio juris*. In contrast, sanctions were the monopoly of the United Nations and no State or group of States had the right to impose them outside the framework of that institution. Perhaps it might be wise to add a clause to article 47 which might read: "This article does not affect the right of the United Nations to apply sanctions in accordance with the Charter".

11. A further flaw of paragraph 1, was that it stated that the aim of countermeasures was to "induce [the State] to comply with its obligations". It so happened that the same thing could be said of retaliation which was not mentioned anywhere in the draft. Measures of retaliation were nevertheless important and also called for a legally clear definition.

12. Article 47 raised the question of the evaluation of the conduct of one State by another, an evaluation which always comprised an element of subjectivity. Moreover, a State could make a genuine error. For that reason, provision had to be made for means whereby the State against which countermeasures were taken could exonerate itself. That clause would be very important, above all, for small countries which had genuine arguments against the countermeasures imposed on them by some stronger States.

13. Turning to new article 47 bis, he simply noted that it was very similar in content to article 50 and should therefore immediately precede that provision.

14. New article 50, subparagraph (b), spoke of "the rights of third parties, in particular basic human rights". If those "third parties" were States or institutions, what was meant by their "basic human rights"? The wisest course of action would be to devote a separate clause to human rights.

15. New article 50 bis stated quite categorically that countermeasures must be suspended if the internationally wrongful act had ceased. It was, however, possible to imagine a situation in which countermeasures had been suspended, but where the responsible State subsequently refused to comply with its secondary obligations of restitution or compensation, for example. What would then be the position of the injured party? Paragraph 3 of the same article would be much more precise if it read: "Countermeasures shall be terminated as soon as the responsible State has complied with the obligations set forth in Part Two relating to its responsibility for the internationally wrongful act".

16. In his opinion, the draft articles under consideration by the Commission could be referred to the Drafting Committee.

17. Mr. CRAWFORD (Special Rapporteur) said that he wished to clarify his position on the question of the relationship between countermeasures and the law of treaties. Under article 60 of the 1969 Vienna Convention, a State injured by the breach of a treaty could terminate the treaty or suspend its operation, subject to certain conditions: the breach must be "material" (the definition set a rather high threshold) and, depending on the nature of the treaty, it might be possible to suspend only part of it. When a treaty was terminated, no one was under any obligation any

⁴ Ibid.

more. When a treaty was suspended, it was in limbo and neither party had to comply with it until it came back into force, assuming that the parties affected by that suspension consented thereto.

18. The legal situation of countermeasures was radically different. The denunciation of a treaty in accordance with article 60 of the 1969 Vienna Convention was a lawful act. Hence it was of no interest to the Commission, which was dealing with the question of a State's non-compliance with a treaty in order to induce another to honour its obligations under Part Two of the draft. The conditions were different as well; countermeasures could be taken even if the breach was not "material", although they had to be proportionate. Similarly, there was no requirement of severance; the underlying obligation was always incumbent on the State subject to the entitlement and it was relevant in the assessment of the right to take countermeasures.

19. While he found the notion of suspension of performance quite attractive because of its relation to reversibility, he could well understand that the Commission might take the view that, when used in article 47, paragraph 2, that term might lead to confusion with the suspension of a treaty. It was probably right, but it had to discriminate between the situation referred to in the 1969 Vienna Convention and the situation in the sphere of State responsibility.

20. He wished to add two comments to his presentation of the chapter under consideration (Circumstances precluding wrongfulness). First, he proposed a simple formulation of article 30, in the event the other articles were adopted. That article had been left open pending a decision on countermeasures.⁵ For the slightly complex reasons explained in paragraphs 363 to 366 of his report, he believed that the broader conception of the exception of non-performance was sufficiently covered by countermeasures and his narrower conception based on the dictum of PCIJ in the *Chorzów Factory* case was sufficiently dealt with in article 38 of Part Two, the retention of which had been proposed. He therefore did not press the proposal for a separate circumstance precluding wrongfulness in the form of the exception of non-performance.

21. Mr. SIMMA said that he agreed with the distinction drawn by the Special Rapporteur between the suspension of a treaty and the suspension of the performance of an obligation in the context of countermeasures. He was, however, unable to agree with the distinction he had made between the situation dealt with in the 1969 Vienna Convention and that which arose in the context of State responsibility. The Special Rapporteur had said that article 60 of the Convention allowed termination or suspension only in the event of a material breach, thereby implying that neither of those acts was authorized if the breach was not sufficiently serious, whereas countermeasures could be adopted on relatively minor grounds. The conclusion was not cogent, for the view could be taken, as he himself had done in a number of publications, that the idea underlying article 60 of the Convention would allow proportionate, reciprocal suspension not as a countermeasure, but owing to the breach. The last paragraph of the preamble of the

Convention indeed stated "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". There had been instances where that sort of proportionate, reciprocal suspension based on the idea of *exceptio non adimpleti contractus* embodied in article 60 had taken place. That was the only point on which he differed with the Special Rapporteur.

22. Mr. CRAWFORD (Special Rapporteur) said that, according to the 1969 Vienna Convention, a treaty could be suspended or terminated on the grounds of a material breach. In other words, the treaty could not be touched if the breach was non-material. Mr. Simma was correct in saying that the exception of non-performance in its broader sense could well lead to what amounted to a suspension in the context of synallagmatic obligations, but that was a matter which was covered by the Convention. It was necessary to resist the idea that there were ways of terminating a treaty or suspending its operation other than those enumerated in the Convention, which specified that it exhaustively stated the grounds for doing so.

23. Mr. PELLET said that Mr. Lukashuk had introduced a useful distinction between countermeasures, formerly known as reprisals, and retortion, but he had been wrong to reproach the Special Rapporteur for not having included retortion in the draft articles. Retortion was a reaction to an act that could just as well be unlawful as lawful. It was by definition a lawful measure—and thus not a "circumstance precluding wrongfulness"—which a State could adopt if it disliked another State's attitude and thus answered a hostile attitude with a hostile attitude. Retortion was not one of the consequences of an internationally wrongful act and was not covered by the topic. If retortion was added to countermeasures, moreover, the Commission would be moving still farther away from the very concept of responsibility, which presupposed at the outset that an internationally wrongful act had been committed. Perhaps it could be stated in the commentary that it was better to resort to retortion first instead of immediately taking countermeasures because retortion was not a threat to the international legal system. It would be a mistake, however, to do so in the draft articles, even if that would be tempting from the standpoint of what could be called legal policy.

24. Mr. LUKASHUK, explaining his idea, said that retortion could be used against a State "in order to induce it to comply with its obligations". That was why it would be appropriate to have a paragraph or an article stating that the draft articles did not cover the question of resort to retortion.

25. Mr. TOMKA said that he thought retortion could be used as a response to a wrongful act. The fundamental difference between retortion and countermeasures was that retortion did not affect the legal situation in any way: it was a response to an act, not a legal instrument. The Commission was codifying the regime for legal institutions and was not to be concerned with non-legal issues.

26. Mr. ROSENSTOCK, supported by Mr. SIMMA, said that he, too, believed that the Commission would be wrong to get involved in the subject of retortion, which was not part of the topic under consideration.

⁵ *Yearbook* . . . 1999, vol. II (Part Two), p. 88, para. 448.

27. Mr. SIMMA, recalling that he found the term “countermeasures” very strange, said that the decision to take up the question and to draft provisions thereon was to be welcomed, because countermeasures were a fact of life and would not go away simply because the Commission tried to ignore them.

28. In essence, he thought the Special Rapporteur was proposing an adequate regime and he agreed in principle with his proposals.

29. With regard to procedure, he had been surprised to see how quickly, during the Commission’s fifty-first session, the procedural link between countermeasures and dispute settlement by arbitration, which had been present in the draft adopted on first reading, had been abandoned. He could live with the decoupling of countermeasures and dispute settlement procedures, however, first, because he had the impression that the Commission’s final product was going to be a soft law instrument, in other words some kind of a declaration to be adopted by the General Assembly, and, secondly, because there was a growing number of special regimes—*lex specialis*—regulating how to induce States to return to legality and thereby equalizing the balance of power between powerful and less powerful States.

30. Several aspects of the issues addressed in chapter III, section D, of the report were good. First, the Special Rapporteur’s definition of countermeasures in new article 47 was a distinct improvement over the old version. Secondly, a valuable distinction was made between the suspension of obligations on the basis of the law of treaties and suspension on the basis of performance, leaving the obligation intact. Thirdly, he endorsed the rejection of Riphagen’s ideas of measures of reciprocity, or reciprocal countermeasures,⁶ not because such measures did not exist, but because in general they were subject to precisely the same regime as other countermeasures. Fourthly, he found that the Special Rapporteur made a very valuable distinction between obligations that must not be legitimate targets of countermeasures, which were covered in article 47 bis, and what could be called collateral infringements of rights, the subject of article 50. He welcomed the rejection of the idea of introducing the exception of non-performance (*exceptio non adimpleti contractus*) among the circumstances precluding wrongfulness. Lastly, he endorsed the proposal that a new text should be drafted for article 30, replacing the word “sanction” by the word “countermeasures”.

31. He was more critical on the Special Rapporteur’s positioning of human rights. First of all, he found it strange to speak of human rights in connection with the rights of third parties, as in new article 50, subparagraph (b), because the expression “third parties” in international law was related to States or other subjects of law, but not to human beings; secondly, because, if a human being had a human right, he was a party, purely and simply, and not a third party; and, lastly, because the word “third” always implied that the person was not involved, and that was not the case if the person had human rights. Furthermore, he could not agree with the rationale put forward by the Special Rapporteur to explain why human rights were

excluded from the operation of countermeasures. The idea was that, with regard to human rights obligations, the primary beneficiaries were not other States, but human beings. That idea was fine, but it was dangerous to relieve States of the responsibility to secure performance of human rights obligations on the part of other States, thereby de-emphasizing the inter-State aspect of human rights obligations. His own rationale was that, while it was true that human rights must not be an object of countermeasures, human rights obligations, whether derived from a treaty or grounded in customary international law, were by definition “integral obligations” within the meaning of new article 40 bis. Performance of those obligations could accordingly not be bilateralized because that would impair the right of other States parties to the obligation to see the human right respected.

32. He liked the first part of new article 47, paragraph 1, but had problems with the phrase “as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so”. It made the sentence too long and attempted to embody a temporal element that was taken care of in article 50 bis, as well as the idea of proportionality, which was the subject of article 49. He proposed a version of the article in which the final part of paragraph 1 would be removed and the remainder combined with paragraph 2. It would read: “... Part Two, by suspending performance of one or more international obligations of the State taking those measures towards the responsible State”. He also thought that the phrase “one or more obligations” was not very satisfactory and that the Drafting Committee should be asked to review it.

33. Turning to article 47 bis, he said that subparagraphs (a) to (c) should be made a bit more forceful by describing the obligations in the following manner:

“(a) The obligation to refrain from the threat or use of force in accordance with the Charter of the United Nations;

“(b) The obligation to respect and ensure the inviolability of diplomatic or consular agents, premises, archives or documents;

“(c) The obligation to submit the dispute to third party settlement.”

A more fundamental problem arose with regard to subparagraph (d), which was highly reminiscent of article 60, paragraph 5, of the 1969 Vienna Convention and dealt with the “reprisals” precluded by humanitarian law. Since, at the time of the United Nations Conference on the Law of Treaties, human rights had been a relatively new idea and since the protection of human rights could not be overemphasized today in a context such as that of reprisals he thought that either a separate paragraph on basic human rights should be inserted, or subparagraph (d) should be reworded, using the draft adopted on first reading as a guide in order to exclude basic human rights from the operation of reprisals. Lastly, he thought that the word “precluding” should be replaced by the word “excluding”.

34. New article 48 conveyed a very important idea and he was in favour of keeping it in the comprehensive format, rather than reducing it to the form proposed in the

⁶ See 2645th meeting, footnote 7.

footnote to the article. In paragraph 1 (c), the word “agree” should perhaps be replaced by the word “offer” because the current wording might create the impression that a *pactum de negociando* was involved. Paragraph 2 reprised the old idea of interim measures of protection, which might be a necessary evil in order to make article 48 as a whole digestible to certain States, but the new wording was not as different from the version adopted on first reading as the commentary tried to suggest. In paragraph 3, he wondered whether the choice of the term “dispute” was appropriate, since certain conditions had to apply to a legal dispute and it might be asked whether it was a dispute in the technical sense of the word that was meant.

35. Turning to new article 49, on proportionality, he said that he was in favour of replacing the negative formulation by the positive formula used by ICJ in its judgment in the *Gabčikovo-Nagymaros Project* case. Since the phrase after the comma in article 49 as worded added nothing, he thought the Court’s judgment in that case should be followed even more closely. After the comma, the text should read: “taking account of the rights subject to the internationally wrongful act”.

36. With regard to new article 50, he wondered whether mentioning “intervention” would not mean opening Pandora’s box. As to subparagraph (b), he recalled the problems he had already mentioned concerning the link between the rights of third parties and basic human rights, but he welcomed the reference to general comment No. 8 of the Committee on Economic, Social and Cultural Rights, which was cited in paragraph 350.

37. In conclusion, he said he was in favour of sending all the draft articles to the Drafting Committee.

38. Mr. ROSENSTOCK said that, with regard to the question of proportionality, what the Special Rapporteur was seeking to do, and did reasonably successfully, was to encompass what Riphagen saw as the two measures of proportionality in the *Air Service Agreement* case, namely, not merely the magnitude of the illegality and loss flowing from the French conduct, but also the harmful effects if that conduct was repeated with regard to numerous other identical agreements held by the United States.⁷

39. Mr. CRAWFORD (Special Rapporteur) said it was true that article 50, subparagraph (b), posed a problem, but the same had been true of the text adopted on first reading. The real problem was that countermeasures taken by a State which might, in their inception, have been lawful—for example, a trade embargo—might, over time, produce a result that violated human rights. That was why he wished to include human rights in article 50—not because of any refusal to take them seriously, but because analysing human rights in the context of countermeasures was a delicate task. Obviously, a State could not take countermeasures which involved the suspension of human rights as such. There might, however, be situations when the human being was not the subject of the right, but, in some sense, the object. That had been true of the old prohibition of reprisals in humanitarian law, a prohibition which, unlike the situation in modern human rights, had

been a pure inter-State obligation of which individuals were beneficiaries. That was why he had placed the prohibition of reprisals in article 47 bis, although the language of that article could be discussed in due course.

40. On analysis, the problem of compliance with human rights fell within the scope of article 50 and not that of article 47 bis as soon as one accepted the distinction between obligations not subject to countermeasures and prohibited countermeasures.

41. He accepted the point that bringing the rights of third parties and basic human rights together in article 50, subparagraph (b), might be thought to be an excess of “human rights-ism” in that it amounted to regarding the beneficiaries of human rights as being third parties vis-à-vis the State. The problem was that it would be odd to devote a separate third paragraph to human rights because in reality they were rights of third parties, when compared with State-to-State obligations, which were the subject of countermeasures. The solution would be to break subparagraph (b) into two parts, one concerned with the rights of third States and the other, with human rights. That would leave out the possibility of an adverse impact on the rights of entities other than third States, but that could be covered in the commentary.

42. Mr. SIMMA said that he welcomed the idea of dividing article 50, subparagraph (b), into two parts, one on the rights of third parties and the other on basic human rights, but he wished to underline the view that it was dangerous to “privatize” human rights obligations by saying that they were obligations not owed to other States. He thought human rights obligations, especially those laid down in treaties, had a double nature: they were obligations between States parties which, like other obligations, justified the exercise of countermeasures in the event that they were breached. That aspect was important and should not be overshadowed by the other aspect of human rights brought out by the European Court of Human Rights in the sense that the obligations arising from treaties were not just obligations among States, but were also, and perhaps in the first instance, obligations vis-à-vis individuals.

43. It would not be illogical to include a subparagraph in article 47 bis exempting basic human rights obligations from the scope of countermeasures, as had been done in the draft adopted on first reading.

44. Mr. Sreenivasa RAO said that the distinction drawn between human rights protection in the context of reprisals and human rights protection in general was valid, up to a point. If human rights protection was considered in the context of armed conflicts, it would be recognized as really being the protection of innocent civilians. When a State was the target of countermeasures—and thus of an attack against which it had to protect itself—it might suspend the exercise of a large number of human rights under a state of emergency. The suspension of some of those rights might not be of great consequence for the purposes of the draft articles. What, however, should be done in situations where, as had occurred during the Second World War, large groups of persons were isolated and put into camps? It was difficult to separate the question of human rights from that of armed conflict situations. Moreover,

⁷ Ibid.

times had changed and an ever-increasing number of rights were considered basic human rights. Provision should be made that both the affected State and the State taking the countermeasures should be bound to protect basic rights. In that perspective, the distinction between articles 47 bis and 50 would lose much of its importance.

45. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Sreenivasa Rao, said that human rights were, of course, to be protected unconditionally. The derogation provisions under public emergencies were part of the human rights regime and, indeed, they provided the test for the acceptability of interning people in times of armed conflict. They were not part of the law of countermeasures.

46. With regard to the point raised by Mr. Simma, the problem was that, if the general protection of human rights was inserted in article 47 bis, the much more important problem of article 50 was avoided because human rights were breached in the context of countermeasures not because reprisals were taken against individuals, but because collateral human suffering occurred and could be extremely severe. It was therefore most important that States should be on notice that, even if they imposed economic blockades or froze bank accounts, there were still individual rights that should be maintained, subject of course to any relevant derogation. It followed that, if there was a choice between a more confined treatment in article 47 bis in relation to the classic problems of reprisals and a broader protection in article 50, human rights were actually better served than they would be by adopting the approach suggested by Mr. Simma.

47. Mr. GALICKI noted that article 50 adopted on first reading had included all the elements that were currently divided between articles 47 bis and 50. It might therefore be a good idea to revisit some of the results of that divorce in order to avoid any repetitions or omissions. As had been said, article 47 bis, subparagraph (d), dealt with obligations of a humanitarian character. That differentiation in terminology ought to be taken into account. Some participants in the debate had considered that the concept included human rights. He would favour harmonizing the terminology and deciding whether the reference should be to humanitarian or to human rights law, as in article 50. The Drafting Committee should consider the matter. The same applied to subparagraph (a) of both articles, which had suffered from the divorce procedure imposed on article 50 adopted on first reading. The procedural separation of various items in the two articles should be carefully reconsidered.

48. Mr. SIMMA said that he wished to put in a plea for keeping the distinction that had been drawn between articles 47 bis and 50. In a case where a State engaged in economic countermeasures against another State, obligations that could not be suspended under article 47 bis would be those arising out of a trade agreement or some economic assistance agreement. The collateral damage would, of course, fall on the innocent population; that was well taken care of in article 50, the provision made perfect sense and there was no confusion. On the other hand, was it impossible to envisage countermeasures that pinpointed human rights obligations?

49. The example given by Mr. Sreenivasa Rao of people rounded up and put in camps called for reflection. Such people were in all probability nationals of the target State. However, that pertained more to diplomatic protection, to the minimum standards governing the treatment of aliens and therefore to individual human rights.

50. Other situations were possible, however. There might, say, exist an association of friends of Austria in Germany. If a problem arose between the two countries, Germany might, by way of countermeasures, detain the friends of Austria, who would be its own, German nationals. Such measures were not unthinkable; indeed, examples could currently be found in the press.

51. For that reason, many difficulties would not be resolved by the insertion of human rights considerations in article 50; nor would his own apprehensions be relieved. It would be useful for the Drafting Committee to reconsider the issue.

52. Mr. PELLET said that his position on countermeasures was well known. First, he had little liking for measures, such as intervention, which could, inevitably, be used only by the most powerful States. Secondly, countermeasures might be an evil, but they were a necessary evil and in any case they were a fact of life. It was therefore necessary to accept them with a good grace, as long as international society remained essentially decentralized; in the absence of an organized system of justice, such a primitive form of "private justice" was unavoidable. Thirdly, the world being what it was, it was better to regulate countermeasures than to leave them in the limbo of lawlessness to which some people wished to confine them. For the weak, nothing was more dangerous than the absence of law.

53. That said, the articles proposed by the Special Rapporteur seemed, overall, to constitute an advance over the draft articles adopted on first reading, even if they were not perfect and in some areas could actually be retrograde.

54. That certainly applied to the wording of the beginning of article 47, which repeated the formulation originally proposed by the previous Special Rapporteur, Mr. Arangio-Ruiz,⁸ which a majority of the then members of the Commission had successfully opposed, despite the determined resistance of a minority, of whom the current Special Rapporteur had been one. Article 47 as adopted on first reading had been neutral: it had presented countermeasures as a fact. The Special Rapporteur was inviting the Commission to return to that solid neutrality, without any clear justification for such a step back into the past, and to accept the idea that countermeasures were lawful under certain conditions: "an injured State may take countermeasures ...". He would prefer a negative formulation, as some States had suggested: "... an injured State may not take countermeasures, unless ...". If such wording was not acceptable to a majority of the Commission, at least there should not be an assumption that States would resort to countermeasures; the Commission should at least return to the neutral, compromise formula that it had

⁸ See fourth report (*Yearbook* . . . 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3), p. 22, art. 11.

laboriously reached at its forty-eighth session, in 1996. In his view, the most negative aspect of the report, on the theoretical level at any rate, was that, at the stroke of a pen, without any explanation, the Special Rapporteur had gone back on a balanced formulation that had been laboriously achieved.

55. Otherwise, the Special Rapporteur had been right to seek to simplify the structure of article 47, although the rationalization could be carried still further. Like Mr. Simma, he had doubts about the validity of the last phrase in paragraph 1: "... in the light of its response to the call that it do so". Apart from the fact that it was hard to understand on its initial reading, he thought that, while such calls and responses should be taken into consideration, they were only two of the relevant factors; the truth was that countermeasures should be taken only when "strictly necessary in view of the circumstances", a wording that he would prefer because he considered it simpler, more restrictive and more precise.

56. With regard to article 47, paragraph 2, he concurred with the Special Rapporteur in believing that restricting countermeasures to what Special Rapporteur Riphagen had called "reciprocal countermeasures" would not be realistic. On the other hand, despite the explanations contained in paragraph 347, he keenly regretted that the Special Rapporteur had eliminated from the article the protection of the rights of third parties, which had been covered by paragraph 3 of the article adopted on first reading. That was particularly surprising, given that paragraph 348 gave the impression that ultimately the Special Rapporteur had been convinced by the Irish Government's suggestion,⁹ which would, on the contrary, have the effect of strengthening the position of third parties, under both article 47 and article 30.

57. As matters stood, it was inevitable that, in certain cases, the interests of third parties would be harmed by countermeasures. Rights and interests, however, should not be confused and, if third parties had rights, there was no reason why, if they were not at fault, the violation of their rights should be legitimized by the breach committed by the author of the internationally wrongful act. Article 47, paragraph 3, adopted on first reading expressly dealt with the consequences of such a situation. It was essential that the notion should be restored to the draft article and that the extremely ambiguous wording proposed by the Special Rapporteur, whereby the same result was seemingly to be attained by the cryptic expression "measures towards the responsible State", should not be retained. On the other hand, he utterly rejected the idea that individuals could be "third parties" in the context of inter-State responsibility. He could therefore not accept the wording proposed by the Special Rapporteur for article 50, subparagraph (b). He concurred with Mr. Lukashuk and Mr. Simma on that point: individual persons were not the objects of human rights law, they were parties to an obligation and not in any way third parties. He was not sure that separating article 50, subparagraph (b), into two sections would suffice to meet his concerns.

58. Article 48 had undergone the clearest and most spectacular development as a result of the Special Rapporteur's proposed changes to the text adopted on first reading. That text had been based on the naïve belief that the excesses that too often accompanied countermeasures would be restrained by the fact that States would, in theory, submit to the compulsory arbitration provided for in Part Three. To rely entirely on such an unrealistic mechanism, which was obviously unacceptable to the vast majority of States, would mean neglecting the basic restrictions that must be imposed on the "private justice" of countermeasures. The Special Rapporteur was right to suggest abandoning such a ludicrous notion, which had lulled the members of the Commission into believing that international society was the same as national society or that it should be forced into the same mould.

59. On the other hand, it was important to preserve the benefits of the text adopted on first reading, which had consisted in making the taking of countermeasures dependent on undertaking negotiations in good faith within a reasonable time. He recognized that article 48, paragraph 3, as proposed by the Special Rapporteur, was an expression of that idea. He regretted, however, that the logical sequence between paragraph 3 and paragraph 1 (c), which dealt with the obligation to agree to negotiate in good faith had been broken by paragraph 2, which he would prefer to see transferred to the end of the article. The provisional measures for which it provided should be seen for what they were: exceptions to the prohibition against taking countermeasures before the path of negotiation had been tried. More emphasis should be placed on their exceptional nature and, rather than the expression "as may be necessary", he would prefer a stronger form of words, such as "as prove [or as are] essential". On the other hand, the Special Rapporteur had been right to remove the ambiguity created by the reference to "measures of protection", despite the fact that the concept was the same. Measures of protection under international procedural law might appear the same, but in fact were not.

60. Referring to the sequence of paragraphs 1 and 2, he also thought that paragraph 1 (b) appeared too soon and that the requirement for the injured State to give notification of the countermeasures that it intended to take before the start of negotiations was too inflexible. The logical and practical order should be, first, a reasoned call for reparation, followed by negotiation in good faith. It was perhaps unnecessary to provide for a separate obligation to agree to negotiate, since a State which envisaged taking countermeasures should not simply "agree to negotiate". It should propose negotiations. Notification could then be given of the intended countermeasures which could legitimately be deployed in terms of the negotiation. That would also fit in with the logic of the fleeting reference, at the end of article 47, paragraph 1, to the insistence on the necessity for countermeasures in the light of the response by the responsible State to the call from the injured State.

61. Paragraph 4—which could become paragraph 3 or, indeed, precede paragraph 2—posed no problem, in principle in any case, and seemed to have been flexibly worded to achieve an acceptable result.

⁹ See footnote 3 above.

62. On the other hand, he was firmly opposed to the alternative suggested in the footnote to new article 48 which eliminated the main achievement of the draft adopted on first reading, namely, the obligation to negotiate, theoretically beforehand.

63. The proportionality dealt with in article 49 was a crucial concept and he welcomed the fact that the Special Rapporteur had substituted the word “and” after the phrase “gravity of the internationally wrongful act” for the word “or”, which had appeared in the article adopted on first reading. Like Mr. Simma, he also considered that the simple word “proportionality”, to which the Special Rapporteur proposed to return, was infinitely preferable to the negative expression “out of proportion” which appeared in the text adopted on first reading.

64. Proposing to discuss articles 47 bis and 50 together, he noted that, in paragraph 334 of his report, the Special Rapporteur stated that the distinction he drew between obligations which may not be suspended by way of countermeasures, and obligations which must be respected in the course of taking countermeasures clarified matters. There, the Special Rapporteur was unduly Cartesian in his approach. While, in the abstract, he understood the distinction the Special Rapporteur had in mind, between the subject of countermeasures and their effect, he was at a loss to understand its application in articles 47 bis and 50. If article 50, subparagraph (a), were to be drafted slightly differently, but without in any way affecting its substance, so as to state, for example, that the obligation not to endanger the territorial integrity of the other States could not be limited by way of countermeasures, the result would be an “obligation not subject to countermeasures”, in other words, an obligation under article 47 bis. The same was true of the duty of non-intervention. As for subparagraph (b), on which he had already spoken, he wished to add that, despite the explanations provided in paragraphs 340 and 341, he failed to understand in what way respect for fundamental human rights differed in essence from the humanitarian obligations under article 47 bis.

65. In any case, it would seem wise to revert to a single article 50 concerning prohibited countermeasures. In that regard, he shared the views expressed by Mr. Galicki, notwithstanding Mr. Simma’s very strong plea.

66. There was no need to embark on a point-by-point discussion of the seven prohibited countermeasures appearing in articles 47 bis and 50. In his view, it would be sufficient to mention the prohibition on resort to force pursuant to the Charter of the United Nations and obligations under peremptory norms of general international law, provided it was mentioned in the commentary that the peremptory character of certain obligations (including those relating to the inviolability of diplomatic agents) had been disputed. That being said, ICJ had itself referred to “imperative obligations” in its order in the case concerning *United States Diplomatic and Consular Staff in Tehran* [p. 20, para. 41]. Similarly, it had described the humanitarian obligations referred to in article 47 bis, subparagraph (d), as “intransgressible” in its advisory opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons* [p. 257, para. 79]. On that point, he agreed with Mr. Simma’s view that there was no reason to distinguish humanitarian obligations from respect for

human rights and he also endorsed Mr. Simma’s remarks concerning fundamental rights of individuals and the need to confine articles 47 bis and 50 to those fundamental rights. The same could no doubt be said of the principle of territorial integrity and perhaps also of the principle of non-intervention. There remained only the obligation concerning settlement of disputes by a third party, but article 48, paragraph 4, appeared to cover the main hypothesis. Admittedly, that paragraph was not exactly coextensive with article 47 bis, subparagraph (c), but he was not sure that there was any need for that addition, which dealt with marginal hypotheses.

67. In any case, while he had nothing against the content of the long enumeration contained in articles 47 bis and 50, he was critical, as he had already been in the debate on first reading, of the very procedure of enumeration, which was probably not exhaustive. One could never be sure of not having omitted something, and, as reference was made to *jus cogens* in article 47 bis, subparagraph (e), that reference could suffice.

68. Turning to article 50 bis, he was in favour of its inclusion in the draft and it was entirely right to specify that the countermeasures must cease when the circumstances justifying them had themselves ceased.

69. Article 50 bis, paragraph 3, thus posed no problem. On the other hand, paragraph 2 was not necessary. To begin with, it raised a number of drafting problems. For example, he was not keen on the expression “may be resumed”, which was a sort of attenuated echo of the opening of article 47, of which he had already spoken harshly. Moreover, neither the word “request” nor the word “order” seemed satisfactory. Lastly, the expression “in good faith” was also unsatisfactory. The Drafting Committee might rectify those matters, but the qualifications were in any case superfluous and could easily be relegated to the commentary, if possible with a few concrete illustrations. Those were thus concrete, but implicit consequences of paragraph 1. The provision was in any case so unnecessary that he did not favour referring it to the Drafting Committee.

70. Matters were different with paragraph 1, which could be referred to the Drafting Committee. He wondered, however, whether the word “orders”, which appeared in its subparagraph (b), was appropriate and thought that the Commission might confine itself to referring to the tribunals or bodies authorized to make decisions binding on the parties.

71. Subparagraph (b) raised two further questions. The first was whether it also referred to decisions taken by the Security Council under Article 25 of the Charter of the United Nations. He supposed that was the case, but, if so, that should be spelled out and explained in the commentary. That also raised interesting legal problems with regard to the *Lockerbie* case.

72. Secondly, it was not clear whether subparagraph (b) referred to orders of ICJ or of another court indicating preliminary measures. That should certainly be the case, but it was not what the proposed text said. In his view, orders of the Court did not constitute binding decisions, still less injunctions. Perhaps the reference was to the

“requests” under paragraph 2, but, if that was the case, paragraphs 1 and 2 did not correspond.

73. As for article 30, he had no problem with the text proposed by the Special Rapporteur in paragraph 362 of his report, which indeed constituted an improvement on the previous wording, thanks to the addition of the expression “and to the extent that”. Nonetheless, he wondered whether that provision was necessary. Its inclusion in Part One created an ambiguity about which some members of the Commission had expressed concern at the previous session, as countermeasures appeared to be simultaneously a circumstance precluding wrongfulness and consequences of responsibility. Such a duality of one and the same legal concept was not helpful. Of course, in the abstract, countermeasures could be seen as a circumstance precluding wrongfulness, but that was also true of other legal institutions, for example, of a decision of the Security Council requiring States to take measures contrary to some of their obligations, something the Council could do within certain limits; and it was also true, or could be true, of consent to wrongfulness or *exceptio inadimpleti contractus*, an exception that, wisely, the Special Rapporteur had decided not to mention in the draft articles. He thought that the Special Rapporteur had been right to take that course, for the same reasons that led him to believe that it was neither useful nor desirable to mention countermeasures in Part One, particularly as, strictly speaking, it was not the countermeasure that precluded wrongfulness, but the wrongfulness of the initial act attributable to the responsible State. It was in fact the first wrongful act that excused the second, not the countermeasure as such. There was something illogical in that. Article 30 was not necessary and articles 47 bis to 50 bis were all that was needed.

74. Summing up, he said that he favoured referring all the draft articles under consideration to the Drafting Committee, except for article 50 bis, paragraph 2, and article 30. He also strongly favoured: first, redrafting article 47 so as to avoid the impression that countermeasures were a right; secondly, reincorporating article 50 into article 47 bis and considerably reducing the list of eventualities referred to in the two provisions; and, thirdly, retaining a clear separation between the general regime of countermeasures and the settlement of disputes. Everything else was a matter of drafting amendments.

75. Mr. LUKASHUK said he broadly endorsed Mr. Pellet’s remarks, except for those relating to article 47 bis, subparagraph (d), and article 50, subparagraph (b). It was also his view that the distinction between humanitarian obligations, namely, those stemming from international humanitarian law, and human rights must be maintained.

76. Mr. CRAWFORD (Special Rapporteur) said that he emphatically did not share Mr. Pellet’s view that the whole of the prohibitions on the taking of countermeasures was covered by the notion of *jus cogens* and that he could not subscribe to his proposal on that point. As States were almost never in agreement that any one norm had the character of *jus cogens*, such a formulation would radically widen the scope of the countermeasures, which was certainly not the outcome desired by Mr. Pellet. In particular, he was very strongly opposed to the idea that the inviolability of diplomatic and consular premises, archives and documents, referred to in article 47 bis, subparagraph (b),

was a norm of *jus cogens*. That provision had in any case been endorsed by States and he would be opposed to its deletion.

77. On the other hand, if the provisions under consideration were to appear in an appropriate form in the draft articles, article 30 was perhaps not necessary, but, if they were couched in the neutral and totally unsatisfactory form in which they had been adopted on first reading, that article was indeed necessary.

78. Mr. ECONOMIDES said that he wondered whether, in the hypothetical situation in which, after the notification by the injured State referred to in article 48, the responsible State replied that it disputed the existence of the breach and proposed the immediate referral of the dispute to ICJ or an arbitration tribunal, the injured State could nonetheless take countermeasures, including those referred to in article 48, paragraph 2.

79. Mr. DUGARD said he endorsed Mr. Lukashuk’s comment that a clear distinction must be drawn between international humanitarian law and human rights.

80. Mr. ROSENSTOCK, referring to Mr. Pellet’s suggestion that the reference to countermeasures in article 30 should be deleted on the grounds that the real point at issue was the initial wrongful act of the responsible State, said that, according to such reasoning, one could *a fortiori* delete the reference to self-defence. One could thus effectively deprive article 30 of all substance and reshape the entire text so as to attempt to solve the problem it contemplated in a totally different manner. By doing so, however, the Commission risked forgoing any chance of completing its work on the topic at its fifty-third session, in 2001.

81. Mr. SIMMA said he too thought that article 30 should be retained. However, the title of article 50 seemed to him far too broad, and he would prefer a different title, for instance, “Prohibited effects of countermeasures”. Moreover, in the English text of its order in the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ had used a very strong wording, but had avoided saying whether diplomatic law fell within the category of *jus cogens*. The question of non-performance of an obligation following decisions taken by the Security Council was covered by a saving clause.

82. Mr. PAMBOU-TCHIVOUNDA endorsed Mr. Pellet’s comments on the order of the provisions in article 48. He considered, however, that there was no reason to confine the modes of dispute settlement to negotiations, in paragraph 3 of that article.

83. Mr. TOMKA, referring to article 30, said that in the *Gab Ž kovo-Nagymaros Project* case, ICJ had considered countermeasures as circumstances precluding wrongfulness. That had, furthermore, been well established in doctrine since the 1930s and the famous Kelsen article.¹⁰ It was thus important to include countermeasures among circumstances precluding wrongfulness.

¹⁰ H. Kelsen, “Unrecht und Unrechtsfolge im Völkerrecht”, *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October, 1932), pp. 571 et seq.

84. Furthermore, States could, by bilateral agreement, derogate from obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents; consequently, those obligations did not fall within the category of *jus cogens*.

85. Mr. MOMTAZ said that countermeasures could be taken only in response to conduct actually unlawful and noted in that connection that, in paragraph 294 of his report, the Special Rapporteur stated that a good faith belief in its unlawfulness was not enough.

86. Mr. PELLET said he still believed it would be preferable, in article 47 bis, to replace the enumeration of the various obligations with a more general formulation covering them all. The existing enumeration was in any case incomplete: one might also refer, for example, to obligations under environmental law and to many others. In that connection, he was surprised that the Special Rapporteur, who had in the past criticized article 19, paragraph 3, should use the same procedure in article 47 bis.

87. With regard to the question raised by Mr. Economides, the reply was to be found in article 50 bis, paragraph 1 (b). As for who was to decide on the need for countermeasures, in international law States were the first judges of lawfulness, regrettable as that might be. Hence the importance of limiting resort to countermeasures as much as possible.

88. Replying to Mr. Rosenstock, he said that the mention of self-defence in article 30 might also be deleted, if only because that was a question of *lex specialis*.

89. In reply to Mr. Simma's comment, he said that decisions taken by the Security Council under Chapter VII of the Charter of the United Nations enabling States not to perform an obligation were admittedly covered by a special provision in the draft articles, but operated in the same way as countermeasures. As for the case cited by Mr. Tomka, ICJ had perhaps accorded much more weight to the Commission's draft articles than was justified by texts adopted only on first reading.

90. Mr. KAMTO said that article 30 must be retained, *inter alia*, for the reason given by Mr. Rosenstock. He also stressed the almost indissoluble link between countermeasures and settlement of disputes, to which he would return in his statement at the next meeting.

91. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Economides, said that in the situation envisaged, the injured State could not take countermeasures if the wrongful act had ceased. Replying to a question by Mr. Pellet, he said that the Security Council was not covered by article 50 bis, paragraph 1 (b), and that its decisions were covered by article 39.

The meeting rose at 1 p.m.

2647th MEETING

Thursday, 27 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of chapter III, section D, of the third report (A/CN.4/507 and Add. 1-4).

2. Mr. KATEKA said that, in the general commentary to chapter III of Part Two adopted on first reading, countermeasures were described as the most difficult and controversial aspect of the whole regime of State responsibility. The commentary said that States resorted to unilateral measures of self-help when they took countermeasures. In his opinion, therefore, great caution was called for in dealing with the articles being proposed.

3. It was clear from the views expressed by some Powers that they did not rule out forcible countermeasures and that was a clear danger signal that countermeasures might be subject to abuse, especially by the strong Powers against the weak, whose ability to take countermeasures might be confined to diplomatic protest notes. The inclusion of countermeasures in the draft would limit the articles' acceptability to certain States. He had indicated his opposition to including countermeasures during the debate on article 30.

4. The Special Rapporteur planned to complete the second reading of the draft articles at the fifty-third session of the Commission, with the Drafting Committee producing a complete text, but with the question of dispute settlement set aside until the end. That process of disaggregation had left a number of issues in a somewhat

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

doubtful situation. For example, article 19 would be mired in the “serious breaches” category. The Special Rapporteur had expressed his preference for a non-binding instrument on State responsibility, and had also delinked countermeasures from binding dispute settlement, stating in paragraph 287 that such a linkage gave a one-way right to the target State. Personally, he would be happy to give the same right to the injured State because dispute settlement was a universally accepted peaceful means of resolving conflicts.

5. The ILA study group on the law of State responsibility had observed in its first report that countermeasures were a dangerous opening of the legal order to power, something which would indicate that a link between countermeasures and compulsory dispute settlement was necessary in order to really guarantee the rule of law in public international law. Disappointingly, the report had gone on to argue that the approach in favour of a compulsory jurisdiction at least with regard to countermeasures seemed hardly realistic. Time and the reaction of States would tell who was being realistic. Just as Part V of the 1969 Vienna Convention had been linked to compulsory dispute settlement, the same might have to be the case with countermeasures.

6. The Special Rapporteur had recast the articles on countermeasures adopted on first reading, stating that the purpose of countermeasures was instrumental, in other words, to induce compliance. That was not necessarily the case, for countermeasures could be punitive in order to satisfy the political or economic purposes of the injured State. However countermeasures were dressed up, they were clearly not palatable. As the commentary to article 30³ had stated, they were measures whose object was, by definition, to inflict punishment or to secure performance, and which under different conditions would infringe a valid and subjective right of the subject against which the measures were applied. The commentary said that that general feature served to distinguish the application of countermeasures, sometimes referred to as “sanctions”, from the mere exercise of the right to obtain reparation for damage. The commentary left no doubt as to the purpose of countermeasures. The Commission was thus being called upon to legitimize what would otherwise amount to the rule of the jungle whereby the strong bullied the weak. He was opposed to the inclusion of countermeasures in the draft articles.

7. If the Commission nonetheless decided to include them, he had a number of comments to make. The reconfiguration of the articles had not simplified matters. The creation of a proposed new article 47 bis, extracted from article 50 adopted on first reading, had not improved the text, and in his view it would be better to restore the omnibus article 50, on prohibited countermeasures. The Special Rapporteur had described article 47 adopted on first reading as a “hybrid” yet in his proposed new article he had retained the gist of paragraph 1 of that article. His own view was that there was more to countermeasures than the question of inducement. It was not helpful to tell a country when its assets abroad were frozen that the action was

instrumental; the State in question might not be able to buy medicines, and instrumentality could therefore lead to punitive results. As Mr. Lukashuk had said, countermeasures were difficult to define in a specific manner. Article 47 might need to be recast.

8. The Special Rapporteur had identified five basic issues in recasting the provisions on countermeasures. He had been right to reject reciprocity countermeasures, for in reality there was no reciprocity; it was one-way traffic. While some developing countries kept their assets abroad in developed countries, and were therefore easy victims when it came to the taking of countermeasures, most of the developed countries had no similar assets in the developing countries that could be seized as a countermeasure.

9. In article 47 bis, the Special Rapporteur had identified for recasting the question of obligations not subject to the regime of countermeasures. Paragraph 334 of the report stated that it seemed better and clearer to distinguish between obligations which could not be suspended by way of countermeasures and obligations which must be respected in the course of taking countermeasures—in other words, between the subject of countermeasures and their effect. Personally, he did not find that distinction helpful when compared with article 50 adopted on first reading. Mr. Lukashuk had proposed that article 47 bis should be placed next to article 50 because of the close link between them, while another member had argued that they should be merged. The language of the *chapeau* to article 47 bis was not as clear as the mandatory language of article 50 adopted on first reading. Indeed, the discretionary “may” could imply that there might be situations in which the obligations mentioned could be suspended. The text of subparagraph (a) would be improved if “embodied” was replaced by “enshrined”.

10. He was concerned about the deletion of article 50, subparagraph (b), as adopted on first reading. The Special Rapporteur had argued, in paragraph 312, that countermeasures were coercive, and that confirmed his worst fears about them. The Special Rapporteur had further argued, in paragraph 352, that a measure could not lawfully be “designed” to endanger the territorial integrity of a State because the use of force was excluded as a countermeasure. It was a difficult argument to sustain because the sovereignty and existence of a State were not threatened solely by the use of force; economic and political coercion had done irreparable harm to the sovereignty of many developing countries. Some members had voiced concern about collateral damage when discussing the human rights provisions and he hoped that they would feel the same concern regarding economic coercion.

11. The Special Rapporteur had then proposed a watered-down text in a truncated article 50 to take care of the concerns of the proponents of subparagraph (b) as adopted on first reading. However, the new text of article 50, subparagraph (a) was insufficient in that it broadened the provision and lost the reality of economic and/or political coercion being used in order to justify destabilizing countermeasures. In his view, the language of article 50, subparagraph (b), as adopted on first reading should be followed.

³ *Yearbook . . . 1979*, vol. II (Part Two), pp. 115 et seq.

12. Article 48 was said to have been by far the most controversial of the four articles adopted on first reading. It would be better if paragraph 1 (c) of the proposed new version was to become paragraph 1 (a) in order to emphasize the importance of negotiation before the taking of countermeasures; for him, the significance of the provision counted for more than the question of logic. While it was helpful for the Special Rapporteur to replace the unfortunate term “interim measures of protection” by the idea of “provisional” measures, the basic problem remained in the sense that, whatever name they were given, countermeasures were wrong because of their unilateral nature. Whether provisional or full, their impact might be difficult to reverse, and the duration or time factor was not the issue. It was the taking of any countermeasures at all that was the problem. In that regard, he would prefer, as stated in paragraph 358 (d), that all countermeasures be postponed until negotiations were concluded or had definitively broken down. Alternatively, the distinction between “provisional” and other countermeasures could be eliminated. Paragraph 4 of article 48 was somewhat vague, and it would be better to use the form of language of article 48, paragraph 3, as adopted on first reading.

13. The new formulation of article 49 was couched positively as opposed to negatively in the article adopted on first reading, and there was merit in deleting the double negative formulation. However, it was not useful to introduce the notion of purpose mentioned in paragraph 346, for the reasons he had already stated.

14. The proposed new article 50, subparagraph (b), provided that countermeasures must not impair the rights of third parties, in particular basic human rights. The Special Rapporteur contended in paragraph 347 that there was no need to refer to the position of third States which might be affected by countermeasures. While countermeasures might not operate objectively, they could cause suffering. For example, a trade embargo imposed by State A against State B could cause grave harm to State C, which might be an innocent victim of countermeasures; landlocked developing countries could be denied essential transit facilities as a result of countermeasures. The citing of “basic human rights” as a specific case raised the question of whether human rights for individuals in the target State could by implication be excluded because it was not a third State. The use of the word “basic” also raised the old argument as to what constituted fundamental human rights and how they related to other derogable human rights. It introduced an element of subjective judgement, which was best left out.

15. In proposed new article 50 bis, the Special Rapporteur had introduced a French proposal to the effect that countermeasures must be terminated as soon as the conditions which justified taking them had ceased. He had clarified that he was talking of suspension of the performance of the obligation and not of the obligation itself, but why did the article refer to suspension if the internationally wrongful act had ceased? The article borrowed the language of article 48 adopted on first reading. It should use the word “terminated” and not “suspended”. Again, paragraph 3 was a qualified termination because of the reference to obligations under Part Two. It was an unnecessary linkage that widened the scope of the paragraph.

16. Lastly, he wished to restate his opposition to the inclusion of countermeasures in the draft articles. If the Commission decided to retain them, it would be better to have general but brief provisions, based on the draft articles adopted on first reading. In all fairness, the Special Rapporteur had done his best in dealing with a difficult subject.

17. Mr. GAJA said that the articles seemed to be better formulated than did the draft adopted on first reading, although in some respects further improvements were possible. For one thing, the text relating to countermeasures might usefully be reduced in size.

18. He agreed with the description of the purpose of lawful countermeasures as coercive. Article 47 indicated that the purpose was to induce compliance with obligations under Part Two. However, all the implications of that purpose were not fully reflected in the articles. Article 50 bis, paragraph 3, rightly stated that, once there had been compliance with obligations under Part Two, countermeasures should cease. However, article 49 stated that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party. That wording evoked the idea that countermeasures were sanctions for an unlawful act, and that the more serious the breach, the greater the countermeasures. In his view, proportionality should instead be assessed in relation to the coercive purpose of countermeasures. If, for example, State A expressed willingness to pay compensation for all the damage caused but insisted that, in order to do so, legislation had to be enacted, countermeasures should be taken only to promote prompt passage of that legislation; in that example, the gravity of the injury did not matter. There might be other cases in which the gravity of the injury did affect the likelihood of the State complying, and in such cases there was some merit in a reference to gravity. The wording of article 49 was borrowed from formulations in the decisions on such cases as *Naulilaa* and the *Air Service Agreement* and, in his opinion, it should be recast. ICJ in the *Gabčikovo-Nagyymaros Project* case considered that the purpose of countermeasures was to induce the responsible State to comply with its obligation under international law, but somehow demoted the relevance of the purpose by saying that it was one of the conditions for the lawfulness of countermeasures. Also, the Court did not relate proportionality to the purpose. Following to some extent the Commission’s half-hearted approach regarding purpose in its first draft articles, the Court had said that proportionality was related to the “injury suffered taking account of the rights in question” [p. 56, para. 85]. The Commission should take a step forward and state the possible implications of the purpose of countermeasures on proportionality.

19. He agreed with much of what had been said by Mr. Galicki, Mr. Kateka and Mr. Pellet regarding the relationship between articles 47 bis and 50. The distinction between a direct breach of an obligation and a breach through consequential effects was very fine indeed. If a State was under an obligation to protect the right to life of individuals, it mattered little whether it directly impaired that right or whether it starved people to death through economic and other measures. While it could be said that the breach of obligations under norms that were not

peremptory could be justified only in the relations between the injured State and the responsible State, such a breach was not generally of interest to the international community. He did not, however, think that the same could be said about breaches of all the obligations that were not imposed by peremptory norms. It would be strange if countermeasures were considered lawful under international law when they implied a breach by the State taking countermeasures of obligations that affected several other States, and particularly the international community as a whole. There should be a general rule stating that when the obligation breached affected the international community as a whole, countermeasures were prohibited. That would cover many of the cases in proposed new articles 47 bis and 50, certainly those in article 47 bis, subparagraphs (a), (d) and (e) and in article 50. While it would be difficult to delete all the examples in article 50 adopted on first reading, one or two could be kept and a more general statement could be included. Unlike Mr. Pellet, he had no problems with the separate references to inviolability of diplomatic agents and to obligations concerning dispute settlement.

20. Paragraph 84 of the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case stated the requirement of *sommation*, formal notice, before countermeasures were taken, which implied that a period of time had first to elapse. It would be useful to indicate in article 48, paragraph 1, that an offer to negotiate formed part of the process of giving notice. He was not convinced of the need for subparagraph (b), as it might be counterproductive to inform the responsible State of the exact countermeasures that were to be taken.

21. The wording on notification in article 48, paragraph 2, denied the need for *sommation* and was also imprecise. He favoured the alternative version proposed in the footnote to article 48 to which some elements could be added.

22. Mr. CRAWFORD (Special Rapporteur), referring to what Mr. Gaja had said about obligations affecting the international community, said he wondered whether the draft articles could be interpreted as saying that countermeasures could be taken only in respect of the bilateral obligations in force between the responsible State and the injured State. If that was the case, the only exclusions required were those in articles 47 bis and 50, inviolability of diplomatic or consular agents and settlement of disputes and, possibly, domestic jurisdiction.

23. Mr. ROSENSTOCK said he had been surprised to hear, in an otherwise convincing presentation, that in addition to giving notice, States had to let a period of time elapse before taking countermeasures. That idea did not seem to be in any way reflected in customary law and merely created more problems than it solved. As long as a demand was made, the law clearly supported the right of the injured State to take countermeasures, not some fancy permutation of the judicial requirements for temporary measures.

24. Mr. GAJA said that, if the Commission wished to engage partly in progressive development of the law, it could stipulate that only bilateral obligations, in the sense of obligations solely towards the responsible State, could be breached by countermeasures. That would also be the

case with obligations under multilateral treaties when multilateral treaties gave rise in practice to a series of bilateral relations. That would arguably restrict countermeasures further than what was now customary international law. Responding to Mr. Rosenstock, he noted that there was no reason why the draft should not say that a period of time was necessary before countermeasures could be taken. The responsible State should not be allowed to play for time to avoid the consequences of its acts, but neither should actions be taken against that State suddenly, before it had even been notified of the invocation of responsibility.

25. Mr. CRAWFORD (Special Rapporteur) said he entirely accepted the criticisms of article 48, paragraph 1 (b), and had no objection to deleting it. He had included it simply because it was part of a coherent proposal made by France that seemed to represent a useful compromise in that area.

26. Mr. KAMTO said that, like some other members of the Commission, he had reservations about countermeasures, primarily because he viewed them as a step backwards at a time when the trend was in the opposite direction, towards the regulation of international relations through dispute settlement machinery, including judicial machinery. It seemed curious that, precisely when international legal institutions that could settle disputes among States at all levels were springing up everywhere, the Commission should be giving States the right to step in and, in some way, take their place. Further, he was not convinced that there was a sufficient basis in general customary law for countermeasures. Recent practice had emerged on the basis of the actions of some States, but it was far from what was traditionally understood as customary law.

27. There was perhaps no point in re-opening the debate on the principle of whether countermeasures should be included in the draft. The question had already been discussed at length and resolved. The subject was politically sensitive, however, and it was therefore important for countermeasures to be clearly delineated before the relevant legal regime was established. Could countermeasures be assimilated to known institutions like reprisals, retortion, reciprocal measures and sanctions? Within that range of measures, countermeasures occupied a very narrow space. It was totally artificial, for example, to try to entirely dissociate countermeasures from sanctions. Paragraphs 290 and 296 of the report detailed some of the concerns expressed by Governments in that regard, and yet the Special Rapporteur himself adopted the opposite viewpoint in paragraph 287. A measure was punitive on the basis, not of its origin—an individual act of a State or a collective act—but of its effects, and of the way it was perceived by the addressee. How could a decision by the United Nations or the European Union to impose an embargo for failure to respect obligations under a human rights treaty be in the nature of a sanction, while a decision taken by a State on the same grounds was not? If Governments were asked how they viewed countermeasures, he was sure they would say they saw them as nothing more nor less than sanctions.

28. As for reciprocity, suspension and above all termination of a treaty as a consequence of a material breach, within the meaning of article 60 of the 1969 Vienna

Convention, had the effect of wiping out the norm, either temporarily or permanently. Countermeasures, on the other hand, were a reaction to a breach that had no such effect: the treaty obligations were undermined but could still be invoked, and the treaty remained in force.

29. Compared to retaliation, which was lawful *ab initio*, countermeasures were unlawful *ab initio* and were made lawful only by the wrongful act to which they were a response. Unlike reprisals, countermeasures could never be military in nature. Armed reprisals had been admitted only at a time when the ban on the use of force had not yet been enunciated as a fundamental principle of international law. The non-use of force was now unequivocally laid down in the Charter of the United Nations. Countermeasures were thus non-military reprisals that could, or could not, have a sanctioning or punitive character. The term “countermeasures” was generic, neutral and thus acceptable to States as covering, at least partially, the two notions of reprisals and sanctions. States had been able to adopt reprisals and sanctions in the anarchy that had prevailed until the early part of the twentieth century, but that was no longer the case today. Countermeasures had emerged in the late 1970s and early 1980s, a time of a considerable weakening of the Security Council’s authority and of a parallel expansion of what had been called “private justice”. That must not be forgotten in seeking to develop the relevant regime.

30. The main issue was how to ensure that, when exercising countermeasures, a State that considered itself injured did not act as if it was an impartial third party, and that countermeasures did not impede or complicate the peaceful settlement of disputes? Chapter III, section D, of the report did not offer an entirely satisfactory answer to those questions, although it did represent an improvement over previous reports on the subject.

31. The principle of recourse to countermeasures and the notions of interim countermeasures and proportionality were all sources of possible disagreement between the State that considered itself injured and the allegedly responsible State—responsibility being something that still remained to be determined. The reputedly injured State could not resolve the disagreement unilaterally, by taking full-scale countermeasures, for example. Resolution could be achieved only through the machinery for peaceful settlement of disputes, ranging from negotiation to judicial proceedings. That was why, in his view, the adoption of countermeasures was inextricably tied in with the peaceful settlement of disputes, but according to the Special Rapporteur that was not so. In paragraph 287, the Special Rapporteur said that there should be no special linkage between countermeasures and dispute settlement, as such linkage gave the allegedly responsible State a one-way right to invoke third party settlement, yet such a right must also be given to the injured State in lieu of taking countermeasures. Why should the injured State consider that it was deprived of the right to resort to third party settlement? If there was a possibility, as outlined in paragraph 299, that the allegedly responsible State would prolong negotiations and engage in dilatory procedures, then he could understand the need to provide in certain instances for countermeasures. But he could in no sense go along with the delinkage of countermeasures and peaceful settlement of disputes.

32. In fact, he was in favour of establishing in Part Two a fully-fledged, comprehensive legal regime for countermeasures. The basic idea must be that countermeasures could be adopted solely to contribute to the proper functioning of the dispute settlement process or to the enforcement of the decisions emerging from that process, and never to obstruct the application of the resulting decisions. In fact, it would be more in keeping with contemporary international law for decisions—and not orders—to impose “interim” measures to be taken on an emergency basis by a third party capable of issuing binding injunctions. That was the role now being played with success by the International Tribunal for the Law of the Sea. The fact that ICJ did not have such powers was regrettable and might be cause for proposing a revision of its Statute and Rules of the Court. But any international arbitral tribunal could make an emergency ruling if the parties so requested. Further, nothing prevented two States that had agreed on the basis of a special agreement to bring a case before the Court from stipulating that any “interim” measures imposed by the Court would be binding upon them. Hence there was a whole range of emergency procedures obviating the need for countermeasures which, in the hands of certain States, could represent a clear threat. Again, countermeasures could be disproportionate, but what if the allegedly responsible State proved not to have been responsible after all? Provision had to be made for reparation—reparation that had to be decided by an impartial third party.

33. Countermeasures could be adopted either before the dispute settlement machinery was initiated, and with the proviso that their validity was subsequently reviewed by an impartial third party, or after the dispute was settled, in order to ensure that the decision adopted by the third party was put into effect. On that understanding, he wished to offer the following comments on the draft articles themselves.

34. In article 47, paragraph 1, he proposed the insertion of the words “or flowing from a binding decision by an impartial third party” after “under Part Two”. For the French version of article 47 bis, subparagraph (a), he endorsed the proposed change from *prévues dans* to *conformément à*. In subparagraph (c), the words “third party” should be deleted, to give the provision broader coverage.

35. It would indeed be useful to transpose subparagraphs (a) and (b) of article 48, paragraph 1, and he thought the words “responsible State” should be replaced by “State considered responsible” for the reasons he had given earlier.

36. He had particular difficulty with article 48, paragraph 2, because it laid down no actual conditions relating to recourse to countermeasures. If retained, it should be reformulated to include a phrase such as “in an emergency” or “if the situation so requires” and to omit the word “provisionally”. He would also favour adding the phrase “in accordance with article 47, paragraph 2” and omitting the phrase “as from the date of the notification”: there was no justification for taking countermeasures hard on the heels of a notification, even if they were interim. Indeed, he doubted the validity of “interim” countermeasures: either they were countermeasures or they were not. If his proposal was accepted, paragraph 3 should naturally

be deleted and paragraph 4 would become paragraph 3. He would then advocate a new paragraph 4, consisting of a reformulation of article 50 bis, paragraph 2, which belonged rather in article 48. He suggested wording along the following lines:

“A State may implement such countermeasures as may be necessary to ensure the execution of decisions made by a third party under a dispute settlement procedure, if the responsible State does not conform with that decision.”

37. As for article 49, it served to reinforce the need for a dispute settlement mechanism, because proportionality could not exist in a vacuum: some body would be needed to assess and monitor it.

38. There was no reason to retain article 50, at least not as a separate article: its title represented a logical impossibility. It could be entitled “Prohibited conduct” or “Countermeasures”; but, by definition, countermeasures could not be prohibited. The solution was to include the provisions of article 50 in article 48. Moreover, with regard to subparagraph (a), the rendering of “domestic jurisdiction” in the French version was not felicitous. The term *domaine réservé* could cause controversy, since its meaning was highly debatable. He would prefer *juridiction interne*. The sole change he envisaged to article 50 bis was to transfer paragraph 2 to article 48 and renumber paragraph 3.

39. Mr. GOCO said he endorsed Mr. Kamto’s realistic approach. The question was indeed in what circumstances a State could be deemed an injured State. The world was full of situations in which there was an incursion by one country into another’s territory, airspace or exclusive economic zone, giving rise to allegations and counter-allegations. There was often no question of referring the matter to a third party. Article 48, paragraph 2, however, required the injured State to notify the responsible State of countermeasures it intended to take. That was to ignore the harsh realities of life: a countermeasure was a measure of self-help. There was a stark difference between the thrust of article 48 and the original proposition in article 30: the former envisaged temporary measures, while the latter was applicable if a State adopted countermeasures in response to another State’s breach of its international obligations. He therefore wondered whether article 30 should still be retained.

40. Mr. PAMBOU-TCHIVOUNDA said that he had been struck by one implication of Mr. Kamto’s comments: the need to ensure that the State deemed responsible really was so. Responsibility must be established before countermeasures could be valid. If it was subsequently found not to be justified, a difficult situation would arise: countermeasures could not be founded on presumed responsibility. If responsibility was not established, the very system of regulating interim countermeasures might, by residing on presumption, be harmed. A situation might even arise in which the State claiming to be the injured party turned out to be the one responsible for the breach. That possibility should be covered by the draft articles.

41. Mr. ROSENSTOCK, while partly endorsing Mr. Pambou-Tchivounda’s point, said he would go further. Mr. Kamto could not accept article 47 because it presupposed

wrongfulness, yet was equally unable to accept draft article 50 because it did not presuppose wrongfulness. That displayed an uncharacteristic lack of logic, which suggested the Commission was adopting a biased approach to a difficult problem that was perhaps simply a realistic reflection of the current state of the world. Not everybody accepted the compulsory jurisdiction of ICJ and there existed no dispute settlement mechanism covering all regions. Countermeasures or reprisals of some kind were bound to be adopted. The question was, therefore, whether it was possible to find a basis for agreement that would keep such action under some sort of control in an organized fashion that did not favour some groups over others. Unless such agreement was reached, the whole attempt to develop a dispute settlement mechanism would collapse.

42. Mr. GOCO questioned whether the right approach had been adopted. Settlement of a dispute was clearly the best solution, if possible, but, in a case such as the border war between Ethiopia and Eritrea, the process of observing the provision in article 48, paragraph 2, could result in further action by the responsible State. The alternative, however, seemed to be to recognize unilateral action by the allegedly injured State.

43. Mr. KAMTO said he did not deny he had expressed strong views on the principle of countermeasures, but they took account of the realities of the international scene. It was incorrect to say that he had dismissed the possibility of interim countermeasures. The question, however, was under what conditions and in what situations they should be adopted. Nor did he believe that ICJ was the only recourse for an injured State: States had been known to have recourse to arbitration. Lastly, he was not opposed to article 50 as a whole; he merely objected to its illogical title. That problem could be solved by incorporating its provisions in article 48.

44. Mr. CRAWFORD (Special Rapporteur) said that realism appeared differently to different people. Mr. Kateka had accused him of being too realistic in assuming that the draft articles could not become a treaty with a system of compulsory jurisdiction. Although, however, he would obviously favour such an outcome, because it would be satisfying to have his work consolidated, it was difficult to envisage realistically. The task before the Commission, if the Commission decided to provide for countermeasures more fully than under the general provision in article 30, was to establish a relationship between them and dispute settlement that would fit in with the slow but general and discernible development in the direction of the availability of third party settlement. It would not, for various reasons, be possible to establish a new and automatic link between the taking of countermeasures and dispute settlement, but articles could be drafted that would fit into existing and developing systems of dispute settlement, so that a State which was credibly alleged to have committed a breach of international law would be in a position to prevent any countermeasures by stopping or suspending the action and submitting the case to a court. That was the effect that the provisions in the draft articles should achieve.

45. Mr. LUKASHUK said he fully shared Mr. Kamto’s concern regarding the peaceful settlement of disputes, but

feared that his approach would require the reconstruction of whole branches of international law. It was quite unrealistic. At the same time, he could not accept the Special Rapporteur's characterization of himself as realistic: even the slightest of the limitations that he proposed was markedly idealistic in comparison with contemporary practice. If Governments approved even a minimum of the proposed provisions, that would constitute a signal success for the Commission and an important step in the progressive development of international law.

46. Mr. Sreenivasa RAO commended the way in which the Special Rapporteur had charted a path through the myriad complexities of the topic, which was replete with nuances and permutations that might never be fully captured. As an added complication, it was deeply enmeshed with policy. The situation of colonial days was not relevant, since times had changed, but it did colour the whole international approach to countermeasures. The previous Special Rapporteur, Mr. Arangio-Ruiz, had believed that the potential for abuse was such that the more sensible approach was to subsume it in the broader topic of State responsibility. If it was fully covered, a whole residuary system of international law would be involved. *Lex specialis* might even be applicable. Moreover, provision for the consequences of an improper application of previous provisions would be needed. He questioned whether a second level of safeguards was required.

47. On the other hand, the view that countermeasures were bound to be taken and that provision must therefore be made to ensure a certain level of reasonableness seemed to have gained ground. He would not say categorically that countermeasures were unfit for legal consideration. States were sometimes compelled to resort to minimum measures of protection. Such measures should, however, be restricted to sanctions, and only in accordance with the Charter of the United Nations, involving such action as freezing bank accounts, denying economic aid or suspending treaty rights and obligations. In the case of human rights violations, action might include resolutions by the Commission on Human Rights or the identification of abuses by a special rapporteur. The examples he had given tended to illustrate that the passionate advocacy of one approach or another was out of proportion to reality, although he acknowledged that the Commission's debates had enabled ICJ, in its consideration of the *Gab Ž kovo-Nagymaros Project* case, to enunciate four propositions that would, in turn, provide the Commission with further guidance. Whether the Commission could proceed to actual codification, however, was another matter.

48. Statements made by States in the Sixth Committee were much more reasonable and pragmatic than some of those made within the Commission, where the temptation was to match one impassioned statement with another. The pragmatism of States, however, was the example to follow: they might make claims but ultimately they compromised. He therefore questioned the usefulness of cut-and-dried propositions on countermeasures. Indeed, no harm would be done if the topic of countermeasures were eliminated altogether from the topic of State responsibility.

49. No one would dispute that countermeasures should be a measure of last resort—"a necessary evil", in Mr. Pellet's words. Thus, if countermeasures were seen as an

exception to the general rule whereby the claimant could not be the judge and enforcer of his own cause, the draft articles must place as many reasonable hurdles as possible in the way of States that might otherwise be tempted to have overhasty recourse to such measures. Hence the emphasis placed, in the draft articles adopted on first reading, on the linkage between countermeasures and dispute settlement. That emphasis needed to be brought out even more strongly in new article 48 proposed for the second reading, and dispute settlement must not be presented merely as an option. In that connection, he noted that article 48, paragraph 4, seemed redundant, as it merely stated the obvious truth that, where a dispute settlement procedure was in force, States must avail themselves of it before resorting to countermeasures. However, if retained, article 48, paragraph 4, should logically be placed before paragraph 3, as advocated by Mr. Pellet and others, so as better to reflect the natural sequence of events. Likewise, article 48, paragraph 1 (b), with its requirement of notification, should not, as the Special Rapporteur had suggested, be deleted, as it set forth a logical sequence of events, and might also enable the responsible State to focus on the most significant of the injured State's grievances. As to subparagraph (c), he endorsed the proposal to replace the word "agree" with the word "offer". In subparagraph (a), the words "reasoned request" should be replaced by "written claim".

50. The problem was that the corpus of international law to which an injured State could have recourse was a highly sophisticated body of law, comprehensible to its creators and practitioners, but rarely to the 180 or so States governed by its provisions. Hence, States did not heed their legal advisers, but instead adopted their own approach, availing themselves of internal institutions by which they were usually better served. In short, the process of codification of international law had not yet been successful: when it came to application and interpretation, doubt had even been cast on the Charter of the United Nations, a text drafted with the utmost clarity. *Jus cogens* was a sealed box, and no one was really sure of its precise contents. Thus, except where rights and obligations had been directly negotiated in the form of a bilateral or multilateral treaty, a corpus of international law from whose development and enforcement the majority of States felt excluded had only very limited application.

51. It was hard to see how a structure that had established *erga omnes* and *jus cogens* obligations, thus positing the existence of a higher order of law, could also permit unilateral actions whereby a State could take the law into its own hands. In such a scheme, an international community seemed sometimes to exist, sometimes not to exist. The real choice, though, was between a global, albeit idealistic, regime and an international free-for-all. No middle course was possible. A balance must be struck, in the treatment of countermeasures, between the interests of the injured State, those of the responsible State and those of the international community.

52. Articles 48 and 50 played a useful role in limiting States' freedom to take countermeasures, as did article 47. In his view, however, articles 47 and 50 should be merged. As worded, the *chapeau* to article 47 bis seemed to suggest that suspension of the obligations enumerated thereafter was a matter for the State's discretion. If that was not

the intention, the *chapeau* should be more strongly worded so as to dispel that impression. Likewise, in subparagraph (a), a stronger term than “embodied” should be found. There seemed also to be an overlap between article 47 bis, subparagraph (a), and article 50, subparagraph (a): a better overview of the conditionalities applicable to countermeasures might perhaps be obtained by combining those two articles.

53. Despite the disadvantages to which the Special Rapporteur had drawn attention, reciprocal countermeasures were to be encouraged wherever feasible. Greater prominence should be given to that idea in the text of the draft articles, not merely in the commentary.

54. A further issue addressed by the Special Rapporteur was the question of the reversibility of the countermeasures as a criterion for their lawfulness or reasonableness. Reversibility was a criterion that had been endorsed by ICJ, as the Special Rapporteur noted in paragraph 289 of his report; and the Commission should echo the work of that organ, just as the Court echoed that of the Commission. Further consideration should be devoted to the question, at least in the Drafting Committee. Moreover, in his submission, reversibility was not to be equated with suspension, but should be seen as a very important criterion in its own right.

55. His third proposition was that the draft articles on countermeasures should be brought into play only where *jus cogens* obligations were involved or a gap needed to be filled. They should never serve as a substitute for other self-contained regimes created by States, which, imperfect as some of them might be, must be honoured and allowed to evolve within the overall structure of international law.

56. Special prominence must also be given to the idea that countermeasures must not violate basic human rights. Protection of human rights must be a fundamental condition where countermeasures were resorted to, not just an issue tacked on to the quite separate issue of third party rights.

57. Lastly, on proportionality, ICJ had noted, in the *Gabčikovo-Nagymaros Project* case, that countermeasures must be commensurate with the injury suffered, taking account of the rights in question. The Special Rapporteur, however, now proposed that countermeasures must be “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effect on the injured party” (art. 49). He had not had time to reflect carefully on the question, but his first impression was that those two approaches were quite different. The matter undoubtedly merited further consideration. Finally, while countermeasures could legitimately be resorted to as a means of inducing the other party to comply with its obligations, they must, of course, be kept entirely separate from the quite different issue of punitive sanctions.

58. Mr. KUSUMA-ATMADJA said he wished simply to refer to the point made about the reversibility of countermeasures as a criterion for their lawfulness. Events moved so fast on the world scene that countermeasures might well, in some instances, prove irreversible.

The meeting rose at 1.05 p.m.

2648th MEETING

Friday, 28 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DUGARD said that international lawyers disliked countermeasures and reprisals because they reminded them that the system in which they worked was primitive and lacked the means for law enforcement which existed in domestic legal systems. That probably explained why textbooks on international law often failed to mention reprisals or countermeasures. Yet they constituted a fact of international life or, as Mr. Sreenivasa Rao had said, a necessary evil and it was therefore up to progressive international lawyers to curb their excesses. The Commission seemed to agree on that. It must therefore adopt provisions which sought to restrict the scope of countermeasures, while recognizing their existence as an unfortunate fact of the international legal order. The draft articles proposed by the Special Rapporteur in his third report (A/CN.4/507 and Add.1–4) would achieve that goal, subject to some changes.

2. The text of article 47 adopted on first reading was a model of inelegance and he was delighted that the Special Rapporteur had substantially redrafted it. Personally, his only regret was that the final sentence had been retained, but the Drafting Committee should be able to recast it to make it clearer and more polished.

3. The Special Rapporteur had rightly rejected the notion of reciprocal countermeasures. In practice, it was virtually impossible for countermeasures to match the obligation that had been breached. For example, in South

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

Africa, in 1984, during apartheid, six leaders of the anti-apartheid movement had taken refuge in the British consulate in Durban. The South African Government had argued that the granting of asylum to political refugees in the consulate violated the Vienna Convention on Consular Relations. In retaliation, it had reneged on an undertaking to return four South Africans to the United Kingdom to stand trial on charges of violating the arms embargo ordered by the British Government. That illustrated the practical difficulty of making countermeasures fit the alleged violation.

4. He endorsed Mr. Sreenivasa Rao's views on the reversibility of countermeasures. Although the Special Rapporteur approved of it in principle, he declined to mention it expressly in article 47, paragraph 2. In his own opinion, it would be wise to refer to it specifically in article 47 and it was therefore an issue for the Drafting Committee.

5. Turning to articles 47 bis and 50, he said that he understood the reasons, spelled out by the Special Rapporteur in paragraph 334 of the report, for separating the two provisions. Article 47 bis dealt with the subject of countermeasures, whereas article 50 discussed their effect. Nevertheless, like most of the members who had commented on the draft articles, he considered the two provisions to be so closely related that they should be amalgamated, but, if that was not possible, they should be situated side by side. Furthermore, the title of article 50 did not tally with its contents and the heading proposed by Mr. Simma, "Prohibited effects of countermeasures" seemed more appropriate. The Drafting Committee could settle that question and, similarly, in article 47 bis it could try to eliminate the repetition of the word "obligations".

6. Article 50 gave rise to more difficulties. First of all, there was a need to separate human rights from third-party rights in two distinct subsections. Most countermeasures inevitably had some adverse impact on some human rights, particularly in the social and economic field, but he was not sure whether the word "basic" was helpful in that respect. As Mr. Simma had suggested, moreover, a clause prohibiting countermeasures that endangered the environment should be included.

7. Article 50, subparagraph (a), proposed by the Special Rapporteur was hardly satisfactory. It would be preferable to return to article 50, subparagraph (b), adopted on first reading. Notwithstanding the difficulty of defining "extreme", the expression "territorial integrity or political independence" should be retained, since it was important and frequently occurred in General Assembly resolutions. The principle of respecting territorial integrity and political independence was valued by developing nations and, in any case, the former wording was clearer. The word "intervention" was notoriously difficult to define and the expression "domestic jurisdiction" was unfortunate, because in English it was reminiscent of a bygone era in which Article 2, paragraph 7, of the Charter of the United Nations was used to trump international law in all circumstances. It had no place in a modern text and so it would be preferable to return to the wording adopted on first reading.

8. As far as the other articles were concerned, he had no objection to articles 49, 50 bis and 30 and he approved of

article 48, subject to the substitution of the word "offer" for the word "agree" in paragraph 1 (c). All those draft articles could be referred to the Drafting Committee.

9. Mr. ELARABY said that the notion of "counter-measure" was highly controversial and, as a matter of principle, he was personally allergic to it, since countermeasures underlined the imbalance and even widened the gap between rich and powerful States and the rest. Having represented his country on the Security Council for two years, he had first-hand knowledge of how easy it was for the most powerful States to impose their will on the international community. It was nevertheless necessary to face up to reality. In the modern-day world, countermeasures were used and abused and were to some extent recognized by customary international law. The Commission therefore had to draft a watertight regime for them.

10. An incident in 1964 offered a fine example of a reciprocal, proportionate and reversible countermeasure. During the troubles in the Congo, the Congolese Government had decided to place the Egyptian Ambassador to the Congo under house arrest. When Mr. Tschombe had been passing through Egypt a short time later, he had been put under house arrest by the Egyptian Government. He had been released when the Egyptian Ambassador had been released.

11. As for the draft articles proposed by the Special Rapporteur, like Mr. Pellet and for the reasons given by him, he would personally prefer article 47 to be drafted in the negative: "Countermeasures may not be taken unless ...". Furthermore, it would be desirable for paragraph 1, to end after the words "those obligations" because the wording that followed was imprecise and added nothing.

12. The prohibition of the use of force or threat of the use of force, a cardinal principle of contemporary international law, should be expressly mentioned in article 47 bis, subparagraph (a). The phrase "within a reasonable time" should be deleted from article 48, paragraph 3. He agreed with Mr. Dugard's comments on the countermeasures referred to in article 50 and hoped that the previous formulation "territorial integrity and political independence" would be reinstated. Lastly, he endorsed the point of view on article 30 expressed by the Special Rapporteur in paragraph 366 of his report.

13. Mr. ADDO said that there could be no denying that the regime of countermeasures was more favourable to powerful nations. The Special Rapporteur himself had noted in paragraph 290 of his report that Governments, in their comments on whether to retain the provisions on countermeasures, i.e. articles 47 to 50, had referred to the unbalanced nature of countermeasures, which favour only the most powerful States. It was therefore not surprising that former Special Rapporteur Riphagen had observed that, when devising the conditions of lawful resort to such actions, the Commission should take care to ensure that the factual inequalities among States did not unduly operate to the advantage of the rich and strong over the weak and needy. It was therefore essential to craft a balanced regime of countermeasures which would be of greater utility in curbing the excesses that some people feared than keeping quiet and pretending that the problem did not exist. As the Special Rapporteur had said, to do noth-

ing about countermeasures would be courting disaster. In view of the current position with regard to international law and international relations, States had to retain the right to take countermeasures in response to acts committed in violation of their legal rights. The complaint invariably levelled against international law was its lack of effective enforcement because of an absence of compulsory judicial process and the limited power of international institutions to impose sanctions on those who violated the law. That was inevitable in a divided world.

14. General international law allowed countermeasures under certain conditions and within the limits of necessity and proportionality. Nonetheless, judicial and arbitral decisions on countermeasures had been rare and scholarly analysis had been relatively sparse. State practice, although abundant, had not shed much light on the circumstances in which retaliation might be authorized or on the precise limits of countermeasures. Admittedly a preference for peaceful settlement rather than countermeasures had been expressed, but little had been said about the relationship between the two. Non-violent self-help and non-forcible countermeasures would certainly remain an important feature of international law and might grow as the network of international law and obligations expanded. The more laws there were, the greater the likelihood of violations and counteraction by those who believed that they were injured, but lacking in any other means of redress. Measures such as trade embargoes, the freezing of assets, the suspension of treaty obligations and the expulsion of foreign nationals confirmed that observation. The *Air Service Agreement* case offered an illustration of one way of enforcing international law, namely, by self-help. The term “countermeasure”, which had been used for the first time in that case, had more recently replaced the word “reprisal”, most probably because of the latter’s pejorative connotation, because it covered armed reprisals, which had become illegal.

15. A countermeasure was therefore an illegal act rendered lawful by the fact that it was a response to a prior illegal act. That was how he construed article 30 of Part One of the draft .

16. According to the *Naulilaa* case, which seemed to be the *locus classicus* of the law on reprisals, the object of a reprisal must be to elicit reparation from the offending State for the offence or a return to legality by the avoidance of further offences. It was lawful only when preceded by an “unsatisfied demand” for reparation or compliance. Countermeasures involving the use of armed force were certainly prohibited by virtue of Article 2, paragraph 4, of the Charter of the United Nations.

17. Turning to the draft articles proposed by the Special Rapporteur, he said that he approved of the incorporation of countermeasures in chapter II of Part Two bis, but those provisions called for some comment. He recommended the deletion of article 47, paragraph 2. Nothing would be lost if it disappeared and, on the contrary, if it were retained, it might create confusion and cause interpretational problems. It might also prove unduly restrictive, owing to the limitations inherent in it.

18. Since no departure was ever allowed from the rules of *jus cogens*, was there any reason to keep article 47 bis,

subparagraph (e)? On the other hand, the Commission might wish to retain it *ex abundante cautela*. As for subparagraph (c) referring to obligations concerning the third-party settlement of disputes, he considered that, when States had undertaken to settle their disputes peacefully, the responsible State must, as a general rule, be allowed sufficient opportunity to make redress. No hasty decisions should therefore be taken after the submission of a demand. Accordingly, if the two States in question had given a formal undertaking to settle their dispute peacefully, recourse to countermeasures by either must be regarded as unlawful. In some situations, however, settlement machinery might prove to be inadequate. In that event, an aggrieved State might justifiably resort to countermeasures under customary international law. Such a course of action was possible because the principle of countermeasures retained, from the point of view of applicability, a separate existence from the rule concerning the settlement of disputes in treaty law.

19. The Special Rapporteur’s analysis demonstrated that countermeasures would be legal if: (a) a breach of an international obligation had occurred; (b) the demand of the injured State had been vain; and (c) the countermeasures of the injured State complied with the principle of proportionality.

20. Article 48 established in principle that countermeasures must always be preceded by a demand which had been made by the injured State, but which the responsible State had disregarded. Although there was no hard and fast rule regarding the content of the demand, it had to be expressed in such clear terms that the responsible State could not fail to understand it or the serious implications involved. Contrary to what was stated in paragraph 1 (b), the injured State should not be obliged to announce the nature of the countermeasures it intended to take. In paragraph 1 (c), it would be better to say that the injured State must “offer to negotiate”, for it was up to the responsible State to accept the offer or to reject it and thereby lay itself open to countermeasures.

21. As for paragraph 4 on the injured State’s obligations in relation to dispute settlement, the principle of good faith required that a State which had undertaken to submit a dispute to arbitration or judicial settlement should not break its word by engaging in unlawful acts. Once the arbitration or judicial proceedings were under way, recourse to countermeasures should no longer be automatic for, in those circumstances, such measures could frustrate the judicial process. That was probably why the Special Rapporteur had drawn up paragraph 4. But he had not solved all the problems. When States belonged to an institutionalized framework like ECOWAS or OAU, which prescribed peaceful settlement procedures, the State concerned certainly had to exhaust those procedures before it took countermeasures. Throughout that period of time, its right to resort to countermeasures was simply in abeyance and could be revived if the institutional framework proved ineffective. For example, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ, in its order of provisional measures, had required the Islamic Republic of Iran to terminate the detention of the hostages and certain other unlawful acts, but the Islamic Republic of Iran had ignored the order for the remainder of the proceedings. Clearly, the Court had

not afforded an adequate remedy in that instance. For that reason, a situation might well arise in which it was necessary to maintain countermeasures during litigation, when the tribunal was unable to bring about a cessation of the injury stemming from the violation at issue in the case.

22. He unreservedly approved the principle embodied in article 49 and the formulation of that provision. Determining the criterion for judging proportionality was, however, likely to present some difficulties. He was also in agreement with article 50, subparagraph (a), but, as far as subparagraph (b) was concerned, he thought that countermeasures consisting of the imprisonment or torture of nationals of the offending State, for example, had to be viewed as unlawful because they contravened established human rights standards. When examining the lawfulness of countermeasures, should a distinction be drawn between various categories of human rights? There was consensus that a State engaging in countermeasures could not violate the physical integrity of nationals of the responsible State. But, for example, if the free movement of the nationals of one State had been restricted by another, was it lawful for the first State itself to impose similar constraints on the nationals of the second? Did the Special Rapporteur perhaps have an answer to that question?

23. Moreover, article 50, subparagraph (b), referred to the rights of third parties. The growing economic and political interdependence of States signified that countermeasures taken against a State might have unintended repercussions on innocent third parties. Did injury to third parties or their property affect the legality of countermeasures? Should the Commission elaborate rules to settle that matter? Were injured third parties entitled to resort to countermeasures in their own right and, if so, against whom? The original injured State or the original offending State? Those were very difficult dilemmas the Drafting Committee might like to ponder.

24. Lastly, he endorsed the principles embodied in draft articles 47 to 50 bis. In his opinion, those provisions should be sent to the Drafting Committee.

25. Mr. GOCO said that he was not sure what was meant by "basic human rights" in article 50, subparagraph (b). Two covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, guaranteed civil, political, economic, social and cultural human rights. Which of those rights had to remain intact for a countermeasure to be lawful?

26. Mr. ADDO said that that was the very question he had raised. While torture was plainly an unlawful countermeasure, it should be permissible to impose restrictions on the free movement of nationals of the responsible State. He quoted the example of the expulsion of Nigerians by Ghana in 1969, followed by the expulsion of Ghanaians by Nigeria in 1983.

27. Mr. KAMTO said that it was hard to regard the expulsion of the Ghanaians by Nigeria as a countermeasure because it had occurred more than 10 years after the first event.

28. Mr. CRAWFORD (Special Rapporteur) said that the rules relating to human rights which were contained in

multilateral treaties had to be coordinated with the law relating to countermeasures. The distinction drawn by Mr. Addo was pertinent, but human rights did have to be protected against the effects of countermeasures. He personally advised the Commission to reserve its position on whether there were fundamental rights from which countermeasures could derogate in certain circumstances and other rights which were non-derogable.

29. Mr. MOMTAZ said that, on the whole, the Special Rapporteur had succeeded in establishing a sound balance between the interests of the injured State and those of the State committing the unlawful act. It was fairly clear from his report that, although countermeasures might be deemed lawful in international law, subject to certain limitations, they should only ever be adopted as a last resort. The purpose of the new articles was to preclude the abuse of countermeasures by introducing substantive and procedural restrictions on the freedom of the injured State to have recourse to them.

30. The enumeration of substantive limitations began in article 47 with the actual definition of the purpose of countermeasures. Paragraph 1 of that article posed hardly any difficulties because it stated that the aim of countermeasures was to induce a State which was responsible for an internationally wrongful act to comply with its obligations, in other words, they should not be of a punitive nature. The question might, however, arise if a violation of international law constituted a crime. The Commission would have the opportunity to return to that issue at a later stage in its work.

31. Article 47 bis itemized the circumstances in which the injured State could not resort to countermeasures. The non-exhaustive list in that article could be shortened, as some of the situations it covered partly overlapped. Subparagraphs (a) and (e) were a case in point; it would be sufficient to speak of "peremptory norms of general international law". The obligations as to the threat or use of force, referred to in subparagraph (a), were embodied in the Charter of the United Nations and were therefore indubitably a peremptory norm of international law. The same was true of the diplomatic immunities mentioned in subparagraph (b), which were certainly of a peremptory and inviolable nature. ICJ had been quite definite about that.

32. Perhaps it should be made clear that the obligations of a humanitarian character mentioned in subparagraph (d) encompassed provisions of both international humanitarian law and human rights law. In both cases, reprisals against persons protected by those bodies of rules were banned. Plainly, subparagraph (d) was based on article 60, paragraph 5, of the 1969 Vienna Convention, which prohibited the termination of provisions "relating to the protection of the human person contained in treaties of a humanitarian character". That clause unquestionably reflected a well-established international custom. It was interesting to note that in 1970, long before the entry into force of the Convention, ICJ had referred to it in its advisory opinion in the *Namibia* case.

33. Having noted that there was a logical link between article 47 bis and article 50, which both related to prohibited countermeasures, he regretted that article 50,

subparagraph (b), no longer referred to countermeasures which endangered the political independence of the State responsible for the wrongful act. In paragraph 352 of his report, the Special Rapporteur justified that deletion by asking how countermeasures could endanger the political independence of the offending State. The question could well arise if the injured State was the main trading partner of the responsible State and refused, as a countermeasure, to buy that State's output, that of a monoculture, for example. The ensuing loss of revenue might certainly endanger the political independence of the responsible State.

34. The reference in article 50, subparagraph (b), to "basic human rights" was likely to give rise to some problems. What did "basic rights" really mean? They might be human rights from which no derogation was ever possible, but that was not always the case. For example, article 11 of the International Covenant on Economic, Social and Cultural Rights qualified the right of everyone to be free from hunger as "fundamental". There was therefore a temptation to say that, pursuant to article 50, subparagraph (b), countermeasures which would cause famine among the civilian population of the State which had committed the wrongful act should be prohibited because they infringed a fundamental right.

35. In that connection, it was pertinent to note that article 23 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, required each High Contracting Party to allow the free passage of all consignments of medical and hospital stores intended for civilians of another High Contracting Party, even if the latter was its adversary. That article unquestionably reflected a well-established custom. Measures designed to interrupt the dispatch of such products in wartime and, *a fortiori*, in peacetime would therefore be prohibited.

36. Again with reference to article 50, he had very serious misgivings about the example mentioned in the last footnote to paragraph 347 of the report. The right of the navies of belligerent States to inspect, on the high seas, merchant vessels flying the flag of a neutral State to make sure that they were not smuggling war contraband to enemy territory had absolutely nothing to do with the topic under consideration. In the French text, moreover, the term *droit de poursuite* was inappropriate, for it had a very different meaning in the law of the sea. If that footnote was to be retained, it should be reworded.

37. Turning to "procedural" restrictions on countermeasures, he considered that Mr. Simma's question whether provisions on the settlement of disputes should be included in the draft articles had been apposite. Disputes could nevertheless arise between States concerned by the countermeasures about the nature of the act attributed to the State against which those measures had been taken. Such measures could be justified only when they were a response to unlawful behaviour. A dispute might therefore turn on the issue whether the act in question was unlawful. For example, in 1969, when Iraq had denounced the border treaty with Iran, by which it had been bound since 1937, it had prided itself on acting as an "allegedly responsible" State, to quote Mr. Kamto. Its initiative did not therefore come under the heading of a lawful countermeasure, but under that of retortion or reprisals.

38. That being so, it would be wise to make provision in the text for recourse to third party dispute settlement. There were numerous cases in which States had adopted countermeasures, although the State against which they were targeted hotly denied the wrongful nature of the original act. When doubts existed about the unlawfulness of the original act and when international law provided no explicit guidance on the subject or was undergoing a sea change, he wondered whether recourse to a compulsory settlement procedure was not essential. Article 50 bis was welcome because it met a vital concern.

39. In conclusion, he drew attention to paragraph 364 of the report, which quoted the example of agreements concerning the exchange of prisoners of war. The term was incorrect and not consonant with international humanitarian law. Under article 118 of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, belligerent States were obliged not to exchange, but unconditionally to release, the prisoners of war they were holding, without delay after the cessation of active hostilities. In other words, States which concluded an agreement to exchange prisoners of war would be acting in breach of that Convention, which reflected what was certainly an established custom. It would be wiser not to quote such an example.

40. Mr. PAMBOU-TCHIVOUNDA said that, judging by the wide range of reactions by States to the draft articles adopted by the Commission on first reading, the question of countermeasures was a politically sensitive one. A body of rules of law to contain and limit the consequences of countermeasures was being elaborated precisely because of the need to give some semblance of normality to a decision which, by definition, was left to the sole appreciation of its author, but whose consequences were cause for concern. In that regard, articles 47 to 50 set out in paragraph 367 of the third report were a brave initiative that should be retained, at least as a working paper for the Commission.

41. Chapter III, section D, called for three sets of general comments. In the first place, it could prompt at least two reactions. The first was a tendency to dramatize the idea of countermeasures and see it as a system for opting out—an arrangement for taking the law into one's own hands as a result of the level of institutionalization of the international community—and it called for the standardization and codification of countermeasures. That could be contrasted with an attitude of indifference or a tendency to downplay countermeasures on the grounds that the basis for resorting to them depended entirely on the State's assessment of the importance of its own interests—countermeasures being self-serving in a way—as could be seen in the words of the arbitrator, Mr. Reuter, in the *Air Service Agreement* case. From that standpoint, the codification of the law on countermeasures was necessary because it could help restrict the hold of the law of the jungle on international relations. No matter what the reaction was, the exercise the Commission was involved in must therefore be carried through.

42. In order to do that, the Commission must know what it was talking about. In that respect, chapter III, section D, lagged behind the text which the Commission had adopted on first reading on the concept of counter-

measures and which had both the advantage and the disadvantage of saying that countermeasures must be seen as a means justified by an end, although its material content was never fully explicated. Section D was totally silent on that point and that was one of the conceptual weaknesses of article 47 as redrafted by the Special Rapporteur. Section D also did not solve the problem of the status of countermeasures, particularly when there was a plurality of responsible States, because a State, even a powerful one, was much less powerful when facing a number of adversaries against which it could never be certain of winning out. That meant that the effectiveness of countermeasures was relative. The unity of the regime being elaborated might also be undermined by the division of the concept of countermeasures into two branches, i.e. countermeasures that were applied by the injured State as some sort of interim measure of protection and countermeasures ordered by an impartial third party. Section D did not specifically define a regime for either of those branches, although it could usefully be clarified by appropriate built-in dispute settlement machinery.

43. Lastly, the report gave the impression that the normative structure of countermeasures must be built on two basic pillars designed to ensure that they functioned rationally. The first was the requirement of proportionality, whose essence as a rule or a general principle of law no longer had to be proven, although a more appropriate formulation in the draft articles could help remove any ambiguity about the motives for countermeasures and thereby facilitate an evaluation of whether the author had been acting in good faith at the time they were taken. The second pillar which was lacking in the draft and should be the subject of a proposal by the Special Rapporteur and the Commission was the all too necessary creation of dispute settlement machinery that would be as flexible as possible in order to give countermeasures a more rational basis, or legitimacy, in contemporary international law, thereby reducing the ambiguity created by their duality, on the one hand, as interim measures of protection and, on the other, as mandated by an impartial third party. That would help introduce a rational approach that would narrow the scope of the presumption of responsibility of which an allegedly injured State could avail itself as grounds for conduct taking the form of countermeasures against the allegedly responsible State. There might then be a whole set of overlapping or competing responsibilities precisely because no one knew who was responsible and who was injured, and chapter III, section D, did not propose any solution for that problem. The effectiveness or usefulness of countermeasures and, by extension, the reliability of the relevant draft articles were accordingly to some extent thrown into doubt.

44. He had a number of drafting proposals to make before the draft articles were referred to the Drafting Committee. First of all, article 47 should be entitled "Object and purpose of countermeasures" instead of "Purpose and content of countermeasures" because what mattered was the purpose for which a State decided to adopt countermeasures. As for the definition of countermeasures, the need for which was obvious, even though it was something new in the system of State responsibility, he proposed the following wording based on the beginning of article 47, paragraph 1, as adopted on first reading:

"For the purposes of the present articles, the term 'countermeasures' means the unilateral adoption by the injured State of any measures it deems appropriate in order to induce a responsible State to comply with its obligations under the said articles, as long as it has not complied with those obligations and has not responded to the demands of the injured State that it do so."

The last part of the sentence avoided the use of the idea of necessity, which carried too heavy a burden of subjectivity and might therefore lead to disagreement. Paragraph 2 could be redrafted to read:

"Subject to the conditions and restrictions provided for in articles 48 to 50, an injured State can take countermeasures in respect of the performance of one or more of its international obligations towards the responsible State."

Paragraph 3 of the text adopted on first reading should be reinstated, with the replacement of the words "State which has committed an internationally wrongful act" by the words "responsible State".

45. Article 47 bis was the result of a division of article 50 adopted on first reading for which there was no justification. In contrast, the Commission should be thinking along the lines of combining article 47 bis as proposed by the Special Rapporteur with article 50 adopted on first reading to form a whole, but a more condensed whole, as proposed by Mr. Momtaz and Mr. Pellet. The title "Obligations not subject to countermeasures" was, however, preferable to "Prohibited countermeasures", the title adopted by the Commission on first reading, which contained a contradiction because, once a countermeasure had been authorized, it could not be prohibited.

46. The structure proposed by the Special Rapporteur for article 48 was the result of a methodological exercise which, if carried out on a strictly formal or structural, and not on a functional basis, would obscure the fact that countermeasures must be useful and be at least to some extent rooted in the international legal order, which existed to benefit not only States, but beyond States, international law and the international community as well. That was why he thought article 48 should consist of three paragraphs. Paragraph 1 should make the exercise of the right to take countermeasures subject to the prior mobilization of a dispute settlement system for which provision must be made in the draft articles. The Commission might thus draw on the wording of article 48, paragraph 2, as adopted on first reading, and paragraph 1 would read:

"An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under the present articles or any other dispute settlement procedure in force or to be agreed between the injured State and the responsible State."

That would be followed by a paragraph 2 on interim measures of protection, which must not be ruled out, but viewed in the light of paragraph 1. Then would come paragraph 3, which would correspond to what Mr. Pellet had called "putting the factors in order" and would read:

"An injured State taking countermeasures shall comply with the following procedure:

- “(a) Request for cessation or reparation;
- “(b) Offer to negotiate;
- “(c) Notification of countermeasures.”

47. Lastly, articles 49 and 50 would be devoted to proportionality and suspension of countermeasures in line with what the Special Rapporteur proposed in chapter III, section D.

Cooperation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

48. The CHAIRMAN welcomed Mr. Brynmor T. I. Pollard, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

49. Mr. POLLARD (Observer for the Inter-American Juridical Committee) said that the Committee had a membership of 11 jurists, who were nationals of OAS member States, elected in their personal capacity for four-year terms of office by the General Assembly of that organization and eligible for re-election.

50. The principal purposes of the Committee were to serve as an advisory body to OAS on juridical matters of an international character, to promote the progressive development and the codification of international law, and to study juridical problems relating to the integration of the developing countries of the hemisphere and the possibility of attaining uniformity in their legislation. During its most recent regular sessions, it had devoted particular attention to five major topics, namely, the right of access to information, including personal information (and limitations to that right); improving the administration of justice in the Americas; the application of the United Nations Convention on the Law of the Sea by the States of the hemisphere; the preparation of a report on human rights and biomedicine or on the protection of the human body; and the juridical aspects of security in the hemisphere.

51. At the request of the General Assembly of OAS, the Committee had sought to ascertain the extent to which national legislation had addressed access to information and the protection of personal data as a prerequisite to determining whether it was desirable to prepare a preliminary draft Inter-American convention on the model of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The Committee was of the view that electronic mail and computerized electronic transmission systems, whether controlled by Governments or private entities, must have adequate legal protection. However, as only six member States had replied to its requests for information, the Committee had decided to continue its consideration of the topic with a view to determining how best to proceed with the matter and, in particular, whether there was a need to develop basic principles, guidelines, a model law or a draft international instrument covering that sphere of activity.

52. The topic “Improving the administration of justice in the Americas”, which had been on the Committee’s agenda since 1995, had been the subject of a preliminary report submitted to the Permanent Council of OAS. The report provided an in-depth study of principles, procedures and mechanisms intended to safeguard the independence of the judiciary and lawyers in performing their functions. The Committee was very supportive of the initiatives that had resulted from the meetings of Ministers of Justice or of Attorneys-General of the Americas. It welcomed in particular the decision of the ministers to establish the Justice Studies Centre of the Americas and their declared commitment to providing greater access to justice by the disadvantaged members of society and to strengthening cooperation among OAS member States in the struggle against transnational and cyber-crime.

53. In March 2000, the Committee had approved a document reviewing the rights and duties of States under the United Nations Convention on the Law of the Sea and had agreed to its being circulated to those organs of member States with responsibility for implementing the Convention or concerned with the law of the sea. The document was a very useful guide to member States seeking to give effect to the Convention, because of its complexity and the difficulties experienced by developing countries in its implementation. The Committee had also decided to keep the matter under review in the light of comments it might receive from member States and the Committee on Juridical and Political Affairs of the Permanent Council of OAS.

54. On the initiative of one of its members, the Committee had commenced discussions on the preparation of a report on human rights and biomedicine or on the protection of the human body. The issues identified had included the right to life from the moment of conception and the issue of excess embryos in artificial insemination or fertilization procedures. It had been agreed that the ultimate goal must be to protect the embryo and to avoid certain practices such as surrogate maternity and post-mortem paternity. However, it had been considered that the time was not yet ripe to develop a model law or a draft convention on the subject. The Committee had decided to inform the Pan-American Health Organization of that conclusion, requesting it to provide information and views on the scientific, medical and technical factors which had to be considered, as well as any other relevant information.

55. At the fifty-sixth regular period of sessions of the Committee, held in Washington, D.C., from 20 to 31 March 2000, there had been an exchange of views during a meeting with the legal advisors of the ministries of foreign affairs of OAS member States on the topic of a new concept of security in the hemisphere. Documents had been presented by the representatives of Chile, Mexico and Peru and by members of the Committee. One member had tabled, on behalf of Canada, a paper entitled “Human Security: Safety for People in a Changing World”. The Canadian thesis was that State security and human security were mutually supportive. A safe world could not be attained unless the people were themselves secure. The other submissions raised the question of the future of security in the hemisphere in the context of wider global

responsibility. All those issues would be the subject of further discussion at the Committee's next regular period of sessions.

56. Joint meetings with the legal advisors of the ministries of foreign affairs of the member States of OAS, which had been held annually, would henceforth be held triennially. In August 1998, the preliminary reports of the co-sponsors of the 1999 Centennial Commemoration of the First International Peace Conference had been considered in a joint session with the co-sponsors, who had given a commitment to take account of the views expressed and the conclusions reached at the joint session when finalizing their reports.

57. Every year since 1974, the Committee had sponsored a course on international law for officials of OAS member States, in which well-known specialists participated. Two members of the International Law Commission, Mr. Baena Soares and Mr. Candioti, had delivered lectures at the course held in August 1999.

58. In concluding, he thanked members of the Commission for the opportunity they had provided to maintain and strengthen the association between the Commission and the Committee and assured them of the great importance the Committee attached to that ongoing collaborative exercise.

59. Mr. OPERTTI BADAN said that the presence of the Observer for the Inter-American Juridical Committee at the meeting was symbolic of the need to harmonize regional codification and universal codification, which must be seen as complementary tasks.

60. Security in the hemisphere was of real importance at a time when new patterns of regional security were emerging, patterns which should be subordinated to the Charter of the United Nations. In the light of certain recent measures, one could not but be concerned at the fact that the mechanisms provided for in the Charter had not been consulted. Human security had been the subject of an in-depth dialogue at the most recent OAS General Assembly and that too was a question of critical importance. Lastly, the Americas region was making genuine efforts to achieve economic and social integration and the Committee's work in that area would always be welcome.

61. The principle of non-interference had always placed limits on international organizations' activities to promote the protection of democracy. A few weeks previously, however, OAS had taken measures to assist the Government of Peru in re-establishing a democratic dialogue, improving relations between the various authorities and relaunching the Peruvian Constitutional Court and the judicial system. That was a very clear demonstration that OAS was not turning a blind eye to problems—indeed, quite the reverse—and that its approach was not punitive, but cooperative.

62. He thanked the Observer for the Inter-American Juridical Committee for his statement and urged the Committee to continue its work on regional codification, in order to meet needs of which insufficient account was taken in the context of universal codification.

63. Mr. MOMTAZ said that, given the crucial role that Latin America had played in the progressive development of the law of the sea, he would like the Observer for the Inter-American Juridical Committee to provide additional information on the difficulties encountered by Latin American member States of the Committee in application of the provisions of the United Nations Convention on the Law of the Sea, which he had himself acknowledged were complex.

64. Mr. GOCO asked what steps had been taken to follow up the Inter-American Convention against Corruption. In Asia, his own region, corruption was a matter for serious concern. Indeed, the phenomenon was no longer endemic, and affected all countries. It would thus be interesting to know what measures had been taken by OAS to combat that scourge.

65. Mr. TOMKA asked the Observer for the Inter-American Juridical Committee what the Committee's plans for its future activities were and whether there was any exchange of information between its member States and the Committee concerning the work of the Commission. He had in any case ascertained that a number of those States submitted written comments to the Commission concerning its work.

66. Mr. POLLARD (Observer for the Inter-American Juridical Committee) said that difficulties arose with regard to the United Nations Convention on the Law of the Sea, for instance, with regard to the delimitation of territorial waters, the contiguous zone and the continental shelf between contiguous States. But the real problem was that the legal services of the ministries of foreign affairs lacked the staff to prepare a catalogue of the tasks to be accomplished and to undertake those tasks, so that, in consequence, much remained to be done.

67. With regard to corruption, the Committee had devoted a good deal of time to preparing draft laws intended to give effect to the Inter-American Convention against Corruption to which Mr. Goco had referred. It was now for member States to take the necessary measures on the basis of that work.

68. As for the question raised by Mr. Tomka, who had asked whether the Committee took account of the work of the Commission, it was true that the Committee chiefly dealt with questions brought before it by the organs of which it was a subsidiary, namely, the General Assembly and Permanent Council of OAS. That did not, however, prevent it from taking account of the work of the Commission, or from taking a great interest in the possibility of contacts with the Commission's members.

The meeting rose at 12.50 p.m.

2649th MEETING

Tuesday, 1 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (continued) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPporteur (continued)

1. Mr. TOMKA said that countermeasures were recognized by international law as a legal institution, as was shown by the decision of ICJ in the *Gabč kovo-Nagymaros Project* case, which had treated countermeasures as a circumstance which might preclude the wrongfulness of an act that would otherwise be characterized as wrongful. Lawful countermeasures should therefore be included among the circumstances precluding wrongfulness, in chapter V of Part One, in article 30. The new version of article 30 proposed by the Special Rapporteur in paragraph 362 of his third report (A/CN.4/507 and Add.1–4) provided a useful basis for further work, and he fully supported its transmission to the Drafting Committee.

2. Accordingly, he also welcomed the inclusion of articles 47 to 50 bis, on lawful countermeasures, and commended the Special Rapporteur's willingness not to press his proposed article 30 bis, under which the exception of non-performance (*exceptio inadimplenti non est adimplendum*) was to have been included among the circumstances precluding wrongfulness. The best way of addressing the concerns voiced by several members regarding unlawful recourse by States to countermeasures was to lay down clear conditions for their lawfulness, thereby limiting the possibility of abuses by States. It was an additional reason for clearly defining in the draft the conditions in which countermeasures could be taken, a position that had not been advocated by some major States that, in their written comments following the adoption of

the articles on first reading,³ favoured leaving that matter out of the draft.

3. Article 47 rightly specified that the purpose of countermeasures was to induce a State that had committed an internationally wrongful act to comply with its obligations arising in the context of its responsibility, for example, in the form of cessation, reparation, or both, and also excluded punitive countermeasures. Nonetheless, article 47 raised a few problems. First, it was not quite clear, from the use of the word “may”, in paragraph 1, whether an injured State had a subjective right to take countermeasures, one balanced by a correlative obligation at least to tolerate the conduct on the part of the allegedly wrongdoing State, or whether the article provided only the possibility for the injured State to take such countermeasures. In paragraph 322 of his report the Special Rapporteur specifically stated that article 47 would be better expressed as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles. Yet that entitlement was not set forth in the text of the article itself. Thus, although in paragraph 294 of the report he did not fully endorse the approach that had been taken by the Commission when adopting article 47 on first reading, the Special Rapporteur effectively adopted more or less the same approach. The term “lawful” did not appear in chapter II of Part Two bis, but in article 30, and the wrongfulness of countermeasures was precluded, not by articles 47 et seq., but by article 30.

4. The issue might at first sight seem purely theoretical. It appeared, however, that some Governments might be reluctant to recognize a “right” of the State to take countermeasures. For instance, Argentina proposed that countermeasures should be regarded as an act merely tolerated by international law, while Denmark, on behalf of the Nordic countries, favoured first stating that resort to countermeasures was unlawful unless certain conditions were fulfilled.⁴

5. In paragraph (1) of the commentary to article 30,⁵ the Commission had qualified a countermeasure as “a measure *permissible** in international law as a reaction to an international offence”, and had stated in paragraph (4) that “Only in specific cases does international law grant to a State injured by an internationally wrongful act committed to its detriment ... the *possibility** of adopting against the State guilty of that act a measure which ... infringes an international subjective right of that State”. Nowhere in the commentary to article 30 had the Commission used the word “entitlement” with reference to countermeasures. Nor was the word “entitlement” used in the general commentary to chapter III (Countermeasures) of Part Two as adopted on first reading.⁶ Instead, paragraph (2) stated that “there is sufficient evidence that the practice of countermeasures is *admitted** under customary international

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook* . . . 1996, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook* . . . 2000, vol. II (Part One).

³ *Yearbook* . . . 1998, vol. II (Part One), document A/CN.4/488 and Add.1–3 and *Yearbook* . . . 1999, vol. II (Part One), document A/CN.4/492.

⁴ *Ibid.*

⁵ See 2647th meeting, footnote 3.

⁶ See footnote 1 above.

law as a means of responding to unlawful conduct". Thus, the concept of "entitlement" to take countermeasures appeared only in paragraph (1) of the commentary to article 47, which stated that "The basic notion of countermeasures is the entitlement of the injured State not to comply with one or more of its obligations towards the wrongdoing State". But if, in certain conditions, countermeasures could be taken in exercise of a subjective right, then there would have been no need to include countermeasures in Part One among the circumstances precluding wrongfulness, since, by definition, the exercise of a right could not at the same time be unlawful.

6. He would thus support the formulation of article 47, paragraph 1, proposed by the Special Rapporteur, provided it was made clear in the commentary that paragraph 1 allowed for the possibility (*faculté*) of taking countermeasures, but not for the entitlement to do so.

7. As to the issue of the relationship between suspension of the obligation and countermeasures, the former was referred to in paragraph 2 of article 47, which stated that "Countermeasures are limited to the suspension of performance of one or more international obligations ...", and in the *chapeau* of article 47 bis, referring to obligations not subject to countermeasures. In that regard, he fully agreed with the views expressed in paragraph 325 of the report, but had some doubts about paragraph 324 and about the wisdom of including in the draft a concept that the Commission previously had deliberately refrained from introducing. In paragraph 324 the Special Rapporteur referred to the findings of ICJ in the *Gabč kovo-Nagymaros Project* case, but the situation in that instance had been quite different. The Court had accepted the argument of one of the parties that a decision by the other party to halt the work provided for under the treaty amounted to an attempt to suspend the operation of the treaty, but had found that a determination of whether a convention had or had not been properly suspended was to be made pursuant to the law of treaties. Accordingly, care should be taken, in drafting articles 47 and 47 bis, to avoid any reference to suspension of performance. It might be sufficient to say in paragraph 2 that countermeasures were limited to the non-performance of one or more international obligations of the State, in order to avoid giving the impression that the law of State responsibility provided additional grounds for suspension of the performance of obligations.

8. It was not clear what criteria justified distinguishing between articles 47 bis and 50 and he shared the view of those who favoured combining them, as had been the case in the articles adopted on first reading. While the enumeration in article 47 bis was basically acceptable, he wondered how an obligation concerning third party settlement of disputes (subpara. (c)) could, in practice, be suspended by way of countermeasures. If there was compulsory jurisdiction and the State availed itself of the right to seize the third party, the failure of the other party to appear would not of itself halt the proceedings. In fact, specific provision should be made for a situation in which the treaty explicitly prohibited the taking of countermeasures. The Special Rapporteur had dealt with the issue in paragraph 343 of the report, but his conclusion had been that it could be achieved by the *lex specialis* provision (article 37 adopted on first reading), and it was sufficient to note the possibility in the commentary to article 50. However, in dealing

with state of necessity, the Commission had adopted a text for article 33 on first reading that prohibited invoking a state of necessity if such a possibility was specifically excluded by the treaty.

9. Lastly, he supported the Special Rapporteur's proposed formulation for article 49, but noted in passing that the word "commensurate" had been used, not only by ICJ in the *Gabč kovo-Nagymaros Project* case, but also by the Commission some 20 years previously, in the commentary to article 30.

10. Mr. KABATSI said the proponents of countermeasures argued that, in a world lacking a centralized legal authority capable of dispensing and enforcing justice among and between States, States must be allowed or entitled to protect and fend for themselves if their international rights were breached. It was further argued that such practice was in any case authorized by existing international custom having the force of law. It was also *Gabč kovo-Nagymaros Project* case. It was argued, too, that, in the light of that scenario, an elaboration of a balanced regime of countermeasures was more likely to be of use in controlling excesses than would silence. Moreover, it was further contended that stringent restrictions and prohibitions on the use of countermeasures were provided in the draft, so as to ensure that the allegedly injured State took countermeasures against the allegedly wrongdoing State only when no other alternative existed, and so as to avoid collateral injury to third States and impairment of basic human rights.

11. Thus, the draft sought to provide, first, that countermeasures could be taken only in response to conduct that was actually unlawful; secondly, that the purpose of countermeasures was to induce the responsible State to comply with its obligations of cessation and reparation, and to refrain from punitive sanctions; thirdly, that countermeasures were to be used only as a last resort, where other means had failed or would clearly be ineffective in inducing the wrongdoing State to comply with its international obligations; fourthly, that countermeasures could be applied only to the extent they were necessary for that purpose; fifthly, that pursuant to the findings of ICJ in the *Gabč kovo-Nagymaros Project* case, countermeasures must be reversible; and lastly, that a dialogue would take place between the supposedly injured State and the supposedly wrongdoing State before and during the taking of countermeasures.

12. All those arguments seemed, *prima facie*, to bestow a human face on the proposed regime of countermeasures. In fact, however, the regime had little or nothing to offer by way of a human face. While countermeasures were theoretically a facility available to all States, in practice the unbalanced nature of the regime favoured the more powerful States at the expense of the weaker. It was no coincidence that countermeasures were most strongly supported by the stronger States, and opposed by the weaker, who constituted a substantial majority. States occupying the middle ground were predictably more ambivalent in their attitude, since their fear of being the victims of countermeasures applied by powerful States was offset by the prospect of resorting to countermeasures against States weaker than themselves.

13. Furthermore, the decision as to the existence of a wrongful act or unlawful conduct, as well as to the extent and gravity thereof, was left to the unilateral wisdom of the State taking the countermeasures. Likewise, the question of proportionality, especially having regard to determination of the gravity of the injury, was one left to the State taking countermeasures to decide. Furthermore, as the Special Rapporteur conceded, the countermeasures might not be reversible as to their effects. Moreover, although the draft articles sought to prohibit countermeasures adversely affecting third parties or impairing basic human rights, serious injury to those parties and impairment of those rights was often inevitable, even though they did not constitute direct targets. That, again, the Special Rapporteur did not dispute.

14. Mr. Simma had rightly likened countermeasures to an elusive dragon, but had not suggested that any attempt should be made to tame it. Maybe that was because dragons were, by their very nature, impossible to tame. In any case, less mythical beasts such as lions and leopards were notoriously safer when encountered in the wild than when let loose in the community. Accordingly, he could not support a set of draft articles which, as currently formulated, could only exacerbate existing inequalities between States, the majority of which were already the victims of underdevelopment, adverse trading conditions, technology lags and a crushing debt burden.

15. As to the question whether the provisions proposed by the Special Rapporteur in his third report constituted an improvement on those adopted on first reading, he would side with those who saw the current proposals as a step in the wrong direction, as Mr. Kamto had eloquently argued. The provisions adopted on first reading had been linked to dispute settlement mechanisms applicable prior to the taking of countermeasures, mechanisms which, as well as offering safeguards against abuses, had also envisaged the real possibility that the draft articles might ultimately take the form of a binding international instrument. No such prospect was envisaged under the current proposals. Article 50, subparagraph (b), prohibiting resort by way of countermeasures to extreme economic or political coercion designed to endanger the territorial or political independence of a State which had committed the internationally wrongful act, was to be deleted from the draft proposed for adoption on second reading. Virtually no safeguards against possible errors and abuses now remained. If forced to choose between the draft articles proposed for adoption on first and on second readings, he would favour the former, as at least providing some solace for weaker States, in the form of the linkage with a prior dispute settlement procedure. The procedural limitations relating to resort to countermeasures imposed under article 48, paragraph 1, were almost entirely vitiated by the provisions of paragraph 2 of that article.

16. In conclusion, while joining those members of the Commission who opposed the inclusion of lawful countermeasures in the draft articles, particularly for the detailed reasons given by Mr. Kateka, he nonetheless wished to acknowledge and applaud the skills of the Special Rapporteur, who had ably handled that most complicated area of the extremely difficult and complex topic of State responsibility.

17. Mr. AL-BAHARNA said that, on the basis of his evaluation of the comments submitted by Governments and the generally supportive statements made in the Commission, the Special Rapporteur had introduced a set of revised draft articles on countermeasures which had no special linkage with the dispute settlement procedures envisaged in Part Three of the draft articles. In paragraph 289 of the third report, the Special Rapporteur referred to the *Gab Ž kovo-Nagymaros Project* case judgment of ICJ, which appeared to have inspired his revision of the articles on countermeasures. Summing up his conclusions on the Court's judgment, the Special Rapporteur noted that the Court had accepted the conception of countermeasures and had also endorsed the requirement of proportionality, while adopting a stricter approach than the language of article 49 might imply. The result was a much improved set of draft articles on countermeasures, one that was far more likely to gain acceptance than the articles on the subject adopted on first reading. The Special Rapporteur was to be commended for his groundbreaking work on the topic.

18. Since new article 47 spelled out the injured State's right to take countermeasures and referred to their lawfulness if the responsible State did not comply with the request or its notification, it was preferable to the version adopted on first reading, which merely defined those measures. The words "may take countermeasures" were more appropriate, as they allowed action to be taken in defence of what the injured State regarded as its right. On the other hand, it might be possible to find a more felicitous phrase than "in response to the call" in paragraph 1. Similarly, it might be wise to use less strong wording than "to the demands", in article 47. The phrase "its response to the notification of the injured State that it do so" might be more apposite. Again, the words "are limited to" in new paragraph 2 were better, since that phraseology reflected the essential scope of countermeasures, as discussed in paragraph 323 of the report. Article 47 bis formulated more elegantly all the five categories of conduct set out in article 50 adopted on first reading, but subparagraphs (a) to (e) should be numbered 1 to 5.

19. The contents of new article 48 were a great improvement on those of the article adopted on first reading, in that they did not mention Part Three and paragraph 1, subparagraphs (a), (b) and (c), listed the gradual steps to be taken by the injured State in a logical order. Such civilized procedural practice was commendable. Nevertheless, subparagraph (a) should read "Notify the responsible State, requesting it that it should fulfil its obligations" for, in his view, the words "a reasoned request" were superfluous. Any notification would have to state the reasons that prompted it. In subparagraph (b) use of the term "notify" was correct. The procedural process outlined in subparagraphs (a) to (c) should be retained and subparagraph (b) should not be deleted, since the steps referred to must be taken before embarking on any countermeasures. In subparagraph (c) "offer" would be more apt than "agree".

20. The Special Rapporteur seemed to justify provisional measures as a first reaction to the wrongful act committed by the responsible State, but personally, he was not in favour of paragraph 2 because, in the absence of a legal framework for "provisional measures", the latter encompassed in fact and in practice all the elements of counter-

measures, but no legal safeguards. Hence an injured State which knew that it was bound to follow the gradual procedure laid down in paragraph 1 would be more likely to resort to countermeasures under paragraph 2, thus rendering the procedure under paragraph 1 meaningless and devoid of substance.

21. While paragraph 2, on provisional countermeasures could be deleted, he disagreed with the deletion of paragraphs 3 and 4 suggested by the Special Rapporteur, since they were related to paragraph 1. The words “within a reasonable time” should offer an injured State a satisfactory safeguard against protracted and fruitless negotiations.

22. New article 49 was simpler and clearer than the article adopted on first reading and rightly embodied the rule of limitations on the right to take countermeasures, as it had been established in the judgment of ICJ in the *Gab Ž kovo-Nagymaros Project* case. New article 50 was likewise a great improvement, because subparagraph (a) was much more elegantly worded than subparagraph (b) of the previous version and the idea contained in existing subparagraph (d) was to be found in (b) of the proposed text. He was inclined to accept the formulation of subparagraph (a), for the reasons outlined in paragraphs 352 to 354 of the report and concurred with the Special Rapporteur that there would be no need to add “or political independence of the State”, for that notion was implicit in “territorial integrity”.

23. The question of what was meant by “basic” or fundamental human rights in article 50, subparagraph (b), had been correctly answered by the Special Rapporteur in paragraph 351 of the report, which seemed to indicate that a wider interpretation of subparagraph (b) could include the prohibition of reprisals against individuals, which were banned in international humanitarian law. The emphasis in subparagraph (b) on third parties, rather than third States, was elucidated in paragraph 349 of the report. On the other hand, that explanation, when seen in conjunction with the express provision of subparagraph (b), confirmed that that paragraph dealt with the rights of third parties in general and basic human rights in particular and that its scope was therefore much wider than basic human rights. For that reason, States would probably reject that subparagraph as it stood, but might be more inclined to accept it if “human” were added before “rights” so that the phrase read “impair the human rights of third parties”.

24. Noting that proposed article 50 bis contained most of the elements embodied in article 48 adopted on first reading, he proposed that the introductory phrase in paragraph 1 should be redrafted to read: “Countermeasures must be suspended as soon as”. Paragraphs 2 and 3 should be inverted.

25. Lastly, as far as the formulation of new article 30 was concerned, in view of what appeared to be general agreement within the Commission that the principle of countermeasures would be incorporated in Part Two bis, that article would necessarily have to be included in Part One of the draft, as suggested in paragraph 362 of the report. Article 30 reformulated by the Special Rapporteur was preferable to the article adopted on first reading, but for the sake of greater clarity, the words “towards another State” should be inserted after “international obligation”, so that

the phrase read “obligation of that State towards another State”.

26. Mr. HE drew attention to the fact that the institution of countermeasures figured prominently in the regime of State responsibility. Its existence in international law had been confirmed by the *Gab Ž kovo-Nagymaros Project* case and the Commission’s decision to include it in Part Two bis on implementation. It was a sensitive topic, because it involved the interests of both the injured and the wrongdoing State. Small, weak States feared that countermeasures might be abused as a tool to exert coercion and enforce the demands of strong States. For that reason, countermeasures could be used only as a last resort in exceptional circumstances and they had to be carefully, precisely regulated to reflect customary international law and not reformulated to the detriment of weak and small States.

27. It had therefore been suggested that countermeasures be narrowly delimited, that their application be strictly defined so as to prevent abuse and that a third-party dispute settlement procedure be established. Another proposal was that it be clearly stated that countermeasures must be adopted in good faith, applied objectively and not affect the rights of third parties. Furthermore, it had been emphasized that a link between countermeasures and a compulsory dispute settlement procedure was vital in order to preserve the rule of law.

28. On the other hand, the view that too many unwarranted restrictions were being placed on countermeasures had led to a call to sever the link between the adoption of countermeasures and recourse to dispute settlement procedures, as the international machinery for the latter was too time-consuming and the wrongdoing State might institute proceedings as a delaying tactic. Moreover, recourse to such procedures could not prevent a State taking what it regarded as appropriate countermeasures.

29. The crux of the issue, therefore, was whether the adoption of countermeasures should be linked to dispute settlement. While that link would guarantee the rule of law, it hardly seemed realistic as long as compulsory third-party jurisdiction was not generally accepted by States. It might be possible to strike a proper balance by including a general regime for third-party dispute settlement in the draft while finding a practical method of separating countermeasures and dispute settlement. To that end, it would be necessary to adjust, amplify and strengthen article 48, the key provision on countermeasures. In paragraph 1 (c) “agree” should be replaced with “offer”. Paragraph 3 should state “If negotiations do not lead to a resolution of the dispute:” and then two subparagraphs should be added to read: “(a) The injured State or the wrongdoing State may submit the dispute to the dispute settlement procedure in force between them; (b) In the absence of any dispute settlement procedure in force between them, the dispute may be submitted to any dispute settlement procedure by agreement between the injured State and the wrongdoing State”. The whole of paragraph 4 should be deleted and replaced by “The injured State may take the countermeasures in question after exhausting the above procedures.”

30. It was generally recognized that proportionality, the issue addressed in article 49, set a limit to countermeasures in international law. The proposed text followed the reasoning of the judgment in the *Gab Ž kovo-Nagyvaros Project* case, which took into account the gravity of the internationally wrongful act and its harmful effects on the injured party. It thus offered a highly effective limitation which would help to curb unilateral arbitrariness in a system without obligatory jurisdiction.

31. Mr. ECONOMIDES pointed out that countermeasures were an archaic practice which inevitably worked to the advantage of powerful States and undermined the prestige and authority of international law. Domestic legislation had long prohibited taking the law into one's own hands, so it was shocking to see that the same rule did not apply in international law. Countermeasures were certainly evil, but were they really a necessary evil? In any event, since the majority of the Commission was in favour of accepting countermeasures, he could do no more than stress the need to subject them to as severe and restrictive a regime as possible.

32. His country had, in its comments, rightly noted that countermeasures were more appropriate for breaches characterized as delicts than for breaches that constituted international crimes and that that distinction should be reflected in chapter III. He was convinced that it would be naive of States to try to respond individually to the international crimes mentioned in article 19 with, possibly serious, countermeasures.

33. International crimes violated international public order and so any reaction had to take the form of a collective response from the international community via its competent organs, first and foremost the Security Council. Such measures naturally had to be not only instrumental but also punitive and purposive. He hoped that the Special Rapporteur would deal with that topic in chapter IV of the third report.

34. For the time being, article 47 or another article ought to state explicitly that countermeasures did not apply in the event of breaches of international obligations essential to the protection of the fundamental interests of the international community as a whole. Article 47 in the formulation proposed by the Special Rapporteur could be interpreted in that way, but only in respect of irreversible crimes like genocide. Similarly, the draft should contain a provision to the effect that countermeasures did not apply to international crimes.

35. Before any countermeasures could be countenanced it was necessary to be absolutely certain that an internationally wrongful act had occurred. In view of the opinion of two leading authorities, Politis⁷ and Fitzmaurice,⁸ who had considered the matter many years earlier, it would be advisable at least to add the word "established" before "internationally wrongful act" in article 47.

⁷ N. Politis, "Le régime des représailles en temps de paix", *Annuaire de l'Institut de droit international*, 1934 (Brussels), p. 31.

⁸ Fourth report on the law of treaties (*Yearbook . . . 1959*, vol. II, p. 37, document A/CN.4/120), at p. 46.

36. He fully endorsed the opinions of Mr. Kamto, Mr. Kateka and Mr. Sreenivasa Rao on the necessity of a link between countermeasures and the settlement of disputes. Dispute settlement by negotiation or recourse to a third party must take priority over any kind of countermeasures. Otherwise, unilateral action on possibly dubious bases would be favoured at the expense of international justice. Naturally, every care had to be taken to ensure that procedure was prompt and that both parties were acting in good faith. Only if reciprocal countermeasures were manifestly impossible should countermeasures be taken that were equivalent to or commensurate with the internationally wrongful act of the responsible State. Furthermore, the adoption of the criterion of the reversibility of countermeasures might help to temper them.

37. The words "an injured State may take . . .", in article 47, could be replaced by "an injured State may have to take . . .". Paragraph 2 could be worded "Countermeasures consist of the suspension of one or more of the international obligations of the State taking those measures towards the responsible State, without the validity of these obligations being affected in any way." Paragraph 3 of article 47 adopted on first reading could be usefully retained in that article or somewhere else in chapter II.

38. Articles 47 bis and 50 should be merged under the heading "Obligations not subject to countermeasures" for the reasons given by Mr. Pambou-Tchivounda (2648th meeting). Article 48, the most important provision in that chapter, was the most problematic since it was biased in favour of the injured State, which was in control of the situation from start to finish. The article rightly attached great importance to the good faith of the responsible State, but was unconcerned about the good faith of the injured State—which might be non-existent. How could the article be more evenly balanced? Paragraph 1, subparagraph (b), should be placed before subparagraph (a) and very short deadlines should be stipulated between the action required in the three subparagraphs. If the responsible State accepted the offer of negotiations, which then failed, and agreed to the dispute being settled by a judicial or arbitral tribunal, the injured State must not be allowed to resort unilaterally to countermeasures. Similarly, the injured State must not have the right to resort to countermeasures if it refused to submit the matter to an impartial third party. Moreover, no clear distinction was drawn between the countermeasures referred to in paragraph 2 and those mentioned in paragraph 3. On the other hand, countermeasures could be taken against the responsible State if it refused negotiations or settlement of the dispute by an impartial third party, or did not apply the tribunal's ruling.

39. Article 49 should be worded "Countermeasures must be equal to the injury suffered, or if that is impossible, they must be commensurate with the injury." The word "equal" was not to be construed as "reciprocal". The last sentence of article 49, as it stood, added nothing of legal pertinence. The title of article 50 bis needed to be revised. In paragraph 1 (b), "or make" should be replaced by "and make" and the last part of the sentence in paragraph 2, beginning "or otherwise fails", should be deleted. Paragraph 1 (b) was in line with his proposal concerning article 48, since he saw no reason why the submission of a dispute to a tribunal should automatically suspend

countermeasures, when the submission of the same dispute to a tribunal at an earlier stage did not automatically prevent their adoption in the first place.

40. Mr. ROSENSTOCK said it was 20 years since he had engaged in a debate like the current one, revolving around the fact that it was better to be powerful than weak. Was there something so exceptional, so particular, about countermeasures as to make it unacceptable to recognize them as a means of dealing with an imperfect world? Everyone agreed with Mr. Economides that it was unfortunate that the society of nations had not developed to the point reached by domestic societies, and that legal obligations must consequently be brought into effect by countermeasures from time to time. The role of countermeasures or reprisals in customary international law was widely and currently recognized. The most recent example of that recognition was the position taken by ICJ in the *Gab Ž kovo-Nagyvaros Project* case. The Court and others who had addressed the issue of countermeasures had made it clear that there were limits to what they facilitated, that the relevant rules must be consistent with their effectiveness and abuses must be avoided. Countermeasures were a response to the breach of an international obligation, and the Commission was benefiting no one by seeking to obscure that fact and also that the goal of countermeasures was the restoration of the status quo ante, the relations that ought to exist under the law.

41. The new draft proposed by the Special Rapporteur was an improvement over that which had emerged on first reading, a draft hastily cobbled together by the Commission that had vitiated the careful and extremely ambitious work done by the Drafting Committee.

42. He agreed with those who wished to delete the last phrase in article 47, paragraph 1. Paragraph 2 of that article seemed acceptable, since "suspension of performance" covered both the removal of a prohibition as well as the suspension of an affirmative obligation. The Drafting Committee might nonetheless wish to craft a less obscure formulation. Article 47 bis, subparagraph (c), seemed awfully broad. Did it refer to obligations that had nothing to do with the wrongful act or the specific countermeasures involved? If so, why?

43. Article 48 entailed a complicated and risk-laden approach and should be replaced by the version in the footnote to that article. It was a trap for the unwary and, a source of confusion and argument. It reflected no customary law and no statement by ICJ. As to article 49, on proportionality, the term "gravity" tended to speak to issues other than the return of the status quo ante. Article 50 appeared to tell a State that, although its territorial integrity had been jeopardized and its domestic jurisdiction violated, it could not respond proportionately. That was preposterous. Subparagraph (b) was somewhat infelicitously drafted. While injury to a third State could not be justified under any notion of countermeasures, it did not affect the legal relationship *inter se* between the injured and the injuring States.

44. Article 50 bis appeared to require automatic suspension of countermeasures, even where a tribunal authorized to issue a suspension order did not do so. Was that not rather hyperactive? If agreement could not be reached, the

basic need might be met by including article 30 in an objective formulation in Part One and making no attempt to spell out the specific actions that triggered suspension.

45. Lastly, it was in nobody's interests for the Commission to respond to the world at the current time as if it was the one which had existed 50 years ago.

46. Mr. OPERTTI BADAN said there was a head-on collision between those who did not wish to include countermeasures in the draft as an institution to be regulated by international law and those who, in contrast, thought that could be done. It was an area in which the borderline between international law per se and foreign relations was fairly indistinct. The Commission, as a body of legal specialists, had the obligation to help to dispel that uncertainty. Its first task was to decide whether, with respect to countermeasures, it should confine itself simply to reflecting reality or engage in progressive development, in line with article 15 of its statute.

47. The question also arose whether there was a set of generally accepted customary rules that legitimized the use of force. Both qualitative and quantitative changes in the international community could be observed. There were now 189 States Members of the United Nations which had differing expectations of it. Some sought the opportunity to respond to crucial domestic problems like economic development. Others wanted the Organization to legitimize certain international acts or conduct. To speak of customary law, immutable and frozen in time, was very difficult. The Commission should accordingly approach the topic of countermeasures with an open mind, yet should not abandon its focus on the law in favour of nothing but realism.

48. The Commission would be adopting rules as recommendations to States on the use of countermeasures to settle disputes by what was, after all, a type of use of force—in Part Three of the draft adopted on first reading, the allegedly responsible State was given the option of obstructing the use of countermeasures by unilaterally bringing into play the mechanism of arbitration. That had acknowledged the link between countermeasures and peaceful settlement of disputes. Paragraph 4 of new article 48 would oblige an injured State that adopted countermeasures to fulfil its obligations for the peaceful settlement of disputes "under any dispute settlement procedure in force". Yet where no such procedures were in force, there would be no such obligation. Was that more restricted formulation really a contribution to the progressive development of international law?

49. Again, article 50 as adopted on first reading listed extreme economic or political coercion as one of the prohibited countermeasures, but no such reference was included in the current proposal. That was unrealistic, because such measures had a strong impact, not only on Governments but also on peoples. A number of precedents should be taken into account. At San Francisco, at the time of the adoption of the Charter of the United Nations, the Latin American nations had submitted proposals to prohibit economic sanctions. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in

accordance with the Charter of the United Nations⁹ prohibited them, and recent regional pronouncements like the opinion adopted by the Inter-American Juridical Committee on the Helms-Burton Act¹⁰ should also be borne in mind.

50. Article 50, subparagraph (b), did not define basic human rights: the Special Rapporteur had said it was not the Commission's place to do so. Did they include economic rights? For a State that had recently gained political independence, economic rights, including the right to market access, for example, were indeed fundamental. Economic stability brought with it political stability.

51. The reference in article 50, subparagraph (b), to "third parties", not "a third State" as in article 47 adopted on first reading, represented major progress. The expression was broader, encompassing persons and economic agents as well as States.

52. If countermeasures were ultimately included in the draft articles, they should be envisaged, not as a right, but as an exception under international law. Moreover, he had serious doubts about whether lawfulness would really be guaranteed by the fact that the injured State itself was authorized to gauge the lawfulness of its own countermeasures. Proportionality as covered in article 49 was therefore a problematic notion. If provisions on that subject were included, they should be as simple and austere as possible.

53. The CHAIRMAN, speaking as a member of the Commission, said he supported the main lines of the Special Rapporteur's proposals on countermeasures.

54. New article 48, paragraph 4, and article 50 bis, paragraph 1 (b), dealt with the same subject, namely the situation after countermeasures had been taken, and must be read together. He had a particular question to raise. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation, between Japan and the United States,¹¹ read: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means." If Japan violated the Treaty, for example by discriminating against Americans within its territory in breach of its commitment to providing most-favoured-nation status, the United States must first try to solve the matter by diplomacy. If that failed to produce a settlement, it could resort to countermeasures. Afterwards, it had the obligation, in accordance with article XXIV, paragraph 2, to submit the dispute to ICJ or to agree on other pacific means of dispute settlement. When the dispute was submitted to the Court, the United States must suspend its countermeasures. Was that a correct interpretation of articles 48, paragraph 4, and 50 bis, paragraph 1 (b), of the draft?

55. Another point came to mind. The Treaty of Friendship, Commerce and Navigation was *lex specialis*, while the draft articles were rules of general as well as residual international law. Accordingly, article XXIV, paragraph 2, of the Treaty had priority of application to problems arising out of the Treaty: its self-contained dispute settlement regime excluded any resort to countermeasures.

56. He accepted the idea that the principle of proportionality set out in article 49 was part of customary international law. If, however, the principle was construed in terms of balance with the injury suffered or the gravity of the wrongful act, he experienced some difficulties. In that connection, he shared the view put forward by Mr. Gaja and agreed with the comment made by the Government of the United States. Countermeasures were authorized to induce the wrongdoers to comply with their obligations. Thus, the proportionality must be relevant to that purpose, in other words, it should be proportional to the minimum degree of measures necessary to induce compliance.

57. Mr. GALICKI congratulated the Special Rapporteur on his inventiveness and tenacity on the problematic question of countermeasures. The question had been the subject of extensive debate in the Commission from its forty-sixth to forty-eighth session, as a result of which the Commission had inherited the set of provisions contained in articles 47 to 50. At its fifty-first session, the Commission had adopted a two-pronged approach to countermeasures. It had decided to retain article 30 on countermeasures as a circumstance precluding wrongfulness, in chapter V of Part One; at the same time, it had deferred finalizing article 30 until it had considered the regime of countermeasures in chapter III of Part Two. In his second report,¹² the Special Rapporteur had identified four options, varying from full retention to total deletion of the treatment of countermeasures in Part Two. The prevailing opinion among members of the Commission had been to deal substantially with countermeasures outside of article 30, but to avoid any special linkage with dispute settlement. That legacy must be kept in mind as the Commission approached its final decision about the place and size of provisions on countermeasures within the draft on responsibility.

58. In his third report, the Special Rapporteur made some refreshing and courageous proposals for the reconstruction of the provisions on countermeasures. Despite some criticism, the prevailing opinion seemed to be that it would be useful to have a separate chapter on countermeasures within the part on implementation of State responsibility. The version of that chapter proposed was over-large, however, and should be condensed by the merging of certain articles. Although he agreed with Mr. Operti Badan that the use of countermeasures should be seen as exceptional in nature, it should not be forgotten that their application in the everyday practice of States was by no means rare. What seemed to be missing in the proposed provisions was a more precise definition or legal description of countermeasures within the meaning of the draft on State responsibility. An attempt should be made to differentiate between such closely related

⁹ See 2617th meeting, footnote 19.

¹⁰ See 2629th meeting, footnote 9.

¹¹ Signed at Tokyo on 2 April 1953 (United Nations, *Treaty Series*, vol. 206, No. 2788, p. 143).

¹² See 2614th meeting, footnote 5.

concepts as countermeasures, reprisals, retortion and sanctions.

59. In paragraph 289 of his report, the Special Rapporteur rightly recalled the full list of elements within the concept of countermeasures given by ICJ in the *Gab Ž kovo-Nagymaros Project* case. Those elements had not, however, been fully reflected in the very brief and functional quasi-definition of countermeasures contained in article 47. Such important factors as the bilateral and reversible character of countermeasures, for example, had not been sufficiently underlined.

60. He had already expressed doubts about the “divorce” suggested by the Special Rapporteur within the provisions of article 50 adopted on first reading on prohibited countermeasures, which would result in the formulation of a new article 47 bis, on obligations not subject to countermeasures. In practice, it was not always possible to distinguish clearly between obligations not subject to countermeasures and prohibited countermeasures. It could also be questioned why certain situations deriving directly from Article 2 of the Charter of the United Nations appeared in article 47 bis, subparagraph (a), while others were included in article 50, subparagraph (a). Article 50, as adopted on first reading, had dealt with those matters together and had also used terminology that was more consistent with the language of the Charter.

61. The differentiation in articles 47 bis and 50 between “obligations of a humanitarian character” and “basic human rights” might create difficulties in practical application. The very concept of “basic human rights” could cause serious problems with respect to the specific rights that should be included. Were the right to freedom of movement and the right to freedom from hunger covered? What about the right to protection of property, which was violated so often in practice as a result of the application of countermeasures?

62. Again, the juxtaposition in article 50, subparagraph (b), of the “rights of third parties” and “basic human rights” was not a very good idea, since the first concept was connected with States, while the second applied to individuals. In order to avoid any problems that might result from the rather artificial inclusion of “rights of third parties” in article 50, it might be advisable to reinstate article 47, paragraph 3, adopted on first reading which dealt with the same problem in the context of the purpose and content of countermeasures, a much more appropriate setting.

63. Many voices had been raised against that proposed separation of article 47 bis and article 50. If it was effected, then the two articles must be placed in direct proximity or in sequence; a clear distinction must be clearly made in their relative scope and language compatible with other international instruments, in particular with the Charter of the United Nations, must be used.

64. Formal conditions relating to resort to countermeasures were listed in article 48 but they seemed too detailed and should be compressed. For example, paragraphs 1 (a) and 1 (b) could be combined. The order in which the conditions were listed was somewhat problematic: article 48 adopted on first reading set out a much more logical

sequence in which the obligation to negotiate in good faith was at the start of the list of the conditions.

65. Article 49 followed the formulas applied by ICJ in the *Gab Ž kovo-Nagymaros Project* case and seemed generally acceptable. It should stay as a separate article, thereby stressing the importance of the principle of proportionality for the application of countermeasures. Article 50 bis required some editorial correction but provided the logical conclusion of the set of articles on countermeasures with the necessary provisions on suspension and termination.

66. He joined with other members of the Commission who were in favour of referring articles 47 to 50 bis to the Drafting Committee for final elaboration.

67. Mr. CRAWFORD (Special Rapporteur), summing up the debate, said that his remarks would be without prejudice to any views expressed later, as they would be taken fully into account by himself and by the Drafting Committee.

68. At its fifty-first session, the Commission had decided to embark on improving the draft articles relating to countermeasures, without any specific link to dispute settlement in the unilateral form which had been proposed on first reading, and then to consider comments received on the revised version. The Sixth Committee would then comment on the provisions proposed and the Commission would resume the discussion on a general level at the fifty-third session in the context of the final text as a whole.

69. Many comments had been made, by States and by members of the Commission, relating both to the general, as in the case of Mr. Kabatsi and Mr. Kateka, and to the particular. States had, by and large, either reluctantly accepted or positively supported the elaboration of the provisions on countermeasures, although they might change their minds when they came to see the end result. The Commission none the less owed it to States to produce the best possible text, on which it would then make a decision in the light of comments by States.

70. The general reluctance to contemplate countermeasures was understandable, but the adoption of countermeasures was a fact of life. As one who had experience of situations in which countermeasures had been taken, he believed that it was preferable to have some regulation than none, in which regard he strongly concurred with the views of Mr. Addo, Mr. He, Mr. Simma, Mr. Tomka, and others. In its quest for the best text, the Commission should draw a clear distinction between the general question of the position taken by the draft on dispute settlement and the specific connection between dispute settlement and countermeasures. The general question depended on the form that the draft would ultimately take and that had not yet been decided. If, following feedback from the Sixth Committee, the majority view in the Commission was that it should take the form of a convention, that would be acceptable to him. Meanwhile, article 48 contained as close a connection between countermeasures and dispute settlement as was possible without introducing new forms of dispute settlement in the text. The Commission had proceeded as far as it could in the direction of the compromise suggested by Mr. Bowett, a former

member of the Commission, while remaining consistent with the underlying decision made at the fifty-first session about the principle of the equality of States. That principle had been seriously impaired by the text considered by the Commission at that session, a text which would have constituted a significant inducement for States to take countermeasures.

71. The debate had been extremely rich and he could not address all the points raised. It was, however, clear that his attempt to make a distinction between articles 47 bis and 50 had been a complete failure. The two should be combined. He hoped that it would nonetheless be possible to distinguish between obligations which were the subject of countermeasures and obligations which could not be breached while countermeasures were being taken. A single article, however, would be sufficient for that purpose, as Mr. Gaja had said.

72. As for the relationship between article 30, which was also being referred to the Drafting Committee, and the provisions of Part Two bis, the general view was that article 30 should be kept in a simple form. He was attracted by Mr. Al-Baharna's suggestion that the words "towards the responsible State" should be inserted. The article set out the legal effect of countermeasures, namely that—if justified in accordance with the provisions of the articles—they precluded wrongfulness vis-à-vis the target State. As ICJ had ruled in the *Gab Ž kovo-Nagymaros Project* case, and as was made clear in chapter II, countermeasures were instrumental. That being so, some clarification along the lines suggested by Mr. Tomka concerning article 47 might be possible: the text could be inverted to stipulate that countermeasures might not be taken unless certain conditions were met. That would leave any illegal effect to be regulated by article 30. It would not involve any of the hypocrisy of the text adopted on first reading, on which Mr. Rosenstock had commented so trenchantly. There was general support for a clearer approach in article 47, although care should be taken over the point raised by Mr. Operti Badan and Mr. Tomka. He hoped that the Drafting Committee would be able to resolve the problem.

73. Many of the comments on articles 47 and 47 bis had been points of drafting, but two had been fundamental. Indeed, they suggested that chapter III, section D, of his third report might not go far enough. The first was the question of reversibility and the second the question of the bilaterality of obligations suspended. Possibly the Commission should bite the bullet and say plainly that countermeasures must be reversible and must relate to obligations only as between the injured State and the target State. The issue of reversibility raised a particular problem: there was no question that action pursued in the course of taking countermeasures should subsequently be undone. Action of which the wrongfulness would be precluded under article 30 would undoubtedly be taken. Reversibility meant a return to the status quo, as Mr. Tomka had emphasized. That notion must not be prejudiced. He had tried to express it through the concept of suspension of the performance of obligations, and there had been general support for a distinction between the suspension of obligations and the suspension of their performance. Article 50 bis, paragraph 3, had also been generally endorsed as a step in the right direction. Whether it went far enough or whether the Drafting Committee could make any improvements re-

mained to be seen, but certainly the question needed further consideration. He suspected, however, that the problem was too subtle for any easy solution.

74. Difficulties also arose over the bilateral character of the obligation that was the subject of countermeasures. It was, as Mr. Rosenstock had said, clear that the position of the injured State vis-à-vis third States was wholly unaffected by the draft articles. If a third State was the subject of a breach, independent rights were available to it. In that sense, countermeasures were bilateral. The Drafting Committee would, again, have to consider whether more could be done.

75. Many drafting comments had been made on article 48, varying from the preference expressed by some members for the simple provision contained in the footnote to the article to the suggestion that no countermeasures of any sort should be taken until negotiations had been exhausted. The fact that a similar and endless debate had taken place on first reading reflected the underlying tension in the topic. The provisions of article 48, although they could clearly be improved, were an attempt to provide a reasonable compromise between the two positions, bearing in mind that the type of reversible or suspendable interim countermeasures in question were precisely those that, if not taken straightaway, could not be taken at all. He therefore continued to favour a compromise along the lines of the proposal in article 48, which was, after all, substantially the same as the compromise achieved on first reading. Many deficiencies might remain, but the Drafting Committee should be allowed to attempt to improve the draft article.

76. He agreed with the view that article 48, paragraph 1 (b), should be deleted. It had originally been included in the draft because it was an endorsement, in slightly different terms, of the moderate proposal by the Government of France aimed at resolving a difficult problem.

77. There had been general agreement on the need to include proportionality: whether it should be treated in a separate article or as part of a broader synthesis was a question for the Drafting Committee. The same applied to commensurability, although he acknowledged that the last phrase in article 49 raised a difficulty that had been acutely analysed. The Drafting Committee would clearly have to consider that matter, too. It might be that ICJ had been right about the second part of the formula as well as about the first.

78. Article 50 would, as he had said, need to be synthesized with article 47 bis. Article 50 bis, meanwhile, had been generally endorsed during the discussion. Whatever decision was reached on article 48, some provision along the lines of article 50 bis should be retained, although there was considerable room for improvement.

79. Despite the doubts expressed by some members, the Commission was in a position to refer the articles in question and article 30 to the Drafting Committee to see whether an improved synthesis of the various ideas put forward could be produced for discussion by the Sixth Committee and by the Commission at its fifty-third session.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the draft articles in paragraph 367 of the third report and article 30 to the Drafting Committee.

It was so agreed.

81. Mr. OPERTTI BADAN said he trusted that the referral to the Drafting Committee would not prejudge the outcome of the Commission's consideration of the topic. The Drafting Committee might resolve many of the problems that had been raised, but that should not be taken to imply that a decision to accept the mechanism of countermeasures under the draft articles had been taken.

82. The CHAIRMAN gave an assurance that the Commission would have another opportunity to examine the report of the Drafting Committee and to make any further comments.

83. Mr. CRAWFORD (Special Rapporteur) said that there would be little opportunity for further debate at the current session. Rather, it would be a matter of registering improvements made by the Drafting Committee. In his fourth report, which, God willing, would be the last, he would revert to the issue in the light of reactions by States in the Sixth Committee. At the fifty-third session the Commission would consider the draft articles as a whole, including the treatment of the issues in chapter III, section D, and chapter IV of his third report. The ultimate choice between the various options would also be made at that time.

84. Mr. HAFNER said that he concurred with almost everything that appeared in chapter III, section D, of the third report and with much of what the Special Rapporteur had just said. Paragraph 338 of the report, however, appeared to refer to a right of the receiving State to "terminate the mission". He doubted that diplomatic law contained such a rule, as recent experience had proved. Indeed, discussions on the issue had already taken place in the Council of Europe. In paragraph 343 the reference to European Union treaties should in fact be to the Treaties establishing the European Communities, on which the exclusive nature of enforcement was based, as confirmed by article 292 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Even within the field of European Community law, however, it could be argued that the system of enforcement was not a self-contained regime for the purposes of State responsibility. On the other hand, it was true that the Treaty on European Union, outside the European Communities, seemingly did not constitute a closed system, since measures by 1, 3 or 14 States against another State that was alleged to be breaching principles embodied in the Treaty on European Union were considered legal. Certainly no arguments had been raised against that conclusion so far. Paragraph 343 also contained a statement which could be interpreted as implying that, where a treaty prohibited reservations, the obligations under that treaty precluded the use of the purpose of countermeasures. He could not accept that proposition. Rights under the United Nations Convention on the Law of the Sea, after all, could be used for that purpose.

85. With regard to article 47, paragraph 1, an injured State should be given the right to take countermeasures not only as long as the responsible State had not complied with the original obligations but also to the extent that it had not complied with them. With reference to paragraph 2, he wondered whether, as some other members had suggested, the expression "towards the responsible State" reflected the bilateral nature of countermeasures clearly enough. Article 47 bis was hardly distinguishable from article 50, except insofar as the former addressed certain rights that must not be suspended, whereas the latter merely stated that, if certain rights were suspended, the suspension must not amount to a threat to territorial integrity. His preference would be to keep the two provisions separate, but in close proximity. He understood from article 47 bis, subparagraph (b), that violations of the rights of other persons who enjoyed diplomatic immunity could lead to countermeasures. That did not apply to the rights of "bilateral" diplomats, such as a minister visiting another State. The word "third", in subparagraph (c), should be deleted, as many treaties provided for a settlement dispute mechanism without involving a third party, or else they required such a procedure as a prerequisite for a third party settlement. The current formulation would lead to a situation where the negotiations or the duty of consultation but not the adjudication procedure could be suspended, even though the former had necessarily to precede the latter. As for article 48, he would prefer the shorter version proposed by the Special Rapporteur in the footnote to the article, and he shared the view of the Chairman and Mr. Gaja regarding article 49.

86. Article 50, subparagraph (a), could be misused to exclude any countermeasures. A refusal to deliver military goods, for example, could also be considered to endanger a State's territorial integrity, since the State would have a limited capacity to defend its territory. In any case, the objective of the wording used differed from that of article 47 bis, subparagraph (a), in that it did not require the use of force to achieve the desired result. It should therefore either be absorbed into article 47 bis, subparagraph (a), or be restricted by some such phrase as "constitutes a direct threat to the territorial integrity". Pollutants also threatened a State's integrity, however. It would therefore be wise to retain the general reference to territorial integrity, but to restrict the manner in which that integrity could be endangered. He questioned whether the reference to intervention should be retained, given the fuzzy definition of the principle of non-intervention. Subparagraph (b) contained two different ideas that should be kept separate. The first could remain in article 50, but it might be preferable to transfer the second to article 47 bis, inasmuch as basic human rights should not be made the object of countermeasures. They were in any case different from the rights of a humanitarian character referred to in article 47 bis, subparagraph (d). In article 50 bis, paragraph 2, the unqualified reference to an "order" from an international tribunal could give rise to the interpretation that even procedural orders, such as the delivery of a written document before a certain date, were included. He doubted whether that was the intention. Therefore, the reference should be made more specific, with the addition of a phrase such as "on the substance" or "on the merits of the case".

87. Lastly, with reference to the order of the articles, he suggested that the provisions limiting the right to resort to countermeasures should appear together, separately from those dealing with questions of procedure. The two kinds were mixed up in the articles as they stood.

88. Mr. GOCO noted that, according to paragraph (4) of the commentary to article 48, the term “interim measures of protection” was inspired by procedures of international courts or tribunals that might have the power to issue interim orders or otherwise indicate steps that should be taken to preserve the respective rights of the parties in dispute. Under the version proposed by the Special Rapporteur, however, the injured State might provisionally implement such countermeasures unilaterally. Moreover, interim measures were not intended to be full-scale countermeasures, yet article 48, paragraph 2, appeared to cover countermeasures that went beyond interim measures of protection. The question thus arose as to whether there was a real distinction between such measures and provisionally implemented countermeasures. With regard to the former, there was, of course, an analogy with domestic law or even international tribunals: a petition for an injunction to stop a particular act was a recognized procedure. Moreover, within that procedure was the equally recognized ancillary remedy for injunctive relief for the respondent to desist from continuing the act. That injunctive relief was analogous to the interim measures of protection. Interim measures could be retained in a reformulation of article 48, paragraph 2, but some further refinement might be needed to clarify the point of including them.

89. Mr. BROWNLIE said he did not have a well formed set of opinions on countermeasures, which were a very intractable subject. He saw some value, however, even at such a late stage, in examining the nature of the task facing the Commission. It was worth considering what the existing position was in international law. The Commission was not a mere codifying body; it could make or propose new law. It was nonetheless useful to test the depth of the water it was trying to navigate. He discerned, from the report and from the debate, an easy assumption that non-forcible countermeasures were recognized in general international law. That proposition was both true and untrue. Non-forcible countermeasures were indeed recognized as one of the circumstances precluding wrongfulness, which was how article 30 had, unsurprisingly, come into being. There was, however, a qualitative difference between the two-dimensional, low-profile status of an institution that figured as one of a list of circumstances precluding wrongfulness—other examples being consent, compliance with peremptory norms and self-defence—and the construction of a three-dimensional institution, namely, countermeasures legitimized by provisions that might involve giving legitimacy to elements that had not previously been recognized as part of general international law.

90. Countermeasures had a multitude of purposes, not in the legal sense but in terms of the political behaviour of States. They were used as an inducement to another State to resort to a dispute settlement procedure; as a reprisal; as a deterrent; as an inducement to abandon a policy; as a form of self-defence (in which case interim measures would apply); or as self-help in order to achieve a settle-

ment. Despite the high calibre of his current work, the fact remained that neither the Special Rapporteur nor his predecessor had produced a clear decision as to which of those purposes was to be legitimated under the draft articles, although the implication of articles 47 and 48 was that it was self-help. In that context, the purpose appeared to be to bring about cessation and reparation, but doing so without any procedure of peaceful settlement.

91. He was not raising the question of linkage but simply analysing the apparent effect of those articles. After all, without any actual procedure of peaceful settlement intervening, the draft articles would legitimate what was, in the final analysis, self-help, even if it was non-forcible. The Special Rapporteur’s approach was empirical, as though the topic was a wild animal that had to be tamed. There was, however, a direct link between the choice of purposes to be legitimated and the technical questions of proportionality and “reversibility”: the latter issues could not be adequately tackled unless their context was clear. For that reason, he believed that even at the current stage in the examination of the topic, more thought should be given to the legitimate purposes of such a form of self-help. It was not simply a question of the long-standing debate about linkage. Rather, it was a question of whether pressure applied in order to achieve a peaceful settlement should be legitimated. Perhaps that was what the Commission aimed to achieve, but, if so, it should be clear about its aim; and that clarity seemed to him to be lacking.

The meeting rose at 1 p.m.

2650th MEETING

Wednesday, 2 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to introduce chapter IV of his third report (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that the part of chapter IV which dealt with the invocation of responsibility to a group of States or to the international community related to issues that the Commission had already considered on second reading in the context of his first report,³ with its examination of article 19 of Part One and at the beginning of the current session in the context of the debate on the second part of article 40, contained in chapter I of his report. Chapter IV therefore completed the process of considering the issues in question, which were obviously extremely controversial. The Commission could not be said to be engaged in codification. The text adopted on first reading had introduced the controversial concept of “crime” as defined in article 19 and, by combining articles 40 and 47, had established a regime of countermeasures in respect of not directly injured States, which was wholly untenable, since it gave third States the right to take countermeasures in respect of any breach of, for example, individual human rights.

3. The problem was that, in completing its work, the Commission was not only engaged in a form of development—whether progressive or not remained to be seen—of the law of State responsibility, but was doing so against the background of a much wider form of development, clearly non-progressive, that had taken place on first reading. The question was what the next step should be. The Commission ought to be able, with the assistance of the Drafting Committee, to produce a complete text by the end of the current session, so that, by the next, it would have before it comments from the Sixth Committee and Governments in order to make final decisions. It should try to formulate the proposals appearing in chapter IV in a way that was broadly acceptable. He therefore invited members to confine their comments to the proposed articles and to avoid a replay of the animated debate on article 19 at the fiftieth session which had resulted in a decision, appearing in paragraph 369 of the third report, that had facilitated and would facilitate progress along the lines indicated in paragraph 371, with a “disaggregation” of the concept of “crime”. He emphasized that, in adopting the draft articles at the current session, the Commission would not be taking a final decision. There would be ample time to do so at the next session.

4. Although the notion of obligations to the international community as a whole had been recognized, there were some outstanding issues. First, it should be recognized that

the law of State responsibility was not the primary means of resolving the problem of breaches, referred to in article 19. The idea that, in cases of genocide or an invasion, for example, the rules of State responsibility were sufficient in themselves, without the accompaniment of any coordinated action by the international community, was a myth, as he indicated in paragraph 372. In fact, conduct defined as “crime” in article 19 related overwhelmingly to the conduct of Governments that were unaccountable to their people. The latter should therefore be protected from any sanctions that might be applied. In that connection, it was significant that, partly owing to the Commission’s initiative and partly for other reasons, the international community was starting—through the Rome Statute of the International Criminal Court, which, though it had not yet entered into force, had been adopted in 1998—to recognize the concept of individual responsibility in such crimes. States were, of course, responsible for their acts, but that responsibility had only an ancillary role, as chapter IV tried to show.

5. At the beginning of the current session, the Commission had approved, in principle, the right of every State to invoke responsibility for any kind of breach of obligations to the international community as a whole. It remained to be determined how far that right should go. Clearly, it should extend to cessation and, as a corollary, to the right to seek declaratory relief and restitution on behalf of the victims.

6. The question was therefore what limitations should be imposed on such rights, bearing in mind other considerations. He invited the Commission to consider three different categories of situation. First, in cases where the primary victim was a State that was the target of aggression or whose population was the victim of a war crime committed by another State, it was for the injured State to take the appropriate action; any response by other States should be secondary, with regard to both the invocation of responsibility and countermeasures. Secondly, in situations where there was no injured State—usually in the context of a population or part of a population falling victim to, for example, an act of so-called “autogenocide”—it was evident that no State could act on its behalf. The international community should be able to intervene in such cases, irrespective of the views of the responsible State, and to seek cessation, satisfaction and restitution. It should also be able to seek reparation, but that was not possible with the existing machinery. It was obvious that third States could not seek reparation on their own account. The third situation was one in which no one—or perhaps everyone—was the victim of the breach. That applied in certain environmental cases which could have long-term effects, but no specific impact, such as global warming or the thinning of the ozone layer. In such cases, member States of the international community should, by virtue of their membership, be able to seek cessation and satisfaction, although in many cases it would be difficult to seek restitution as such.

7. The question was whether the Commission could proceed beyond that position. If it intended to elaborate a regime of “crime”, properly so-called, that would involve, as a minimum, the notion of penalties. That question was dealt with in paragraphs 380 et seq., and in particular paragraph 382, in which he recounted the case of the

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7.

Commission of the European Communities v. Hellenic Republic in which, for the first time in its history, the European Court of Justice—which, if not worldwide, had a Europe-wide jurisdiction—had imposed a fine on a member country for a continuing breach of European law. He analysed the procedure in paragraphs 383 to 385 in order to see what lessons could be drawn at the international level. When international law did not permit the establishment of collective procedures, it tried to establish individual ones. The same applied, at a certain level, to countermeasures. Two cases could be envisaged in that context. First, when the State victim itself had the right to take countermeasures as the result of a breach of an obligation to the international community as a whole, or indeed of any multilateral obligation, other States parties to the obligation should be able to assist that State, at its request, in taking countermeasures, within the limits that they could have taken countermeasures themselves. Such a procedure was directly analogous to that of collective self-defence. The other, more difficult, case concerned collective countermeasures taken in response to breaches when there was no State victim. Practice was limited in that regard, but it existed nonetheless. It was reviewed in paragraphs 391 et seq. and the conclusions drawn from that review were contained in paragraph 396, to which he referred the Commission. Practice was obviously embryonic, controversial and extremely difficult to qualify as universal. Moreover, until recently, it had not been supported by any *opinio juris*. A case could be made, in those circumstances, that the Commission should merely adopt a saving clause and leave any development of the law in that area to the future. That had been his own tentative view at the fiftieth session. He had come to believe, however, that the Commission had no need to be prudent, unless the Sixth Committee so required. The least that could be done was to submit the proposal, contained in paragraphs 401 et seq., that the States parties to an obligation to the international community in its entirety should have the right to take collective countermeasures in response to gross and well-attested breaches.

8. After analysing, in paragraphs 407 et seq., the additional legal consequences flowing from the commission of a “crime” under Part Two, as adopted on first reading, he considered that they were not worthy of being regarded as responses to crimes, for the reasons set out in the report. It was, however, arguable that, in the case of an egregious breach of an obligation to the international community, when there was no injured State, the other States members of the international community should be able to seek aggravated damages from the responsible State on behalf of the actual victims. To that extent, the draft articles constituted a progressive development of international law. He had therefore proposed a new version of article 53, which appeared in paragraph 412, with an additional paragraph using less dramatic wording, without the word “crime”, which could lead to the further development of criminal law. The result was new article 51, entitled “Consequences of serious breaches of obligations to the international community as a whole”, which constituted the only article in the new chapter III, entitled “Serious breaches of obligations to the international community as a whole”.

9. He also referred the Commission to a footnote to paragraph 413, which contained all the basic concepts that could be incorporated in article 40 bis. Furthermore, he put

forward a proposal for two articles on countermeasures, article 50 A, entitled “Countermeasures on behalf of an injured State”, and article 50 B, entitled “Countermeasures in cases of serious breaches of obligations to the international community as a whole”.

10. He considered it most important that the text submitted by the Commission to the Sixth Committee should, as far as possible, be a consensus text. If the Commission appeared to be split down the middle concerning a concept as controversial as that of “crime”, it would condemn the entire text of the draft articles to obsolescence. That was why the action he proposed, over-ambitious though it might be, was, bearing in mind the decision taken by the Commission at its fiftieth session, the maximum tenable proposition. With regard to Part Four, relating to general provisions, the Commission had agreed that it should contain a *lex specialis* article, as article 37 adopted on first reading had been. He had proposed a reformulation of that article, since it was not enough that a text, such as a treaty, existed to deal with a particular point; the text should deal with that point in such a way that, on interpreting the relevant provision, it could be said that it was intended to exclude all other consequences.

11. The second saving clause, adopted at the fiftieth session, remained unchanged, in the form of article 50 A.

12. The third was article 39, which concerned the relationship between the draft articles and the Charter of the United Nations. The article had been vigorously criticized by, among others, his predecessor as Special Rapporteur. He agreed with those criticisms and had therefore proposed a much simpler version of the article, which would not look like a covert amendment of the Charter.

13. A saving clause was also needed on to the law of treaties to specify that the draft articles on State responsibility were not concerned with the existence or the content of a primary obligation, but dealt solely with the consequences of a breach. He had therefore tried to formulate article 50 B in general terms so that it would apply both to customary international law and to the law of treaties.

14. Those were the only saving clauses that were currently needed. For the reasons stated in paragraph 428, a saving clause was not necessary for diplomatic protection and the relationship between that topic and State responsibility could be stated in the commentary. Nor did the draft articles deal with the questions of invalidity and non-recognition. Non-retroactivity need not be mentioned and a definition clause was not necessary.

15. In conclusion, he recommended that the new draft articles should be added to the text on State responsibility, so that if, by some accident or miracle, the Drafting Committee could complete its consideration during the current session, they could be examined by the Sixth Committee at the next session of the General Assembly and by the Commission itself at its fifty-third session.

16. Mr. KATEKA said that the Special Rapporteur’s presentation had been extremely enlightening and, personally, he too hoped that the Commission would reach a consensus on the issues under consideration.

17. The term “collective countermeasures” was a misnomer. In fact, what was envisaged was action by a State, or group of States, in response to a violation of collective obligations. It would be less confusing if some other terminology could be found. Although he was against countermeasures, he could well see that “collective” countermeasures might be used in a situation where equally powerful States were involved, for, while the embrace of someone of the same stature was not dangerous, a bear-hug from a giant could be suffocating. He could therefore contemplate the adoption of countermeasures in a regional context. For example, countries in the Great Lakes region of Africa had taken countermeasures against one State in the region which had been violating human rights in order to induce the wrongdoer to sit down at the negotiating table and settle governance problems. Much time had been needed, but a “peace agreement” was to be signed shortly. Another, more delicate example was that of the measures initiated by the European Union against Austria. He did not know whether they would produce the desired effect, but he would like to hear the Special Rapporteur’s opinion on the matter. He was not sure whether the Commission was in a position to draw up provisions catering for regional circumstances.

18. When reviewing State practice, the Special Rapporteur had cited several examples of collective countermeasures, the first of which concerned a State engaged in genocide. That illustrated the dilemma of countermeasures, which were a politically sensitive issue, especially in view of the fact that they were not applied uniformly. The situation in the former Yugoslavia and the massacres which had occurred in Rwanda in 1994 were sad cases in point. In his analysis, the Special Rapporteur had concluded that it was necessary to limit the circle of States entitled to take collective countermeasures. In his own opinion, that right had to be restricted to a group of States linked to a particular region.

19. In article 51, relating to the consequences of serious breaches of obligations to the international community as a whole, the Special Rapporteur had tried to solve the conundrum posed by the related articles 19 and 53 adopted on first reading. In paragraph 374 of his report, he suggested that consideration should be given to those few norms which were generally accepted as universal in scope and non-derogable. He cited the dictum of ICJ in the *Barcelona Traction* case, but added that it was unnecessary and indeed undesirable for the draft articles to quote examples of such norms. He personally disagreed with the Special Rapporteur on that point. Some of the examples he had given were already in article 19. They were merely illustrative and did not purport to be exhaustive. They should therefore be retained. The examples cited by the Special Rapporteur were the prohibition of the use of force in international relations, the prohibition of genocide and slavery, the right of self-determination and non-derogable human rights and humanitarian law obligations. He had wisely avoided controversial issues such as aggression or massive pollution. Nevertheless, examples of serious breaches on which there was general agreement should be included in the draft articles. The Special Rapporteur had likewise taken the welcome step of avoiding the use of the Latin terms *erga omnes* and *jus cogens*. Relegating examples to the commentary would, however, be unjust

to those who, like him, were diehard proponents of article 19.

20. In article 51, paragraph 2, the Special Rapporteur provided for “punitive damages”, but had put the term in square brackets. The same was true of subparagraph (c) in the provision contained in a footnote to paragraph 413, which he proposed to add to article 40 bis. It would seem that the square brackets were prompted by the view expressed by the Special Rapporteur in paragraph 380 of his report that punitive damages did not exist in international law, but, in his own opinion, the Commission should remove the brackets. Even if punitive damages were to be used for the benefit of the victims of the breach, that was a good starting point for recognizing the existence of crimes.

21. It was to be noted that, in article 51, the Special Rapporteur had echoed the language of article 53 adopted on first reading, in that he had replaced the word “crime” by the words “serious breach” or “breach”. He did not understand what the Special Rapporteur meant in paragraph 412 when he said that since the proposed chapter III was self-contained, and since article 19 adopted on first reading played no role whatever in Part One, if chapter III was adopted, article 19 itself could be deleted.

22. Article 50 A on countermeasures on behalf of an injured State called for the same reservations as the situation in which one State exercising self-defence issued an “invitation” to another for assistance. The same applied to intervention following an “invitation” in a humanitarian crisis. Great care was required in such circumstances and, when a State did not suffer direct harm, its involvement should be limited, as stated in paragraph 402 of the report. Article 50 A did not, however, really establish any restrictions and could give rise to misuse. The Drafting Committee should examine it in detail.

23. Article 50 B had the same drawback as article 50 A. Intervention in the form of countermeasures worried small States. There was no mechanism because the Commission had not elaborated one. In any case, even existing collective security institutions faced difficulties and it was doubtful whether countermeasures would fare any better. Of course, an attempt could be made to seek cessation through the exertion of pressure on the wrongdoing State by recourse to those provisions, but they might not be sufficiently explicit in that respect.

24. As for Part Four, on general provisions, he supported the redrafting by the Special Rapporteur of the articles in question, especially article 37, on the *lex specialis*, and article 39, on the relationship of the articles on responsibility with the Charter of the United Nations. Article A was a saving clause of the responsibility of international organizations, a topic which the Commission could study in the future if it accepted the report of the Working Group on the Long-Term Programme of Work.

25. Mr. HAFNER, referring to Mr. Kateka’s comment on what he had called the “measures by the European Union against Austria”, emphasized that those had not been measures by the European Union, but measures by 14 members of the European Union, and that they did not fall within the scope of the draft articles because Aus-

tria had not committed any breach and State responsibility was therefore not involved. They were not countermeasures or sanctions, but measures which must be judged on their own, under European Union law and under general international law.

26. Mr. CRAWFORD (Special Rapporteur) said that he agreed entirely with Mr. Hafner.

27. With regard to the penultimate sentence of paragraph 412 of the report, to which Mr. Kateka had referred, he indicated that it meant that, if there had to be an equivalent of article 19, it must be included in chapter III. Article 19 played absolutely no role in Part One of the draft and did not belong there. If the Commission decided to give examples of the breaches referred to in article 50, it must do so in chapter III and not in Part One.

28. Mr. SIMMA said that, at least, in principle, he was satisfied with the results the Special Rapporteur had arrived at in chapter IV of his report, namely, the proposed draft articles, but the presentation of the issue was singularly heterogeneous and too detailed for some secondary issues, such as the reference to the case of *Commission of the European Communities v. Hellenic Republic*, whereas others were hardly dealt with at all, such as those referred to in article 51. It was also strange that the provisions designed to respond to the criticism of article 40 were contained in a footnote, i.e. a footnote to paragraph 413. He hoped that the acceptance of the draft articles would not suffer thereby and that the commentaries the Special Rapporteur was to prepare would deal systematically and in depth with the issues that had been passed over in silence, especially in view of the abundant literature, which the Special Rapporteur did not, moreover, mention anywhere in his footnotes.

29. With regard to the historical compromise which the Commission had reached at the fiftieth session and which was reproduced in paragraph 369 of the report, it might be considered that a systematic development by the Special Rapporteur of obligations *erga omnes* and peremptory norms would be a satisfactory replacement for article 19. He regretted the absence of such a development, but the final result was acceptable, although only barely. Fortunately, the scope of the regime currently sketched out would be very limited because a number of special regimes in place made it a kind of “second-rate” regime. For example, Chapter VII of the Charter of the United Nations defined the regime applicable to aggression, as well as to gross breaches of human rights, which the Security Council currently regarded as threats to international peace. In that connection, there were also increasing numbers of treaty regimes, such as the Fourth ACP-EEC Convention (Lomé Convention), which made respect for human rights a condition for the performance of obligations by the European Union States. There was a self-contained international trade regime and there were special environmental regimes.

30. There was some uneasiness about allowing countermeasures by not directly injured States, but such uneasiness was only a reflection of uneasiness about countermeasures in general. On the one hand, the Commission was afraid of creating a monster, but, on the other, it could not allow gross and egregious breaches of interna-

tional law to go unsanctioned. The exercise might prove to be somewhat artificial, particularly in the case of “victimless” breaches. The Special Rapporteur had given global warming as an example of such breaches, but, in his own view, the idea that States could combat global warming by countermeasures was quite simply ludicrous.

31. It was, however, to be welcomed that collective countermeasures would be subject to the limitations that the Drafting Committee was in the process of putting together. Secondly, only serious, manifest and well-attested breaches would be subject to that type of countermeasure. Thirdly, the practice of States showed that not directly injured States were far from abusing countermeasures in the event of a breach of human rights and other obligations *erga omnes* and that they were in fact hardly concerned with such breaches, in respect of which selectivity was widespread. Great care must in any event be taken in assigning obligations to third States, as was done in article 51. Lastly, leaving it up to the “organized international community”, i.e. the United Nations, to react to breaches of obligations *erga omnes* bordered on cynicism.

32. It must be stressed in the commentary that, whenever possible, the decision to take collective countermeasures must also be collective.

33. The Commission must not forget that it was devising a regime of non-forcible countermeasures which would help avoid situations where States claimed that they had exhausted all peaceful means and adopted the attitude which had been taken by the United Kingdom in the context of the collective measures adopted against Yugoslavia in 1998.⁴ If the Commission defined a feasible regime of pacific collective countermeasures, States would be less likely to adopt another course, such as the regrettable one taken in Kosovo.

34. The case studies on collective countermeasures contained in the report were extremely interesting, but perhaps the Special Rapporteur could have referred to the laws which the United States had adopted in the 1970s and which made military, economic and technical assistance subject to a particular human rights performance. Some of the laws in question even provided that the findings of ICRC must be taken into account as a basis for the evaluation of that performance and the Commission might consider such a procedure. The reference to European Community penalties was too long and the conclusion he had drawn was that, since it had taken as densely integrated an institution as the European Community 40 years to arrive at the Maastricht Treaty providing for such sanctions, it might take many decades for the international community to come up with a regime of countermeasures worthy of the name. With regard to punitive damages, there had to be a procedure for coordinating the demands of States.

35. In his opinion, the provisions which the Special Rapporteur proposed to add to article 40 bis in a footnote

⁴ See G. Marston, ed., “United Kingdom materials on international law 1998”, *The British Year Book of International Law*, 1998, vol. 69, pp. 580–581.

to paragraph 413 of his report should be included in a separate article. Subparagraph (a) should mention guarantees of non-repetition, which were referred to several times in the relevant paragraphs of the report.

36. As far as third States were concerned, article 50 A should refer to the gravity of the breach because, as it stood, it appeared to allow assistance to an injured State regardless of how serious the breach was.

37. The title of article 50 B was too broad and, as it stood, the provision also covered the situations dealt with in article 50 A. There was a mistake in paragraph 1, which should refer to article 51. Moreover, the categories defined in paragraphs 377 to 379 of the report were not to be found in the text of that article.

38. As to article 51, the Commission must decide once and for all how to qualify the breaches it had in mind. Article 51 referred to "serious and manifest" breaches, whereas the text of the report described them as "gross and egregious" and, at times, as "well attested". In introducing his report, the Special Rapporteur had referred to "well-attested" breaches and he personally would prefer that term or the term "reliably attested", which was widely used in the human rights context and had the advantage of referring to the evaluation of an objective third party. The wording of paragraph 1 might also be closer to that of article 19, paragraph 2, as adopted on first reading.

39. The obligation provided for in paragraph 3 (a) was relatively settled and did not give rise to any problem, whereas paragraph 3 (b) posed the theoretical, although minor, problem of its relationship with article 27. However, paragraph 3 (c) on the obligation to cooperate was probably the most problematic of all the provisions under consideration. In a situation such as that in Kosovo in late 1997 and early 1998, a State which wanted to play the role of the leader in the taking of countermeasures could ask other States to cooperate, but there was nothing to indicate to whom the obligation to cooperate was owed: was it owed to the international community, to the victim or to the State which requested cooperation? In any event, the Commission could not make it an obligation of every State to cooperate at the request of the State taking the lead.

40. In paragraph 4, the reference to penal consequences was not clear. Did it mean individual criminal responsibility or did it refer to the absurd idea of the direct criminal responsibility of States? It must also be asked whether the procedural conditions defined in article 48 could all apply to collective countermeasures.

41. With regard to the proposed general provisions, the words "to the extent" in article 37 should be deleted because they were logically incompatible with the word "exclusively". There was no such thing as a scale of exclusivity. The new wording of article 39 was much better than that adopted on first reading.

42. Mr. LUKASHUK said that he had some doubts about article 50 B, paragraph 2, which dealt with cooperation between States and embodied a rule which was in the nature of a general principle, representing "soft" law. It nevertheless reflected the principle of cooperation, which was one of the fundamental principles of international law.

It was therefore of particular importance in connection with collective countermeasures and must be retained.

43. Mr. PAMBOU-TCHIVOUNDA thanked Mr. Simma for having drawn the Commission's attention to a flaw in the structure of article 51, which referred to two things: paragraph 1 dealt with a "breach of an international obligation" or, in other words, what was covered by the title of chapter III of Part One, while paragraphs 2 to 4 corresponded to the title of the article, i.e. the type of breach which was measured by the yardstick of seriousness and gave rise to certain consequences, and to the consequences themselves. Justice must be done to the Commission and its efforts to make a distinction between "crimes" and "delicts", to use Roberto Ago's terminology, based on that concept of seriousness.⁵ There had been lengthy discussions of that two-pronged use of terms and it had been discovered that it caused more problems than what it referred to. In the text under consideration, those terms had disappeared, even if their purpose had been maintained, and that was a good thing. Article 51, paragraph 1, thus retained the content of the former article 19, paragraph 2, even though it did not say so.

44. In order to bring out the distinction in the structure proposed by the Special Rapporteur, it might be necessary, for the sake of symmetry, to divide article 51 into two parts. Paragraph 1 would be a specific article, which would be entitled, for example, "Serious and manifest breach of an obligation to the international community as a whole" and incorporated in Part One following article 25 of chapter III, which was entitled "Breach of an international obligation". The second part would symmetrically contain the consequences of that specific provision, namely, paragraphs 2 and 3 of the new article 51. That configuration would take care of concerns that had been weighing on the Commission for a long time.

45. Mr. SIMMA said he agreed with Mr. Pambou-Tchivounda that there was a certain lack of symmetry between the regime applicable to breaches which might be termed "normal" and the one that was applicable to breaches of obligations *erga omnes*. He therefore suggested that chapter III should be enriched because, with its single provision on a serious breach of fundamental obligations to the international community, it was a bit meagre. There would be an article on injury in general, the remedies available to injured States, the countermeasures available to injured States, the regime applicable to obligations to the international community, the content of the provisions in a footnote to paragraph 413 and then articles 50 A, 50 B and 51. That would be a dignified regime for a very important issue.

46. Mr. CRAWFORD (Special Rapporteur) said that he would readily agree to split article 51 in two and include new elements in it, but he was strongly opposed to including it in Part One, where it would perform absolutely no function. If it was so included, moreover, it would be necessary to consider the rules for the attribution of responsibility applicable to that category of breach. Its

⁵ See fifth report (*Yearbook* . . . 1976, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2), p. 39, para. 117.

place was therefore in chapter III. He had no objection to the structure proposed by Mr. Simma.

47. Mr. PAMBOU-TCHIVOUNDA, explaining his idea, said that it must be clear at the end of Part One whether there was only one type of breach or several. It might not be understood why there were several regimes in Part Two relating to the consequences of a wrongful act.

48. Mr. TOMKA said that he agreed with the Special Rapporteur. Part One must relate to breaches of international law as such, without distinction. The distinction would be drawn in terms of the consequences of the breach: there would first be the “usual” consequences and then the consequences of “serious breaches of obligations to the international community as a whole”. In order to flesh out chapter III, the solution might be to make paragraph 1 of new article 51 a separate article, to be followed, in another article, by paragraphs 2, 3 and 4.

49. Mr. GAJA said that the content of the provisions in a footnote to paragraph 413 gave an indication of what States other than the injured State could seek in the event of the breach of an international obligation to the international community as a whole. The Special Rapporteur had recalled—as clearly stated in the text of subparagraph (b) proposed in the footnote—that, in that particular situation, non-injured States could seek restitution in the interests of the injured person or entity and also damages for the victims of the breach, but the latter only in the event of a serious and manifest breach of an obligation *erga omnes*. For example, in the event of a serious and manifest violation of human rights, it was possible to seek compensation from the responsible State, but what would happen if the violation was not serious and manifest? In practice, it could be said that there was no obligation to provide compensation because the obligation of the responsible State would simply be theoretical. No State could invoke respect for that obligation. The same was true in other cases as well, such as that of the pollution of the oceans. In some cases, even when there was an injured State, the damage could go beyond the injury suffered by that State. Perhaps the Commission should make way for that eventuality and consider the possibility of seeking more than the injured State itself was entitled to claim.

50. He was also of the opinion that the distinction made in general in paragraph 374 between derogable and non-derogable human rights was not entirely relevant. If an obligation existed under customary international law with regard to human rights, it did not make much difference which of those rights had been violated, at least from the point of view of the obligation to make reparation.

51. Concluding his comments on that point, he was of the opinion that the provision proposed in a footnote to paragraph 413 was only partially satisfactory and that something else should be added. Account should be taken of the possibility that any State could seek reparation, although not for its own benefit, when there was no injured State.

52. Referring to the question of international crimes, he recalled that there had been a logical explanation for the idea of putting article 19 in Part One and it had been

clearly stated by Roberto Ago in his fifth report⁶ and in the Commission’s discussions. According to the original approach, international crimes of States were not regarded as serious breaches of obligations which would entail the ordinary consequences of wrongful acts, plus some other consequences. The original idea had been that there would be two sets of consequences. It had therefore been necessary to include something on crimes in Part One. However, the Commission had gradually moved towards the idea that international crimes were basically wrongful acts which entailed some additional consequences. There was then no reason to refer to international crimes in Part One.

53. New article 51 did not seem to add much to what had been provided on first reading. What was essentially new was paragraph 2, i.e. the idea of punitive damages. He had nothing against that as an exercise in the progressive development of international law, but he did have doubts about the practical implementation of that principle. How would a State obtain punitive damages? That would have to be linked to the possibility of an institutionalized way of responding to the international crimes of States.

54. He shared Mr. Simma’s view on new article 51, paragraph 3. Paragraph 3 (b) should be read in conjunction with article 27, which already covered the content of paragraph 3 (b). It was true that article 27 dealt with the commission of a wrongful act and paragraph 3 (b) with the maintenance of the wrongful act, but, in one way or another, that contributed to the wrongful act and, if rendering aid or assistance had the consequence of entailing international responsibility, it was hard to see how States could say that, in the event of a serious or manifest breach of an international obligation, they would not have the same kind of obligation as that implied in article 27. Paragraph 3 (b) did no harm, but should at least contain a reference to article 27.

55. He also agreed to some extent with Mr. Simma’s comments on paragraph 3 (c) that States had to cooperate in the application of measures designed to bring the breach to an end. That meant—and was thus going a bit far—that States were under an obligation to cooperate in the application of countermeasures, even when such measures were taken unilaterally by a State. The need for cooperation was understandable, but it should not be expressed in those terms. Paragraph 3 (c) should at least be redrafted.

56. Since new article 51 did not say much, he proposed something should be added to the consequences of serious and manifest breaches of international obligations to the international community as a whole. In that connection, he was referring to the barrier that international law set up to the attribution to individuals of the legal consequences of their conduct as organs of the State. The basic rule was that a State could not regard such conduct as individual conduct, but, rather, as State conduct, with some exceptions, particularly that of international crimes committed by individuals. If a head of State made that State commit genocide, he could not claim that his individual act had

⁶ Ibid.

been an act of the State; international law then made it possible to punish his conduct. However, not all breaches of obligations of States to the international community as a whole implied that individuals acting on behalf of the State committed an international crime. It would therefore not be reasonable to define all conduct which led the State to commit a serious and manifest breach of an obligation towards the international community as an international crime of an individual. His own proposal would be much more limited in scope. It would simply give States the possibility of uncoupling the individual from the State so that the individual whose conduct had given rise to a serious and manifest breach of an obligation of that State to the international community as a whole could not use as a defence in a criminal or a civil case the fact that he had acted as an organ of that State. The inclusion of a provision along those lines would make it possible to add an element of deterrence to relations between States.

57. With regard to paragraph 4, he was of the opinion that it would be wise to leave the further consequences of breaches to future developments of the law, whether or not they involved an institutional response. Such developments might well relate to the category of serious and manifest breaches in general, as the report suggested, but it was more likely that they would relate to specific breaches. There might thus be a system for one type of breach and not for another. It would be useful to indicate that account was being taken not only of a general development, but also of a specific development which would, technically speaking, come under a *lex specialis*, since that was probably the form it would take. The international community would react to some of those breaches and not necessarily to others, which might be regarded as equally serious, but which might require a different response for which international society was not yet ready.

58. The last part of his statement related to countermeasures. He appreciated the survey of State practice in relation to countermeasures in the event of breaches of obligations to the international community as a whole. However, the conclusion to which it led and the text of proposed articles 50 A and 50 B did not correspond exactly to what such practice seemed to suggest. In most of the cases referred to and probably in all cases, the only purpose of countermeasures was to bring about the cessation of an allegedly wrongful act. There was no evidence that States used collective countermeasures to obtain reparation. Even if States were entitled to seek reparation, practice appeared to justify the adoption of countermeasures only in relation to cessation. There was thus no perfect parallel, and that was entirely comprehensible and must be seen in a positive light because the Commission was not trying to extend countermeasures to the full range of uses to which they might be put. Countermeasures should thus be regarded as admissible only to the extent that their purpose was cessation. That also had another advantage because it was not necessary to obtain the consent of the injured State, if there was one. As the Special Rapporteur had recalled, the injured State had no possibility in that case of allowing a derogation from the obligation and another State could demand cessation. Thus, in the case of the military occupation of part of the territory of a State, even if that State did not make a protest for one reason or another, the other States could still press for an end to the military

occupation. It would then be reasonable for them to use countermeasures to bring about that cessation.

59. Mr. CRAWFORD (Special Rapporteur) said it was possible that new article 51, paragraph 3 (b), overlapped with article 27 of chapter IV of Part One. In article 27, the emphasis was on the commission of the wrongful act, whereas, in article 51, paragraph 3 (b), it was on the maintenance of the situation created by the wrongful act. Did that difference, which obviously dated from the first reading, change anything? It could be assumed that, in many cases, the primary obligation, which was, of course, a continuing obligation, would be breached in relation to the continuing situation. There might, however, be cases where that was not so. For example, when conduct amounting to a crime against humanity led a population to flee to another State and then ceased, the question was whether the population must be allowed to return home. It was not clear whether failure to allow it to return home was in itself a crime against humanity. There might well be a situation in a context like that where there was some room for article 51. That was why it was rather difficult to limit collective countermeasures to cessation. There might well be situations of restitution after the wrongful act had ceased which were analogous to cessation and it was not certain that a clear-cut distinction should be made between the two. He fully agreed with the way in which Mr. Gaja viewed the situation, namely, that cessation was meant in all cases. Moreover, the system of penalties provided for by European Community law, as it was currently applied, focused primarily on cessation. Whether or not it should be so limited was a matter for consideration. He himself would have no difficulty in accepting a more stringent limitation, obviously, but there was a problem in the case of restitution following, for example, a crime against humanity where the crime had ceased and the Government which had committed it had gone out of office, but the consequences, such as millions of displaced persons, continued to exist. The ratification of those consequences might amount in a curious sort of way to the *ex post facto* ratification of the crime. That situation might not be covered by chapter IV of Part One.

60. There was also the problem of the "transparency" of the State, a concept which Mr. Gaja had tried to operationalize by saying that, in the case of gross breaches, an individual was not entitled to rely on his status as an organ of the State during the subsequent individual prosecution. He took it that the provision Mr. Gaja was proposing did not involve creating any new criminal offence. Rather, it involved the disabling of reliance on an immunity, a question which had hovered over the "*Rainbow Warrior*" case without ever coming quite out into the open.

61. In his own opinion, that question was not properly a matter of State responsibility, but one of individual responsibility. He was not at all convinced by the idea that the State became "transparent" only in extreme circumstances. As far as breaches of international law were concerned, the State was always transparent. In other words, it was always accountable for its acts and a private individual was always accountable for his acts, whether or not he had any official function. It was generally not a good idea to try to link the two.

62. The only historical example of the principle of the transparency of the State was given by the category of “criminal organizations” defined in article 9 of the Charter of the Nürnberg Tribunal,⁷ in which there had been a separate procedure for identifying certain organizations as criminal per se. Individuals had then been treated as criminals by reason of their membership of those organizations, although there had been a second-stage procedure during which the accused had been able to plead in mitigation in respect of their membership of those organizations. Two things could be said about that historical experience: first, that it had never been repeated, since the crime of “guilt by association” did not appear in any later text; and, secondly, that the principle had been applied not to the German State or to the German Government, but to organizations, such as the SS.

63. In his view, trying to find a link between State responsibility and individual responsibility politicized the question of the charge against the individual and the existing rule of international law that individuals, including State officials, were responsible for crimes under international law regardless of their State position was itself a rule on transparency which applied regardless of the category of the act in question and its attribution to the State.

64. Mr. GAJA said he agreed that, in the case of an international crime attributable to individuals, the rule of transparency did not have to be stated because it followed from general principles. There could, however, also be problems of civil liability or cases where international law as it currently stood had not reached the stage of considering a certain activity as criminal. His proposal was therefore designed not to deal with the question of responsibility of individuals, but was something which would govern only relations between States, but which would also have a deterrent effect on individuals.

65. Mr. CRAWFORD (Special Rapporteur) said he agreed that the problem was a real one and one which had, for example, been hovering over the Pinochet case. The question was, however, whether, as a matter of law, it was one of responsibility. In his opinion, the argument was valid in the context of immunity, but it could be asked whether, as a matter of principle, the Commission should become involved in that area. In that connection, he noted that the Commission had been extremely conservative at its fifty-first session about dealing with that question in the field of immunity. He also wondered whether the text was not already overcharged. He nevertheless encouraged Mr. Gaja not to withdraw his proposal, which might be supported by other members of the Commission.

66. Mr. DUGARD said that, as Special Rapporteur on the topic of diplomatic protection, he supported the approach the Special Rapporteur had adopted in respect of diplomatic protection in paragraph 428 (b) of his report. Secondly, he was of the opinion that, if the Commission planned to adopt the draft articles in the form of a declaration, it should make no mention of the subject of retroactivity, in the hope that the draft articles would be construed

as being as declaratory of existing law and would therefore have a retroactive effect. As to the idea expressed in paragraph 396 that practice with regard to reactions to breaches of collective obligations was dominated by the Western countries, there were examples to show that that was not accurate. Thus, the 1973–1974 Arab oil boycott had been interpreted, in particular by Shihata, as a response to Israel’s illegal occupation of the West Bank and Jerusalem and to the Western States’ support for that occupation.⁸ Another example was that of the reaction of African States to apartheid in South Africa and to minority rule in Rhodesia, which had, of course, resulted not in the breach of treaties, but in breaches of customary international law, with States, particularly neighbouring States, allowing the liberation movements to set up bases in, and operate from, their territories. That was an example of the reaction by African States to the breach of collective obligations relating to human rights and self-determination.

67. In his opinion, the 1966 judgment of ICJ in the *South West Africa* cases had been a major setback for international law, since the Court had affirmed that States could act only where their national interests were involved. The Court had remedied its position somewhat in the *Barcelona Traction* case, but, in the *East Timor* case, it had seemed to revert, in fact, if not in law, to its earlier position. He therefore particularly welcomed the Special Rapporteur’s bold denunciation, in article 50 B and in several paragraphs of the report, of the principle stated by the Court in 1966. He was proud to be associated with the final rejection of that principle.

68. He also noted that, out of politeness or perhaps in a spirit of compromise, the members of the Commission had been avoiding the question of article 19 and recalled that, at the fiftieth session, the question of the possible retention of that article in the draft had shown that the members of the Commission had been very evenly divided in their views. Chapter IV of the report was therefore a brilliant exercise in compromise which gave the supporters of article 19 the toys of *jus cogens* and obligations *erga omnes* to play with and which satisfied the enemies of article 19 by abandoning the word “crime”. He was, however, not completely satisfied with the way in which the exercise had been conducted. Of course, article 19 itself should go, but the concept of crime should not be eliminated completely. It could, for example, be referred to if a sentence was added at the end of new article 51, paragraph 1, stating that such an act, resulting from the gross and systematic breach by a State of an international obligation essential for the protection of fundamental interests of the international community, constituted a crime. The wording of that sentence would be largely based on that of article 19, to which it would add the concept of a “gross and systematic breach of an international obligation”, as referred to by the Special Rapporteur in paragraphs 404 and 405 of his report. No further changes would have to be made to article 51. He realized, however, that there could be a number of objections to that idea. As the Special Rapporteur had stressed, if the Commission adopted the concept of international crime, it

⁷ 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, No. II-251, p. 279), p. 290.

⁸ I. F. I. Shihata, “Destination embargo of Arab oil: its legality under international law”, *AJIL*, vol. 68, No. 4 (October 1974), p. 591.

would have to deal with the question in a more systematic way, particularly by defining specific rules on justification and due process and also considering the question of penalties. However, some members might find a reference to the word "crime" in the draft articles to be quite simply unacceptable.

69. On the other hand, there might be advantages to such a course. In the first place, that solution would certainly be better than retaining article 19, which, as nearly everyone agreed, was particularly badly drafted, especially as it listed a number of examples, even though it was not normal to legislate by way of example. Another advantage would be the retention of the word "crime", since the Commission must face the fact that, whether it liked it or not, the concept of State crime was currently part of the language and idiom of international law. To abandon the concept completely might be seen by many quarters and perhaps even in the Sixth Committee as a step backwards. In paragraph 391 of his report, the Special Rapporteur himself cited an example in which the United States had described the conduct of the Ugandan Government as constituting the "international crime of genocide", and had referred explicitly to the State itself. Everyone knew, moreover, that, in the case of South Africa during the apartheid era, the international community had repeatedly condemned apartheid as an international crime and had described the State as criminal. Apart from its political consequences, that position had also had an effect in law in that it had given some legality or a semblance of legality to the use of force by national liberation movements. It could, moreover, be asked what was in a name and he did not see why the conduct described by the Special Rapporteur in paragraph 372 as constituting "gross breaches of fundamental obligations" could not be called an "international crime". Examples of the reaction of States in such cases also indicated that the description of the action of States was unclear. Thus, when the Government of the Netherlands had decided to suspend its assistance to Suriname, it had stated that the case involved a fundamental change of circumstances.⁹ Other States had characterized their action as collective countermeasures against serious breaches of fundamental obligations. He pointed out that new article 51, paragraph 2, already referred to "punitive damages" and paragraph 3, referred to the concept of non-recognition, both of which had a criminal flavour about them. If the Commission wanted to retain the word "crime" simply because it had become part of the language of international law, it could do so very easily in article 51 without reintroducing article 19. That might satisfy the supporters of article 19 more than the compromise proposed by the Special Rapporteur.

70. He was nevertheless aware that, if the Commission followed that course, it would not be in a position to complete the draft articles during the current quinquennium. The Special Rapporteur had made an impassioned appeal for compromise on that issue and he agreed that a lack of compromise would have serious consequences for the draft articles and perhaps also for the Commission's reputation. The compromise proposed by the Special Rapporteur was brilliant and he would therefore be prepared to accept it, provided that the Commission should not be seen

to be simply abandoning the concept of international crime. He took the view that there was a place for the concept of international crime in the contemporary international order, but that place was not in the draft articles on State responsibility. He therefore insisted that, if the Commission dropped article 19, it should include a study of international crime in its long-term programme of work. It would also be wise for the Commission to make that proposal at the time when it referred the draft articles to the Sixth Committee so that it would not give the impression that it was abandoning an important concept that was currently deeply entrenched in international law.

71. In conclusion, he said that he was prepared to accept the compromise on the terms he had indicated.

72. Mr. ROSENSTOCK said that he did not want silence to suggest that the term "international crimes of States" had become part of the language of international law. It was, rather, an oddity. He did not understand how it could have found its way into the Commission's work; at no time during the past decade had it been supported by at least half of the Commission's members. He also did not think that it was reasonable to expect, as the price to be paid for taking on the legislative proposals put forward by the Special Rapporteur, to have to accept the concept of crimes. The Commission must decide whether or not it wished, and at what price and to what extent, to imperil everything that had been done to date on the topic of State responsibility by flights of fantasy. The Special Rapporteur's proposals were interesting, worth considering and must definitely be referred to the General Assembly, on a first-reading basis, in order to obtain reactions and indications as to whether there was support for continuing the work along the proposed lines. If the Commission went beyond that, however, it would be taking the enormous risk of imperilling the entire exercise it had been carrying out. Statements characterizing certain types of conduct as "criminal" were essentially political in nature and, in the current context, the concept of crime was not meant in any normal sense of the term as used by lawyers.

73. Mr. HAFNER said that, in his opinion, the expression "international crimes of States" was accepted in the terminology of international law, but was not understood by everyone in the same way. As the law now stood, there were at least three different interpretations and that made the question a very sensitive one.

74. Mr. ECONOMIDES said that, in his opinion, article 19 was a key provision of the draft and all the more valuable in that it also reflected the progressive development of the law. The Commission currently had before it another proposal, which was the result of the Special Rapporteur's enormous efforts to find a basis for consensus. He personally was, however, not convinced that the ideal balance had been found. Mr. Dugard had made a realistic proposal which should be considered with a great deal of attention in order to arrive at a balanced solution. Perhaps other proposals would be made in order to reach a more satisfactory compromise, but he could not agree with the apparently negative position taken by Mr. Rosenstock. The work carried out over a period of many years must naturally be safeguarded, but not at the expense of one part of the Commission.

⁹ See *Netherlands Yearbook of International Law*, vol. XV (1984), p. 321.

75. Mr. CRAWFORD (Special Rapporteur) said that article 51, paragraph 4, used the word “penal” in all possible connotations because the Commission could not exclude the possibility and the contingency of decades of the development of international law.

76. With regard to the submission of the draft articles to the Sixth Committee, it would be desirable for the Committee to have an integrated text so that it could see how the various articles related to each other and for the Commission, in its report to the General Assembly on the work of the current session, to distinguish between the aspects of the report on which substantive comments had been made by Governments and were representative of many years of work and those which were essentially new.

77. Mr. SIMMA noted that, when he had said that the text of article 51 should be brought closer to that of article 19, he had not been referring to article 19 as a whole, but only to article 19, paragraph 2, describing the obligations article 19 had in mind, and that he certainly had no intention of proposing that the word “crime” should be added as part of that approximation.

78. Mr. BROWNLIE said that the exercise the Commission was engaged in involved the codification of State responsibility, which was a long-established part of customary law that would survive regardless of the outcome of the Commission’s work. The Commission was also ambitiously trying to construct a system of multilateral public order by merely normative means. For that and other reasons, it must look at State practice, which would show, for example, that it was not only Western States that had gone in for multilateral sanctions.

79. Referring to article 19, he did not agree with the approach of saying that the fact that the Commission was setting aside article 19 would in a way amount to abandoning the concept of international crime. Indeed, some members of the Commission held the view that article 19 was a weak version of the international crime concept and was in the wrong place. It was an inappropriate article that did not belong in the draft in any event.

80. For the time being, the Commission’s concern should be to transmit an integrated draft to the Sixth Committee in order to obtain feedback.

81. With regard to more specific aspects of the report, the references to State practice could be developed and rounded out. As to terminology, he took the view that the concept of collective countermeasures might give rise to misunderstandings, not least because of its association with bilateral countermeasures. Collective countermeasures were essentially collective sanctions and they were often parallel rather than collective. Although it was difficult to find an alternative, he would prefer the term “multilateral sanctions”.

82. It was inaccurate to say, as the Special Rapporteur did, that the obligation of non-recognition referred to in article 51 was in the sphere of progressive development. There again, the Commission must be scrupulously careful to establish a link between its work and what had existed for decades. The principle of non-recognition had first been affirmed by the Assembly of the League of Nations in the early 1930s, and that should be acknowledged in the

commentary. The report should also at least mention the problem of invalidity because, apart from being a political sanction in some cases, non-recognition was, in a more legal context, a reaction to the invalidity of an act.

83. He did not think that the term “serious and manifest breach by a State of an obligation” in article 51 was as objective as it seemed, since breaches committed by permanent members of the Security Council usually tended not to be seen as manifest.

The meeting rose at 1.10 p.m.

2651st MEETING

Thursday, 3 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. GOCO said that, during his period of office as his country’s Solicitor-General, he had handled a number of cases with international ingredients. He was, however, rooted in the study and analysis of national law and in advocacy. He had therefore found the Special Rapporteur’s third report (A/CN.4/507 and Add. 1–4) particularly illuminating. Any doubts he had had about certain issues were largely dispelled.

2. The use of the expression “legal interest” in paragraphs 375 and 376 of the report raised the important

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

question of how it should be understood. He wondered whether it was the kind of legal interest that was recognized in a judicial forum or could pass the test of judicial scrutiny. Legal interest was, after all, a real and existing interest that was legally protected. The requirement of *locus standi*, moreover, could serve as a preclusion when a party failed to show legal interest in the suit or lacked legal personality. ICJ had heard several cases on the issue, including the *South West Africa* cases, in which Ethiopia and Liberia had made applications to the Court asking it to affirm the status of South Africa as a territory under mandate. The Court had taken an empirical view of legal interest as a general issue and refused to restrict the concept, as a matter of general principle, to provisions relating to a material or tangible object. It had held that such rights or interests, in order to exist, must be clearly vested in those who claimed them, whether by some text or instrument or rule of law. A similar issue had been raised by the *Northern Cameroons* case, in which the Court had been requested to declare that the United Kingdom, as administering authority for the Cameroons, had failed to fulfil its obligations under the relevant trusteeship agreement.

3. Another possible procedural point was that of the proper joinder of parties. The existence of the legal interest of the parties to be joined was, of course, fundamental. Yet another issue was that of the existence of a valid cause of action, or whether a legal demand was being asserted, as opposed to a mere remonstrance or request for reparation. The justification for the involvement of other States, or the whole international community, was a serious breach of obligations. Hence a pre-emptory issue would be the kind of breach committed that would warrant the participation of other States. Once the breach had been committed, the necessary legal interest for other States to join the victim State was instantly achieved, but, of course, the latter must first give consent. If such consent was lacking, other States willing to join might not be able to do so. The question still remained, however, whether—aside from the nature of the breach, which was the yardstick to be used in cases of assistance to a victim State—alliances, treaties or regional groupings, of which there were many, were sufficient to provide a legal interest.

4. The examples of countermeasures cited in paragraph 391 were not collective countermeasures in the strict sense, inasmuch as the States taking those measures could not claim to be injured. Indeed, some had merely decided to suspend treaty rights, alleging a fundamental change of circumstances. Moreover, paragraph 396 contained the admission that State practice was dominated by a particular group of Western States. There were few instances of States from Africa and Asia taking collective countermeasures, as was confirmed in paragraph 290 of the report, relating to the fact that countermeasures favoured the most powerful States. The matter required serious consideration, given current realities among developed, developing and underdeveloped countries. The rich and industrialized countries were grouped together in alliances, while other nations had weak links with each other and relied on support from some powerful State. Although sovereign and independent, they were economically dependent. The result was that, for all the care taken in their elaboration, the likelihood of collective countermeasures being taken was small. There were powerful reasons preventing States from joining a victim State. In that con-

text, an independent panel assembled by OAU had blamed some States and institutions for the genocide in Rwanda in 1994. It was worth asking why no State had intervened to support a concept in which they claimed to believe, following such a serious breach of obligations to the international community as genocide.

5. He would comment on the wording of the proposed articles in the Drafting Committee.

6. Mr. MOMTAZ said that chapter IV of the third report had the great advantage of enabling the Commission to extend its discussion of responsibility in the context of the bilateral relations between States. The shadow of article 19 adopted on first reading, dealing with a most controversial topic, lay over the whole of the chapter. Without wishing to reopen the debate on the distinction between international crimes and international delicts, he merely observed that the distinction unavoidably existed and some time should be given over to serious consideration of it. He had taken careful note of the proposal in that regard by Mr. Dugard (2650th meeting).

7. As to the report itself, he fully shared the concern expressed by the Special Rapporteur in paragraph 372, concern that the Security Council had also expressed, about the harmful effects of some of its resolutions on the innocent civilian population of targeted States. The President of the Council had made several statements concerning the need to ensure that sanctions conformed with international humanitarian law. An independent group of experts was to be set up by the Council to consider the matter.

8. With regard to paragraph 391, he agreed with Mr. Dugard that the taking of collective countermeasures was not confined to Western States and drew attention to the measures taken by certain Arab countries against Egypt after the Camp David accords³ and also to those taken by the member States of the Gulf Cooperation Council against Iraq after the invasion of Kuwait.

9. As to paragraph 393, it was somewhat surprising that the Special Rapporteur, although using the word “invasion”—which undoubtedly had a negative connotation in international law—to describe the action of the Union of Soviet Socialist Republics in Afghanistan, seemed nonetheless to have doubts as to the unlawfulness of that action.

10. Paragraph 374, revealed some confusion between the category of norms that ICJ characterized as *erga omnes* in its ruling on the *Barcelona Traction* case and the peremptory norms of general international law. That confusion was, perhaps, due to the fact that all the examples given concerned peremptory norms of general international law or *jus cogens*.

11. He shared Mr. Brownlie’s reservations about the term “collective countermeasures” and was wholly in favour of his suggestion of the alternative “multilateral sanctions”. His own main concern, however, was that the

³ Framework for peace in the Middle East agreed at Camp David, signed at Washington on 17 September 1978 (United Nations, *Treaty Series*, vol. 1138, No. 17853, p. 39).

Special Rapporteur's reasoning was based on the right of not-directly-affected States to come to the assistance of a State injured by a gross breach of obligations to the international community. That right was brought out in articles 50 A and 50 B. That approach, however, did not take account of the obligation on member States of the international community to react to breaches of international humanitarian law, an obligation that was clear from article 1 of all four of the Geneva Conventions of 12 August 1949 and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), which laid down that States parties should respect and "ensure respect" for the Conventions in all circumstances. Legal opinion overwhelmingly held that the expression "ensure respect" placed an obligation on States to react to any breach of international humanitarian law. ICJ had been quite explicit on the matter when considering the case concerning *Military and Paramilitary Activities in and against Nicaragua*. In paragraph 220 of its judgment in that case, the Court had stated that the United States is under the obligation according to "the terms of article 1 of the Geneva Conventions, to 'respect' the Conventions and even to 'ensure respect' for them in all circumstances". It had also added that such an obligation derives "from the general principles of humanitarian law to which the Conventions merely give specific expression".

12. The question was, therefore, how best to deal with the matter. He would suggest—at what was admittedly a late stage—inserting a reference in new article 51, paragraph 3, to the requirement to ensure respect for international humanitarian law. As for paragraph 3 (c), it clearly related to cooperation with a view to bringing to an end the breach of a due obligation. In other words, not-directly-injured States could not claim compensation, for the simple reason that the harm suffered by such States was non-material or moral in character.

13. Paragraph 4, was not useful as it stood. It went without saying that, even if the draft articles were adopted in the form of a convention, they could not be an obstacle to the development of either customary or treaty law.

14. With regard to article 39 as adopted on first reading, he was grateful for the reference in a footnote to paragraph 426 to the extremely stimulating article by Mr. Arangio-Ruiz, which he had found totally convincing. He suspected that the Special Rapporteur had also been impressed, which would explain the drastic revision of the wording and, indeed, the proposal to delete the draft article altogether. Ever since the decision of ICJ in connection with the *Lockerbie* case, Article 103 of the Charter of the United Nations, had been extensively interpreted. Yet it was clear that Article 103 related only to the provisions of the Charter itself; it did not relate to decisions taken by United Nations bodies, including the Security Council. On the other hand, it gave the provisions of the Charter priority over those contained in other legal instruments, thus excluding rules with a purely customary basis. Hence, the question obviously arose as to whether, once adopted, the draft articles would lose their customary character simply because they had been codified. He doubted it. The Court had been quite clear in that respect with regard to Article 51 of the Charter and the notion of self-defence, when handing down its judgment in the case concerning

Military and Paramilitary Activities in and against Nicaragua. In paragraph 176 of its judgment it had stated that customary law continued to exist side by side with treaty law and that Article 51 could not supplant customary international law.

15. The same argument could be applied to the draft articles now before the Commission. Their provisions were sometimes founded on general international law. Those with a customary basis would not come under the scope of application of Article 103 of the Charter of the United Nations. He believed that article 39 added nothing and therefore doubted its validity. The same question had arisen during the drafting of the Rome Statute of the International Criminal Court. Article 16 of the Statute, which gave the Security Council the possibility of indefinitely suspending a case before the Court, had been strongly criticized by many representatives of current legal opinion. He would therefore gladly accede to the Special Rapporteur's proposal in a footnote to paragraph 426 that article 39 should simply be deleted altogether.

16. Mr. HAFNER said that the Special Rapporteur was to be congratulated for completing, with his submission of chapter IV of his third report, the enormous task of preparing the draft articles on State responsibility for second reading. Chapter IV had far-reaching political consequences and political implications, and also raised extremely complex issues with regard to ongoing developments in international law and international relations.

17. The first part related to *erga omnes* obligations and obligations to protect the collective interests of States. In that context, the vexed question of international crimes needed to be settled. He shared the view that international crimes as such should not be included in the draft articles. Always assuming it could be agreed that such a category even existed, the time was not yet ripe to deal with them in detail, and the task of defining them in any case belonged to the field of the primary rather than the secondary rules. Since the primary rules had not yet established the extent, scope and content of such crimes, it would be premature to deal with the secondary rules or consequences that followed from the existence of primary rules. It could, of course, be claimed that the same situation arose with regard to *jus cogens* in the 1969 Vienna Convention, which contained no definition of the content of that concept. It must be borne in mind, however, that crimes were a much more sensitive area, and that the Convention had deliberately provided for a mandatory judicial procedure before ICJ where issues involving *jus cogens* were concerned—a situation that would not arise in the field of State responsibility. He thus supported the Special Rapporteur's decision to deal only with delicts possessing particular features indicating their gravity.

18. In that regard, it must also be borne in mind that the draft articles already identified different categories of obligations. Obligations could be bilateral or they could be multilateral, a category which included obligations owed to a group of States, or those owed to the international community as a whole; while both of these groups included further subcategories such as those affecting the enjoyment of the rights of other States, and those designed to protect a collective interest. But that categorization was to be distinguished from the category of

different kinds of breaches, which could apply to all types of obligations, such as those of a continuing character. A particular kind of breach was one that was serious and manifest. New article 51 addressed all obligations owed to the international community as a whole, but only with respect to certain types of breaches. Hence, there was a substantial difference between crimes according to the original definition under article 19, and the kind of breaches addressed in article 51. Consequently, crimes—if they existed—were not dealt with in article 51, and he thus concurred with the view expressed by Mr. Dugard, that it might be a good idea to place that item on the future agenda of the Commission. On the other hand, Mr. Dugard's other proposal, namely, to include the definition of crimes under article 19 in article 51, would entirely change the scope of that article. In his view, in the draft articles proposed for second reading, crimes were considered to be covered by the *lex specialis* rule alone. To deal with that issue at the current juncture could seriously jeopardize the entire exercise.

19. The view expressed by the Special Rapporteur in his oral introduction concerning the relationship between State responsibility and individual responsibility was correct. Although classical doctrine considered State responsibility to be unfettered by individual responsibility, nonetheless the function of the latter was undoubtedly to release the population from the status of hostage in which it was placed by State responsibility. He very much concurred with such a philosophy, which also underlay the creation of the International Criminal Court.

20. Likewise, the imposition of punitive damages was not confirmed as a practice in existing international law. The case of article 228 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam), referred to by the Special Rapporteur in paragraph 382 of his report, was a special one, reflecting the high degree of integration achieved since the signing of the Treaty on European Union, and questions still remained with regard to its application. It should also be noted that there was still no power to enforce a decision on pecuniary penalties—a fact which merely confirmed that the Commission was dealing with the progressive development of international law. As the Special Rapporteur had rightly pointed out, the first decision in that regard had been taken by the Court of Justice of the European Communities as recently as July 2000, although the procedure had been initiated by the European Commission on earlier occasions. It was interesting to note, however, that the procedure had been activated with regard to environmental matters, where *erga omnes* obligations were involved and there was possibly no injured State. Thus, on the one hand, it was not possible to generalize on the basis of that power of the Court of Justice of the European Communities, and on the other, that power was limited in practice to cases of a certain type.

21. As to the draft articles themselves, for the reasons he had already given, he favoured retention of the second bracketed text in new article 51, paragraph 2, and consequent deletion of the reference to “punitive damages”. The commentary should include a discussion of the extent to which the issue of validity, raised by Mr. Brownlie, was involved in paragraph 3 (a). Although the statements by Mr. Gaja and Mr. Simma (2650th meeting) concerning the

relationship of paragraph 3 (b) to article 27 seemed convincing, he nevertheless tended to support the view expressed by the Special Rapporteur in his response to Mr. Gaja, concerning the difference between the two provisions. Consequently, he saw paragraph 3 (b) as having a certain merit.

22. The main problem lay with paragraph 3 (c), which, along with paragraph 3 (b) was certainly inspired by Article 2, paragraph 5, of the Charter of the United Nations. Both provisions generalized the obligation, and extended it beyond the United Nations, to any States that took such measures and to which the obligation was due. He had already said, during the Commission's consideration of article 29 bis, on peremptory norms, that the articles seemed to affect the law of neutrality. That was particularly true of subparagraph (c), which, if applied, would change the very purpose of neutrality, namely, impartiality. According to that principle, a neutral State would be obliged to render the same assistance to the responsible State as it was required to render to the other States addressed in subparagraph (c). That, however, would contradict the obligation under subparagraph (b). Of course, one could argue that neutrality was now no longer governed by the rule of equidistance. That, however, remained a debatable assertion. The *lex specialis* rule could be invoked to solve the problem, but he doubted whether the law of neutrality could be considered a *lex specialis* in relation to State responsibility. Hence, it could only be argued that the responsible State was obliged to tolerate such cooperation by the neutral State with the other States, since it would also be bound by the rules on State responsibility—a situation similar to that of neutral States participating in the United Nations. But then it must be recognized that the law of neutrality was undergoing substantial change and that the article would thus constitute development of international law—though whether that development was “progressive” was a moot point. He questioned whether it was possible to go so far, and thus joined those who had expressed doubts regarding the provision.

23. Other considerations also cast doubt on paragraph 3 (c). Thus, the Security Council in paragraph 2 of resolution 678 (1990) of 29 November 1990, adopted under Chapter VII of the Charter of the United Nations, had authorized Member States to use all necessary means to restore international peace and security in Kuwait. By paragraph 3 of the same resolution it had requested all States to provide appropriate support for the actions undertaken in pursuance of paragraph 2. The fact that the resolution did not use the word “decides” meant that the Council had not imposed a clear obligation of cooperation on States not participating in the collective measures under paragraph 2. Clearly, the Council had not been sure whether such an obligation would be in accordance with international law or accepted by States. Nor was it possible to draw the conclusion from Article 2, paragraph 5, of the Charter that there was any duty to cooperate with the States taking the collective measures. The only obligation that could be inferred from the linkage between the Council resolution and Article 2, paragraph 5, of the Charter (and also, perhaps, Article 25) was that States simply had a duty not to obstruct those measures.

24. A further problem with paragraph 3 (c) was the expression “cooperate in the application of measures designed to bring the breach to an end”. While it could of course be inferred that such measures must be lawful, that was nowhere stated. The first condition to be imposed on the measures was thus that they must be in accordance with international law. Only then could a duty of cooperation be established.

25. As to paragraph 4, the reference to “penal” consequences was superfluous, since it was vitiated by the presence of the words “or other consequences”. However, the provisions appearing in a footnote to paragraph 413 of the report was a necessary addition, though it should form a separate article, as proposed by Mr. Simma. A reference to non-repetition should be inserted in subparagraph (a) proposed in that footnote, as non-repetition went hand in hand with cessation. Then there was the important question whether the State should be entitled to claim restitution and additional damages and to take countermeasures in order to induce the responsible State to comply. Subparagraph (c) proposed in the footnote raised various questions in that regard: for subparagraph (c) (i) used the expression “in the interests of the injured person or entity”, which would require communication between the invoking State and the victim, whereas subparagraph (c) (ii) seemed not to require such communication, although damages were to be used for the benefit of the victims of the breach. While that proposal was supported by a certain moral conviction, he doubted whether there were instances in which that had happened. Clearly both articles must be read in conjunction with article 51, which failed to indicate the State entitled to refer to the obligation of the responsible State. The proposal in the footnote was thus a necessary corollary to article 51.

26. He could support the proposed new formulation for article 37, including the words “to the extent”. Presumably, the intention was that article 37 should place the entire draft on State responsibility under the *lex specialis* regime. The article referred, however, only to “the conditions for ... an internationally wrongful act”, and he thus wondered whether that also included the definition of such an act, or, in terms of the headings of the different Parts, the general principles, the act of the State under international law and the breach itself. If the text was to be retained, some clarification should be provided in the commentary, a matter that could be taken up by the Drafting Committee. A legal solution certainly needed to be found to the question of the relationship between *lex specialis* regimes and the general regime of State responsibility. Could a State not bound by a special regime act under the general regime where it was also entitled to invoke State responsibility? In his commentary the Special Rapporteur had referred to a solution by interpretation. At the current late stage in the proceedings, it seemed that the Commission would have to concur with that view whether or not it offered a plausible solution. Nevertheless, very complex issues were involved.

27. The wording of new article 39 posed no problems, although it could be argued that the provision was redundant, as it already flowed from Article 103 of the Charter of the United Nations. Nevertheless, bearing in mind the comments by Mr. Momtaz, whose concerns he to some extent shared, the consequences of the eventual legal sta-

tus of the draft needed to be considered. If the articles were eventually to take the form of a resolution reflecting customary international law, it could then be argued that they would prevail over the Charter, since Article 103 covered treaty obligations but not customary law. New article 39 was thus particularly important, as it should be interpreted in such a way as to ensure that Article 103 of the Charter prevailed over the instrument in which the draft articles were to be embodied.

28. Mr. ECONOMIDES said he would deal only with the compromise solution the Commission was seeking with regard to articles 19 and 51 to 53 of the draft articles adopted on first reading.

29. The compromise solution proposed by the Special Rapporteur was not, in his view, and could not, a priori, be satisfactory. The Special Rapporteur had eliminated the term “international crime”, a term which was nevertheless well established in law at the current time: the terms “crime of aggression” and “crime of genocide” had universal currency. Furthermore, that term alone had a considerable deterrent effect where the most serious breaches were concerned. The Special Rapporteur had deleted article 19 in its entirety, article 40, paragraph 3, and article 52 of the articles adopted on first reading and proposed a new article 51 in exchange for those excisions.

30. New article 51, paragraph 1, should constitute a separate article, as had already been proposed by Mr. Simma and Mr. Tomka, and should also be considerably expanded. The article must contain a definition of a serious breach, as currently set forth in article 19, paragraph 2. That definition should be worded: “The breach by a State of an international obligation essential for the protection of fundamental interests of the international community as a whole constitutes a serious breach within the meaning of this chapter.”

31. He supported the idea of mentioning that the breach must be duly established or manifest, as was the case with any internationally wrongful act, particularly when a State was moved to take countermeasures in connection therewith. The article must also contain an enumeration of most, even if not all, of the serious breaches mentioned in article 19, paragraph 3, and, in particular, of aggression. Needless to say, the enumeration would not be exhaustive, but it was nevertheless essential, for everyone must be aware of what was understood by the words “serious breach”.

32. Paragraph 2 of article 51, which constituted the only proposal of substance offered by the Special Rapporteur, should also take the form of a separate article. In his view, punitive damages should be retained solely in the case of serious breaches. As for the two expressions currently contained in square brackets, he would prefer to combine them in an expression worded “punitive damages reflecting the gravity of the breach”.

33. Paragraph 3 could also be divided into two articles. The first might be worded: “A serious breach entails, for each other State individually”—the word “individually” was important—“the obligations:”, followed by subparagraphs (a) and (b) as currently worded. The second article might read: “A serious breach also entails, for all the States, the obligations to cooperate with the injured State:

(a) in the performance of the obligations set forth in the previous article; (b) in the application of measures designed to eliminate the consequences of the serious breach.” Needless to say those measures must be in accordance with international law.

34. Paragraph 4 could comprise the final article of the chapter. Naturally, it needed to be substantially improved by the Drafting Committee.

35. Another factor to consider was whether the vacuum left by the deletion of article 40, paragraph 3, could be filled by article 40 bis, paragraph 2, and articles 50 A and 50 B. It was not an easy question to answer. The new provisions were complex and needed careful study, which he hoped could take place not only in plenary but also, especially, in the Drafting Committee. However, it appeared that, to implement the provision in article 50 bis and avoid possible abuses, it would be necessary to comply with the duty of non-intervention in matters falling within States’ national jurisdiction in accordance with the Charter, a duty spelled out in the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁴ His proposals contained nothing new. They were based on the article 51 proposed by the Special Rapporteur and on article 51 adopted on first reading, and also drew to some extent on article 19.

36. His conclusion with regard to the compromise solution proposed by the Special Rapporteur was that the Commission’s immediate task should be to try and improve the text as much as possible and that it should revert to the question at the next session. Lastly, he wished to congratulate the Special Rapporteur for his report on a topic of crucial importance and to thank him for the efforts he had made to produce a fair and honest compromise.

37. Mr. KABATSI said that, thanks to the Special Rapporteur’s endeavours, it now seemed the Commission was about to present to the General Assembly and to the international community as a whole a complete package of draft articles on the topic of State responsibility. In chapter IV of his third report, the Special Rapporteur had tried to tie up any loose ends and had provided compromise solutions on controversial provisions, realigning the pieces of the jigsaw so that the resulting picture was less confusing.

38. In general he welcomed the Special Rapporteur’s consideration and elaboration of the notion of the right of every State to invoke responsibility for breaches of obligations to the international community as a whole and particularly welcomed the very useful limitations imposed on that right if exercised on behalf of another State. He was less comfortable with the step the Special Rapporteur had—with commendable reluctance—taken with respect to the notion of punitive damages. The Special Rapporteur might, however, be correct in saying that the new path mapped out by the European Union could in time, perhaps in the not too distant future, prove attractive to other States or regional groupings.

39. He also supported the Special Rapporteur’s treatment of the subject of collective countermeasures, even

though, uncharacteristically for the Special Rapporteur, the examples of State practice provided were confined almost exclusively to Western States. Mr. Dugard and Mr. Kateka had provided additional examples from among African States, including what had once been termed the “front-line States” and States of eastern Africa and the Great Lakes region. Other examples that sprang to mind were the collective actions taken in recent years by Commonwealth States against errant States such as Nigeria. All those examples should reassure the Commission that widespread State practice did exist as far as collective countermeasures were concerned. Although those examples did not always necessarily amount to countermeasures within the meaning of chapter II of Part Two bis, elements thereof were nevertheless discernible in those States’ practice.

40. It might therefore be supposed that he had finally become reconciled to the notion of unilateral countermeasures. That was not the case. He could live with collective countermeasures, or sanctions, as Mr. Brownlie preferred to call them, because, unlike the case of unilateral countermeasures by individual States, in the case of collective countermeasures the scope for error and abuse was reduced by the wisdom and good faith of the other States involved. That situation was different from the “self-help” situation of unilateral judgement covered by chapter II of Part Two bis.

41. He welcomed the Special Rapporteur’s treatment of the issue of “gross breaches” of obligations to the international community as a whole, and the proposed recommendations. Unlike a number of other members, he did not adhere to the notion of State criminality. States could commit grave or serious breaches of international law to the prejudice of other States, which would also invariably be to the detriment of the international community as a whole. Such States should, accordingly, expect commensurate consequences by way of reparation. But that was where matters should end. There was no commonly accepted understanding of the expression “State crime”, for no light was cast upon it even in the context of national penal provisions—reason enough to refrain from using it. The derogatory connotations of the word “crime” could stigmatize the innocent populations of States temporarily governed by tyrannical regimes. Such had been the case in Uganda under the regime of Idi Amin, and although the United States had perhaps been justified in imposing trade sanctions upon Uganda, it had been a population already suffering under Amin’s genocidal policies, not Amin and his cohorts, who had borne the brunt of the sanctions imposed.

42. He agreed that chapter III of Part Two, on serious breaches of international obligations, was not the proper place for provisions containing the principle embodied in article 19; they belonged more in Part Two, chapter II, dealing with the legal consequences of the international responsibility of a State.

43. As to new article 51, paragraph 2, he preferred the wording “damages reflecting the gravity of the breach”, as the idea of punishing States was unpalatable. The words “as lawful” should be deleted from paragraph 3 (a), because a situation created by a breach could not be lawful. Perhaps “lawful” could be replaced by “acceptable”.

⁴ See 2617th meeting, footnote 19.

He shared the doubts already expressed about the obligation to cooperate referred to in paragraph 3 (c) and concurred with Mr. Hafner that there could be no such obligation in all cases. He approved of articles 50 A and 50 B and the principles contained in Part Four.

44. Mr. LUKASHUK said that he agreed with most of the points made in the report, but wondered whether the Commission would be able to tame the lions and tigers to which Mr. Kabatsi had referred at an earlier meeting.

45. Paragraph 376 suggested that obligations to the international community as a whole generated the right to act in the general interest. Did the enforcement of those obligations demand State action in defence of general interests? Did that signify recognition of something similar to *actio popularis* in Roman law? ICJ had found in the *South West Africa* cases that no such institution yet existed in international law and the Special Rapporteur also appeared to have adopted that position.

46. In paragraph 391, the Special Rapporteur indicated that, because of scruples concerning the lawfulness of NATO strikes against Yugoslavia, member States had relied not on legal, but on moral and political grounds. Perhaps it should be stipulated that countermeasures could not be predicated on either moral or political considerations—a point that could be of practical significance.

47. The Special Rapporteur's mention, in paragraph 394, of retortion in the event of a breach of obligations of a general nature was a reminder that, unless something was said on that subject in the draft articles, it would be a dilemma constantly encountered in theory and in practice.

48. He had some qualms about the title of chapter III, because it gave the impression that the chapter discussed the concept of serious breaches or enumerated such breaches. It would be an appropriate title for a section of a criminal code, but it was unsuited to a text on procedural law. Since the chapter was concerned with responsibility, it should be entitled "Responsibility for serious breaches of obligations ...". Similarly, with regard to article 51, the consequence of serious breaches of obligations was responsibility and indeed the article talked about responsibility. Its title should therefore reflect its content and read "Responsibility for serious breaches ...". Paragraph 2 might then be worded "Such responsibility entails for the State responsible for that breach all the legal consequences of any other internationally wrongful act and, in addition, punitive damages." Punitive damages were very important in that context.

49. He had real doubts about paragraph 3 (a) of new article 51, since it seemed that the obligation not to recognize as lawful the situation created by the breach, had nothing to do with the specific characteristics of the breach, but could apply to any breach. It was true, however, that no unlawful consequence could be recognized.

50. The idea of responsibility had also been omitted in paragraph 3 (b). It would be much more accurate to formulate that subparagraph "not to render aid or assistance to the State which is responsible for the commission of the breach ...". He was not convinced of the need to completely delete article 19 and in that respect he broadly agreed with Mr. Economides.

51. It was necessary to emphasize the importance of the provisions contained in article 50 A, for their absence could give rise to the practice of police States enforcing the observance of international law on behalf of other States and thus making the latter dependent on them. The title of article 50 B had again forgotten the term "responsibility".

52. As to article 50 B, paragraph 1, when *erga omnes* obligations were concerned, any State could be regarded as injured and hence there was no neutral State. For that reason the clause should be formulated "In cases referred to in article 50, where no individual State is directly or particularly injured by the breach ...". Plurality of responsibility raised quite serious issues, which had been ignored by the Special Rapporteur, in other words the delimitation of the category of directly injured States and States with a legal interest. Such difficulties had often occurred in practice and would continue to appear.

53. With regard to new article 39, he had doubts about referring solely to Article 103 of the Charter of the United Nations, one that conferred a particular status on the Charter as a whole. Therefore, the reference should be to the Charter as a whole, with a final mention of Article 103. An acceptable provision based on that article could indubitably be drawn up by the Drafting Committee.

Reservations to treaties⁵ (concluded)* (A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,⁶ A/CN.4/L.599)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)**

54. The CHAIRMAN invited the Special Rapporteur to introduce chapter III of his fifth report on reservations to treaties (A/CN.4/508 and Add.1–4).

55. Mr. PELLET (Special Rapporteur) said he first wished to inform members that the Commission on Human Rights had postponed its consideration of reservations to human rights treaties for a further year, since Ms. Hampson had not prepared a document for the current session of the Sub-Commission on the Promotion and Protection of Human Rights.

56. The issue discussed in chapter III—prepared in French, and not, as the Secretariat persisted in indicating, in French and English—was the moment of formulation of reservations and interpretative declarations. It was not an entirely new question for the Commission, since it had been discussed in connection with the definition of reservations adopted in draft guideline 1.1, which reproduced the definition in the 1969 Vienna Convention. That definition specified that reservations were unilateral statements made by a State or international organization when

* Resumed from the 2640th meeting.

** Resumed from the 2633rd meeting.

⁵ For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), p. 91, para. 470.

⁶ See footnote 2 above.

signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty. The definition had been further clarified, particularly in draft guideline 1.1.2, stating that the instances in which reservations might be formulated included all the means of expressing consent to be bound mentioned in article 11 of the 1969 and 1986 Vienna Conventions. Nevertheless, those clarifications had not entirely resolved all the difficulties pertaining to the moment at which a reservation could or must be formulated and those were questions addressed in chapter III. They were broached from the angle of the formulation of reservations, which constituted section one of chapter III of the fifth report, entitled "Formulation, modification and withdrawal of reservations and interpretative declarations".

57. He had abided strictly by the plan of work adopted when the first report⁷ had been considered and had therefore investigated solely the procedure for formulating reservations. He had not examined the potential consequences of incorrect procedure, which could be considered only when the problems caused by impermissible reservations were scrutinized. He had looked into the formulation of reservations, but not the correctness or incorrectness of that formulation. He had, however, noted a curious feature of the vocabulary used in the 1969 Vienna Convention when it defined reservations. Article 2 spoke of a unilateral statement "made" at a given time by a State, yet articles 19 to 23 generally employed the verb "to formulate". Article 19, subparagraph (b), referred, however, to reservations provided for by a treaty which could be "made" and not "formulated". That difference was not accidental, but the result of a careful choice. "Made" had to be used when reservations were sufficient in themselves to produce effects, without having to be either confirmed or accepted. "Formulated" had to be employed when the reservation was proposed by the State in question but when it did not, by itself, produce the effects normally associated with a reservation. In his opinion, the word "made" was employed erroneously in article 2, but it was probably not worth amending draft guideline 1.1. The Convention could not be rewritten. In the draft guidelines the Commission was going to consider or adopt, however, care would have to be taken to use the two verbs correctly.

58. He wished to draw the Commission's attention to a point not discussed in the report, namely the moment at which a reservation could be modified. Clearly there were links between the formulation and the modification of a reservation. Nevertheless, modification could not be separated from the withdrawal of a reservation, for modification was a diluted form of withdrawal. He would examine it in his next report which the Commission could consider at its fifty-third session.

59. The questions examined in his report were of a very dry, technical nature, but their practical importance was not inconsiderable. Draft guideline 2.2.1, entitled "Reservations formulated when signing and final confirmation", might appear complicated at first glance, but it merely reproduced article 23, paragraph 2, of the 1986 Vienna Convention, which included rules on the participation of

international organizations. That was reflected in the reference to acts of confirmation, which were equivalent to ratification by States. He proposed that the Commission should simply follow the method it had used when it had adopted draft guideline 1.1, in other words to include in the Guide to Practice a provision that was common to both the 1969 and 1986 Vienna Conventions. It was necessary in order to make the Guide as complete and easy to use as possible.

60. He had asked himself whether the rule in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions was justified, recalling that there had to be good reasons for proposing its modification, in view of the fact that the decision had been taken in principle, with the approval of the Sixth Committee, not to call into question the Vienna Convention rules, unless it was absolutely necessary to do so. In the case of draft guideline 2.2.1, he saw no such necessity. That did not mean that article 23, paragraph 2, did not have any disadvantages. It probably went beyond mere codification and, when it had been adopted, it had been more akin to progressive development. Since then, the rule had become generally accepted and it reflected prevailing, if not consistent, practice. If the Commission were to question the rule, it would also call into question the practice followed.

61. The advantages of the rule embodied in article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions had been explained in the reports of the Commission to the General Assembly on the work of its fourteenth session (1962)⁸ and the second part of its seventeenth session and of its eighteenth session (1966)⁹, as well as in the fourth and fifth reports by the Special Rapporteur, Paul Reuter, on the question of treaties concluded between States and international organizations or between two or more international organizations.¹⁰ Nevertheless, the main disadvantage of the rule was that by demanding that reservations be confirmed when expressing final consent to be bound, States would probably be discouraged from indicating the reservations they intended to make when a text was adopted, i.e. at the moment of signature. The practice of indicating intentions made for greater predictability regarding the future commitments or undertakings of the parties. The disadvantages did not, however, outweigh the advantages to such an extent that it was worth calling into question article 23, paragraph 2, of the 1969 and 1986 Vienna Conventions.

62. The second question was whether it would not be a good idea to reformulate the terms of article 23, paragraph 2, of the 1969 Vienna Convention, the text of which was not entirely satisfactory. It was not clear, for example, what was meant by the phrase "subject to". The list of means of expressing consent to be bound by a treaty was incomplete, since it was the same as the one contained in the definition of reservations in article 2, paragraph 1 (d), of the Convention, which did not cover all the elements in

⁸ *Yearbook* . . . 1962, vol. II, p. 182, document A/5209.

⁹ *Yearbook* . . . 1966, vol. II, pp. 210–211, document A/6309/Rev.1 (part II).

¹⁰ *Yearbook* . . . 1975, vol. II, p. 38, document A/CN.4/285, and *Yearbook* . . . 1976, vol. II (Part One), p. 146, document A/CN.4/290 and Add.1.

⁷ See 2632nd meeting, footnote 6.

its article 11. That lacuna had in fact led the Commission to adopt draft guideline 1.1.2, which bridged the gap. The more comprehensive wording of draft guideline 1.1.2 could be used in the current instance, but he did not think that was necessary: a reference in the commentary to the missing elements, essentially an exchange of letters, would suffice.

63. Similarly, he did not think it necessary to supplement article 23, paragraph 2, of the 1969 Vienna Convention to take into account succession of States. The Commission had agreed that all guidelines on that subject would be combined in a separate section, and in any event the word “State” covered the concept of successor State. When a successor State ratified a treaty, it was acting first and foremost as a State, not as a successor State. In draft guideline 2.2.1, therefore, it was fitting simply to reproduce the wording of article 23, paragraph 2, of the Convention without referring specifically to succession of States, and perhaps to include more on that subject in the commentary than had the framers of the Convention. In general, the wording of that Convention should, wherever possible, be used as the point of departure and greater precision introduced as and when necessary.

64. One point on which greater precision was indeed needed was addressed in a separate guideline, draft guideline 2.2.2, entitled “Reservations formulated when negotiating, adopting or authenticating the text of the treaty and formal confirmation”. The reasons for making a separate provision rather than simply expanding draft guideline 2.2.1 were both of principle and practicality. The 1969 Vienna Convention should not be rewritten and draft guideline 2.2.1 was fairly long already. Draft guideline 2.2.2 simply reinstated the text proposed by the Commission during the elaboration of the Convention, and which had disappeared in circumstances which Ruda had described as “mysterious”,¹¹ as noted in paragraphs 241 and 254 of the report. The text had simply disappeared, and no justification had ever been given for its disappearance.

65. The additional detail he was proposing in draft guideline 2.2.2 would be to extend the rule in draft guideline 2.2.1 to embryo reservations formulated when a treaty was being negotiated, adopted or authenticated. The reason was to be found in the report of the Commission on the work of its eighteenth session¹² and was reproduced in paragraph 253 of his report. Embryo reservations were sometimes relied on as amounting to formal reservations and, in the Commission’s view, it was essential for the State concerned to formally reiterate the relevant statements when signing, ratifying, accepting, approving or acceding to a treaty.

66. There were two other points on which article 23, paragraph 2, of the 1969 Vienna Convention needed to be supplemented. The first was covered in draft guideline 2.2.3: a reservation did not require subsequent confirmation if it was formulated when signing an agreement in

simplified form, in other words, if the treaty entered into force solely by being signed. That rule could be deduced *a contrario* from draft guideline 2.2.1, but what went without saying went even better when it was said, and that was all the more true since the Commission was elaborating a guide to practice. It would also remove the ambiguity of the words “subject to” in article 23, paragraph 2, of the Convention which were reproduced in draft guideline 2.2.1. The only real problem he could foresee was one of drafting. Should the treaty in question be described as “an agreement in simplified form”, wording that civil law practitioners would be comfortable with, or as “a treaty that enters into force solely by being signed”, which meant the same thing but was more acceptable, perhaps, to common law practitioners.

67. The last draft guideline on reservations formulated prior to the expression of final consent to be bound by a treaty was draft guideline 2.2.4, reservations, entitled “Reservations formulated when signing for which the treaty makes express provision”. The subject matter was not of crucial importance, but adoption of the draft guideline would usefully clarify a point on which practice was variable and poorly established. In paragraph 262 he cited the example of the Convention on reduction of cases of multiple nationality and military obligations in cases of multiple nationality. It provided that the parties could make reservations when signing the Convention, even though it was an instrument that had to be formally ratified. Was it logical, in such instances, to demand that a State availing itself of the Convention’s authorization to make a reservation upon signature should confirm its reservation when it expressed its final consent to be bound by the instrument? He was quite convinced that it was not, and that it could also cause big practical problems, at any rate with regard to reservations made in the past in such situations, many of which had not been confirmed, doubtless on the strength of the authorization expressly set out in the treaty. True, other States, or the same States in the context of other treaties, had taken the precaution of confirming reservations formulated upon signature, but that happened less often than did non-confirmation.

68. As to late reservations, everyone agreed that, unless otherwise provided by a treaty, the expression of final consent to be bound constituted the last time at which a party to a treaty could formulate a reservation. That rule arose from the very definition of reservations and was also implied by the *chapeau* of article 19 of the 1969 and 1986 Vienna Conventions. It was mentioned by ICJ in the case concerning *Border and Transborder Armed Actions*, by the Inter-American Court of Human Rights in its advisory opinion concerning *Restrictions to the death penalty*, and also by the Swiss Federal Court in a very interesting case¹³ cited in paragraph 282 of his report. Other precedents, which he described in paragraphs 281 to 285, had fairly clear consequences. The principle by which a reservation could not be formulated after the expression of final consent to be bound was a stringent rule which States should not be able to get around, whether by interpretation (as shown in the Inter-American

¹¹ J. M. Ruda, “Reservations to treaties”, *Collected Courses of the Hague Academy of International Law, 1975-III* (Leiden, Sijthoff, 1977), vol. 146, p. 195.

¹² See paragraph (3) of the commentary to article 18 (footnote 9 above), p. 208.

¹³ Swiss Federal Supreme Court, *F. v. R. and State Council of the Canton of Thurgau*, decision of 17 December 1992, *Journal des Tribunaux*, 1995, p. 536.

Court of Human Rights findings) or by adding conditions or limitations to a declaration made under an optional clause (as in the decision of the European Commission on Human Rights in the *Chrysostomos* case and in the judgment of the European Court of Human Rights in the *Loizidou* case). That principle needed to be spelled out in the Guide to Practice, and that was what he was proposing in draft guideline 2.3.4, entitled “Late exclusion or modification of the legal effects of a treaty by procedures other than reservations”.

69. The principle was not open to doubt and must be interpreted rigorously, but could be the object of a contrary provision. Nothing, in fact, prevented the contracting parties from stating that a reservation could be formulated or even made after the expression of consent to be bound or after the treaty’s entry into force. Examples of such authorizations of reservation after ratification, ranging in date from 1912 to 1999, were given in paragraph 289 of the report. Owing to the firmness of the principle of customary law that where a treaty was silent, a reservation must be formulated at the latest at the time of consent to be bound, any derogation would have to be express. In draft guidelines 2.3.4 and in 2.3.1, the phrases “unless the treaty provides otherwise” or “unless otherwise provided in the treaty” were signals to States that in order to derogate from the principle, the treaty must expressly provide for such derogation.

70. He proposed going even further and offering to States, together with draft guideline 2.3.1, model clauses for derogations that could be included in future treaties if the negotiators so desired. In that connection, he recalled the Commission’s report on the work of its forty-seventh session, which indicated that the guidelines for the practice of States would, if necessary, be accompanied by model clauses.¹⁴ He envisaged those model clauses, and so, he believed, did the Commission, as simple examples of provisions that could be included in treaties to prevent problems of implementation with respect to reservations. Such was the purpose of the model clauses in paragraph 312, which he hoped the Drafting Committee would discuss in conjunction with draft guideline 2.3.1.

71. The text of the draft guideline could be improved stylistically by the Drafting Committee, but it pinpointed the two fundamental exceptions to the prohibition on formulation of reservations after the expression of consent: “unless the treaty provides otherwise”, and “unless the other contracting Parties do not object”. The first of those exceptions was self-evident and the second was logical and stemmed from well-established practice. It was logical because States could not be forced to agree to set aside the application of a customary rule which obviously was not preemptory. Since a party could withdraw from a treaty and formulate additional reservations when it re-acceded, it would not be wise to take an unnecessarily rigid stance: the party should be authorized to make reservations directly, without going through the process of withdrawal, as long as no other party objected.

72. It was in response to a situation of that nature that the Secretary-General had softened his earlier position consid-

erably in the late 1970s. In 1979, France had indicated its intention to denounce the Convention providing a Uniform Law for Cheques with a view to re-acceding to it with new reservations.¹⁵ The Legal Counsel, acting on behalf of the Secretary-General, the depositary, had suggested that France could address to the Secretary-General a letter, which he would communicate to the other parties, and in the absence of any objection, the reservations would be considered to take effect. That was done, and the practice was subsequently followed by the Secretary-General for the treaties of which he was depositary. A number of examples of similar instances involving other depositaries were given in paragraphs 298 to 302 of the report. That approach had undoubtedly prevented a number of instruments from being denounced outright, and in fact, any contracting party that considered the reservation an abuse could object to it. That thinking had led him to propose draft guideline 2.3.3, entitled “Objections to reservations formulated late”.

73. It was suggested in the literature that such objections should have the same effect as objections to reservations in general, and that objections would prevent a late reservation from taking effect only as between the objecting State and the reserving State. Personally, he did not agree, because it would mean that all the rules concerning the time limitation on the formulation of reservations would be called into question. Any State or any organization would be able to formulate a new reservation at any time and that would constitute a serious threat to the security and stability of legal relations. The very principle of *pacta sunt servanda* would be undermined. Moreover, that interpretation did not correspond to the practice of depositaries, who had always considered, in the words of the United Nations Legal Counsel, that a late reservation would be regarded as taking effect in the absence of any objection by the States parties.

74. In draft guidelines 2.3.1 and 2.3.3, the most important thing was that no State objected to the late formulation of a reservation. On the other hand, once the principle of late formulation was accepted, the usual legal regime for reservations should apply and nothing prevented a State party not objecting to late formulation of a reservation from objecting to the reservation itself and even refusing to be bound to the reserving State. That possibility was left open in draft guideline 2.3.3. He had wondered whether express rather than tacit acceptance of reservations should be required, but that was not in keeping with the practice of depositaries and State practice and would not be realistic. The most that could be asked of States was not to object to reservations.

75. The last, difficult, problem that remained was the time period within which objections could be made to the late formulation of reservations. Practice was ambiguous in that area. Most depositaries who had faced the problem had managed not to take a position on it. As recently as 4 April 2000, the Secretary-General of the United Nations had announced a change from 90 days to 12 months in response to representations made by the European Union. Certainly, 90 days had been too short; States had had no time to examine the proposed reservations.

¹⁴ *Yearbook . . . 1995*, vol. II (Part Two), pp. 108–109, paras. 488 and 496.

¹⁵ See United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), pp. 199–200.

That is also true a fortiori of the month applied by the Secretary-General of IMO which was obviously much too short. Twelve months, on the other hand, was quite long because, for that whole period, States were uncertain as to the fate of the reservation. However, article 20, paragraph 5, of the 1969 Vienna Convention allowed 12 months for objections to reservations, and taking into account also the position of the Secretary-General of the United Nations, he nevertheless proposed setting a time limit at 12 months, rather than 6 months, which he would have preferred.

76. As to the formulation *ratione temporis* of interpretative declarations, late interpretative declarations occurred very rarely, since contrary to the definition of reservations, draft guideline 1.2, which defined interpretative declarations, contained no time element. That meant an interpretative declaration could be made at any time, even though that was not spelled out in any of the draft guidelines adopted so far. However, some treaties placed express limitations on the moment at which interpretative declarations could be formulated. Such was the case with article 310 of the United Nations Convention on the Law of the Sea and article 43 of 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. In that case, an interpretative declaration could be late and should be dealt with by analogy like a late reservation. That was made clear in draft guideline 2.4.3, with regard to simple interpretative declarations. Draft guideline 1.2.1 indicated that conditional interpretative declarations could be formulated only at the time of expression of consent to be bound by the treaty. A separate draft guideline would have to be included on conditional interpretative declarations. Since such declarations operated like reservations, he proposed that draft guidelines 2.2.3 and 2.2.4 should be transposed to draft guidelines 2.4.4, 2.4.6 and 2.4.7 for conditional interpretative declarations.

77. With those remarks, he was submitting the 14 draft guidelines contained in chapter III of his fifth report to the Commission for its consideration and expressed the hope that they would be referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

2652nd MEETING

Friday, 4 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner,

Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

State responsibility¹ (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. TOMKA recalled that, at the fiftieth session, since the Special Rapporteur had unsuccessfully proposed that article 19 and articles 51 to 53 of the draft should be deleted, the Commission had reached a compromise, discussed in paragraph 369 of the third report of the Special Rapporteur (A/CN.4/507 and Add. 1–4), as to the further procedure in considering the issues involved. Although the Special Rapporteur, as apparent from paragraph 371 of the report, had made genuine efforts to discharge his mandate, a number of questions remained unanswered.

2. For example, when the Special Rapporteur dealt in chapter IV of the third report with “responsibility to a group of States or to the international community”, was it to be inferred that the responsibility was the same or that the legal consequences of a breach of an obligation to a group of States and an obligation to the international community were the same? Was that concept deemed to replace the unfortunate expression “international crime”, used in article 19, when article 19 related more to breaches of obligations to the international community as a whole and not to a group of States?

3. Again, some notions used in the report were, despite the Special Rapporteur’s efforts, comparatively “foggy”. That was true of *erga omnes* obligations, peremptory norms (*jus cogens*), most serious breaches and collective obligations. In article 40 bis, paragraph 2 (a), the Special Rapporteur used the term *erga omnes* to qualify an obligation owed to the international community as a whole. In paragraph 373 of the report, he affirmed that the content of obligations to the international community as a whole was largely coextensive with the content of peremptory norms, that by definition a peremptory norm must have the same status vis-à-vis all States, that they were norms with an *erga omnes* effect and no derogation was permitted. But the Special Rapporteur himself noted that an obligation might exist *erga omnes* yet be subject to modification as between two particular States by virtue of an agreement between them, and it would follow that the obligation was not peremptory. The Special Rapporteur went on to conclude that it would follow that, in the event

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

of a derogation, the same obligation was not owed to the international community as a whole. Therefore, the question was why, in article 40 bis, paragraph 2 (a), the obligation to the international community as a whole was qualified as an *erga omnes* obligation when it could be derogated, which would mean, in that case, that it was no longer owed to the international community as a whole. Hence it might be preferable to concentrate—when dealing with what was previously covered by the term “crime”—on breaches of peremptory norms, since the language used by the Commission in article 19 implied that the article covered obligations flowing from peremptory norms rather than the broader concept of *erga omnes* obligations. While he shared the Special Rapporteur’s views as expressed in paragraphs 374 and 375 of the report, he thought that those issues were dealt with in a rather cursory fashion and a more thorough examination was called for. In addition, he acknowledged that examples of peremptory norms should be cited not in the draft articles but in the commentary. Furthermore, he wondered about the role that the State’s consent could play in the context of a breach of peremptory norms, since there could be no derogation from such norms. The introduction of penalties could revive the debate on the criminal responsibility of States, which was not desirable, as the overwhelming majority of States rejected the idea that such responsibility existed in international law. While the Special Rapporteur did cite an interesting example of a penalty imposed by the Court of Justice of the European Communities, it had to be recognized that the Court’s competence was based on a particular treaty, something that could not be envisaged in the context of general international law.

4. The report’s review of State practice in regard to collective countermeasures was interesting, but not entirely balanced. Admittedly, it revealed that States from different regions had taken similar measures but, in some cases, actions presented as collective countermeasures had been more in the nature of politically motivated retaliation. A very interesting example, nevertheless, was that of the legislation adopted by the United States Congress against Uganda, whereby the Congress had recognized that a Government might be involved in a criminal act and that the State bore responsibility if the act was attributable to it. Hence, it could be seen that the position of the Congress was different from that officially expressed by the Government of the United States on the draft articles adopted on first reading.

5. The overall impression he gained from reading chapter IV of the third report was that the Special Rapporteur was indiscriminately covering a number of concepts that fell into slightly different categories, and the confusion was made worse by the idea that the obligations contained in international instruments pertaining to human rights and environmental law were *erga omnes* obligations and, in many instances, even of a peremptory character. However, that was not certain, for even the provisions that defined certain human rights as being underogable related, not to a derogation between States parties, but to the prohibition on a State, when it declared a state of emergency, to derogate from certain basic human rights.

6. Accordingly, he wondered whether the Commission should endorse the draft articles or continue elsewhere the consideration of breaches of peremptory norms, settling

the situation by a saving clause indicating that the draft articles did not prejudice any possible consequence of a breach of a peremptory norm of international law. The Commission could also arrange to conduct such an examination as a separate topic on its programme of work, provided the States Members of the United Nations approved of that procedure and the proposal.

7. As to Part Four, containing general provisions, he generally endorsed the content of new article 37, although the wording could nonetheless be improved by the Drafting Committee, as well as that of draft articles A and B. Article 39, concerning the relationship to the Charter of the United Nations, should be deleted. If the Commission ultimately recommended that the General Assembly should adopt the draft articles in the form of a declaration, there would be no room for such a provision, and if the Commission recommended their adoption in the form of a convention, the question of the relationship to the Charter would in any case be settled by Article 103 of the Charter itself.

8. Mr. KAMTO said that the Special Rapporteur deserved all the greater congratulations for chapter IV of the third report inasmuch as he displayed the same courage and the same concern for balance as in chapter III and did not hesitate to engage in bold development of international law or attempt to codify widely differing and comparatively ill-established practice. Some brief observations were none the less called for on certain concepts, and on an innovative and sometimes unexpected terminology. For example the notion of “victim State” could create confusion with that of “injured State”, which was clearly defined elsewhere, and which it would be better to keep to, if only for the sake of consistency. Similarly, he had some doubts as to the conceptual relevance of the notion of “collective countermeasures”, in which the Special Rapporteur included both what he called “punitive damages” and “penalties” in paragraph 380 of the report, and various other forms of reactions to wrongful acts ranging from an economic embargo to suspension of air traffic. They were what was largely known in the doctrine as “international sanctions”. Actually, whereas the difference between “individual countermeasures”, which the Commission had considered in the context of articles 47 to 50, and collective countermeasures, should lie in their individual character on the one hand and collective on the other, yet it was apparent that the content of a countermeasure was not the same, according to whether they were taken individually or collectively or multilaterally. Consequently, the same term or the same concept could not be used to designate two different legal realities. In his opinion, apart from measures of retaliation and measures of reciprocity, any reaction to a wrongful act in the international context constituted a sanction. A large part of legal writings defined sanctions on the basis of domestic legal criteria, placing the emphasis on the perpetrator of the infringement, the characterization of the infringement, the legal predictability or legal predetermination of the sanction to be taken, but the notion of a sanction in international law should be defined on a wider basis, drawing to some extent on the existing concept in internal law but also taking account of the reality of a poorly structured international society where the same type of institutions as in the domestic legal system did not exist. That was why, as he had pointed out in connection with the consid-

eration of articles 47 to 50, the element of the addressee's perception of the countermeasure or of the reaction was of considerable importance in the definition of a sanction.

9. As to the practice presented by the Special Rapporteur, the examples might perhaps have been better chosen but, above all, they would have gained from being presented in such a way as to be exploited to the best in legal terms. In that regard, it would have been extremely useful to indicate, in each case, the initial obligation breached by the responsible State before mentioning the sanction or countermeasure taken by the injured State. The Special Rapporteur had done so in the case of the United States with regard to Uganda in 1978, of the measures taken against Argentina and those against Iraq. On the other hand, it was surprising to see that, in the case of Poland and the Union of Soviet Socialist Republics, the mere movement of Soviet troops along the frontier and not across the frontier or within Polish territory had justified "countermeasures" against the USSR and that, in the case of the Federal Republic of Yugoslavia, what everybody called a "humanitarian crisis", without any further indication of the international obligation or obligations breached, had justified countermeasures. Moreover, in the latter case, the reason invoked by the United Kingdom Government³ was surprising to say the least, since it was based on "moral and political reasons" in order to justify Yugoslavia's loss of its rights stipulated in a bilateral treaty. Hence, a need arose for clarification, so that the Commission would not convey the impression, either that it was following suit in a dubious practice or that it did not intend to indicate very clearly the conditions in which the taking of countermeasures was permissible.

10. As to the notion of a crime, he was under the impression that the Commission sometimes liked to scare itself, since it was a well-established notion in legal language, one which some of the most important States in the international community used to justify some of their acts. In that connection, the position adopted by the United States Congress in 1978 was not to be considered as a negligible factor, even though opinions had since changed. It was a factual argument, but there were also other arguments which showed that the concept of an international crime was already to be found among the legal concepts of the international legal system. For example, the fact that the Special Rapporteur himself had conceived of punitive damages strengthened the idea that there were infringements of a special character that warranted a special characterization. Moreover, crimes such as genocide or apartheid were also committed by States or by means of institutions or instruments of the State. For instance, it was not possible to speak of the crime of genocide in Rwanda and overlook the means the State had used to assist in the commission of that crime. Hence, if the Commission could, for the purpose of balance and conciliation, but not for considerations of a legal nature or of reality, set aside the term "crime", it could not in any event reject the content of the term. It was, moreover, possible to turn the notion of transparency around and consider that when a crime of an individual was established, it was a presumption of a crime by the State, the point of departure for reverting to a State crime. All those reasons implied that

the concept of a crime did exist and that the Commission should make proper use of it in the draft articles.

11. He endorsed Mr. Economides's proposals (2651st meeting) to secure a compromise in connection with article 51 and make sure that the Commission, without using the terminology, endeavoured to exploit the content of article 19 to the full.

12. With regard to article 50 A, the expression "at the request and on behalf of an injured State" should be replaced by the formulation "at the request, on behalf and in place of an injured State", so that an injured State which had requested another State to take countermeasures could not keep back the possibility of itself resorting to countermeasures again or later on. It was important to make sure, in connection with multilateral countermeasures and, by analogy, that the *non bis in idem* rule applied so as to prevent a proliferation of sanctions for one and the same breach, something that would amount to overlooking the element of proportionality which should apply in that case too.

13. Lastly, for the reasons explained by Mr. Momtaz (*ibid.*), he was wholly in favour of deleting article 39, which contributed nothing but could well add to the confusion and create problems of interpretation.

14. Mr. CRAWFORD (Special Rapporteur), said he wished to confirm what he had stated in the footnote to paragraph 399 of the report, namely, that in citing certain examples he did not judge or intend to make the Commission judge the substance of the measures taken in those situations. The fact of citing particular examples of measures—countermeasures, retortion or others—did not imply any judgement of their merits. They were simply examples of State practice which sought to set the context of the situation.

15. Mr. PELLET congratulated the Special Rapporteur on his *tour de force* and, in keeping his promise, in succeeding at the current session in finishing the review of the entire draft when he had made the risky decision of leaving the most controversial aspects, namely countermeasures, crimes and the relationships between the law of responsibility and the law of the Charter of the United Nations, to the end. It was nonetheless true that it was preferable for States to be able to express their reactions for the last time in the Sixth Committee and, in order to do so, for them to have an idea of the solutions—whether or not they were compromises—towards which the Commission was headed. However, the Special Rapporteur should perhaps have started with that and concluded by discussing the more technical questions. The Drafting Committee would, in any event, have to take its time, since it was at the next session, not the current session, that the Commission would be adopting the final draft.

16. In terms of substance, it should be noted that the Special Rapporteur had apportioned the meanest share to the question—one which was fundamental—of the relationship between the draft articles and the Charter of the United Nations, or more generally between the law of the international responsibility of States and the law of the maintenance of international peace and security. It had been done in article 39, which appeared in Part Four. He was in no sense opposed to the idea behind the draft

³ See 2650th meeting, footnote 4.

article, but could not fail to note that the draft on State responsibility, on the one hand, and the Charter, on the other, were two different things.

17. At most, the Charter of the United Nations could be considered as enunciating primary rules, a breach of which entailed, as did any breach of primary rules, the responsibility of the State to which the breach was attributable, whereas the draft under consideration was or should be concerned only with the secondary rules—on the understanding conversely, that it did not mean the Charter mechanisms could not, in some cases, be of assistance in the implementation of responsibility. But they would only be fortuitous cases, for the prime function of the United Nations was to ensure not respect for international law but, chiefly and in all cases, to maintain international peace and security. The least one could say was that the relationship between those two bodies of rules was extremely complex, as a number of States, particularly the United Kingdom, had emphasized. Contrary to two opinions expressed in the course of the meeting, he did not believe that it was a reason to evade the problem. He nonetheless thought that more prudence was called for than had been displayed by the Special Rapporteur in the formulation of article 39, which was, all in all, very restrictive and separated those two bodies of rules only from a very special standpoint, that of the hierarchy of rules, something which, as Mr. Tomka had said, would be of value only if the draft articles were to take the form of a treaty—and that, in his view, seemed quite pointless.

18. Article 39 was restrictive in two respects. First, the saving clause was confined to the “legal consequences of an internationally wrongful act”, and he failed to see why. The Charter of the United Nations could also, and assuredly did, have an impact on the origin of an internationally wrongful act, for example, through the creation of obligations stemming from the adoption of the resolutions of the General Assembly, the Security Council or other United Nations bodies. Secondly, it was confined to Article 103 of the Charter, and again he failed to see why. In the 1969 Vienna Convention, such a limitation, referred to in article 30, paragraph 1, was conceivable, for Article 103 of the Charter, like indeed other comparable provisions of the constituent instruments of international organizations, related to the hierarchy between treaties: the Charter was a treaty and the Convention was also one. But that did not apply in the current instance. Why Article 103 of the Charter and not another article? The important thing was that the law of responsibility, on the one hand, and the law of the Charter on the other, were on two completely different planes. It would be enough simply to word article 39 so as to read: “These draft articles are without prejudice to the Charter of the United Nations.” It would be dangerous to mention Article 103 alone, for there were risks of incompatibility in other respects.

19. Again, as far as Part Four was concerned, he endorsed articles A and B proposed by the Special Rapporteur, but did not share his position regarding diplomatic protection. It seemed necessary for the draft to include a provision specifying that the draft did not deal with diplomatic protection. Such a step would considerably simplify the Commission’s work whenever, in questionable provisions, the Special Rapporteur or other members wished to draw the Commission into the field of damage caused to

non-State entities—indirect damage. In that case, it was the law on diplomatic protection that applied. The “without prejudice” clause concerning diplomatic protection should appear in Part Two.

20. He endorsed article 37 as proposed by the Special Rapporteur, with one small reservation: the adverb “exclusively” seemed inappropriate. In fact, other rules of international law might well apply partially to a particular kind of wrongful conduct, but, as for the rest, the law on responsibility applied. Moreover, the adverb in question was not compatible with the expression used in article 37: “where and to the extent” and he would therefore like it to be deleted.

21. With reference to chapter III of Part Two, in other words, to article 51 and, first of all, the question of crimes, he reaffirmed that he upheld the concept of an international crime of the State, as did other members of the Commission. In his opinion the word “crime” was perfectly suitable to designate particularly serious breaches of international obligations essential for the protection of the fundamental interests of the international community as a whole, or perhaps particularly serious breaches of norms of *jus cogens*. He also believed that the word did not have in international law the penal connotation it had in internal law. Lastly, he believed that the word was suitable precisely for the reasons that Mr. Kabatsi had given (2651st meeting) in order to reject it: it cast opprobrium on the State in question, and rightly so. A genocidal State was a criminal State. It was not embarrassing to say so even though the consequences of such criminality were not consequences of a penal type. Nevertheless, he noted with satisfaction that in actual fact the Special Rapporteur had been “converted to crime”, by following more or less the same route as his predecessor, Mr. Arangio-Ruiz. Both had started by loudly proclaiming their opposition to the concept of crime as theorized in article 19. Then, both had come to recognize that it answered an absolute need for a quite simple and obvious reason: it was impossible to deal in the same way with the crime of genocide, a crime that could be committed by a State, and with a regrettable but ultimately banal breach of a bilateral or multilateral trade treaty—a “delict” within the meaning of article 19—and personally he would definitely not regret the removal of the term “crime”.

22. The difference between the previous Special Rapporteur and the current one was that the latter was more careful in revealing his conversion. Knowing that he would obtain neither consensus within the Commission nor approval from most of the major Western States which tried to dictate their law in the Sixth Committee, and often succeeded in doing so, the Special Rapporteur had cheerfully sacrificed the word “crime” but had kept the thing, going so far as to improve somewhat the legal regime for what the draft had called a “crime” and which had now become a nameless concept, if not a somewhat laborious and not quite accurate circumlocution, namely “serious breaches of obligations owed to the international community as a whole”. The formula was not quite exact, because it was not enough for an obligation to be “owed to the international community as a whole” for the rules set out in chapter III to apply. It was to be, or should be—and that was precisely what the draft failed to do—concluded that those obligations were regarded as essential

by that selfsame “international community as a whole”, according to the selfsame system as the one applicable to the determination of *jus cogens*. The rule in question should also be one that protected the fundamental interests of the international community, and not just any interest. However, that idea was better expressed in article 19, paragraph 2, as adopted on first reading, than in the rather pallid and ultimately much broader formulation now proposed. Actually, the Special Rapporteur was considerably opening up a notion that he (Mr. Pellet) had always deemed necessary, but had also deemed it necessary to confine to breaches of truly fundamental obligations. Moreover, the Special Rapporteur rightly insisted on the fact that the breach should be serious. In that regard, for his part he did not very much like the adjective “flagrant”, which raised the question of proof.

23. By combining the text adopted on first reading and the new text proposed, it should be possible to arrive at a very satisfactory solution consisting, as other members of the Commission had proposed, in detaching paragraph 1 from new article 51 and turning it into a separate article, placed at the head of chapter III, and probably not in Part One. In that regard, he agreed with the Special Rapporteur that the definition of a crime was useful only to draw the particular consequences thereof: it was enough for it to appear in that chapter. The article should be drafted more or less as Mr. Economides had proposed (*ibid.*), but with one important difference. He was strongly opposed to reproducing in the article itself the examples in article 19, paragraph 3, for examples had no place in a codification text. The simplest and most satisfactory course would be to use a formulation of the kind: “This chapter applies to international crimes of the State”, and then give the definition of those crimes. If the word “crime” really was to be done away with, despite the fact that it had been consecrated for a quarter of a century, it would be possible to use a formulation such as: “This chapter applies to responsibility incurred by a serious breach by a State of an international obligation considered by the international community as essential for the protection of its fundamental interests”, or, to simplify, “... of an obligation essential for the protection of the fundamental interest of the international community”, or again “... of the peremptory norms of general international law”. They were nonetheless, fundamental drafting problems. In any event, he feared that with the vague formulation proposed by the Special Rapporteur, the Commission would apply a regime of aggravated responsibility to internationally wrongful acts which did not warrant such turmoil. The formulation of article 19 was more precise but, paradoxically, more prudent.

24. In the matter of consequences, first of all he did not regret the disappearance of article 41, which had been superfluous. Secondly, he was not opposed to the idea that crimes could entail an obligation to pay aggravated damages, although he had been vigorously against it during the consideration of article 45. However, he did not believe it essential to use the adjective “punitive”, which had a pointlessly provocative penal connotation. In his opinion, it would be sufficient to use the second expression placed in square brackets in article 51, paragraph 2, namely “damages reflecting the gravity of the breach”. Moreover, in the French version in any event and doubtless in the English version, the phrase was unsound: one could not say that the

breach “entails ... damages”; at best, it entailed an obligation to pay damages. It was not simply a drafting problem, but something that led to a somewhat more serious problem. Actually, he did not believe that such aggravated damages were inevitable and payable in all cases. In the case of crimes they were a possibility (totally ruled out for other breaches) when necessary for full reparation. In fact, it was rather surprising that aggravated damages should be mentioned immediately, as early as paragraph 2, as it would be more suitable to transfer the beginning of paragraph 2 to the new article that ought to be drafted on the basis of paragraph 1 and to place the possibility of any aggravated damages at the end of article 51, or in a separate article.

25. Subject to more thorough consideration, unlike other members he thought that paragraph 3 and its three subparagraphs were acceptable as proposed. On the other hand, he was greatly hostile to paragraph 4, more particularly to qualifying any additional consequences as “penal or other”. He would accept a saving clause stating that there might be other consequences, but in no case could he accept the idea of penal consequences. In that regard, he noted that the Special Rapporteur had discussed at length the issue of the penalty payments provided for in article 228 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam). For his part, he very much doubted whether such penalty payments were genuinely penal in character. Then, and above all, as the Special Rapporteur himself acknowledged, such a thing did not exist in international law. Penal sanctions were not inflicted on States—at least in context of the law of international responsibility. While criminal States like Nazi Germany or Iraq, which had aggressed a sovereign State, had been “punished”, they had been punished not in the context of the law of international responsibility but that of the “law of war” or of the “law of the Charter of the United Nations”. Article 39, provided it was properly drafted, was enough or should be enough. In the current state of the development of general international law, there was no penal State responsibility and the wording of article 51, paragraph 4, was very dangerous in that it implied the opposite. If, as the Special Rapporteur contended in paragraph 411 of the report, it was necessary to preserve the possibility of future developments, it was enough to say that paragraphs 2 and 3 were without prejudice to additional—without any other further qualification—consequences that the breach produced an international law. That left every possibility open for the future. For the moment, and doubtless for a long time to come, the international responsibility of the State was not penal, and hence the wording of paragraph 4 was formidably misleading.

26. Admittedly, paragraph 4 could be read otherwise and any penal consequences could be considered as constituting consequences not for the State itself but for the individuals through whom the State acted. In that case, he would agree, for he continued to think that one of the main consequences of the concept of an international crime of the State (or a serious breach by a State of an international obligation considered by the international community as essential for the protection of its fundamental interests) was that, in that instance, the State became transparent. In that regard, he concurred with Mr.

Gaja's comments (2650th meeting): it meant that the State's leaders were no longer covered by their immunities and they could be made directly and personally responsible for wrongful acts that they had committed or caused to be committed in the name of the State. The State façade vanished, because they were very special breaches that constituted crimes. But that idea, which was extremely important and was a consequence of a "serious breach..." that was rapidly gaining ground, should be expressly enunciated in a formulation of the kind: "such a breach entails the international responsibility of the agents of the State who commit the internationally wrongful act". He was very attached to that idea, which lay at the core of the debate, and would be ready to request a vote for it to be included.

27. Chapter III had two gaps. The first concerned the initiation of an *actio popularis* as a result of the commission of a crime, in the spirit of the celebrated *dictum* of ICJ in the *Barcelona Traction* case, which went back on its position four years earlier in the *South West Africa* cases. Naturally, the commission of a crime or of a "serious breach..." could not in itself constitute an autonomous basis for competence for international jurisdictions and courts and the draft was not concerned with the competence of the courts. But if such competence did exist, the perpetration of a crime gave all members of the international community an interest to act, and it should be specified in the draft. The second gap was a problem the Commission had already discussed at length in connection with articles 43 to 45 adopted on first reading. The existence of a crime had an impact on the choice of the mode of reparation. In particular, the directly injured State could not in that case renounce *restitutio in integrum* for compensation, as in doing so it would use rights that did not belong to it but belonged to the international community as a whole. Again, above all the injured State could not, for the same reason, renounce reparation, whereas it could easily do so in the case of a straightforward breach. It was a fundamental consequence and one that the draft articles could not ignore. Suppose, for example, that a State that was a victim of aggression lost half of its territory. It was totally inconceivable that it could request the international community to give up any action. The rule prohibiting aggression was a rule that protected the interests of the international community as a whole.

28. It was regrettable that the question of countermeasures was dealt with in two separate articles, articles 50 A and 50 B. The Special Rapporteur expended boundless ingenuity to try and convince members that two separate cases were involved. Personally, he was still convinced that it was a marginal distinction and basically quite artificial. The common and fundamental point of departure was that the breach related to a rule of essential importance to the international community as a whole and that explained and justified the right of reaction that lay with all States members of that community. Accordingly, regardless of whether there was a specially injured State, the right of reaction was the same. The other States did not intervene under article 50 A "on behalf of" the injured State: they always did so as members of the international community whose interests were under threat. In addition, he was not convinced by the example of the case concerning *Military and Paramilitary Activities in and against Nicaragua*, to which the Special Rapporteur referred at some length in

paragraph 400 of the report. The point at issue had been not the law of the Charter of the United Nations properly speaking, because of the United States reservation, but the "law of the maintenance of peace", which was quite clearly separate from the law of the international responsibility of States. That rapprochement made by the Special Rapporteur in emphasizing yet again the *Gab Ž kovo-Nagyvaros Project* case seemed very artificial. In his opinion, it did not involve the law of State responsibility. For all those reasons, he very seriously questioned the cogency of a provision like article 50 A, at any rate as a completely separate hypothesis from the one evoked in article 50 B.

29. On the other hand, he was not unaware that the modalities, or more accurately the purpose, of such reactions differed, depending on whether the State was directly injured or not, in the sense that only the State or States specially injured could obtain reparation, within the meaning of Part Two of the draft, for themselves. But that only came in at a later stage. Initially, the injured State reacted as a member of the international community whose interests were under threat. Subsequently, if it had suffered personal individualizable damage, it was then entitled to demand all the consequences set out in chapter II of the draft. In his view, articles 50 A and 50 B contained the essential elements to be taken into consideration, but they were not presented from the proper standpoint. First, the underlying idea should be that all States, in a situation of that kind, could react; secondly, it should be stated that they could do so, naturally, within the limits generally fixed for countermeasures to be lawful, bearing in mind that principle of overall proportionality, in other words, the more serious the breach, the higher the threshold of reaction could be; thirdly, it should be indicated that those reactions could, in all cases, aim at cessation of the breach, guarantees of non-repetition—which should be mentioned—and reparation in the interest of the victims, and not of the victim States; and fourthly, it should be indicated either at the end of a single article or in a separate article that, in addition, the directly injured State as defined in the draft could directly and personally claim reparation within the meaning of Part Two. In that way, the draft that the Commission would be adopting on second reading would be a very marked advance over the current draft, regardless of whether or not the word "crime" was kept. In short, what did the word matter provided the thing remained? Even though the draft proposed by the Special Rapporteur was far from perfect, it did pinpoint better the consequences of a crime than had the draft adopted on first reading, and if the Special Rapporteur continued to display the same broad-mindedness, the Drafting Committee could still improve the text considerably.

30. He therefore endorsed referral to the Drafting Committee of the draft articles under consideration and also of the missing draft articles he had briefly spoken about. He could have gone into those at much greater length, for their importance warranted much more thorough-going discussion than was the case in the current circumstances.

31. Mr. CRAWFORD (Special Rapporteur) said that the situation dealt with in article 50 A was completely different from the one envisaged in article 50 B. It covered a case in which the obligation breached was owed to a

group of States or in which a State of that group was specially injured. The other parties to the obligation could take collective countermeasures on behalf of that injured State and to the extent that that State agreed. Article 50 A was not concerned with obligations owed to the international community as a whole. If one followed Mr. Pellet's interpretation, article 50 A could be deleted and the conclusion would be that the only situations in which countermeasures could be taken by a State other than the injured State, within the meaning of article 40 bis, paragraph 1, were those covered by chapter III.

32. Mr. PAMBOU-TCHIVOUNDA said that Mr. Pellet's highly condensed statement called for three comments. To begin with, there was a contradiction between the act of engaging in a collective reaction on behalf of the international community as a whole and the act of demanding reparation on behalf of the victims. Secondly, the demand for reparation on behalf of the victims seemed very much like a kind of diplomatic protection exercised by the international community as a whole. Thirdly, and perhaps more importantly, the notion of an organized reaction by the international community as a whole seemed to denote countermeasures. Moreover, one might well wonder whether the interest of the international community as a whole was a concept that had been established once and for all. When one State or another said it was acting in the interests of the international community, it seemed legitimate to ask it to prove its argument. Third-party arbitration might therefore prove necessary and the problem of arranging a dispute settlement mechanism therefore seemed to arise as acutely in the field of serious breaches as in that of countermeasures.

33. Mr. PELLET responding to the Special Rapporteur, said that, if article 50 A did indeed cover a separate situation, it should appear in chapter II, on countermeasures. Article 50 B, on the other hand, had its proper place in chapter III.

34. As to Mr. Pambou-Tchivounda's comments, collective countermeasures were of course subject to all the limits defined for countermeasures in general in chapter II. In that regard, the draft articles on responsibility could in no case justify recourse to armed force.

35. Furthermore, in the case of direct victims of a serious breach owed to the international community as a whole, such as genocide, it was conceivable in the case of Rwanda, for example, that the international community could demand from the Rwandese Government reparation for the victims and that States could do so individually in ICJ if there was a jurisdictional link. As for the problem of the determination of the existence of a crime, the draft should contain a provision similar to article 66 of the 1969 Vienna Convention. The Commission had never departed from that solution, and had even said that it would consider it again, and it could very easily do so at the next session.

36. Mr. GOCO said that, if States did not all react to serious breaches of obligations owed to the international community as a whole, such breaches were generally brought to the attention of the United Nations, which adopted resolutions and, implicitly, did so in the name of the States members of the international community. It was not necessary for States to react individually.

37. Mr. ECONOMIDES, noting that Mr. Pellet had placed an interpretation on articles 50 A and 50 B that the Special Rapporteur had not accepted, said he would like some clarification in that regard. His own interpretation of article 50 A was that it covered both serious breaches and also multilateral breaches in which a State was directly injured. In the case of serious breaches, the other States could react, but on behalf of and at the request of the injured State; it was that State which triggered that reaction. Article 50 B, on the other hand, was concerned only with serious breaches, there was no directly injured State and all States could react in their own name. He asked the Special Rapporteur whether that was how the two provisions were to be construed.

38. Mr. SIMMA, speaking on a point of order, pointed out that at the request of the Chairman, the Commission had decided, in the light of the little time available, not to engage in a discussion of the statements by members. He asked the Chairman whether the Commission had decided to give up that approach.

39. The CHAIRMAN said that he did not wish to prevent members from expressing their views, but he hoped that they would bear in mind the need to show some discipline.

40. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides's interpretation was the right one: article 50 A concerned countermeasures taken on behalf of an injured State because both the State taking them and the injured State were parties to an obligation that was in their common interest. Article 50 B concerned obligations owed to the international community as a whole and was confined to serious breaches; it applied only when there was an injured State within the meaning of article 40 bis, paragraph 1. The two articles overlapped because, obviously, if the obligation breached was owed to the international community as a whole and there was an injured State, article 50 A would apply. In that case, it was the injured State that made the decision. For example, in the case of Iraq's invasion of Kuwait, an obligation owed to the international community as a whole had been breached and Kuwait had been an injured State within the meaning of article 40 bis, paragraph 1; hence, it had been for that State to decide on countermeasures. In such a case, article 50 B could be considered as prevailing over article 50 A, and the question might be discussed, but it was clear that article 50 A was much broader in application.

41. As to the place for those two provisions, when an article that he was proposing replaced an article that already existed, it had the same number as that article. It might be a source of confusion, but since the draft had been restructured, it did not in any way prejudice the part of the draft in which it would appear.

42. Mr. ADDO said that the Special Rapporteur had done an admirable job in endeavouring to solve the problems posed by State crimes and obligations *erga omnes*. Considering that the Special Rapporteur, like himself, had been opposed to the inclusion of crimes, the proposals made in chapter IV of the report were praiseworthy. They were a response to the current needs of the international community, which had never been defined but taken for

granted, rather than a codification of rules from case law and State practice. As the Special Rapporteur noted, despite the substantial debate surrounding article 19 and the notion of international crimes of States, practice was almost entirely non-existent.

43. He agreed with the general thrust of chapter IV of the report. Compromises were proposed and should satisfy both the ardent proponents of the inclusion of the notion of State crimes and also the opponents. Personally, he did not think that a reference to crimes must be made at all costs, at the risk of pointless disputation, since the concept itself had been captured.

44. A feature of international crimes of States was that all States members of the international community, even if not directly injured by the breach, had the right to demand cessation by taking countermeasures, something that was provided for in the draft articles proposed by the Special Rapporteur. Another feature was the duty of States to refrain from condoning the breach and from recognizing the resulting situation as valid. That too was being proposed by the Special Rapporteur. On the whole, chapter III of the draft, as proposed, should be adopted and referred to the Drafting Committee. However, paragraph 3 (c) and paragraph 4 of article 51 should be deleted. They did not seem necessary and were indeed superfluous.

45. Lastly, he endorsed the Special Rapporteur's proposals for the general provisions in Part Four.

46. Mr. OPERTTI BADAN said that he appreciated the arguments developed in the course of the plenary meeting, particularly those of Mr. Pellet, which in his opinion deserved to be read very carefully. It was apparent from paragraph 369 of the report that the Special Rapporteur had discharged his mandate, since he had simply obeyed the wishes of the Commission and, making article 19 disappear, had not abandoned the legal interests it had protected. He had simply done away with the wording, but not the content.

47. The Special Rapporteur had said that the role of the general law of State responsibility had been secondary in the field of obligations owed to the international community as a whole. But the role did undeniably exist. It was the very essence of the question that should be raised, namely, to what extent did the interests of the international community belong in the field of State responsibility and to what extent were they part of the system of the maintenance of international peace and security? There was a borderline and it should be clearly defined.

48. It followed from the Commission's work that it was difficult to accept the concept of individual countermeasures, as opposed to that of collective countermeasures, because it was difficult to legitimize the conduct of the injured State vis-à-vis the responsible State, to assess the proportionality and to determine all the consequences that ensued. The current debate had brought out one aspect that could not be overlooked: when the legal interests protected by the whole of the international community were attacked, some States were given a kind of delegation of authority so that, in the framework of ad hoc alliances, they defended the values of that community, outside the institutional mechanisms for the maintenance of international peace and security. He wondered whether such insti-

tutional mechanisms could be strengthened in that way. He asked whether it was not more of a method of legitimizing not only individual but also collective or partly collective conduct on behalf of the international community, an ill-defined notion generally encompassed in that of an international organization, although they were two different things.

49. Some specifics were called for. Collective countermeasures were not designed as a solution to the shortcomings of the competent international organizations. Just as individual countermeasures were an exception to the normal operation of international law, collective countermeasures would be taken only when the normal mechanisms did not operate. Such collective countermeasures, taken in the name of international solidarity, should leave an option for resort to the institutional mechanisms. It was something that needed to be said in the text, for otherwise the two fields would be divorced—a divorce that was difficult to accept.

50. The issue of proportionality also arose in regard to collective countermeasures. But proportionality was more difficult to assess when the legal interest to be protected was universal and when more than one actor therefore stepped in to defend it. He therefore agreed with Mr. Pellet that one of the problems of article 19 had been the use of examples of certain legal interests—the environment, the prohibition of genocide, and so on. However, in his opinion, the idea that those values were not examples and that they were the very substance of the article should not be given up.

51. Again, he agreed with Mr. Pellet on the subject of reparation. Reparation should not be seen as the counterpart of a repressive collective action but as a means of offering reparation to the victim—the international community in the current instance—viewed as a value and not as an active subject.

52. The Special Rapporteur had said no firm conclusions could be drawn from practice as to the existence of a right of States to resort to collective countermeasures. Accordingly, the draft articles were ones which the author himself said were based on uncertain foundations. In other words, the Commission was engaged in progressive development, but was not in a position to rely on established practice. His own conclusion from his political experience was that the type of rules that would emerge from that work would be very difficult to accept. Delegating power to a group of countries that would act outside the institutional framework to defend universal common interests would be very difficult for State legislative bodies to accept.

53. In paragraph 411 of the report the Special Rapporteur spoke of future developments, but for his own part he was quite pessimistic about them. The work on reform of the Charter of the United Nations showed how difficult it was to reorganize international life by bringing in a new balance between legal relations and power relations. His experience at the head of the General Assembly for a year did not allow him to believe that the reform of the Security Council would be successful. The ideas seemed therefore, to be that, if it was not possible to develop a political system to protect the integrity of States and the

international community's legal interests, it could be done through the law of State responsibility. One might well ask whether it was the right method.

54. Mr. GALICKI said that chapter III of Part Two of the draft, entitled "Serious breaches of obligations to the international community as a whole", as proposed by the Special Rapporteur, was in fact a compromise solution to the serious problems faced by the Commission at its fiftieth session, when it had considered the distinction between international crimes and international delicts proposed in article 19. Since no satisfactory conclusion had been reached, the Special Rapporteur was now proposing a *sui generis* fragmentation of the problem through the development in the draft articles of such key notions as obligations *erga omnes*, peremptory norms of general international law and, finally, serious breaches of obligations to the international community as a whole. The Special Rapporteur's general approach in order to avoid direct development of the concept of international crime as belonging in fact to the realm of the primary rules seemed acceptable. Instead of using the questionable term "international crimes" and attempting to define it in a narrower or broader way, it seemed much more useful to concentrate in the draft articles on the consequences that might ensue from serious breaches of international obligations.

55. The proposed chapter III nonetheless called for some criticism with regard to both form and substance. First, the expression "serious breaches" in the title of the chapter was different from the formulation used in new article 51, paragraph 1, namely, "serious and manifest breach". The use of such general terms would call for a more detailed definition, such as the one in articles 46 and 60 of the 1969 Vienna Convention.

56. Secondly, although the only article in the new chapter, article 51, was entitled "Consequences of serious breaches of obligations to the international community as a whole", in the article itself those consequences were practically limited to the obligations of the State responsible for the wrongful act or of all other States. The text's silence regarding the other possible consequences, in particular those relating to the rights of "other States", could not be justified by the general "excuse" clause contained in paragraph 4 of article 51. While article 50 B, on countermeasures in cases of serious breaches of obligations to the international community as a whole, had rightly been placed in chapter II of Part Two, it seemed that such an important consequence of serious breaches as countermeasures should at least be mentioned in chapter III of Part Two. Chapter III generally gave an impression of being too limited and unbalanced compared with the other chapters in the draft.

57. The Special Rapporteur's proposed articles 50 A and 50 B were intended to complete the set of provisions on countermeasures in chapter II of Part Two bis. Nevertheless, some loopholes still existed, such as the lack of a formal possibility for a State belonging to a group of States to which the obligation breached had been owed of taking countermeasures at the request and on behalf of an injured State—as provided for in article 40 bis, paragraph 1.

58. It seemed from article 50 B, paragraph 1, that the purpose of applying countermeasures should be extended

not only to obtaining cessation of the breach but also obtaining assurances and guarantees of non-repetition. In the case of reparation, the term "victims", which had some criminal law connotations, should be avoided and replaced by, for instance, "those affected by the breach".

59. Similarly, the expression "collective countermeasures" used by the Special Rapporteur in his report could be replaced by "multilateral countermeasures" which did not suggest any institutional or organized form of reaction.

60. In paragraph 391 of the report, the Special Rapporteur gave a number of examples in which States reacted against breaches of obligations *erga omnes*, recalling among others, a case in 1980 when the Polish Government had imposed martial law and subsequently undertaken measures in breach of fundamental human rights, the countermeasures taken by the United States had included immediate suspension of landing rights of Polish LOT Airlines planes in the United States, rights which the company had enjoyed under a bilateral agreement. Poland had demanded arbitration proceedings on the basis of the agreement, which had in the meanwhile terminated. The United States had agreed, and that could have given rise to an interesting case in which the question of the legality of countermeasures in a situation of that kind would doubtless have been raised. However, that had not been the case because, after a lengthy procedure in establishing an arbitration tribunal, Poland had dropped the case and a new bilateral air services agreement had been concluded with the United States.⁴

61. The Special Rapporteur was also proposing provisions for Part Four of the draft, entitled "General provisions". The title did not correspond with the content of the part in question, since they were mostly saving clauses, and the part could be entitled "Final provisions" or "Final clauses". If the Commission decided that the final product of its work on State responsibility should take the form of a treaty, some provisions would have to be added to the draft, for instance, on non-retroactivity. On the other hand, in that case, article 39 would be pointless, since it simply reflected the priority of obligations under Article 103 of the Charter of the United Nations.

62. He congratulated the Special Rapporteur on successfully finalizing the preparation of the draft articles on responsibility. He was convinced that the draft articles should be referred to the Drafting Committee as soon as possible.

63. Mr. CANDIOTI said that, in his opinion, the draft articles submitted by the Special Rapporteur made it possible to move ahead on the question of "international crimes" of States. Regardless of the final decision on the "penalist" terminology used in the draft articles as adopted on first reading, the main point was that the Special Rapporteur's work in recasting the articles, the existence of a category of particularly serious violations by a State of fundamental obligations to the international

⁴ See the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic, signed on 19 July 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269).

community as a whole was still recognized and it was clearly accepted that special rules should apply to that category of breaches as far as the consequences of responsibility were concerned.

64. That category of breaches, therefore, was constituted by the failure to perform obligations generally recognized as being universal in scope and of an intangible content, in respect of which all States had a legal interest, even if they were not directly injured by the breaches. Examples were to be found in the prohibition of the use of force, genocide, enslavement or respect for basic human rights and humanitarian law. In that connection, the Commission should move cautiously in the light of the development and the current structural limits of the international community. As Mr. Brownlie had said, introducing the rule of law at the international level depended to a large extent on the institutional progress of international society, and not only on normative instruments. From that standpoint, the establishment of the International Criminal Court to judge international crimes by individuals, whether or not they were acting as agents of the State, showed that it was possible to move along that path.

65. As to the matter under consideration, the Special Rapporteur's proposal to assign a new chapter to the consequences of serious breaches of obligations owed to the international community as a whole and to incorporate rules giving a substantial and more precise content to those consequences seemed very important. In that respect, the Special Rapporteur's analysis and new article 51, paragraph 2, which provided for punitive damages as a special consequence, were relevant.

66. He also endorsed the idea expressed in paragraph 411 of the report and reflected in article 51, paragraph 4, that it was necessary to reserve to the future such additional consequences, penal and other, which might attach to internationally wrongful conduct by reason of its classification as a crime or as a breach of an obligation to the international community as a whole. Equally appropriate were the distinctions the Special Rapporteur drew between the various possibilities of reaction by other States to the responsible State for that category of breach, depending on whether the main victim of the wrongful act was a State or the population of the responsible State or was not even identifiable.

67. He therefore supported the suggestion by Mr. Simma and other members to incorporate in the chapter on States entitled to invoke responsibility the rule set out in the provision in the footnote to paragraph 413 of the report and to turn it into a separate article that would provide in subparagraph (a) for guarantees of non-repetition.

68. The way in which the Special Rapporteur had dealt with countermeasures for that category of breach also helped to clarify the topic, but did not overlook the fact that resort to countermeasures, whether individual or multilateral, would be a solution that would be tolerated only to the extent that States had no other lawful and effective means of bringing about cessation of the wrongful act and ultimately obtaining reparation, and that in no case should the measures adopted include the threat or use of force, which were prohibited under the Charter of the United Nations.

69. A number of interesting ideas had been put forward in the course of the debate on the formulation of the draft articles proposed by the Special Rapporteur, and the Drafting Committee would definitely take them into account. He particularly endorsed Mr. Economides's proposal to turn article 51, paragraph 1, into a separate article to characterize infringements as "serious, established and manifest breaches" of obligations of essential importance to the international community as a whole, in accordance with paragraph 2 of article 19. The more obvious examples of such breaches could be listed, for illustrative purposes, in the commentary.

70. Lastly, an interesting proposal had been made by Mr. Dugard, who would like to include in the Commission's long-term programme of work a study of international crimes of States. He endorsed the content and the wording of the general provisions proposed by the Special Rapporteur for Part Four.

The meeting rose at 12.45 p.m.

2653rd MEETING

Tuesday, 8 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

State responsibility¹ (continued) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1-4,² A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. AL-BAHARNA drew attention to paragraph 368 of the third report of the Special Rapporteur (A/CN.4/507

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

and Add.1–4), in which the Special Rapporteur specified the two main groups of issues dealt with in chapter IV: the responsibility of a State towards a group of States, and the residual and saving clauses envisaged for Part Four of the draft. Paragraph 369 recalled that, following an extensive debate on the issues raised in respect of “international crimes” by articles 19 and 51 to 53 as adopted on first reading, the Commission had provisionally decided that “a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19”.³ It was in that context that the Special Rapporteur was submitting to the Commission articles 51, 50 A and 50 B.

2. Article 51 had attracted sharp criticism, especially from members who did not seem to be convinced that article 19 would not play any role in chapter III of Part Two. In the hopes of gaining acceptance for a less controversial provision, he was therefore proposing that article 51 be redrafted. In keeping with the comments by Mr. Dugard, supported by Mr. Economides, on the need to retain in article 51 the concept of an international crime, and building on Mr. Simma’s reference to article 19, paragraph 2, article 51 would be split into two: the first, article 51, amounting to a definition of serious breaches of an obligation to the international community as a whole, and the second, article 51 bis, on the consequences of serious breaches of such obligations.

3. In his reformulation, article 51 would read:

“This chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an international obligation essential for the protection of fundamental interests of the international community as a whole. Such a breach may constitute an international crime under contemporary international law.”

Article 51 bis would be worded:

“The serious and manifest breach defined in article 51 entails:

“1. For the State responsible for the breach, all the legal consequences of any other internationally wrongful act and, in addition, punitive damages or any other damages reflecting the gravity of the breach.

“2. For all other States, the following further obligations:

“(a) Not to recognize as lawful the situation created by the breach;

“(b) Not to render aid or assistance to the State which has committed the breach in maintaining the situation so created.

“3. Paragraphs 1 and 2 are without prejudice to such further penal or other consequences that the breach may entail under general international law.”

4. In his proposal he had included in the definition contained in article 51 the principle of protection of funda-

mental interests of the international community as a whole and the concept of an international crime, with the addition of the word “may” before the word “constitute”. As Mr. Dugard had said, in order to leave the door open to reconsideration in the future, the Commission should not abandon the concept of an international crime. The concept was kept alive, perhaps in name only, in his proposal, without entailing any criminal or penal consequences for the State as a legal person. Article 51 bis, paragraph 1, specified clearly the legal consequences of a breach in terms solely of punitive damages and referred to breaches, not to crimes. In addition, his proposal inserted the phrase “under contemporary international law” after the expression “an international crime” in article 51.

5. The reference to an international crime might not satisfy Mr. Economides, who would like the crime of aggression to be mentioned in article 51. But that article spoke of breaches, not crimes, and it would not be appropriate to refer there, or anywhere else in the draft articles, to aggression or the other crimes mentioned in article 19, paragraph 3. The crime of aggression should be left to the Security Council to deal with under Chapter VII of the Charter of the United Nations, subject, of course, to the right of self-defence which was open to the injured State itself and to other States that might assist the injured State individually or collectively. That right was accorded under the provisions of the Charter, and article 29 *ter* of the draft recognized it as one of the circumstances precluding wrongfulness.

6. The Special Rapporteur did not seem to reject the concept of crimes within State responsibility, for in paragraph 410 he affirmed that they were broadly acceptable, but only so long as they did not carry a *contrario* implications for other breaches which might not be egregious, systematic or gross. His own proposal bridged the gap, he believed, between an ordinary breach and a serious and manifest breach of such gravity that it culminated in or constituted an international crime, within the meaning of article 19, paragraph 2. The reference to international crime was supported by a number of members of the Commission, and a majority endorsed splitting article 51 in two. Article 51 might, however, need further discussion in the Drafting Committee and in the Commission at its fifty-third session.

7. Otherwise, he agreed with the Special Rapporteur’s arguments in paragraphs 408 and 410 concerning the content of articles 51 to 53 as adopted on first reading, with his idea of consolidating those articles and with his inclination to do away with article 52. The replacement of the word “crime” by the more appropriate word “breach” in new article 51, paragraphs 3 (a) to 3 (c), proposed by the Special Rapporteur was understandable and necessary. Paragraph 3 (c) consolidated perfectly sub-paragraphs (c) and (d) of article 53 adopted on first reading. Unlike some members, he agreed with the principle of cooperation introduced in new article 51, paragraph 3 (c), but thought its implementation might require some form of coordinated procedure. New paragraph 4, was necessary in order to accommodate in the future the criminal or penal consequences of the breach under international law.

8. Articles 50 A and 50 B were acceptable on the whole, although it was noteworthy that they did not use the term

³ *Yearbook* . . . 1998, vol. II (Part Two), p. 77, para. 331.

“collective countermeasures” that appeared repeatedly in paragraphs 386 to 390 of the report. The Special Rapporteur had elected to discuss under that rubric cases where States legitimately asserted a right to react against breaches of collective obligations to which they were parties, even if they were not injured States. However, the review of State practice in paragraphs 391 to 394 and 397 showed no clear evidence that the reactions of States described therein had been termed countermeasures. Some States, instead of relying on a right to take countermeasures, had asserted a right to suspend the treaty because of a fundamental change of circumstances. In other cases, States had asserted a right to take countermeasures, but their actual responses had fallen short of being countermeasures. No clear conclusions could thus be drawn as to the existence of a right of States to resort to countermeasures in the absence of injury in the sense of article 40 bis, paragraph 1.

9. Article 50 A clearly concerned countermeasures taken by a State other than the injured State under article 40 bis, paragraph 2, where such a State had a legal interest in the performance of an obligation, but did not indicate that the countermeasures could be taken by more than one State at the request of the injured State, even though such a request would most likely be addressed to more than one State. In the midst of an emergency, an injured State was unlikely to be in a position to lay down conditions. The phrase “subject to any conditions laid down by that State” was therefore unnecessary. Article 50 B, paragraph 2, should apply to article 50 A as well as to article 50 B, paragraph 1, and might require some coordinated procedure for implementing the necessary cooperation. As Mr. Brownlie had said, the Special Rapporteur should cite further examples of State practice in order to make articles 50 A and 50 B more acceptable to the Sixth Committee—or at least, less debatable there.

10. As to the proposed general provisions and saving clauses, new article 37, with the change of title, was acceptable, but either the word “or” or the words “the legal consequences” should be deleted. Article A was also acceptable, although the brevity of the title might be sacrificed for greater clarity. He experienced no difficulty with article B but would like to see the words “under general international law” added at the end. New article 39, on the relationship to the Charter of the United Nations, was preferable to the text adopted on first reading and took into account the view of former Special Rapporteur Arangio-Ruiz quoted in a footnote to paragraph 426.⁴ He did not agree with other members that the article should be deleted.

11. Mr. BAENA SOARES congratulated the Special Rapporteur on his balanced and excellent chapter IV. Some provisions were being considered for the first time, meaning that the views of Governments had not yet been heard. As the Special Rapporteur pointed out, however, the Commission could always return to those provisions, and to others, if necessary, at its next session.

⁴ G. Arangio-Ruiz, “Article 39 of the ILC draft articles on State responsibility”, in *Rivista di diritto internazionale*, vol. 83, No. 3 (2000), pp. 747–769.

12. The far-reaching political consequences of some of the provisions would certainly be taken into account by the Sixth Committee of the General Assembly. He welcomed the fact that many members of the Commission had rightly expressed concern about the impact of sanctions on civilian populations. The provisions related to collective measures that were not of an institutional character, as the Special Rapporteur pointed out in paragraph 387 of the report. It was one more reason for displaying caution in the indispensable task that had been described as taming the beast, namely the beast of abuse of power. The more stringent the disciplinary rules on collective countermeasures, the better the Commission would have done its work. Everyone seemed to agree that the monster must be checked, not fed.

13. Caution had already been exercised during the elaboration of the articles and in the discussion in the Drafting Committee, but the concerns he had just expressed should continue to be kept in mind for future drafting work. Some members who did not at all approve of countermeasures, whether collective or not, and others who encountered difficulty with the concept, had agreed to discuss it, on the grounds that it was the only way of limiting the scope of such measures. Uppermost in everyone’s mind was the crucial question that had divided the Commission in the past: it would now have to be addressed if the Commission was to finish its work. He agreed with those who considered that article 19 was justified and useful—those who preferred to call a spade a spade—but he could join with others who advocated compromise formulas, as long as the formulas truly promoted agreement and preserved the content of the concept in article 19.

14. A number of proposals had already been made, with laudable efforts by the Special Rapporteur and very useful contributions by Mr. Economides, which he endorsed. The Drafting Committee would, he hoped, find the appropriate solution, one that would be suitably rigorous and precise. Article 37 was useful and should be retained. It had its place in the draft, though perhaps in a different formulation, such as the one proposed by Mr. Pellet. In his opinion it was time to refer the draft articles to the Drafting Committee.

15. Mr. RODRÍGUEZ CEDEÑO said that the Commission’s work on State responsibility, on the basis of the reports by the Special Rapporteur and his predecessors, went far beyond codification and began to attain the progressive development for which the Commission was bound to strive when appropriate and, above all, possible. Progressive development, however it was defined, should focus on the general behaviour of States, not only of those in favour of such development but also those against it, as they often represented a substantial majority that the Commission could not afford to overlook.

16. The Special Rapporteur had suggested that consensus was the best way forward; but such consensus should take account of all the concerns that had been expressed. It should be clearly recognized that, even if consensus was achieved on the basis of agreement on certain criteria, there was no guarantee it would be accepted by States. The Commission should therefore show caution in reaching its conclusions.

17. The proposed draft articles avoided the use of the word “crime”. That could, however, by no means imply a disregard for the notion of an international crime, which was still closely tied in with a specific category of international obligations that should be governed by a particular regime.

18. As the Special Rapporteur had said, agreement should be reached concerning article 19. There was no question of imposing it, still less of deleting it, but an acceptable formula should be found that would recognize the existence of fundamental obligations and the importance to be attached to their breach, especially in the most serious cases, which should therefore entail, at the very least, well-defined consequences. The obligations he had in mind—which should be defined in Part Two of the draft and should, of course, take into account the thrust of article 19—were those it was in everybody’s interest to respect. Any State should be able to insist on such respect and, at the very least, require cessation of the breach. That did not mean, however, that such interest was unlimited, since it differed from that of an injured State, particularly if that State had suffered material damage.

19. New article 51 was essentially a revision of articles 51 to 53. Paragraph 1, which defined the scope of application, should, as Mr. Pambou-Tchivounda had said, become a provision standing on its own, since the text did not correspond to the title of the draft article. Paragraph 2, which provided for punitive damages, supplemented the earlier text which, despite the arguments put forward in paragraph 380 of the report, would have been acceptable, at any rate in the case of serious breaches. The concept of punitive damages would nonetheless need to be precisely defined, as he was not sure that the expression carried the same meaning in all the various legal systems. Paragraph 3 laid down further specific obligations arising out of serious breaches of obligations owed to the international community as a whole: two negative and one positive. The paragraph was an improvement on its predecessor. Paragraph 3 (c), in particular, which successfully conflated subparagraphs (c) and (d) of the text adopted on first reading, reflected, up to a point, the international solidarity required in confronting international crimes or, if that term was to be avoided, serious breaches of fundamental obligations. The obligation to cooperate in the application of measures, provided for in paragraph 3 (c), did not introduce a new concept: the same obligation had been included in the Rome Statute of the International Criminal Court in relation to individual criminal responsibility, which was another factor that should always be taken into consideration, as a separate provision, in the context of breaches. The new paragraph 4 contained a clause allowing for legal consequences not provided for in the article. In that context, it should be understood that the “penal ... consequences” in question must relate only to individual criminal responsibility.

20. With regard to the issue of collective countermeasures, which posed serious difficulties owing both to its legal complexity and its political implications, the right to take countermeasures, collectively or otherwise, should be governed by extremely precise and balanced rules enabling the countermeasures to achieve their objective but at the same time ensuring that they were not abused, to the particular detriment of smaller countries. Article 50 B,

based on article 43, paragraph 3, adopted on first reading, involved a delicate issue. One of the concerns regarding the countermeasures regime, i.e. in the case of a serious breach of fundamental obligations, was the excessive leeway given to States to identify or determine a serious breach. The Special Rapporteur submitted a number of conclusions in paragraphs 401 and those following, based on an examination of existing practice. The latter was, however, too close to politics than it was to law to demonstrate that any such right existed. Other reactions should be taken into account. He had in mind those of many of the States in the Commission on Human Rights to collective action against human rights violations in various countries. Although such reactions related to the use of force, they revealed the existence of criteria quite different from those confronting the International Law Commission. It had been contended that such action conflicted with the principles of non-interference and territorial integrity, and even involved the abuse of power by a country or group of countries in placing their own interpretation on the interests of the international community. In his view, there was no foundation for equating the right to demand cessation with the right to apply countermeasures, even if the case of a violation was serious, systematic and continuous.

21. It was, of course, important to establish some form of regulation. States should be given the means to ensure respect for obligations, other than through the use of force, but any regime should be balanced and realistic, based on universally accepted practice. There should be detailed provisions relating not only to the nature of the obligation but also to the seriousness of the breach and the extent to which it was systematic and continuous. That would enable the provisions to be properly interpreted and would prevent their abuse.

22. Mr. ROSENSTOCK said that, in considering chapter IV of the third report, the Commission was faced with enormously complex issues, yet had little time, at the current session, to ponder them or to seek common ground. The Special Rapporteur’s proposals involved departing from previous informal understandings, creating entirely new notions and, above all, legislating, purely and simply: not codifying or even seeking to coax existing practice forward by proposals *de lege ferenda*. Hasty action must be avoided.

23. With regard to the specific issues before the Commission, he wished to reiterate his view that “crimes of States” was an idea without any foundation, one which, if pursued, would be likely to cause confusion and could impede the variously developing field of the criminal responsibility of individuals, to which the Commission had made a significant contribution. Paragraph 380 of the report was particularly cogent in that context. Moreover, the Commission had decided to focus on secondary rules, not to invent new primary rules. It was and should be outside the Commission’s scope to entertain—as article 51 sought to do—the notion of a qualitative distinction among acts or omissions by States that triggered State responsibility. To do so was little different from creating new rules. The attempt to establish categories of “seriousness” smacked of the alchemist’s labours. New article 51, paragraph 2, referred glibly to “punitive damages”. Only an alchemist could achieve such an outcome. As for the

phrase “damages reflecting the gravity of the breach”, he wondered what it added to the quantum of responsibility of the wrongdoing State. If nothing, why bother? If it did add something, it meant that qualitative distinctions were being applied again.

24. There were more mundane problems regarding new article 51, some of which might be ameliorated if not totally cured by the Drafting Committee. For example, what was the distinction in paragraph 1 between a “serious” and, by inference, a non-serious breach? He doubted that there was a precedent for such a distinction. Perhaps it was the same, by analogy, as “material” as opposed to “non-material”, only with occasionally more dangerous consequences. If the aim was to make the injured State whole, he questioned the need for such a distinction. If anything, the term “systematic” was preferable to “serious”, since at least it was quantitative not qualitative. The word “manifest” could also raise difficulties. The implication was that open misbehaviour by a State was qualitatively worse than subtle misbehaviour, with correspondingly different rights for other States. It was an invitation to States to indulge in clandestine misbehaviour. He doubted that that had been the intention of ICJ in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Was a border incident involving a violation of Article 2, paragraph 4, of the Charter of the United Nations more or less grave or serious than a chemical explosion caused by a lack of due diligence, when notice could have been given to the leeward State but, owing to the laxity of the wrongdoing State, had not? The Commission could follow Mr. Galicki’s advice and, by providing definitions, clarify some of the issues. On the other hand, it might thereby get caught up in a process it could never end.

25. He had no particular problems with new article 51, paragraphs 3 (a) and 3 (b) but he would be interested to hear the views of other members on the use of the term “obligation” and whether it was always appropriate or only sometimes; and, if the latter, how the distinction should be made. Indeed, fine tuning—and modest ambition—concerning the indirectly injured State might be worth considering further as a way of avoiding some of the problems. He was far from certain that paragraph 4 was necessary. The reference to “penal” consequences, meanwhile, was neither necessary nor desirable, though in some respects it might be perceived by some as a wink to the cognoscenti, assuring them that qualitative distinctions still existed but were temporarily in abeyance.

26. He continued to favour the initial view expressed by the Special Rapporteur that article 19 should be extirpated, not given some euphemistic substitute, possibly with a saving clause. That did not mean countermeasures need be removed from Part Two or that the role of the indirectly injured State could not be dealt with more adequately than did the draft adopted on first reading. As paragraph 375 made clear, all States had a legal interest in securing cessation and assurances against repetition.

27. The Commission was in danger of getting carried away. Members—including the Special Rapporteur—should reread paragraph 411, with its cautionary language. The process seemed to have begun with the establishment of some rules, but that had led to attempts to create a new

system of public order. Mr. Brownlie’s comment in that connection had struck a chord. Mr. Operti Badan’s statement (2652nd meeting), with its political perspective, had been sobering. It had contained warning signals which, if ignored, would endanger the entire set of draft articles. Premature efforts to create rules about collective countermeasures could damage both the draft and the general development of such new notions.

28. A strong case could be made for limiting the discussion of countermeasures to Part One, if that was necessary to avoid taking up a position on the issue. Part Two did not deal with any of the other circumstances precluding wrongfulness, partly because to do so would blur the line between primary and secondary rules and partly because the Commission accepted that its draft declaration was not a prescription for saving the world but a series of interrelated legal rules, the elucidation of which could help States resolve some—but not all—problems. Problems concerning *erga omnes* obligations might not, in themselves, be sufficient grounds for deleting countermeasures from Part Two, but other grounds for doing so were probably proliferating in the discussions of the Drafting Committee.

29. On the other hand, a careful further examination of the role of the not-directly-injured State might, if undertaken on the clear understanding that there was no question of creating qualitative distinctions among wrongful acts, and with modesty in response to the remarks of Mr. Brownlie and Mr. Operti Badan, could make it feasible and possibly even worthwhile to include the issue of countermeasures in Part Two. There was, however, a danger that the draft articles could collapse or become deadlocked in such a way that the declaration or treaty on State responsibility would be repeatedly deferred after efforts by various working groups failed to achieve any status whatsoever for it.

30. Incidentally, using the term “sanction” in connection with Chapter VII of the Charter of the United Nations was questionable, to say the least. The decision to use the term “measures” rather than “sanctions” in that Chapter had been very carefully considered and very deliberate.

31. The Special Rapporteur’s proposal for general provisions in Part Four posed no problems, beyond relatively minor drafting changes. Some of the discussion of article 39 within the Commission had been disturbing, reflecting as it did an excessively limited view of the sweep and impact of Article 103 of the Charter of the United Nations. It was therefore right that a paragraph along the lines suggested by the Government of France⁵ or the Special Rapporteur should be included.

32. The Commission had come a long way. The problems confronting it were essentially finite in nature. If they were approached on the basis of existing State practice, with modesty and determination, the Commission should be able to offer the world an important and useful product in a year’s time.

33. Mr. SEPÚLVEDA said that the Special Rapporteur was to be congratulated on his third report, the culmina-

⁵ See 2615th meeting, footnote 5.

tion of a series of reports that had gradually overcome obstacles that barely four years previously had seemed insurmountable, such as the vexing question of international crimes and delicts. It was still too early to tell whether the solution proposed in that regard would meet with the support of States, but there could be no doubt that it constituted an important contribution to the progressive development of international law.

34. In order to understand what had been achieved in chapter IV of the third report, it was necessary to refer back to earlier concepts, which formulated working hypotheses that, if they proved acceptable, would facilitate acceptance of the proposals contained in the chapter. One example was proposed article 40 bis, which established the circumstances in which a State would have the right to invoke the responsibility of another State. That definition of the conditions whereby a State would be injured by an internationally wrongful act of another State enabled the obligation breached to be regarded, not just as an individual obligation, but as an obligation to the international community as a whole. That broadening of the connotation of what constituted an injured State would give States a legal interest in the performance of an international obligation to which they were parties, when that obligation had been contracted with the international community as a whole, or had been established to protect the collective interests of a group of States.

35. It was a provision that undoubtedly represented a step forward in the regulation of international affairs. However, the basis for the rule would have to be confirmed by State practice. It would have to be determined whether it was generally acknowledged that a State could suffer injury merely because an obligation owed to the international community had not been performed. It would also be essential to specify the real nature of the legal consequences of State responsibility which States injured to varying degrees could invoke. For example, in the case of a breach of *erga omnes* obligations, it was not clear what mechanism would be used to enable States that had a legal interest but that were not directly injured to secure cessation, restitution, compensation, satisfaction or, in extreme cases, the application of collective countermeasures. That question was tied in with the effectiveness of the application of a rule that presupposed the creation of an abstract principle.

36. Countermeasures, as an instrument necessary to induce the responsible State to comply with its international obligations, were one aspect of the right of a State to invoke the responsibility of another State. He had originally been opposed to including countermeasures in the draft articles, as tantamount to the legal recognition of a practice based on abuse of power: by including them, the Commission would be embodying a principle based on coercion and unilateral use of force, one that should be anathema to any balanced legal order. Nonetheless, he had to acknowledge that the drafting of the rules regulating the purpose and content of countermeasures, obligations not subject to countermeasures, conditions relating to resort to countermeasures, proportionality, prohibited countermeasures and the suspension and termination of countermeasures when certain requirements were fulfilled had taken a turn in the right direction. The proposed new articles 47 to 50 bis represented a significant advance in the

definition of the nature and scope of countermeasures, establishing a regime that could impose the requisite legal safeguards against abuses of power.

37. One innovation was the introduction of the concept of collective countermeasures, which, in a sense, flowed naturally from the acceptance of the rules set forth in article 40 bis. The question posed by the Special Rapporteur was whether States had a legal right to react to a breach of a collective obligation to which they were parties, even where they were not directly injured in the strict sense. According to the Special Rapporteur, those cases were not limited to situations in which a group of States acted in concert, but also included the possibility that the collective element might also be supplied by the fact that the reacting State was asserting a right to respond in the public interest to a breach of a multilateral obligation to which it was a party, although it had not been individually injured by that breach. Thus, a distinction was being drawn between, on the one hand, individual countermeasures, whether taken by one State or by a group of States each acting within its own competence and through its own organs, and, on the other, institutionalized collective measures taken under Chapter VII of the Charter of the United Nations.

38. The problem with accepting such a hypothesis was that the distinction was not sufficiently clear, and seemed to involve an overlapping of other existing institutions, such as collective self-defence and collective security, particularly in the context of regional collective security pacts such as the Inter-American Treaty of Reciprocal Assistance, the North Atlantic Treaty or the now defunct Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact).

39. In the case of collective self-defence, the vital interest of various States was breached and those States would exercise collectively what was undoubtedly their individual right. In the case of collective security, the vital interest of a State was affected, and other States, in an act of solidarity, came to its assistance. In the case of collective countermeasures, the nature of the obligation breached, in other words, the definition of the legal interest of the State that, without being the State directly injured, was an affected State, could easily be confused with the nature of the right implicit in collective self-defence or collective security. It was thus indispensable to differentiate clearly between the constituent elements of those categories of rights so as to circumscribe and limit the scope of collective countermeasures.

40. For example, article 50 A, determining what countermeasures could be taken by a third State on behalf of an injured State, seemed closely to resemble the type of measures taken over the last 50 years in the context of regional collective security pacts. Even more notable was the case of the countermeasures that could be taken in the case of a serious breach of an obligation to the international community as a whole, as provided for in proposed article 50 B. A breach of such obligations *erga omnes* could constitute a wrongful act of such magnitude that it would inevitably prompt measures under Article 51 of the Charter of the United Nations or an act of collective security. In those circumstances, there was extraordinarily

little room for the establishment of a new legal institution of “collective countermeasures”.

41. The basis for and validity of collective countermeasures depended on the type of rights affected and the type of obligations established on behalf of the injured State and of the States assisting it in invoking the responsibility of a State. But the other essential element was the general recognition that those measures were accepted as lawful and legitimate by the community of States as a whole, and not just by a section thereof. Consequently, it was essential that there should be a general principle in State practice, enabling the concept of collective countermeasures to be accepted by a significant number of States as a legal notion belonging to a commonly recognized normative system, and thus as a contribution to the international legal order.

42. However, the analysis of State practice presented by the Special Rapporteur did not demonstrate the existence of a group of legal measures accepted by all States, that could justify establishing collective countermeasures as a new legal institution. In the first place, the examples provided were extraordinarily few in number. Furthermore, the illustrations referred to countermeasures taken by a small number of States, all of them industrialized nations. The third report provided no example of the taking of collective countermeasures by a group of non-industrialized States. He himself could not, on the spur of the moment, provide an example of the invocation or exercise of collective countermeasures by Latin American States.

43. Of the six cases referred to by the Special Rapporteur, three were in some way subject to the terms and rules set forth in Chapter VII of the Charter of the United Nations. That again showed the difficulty of establishing a clear demarcation between collective security, collective self-defence and collective countermeasures.

44. The provisions concerning the consequences of serious breaches of obligations to the international community as a whole, to be found in new article 51, again presupposed the establishment of a system of collective sanctions of an essentially punitive nature, identifiable with the enforcement measures provided for in the Charter of the United Nations. There seemed to be no imperative need to create a parallel system, alongside the constitutional norms already in force, and with no organized and centralized institutional mechanism in place, to replace the one that had already demonstrated its advantages and shortcomings.

45. Lastly, even accepting the Special Rapporteur's arguments for dissociating the system of countermeasures from that of peaceful settlement of disputes, it was not desirable to delete from the draft a chapter establishing rules for the settlement of disputes between States in the highly sensitive area of international responsibility, one which would undoubtedly be a continuing source of controversy in the years ahead.

46. Mr. PELLET said that, by launching a fierce attack on so-called “collective countermeasures”, Mr Sepúlveda and others were tilting at windmills, by criticizing the institution of countermeasures taken collectively by States, which was not, however, the phenomenon the Special Rapporteur was seeking to target. The Special Rapporteur, for his part, was playing the sorcerer's apprentice by

labelling the phenomenon “collective countermeasures”, when in point of fact it was no such thing. The real question was whether, where an exceptionally serious breach such as genocide—which affected the international community as a whole and which thus concerned all States individually—had been committed, any State of the international community was entitled to react individually, even when not directly injured by the breach. In his view, the answer was emphatically in the affirmative. That did not mean, however, that the reaction must necessarily be collective, still less that it must involve the use of force. He thus agreed entirely with the Special Rapporteur on the substance, but considered the use of the term “collective countermeasures” most unsatisfactory in that context.

47. Mr. HE pointed out that the issue of State crimes had again arisen in connection with breaches of *erga omnes* obligations and violations of the collective interests of States. He did not, however, believe that the concept of State crime had been established in the context of international law on State responsibility since, unlike the position with regard to individual criminal responsibility, there was no State practice or international jurisprudence to support it.

48. The treatment in article 51 of the consequences of serious breaches of obligations to the international community as a whole rested on the categorization of international obligations in articles 40 bis and ter. Yet, as Mr. Hafner had emphasized, there was a substantial difference between the breaches addressed in article 51 and the crimes referred to in article 19. According to some commentators, while acts affecting the fundamental interests of the international community were to be considered as wrongful acts *erga omnes*, the reverse was not true. Accordingly, crimes, even if they did exist, were not covered by article 51. Thus, the suggestions made by Mr. Dugard, Mr. Economides and Mr. Pellet would completely change the scope of the article and endanger the whole exercise. Since the concept of State criminality was not recognized by international law, it seemed futile for the Commission to embark on such a grandiose endeavour.

49. Paragraph 1 of new article 51 was acceptable and, in paragraph 2, the alternative “damages reflecting the gravity of the breach” was preferable. As far as paragraph 3 (a) was concerned, Mr. Brownlie had been quite right to refer to the question of validity. On the other hand, Mr. Kabatsi, referring to the words “as lawful”, held that no situation created by a breach could be deemed lawful. Consequently, it would be appropriate to make the point in the commentary that “reality” had to be taken into account as a factor in non-recognition of the situation.

50. Paragraph 4 was superfluous. He endorsed the Special Rapporteur's view that it would be desirable to leave room for further developments, given the rapid advances being made in the field of community obligations. Similarly, it was necessary to await developments in the concept of “crime”. It would therefore be better to have a general without prejudice clause on the issue in Part Four, rather than in article 51, which dealt only with the consequences of serious breaches of obligations *erga omnes*.

51. The proposal set out in the footnote to paragraph 413 of the report should certainly be incorporated, partly in article 40 bis and partly in a separate article, as proposed by Mr. Candioti, Mr. Hafner and Mr. Simma, and the word “non-repetition” should be inserted in article 36 ter. He agreed that articles 50 A and 50 B should be placed in chapter II of Part Two bis, because they dealt with issues of a different nature, with different content. Lastly, it would be useful to retain article 37, as worded in paragraph 429, irrespective of whether the draft took the form of a declaration or a convention.

52. Mr. CRAWFORD (Special Rapporteur) explained that the concordance which had just been circulated to members offered an informed guess at the order in which the articles would ultimately be placed in the draft that the Drafting Committee would propose to the Commission for adoption and submission to the Sixth Committee of the General Assembly.

53. He anticipated in the light of the remarks by Mr. Economides and others that the Drafting Committee might well wish to split article 51 in two. It was assumed that the proposal contained in the footnote to paragraph 413 of the report would appear as a subsection of new article 49 together with article 40 bis, paragraph 2. The new article would deal with a broader group of States with a legal interest in obligations of a collective or multilateral character.

54. He had endeavoured to make legal sense of the miscellaneous proposals put forward in connection with chapter IV. The comments by Mr. Al-Baharna, Mr. Economides and Mr. Pellet had been extremely constructive and he had been particularly impressed by the statements of Mr. Operti Badan and Mr. Tomka, both of whom had wide experience of the constituency to which the Commission reported. They had expressed considerable scepticism about the scope for moving ahead with the substantive matters covered in chapter IV of the report. Mr. Tomka’s stance was similar to his own position back at the fiftieth session, namely, that the whole of the article 19 issue could be handled in a saving clause, and indeed that was an option open to the Sixth Committee. Nevertheless, he believed that the Commission should tend more towards the compromise suggested, not only in order to obtain the comments of the Sixth Committee, but also because it reflected a reasonable central position between the very strongly contrasting views within the Commission.

55. While the time was not yet ripe for an elaborated regime of crimes properly so called, it was vital to express the basic idea that States held a small number of obligations to the international community as a whole. Those obligations were, by definition, serious and a breach of them was, by definition, significant. Trivial breaches of such obligations might occur, but in some cases, for example genocide and aggression, the definition of the obligation was such as to exclude trivial breaches. The attempt to embody that notion in new article 49 on the invocation of responsibility in the collective interest seemed to meet with general approval.

56. There had been a surprising amount of agreement in respect of some of the other issues. He fully appreciated the concerns eloquently expressed by Mr. Sepúlveda in

relation to the whole question of “collective” countermeasures, although the term “multilateral” countermeasures might well be preferable. Mr. Pellet had been right to say that responses to breaches of obligations to the international community as a whole could be responses adopted by one State or by a number of States. Their collective character was determined by the nature of the obligations and the breach in relation to which they responded, rather than the fact that they were acting as a group.

57. It seemed that new article 51, as it stood, could be sent to the Drafting Committee for improvement, and he was curious to see what the result of splitting the article would be. It had to be acknowledged that, since practice was limited, the Commission’s activity was legislative in nature, notwithstanding the fact that some articles reiterated existing rules, for example in the field of non-recognition and the acceptance of the basic category of obligations to the international community as a whole. Its work could not be described as progressive development, although some of the consequences might be progressive. The Commission would therefore await the Sixth Committee’s comments and reconsider the issues involved at its next session. It was a very important aspect of the Commission’s deliberations, because it offered the Sixth Committee the opportunity for substantive input and enhanced the relationship between the Commission and the Sixth Committee, which was the goal set in the report of the Commission on the work of its forty-eighth session.

58. He was not enthusiastic about the idea that the title of article 51 should be amended to refer to essential obligations. There were many obligations in international law which were essential, despite the fact that they gave rise to bilateral relationships. The whole body of diplomatic immunities was clearly vital to relations between States and to the international community as a whole, but the individual relationships were still bilateral. The core concept was necessarily that established in the judgment in the *Barcelona Traction* case, namely that there were certain obligations to the international community as a whole and every State, individually, had an interest in compliance with them. The term “essential” did not capture that notion. Of course, by definition, the norm was essential by virtue of its being an obligation to the international community as a whole, but that did not necessarily apply vice versa. The character of the breach could naturally be qualified in addition, because breaches of those obligations could conceivably be relatively minor.

59. He had taken careful note of members’ statements and they would be borne in mind by the Drafting Committee. Nevertheless, one or two points required some immediate comment. Some aspects of the definition of the category of breach referred to in new article 51, paragraph 1, could be improved. There might be some material in article 19, paragraph 2, or elsewhere, which would be of assistance, subject to the reservation he had already expressed about the notion of “essential” obligations.

60. Paragraph 4 was not strictly necessary, inter alia, because of article 38, as adopted on first reading (article 33 on renumbering), but it was useful, especially because of the possibility of further developments in that particular

field. Personally, he had no strong feelings about the word “penal”, but if it encountered opposition it could be omitted, because deleting it would not affect the operation of the provision. He had been mildly entertained by the vehemence with which Mr. Pellet had advocated the inclusion of the concept and by his consistency in depriving it of any punitive element whatsoever, whether punitive damages or penal consequences. For his own part, he had no objection, because if the Commission was examining obligations to the international community as a whole, the question of punitive consequences could be left to one side.

61. The question of transparency and the alleged consequence of serious breaches of essential obligations involving individual criminal responsibility had no place in the draft articles, because it raised issues pertaining to the category of individual criminal responsibility of persons or, alternatively, the category of State immunity. He was happy to preserve the current legal position, because the matter had recently been considered in the context of the Rome Statute of the International Criminal Court, which contained two relevant provisions. Article 27, on the irrelevance of official capacity, made it clear that any individual charged with, or guilty of a crime under international law, could not in any respect plead his or her official capacity. There was no question that the responsibility of the State was in any sense a prerequisite for the charge. That person was quite simply individually responsible for breaches of criminal rules relating to individuals under international law, as it had always been understood in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.⁶ Article 27 was combined with article 98, which stipulated, *inter alia*, that the Court might not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations with respect to the State or diplomatic immunity of the person of a third State. That article therefore refuted the idea that State immunity somehow disappeared when conduct attributable to the State, but carried out by individuals, was a crime. He was not opposed to the general description of genocide as a crime, but the approach adopted by the Rome Statute to the question of immunity was inconsistent with its abolition. When the Commission had dealt with State immunity the year before, its approach to the question had been extremely conservative. There was therefore a need for consistency. The Commission should not be so carried away by its fondness for the *Barcelona Traction* category of obligations as to attribute to a breach any consequences it was not prepared to allow when discussing other areas of international law.

62. He had been slightly surprised by the favourable response to articles 50 A and 50 B, notwithstanding the concerns expressed by Mr. Sepúlveda and other members. When a State was individually injured and individually entitled to take countermeasures, another State with a legal interest in the norms violated should be able to assist. There was clear practice to that effect. Hence article 50 A was not outside the scope of the current exercise. Article 50 B was obviously quite different, although it was a considerably modified and reduced form of the version which had existed on first reading. It had been broadly

accepted, including by a number of members who had seemed to favour countermeasures only when they were multilateral. He disagreed with Mr. Kateka that such actions could conceivably be limited to multilateral reactions in a single region, although he did accept his point that they might well be a reflection of a local community concern within that area. Nevertheless, inequalities of power existed as much at the regional as at the global level.

63. There had been general approval for the referring of Part Four, as it stood, to the Drafting Committee, even though a number of individual drafting suggestions had been made. For the reasons given by a number of members, he was disinclined to delete article 39 completely, having regard to the massive debate prompted by the earlier version. On the other hand, a simplified version seemed appropriate.

64. With reference to Part Four, the broad approval of article B was gratifying. As far as article 37 was concerned, Mr. Pellet had suggested that the word “exclusively” was unnecessary in the light of the phrase “and to the extent that”. The Commission had to accept, however, that the mere fact that a particular norm entailed a particular consequence was not by itself sufficient to trigger the *lex specialis* principle. He had tried to convey the notion that a further condition was required by the word “exclusively”. Perhaps the word was too strong. That was a matter for the Drafting Committee to resolve.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the draft articles, together with those contained in the footnotes to paragraphs 407 and 413 of the report, to the Drafting Committee.

It was so agreed.

The meeting rose at 11.50 a.m.

2654th MEETING

Thursday, 10 August 2000, at 12.10 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

⁶ *Yearbook* . . . 1950, vol. II, pp. 374–378, document A/1316, paras. 95–127.

Cooperation with other bodies (continued)*

[Agenda item 9]

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

1. The CHAIRMAN invited Mr. Kamil, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), to address the Commission on the Committee's activities.

2. Mr. KAMIL (Observer for the Asian-African Legal Consultative Committee) said that AALCC attached great importance to its traditional and long-standing ties with the Commission and appreciated the role the Commission played in determining the shape and content of contemporary international law. As one of the Committee's main objectives was to examine questions that were under consideration by the Commission and to arrange for the views of its member States to be placed before the Commission, it had become customary for the two bodies to be represented at each other's annual sessions. In recent years, the Commission had also been represented at the meeting of legal advisers of the member States of AALCC, which was convened at United Nations Headquarters in New York during the sessions of the General Assembly. He looked forward in earnest to welcoming the members of the Commission during the fifty-fifth session of the Assembly.

3. The thirty-ninth session of AALCC had been held in Cairo in February 2000. New officers and a new Secretary-General had been elected. Four members of the Commission had attended the session, including Mr. Hafner, who had officially represented the Commission. As many as 14 substantive items had been on the agenda, including that of the work of the Commission at its fifty-first session. That work was of enormous interest to the Governments of the countries of Asia and Africa and to the Committee as a body in the service of its member States. The Committee had wanted the views expressed during its session to be brought to the Commission's attention.

4. With regard to the topic of State responsibility, the view had been expressed that it would be preferable for the Commission to retain as far as possible the substance of the draft articles adopted on first reading. Some preliminary comments had been made on the new texts proposed by the Special Rapporteur. One delegation had stated that it was in favour of the retention of article 20, which drew a distinction between obligations of conduct and obligations of result. That provision was of particular interest to the developing countries, most of which did not have the same means as others of achieving the result required of them. As rightly pointed out in the Commission itself, the obligation of prevention came under the heading of obligations of conduct and any reference to that concept could therefore be deleted from the draft article. Article 26 bis on the exhaustion of local remedies embodied an established rule of general international law. The exhaustion of local remedies was a precondition for an international claim and a breach of an international obligation would therefore

take place only if those remedies had been exhausted. As to article 33 on state of necessity, the AALCC representatives had agreed with the Special Rapporteur's interpretation. As it stood, the article did not cover humanitarian intervention involving the use of force in the territory of another State. With regard to article 30 on countermeasures, one delegation had agreed with the inclusion in the draft articles of a set of rules on those measures. It had also supported the linkage between countermeasures and compulsory dispute settlement. That procedure must, of course, be available to both parties, that is to say, the State which had committed the wrongful act and the injured State.

5. Referring to international liability for injurious consequences arising out of acts not prohibited by international law, he said that delegations in the Committee had commended the Special Rapporteur's work and supported the "polluter pays" principle and the concept of "equity" the Special Rapporteur had adopted. Concerns had been expressed that the decision the Commission had taken at its fifty-first session to suspend the consideration of the topic might delay the completion of its work on that topic. One delegation had expressed the preference that the final outcome should take the form of a framework convention.

6. In respect of reservations to treaties, it had been stated that the 1969 Vienna Convention established a flexible and pragmatic balance between the need to preserve the unity and integrity of treaties and the need to ensure their universal ratification. Against that background, it had been considered that the formulation of a set of guidelines would be a more practical exercise for filling the gaps, if any, in the Vienna regime. As to the idea of enabling human rights treaty monitoring bodies to determine the validity or acceptance of reservations, it had been pointed out that such a role would exceed the mandate of those bodies and thus give them retroactive authority. It had also been considered that there was a need for a flexible system which would integrate human rights agreements in a balanced way. A special meeting on reservations to treaties had been held during the thirty-seventh session of AALCC, in New Delhi, in April 1998. The results had been forwarded to the Commission at its fiftieth session. The Committee would be very happy to organize a similar meeting on another topic on the Commission's agenda.

7. Referring to the topic of unilateral acts of States, he said that the delegations present at the thirty-ninth session of AALCC had been of the opinion that the Commission should take steps to crystallize the applicable articles. It was of primary importance that it should precisely delimit the "unilateral acts" it intended to cover. In that context, emphasis had been placed on the distinction which must be made between "treaty acts" and "unilateral acts". The Committee had also commended the Commission on its adoption of a set of 27 draft articles on nationality of natural persons in relation to the succession of States.

8. On the initiative of the Government of Japan, AALCC had included an item entitled "Jurisdictional immunities of States and their property" on the agenda of its thirty-ninth session. Mr. Hafner, a member of the Commission, had described the Commission's work on that topic. Nearly all the delegations which had spoken had

* Resumed from the 2648th meeting.

acknowledged that it was important and urgently necessary to codify international rules on that question. One of them had highlighted the complexities of the problem, which straddled public international law, corporate law and business practices. The transition from an absolute to a restrictive theory of immunities had been seen as a necessary concomitant of the changing functions of modern States. Reference had been made to the explicit provisions of the draft article on ships owned or operated by a State (art. 17) and the view had been expressed that air transport could also be covered.

9. As to substance, one delegation had expressed the view that States should have a say in the determination of the status of "State enterprises" for purposes of immunity. Differences of view about the "nature" or "purpose" test had suggested that efforts should be made to develop definite criteria to assess whether a particular activity amounted to a commercial transaction. During the preparation of a general convention on the subject, account would have to be taken of State practice and the jurisprudence of various legal systems—civil law, common law and Islamic law.

10. AALCC intended to organize a debate on that subject during the meeting of legal advisers of its member States which would be held in New York during the fifty-fifth session of the General Assembly. That would enable the member States of the Committee to hold an exchange of views on the draft articles on jurisdictional immunities of States and their property and to coordinate their positions in the Sixth Committee. One delegation, which had emphasized the need to strengthen the dialogue between the Sixth Committee and the Commission, had suggested that the report of the Commission should be made available to States well enough in advance. Within AALCC, there was a need to identify ways and means of making a substantial contribution to the Commission's work. As time was short during the annual session, it had been proposed that, in future, the Committee should consider only one of the topics on the Commission's agenda, thereby facilitating the in-depth consideration of crucial issues.

11. The other items considered at the thirty-ninth session had been: the United Nations Decade of International Law;¹ the status and treatment of refugees; the deportation of Palestinians and other Israeli practices, including the massive immigration and settlement of Jews in the occupied territories in violation of international law; the legal protection of migrant workers; the extraterritorial application of national legislation; sanctions imposed on third parties; the follow-up to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court; the United Nations Conference on Environment and Development; the legislative activities of United Nations agencies and other international organizations concerned with international trade law; the report on the outcome of the Third WTO Ministerial Conference, held in Seattle from 30 November to 3 December 1999; and the report of the Seminar on Issues relating to the Implementation of Intellectual Property Rights, held in New Delhi in November 1999.

¹ Proclaimed by the General Assembly in its resolution 44/23 of 17 November 1989.

12. He had two proposals to make on ways of intensifying the working relationship between AALCC and the Commission. The first was that they should jointly organize a symposium or workshop in which the United Nations Office of Legal Affairs might also take part and the purpose of which would be to determine why States were reluctant to ratify some of the conventions which had been elaborated on the basis of Commission drafts and to devise ways of increasing accessions to those conventions. The second proposal related to the role which the Commission considered that the Committee might play in encouraging States to participate more actively in the work of the Commission and the Sixth Committee of the General Assembly, particularly by replying to questionnaires and requests for comments and observations by the Commission.

13. As to future cooperation between AALCC and the Commission, he said that the AALCC secretariat would continue to prepare notes and comments on the substantive items considered by the Commission in order to assist the representatives of AALCC member States in the Sixth Committee in their discussions of the report of the Commission. An item entitled "Report on the work of the International Law Commission at its fifty-second session" would thus be included on the agenda of the fortieth session of AALCC, which would be held in 2001. On behalf of the Committee, he invited the Chairman and the members of the Commission to participate in that session and expressed the hope that the increasingly closer cooperation between the Committee and the Commission would continue.

14. Lastly, he indicated that one of the Committee's objectives for the years to come was to convince African and Asian member countries of la Francophonie to become members of the Committee. Accordingly, the Committee's statutes and regulations had been translated into French and should be distributed to the French-speaking countries soon.

15. Mr. HE said that he welcomed the tradition that, each year, the Secretary-General of AALCC reported to the Commission on the Committee's activities and that members of the Commission attended the Committee's annual session and other meetings and seminars to report on the Commission's work. He was particularly glad that the Committee had shown an interest, through comments and relevant materials, for example, in the topics on the Commission's agenda. The secretariats of the Commission and the Committee also cooperated on matters of common interest and exchanged documentation. He sincerely hoped that, under the guidance of the Committee's new Secretary-General, cooperation between the Committee and the Commission would be further developed.

16. Mr. MOMTAZ recalled that AALCC was a regional organization to which one quarter of the member States of the international community belonged and which had played and continued to play a very important role in the progressive development of international law.

17. He fully supported the first proposal by the Secretary-General of AALCC, although he was of the opinion that account should be taken not only of "still-born" conventions of which the Commission had pre-

pared the drafts, but also of the Commission's "stillborn" drafts. As to the second proposal, the Committee might encourage its member States to answer the Commission's questionnaires by holding discussions on the topics with which the questionnaires dealt. Lastly, he was of the opinion that the fact that New Delhi was so far away should not be an obstacle to the French-speaking African countries' membership of the Committee.

18. Mr. GOCO said he was convinced that AALCC could play a useful role by urging its 45 members to reply to the questionnaires the Commission sent them on particular topics or drafts. Its assistance might also be especially useful from the viewpoint of the much hoped for entry into force of the Rome Statute of the International Criminal Court, the preparatory work for which the Committee had made a significant contribution during its meeting in Manila in 1996. Since the Rome Statute's entry into force depended on the deposit of 60 instruments of ratification and only about 10 States had ratified it, the Committee might approach its members to encourage them to deposit their own instruments of ratification.

19. Mr. Sreenivasa RAO thanked the Observer for the Asian-African Legal Consultative Committee for his excellent report and for his proposals, which were designed to intensify the relationship between the Commission and the Committee in the interests of the progressive development and codification of international law. He had no doubt that, primarily thanks to its new Secretary-General's personal qualities, AALCC would be joined by increasing numbers of French-speaking members from Africa and Asia.

20. Mr. ADDO said that he would like to know what was happening with the plan for the creation of a web site for AALCC, to which the former Secretary-General of the Committee had referred in the statement he had made at the Commission's preceding session.

21. Mr. KAMIL (Observer for the Asian-African Legal Consultative Committee) said that the web site had been created and that the address would be communicated to the members of the Commission shortly.

22. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his very interesting statement on the activities of AALCC.

The meeting rose at 1 p.m.

2655th MEETING

Friday, 11 August 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard,

Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Draft report of the Commission on the work of its fifty-second session

1. The CHAIRMAN invited members to consider the Commission's draft report.

CHAPTER I. *Organization of the session* (A/CN.4/L.590)

Paragraphs 1 to 10

Paragraphs 1 to 10 were adopted.

Paragraph 11

2. The CHAIRMAN said that, in paragraph 11, the words "opened the session and" had to be deleted as Mr. Corell, the Legal Counsel, had not, in fact, opened the session.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted.

Chapter I, as amended, was adopted.

CHAPTER II. *Summary of the work of the Commission at its fifty-second session* (A/CN.4/L.591)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

3. Further to a query by Mr. PELLET, Mr. DUGARD and Mr. GAJA confirmed that it was draft articles 1, 3 and 5 to 8 that had been referred to the Drafting Committee. Draft article 4 had not been referred.

Paragraph 2, as amended, was adopted.

Paragraphs 3 and 4

Paragraphs 3 and 4 were adopted.

Paragraph 5

4. Mr. ECONOMIDES recommended that the word *subsidiare* should be deleted from the French version of the paragraph.

5. The CHAIRMAN explained that the Commission had been deliberating the topic of prevention of transboundary damage from hazardous activities as a sub-topic of international liability for injurious consequences arising out of acts not prohibited by international law.

6. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed that the notion of sub-topic should be rendered as *sous-thème* in French.

Paragraph 5, as amended in the French version, was adopted.

Paragraph 6

7. The CHAIRMAN suggested that the adoption of paragraph 6 should be deferred until after the submission of the report of the Planning Group.

It was so agreed.

Paragraph 7

Paragraph 7 was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted with minor editing changes.

CHAPTER V. Diplomatic protection (A/CN.4/L.594)

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Paragraph 5

8. Mr. TOMKA pointed out that Mr. Bennouna had been elected as judge to the International Tribunal for the Former Yugoslavia in 1998, not 1999.

9. Mr. MIKULKA (Secretary to the Commission) said that the paragraph would be amended to read "At its fifty-first session, in 1999, the Commission appointed Mr. Christopher John R. Dugard Special Rapporteur for the topic, after Mr. Bennouna was elected as a judge to the International Tribunal for the Former Yugoslavia".

Paragraph 5, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraphs 6 and 7

Paragraphs 6 and 7 were adopted.

Paragraph 8

10. The CHAIRMAN said that it would be necessary to amend paragraph 8 to state that draft articles 1, 3 and 5 to 8 had been referred to the Drafting Committee.

Paragraph 8, as amended, was adopted.

Paragraphs 9 to 13

Paragraphs 9 to 13 were adopted.

Paragraphs 14 to 16

11. Mr. PELLET asked whether the articles should not be referred to as draft articles.

12. Mr. PAMBOU-TCHIVOUNDA said that the terms "article" and "draft article" had been used indiscriminately in the paragraphs already adopted. Greater consistency would be desirable and, in his opinion, it would be more appropriate to speak of "draft articles".

13. Mr. PELLET and Mr. TOMKA proposed that the secretariat should ascertain what the normal practice was in that respect.

14. Mr. MOMTAZ suggested that paragraph 13, which spoke of eight draft articles, could be regarded as an introductory paragraph.

15. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that paragraph 13 was indeed introductory. He felt that, for economy's sake, the term "article" could be employed thereafter.

Paragraphs 14 to 16 were adopted.

Paragraph 17

16. Mr. KAMTO said that the paragraph set out two opposing viewpoints on whether diplomatic protection extended to the protection of human rights, but it did not indicate which of those viewpoints was favoured by the Commission as a whole. The average reader, including representatives in the Sixth Committee, would be left wondering what the Commission thought about the matter.

17. Mr. DUGARD (Special Rapporteur) said there had been no consensus on the issue, and the paragraph reflected the fact that differing views had been expressed without a clear trend being discernible. The question related to the philosophy underlying diplomatic protection and was not something on which a decision was required.

18. Mr. GAJA said he wished to make a general point. The report should not be weighted down with indications of exactly how many members of the Commission had taken a given view on a particular issue. That could be seen from the summary records, which should be made available on the Commission's web site as soon as the corrections procedure was completed.

19. Mr. TOMKA endorsed the Special Rapporteur's comments and drew attention to paragraph 89, which indicated that article 1 had been the subject of informal consultations because no consensus had been achieved.

20. Mr. PELLET said that paragraph 17 was fine as it stood: it faithfully reflected the discussion on article 1.

21. Mr. GOCO drew attention to the section heading for paragraphs 16 to 22, namely "Summary of the debate", and said paragraph 17 was merely a compilation of the various views expressed on whether diplomatic protection extended to human rights protection, not a reflection of the Commission's final stance.

Paragraph 17 was adopted.

Paragraph 18

22. Mr. TOMKA said the second and fourth sentences were contradictory. The best course would be to delete the words "and it usually involved two stages", in the second sentence and the word "First" in the third sentence.

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

23. Mr. SIMMA, supported by Mr. GALICKI and Mr. TOMKA, said that the phrase "particularly Eastern European States", in the third sentence, was superfluous and should be deleted.

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraph 21

24. Mr. SIMMA pointed out that the reference to a compromise solution, in the second sentence, was inappropriate in the context of breaches of domestic law. The words "a compromise solution" should be replaced by "it was" and the phrase "according to which" by the word "that".

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

25. Mr. SIMMA said the first sentence was awkwardly phrased. He proposed that the phrase "the Commission in its work on" should be inserted after "diplomatic protection," and that the words "its work on" should be inserted after "consistent with".

It was so agreed.

26. Mr. KAMTO pointed out that a phrase seemed to be missing in the French version of the last sentence.

27. The CHAIRMAN said that that omission would be rectified.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

28. Mr. SIMMA said he objected to the comments mentioned in the first sentence being described as "interesting". It implied that some comments were more interesting than others.

29. Mr. AL-BAHARNA proposed that the word "interesting" should be deleted.

30. The CHAIRMAN, supported by Mr. PELLET, pointed out that the section heading for paragraphs 23 and 24 was "Concluding remarks by the Special Rapporteur". If the Special Rapporteur had described the comments in that way and had no objection to the use of the word "interesting", there was no reason for it to be deleted.

31. Mr. KABATSI, supported by Mr. GAJA, said that, in his own report, the Special Rapporteur was entitled to make whatever evaluations he wished, but the Commission was now adopting its report to the General Assembly. The word "interesting" should be deleted.

32. Mr. CANDIOTI suggested that the words "In his view" should be inserted at the beginning of the first sentence.

33. Mr. DUGARD (Special Rapporteur) said he had no strong views, but it would be better for the word "interesting" to be deleted.

It was so agreed.

34. Mr. TOMKA proposed that the word "internationally" should be inserted before "wrongful act" at the end of the second sentence of paragraph 24.

It was so agreed.

35. Mr. AL-BAHARNA said that, consequently, the word "internationally" should likewise be inserted between the words "potentially" and "wrongful act".

It was so agreed.

36. Mr. AL-BAHARNA said that the last sentence of paragraph 24 should be deleted, as it conveyed an opinion of the Special Rapporteur, but the report was that of the Commission.

37. Mr. DUGARD (Special Rapporteur) said his intention had been to have the question considered further by the Drafting Committee.

38. Mr. GOCO said he was in favour of keeping the last sentence, which merely set out the Special Rapporteur's assessment of the situation at the close of the discussion on diplomatic protection.

39. The CHAIRMAN suggested that the words "by the Drafting Committee" should be inserted at the end of the sentence to make the Special Rapporteur's intentions clear.

It was so agreed.

Paragraph 24, as amended, was adopted.

Cooperation with other bodies (*continued*)

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

40. The CHAIRMAN invited Mr. Benítez, Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, to inform the Commission of developments that had taken place within the Council of Europe since the Commission's previous session.

41. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe) said that the year 2000 marked the fiftieth anniversary of the adoption of the European Convention on Human Rights and a number of events had been organized for that milestone, including the preparation of a number of texts on topics that were relevant to the concerns of the Commission. First, a report had been prepared under the aegis of CAHDI by the Max Planck Institute for International and Foreign Public Law, the Eric Castren Institute and the T.M.C. Asser Institute, on the basis of information gathered under a pilot project of the Council of Europe on State practice regarding those issues.¹ The report had been presented to the Secretary-General of the Council of Europe at the CAHDI meeting in September 1999 and subsequently forwarded to the Secretary-General of the United Nations as the Council's contribution to the United Nations Decade of International Law.²

42. At the Commission's fifty-first session, he had mentioned the adoption by the Committee of Ministers of the Council of Europe of recommendation No. R (99) 13 on responses to inadmissible reservations to international treaties.³ In 2000, CAHDI had been able to complete its work on the topic by producing a document entitled "Practical issues regarding reservations to international treaties",⁴ which was a practice-oriented document based on

the expertise of practitioners in treaty-making. The aim was to avoid, as far as possible, problems connected with reservations to international treaties. The subject had been extensively discussed by CAHDI and its working party on reservations to international treaties, with particular focus on recent developments, especially the practice of denunciation of a treaty, re-ratification with reservations and modification of reservations. CAHDI had closely followed the practice of the Secretary-General of the United Nations in his role as the depositary of international treaties and had entered into a dialogue with his representatives in order to ascertain the implications of that practice. It should be stressed that the document, which had been adopted by CAHDI, was neither a recommendation nor a treaty. It was simply intended to serve the member States of the Council of Europe. With the document's endorsement by the Committee of Ministers and publication in the Official Gazette of the Council of Europe, the Group of Experts on Reservations to International Treaties (DI-E-RIT) of the Council of Europe had concluded its work. CAHDI, however, would pursue its activities, in the context of its role as the European observatory of reservations to international treaties, both within and outside the Council of Europe. It would also enter into a dialogue with reserving States where the admissibility of their reservations was called into question. CAHDI looked forward to the visit by Mr. Pellet at its meeting in September 2000.

43. As another contribution to the fiftieth anniversary of the European Convention on Human Rights, CAHDI had commissioned a special report on the Convention's implications for the development of public international law.⁵ The report, assessed the implications of such topics as reservations, interpretation of treaties, State sovereignty, due process standards, protection of the environment, State responsibility with *erga omnes* obligations, diplomatic protection, responsibility and territoriality, State responsibility for non-governmental acts and imputability and, in the field of international humanitarian law, the application of the principle of proportionality and limits to collateral damage. The author's conclusion was that the Convention's impact on general international law had been significant. One area where its influence had, so far, been limited to human rights systems, however, and did not extend to general international law, was that of reservations to treaties. The report and a record of the significant discussion held by CAHDI had been forwarded to the Council of Ministers as CAHDI's contribution to the celebration of the fiftieth anniversary of the Convention. One issue raised at the discussion had been the preparation by the European Union of a charter of fundamental rights and the possible implications of such a charter—about which some delegates had expressed concern for the way the human rights bodies operated in Strasbourg. It had therefore been decided that CAHDI would act as a clearing house for information regarding the initiative. At its meeting in September, the Under-Secretary-General, himself a member of the working party entrusted with preparing the draft charter, would report on the progress made.

¹ J. Klabbers and others, eds., *State Practice Regarding State Succession and Issues of Recognition: the Pilot Project of the Council of Europe* (The Hague, Kluwer Law International, 1999).

² See 2654th meeting, footnote 1.

³ Council of Europe, 670th meeting of the Ministers' Deputies (18 May 1999).

⁴ See 2632nd meeting, footnote 8.

⁵ T. Meron, *The Implications of the European Convention on Human Rights for the Development of Public International Law* (Strasbourg, Council of Europe Publishing, 2000).

44. CAHDI had also considered the latest developments concerning the International Criminal Court at a consultation meeting, held in May 2000, on the implications for the member States of the Council of Europe of the ratification of the Rome Statute of the International Criminal Court, in which the European Committee on Crime Problems had participated. All had stressed their commitment to the integrity of the Rome Statute and reaffirmed the objective of early establishment of the Court. In that context, they had noted the important role that the 41 member States of the Council could play, since they represented two thirds of the requisite number of 60 ratifications for the entry into force of the Statute. Another activity had been the exchange of views with representatives of various international bodies. The President of the European Court of Human Rights had participated in a discussion on developments in the Strasbourg system following the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby and the unification of the system since the European Commission of Human Rights had been wound down. There had also been a useful exchange of views with the President and Vice-President of the International Court of Conciliation and Arbitration, who had called for greater use of the Court by member States.

45. Yet another activity in the field of legal cooperation was the fight against corruption, in which the International Law Commission had also shown an interest. The Council of Europe Criminal Law Convention on Corruption and the Civil Law Convention on Corruption had been widely accepted by member States and others. Over 30 member States, and a non-member, Bosnia and Herzegovina, had signed the former, while three had ratified it. Over 20, with Bosnia and Herzegovina, had signed the latter, which had also been ratified by Bulgaria. Fourteen ratifications were needed for the entry into force of both Conventions. The Council had also adopted Recommendation No. R (2000) 10 of the Committee of Ministers to member States on codes of conduct for public officials, which sought to fight corruption in the public sector. The adoption of the Recommendation completed the Council's mandate concerning the fight against corruption, as set out in the Programme of Action against Corruption adopted by the Committee of Ministers in 1996. In that context, he recalled the Council's Enlarged Partial Agreement establishing the Group of States against Corruption (GRECO),⁶ in which member and non-member States could participate on an equal footing, although not all member States were obliged to take part. It monitored all the Council's activities in the fight against corruption and the commitments by member and non-member States thereto. The condition for its establishment had been notification by 14 member States of their intention to participate; to date, 22 had done so. Austria, Italy, Malta and Portugal had also expressed their wish to join GRECO.

46. The European Convention on Nationality had produced a significant number of signatures and the required three ratifications for its entry into force, which had taken

place on 1 March 2000. He also drew attention to Recommendation No. R (99) 18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness. In addition, the Council of Ministers had adopted Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the prohibition of discrimination, which would constitute a further substantial step in securing the collective enforcement of fundamental rights through the Convention and strengthen the arsenal available to member States for combating racism. Lastly, he drew attention to a statement by the Director-General of Human Rights at the Council of Europe to the United Nations Commission on Human Rights.

47. Mr. KATEKA noted that, under article 1, paragraph 4, of the Model Code of Conduct for Public Officials contained in the appendix to Recommendation No. R (2000) 10, the Code did not apply to publicly elected representatives, members of the Government or holders of judicial office. He wondered why such an important segment of public officials was excluded. Perhaps there was another code of conduct that applied to them.

48. Mr. GALICKI welcomed the continuing cross-pollination between the Council and Europe and the Commission. At the 1st European Conference on Nationality, in October 1999, the Commission's draft articles on nationality in relation to the succession of States had been highly valued and indeed had had some impact on further developments in the field, such as the adoption of Recommendation No. R (99) 18 and the draft recommendation on multiple nationality, which itself was connected with the Commission's work on diplomatic protection. Moreover, the proposed additional protocol to the European Convention on Nationality would undoubtedly draw on the Commission's work.

49. Mr. TOMKA informed members that CAHDI met each autumn to prepare for the consideration of the report of the Commission in the Sixth Committee. CAHDI's deliberations were greatly facilitated by the annual update of the Commission's work prepared by Mr. Simma and published in the *Nordic Journal of International Law* which provided valuable information in advance of the publication of the report of the Commission to the General Assembly.

50. Mr. GOCO said that the very important work undertaken by the Council of Europe on the topic of corruption offered a wealth of material that would continue to be of great assistance to the Commission as it moved forward in its own work on that topic. He noted that the Model Code of Conduct for Public Officials appeared to contain a provision requiring officials to make periodic declarations of their assets and liabilities. He also asked how the question of money laundering was addressed in the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption.

51. Mr. PELLET asked what was the precise meaning of the somewhat esoteric expression "commitment to the integrity of the Rome Statute", to be found in the conclusions of the consultation meeting on the implications for Council of Europe member States of the ratification of the

⁶ Council of Europe, Committee of Ministers, resolution (98) 7 (5 May 1998).

Rome Statute of the International Criminal Court. Moreover, he would like some clarification concerning the deadline for the formulation of late reservations to Council of Europe conventions.

52. Mr. GAJA said that the survey of the practice of depositaries contained in paragraph 316 of Mr. Pellet's fifth report on reservations to treaties (A/CN.4/508 and Add.1-4) revealed that when faced with a late reservation, the Secretary-General of the United Nations and the Secretary-General of IMO circulated a note to all contracting parties, inquiring whether they had any objection to the making of the reservation. If no objection was expressed, the reservation was held as admissible, even if formulated late. According to the last paragraph of section 16 of the background document dealing with practical issues regarding reservations to international treaties, that option was currently unavailable in the Council of Europe. He would be interested to know the reasons, particularly in view of the comment at the end of the paragraph, to the effect that a number of States had started to explore ways of getting round the prohibition, such as denouncing a treaty and then ratifying the same treaty again with reservations.

53. Mr. BENÍTEZ (Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe), replying to Mr. Kateka's question, said that senior public officials and elected representatives were excluded from the scope of the Model Code of Conduct for Public Officials because it enshrined certain principles, such as the requirement of political neutrality, that could not be applied to persons holding a political mandate, such as ministers, staff of ministers' private offices or elected representatives. The Council of Europe had not as yet produced a model code applicable to such categories of persons, but, given the political will that existed in that area, the Parliamentary Assembly of the Council of Europe had not ruled out the possibility of formulating such a code. At local and regional level, the competent body, namely, the quasi-statutory Congress of Local and Regional Authorities in Europe, had adopted a code of conduct for local and regional elected representatives.

54. With regard to Mr. Goco's question concerning declaration of assets, article 14 of the Model Code of Conduct for Public Officials stipulated the duty of public officials to declare their interests at the time of nomination and at regular intervals thereafter. The Council of Europe definition of interests, to be found in article 13, paragraph 2, was very broad, encompassing personal and family interests of any nature. Article 14, covering officials leaving the public service, was to be read in conjunction with article 26, which contained further provisions in that regard. The Criminal Law Convention on Corruption and the Civil Law Convention on Corruption required 14 notifications in order to enter into force, a number which should shortly be attained. Twenty-two notifications by States of their intention to join GRECO had been received, and that agreement had thus already entered into force. CAHDI would be pleased to forward to the Commission any relevant information in that connection. As for Mr. Goco's question on money laundering, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime was already in force, and,

indeed, was one of the pillars of the Council's fight against crime.

55. The work of the Council of Europe in the field of nationality went far beyond the recent adoption of the recommendation of the Committee of Ministers on avoidance of statelessness. As Mr. Galicki had pointed out, a number of activities were under way, and it was to be hoped, that they would soon result in the adoption of texts.

56. As to Mr. Tomka's remarks, he stressed that the Council of Europe was extremely grateful for the fruitful cooperation that existed between its committees dealing with international law and nationality and the Commission, cooperation that those committees were committed to pursuing. Thus, Mr. Pellet would be participating in the next meeting of CAHDI. The reports submitted periodically by Mr. Simma were a further example of such cooperation. The secretariat of the Commission also kindly provided CAHDI with advance copies of the annual report of the Commission on the work of its most recent session, to facilitate its participation in the work of the Sixth Committee. Cooperation was further enhanced by the fact that some members of the Commission had been or were also members of CAHDI. Mr. Tomka was himself a Vice-Chairman of both bodies.

57. Replying to Mr. Gaja's and Mr. Pellet's questions, he said that the reference to the commitment of Council of Europe member States to the "integrity of the Rome Statute" was a formulation that had been chosen deliberately. It was his understanding that the intention had been to rule out the possibility of delegations using the process of negotiating the rules of procedure as an opportunity to call into question provisions of the Statute itself. He had no definite information to hand concerning the deadline for late reservations. Such reservations were admissible, and he was not aware that any deadline was imposed.

58. CAHDI had been extremely concerned at recent developments with regard to the possibility of denouncing and re-ratifying treaties. The issue was covered in the first paragraph of section 8 of the background paper on practical issues regarding reservations to international treaties, which stated that the validity of such action was controversial. The passage in question continued: "The view has been expressed that this procedure is circumventing the rule that reservations may only be made when expressing consent to be bound. The view has also been expressed that, although highly undesirable, there are no formal rules against such a procedure." Fortunately, the Council of Europe had not yet been confronted with concrete instances of such a situation. His own preliminary impression was that such a practice would not be welcomed.

59. The CHAIRMAN thanked the Observer for the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe for his very full presentation.

The meeting rose at 1 p.m.

2656th MEETING

Monday, 14 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

CHAPTER VI. *Unilateral acts of States* (A/CN.4/L.595 and Add.1)

1. The CHAIRMAN invited the members of the Commission to consider chapter VI of the draft report.

A. Introduction

Paragraphs 1 to 11 (A/CN.4/L.595)

Paragraphs 1 to 11 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

1. DOCUMENTS BEFORE THE COMMISSION AND MEETINGS DEVOTED TO THE TOPIC

Paragraphs 12 to 14

Paragraphs 12 to 14 were adopted.

2. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

Paragraph 19

2. Mr. MOMTAZ said that, in the French text, the words *ou forclusion* should appear in brackets after the word *estoppel* in paragraph 15, which was where they were used for the first time.

Paragraph 19, as amended in French, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

3. Mr. LUKASHUK said that the words “or politically” in the second sentence should be deleted because the Commission had decided to consider only unilateral acts having legal effects at the international level.

4. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, although paragraph 21 reflected exactly what he had said in introducing his report, he did not object to the deletion proposed by Mr. Lukashuk.

5. Mr. TOMKA said that paragraph 21 should be kept as it stood because, although the Commission had decided to consider only unilateral acts having legal effects, States could still commit themselves politically at the international level.

6. Mr. PELLET said that at least the words “or not” in the third line should be deleted.

7. The CHAIRMAN said he took it that the Commission wished to adopt paragraph 21, as amended by Mr. Pellet.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

8. Mr. TOMKA said that, when reference was made to a new draft article, the text should be reproduced in a footnote to make it easier to understand the report. That was what the Commission had done in chapter IV on State responsibility. That comment naturally applied to all the other paragraphs in which a new draft article was mentioned.

9. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that he agreed with Mr. Tomka and would comply with his request.

Paragraph 22 was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

10. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that the third sentence contained an error: the word “dependence”, which was used three times, should be replaced by the word “independence”.

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

Paragraph 27

11. Mr. PELLET said that the second sentence was obscure and he thought that the Special Rapporteur had meant that the 1969 Vienna Convention defined the treaty without excluding other acts that might be characterized as treaties.

12. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, in Spanish, the sentence in question reflected exactly what he had said, namely, that a treaty, as defined in the Vienna Convention, was not the only type of treaty act to which the Convention could apply.

13. After an exchange of views in which the SPECIAL RAPporteur, Mr. ECONOMIDES, Mr. HAFNER, Mr. KATEKA, Mr. PAMBOU-TCHIVOUNDA, Mr. PELLET and Mr. TOMKA took part, the CHAIRMAN suggested that the consideration of paragraph 27 should be suspended until the Rapporteur had held informal consultations with the members concerned to arrive at a text that would be acceptable to everyone.

It was so agreed.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

14. Mr. BROWNLIE said that, in the penultimate sentence, the word “enlarging” should be replaced by the word “extending”.

Paragraph 29, as amended in English, was adopted.

Paragraphs 30 to 32

Paragraphs 30 to 32 were adopted.

Paragraph 33

15. Mr. MOMTAZ said that he had doubts about the meaning of the last sentence and the reasons why it had been necessary to refer to the establishment of commissions of enquiry by the Security Council, a question which had nothing to do with the rest of the paragraph.

16. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that the Security Council could adopt decisions under Chapter VII of the Charter of the United Nations which could be a ground for the invalidity of a unilateral act. Under Chapter VI of the Charter, it could adopt only recommendations, which were not a ground for invalidity, except that it could also—and that was the only exception—take a decision to establish a commission of enquiry.

Paragraph 33 was adopted.

3. SUMMARY OF THE DEBATE

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

17. Mr. LUKASHUK proposed that, for reasons of logic, the words “organize and clarify” in the second sentence should be replaced by the words “clarify and organize”.

18. Mr. MOMTAZ, referring to the last sentence, said he did not think that a unilateral act could be a substitute for treaty law. It would be more appropriate to say that it could be a substitute for treaty-making procedure.

19. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, when States wanted to maintain a certain legal relationship, but could not have recourse to a treaty act because political circumstances prevented them from doing so, they could operate by means of a unilateral act. As Rapporteur, he was prepared to try to find wording that would better reflect that idea.

20. Mr. TOMKA said that the problem could be solved by simply stating that a unilateral act could be regarded as “a substitute for a treaty”.

21. Mr. ECONOMIDES said that he agreed with that proposal and that it would be even more accurate to say that a unilateral act could be considered as a substitute for a treaty act, since that was exactly what was meant.

22. Mr. GOCO, referring to the fourth sentence, said that the words “at best as old as treaties” was awkward.

23. Mr. BROWNLIE proposed that the words “at least as old as treaties” should be used.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

24. Mr. PAMBOU-TCHIVOUNDA said that paragraph 37 simply repeated the idea already expressed in the first sentence of paragraph 36.

25. The CHAIRMAN suggested that the first sentence of paragraph 36 should be replaced by paragraph 37.

It was so agreed.

Paragraphs 36 and 37, as amended, were adopted.

Paragraph 38

26. Mr. MOMTAZ said that he did not understand the beginning of the third sentence, which read “In deciding how to ‘codify’ such relative freedom of action”, since there was an apparent contradiction between “freedom” and “codify”. In order to avoid any misunderstanding, he proposed that the sentence should read: “In trying to

find ways of codifying the rules which limit freedom of action ...”.

27. Mr. GOCO said that the sentence was explained by the sentences which preceded it, which explained which freedom of action was meant and why it was characterized as “relative”.

28. Mr. SIMMA said that he was the one who had expressed the view stated in that sentence, which accurately reflected what he had said. It was precisely in order to show how strange the idea of “codifying” a freedom was that that word was in quotation marks.

29. Mr. TOMKA said that there was a contradiction between “codify” and “freedom of action”, but it was not the only one in the report, which did nothing more than sum up sometimes contradictory opinions expressed during the discussions. For example, the beginning of paragraph 35 stated that unilateral acts were important and were part of day-to-day diplomatic practice, whereas, at the end of paragraph 36, it was stated that the Commission had “few tools or guidelines” for codifying the rules “of a little known area”. Opposing views had been expressed during the discussions and it was quite normal for the report to reflect them.

Paragraph 38 was adopted.

Paragraph 39

30. Mr. PAMBOU-TCHIVOUNDA, supported by Mr. ECONOMIDES, proposed that the word “present” should be replaced by the word “observed”.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

31. Mr. LUKASHUK proposed that, in the seventh sentence, the words “as well as that of the acts of international organizations” should be deleted.

32. Mr. ECONOMIDES said that, although he was the one who had expressed that opinion, he also considered that those words were not relevant.

Paragraph 42, as amended, was adopted.

Paragraphs 43 to 47

Paragraphs 43 to 47 were adopted.

Paragraph 48

33. Mr. PELLET proposed that, in the French text, the words *accord officieux* should be replaced by the words *accord informel*.

Paragraph 48, as amended in the French text, was adopted.

Paragraphs 49 and 50

Paragraphs 49 and 50 were adopted.

Paragraph 51

34. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic), referring to the last sentence, said that he did not quite see how the concept of “multilateral” unilateral acts could have been abandoned, since, to his knowledge, it had never been referred to. The sentence should therefore be deleted.

Paragraph 51, as amended, was adopted.

Paragraphs 52 and 53

Paragraphs 52 and 53 were adopted.

Paragraph 54

35. The CHAIRMAN, speaking as a member of the Commission, said that the words “an unilateral act” were used several times and should be replaced by the words “a unilateral act”. He requested the Rapporteur to deal with that question.

36. Mr. TOMKA said that the words “*Nuclear Tests case*” should be replaced by the words “*Nuclear Tests cases*” because there had been two cases.

Paragraph 54, as amended, was adopted.

Paragraphs 55 and 56

Paragraphs 55 and 56 were adopted.

Paragraph 57

37. Mr. TOMKA said that, at the end of the sixth sentence, the word “(Jurisdiction)” should be added after the words “*Maritime Delimitation and Territorial Questions between Qatar and Bahrain case*”.

Paragraph 57, as amended, was adopted.

Paragraph 58

38. Mr. PELLET said that, at the end of the first sentence, the words “since peoples, national liberation movements or individuals could also be the beneficiaries of legal commitments” would be clearer than the words “since peoples, national liberation movements or individuals could also give rise to legal obligations”.

39. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal and that the end of the first sentence should be amended to read: “could also be beneficiaries of legal commitments”.

It was so agreed.

40. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that, in the first sentence, it might not be accurate to say that “some members wondered”, since only one member had done so.

41. Mr. KATEKA, supported by Mr. Sreenivasa RAO, proposed that the words “some members wondered” should be replaced by the relatively neutral words “it was queried”.

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

It was so agreed.

Paragraph 58, as amended, was adopted.

Paragraphs 59 to 68

Paragraphs 59 to 68 were adopted.

Paragraph 69

43. Mr. PELLET said that, since the last sentence of the French text, which corresponded to the last two sentences of the English text, duplicated the sentences which preceded it, it should be deleted.

44. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission decided to delete the last two sentences of the English text and the last sentence of the French text.

It was so agreed.

Paragraph 69, as amended, was adopted.

Paragraphs 70 to 73

Paragraphs 70 to 73 were adopted.

Paragraph 74

45. The CHAIRMAN, replying to a question by Mr. Goco, said that the words “one view” were not necessarily synonymous with the words “one member”.

46. Mr. CANDIOTI noted that, in the French text, those words had been translated as *un membre*. They should therefore be replaced by the words *selon une opinion* and the secretariat should be requested to harmonize the entire text.

Paragraph 74, as amended in the French text, was adopted.

Paragraphs 75 to 80

Paragraphs 75 to 80 were adopted.

Paragraph 81

47. Mr. TOMKA said that, in the last sentence, the words “1977 *Eastern Timor* case” should be replaced by the words “1995 *East Timor* case”.

Paragraph 81, as amended, was adopted.

Paragraph 82

Paragraph 82 was adopted.

Paragraph 83

48. Mr. PELLET said that he did not understand the eighth sentence because a presumption of incompetence would be more logical than a presumption of competence. The seventh sentence was also not very logical.

49. Mr. TOMKA said that the entire paragraph should be looked at again. He proposed that the Rapporteur should try to find the statement being referred to in the relevant summary record and check with the person who had made that statement before informing the Commission of his conclusion.

50. The CHAIRMAN said that the adoption of paragraph 83 should be deferred until that problem had been solved by the Rapporteur.

It was so agreed.

Paragraphs 84 to 94

Paragraphs 84 to 94 were adopted.

Paragraph 95

51. Mr. BROWNLIE said that in the second sentence he was not very satisfied with the words “objective status of that State”, especially in relation to neutral status. He proposed that the word “objective” should be deleted.

52. Mr. HAFNER said that the problem could be solved if the words “objective status” were replaced by the words “status *erga omnes*”.

53. Mr. KUSUMA-ATMADJA said that he did not agree with Mr. Hafner’s proposal, since it was “obligations *erga omnes*” that were referred to, not “status *erga omnes*”.

54. Mr. PAMBOU-TCHIVOUNDA, noting that the Commission should be careful not to mix things up, said that he agreed with the comment by Mr. Kusuma-Atmadja.

55. Mr. TOMKA said that there was no need to modify the word “status” because an example was given in the following sentence.

56. Mr. PELLET said he also thought that Mr. Brownlie’s wise proposal should be adopted.

57. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 95, as amended by Mr. Brownlie.

It was so agreed.

Paragraph 95, as amended, was adopted.

Paragraph 96

58. Mr. BROWNLIE said that the word “unopposability” at the end of the second sentence should be replaced by the word “inopposability”.

Paragraph 96, as amended in English, was adopted.

Paragraphs 97 to 101

Paragraphs 97 to 101 were adopted.

Paragraph 102

59. Mr. PELLET proposed that, in order to make paragraph 102 mean something, the words “stemming directly from the law” should be replaced by the words “stemming directly from general international law”.

60. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that he accepted Mr. Pellet’s proposal. The words “cases of absolute invalidity” should be replaced by the words “causes of absolute invalidity”.

Paragraph 102, as amended, was adopted.

Paragraphs 103 to 106

Paragraphs 103 to 106 were adopted.

Paragraph 107

61. Mr. TOMKA, referring to the penultimate sentence, said he wondered whether the words “continued to be binding” should not be replaced by the words “continued to be operative”.

62. Mr. SIMMA proposed that the words “became operative again” should be used.

63. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 107, as amended by Mr. Simma.

It was so agreed.

Paragraph 107, as amended, was adopted.

Paragraphs 108 and 109

Paragraphs 108 and 109 were adopted.

64. Mr. TOMKA, noting that the paragraphs which followed related to the Special Rapporteur’s summing up, said he wondered whether, in keeping with the usual practice, they should not be placed in a new section 4, to be entitled “Special Rapporteur’s concluding remarks”. The

current section 4 (Establishment of the Working Group) (A/CN.4/L.595/Add.1) would become section 5.

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

It was so agreed.

Paragraphs 110 to 114

Paragraphs 110 to 114 were adopted.

Paragraph 115

66. Mr. TOMKA, noting that the last sentence did not faithfully reflect the debate, proposed that it should be replaced by the following sentence: “That point could be further examined by the Working Group”.

Paragraph 115, as amended, was adopted.

Paragraphs 116 to 123

Paragraphs 116 to 123 were adopted.

Paragraph 124

67. Mr. BROWNLIE proposed that the paragraph should be simplified and made more general.

68. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that he would submit a new text along those lines.

69. The CHAIRMAN said he took it that the Commission wished to leave paragraph 124 pending.

It was so agreed.

Paragraph 125

70. The CHAIRMAN said that Mr. Tomka’s comment on paragraph 115 also applied to paragraph 125 and invited the Rapporteur to amend that paragraph accordingly.

Paragraph 125 was adopted on that understanding.

4. ESTABLISHMENT OF THE WORKING GROUP (A/CN.4/L.595/Add.1)

Paragraphs 126 to 128

71. Mr. PELLET, recalling that the report of the Working Group had not been submitted to the Commission and had therefore not been considered, questioned whether these paragraphs should be adopted. He noted, for example, that, in the *chapeau* of paragraph 127, reference was made to “a strong measure of support” for certain points concerning further work on the topic. Where did that strong measure of support come from? It certainly did not come from the Commission.

72. Mr. TOMKA, replying to Mr. Pellet, proposed that it should be stated that the Working Group had provided such support.

73. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said it was true that the Working Group had not been able to report to the Commission. He nevertheless thought that its work should be reflected in the report of the Commission. He therefore accepted Mr. Tomka's proposal.

74. Mr. PELLET said that Mr. Tomka's proposal was good, but it did not go far enough. He himself proposed that it should be explained at the end of paragraph 127 or in a paragraph 127 bis that the Commission had not been able to discuss the conclusions in question.

75. Mr. HAFNER said that he also supported Mr. Tomka's proposal, but noted that, if it was accepted, there would be no need for paragraph 128.

76. Mr. LUKASHUK said that he did not agree with the conclusion stated in paragraph 127 (a), since the legal effects produced by unilateral acts were predetermined by international law.

77. The CHAIRMAN recalled that subparagraphs (a) to (d) were conclusions by the Working Group, not by the Commission.

78. Mr. PELLET said that that was how he understood paragraph 127 and, as to substance, he supported Mr. Lukashuk's comment. He agreed with Mr. Tomka's proposal, reiterated his proposal that a new paragraph 127 bis should be added, in a sentence to follow paragraph 127, and suggested that paragraph 128, which he found legitimate, should be retained.

79. Mr. HAFNER, referring to paragraph 128, asked whether the Commission could really request the views of delegations in the Sixth Committee on points which it had not considered. For the sake of logic, that paragraph should perhaps begin with the word "Nevertheless".

80. Mr. ECONOMIDES suggested that the content of the additional paragraph 127 bis proposed by Mr. Pellet should be transferred to paragraph 128, which would be amended along the lines indicated by Mr. Hafner.

81. Mr. RODRÍGUEZ CEDEÑO (Rapporteur and Special Rapporteur for the topic) said that Mr. Economides' idea was acceptable.

82. The CHAIRMAN invited the Rapporteur to submit a new text at the next meeting.

The meeting rose at 1 p.m.

2657th MEETING

Monday, 14 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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

CHAPTER VI. *Unilateral acts of States (concluded) (A/CN.4/L.595 and Add.1)*

B. *Consideration of the topic at the present session (concluded)*

4. ESTABLISHMENT OF THE WORKING GROUP (concluded) (A/CN.4/L.595/ADD.1)

Paragraphs 127 and 128 (concluded)

1. The CHAIRMAN said that, following consultations, a new formulation of the *chapeau* of paragraph 127 had been proposed, to read:

“The Working Group reported that while, in the light of the above-mentioned circumstances, no final conclusions could be drawn from the meetings held, there was a strong measure of support in the Working Group for the following points concerning further work on the topic:”

The new text would then be followed by subparagraphs (a) to (d) as currently worded.

2. Paragraph 128 would then read:

“The Commission did not have time to consider the report of the Working Group. However, the Commission agreed that it would be useful to seek the views of Governments on points (a), (b) and (c) above and that the Secretariat should proceed along the lines suggested in point (d) above.”

3. Mr. HAFNER asked whether the Working Group had submitted a formal report to the Commission in the form of a document.

4. The CHAIRMAN said that, strictly speaking, no formal report had been submitted. The main thrust of the paragraph was, however, that the Commission had not

had time to consider in plenary the points on which the Chairman of the Working Group had reported.

Paragraphs 127 and 128, as amended, were adopted.

2. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS THIRD REPORT (concluded) (A/CN.4/L.595)

Paragraph 27 (concluded)

5. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) suggested that the second sentence of paragraph 27 should be reformulated to read: “The Convention had to do with a type of conventional act, the treaty, which it defined, but without excluding other types of conventional acts distinct from a treaty as defined in article 2, paragraph 1 (a), of the Convention, to which the rules of the Convention could be applied irrespective of the Convention itself.”

6. Mr. ECONOMIDES said that the phrase “distinct from a treaty” was superfluous and would simply create confusion. The phrase “other types of conventional acts” fully covered the distinction. He would not, however, press the point.

7. The CHAIRMAN said that, if the formulation “as defined in article 2, paragraph 1 (a), of the Convention” was to be used, the phrase “distinct from a treaty” should be retained.

Paragraph 27, as amended, was adopted.

3. SUMMARY OF THE DEBATE (concluded)

Paragraph 83 (concluded)

8. The CHAIRMAN said the Rapporteur had proposed that the last five sentences of paragraph 83, starting with the word “Furthermore”, which dealt with drafting questions not usually addressed in the report, should be deleted.

Paragraph 83, as amended, was adopted.

Paragraph 124 (concluded)

9. The CHAIRMAN said it had been proposed that three sentences should be deleted from paragraph 124. As amended, the paragraph would read:

“In response to the question whether any pattern could be discerned from the replies of Governments to the questionnaire (A/CN.4/511) the Special Rapporteur said that some of the replies had been critical of the treatment of the topic, but had been very useful, and the suggestion to provide an addendum to the commentaries would be taken into account in subsequent reports.”

Paragraph 124, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VI, as amended, was adopted.

CHAPTER VIII. *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.597)

A. Introduction

Paragraphs 1 to 8

Paragraphs 1 to 8 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted.

Paragraph 13

10. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that, at the end of paragraph 13, the phrase “did not subtract from it” should be replaced by “only facilitated identifying and defining that obligation”.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

11. Mr. PELLET said it was not clear what was meant by the expression “right of engagement”, in the penultimate sentence.

12. Mr. Sreenivasa RAO (Special Rapporteur) said that the expression could be replaced by the words “right of consultation”.

It was so agreed.

13. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed replacing the words “So if”, at the beginning of the third sentence, by the word “furthermore”, and ending the sentence with the word “risk”.

14. He said that the remainder of the third sentence should be redrafted to read: “The phrase ‘acts not prohibited by international law’, originally intended to distinguish liability from responsibility, might not be necessary or, indeed, appropriate to define the scope of the regime on prevention.” Mr. PELLET said that the proposed redrafting raised the perennial problem of the distinction drawn in English between liability and responsibility, a distinction that did not exist in French and Spanish.

15. After a brief discussion in which Mr. GALICKI, Mr. PELLET, Mr. Sreenivasa RAO (Special Rapporteur) and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the problem could be avoided by altering the phrase “distinguish them from wrongful acts” to “distinguish these activities from those covered by the topic of State responsibility”.

It was so agreed.

16. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed that the words “it would become prohibited”, in the fifth sentence, should be replaced by “it could arguably be prohibited”. He said that the last sentence of paragraph 15 should be amended for the sake of clarity to read “In his opinion, deleting the reference to the words ‘acts not prohibited by international law’ would not create further problems, and might even secure a greater consensus for the draft articles.”

It was so agreed.

17. Mr. SEPÚLVEDA said that the third sentence, in the amended form, still created difficulties in the Spanish and French versions, as the word *responsabilidad* or *responsabilité* were repeated, which was plainly nonsense.

18. Mr. PELLET commented that the Commission was going round in circles. He suggested that the second sentence might read “While State responsibility dealt with wrongful acts, international liability, the subject of the present report, dealt with compensation.” The French translation of the very last sentence was wrong and should be more closely aligned with the original English.

19. Mr. TOMKA suggested that, in order to facilitate comprehension, the word “liability” should be added in brackets after the relevant term in the French, Spanish and Russian versions.

20. Mr. KABATSI enquired whether the phrase in the second sentence of paragraph 15 “acts not necessarily prohibited by international law” might not imply that international liability, in certain circumstances, covered acts prohibited by international law.

21. Mr. Sreenivasa RAO (Special Rapporteur) said that Mr. Kabatsi had made a pertinent drafting point. It would be better to recast the phrase to read “acts not expressly/ explicitly prohibited by international law”.

22. Mr. TOMKA said that the word “necessarily” should simply be deleted.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

23. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) proposed that, the phrase “particular attention needed to be paid to the preamble” should be replaced by “necessary attention be paid to this concern in the preamble”.

24. Mr. MOMTAZ said that the text should refer to draft articles and not articles. Furthermore, the French version should be brought into line with the wording proposed by Mr. Pellet for paragraph 15. The expression “universal endorsement” might cause some difficulties and should be deleted. The sentence would then read “In order to encourage a broader consensus on the draft articles ...”.

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

Paragraph 19 was adopted with minor editing changes.

Paragraphs 20 to 26

Paragraphs 20 to 26 were adopted.

Paragraph 27

Paragraph 27 was adopted with a minor editing change.

Paragraphs 28 to 32

Paragraphs 28 to 32 were adopted.

Paragraph 33

25. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that the last sentence of the paragraph should be redrafted to read “The prevention articles would also apply to cases where there was no agreement or clear legal prescription that the activity involved was prohibited.”

Paragraph 33, as amended, was adopted.

Paragraph 34

26. Mr. HAFNER observed that “the principle of precaution” should be called “the precautionary principle”.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 35 bis

27. Mr. PAMBOU-TCHIVOUNDA objected that paragraph 35, concerning the preamble, made no reference to the views he had expressed with regard to the fifth preambular paragraph. He therefore proposed that a new paragraph 35 bis be added, reading:

“As to the subject matter, however, one member observed that the fifth preambular paragraph contained innovative wording which endowed the set of draft articles with a vital conceptual basis, indeed with the key to the whole system, in respect of both the section on prevention and a future section, which should be devoted to compensation. The paragraph, dealing with the freedom of States to carry on or permit activities in their territory, should, according to that member, be transferred to a specific provision in the actual body of

the draft articles, namely a draft article 2 bis on the obligation of prevention.”

28. He believed that the wording he was proposing for the attention of the Rapporteur, the Special Rapporteur and indeed the whole Commission, reflected what he felt was a remarkable, essential feature of the preamble.

29. Mr. ROSENSTOCK said that he had no objection to the inclusion of a reference to Mr. Pambou-Tchivounda's opinion, but it would have to be more succinct than the paragraph he had just proposed.

30. Mr. PELLET wondered if it would be possible to say “One member suggested that, in view of its importance, the principle set forth in the fifth preambular paragraph on the rights of States freely to carry on activities in their territory, deserved to be laid down in the actual body of the draft articles”. That formulation would be more sober and more appropriate to a report which was not supposed simply to reiterate the views of each and every member.

31. Mr. Sreenivasa RAO (Special Rapporteur) said that he would be pleased to include a brief reference to Mr. Pambou-Tchivounda's view.

32. Mr. PAMBOU-TCHIVOUNDA said he could agree to his concerns being formulated along the lines suggested by Mr. Pellet.

Paragraph 35 bis was adopted.

Paragraph 36

Paragraph 36 was adopted.

Paragraphs 37 and 38

33. Mr. PAMBOU-TCHIVOUNDA said he had problems with the concept of duty of prevention in paragraph 37 and thought that, before that concept was addressed, a draft article on the obligation of prevention should be formulated. He drew attention to the summary record of the 2642nd meeting, at which he had proposed wording for such a provision, and suggested that the relevant paragraphs of the record should be incorporated in the report.

34. Mr. PELLET said he was opposed to transforming the Commission's report into a collage of the summary records. He would, however, accept wording along the lines of “According to one member, an article on the obligation of prevention should be included”.

35. Mr. Sreenivasa RAO (Special Rapporteur) suggested that the order of paragraphs 37 and 38 should be reversed in order to improve the logical sequence and better reflect the discussion. He also proposed that in paragraph 38, to become paragraph 37, the word “covering” should be replaced by “deleting the words”.

It was so agreed.

Paragraphs 37 and 38, as amended, were adopted.

Paragraphs 39 and 40

Paragraphs 39 and 40 were adopted.

Paragraph 40 bis

36. Mr. MIKULKA (Secretary to the Commission) read out the following wording proposed by a member: “The view was also expressed that the proposed deletion would be tantamount to legitimizing prohibited activities, which would not be acceptable.”

Paragraph 40 bis was adopted.

Paragraph 41

Paragraph 41 was adopted.

Paragraph 41 bis

37. Following consultations suggested by Mr. TOMKA and the CHAIRMAN, Mr. MIKULKA (Secretary to the Commission) read out the following wording, to become paragraph 41 bis: “With regard to draft article 3, according to one member the definition of the obligation of prevention should be dealt with in a separate article.”

38. Mr. ECONOMIDES, recalling that he, too, had taken that viewpoint, proposed that the words “according to one member” should be replaced by “the view was expressed that”.

It was so agreed.

Paragraph 41 bis, as amended, was adopted.

Paragraph 42

39. Mr. PELLET said that the words “could be given” did not seem accurate and proposed that they should be replaced by “was required”.

40. Mr. Sreenivasa RAO (Special Rapporteur) said that the phrase “for any kind of activity” was too broad.

41. After a brief discussion in which Mr. HAFNER and Mr. PELLET took part, the CHAIRMAN suggested that the phrase should be replaced by the words “for any activity falling within the scope of these draft articles”.

It was so agreed.

Paragraph 42, as amended, was adopted.

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

Paragraph 45

42. Mr. GAJA proposed that the phrase “the balance of interest was correctly maintained, that” should be deleted and that the words “level of interest” should be replaced by “level of risk”.

Paragraph 45, as amended, was adopted.

Paragraph 46

Paragraph 46 was adopted.

Paragraph 46 bis

43. Mr. ECONOMIDES, supported by Mr. MOMTAZ, proposed the insertion of a new paragraph, to read: "With regard to article 19, paragraph 2, it was pointed out that this provision contains gaps that could be filled by referring to article 33 of the Convention on the Law of the Non-Navigational Uses of International Watercourses".

It was so agreed.

Paragraph 46 bis was adopted.

Paragraph 47

44. Mr. TOMKA proposed that the word "framework" should be inserted before the word "convention".

Paragraph 47, as amended, was adopted.

Paragraphs 48 and 49

Paragraphs 48 and 49 were adopted.

Paragraph 50

45. Mr. PELLET suggested that, for consistency with wording used earlier in paragraph 15, the phrase "principle of engagement" should be replaced by "principle of consultation".

46. Mr. Sreenivasa RAO (Special Rapporteur) said that, if Mr. Pellet's suggestion was adopted, the end of the preceding sentence should be changed from "engage themselves" to "consult among themselves".

47. Mr. HAFNER said that, arguably, there was no such concept as a principle of consultation. The sentence should be reformulated to eliminate any reference to such a principle.

48. Mr. Sreenivasa RAO (Special Rapporteur) proposed the following alternative wording: "Emphasizing consultation at the earliest possible stage was the main value of the draft".

49. Mr. BROWNLIE said that the phrase "principle of consultation" should be retained. It was an unusual locution, but the Commission was, in point of fact, creating such a principle within the framework of the draft articles, thus differentiating it from the more common reference to consultation as one of a list of options in general international law.

50. Mr. ECONOMIDES suggested that the word "principle" could be replaced by "need" or "necessity". The salient part of the sentence, after all, was that consultation was desirable at the earliest possible stage.

51. Mr. Sreenivasa RAO (Special Rapporteur) proposed that the word "principle" should be replaced by the word

"duty", which was stronger and conveyed better the idea of obligation.

52. The CHAIRMAN recalled that paragraph 15 had contained the phrase "right of engagement". "Right of consultation" might, by analogy, be appropriate in paragraph 50.

53. Mr. MOMTAZ suggested that "obligation", the word the Special Rapporteur had mentioned, might be the appropriate one to use.

54. Mr. KUSUMA-ATMADJA said he considered both "obligation" and "duty" acceptable, but the latter was stronger.

55. The CHAIRMAN suggested that the word "obligation" should be used.

Paragraph 50, as amended, was adopted.

Paragraph 51

56. Mr. ROSENSTOCK said that the word "leaving" was surely a typographical error and should be deleted.

Paragraph 51, as amended, was adopted.

Paragraph 52

57. Mr. ECONOMIDES said that the wording "he saw no need for the Commission to redraft it" was inappropriate: it implied annoyance on the part of the Special Rapporteur. It should therefore be changed or deleted.

58. Mr. Sreenivasa RAO (Special Rapporteur) said he accepted that point. An alternative would be to reformulate the whole second half of the paragraph to read: "since article 19 had generally met with the approval of Governments, he proposed its retention without any changes".

Paragraph 52, as amended, was adopted.

Paragraph 53

Paragraph 53 was adopted.

Paragraph 54

59. The CHAIRMAN suggested that a sentence should be added to the effect that the Drafting Committee had not had time to consider the draft preamble and revised draft articles 1 to 19 at the current session.

60. Mr. Sreenivasa RAO (Special Rapporteur) said that, in haste, he had inserted the title of the draft articles before the preamble. The appropriate position, however, was after the preamble and immediately before article 1.

61. Mr. GAJA said that the preamble read like a draft resolution. The Drafting Committee should consider only the draft articles and replace the existing draft preamble with one that would be appropriate to the draft convention.

62. Mr. TOMKA supported the Chairman's suggestion. The sentence might be worded: "Owing to lack of time, the Drafting Committee was not able to consider the draft preamble and articles". It was also necessary to clarify the status of the annex. There was no clear connection between it and the report, except for the statement in footnote 6. At the least, footnote 9 should be expanded to remind the reader of the status of the annex. As for the draft preamble, he would reiterate his view that the last three paragraphs were inappropriate. They belonged in a draft resolution of the General Assembly and it was not for the Commission to take on the task of drafting such a resolution. The proposal that the title should be placed after the draft preamble was quite acceptable. The draft articles were not a finished product adopted by the Commission, but a text proposed by the Special Rapporteur. Any criticism would be for him to deal with.

63. The CHAIRMAN raised the question of what the annex was annexed to. Its status might be clearer if, following the example of the reports on diplomatic protection and unilateral acts of States, the annex formed a footnote.

64. Mr. Sreenivasa RAO (Special Rapporteur) endorsed that suggestion. The appropriate place would be in footnote 6, which would also make it clear that the draft articles were his responsibility alone.

65. The CHAIRMAN said that the annex was too long for a footnote. The format, however, could be discussed later.

66. Mr. HAFNER supported the view that the status of the annex should be more clearly signposted in a footnote. The suggestion that the title should be moved, however, was more problematic. If it was moved, there would effectively be no preamble and States would justifiably view the existing text as a draft resolution of the General Assembly.

67. Mr. ECONOMIDES said that it would be a pity to lose the positive ideas contained in the draft preamble. He therefore suggested that the phrase "*The General Assembly*" and the "*Adopts*" and "*Invites*" changes should be deleted. What was left would be an appropriate preamble.

68. The CHAIRMAN suggested that, regardless of the status of the annex, the whole text should be referred to the Drafting Committee, which could make the necessary revisions.

69. Mr. ROSENSTOCK said he concurred. Mr. Hafner was correct in saying that the existing text did not constitute the preamble to a convention, but further discussion within the Commission was unnecessary. The text proposed by the Special Rapporteur had been referred to the Drafting Committee and there would be time for the Commission to reach a decision when it went through the final text paragraph by paragraph.

70. Mr. PELLET said that the Commission should not risk reopening the whole discussion. What States wished to see was the text proposed by the Special Rapporteur, which, until the Commission had endorsed it, remained his responsibility alone. A fuller explanation than that suggested by Mr. Tomka should be added to the end of paragraph 54, along the following lines: "However, for the

convenience of States, the Commission annexes to the present chapter the text of the draft preamble and revised articles as proposed by the Special Rapporteur".

71. Mr. BROWNLIE said that it was obviously extremely helpful to have the draft preamble and revised articles available for reference, preferably in an annex, although he endorsed what other members had said about the status of the annex. He trusted that any inconsistencies with other chapters of the report would be tidied up.

Paragraph 54, as amended, was adopted.

Section B, as amended, was adopted.

Chapter VIII, as amended, was adopted.

The meeting rose at 6 p.m.

2658th MEETING

Tuesday, 15 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

Cooperation with other bodies (*concluded*)*

[Agenda item 9]

VISIT BY THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN extended a welcome to Mr. Guillaume, President of the International Court of Justice, whose visit reflected the close ties between ICJ and the Commission.

2. Mr. GUILLAUME (President of the International Court of Justice) said that he wished first to thank the Chairman for his welcome and, above all, for himself and

* Resumed from the 2655th meeting.

on behalf of the Court, for the invitation to speak to the Commission for the customary exchange of views.

3. Indeed, there was a long tradition of cooperation between ICJ and the Commission. The two bodies were united by personal ties, first because a number of former members of the Commission were now judges at the Court and second because some current members of the Commission sometimes appeared as counsel at the Court. However, above and beyond that, they were united by a common aim—the development of international law, by methods that were admittedly different, since the Court had to decide on particular disputes or to respond to requests for advisory opinions on specific points, whereas the Commission had a much wider role of codification and progressive development of international law. Both functions were obviously complementary in the headway being made in international law. The Court and the Commission had an influence on one another, as had occurred on a number of occasions, for instance in the law of the sea or the law of treaties.

4. It would doubtless be worthwhile for the Commission to learn what the Court was doing at the current time, what cases were on the docket, what the short- and medium-term problems were, and also, more generally, what problems arose because of the phenomenon Mr. Hafner had recently discussed in an interesting study entitled “Risks ensuing from fragmentation of international law”,¹ namely, the fragmentation of international law and international justice, a subject of common interest.

5. At the current time, the Court had 23 cases on the docket, an absolute record in the history of international justice, cases in which—a very important fact—all parts of the world, all legal systems and both industrialized and developing countries were represented: 5 cases between African States, 2 Asian States, 10 European States, 1 Latin American State and 5 cases that crossed the continents. The purpose varied considerably. The Court was seized with traditional cases, for example, territorial disputes between neighbouring countries that wanted to establish a common border or determine their sovereignty over certain areas. That was the bulk of the matter in four cases: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*; *Land and Maritime Boundary between Cameroon and Nigeria*; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*; and *Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea*. The Court was obviously the body to deal with those matters, for it was the type of case which, very often, was difficult to resolve by negotiation, as stated in the old arbitral treaties, for reasons concerning the honour of nations or for political or diplomatic considerations and in which the judge could render real service.

6. The classic type of case also included those in which a State denounced the treatment suffered by one or more of its nationals abroad. The Court was now seized with two cases of that kind: the *LaGrand* case and the *Diallo* case.

7. It was seized with a third kind of case, those cases linked to events brought to the attention of United Nations political bodies, namely the General Assembly or the

Security Council: *Lockerbie*; *Oil Platforms*, a case in which the Islamic Republic of Iran complained of the destruction of oil platforms by the United States of America during the first Gulf war in 1987 and 1988; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, two cases in which Bosnia and Herzegovina and Croatia had, in two separate applications, called for the condemnation of Yugoslavia for a breach of the Convention; *Legality of Use of Force*, cases between Yugoslavia and 10 States members of NATO challenging the legality of their action in Kosovo; and lastly, the *Armed Activities on the Territory of the Congo* cases, in which the Democratic Republic of the Congo claimed to have been the victim of armed aggression by Burundi, Rwanda and Uganda. Clearly, the Court had before it many highly varied cases, often complicated by the fact that the respondents introduced preliminary objections to jurisdiction or inadmissibility or even counter-claims, a rarely-used institution in the Court's practice but one which was starting to gain ground, not to mention requests for indications of provisional measures from applicants and respondents.

8. Over the past year, in other words since 1 August 1999, the Court had been engaged in a number of activities.

9. In December 1999, the Court had settled a dispute between Botswana and Namibia in the *Kasikili/Sedudu Island* case concerning sovereignty over the island by ruling that the island formed part of the territory of Botswana yet specifying that in the two channels around the island the nationals of both States and vessels flying their flag should receive national treatment on an equal footing. It had completed its consideration of the *Aerial Incident of 10 August 1999* case, which Pakistan had submitted to the Court in September 1999 further to the destruction of a Pakistani aircraft by Indian fighter planes, in Indian territory according to India, in Pakistani territory according to Pakistan. Since India had raised an objection to jurisdiction, the Court had settled the case rapidly and said that it had not had jurisdiction, in view of India's reservations to its declaration of acceptance of the compulsory jurisdiction of the Court, and had at the same time reminded the parties of their obligation to settle their disputes by peaceful means, and in particular the dispute which grew from the aerial incident.

10. The Court had also ruled on a request for indications of provisional measures filed by the Democratic Republic of the Congo against Uganda. In an order of 1 July 2000 it indicated a number of measures to be taken by both parties in that regard. The Court had also issued about a dozen orders, relating essentially to procedural issues, and more particularly an order authorizing Equatorial Guinea, which had a legal interest to do so, to participate in the *Land and Maritime Boundary between Cameroon and Nigeria* case. After five weeks of hearings held in May and June 2000, it had started its deliberations on the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case and would probably issue its judgment by the end of the year. In its autumn schedule it had included hearings in the *LaGrand* case. Finally, the Court had succeeded in dealing with cases ready to be adjudicated, but the situation would become much more

¹ For the study see *Yearbook ... 2000*, vol. II (Part Two), annex.

difficult in the first half of 2001, when a number of cases would be ready to be judged at the same time.

11. The Court would then encounter many problems, first, budgetary problems. Its annual budget was slightly higher than US\$ 10 million for a Registry of 62 members, whereas the International Tribunal for the Former Yugoslavia had an annual budget of close on US\$ 100 million and employed 1,000 agents. Admittedly, the functions of the two courts were not quite identical, as the Tribunal, for example, needed on-the-spot investigators. Nevertheless, the Court would be needing more human and financial resources, both for the Registry and also for itself, since it would be good for the judges to have, like those in most international courts, assistants to help them in their task. The Court hoped that its voice would be heard especially as the General Assembly itself had said, in adopting the Court's 1999 budget, that the next one could be increased.

12. Obviously, problems arose regarding the organization of work, both for the parties and for the Court. It was important to limit the volume of the dossiers, which was often excessive, and the United States and Germany had already decided jointly to submit the *LaGrand* case against each other in a memorial and counter-memorial and to cut the number of hearings down to five meetings, two for each of the parties and half a meeting each to respond. Such measures were reasonable as they allowed States to express themselves without unduly burdening the Court with documents and pleadings. For its part, the Court itself had to take action. In particular, it had decided that, in principle, in matters of jurisdiction and admissibility it would cut down on judges' notes, in other words, it would move directly after a phase of further reflection from hearings to deliberations. The list of measures was doubtless not an exhaustive one.

13. Over the longer term, the problem ahead was that of the fragmentation of international law and of the multiplication of international courts, with repercussions for the ICJ. The fact was that special international courts had increased in number and that, alongside the Court, the only one with universal and general jurisdiction, there were in particular the International Tribunal for the Law of the Sea, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, several courts with jurisdiction concerning human rights, arbitration tribunals that were often standing tribunals and the WTO Dispute Settlement Body. The situation undeniably had its advantages. The fact that a greater number of disputes could be submitted to the judges certainly marked an advance in justice and law, especially since the phenomenon had not weakened traditional courts; Governments were henceforth more accustomed to turning spontaneously to the judge, who played an increasing role in all fields. But the situation also had its difficulties. The most obvious lay in the risk of the fragmentation of international law, whether of the primary rules, which were of concern to the Commission, or the secondary rules, which were of concern to the Court. As to the secondary rules, the increase in the number of jurisdictions led to a risk of conflicting judgements, rarely in the actual terms of the judgement—because it was unlikely that the identical question would be referred to different judges, but much more likely in the case of the substantiation, of the legal reason-

ing. An example concerned the *Tadić* case, in which the International Tribunal for the Former Yugoslavia, on the question of the attribution to States of certain acts in the case of the intervention of a foreign State in an internal conflict, had knowingly adopted a position different from that taken by the Court itself. The Tribunal had recalled the Court's case law, criticized it and said it would depart from it. It was a serious risk, which had materialized in that particular case, and could happen in many other situations. Was it a bad thing? Was it a good thing? Some people, proponents of market forces, might claim that it was good to make courts compete and to promote the one which would develop the best case law—in other words, it was a matter of applying the laws of natural selection to international justice. But it was not a satisfactory system, and for a number of reasons. First, it brought uncertainty as to the forum—uncertainty likely to lead to conflicts of jurisdiction and above all to States practising forum shopping—and to the content of the law. Second, it could have unfortunate effects in that competition could lead to legal demagoguery, i.e., which was the best court: the one that would best defend the interests of States, the interests of the victims or the interests of the law? The more desirable it was for judges to play an increasing role in international life, the more regrettable it would be to fall into government by judges. Third, and by no means least, it introduced anarchy and chaos in international law. If the contradictions increased it would be very difficult for States to know how to behave and for State legal advisers to perform their task. Such fragmentation of international law and international justice was a real danger to the role of international law in international life.

14. What were the answers? The first would be to transpose the pattern of municipal law to international law, in other words, to turn ICJ into a kind of court of appeal for all specialized international courts. It was an interesting idea, but it was probably not very realistic. States did not seem to be ready to accept such a system, any more than were the specialists in one subject or another. It seemed, on the other hand, that even more international courts were not called for. Indeed, it had been suggested to set up international tribunals for space or for the environment, but it did not seem to be a good idea, as an excessive specialization in international law risked producing mediocre or even incoherent results. The solution to the problem should be sought in another direction, for example, in giving ICJ the possibility of being seized by other international courts with preliminary issues, in other words, transposing to the system of international justice the current European Community law system. The difference was that, in the case of the latter, a national judge could raise preliminary issues in the European Court of Justice, but that would be impossible for the ICJ, as Governments would prove extremely reluctant. On the other hand, to the extent that States had agreed that some cases should be brought before an international court, the latter could raise preliminary issues with the ICJ and that would not mean any additional abandonment of sovereignty. It would simply be a method of organizing international justice, in other words, it would afford international tribunals an opportunity, when grave difficulties arose in the determination, interpretation or application of a treaty or customary rule of public international law, of requesting the Court, before issuing its ruling, to clarify them. The

procedure could be adopted by a straightforward treaty, without any need to revise the Court's Statute, in which Article 36, paragraph 1, stipulated that "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." Such a solution, not entirely satisfactory in that it still allowed tribunals to decide whether or not to seize the Court, at least opened a door and deserved examination.

15. He was entirely ready to engage in an exchange of views with the members of the Commission.

16. The CHAIRMAN thanked the President of the International Court of Justice for his interesting statement.

17. Mr. HAFNER thanked the President of the International Court of Justice for his explanations about the Court's activities and the thoughts on international law he had shared with members of the Commission. The President had raised a subject which was close to his own heart, namely the risks caused by the fragmentation of international law and international justice, which, along with the fragmentary approach used to create international law and the nature of disputes themselves, made for an increased number of international dispute settlement mechanisms. Those matters were due to the diversity of the parties to the disputes—private individuals, companies against States, etc.—and in particular the emancipation of private individuals in relation to their countries so that they had become independent actors in international relations, whether in making claims or engaging in proceedings. That was how special courts and international criminal courts had developed and he would point out that the Security Council had unanimously adopted resolution 1315 (2000) of 14 August 2000 on the establishment of an ad hoc tribunal for Sierra Leone.

18. The creation of various types of dispute settlement mechanisms seemed necessary, all the more so since it could lead States to use them instead of settling their disputes by force. Nevertheless, it should not be forgotten that it could also break the harmony and consistency of the entire system of international law. In order to avoid that, the first step should be to institute closer communication between the various tribunals and dispute settlement mechanisms, so that they gained an objective knowledge of the deliberations and decisions handed down by each one. What was the place of ICJ in that process? He noted in that connection that the Rome Statute of the International Criminal Court provided, in article 119, that ICJ could be seized with disputes between States in connection with the interpretation and application of the Statute, unless it was an issue falling directly within the jurisdiction of the International Criminal Court. The question was whether it was a first step towards recognition of a prime role for ICJ among all the international dispute settlement mechanisms and whether that role would have an impact on the jurisdiction of the various dispute settlement mechanisms called upon to adjudicate in litigation not between States but between different actors, on the basis, nonetheless, of international law.

19. Mr. BROWNLIE asked the President of the Court if he considered that oral pleadings were necessary in the Court.

20. Mr. DUGARD, referring to the remarks by the President of the Court on the proliferation of international tribunals, pointed out, like many jurists, he had been surprised that, in the *Tadić* case, the International Tribunal for the Former Yugoslavia itself had ruled on the lawfulness of its establishment by the Security Council. He wondered whether it would not have been preferable for the Council itself to ask the Court for an advisory opinion on that point and whether, generally speaking, the Council should not make more frequent use of its authority to request advisory opinions from the Court.

21. Mr. LUKASHUK asked whether the Court, in view of its workload, did not make more frequent use of the chambers procedure and, in addition, whether it would not be desirable for United Nations bodies to ask the Court more often for advisory opinions, since they had a particular role to play in international relations and had almost as much authority as judgments, even though they were not binding.

22. Mr. ADDO asked the President of the Court whether, in his opinion, the Court was competent to monitor the lawfulness of the decisions of the Security Council.

23. Mr. Sreenivasa RAO, referring to a possibility, mentioned by the President of the Court, of international tribunals referring preliminary issues to the Court, said he feared that, in practice, such a solution would meet with the reluctance of the judges in the various international tribunals. By and large, those judges had the same training and the same skills as the members of the Court and it was unlikely, psychologically, that they would hand an issue over to someone else. It did not seem possible, for the same number of reasons, to turn the Court into an appellate court.

24. Mr. GUILLAUME (President of the International Court of Justice) said he thought, as did Mr. Hafner, that the proliferation of international courts was consonant with the increase in the number of actors in international life, whether individuals, companies or non-governmental organizations, and the consequence was an increase in the number of parties in dispute and a greater variety of decisions to be taken. Nevertheless, the risk of divergences lay not in the terms of the decisions themselves but in the explanatory statements, in other words, in the statement of the rules of law underlying the decisions. The first step was doubtless to establish improved communication between the various courts and tribunals. Then, judges should be better acquainted with the case law of the other courts, and the essential factor was, in the final analysis, the wisdom of the judges. In that regard, judges were men just like others and they might, for example, want to differentiate themselves or to assert themselves as a body. In his opinion, one could not rely entirely on men's wisdom. Institutional training seemed necessary.

25. As to Mr. Brownlie's question, it was a long-standing debate in which the national legal traditions played an important role. In the context of international justice, it was essential in some cases to hold oral hearings for political reasons. Governments wanted to demonstrate to their public and their parliament that they had done everything in their power to succeed. The Court's hearings were some-

times televised and in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, for example, they had been broadcast direct in the two countries concerned. Another reason was that, in the written procedure, the positions of the parties changed and the oral debate often allowed the case to settle down, with both parties, for instance, giving up certain contentions they had made in their written arguments. In his view, the solution would be, in straightforward cases, for example, where the Court examined its jurisdiction, to cut down on the oral procedure or to limit it to half a day. In more complex cases, and at any rate where the Court was examining the merits, an oral procedure was necessary but it could be cut down considerably and limited, for instance, to a week by making the requisite adjustments.

26. With reference to the question by Mr. Dugard and the second question by Mr. Lukashuk, he thought that increased use of the advisory opinion procedure would fight against fragmentation of the law. As for the case mentioned by Mr. Dugard, it seemed difficult for a court itself to rule on the validity of its establishment. In fact, if the International Tribunal for the Former Yugoslavia had adopted the opposite approach, the situation would have been paradoxical in the extreme. In that case, it would definitely have been better for the Security Council to ask the Court for an advisory opinion on the matter. He intended to enter into contact with the Council in an effort to make it more aware of that possibility, when he visited the General Assembly at the forthcoming session.

27. As for Mr. Lukashuk's first question, increased use of the chambers procedure ran into two obstacles. The first was that the States concerned should concur; when States submitted a case to an international court they were looking for the best possible membership. That was obvious in the arbitration procedure. States often preferred a case to be examined by the Court in plenary rather than by a chamber when it was difficult for them to determine in advance, since they did not know the membership, what the chamber's tendency would be. Second, while chambers did cut down the work of the judges, they did not cut down that of the Registry, and at the current time, a considerable bottleneck lay in the Registry. In his view, therefore, increased use of the chambers procedure did not seem to be the solution.

28. He was unable to answer Mr. Addo's question about monitoring the Security Council's decisions, for the matter was before the Court in the *Lockerbie* cases. The Libyan Arab Jamahiriya was arguing that the Security Council's decisions in that regard were unlawful. The Court could therefore be led to say whether it was competent to monitor the lawfulness of the Council's decisions as a defence, and if so, what the conditions were for such lawfulness, such as conformity with the Charter of the United Nations, but also conformity with general international law.

29. He agreed with Mr. Sreenivasa Rao's comment. He recognized that it was difficult for a judge, like any other man, not to take the decision himself and to ask someone else to take it for him.

30. Mr. PELLET said it was not surprising that the President of the Court considered that all pleadings before the Court were too long and should be shortened—it could be

hard for judges to experience lengthy pleadings by counsel. Counsel were nonetheless of a different opinion, for the States they represented wanted to be certain that everything had been said to defend their case and the oral proceedings were the last opportunity for them to be heard. He was therefore somewhat disturbed at the fervour with which the Court was trying to shorten the oral proceedings. In his opinion, a balance should be found, as political, diplomatic and psychological problems were at issue.

31. The proliferation of international courts was not, in his opinion, necessarily a bad thing and could be reasonably continued. Nobody could be certain of holding the sole truth and, in that connection, there was nothing to say that the solution adopted by the International Tribunal for the Former Yugoslavia in the *Tadić* case was not as good as that of the Court. Moreover, he was not convinced of the need to stop creating international courts. There were some extremely technical fields and the Court was not necessarily competent in all subjects. The WTO Dispute Settlement Body was a good example in that respect. However, coordination mechanisms were necessary and the preliminary issue procedure, adopted in article 177 of the Treaty on European Union (Maastricht Treaty), was probably the right solution. He would like to know why Mr. Guillaume seemed so hostile to national courts being able to seize the Court with preliminary issues. National judges were often particularly ignorant in matters of international law and, if a State agreed that its courts could refer to the ICJ to ask for its opinion, it was difficult to see why the ICJ would not do so.

32. Mr. ECONOMIDES questioned the moderation, often the extreme moderation, to be seen among the members of the Court. Mr. Guillaume had spoken of the Court's wisdom, but one also heard of its timidity, sometimes even its weakness. One's impression was that, when the Court examined a reservation to an international treaty concerning its jurisdiction, it often tended to interpret the clause extensively, moving in the direction of non-jurisdiction rather than that of jurisdiction. Could Mr. Guillaume confirm that impression?

33. He had also noted that the Court displayed more moderation in its judgments than in its advisory opinions, where it could be somewhat more audacious. In other words, did advisory opinions more than judgments, allow the Court to go further in the development of international law?

34. Lastly, as far as he was aware, the Secretary-General of the United Nations had never asked the Court for an advisory opinion. Should he be authorized, indeed encouraged, to do so? Since he followed international life throughout the world from day to day, the Secretary-General presumably had many legal questions to ask and it would perhaps be normal for him to raise them with the Court. Would that not also be another way of developing international law?

35. Mr. GOCO recalled that, in accordance with the Statute of the Court, the consent of the parties to a dispute was required for the Court to have jurisdiction, but in some cases the consent might be presumed, in other words, regarded as implicit. He would like to know what

the Court thought of tacit consent and whether it had already had an occasion to act in such circumstances.

36. Mr. SIMMA, referring to coverage of the Court's hearings by the media, said he gathered from Mr. Guillaume's statement that Mr. Guillaume had not been hostile to that idea. What, more specifically, did Mr. Guillaume think of television broadcasts of the Court's work?

37. A distinctive feature of the Court, one that was very surprising for lawyers used to national courts, was that whenever a party was asked a question it was given a number of days, sometimes a number of weeks, to reply. That doubtless explained the lifelessness of the proceedings, from which the judges themselves seemed to suffer. Would it not be possible to make the pleadings stage livelier, as was the case, for example, with the European Court of Justice?

38. Mr. GUILLAUME (President of the International Court of Justice) said he agreed with what Mr. Pellet had said, namely, the oral pleadings involved a political, diplomatic and psychological element that could not be ignored. Obviously, such pleadings were intended not only for the judge but for public opinion. There were many instances in which counsel themselves knew that what they were saying had little bearing on the subject and would have no impact on the decision. It was not a contemptible function, as it was sometimes difficult for States to refer matters to an international court. Consequently, it was normal that they should have the opportunity to acquaint their population and their parliament with the fact that they had done everything to defend the national interest. But that did not necessarily imply five weeks of pleadings. From the moment when the judge himself told the parties not to exaggerate because the resources of the Court were not unlimited, there was room for a solution that balanced the needs of justice and those of public opinion.

39. On the other hand, he did not share Mr. Pellet's view that, after all, competition between judges was not such a bad thing, that nobody was infallible and that the International Tribunal for the Former Yugoslavia had perhaps been right to hand down a decision different from that of the Court. It was not whether a solution was right or wrong—a question for doctrine—but whether a question which, once judged, should be challenged. The traditional phrase was *res judicata pro veritate habetur*, in other words, the object of the judgement was held to be the truth. In view of the fragile nature of international law, it was a major consideration, regardless of one's assessment of a particular decision being well-founded.

40. He had nothing against the principle of referral to the Court of certain cases by national courts, but it was difficult to see how Governments would agree to it. He cited several studies published in the past in specialist magazines in which the idea had been put forward, but it could not be said to have found a favourable echo among Governments. It was unfortunately no more realistic than the solution of transforming ICJ into an appellate court for other international courts. They were intellectually satisfying solutions, but did not seem to be feasible.

41. Mr. Economides had wondered about the "moderation", indeed the "timidity", if not the "weakness" of the Court and in particular had mentioned in that connection

the Court's interpretation of reservations to treaties or declarations concerning its jurisdiction. He did not share that point of view. There were cases in which the Court had declared that it was competent when the solution had not been obvious, for example, in the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case. In the *Fisheries Jurisdiction and Aerial incident of 10 August 1999* cases, it had found itself faced with reservations which had been perfectly clear in the minds of States that had formulated them. In the first case, Canada had excluded any North Atlantic fisheries dispute. Spain had complained of Canada's conduct in inspecting Spanish vessels in the North Atlantic. The reservation had obviously been applicable. In the second case, India had excluded any dispute with a State which was or had been a member of the Commonwealth, which had been the case with Pakistan. How could one get round that type of reservation other than by ignoring the explicit will of States? The Court's jurisdiction was based on consensus: that was why States agreed that the Court could adjudicate. When it was faced with a reservation which clearly manifested the will of States, it would be bad legal policy, and above all bad law, to interpret it against the will of the parties. Certainly, a judge always preferred to declare that he had jurisdiction, but there could be wisdom in recognizing that he did not.

42. Like Mr. Economides, he thought that advisory opinions probably afforded better opportunities for the development of international law than did judgments on inter-State disputes. A dispute was very specific, had very precise limits and, something that was sometimes forgotten, it was desirable for the Court's decision to be adopted in these cases by as large a majority as possible in order to be more properly founded and easier to enforce. Consequently, the aim was to get to the point in contentious cases and to justify the solution without accessory substantiation. He cited the example, sometimes regretted by legal writers, of the *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* case, in which the Court had held that the Aozou Strip came under the sovereignty of Chad by virtue of the Treaty of friendship and good-neighbourliness, of 1955, between France and the Libyan Arab Jamahiriya.² The Court had not taken a position on the whole of the situation prior to the Treaty because the treaty had justified the accepted solution. The judgment consisted of 23 pages, whereas more than 6,000 pages had been filed by the parties, and it contained a half page for thousands of pages by the parties on problems that did not have to be adjudicated. Publicists had taken the view that the Court had not overtired itself. But if the Court had settled all of it, there might well have been divergences between the members that would have weakened the judgment, whereas the judgment had been unanimous, except for the ad hoc Libyan judge, and it had been executed within three months. The fact that members of the Court had taken up only certain points without going into pointless digressions had played a large part in that fortunate outcome. With advisory opinions, however, it was sometimes possible to achieve more comprehensive developments than with judgments.

² United Nations, *Treaty Series*, vol. 1596, No. 27943, p. 151.

43. The reason why the Secretary-General had never asked the Court for an advisory opinion was simple: he did not have the authority to do so. The question had been discussed, and no agreement had been reached. Personally, he thought it would be conceivable to give the Secretary-General such authority. Politically, it would doubtless be necessary to combine applications for advisory opinions with a particular procedure within the United Nations on which States could come to an agreement.

44. As for Mr. Goco's *forum prorogatum* question, there had been no recent example of such a procedure. The Court was periodically seized with a request by a State that was a kind of offer to another State, specifying that it was ready to come before the Court for a particular case. The Court transmitted the information. If the other State did not reply, or replied in the negative, the case stopped there. It had happened with a request by Eritrea against Ethiopia that had been received by the Court, transmitted to Ethiopia and had gone unanswered. Consequently, there could be no *forum prorogatum*. Caution was required with the concept of implicit consent, for if consent could be implicit, it had to be clear. That was where the difficulty lay.

45. With reference to Mr. Simma's question, he was not opposed to television broadcasts of the Court's hearings, which could perhaps be explained by the fact that the statements by the parties were prepared beforehand and there were no excessively spontaneous proceedings. Accordingly, from the Court's standpoint, or that of the parties, there was no drawback to broadcasts of oral pleadings, because they were organized in advance. The only thing on which the Court made demands was purely material—there should be no technical equipment capable of disturbing its work.

46. On the question of whether oral proceedings could be livelier, there again, there were two traditions: that of very lively discussions, with exchanges of views between the judges and the parties in which the judges did not hesitate to disclose their feelings about the file, and the opposite tradition because, in some States, respect for the confidentiality of the deliberations was much greater and hence there was no question of a judge allowing a glimpse of his reactions. Moreover, the parties themselves were rarely ready to play the game because they greatly feared being unable to weigh up their replies. The proof was that the Court generally gave the parties a choice of an immediate reply, a reply at the following sitting or a written reply, but the parties systematically opted for a written reply. The reason was that States were complex institutions in which a reply sometimes entailed internal consultations, which could not be carried out on the spot. Things could certainly be improved, as in the example of the European Court of Justice. However, it was easier to give an immediate reply in the system of Community law, which was closer to municipal law, than in the more uncertain system of international law. Lastly, the questions raised by judges were a matter for internal discussion: a member of the Court did not raise a question without having spoken about it to his colleagues. That explained why many of the questions raised were purely factual. The system was definitely not perfect, but progress was difficult.

47. Mr. KAMTO said he would like to know the Court's opinion on the legal force of preliminary measures that it indicated. Was it not reasonable to expect that, if such measures had a more strongly asserted binding force, States would ask the Court more often about a number of disputes for which they were obliged to turn to the Security Council or to find other solutions?

48. Mr. MOMTAZ said that ICJ had on two occasions been called on to interpret certain provisions of the Convention on the Privileges and Immunities of the United Nations. It seemed to have placed a broad interpretation on the immunities granted under the Convention to United Nations experts on mission. It had certainly been fully aware of the potential consequences of its interpretation. Proof was to be found in the advisory opinion on the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, between Malaysia and the United Nations. The Court had said that the principle of immunity did not call into question the principle of the responsibility of international organizations. Yet treaty law, and more particularly the Convention on the Privileges and Immunities of the United Nations, was silent on the major issue of the responsibility of international organizations. He would like to know whether the Court was thus issuing to the international community, legal writers and more particularly the Commission, a kind of invitation to fill that gap by developing international law.

49. Mr. GUILLAUME (President of the International Court of Justice), replying to Mr. Kamto, said there had been a longstanding debate about whether the preliminary measures indicated by the Court were binding. There were textual arguments, particularly in the English version of the Statute in that direction. But the opposite had also been contended. Only one point had perhaps gone unnoticed: the order indicating preliminary measures in the *Armed Activities in the Territory of the Congo* case said "[States] should" in the French version and "[States] must" in the English version, where traditionally the formula was "[States] should". It was an evolution in case law in connection with the English language that might prove interesting.

50. In the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* case, the Court had specified that, if there was immunity experts could not be held responsible for their remarks in their official capacity, and it was thus the United Nations that became responsible. That seemed quite legitimate, for a vacuum in responsibilities was inconceivable. There had been nothing more in what the Court had written, for the Court had simply emphasized that, where action was taken there was responsibility. Once the expert was not responsible, then the United Nations was. The Court had gone no further, even though one could conceive of developments in international law in that regard. In fact, the paragraph referred to on that point had been more in the nature of an *obiter dictum*.

51. The CHAIRMAN thanked the President of the International Court of Justice for his very useful statement.

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

CHAPTER V. Diplomatic protection (*continued*)* (A/CN.4/L.594)

B. Consideration of the topic at the present session (*continued*)*

52. The CHAIRMAN invited members to resume consideration of chapter V of the report.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

53. Mr. SIMMA said that the paragraph was unclear in that it seemed constantly to change the subject, to such an extent that, in the phrase "However, the right had been greatly abused in the past", it was difficult to see which right was involved. To remove any ambiguity, he proposed that the phrase should be replaced by "However, the right to forcibly protect the rights of its nationals had been greatly abused in the past".

54. Mr. TOMKA said that the words "unilateral intervention", in the second sentence, should be replaced by "unilateral action".

55. Mr. DUGARD (Special Rapporteur) said he agreed to those two proposals.

Paragraph 26, as amended, was adopted.

Paragraph 27

56. Mr. SIMMA said that, subject to the agreement of the Special Rapporteur, he proposed that the first sentence should be supplemented to indicate that it was humanitarian intervention "in the sense of forcible protection of human rights of nationals of foreign countries" that did not fall within the framework of the study. One part of doctrine held that humanitarian intervention covered both forcible protection of a State's nationals and humanitarian intervention to protect foreigners.

57. Mr. RODRÍGUEZ CEDEÑO (Rapporteur), supported by Mr. ECONOMIDES, said that such an explanation could be interpreted *a contrario* as recognition of a link between diplomatic protection and other forms of humanitarian intervention, which was not the case.

58. Mr. DUGARD (Special Rapporteur) said it was enough to refer to paragraph 60 of his first report (A/CN.4/506) to see that the explanation proposed by Mr. Simma was appropriate. He therefore approved of the proposal.

59. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 27 as amended by Mr. Simma.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 31

Paragraphs 28 to 31 were adopted.

Paragraph 32

60. Mr. BROWNLIE said that the third sentence in paragraph 32 seemed to contradict the tenor of the first sentence of paragraph 31, which was also taken up at the end of paragraph 34 and set out the idea, expressed by some members, that the topic of diplomatic protection as included on the agenda did not cover the problem of the lawfulness of the threat or use of force by States. However, as now drafted, the third sentence of paragraph 32 wrongly implied that the members who had adopted such a position had in fact endorsed the legal concept expressed by the Special Rapporteur in article 2.

61. Mr. GAJA, endorsing that comment, proposed that the problem should be remedied by two amendments: replacing the expression "members" by "some members", and the words "would take" by "could take".

62. Mr. TOMKA said that caution called for the whole of the third sentence to be deleted.

63. Mr. GOCO said that, in his opinion, the sentence correctly reflected the discussion and should not be touched.

64. Mr. PELLET said the sentence was incomprehensible in that it mixed legal considerations with factual considerations and the text would be clearer if the expression "would be entitled to take" were substituted for "would take".

65. Mr. SIMMA proposed that the last phrase should simply read: "was correct in the interpretation of Article 51 of the Charter (or the right of self-defence)".

66. Mr. HE said it was important to know the views of the members who had expressed that opinion.

67. Mr. GALICKI proposed that, in order to introduce some logic between the two parts of the sentence, the phrase "but outside diplomatic protection" should be added at the end.

68. Mr. DUGARD (Special Rapporteur) proposed, in the light of the various proposals made, that the sentence should be recast to read: "But some of the members who supported the second view, namely that the question of the use of force fell outside the scope of diplomatic protection, were of the view that the Special Rapporteur was correct in law and that States might use force to protect their nationals in the exercise of the right to self-defence but that this did not fall within the scope of diplomatic protection."

69. Mr. BROWNLIE said the proposal did not sufficiently reflect the view of a third group of members who had simply affirmed that the question of the use of force did not fall within the Commission's mandate and they had deliberately stood aside from the debate on that issue. The Special Rapporteur should therefore be asked to find, in collaboration with the Rapporteur, a formulation that

clearly brought out the existence of three views within the Commission.

70. Mr. Sreenivasa RAO said that he endorsed Mr. Brownlie's proposal.

71. The CHAIRMAN suggested that the Rapporteur, together with the Special Rapporteur and members of the Commission who had expressed reservations regarding the third sentence, should endeavour to find a formulation to be submitted at a later meeting. If he heard no objection, he would take it that the Commission agreed to that suggestion.

It was so agreed.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

72. Mr. ECONOMIDES proposed that, in order to restore a balance between the two schools of thought in the Commission, the expression "most members", which implied that there had been a majority and a minority, should be replaced by "other members", in the seventh sentence. He would also point out that, in the discussion, nine members had submitted a written proposal for article "X" which had read: "Diplomatic protection is a peaceful international institution precluding resort to the threat or use of force and to interference in the internal or external affairs of the State." That proposal, which was nowhere noted in the report, should appear somewhere. That, however, was a matter that fell to the Special Rapporteur.

73. Mr. SIMMA said that the whole of the seventh sentence should be recast, as the formulation "most members of the Commission had not taken a firm position on the Charter provisions" clumsily reflected the position of members, including his own and that of Mr. Brownlie, who had been of the opinion that it was necessary to keep to the issue of diplomatic protection and simply state that the question of the use of force did not fall within the topic.

74. Mr. BROWNLIE reaffirmed what he had said in connection with paragraph 32, namely, the text should more clearly reflect the existence of three schools of thought in the Commission, namely of the members who had endorsed article 2, those who had disapproved of article 2 and those whose position was too discreetly reflected in the text or had simply taken the view that the question of the use of force did not fall within the topic.

75. Mr. KAMTO said that a method should be found of recalling the very firm position of the nine members who had made the written proposal for article "X". Again, it was not acceptable to state, as did the fourth sentence of the paragraph, that "In all honesty, [the Special Rapporteur] could not, like his predecessor, contend that the use of force was outlawed in the case of the protection of nationals". It was the expression of an opinion that had to be counterbalanced by very clearly mentioning the view of the members who had firmly said that they were in favour of the prohibition of the use of force by States, even to pro-

tect their nationals abroad, which had been the meaning of the proposed article "X".

76. Mr. ROSENSTOCK pointed out that the paragraph set out the conclusions expressed by the Special Rapporteur. However, a straightforward sentence would be enough to settle the question of the three schools of thought which, according to Mr. Brownlie, had emerged in the Commission.

77. The CHAIRMAN said that consideration of paragraph 34 would be continued at a later meeting, so as to allow the Rapporteur, together with the Special Rapporteur, to review the formulation.

The meeting rose at 1 p.m.

2659th MEETING

Tuesday, 15 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Momtaz, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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

CHAPTER V. *Diplomatic protection (continued) (A/CN.4/L.594)*

B. *Consideration of the topic at the present session (continued)*

Paragraph 32 (concluded)

1. The CHAIRMAN said that, following informal consultations between the Rapporteur, the Special Rapporteur and other members, it was proposed that the third sentence should be split in two and should read: "However, some of the members who supported the second view, namely that the question of the use of force fell outside the scope of diplomatic protection, were of the view that the Special Rapporteur was correct in his interpretation of Article 51 of the Charter and that States would be entitled to use force in the exercise of the right to self-defence if their nationals' lives were at stake. Other

members who supported the second view took no position on the issue of the use of force”.

Paragraph 32, as amended, was adopted.

Paragraph 34 (*concluded*)

2. The CHAIRMAN said that, following consultations, it was proposed that the seventh sentence should read: “However, other members of the Commission had not taken a position on the Charter provisions ...”.

Paragraph 34, as amended, was adopted.

Paragraph 35

3. Mr. TOMKA suggested that the phrase “in the *Nottebohm* case” should be preceded by the words “by ICJ”.

Paragraph 35, as amended, was adopted.

Paragraphs 36 to 42

Paragraphs 36 to 42 were adopted.

Paragraph 43

4. Mr. DUGARD (Special Rapporteur) said that, in the discussion on article 1, some members had objected to a reference that singled out the Constitutions of Eastern European States. For consistency’s sake, therefore, the phrase “especially those of Eastern European countries” should be deleted.

Paragraph 43, as amended, was adopted.

Paragraph 44

Paragraph 44 was adopted.

Paragraph 45

5. Mr. TOMKA suggested that the word “modern” should be replaced by “contemporary”.

Paragraph 45, as amended, was adopted.

Paragraphs 46 to 53

Paragraphs 46 to 53 were adopted.

Paragraph 54

6. Mr. TOMKA said that the phrase in brackets, which read “established after the Kuwait-Iraq conflict”, was worded too neutrally for such a politically sensitive topic. He therefore suggested that the phrase should be deleted.

Paragraph 54, as amended, was adopted.

Paragraphs 55 to 61

Paragraphs 55 to 61 were adopted.

Paragraph 62

7. Mr. TOMKA said that States which had recently adopted legislation on granting nationality in the case of the dissolution of another State might take exception to the phrase “in an authoritarian manner”. Some more acceptable form of words should be found.

8. Mr. ECONOMIDES said that the paragraph reflected remarks that he had made. He had not used the word “authoritarian”, which indeed had an unfortunate ring. He suggested that “ex officio” would be a suitable alternative.

9. Mr. BROWNLIE suggested a neutral, non-judgemental expression from English law: “by operation of law”.

It was so agreed.

Paragraph 62, as amended, was adopted.

Paragraphs 63 and 64

Paragraphs 63 and 64 were adopted.

Paragraph 65

Paragraph 65 was adopted with a minor editing change.

Paragraph 66

Paragraph 66 was adopted.

Paragraph 67

10. Mr. TOMKA, supported by Mr. KUSUMA-ATMADJA, expressed a preference for rewording the phrase “even if all States did not recognize it”, which was ambiguous, to read “even if not all States recognized it”.

11. Mr. BROWNLIE said he had no objection to that part of the text as it stood, but in his opinion, the word “it”, in the same phrase, needed clarification. It should be replaced by “the institution”.

Paragraph 67, as amended, was adopted.

Paragraphs 68 to 75

12. Mr. SIMMA said he found the whole summary of the debate on article 6 unsatisfactory. As the Special Rapporteur had pointed out in his concluding remarks, in paragraph 75, there had been two points of view, both backed by strong authority, yet in the summary there was a marked lack of balance between the two. The argument in favour of the applicability of the rule that the State of dominant nationality might exercise diplomatic protection against another State of nationality had been given short shrift, whereas two thirds of the summary were devoted to the opposite view, supported by verbatim quotations from the 1930 Hague Convention. As he recalled,

the Commission had been more or less evenly divided, with equally strong feeling on both sides.

13. Mr. ECONOMIDES said he concurred with Mr. Simma. There had been strong opposition to the principle contained in article 6, yet it was reflected only in paragraph 72, and weakly at that. He therefore suggested that paragraph 69 should be followed by a new paragraph stating the opposite case, with all the arguments to support it. Whatever approach was adopted, the paragraphs would need to be re-examined in order to establish a better balance that would faithfully represent two very different schools of thought.

14. Mr. GOCO said that, if that course was followed, there was a danger the whole summary of the debate on article 6 would need to be rewritten. He would favour considering the summary on a paragraph-by-paragraph basis.

15. Mr. SIMMA said he agreed with Mr. Economides that there was an imbalance, but in his opinion it was in the opposite direction. Paragraph 69 and the beginning of paragraph 70 contained a few phrases in support of the view that the principle contained in article 6 should apply, but from then on the arguments were all in support of the opposing view. Paragraph 72, in its entirety, constituted an argument against the view of the Special Rapporteur: despite the examples cited, the “situation was not so simple”; after which a range of arguments against the principle was adduced. Extensive drafting changes were required. There was no point in going through the text paragraph by paragraph.

16. The CHAIRMAN asked whether Mr. Simma envisaged a wholesale redrafting of paragraphs 68 to 74 or whether he considered that the balance could be restored by a new paragraph.

17. Mr. SIMMA said that the essence of the debate had been so misrepresented that the addition of a paragraph would not suffice to rectify the imbalance. He suggested that those interested could meet informally and put forward an alternative text.

18. Mr. KABATSI requested clarification as to whether the reference in paragraph 75 to “strong authority” related to legal authority or to the number of members supporting each point of view.

19. Mr. DUGARD (Special Rapporteur) said that he had had legal authority in mind. He would be happy to have the text amended to reflect that.

20. Mr. KABATSI said that there was no need to add the word “legal”, so long as there was no implication of more support for one side than the other.

21. Mr. BROWNLIE suggested that, as in the case of paragraph 32, paragraphs 68 to 74 should be remitted to the Special Rapporteur, together with the Rapporteur and other members, to redraft as necessary in the light of what had been said.

22. The CHAIRMAN said he concurred. Some members wanted a review of all the paragraphs relating to article 6 and that could not be done in plenary. The Rapporteur should undertake consultations with the Special Rapporteur

and interested members. Meanwhile, the Commission should defer adoption of the paragraphs.

23. Mr. DUGARD (Special Rapporteur) said that there was a sharp conflict of opinion. Mr. Simma—rightly, in his view—considered that more attention should be paid to the view that had been finally adopted and approved by the informal consultations, whereas Mr. Economides thought otherwise. The minority view had, perhaps, been given excessive prominence in order to avoid the suggestion that it had been overlooked. He therefore sought guidance on how the paragraphs should be redrafted.

24. Mr. ECONOMIDES said that paragraphs 68 to 74 were based on the summary record. However, the views of those supporting the classical rule of the non-responsibility of the State in respect of its own nationals were not properly reflected until paragraph 72. He therefore suggested a paragraph 69 bis along the following lines:

“Other members, on the other hand, supported the classical rule of the non-responsibility of the State in respect of its nationals, adducing a number of arguments that appear in the paragraphs below, particularly the fact that article 4 of the 1930 Hague Convention, which remains valid, provides that ‘A State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses.’”

The rest of the paragraphs dealing with article 6 could then remain unchanged.

25. Mr. SIMMA said that the last sentence of paragraph 72, for example, did not reflect both sides of the debate that had taken place and his own contribution to it. The sentence should also state that the position expressed therein had been called into question. Mr. Economides’ constructive proposal appeared to offer a way forward.

26. Mr. TOMKA said that the best course would be to ask the Rapporteur, the Special Rapporteur and interested members to prepare a new text, on the basis of the summary records, for consideration at a later meeting.

27. Mr. GOCO endorsed Mr. Tomka’s remarks, but thought that Mr. Economides’ proposal might profitably be discussed at the current meeting.

28. The CHAIRMAN said that the problem seemed to be one that could not be solved at the current meeting. Accordingly, if he heard no objection, he would take it that the Commission wished to adopt paragraph 75 without amendment, and to defer consideration of paragraphs 68 to 74 pending further consultations between the Rapporteur, the Special Rapporteur and interested members.

It was so agreed.

Paragraph 75 was adopted.

Paragraphs 76 to 80

Paragraphs 76 to 80 were adopted.

Paragraph 81

29. Mr. TOMKA drew attention to an apparent inconsistency between the last two sentences of paragraph 81. Given that the first of the two sentences cited jurisprudence of the Iran-United States Claims Tribunal, the phrase “even though practice and jurisprudence on the subject were non-existent” should be deleted from the second sentence, which would thus end with the words “. . . follow that course”.

Paragraph 81, as amended, was adopted.

Paragraphs 82 to 86

Paragraphs 82 to 86 were adopted.

Paragraph 87

30. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that the remarks concerning UNHCR were irrelevant to the tenor of paragraph 87 and should be relocated, either at the end of the paragraph or in a separate paragraph. Better still, they should be deleted altogether since, in his view, UNHCR had no authority to take up complaints on behalf of refugees with the Government of the country concerned, and the “protection” it exercised was very different from diplomatic protection.

31. Mr. SIMMA said that, if the matter relating to UNHCR was deleted, the balance of paragraph 87 would be disrupted, as the differing views referred to in its first sentence would no longer be represented.

32. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that the only way to preserve the balance of paragraph 87 would be to redraft it so as to link the opening and concluding sections while eliminating the central section, which had absolutely no bearing on the remainder of the paragraph.

33. The CHAIRMAN said he would take it that the Commission wished to defer consideration of paragraph 87.

It was so agreed.

Paragraph 88

34. Mr. SIMMA said that, in the interests of consistency, paragraph 88 should, like other paragraphs reflecting the Special Rapporteur’s views, open with a formulation such as “The Special Rapporteur was of the view that . . .”.

Paragraph 88, as amended, was adopted.

Paragraph 89

Paragraph 89 was adopted with minor editing changes.

Paragraph 90

Paragraph 90 was adopted.

CHAPTER VII. *Reservations to treaties* (A/CN.4/L.596 and Add.1 4)

A. Introduction (A/CN.4/L.596)

Paragraphs 1 to 15

35. Mr. PELLET (Special Rapporteur) said that paragraphs 10 to 14 contained many details already reflected in the Commission’s report on its previous session, and which were thus superfluous. Accordingly, those paragraphs could be very substantially compressed. Most of paragraph 10, much of paragraph 11 and all of paragraph 12 except its first sentence could be deleted. The first three sentences of paragraph 13 should be retained, and the remainder, as well as the whole of paragraph 14, deleted.

Paragraphs 1 to 15, as amended, were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.596 and Add.1)

Paragraphs 16 to 18 (A/CN.4/L.596)

Paragraphs 16 to 18 were adopted.

Paragraphs 19 to 23 (A/CN.4/L.596/Add.1)

Paragraphs 19 to 23 were adopted.

Paragraph 24

Paragraph 24 was adopted with a minor editing change to the French version.

Paragraph 25

36. Mr. PELLET (Special Rapporteur) said that the footnotes to chapter VII merely referred the reader to the text of the guidelines in his fifth report (A/CN.4/508 and Add.1–4). The text of the draft guidelines should be reproduced *in extenso* in the footnotes, in line with the procedure adopted in other chapters of the report.

37. The CHAIRMAN said that the secretariat would take note of the Special Rapporteur’s request.

Paragraph 25 was adopted.

Paragraphs 26 to 29

Paragraphs 26 to 29 were adopted.

Paragraph 30

38. Mr. SIMMA said that, unlike other chapters of the report, much of chapter VII, with its wealth of substantive footnotes, resembled a “mini-report” by the Special Rapporteur.

39. Mr. PELLET (Special Rapporteur) said that the chapter had intentionally been drafted in the form of a “mini-report” in order to spare him the time-consuming task of reintroducing that part of his report—which had been introduced but not debated at the current session—at the next session of the Commission. The format of chapter VII should therefore be left unchanged.

40. Mr. ECONOMIDES, supporting the Special Rapporteur’s position, said it was extremely helpful for the Commission to have detailed explanations of the draft guidelines in its report, a practice that might usefully be followed in other chapters of the report.

41. Mr. TOMKA said that the best course might be to retain the existing format of chapter VII, while urging future Rapporteurs and the secretariat to bear Mr. Simma’s comments in mind when drafting reports of the Commission on subsequent sessions.

It was so agreed.

Paragraph 30 was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Paragraph 33

42. Mr. KAMTO expressed the opinion that more than one case should be cited in the footnote to the second sentence, since the body of the text spoke of “a number of cases”.

43. Mr. TOMKA suggested that possibly the difficulty could be overcome by inserting “e.g.” between “Cf.” and “Swiss”.

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

44. Mr. PELLET (Special Rapporteur), Mr. GAJA and Mr. ROSENSTOCK drew attention to some drafting errors. The words “but also” in the parentheses should read “as well as”. The sentence should then go on to read “... tacit consent of the other contracting parties to the formulation of the late reservation ...”.

Paragraph 35, as amended, was adopted.

Paragraphs 36 and 37

Paragraphs 36 and 37 were adopted.

Paragraph 38

45. Mr. PELLET (Special Rapporteur) said that, in the French version, the phrase *S’agissant par la suite des déclarations interprétatives* should be deleted.

Paragraph 38, as amended in the French version, was adopted.

Paragraph 39

Paragraph 39 was adopted with minor editing changes to the French version.

Paragraph 40

Paragraph 40 was adopted.

Paragraph 41

46. Mr. HAFNER and Mr. SIMMA said that, while the adoption of the guidelines had been surrounded by lengthy discussions, not a single line of the report was devoted to the discussions.

47. Mr. PELLET (Special Rapporteur) said he declined all responsibility for the drafting of the report. The Rapporteur had, however, rightly followed customary practice. Draft guidelines which had been adopted were not published until the commentaries were issued. They generally reflected the discussion. The situation might be regrettable, but no previous Commission report had ever contained both the commentaries and a summary of the discussion. Once in the past, he had seen to it that his guidelines had not been published, so that the discussion could be included in the report. Since he had taken the trouble to draft commentaries in the document under consideration, there was no summary of the debate.

48. Mr. SIMMA said he bowed to the facts, but the Commission had been faced with a special situation at the current session. It had examined the text of a proposal by a Special Rapporteur for the very first time and had adopted part of it, all within one session, but nowhere in the report was there any record of the Commission’s thinking.

49. Mr. PELLET (Special Rapporteur) said that no one was being asked to approve anything that had not been discussed. He reiterated that the Rapporteur had merely followed normal practice.

50. Mr. TOMKA said that, as far as he remembered, at the previous session, when the draft articles on nationality of natural persons in relation to the succession of States had been adopted in the form of a declaration and accompanied by commentaries, the report had not included a record of the discussion which had taken place. Perhaps the secretariat could refresh the members’ memory about the procedure to be followed.

51. The CHAIRMAN emphasized that there was no reason to depart from the Commission’s usual practice. While he appreciated Mr. Simma’s concerns, it was necessary to restrict the length of the report.

Paragraph 41 was adopted.

Section B, as amended, was adopted.

C. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading (A/CN.4/L.596/Add.2-4)

1. TEXT OF THE DRAFT GUIDELINES (A/CN.4/L.596/ADD.2)

Paragraph 1

52. Mr. PELLET (Special Rapporteur) asked if it would be possible to include a footnote indicating that the commentaries to the draft guidelines adopted by the Commission at its fifty-first session could be found in the report to the General Assembly on the work of its fifty-second session.

It was so agreed.

Paragraph 1, as amended, was adopted.

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-SECOND SESSION (A/CN.4/L.596/ADD.3-4)

53. Mr. HAFNER said that perhaps a paragraph should be inserted at the beginning of section 2 to reflect the fact that the Commission was adopting commentaries.

54. The CHAIRMAN said that a paragraph would be inserted accordingly.

Commentary to guideline 1.1.8 (A/CN.4/L.596/Add.3)

55. Mr. SIMMA asked what was meant by the first sentence of paragraph (5).

56. Mr. KUSUMA-ATMADJA said that he understood it to be a reference to other conventions which did preclude reservations, such as the conventions on the law of the sea.

57. Mr. SIMMA asked whether the sentence should not read "In fact, the Vienna Conventions do not preclude the making of reservations not on the basis of an authorization implicit in the general international law of treaties, as codified in articles 19 to 23 of the 1969 and 1986 Vienna Conventions, but on the basis of specific treaty provisions".

58. Mr. PELLET (Special Rapporteur) said he agreed to Mr. Simma's rendering of the sentence.

59. Mr. TOMKA proposed the deletion of footnote 12. After all, who was to do the verifying?

It was so agreed.

60. Mr. GAJA queried the meaning of paragraph (15). Perhaps the last sentence could be altered to make it clear that the clauses in question might or might not be reservations.

61. Mr. ROSENSTOCK said that, as currently worded, the second sentence seemed to rule out the possibility that clauses offering a choice between provisions of a treaty were not reservations, which was not what was meant. He

proposed that the word "not" should be transposed from the phrase "are not reservations" and placed earlier in the sentence to read: "... so as not to imply that all clauses that offer ...".

62. Mr. TOMKA pointed out that, according to paragraph (15), options were sometimes reservations and sometimes they were not. That conflicted with paragraph (13) and contradicted draft guideline 1.1.8, both of which stated, directly or by reference to the 1969 and 1986 Vienna Conventions, that options were reservations. Paragraph (15) should be deleted.

63. Mr. ECONOMIDES said he agreed with Mr. Gaja that paragraph (15) was somewhat abstruse. However, an attentive reading revealed a distinction between the situation described in article 17 of the 1969 and 1986 Vienna Conventions, when options in some cases could constitute reservations, and the situation in which such clauses were not reservations. Paragraph (15) should be retained unchanged.

64. Mr. KUSUMA-ATMADJA said he favoured retention of the paragraph or deletion of the entire second sentence, but he was opposed to minor amendments to the second sentence.

65. Mr. PELLET (Special Rapporteur) said the idea behind paragraph (15) was that article 17 of the 1969 and 1986 Vienna Conventions implied that acceptance of a treaty could be partial on the basis either of a reservation or of other techniques, which meant that clauses permitting partial participation could either be reservations or they could not. If that was what Mr. Rosenstock's amendment indicated, it was acceptable.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the amendment proposed by Mr. Rosenstock.

It was so agreed.

Paragraph (15), as amended, was adopted.

The commentary to guideline 1.1.8, as amended, was adopted.

Commentary to guideline 1.4.6 [1.4.6, 1.4.7]

67. Mr. KABATSI suggested an editing correction to paragraph (5).

68. Mr. HAFNER drew attention to subparagraph (a) and requested clarification of the words "generally speaking".

69. After a brief discussion in which Mr. HAFNER, Mr. PELLET (Special Rapporteur) and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the words "generally speaking" should be replaced by "in most cases".

It was so agreed.

Paragraph (5), as amended, was adopted.

70. Mr. ECONOMIDES, supported by Mr. SIMMA, said that, in the last sentence of paragraph (9), the second use of the word “optional” should be corrected to read “compulsory”.

71. Mr. BROWNLIE said that the wording was correct as it stood: the jurisdiction of ICJ was optional at the stage of proceedings described in the paragraph. Once that jurisdiction had been accepted, it was compulsory.

72. Mr. TOMKA suggested deletion of the phrase “optional clause recognizing the optional”.

It was so agreed.

Paragraph (9), as amended, was adopted.

The commentary to guideline 1.4.6 [1.4.6, 1.4.7], as amended, was adopted.

Commentary to guideline 1.4.7 [1.4.8]

73. Mr. SIMMA queried the use of the word “with” in the first sentence of paragraph (12).

74. The CHAIRMAN suggested that the words “with reservations” should be replaced by the phrase “between these statements and reservations”.

It was so agreed.

Paragraph (12), as amended, was adopted.

The commentary to guideline 1.4.7 [1.4.8], as amended, was adopted.

Commentary to guideline 1.7 (A/CN.4/L.596/Add.4)

75. Mr. PELLET (Special Rapporteur) and Mr. SIMMA drew attention to some editing changes required at the beginning of the commentary.

76. Mr. ECONOMIDES said that the end of the last sentence in paragraph (1) might lend itself to the wrong interpretation. He proposed that the phrase “while safeguarding the ‘hard core’ of the treaty” should be deleted.

It was so agreed.

Paragraph (1), as amended, was adopted.

77. Mr. HAFNER asked whether the “treaty clauses” referred to in the first sentence of paragraph (2) were clauses entitling States to conclude treaties or whether they were treaty provisions themselves. If the latter was the case, the word “treaties” would be preferable to “treaty clauses”.

78. Mr. PELLET (Special Rapporteur) said that, if it made the meaning clearer, the words “treaty clauses” could be replaced by the words “clauses in the treaty itself”.

It was so agreed.

Paragraph (2), as amended, was adopted.

The commentary to guideline 1.7, as amended, was adopted.

The meeting rose at 6 p.m.

2660th MEETING

Wednesday, 16 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/504, sect. E)

[Agenda item 8]

REPORT OF THE CHAIRMAN OF THE PLANNING GROUP

1. The CHAIRMAN invited Mr. Kamto, Chairman of the Planning Group, to report on the work of the Planning Group.

2. Mr. KAMTO (Chairman of the Planning Group) said that the Planning Group had held four meetings at the Commission’s current session. It had discussed section E of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fourth session, entitled “Other decisions and conclusions of the Commission” (A/CN.4/504, paras. 181 to 188) and had also taken account of paragraphs 8 to 11 of General Assembly resolution 54/111 of 9 December 1999. It had decided to re-establish the Working Group on the long-term programme of work and the working group on split sessions. It had also had before it a proposal submitted by Mr. Pellet entitled “Elections to the International Law Commission” (ILC(LII)/PG/WP.1).

3. Having considered the reports of the two working groups at its meeting on 10 August 2000, the Planning Group had decided, first, to adopt the report of the Working Group on the long-term programme of work (ILC(LII)/WG/LT/L.1 and Add.1), replacing the words “might be worth” by the words “are worth” in the first

sentence of the last paragraph of document ILC(LII)/WG/LT/L.1; secondly, to adopt the report of the working group on split sessions (ILC(LII)/WG/SPS/L.1); and, thirdly, to include on the agenda for the Commission's next session the proposal made by Mr. Pellet entitled "Elections to the International Law Commission".

4. Chapter IX of the Commission's draft report (A/CN.4/L.598) would reflect decisions on the long-term programme of work and on the work of the working group on split sessions dealing with the length, nature and place of the Commission's future sessions. He thanked all members of the Planning Group and the two Working Groups and, in particular, Mr. Brownlie, Chairman of the Working Group on the long-term programme of work, and Mr. Rosenstock, Chairman of the working group on split sessions, for their spirit of cooperation and efforts to achieve concrete results.

5. The CHAIRMAN thanked the Chairman of the Planning Group and suggested that the Commission should take note of his oral report.

It was so agreed.

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

CHAPTER VII. Reservations to treaties (concluded) (A/CN.4/L.596 and Add.1-4)

C. Text of the draft guidelines on reservations to treaties provisionally adopted by the Commission on first reading (concluded) (A/CN.4/L.596/Add.2-4)

2. TEXT OF THE DRAFT GUIDELINES WITH COMMENTARIES THERETO ADOPTED BY THE COMMISSION AT ITS FIFTY-SECOND SESSION (concluded) (A/CN.4/L.596/ADD.3-4)

6. The CHAIRMAN invited the members of the Commission to continue their consideration, paragraph by paragraph, starting with the commentary to guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4].

Commentary to guideline 1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] (A/CN.4/L.596/Add.4)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

7. Mr. SIMMA proposed that, in order to make the text clearer, the reference to article 19, paragraph 3, of the ILO Constitution contained in footnote 4 should be moved to the end of the introductory sentence.

Paragraph (2), as amended, was adopted.

Paragraph (3)

8. Mr. SIMMA, referring to the last sentence, said that he did not understand the meaning of the word "injunction" and thought that it might be deleted.

9. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to delete the words "injunction or a".

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

10. Mr. SIMMA said that, in the second subparagraph, the word "derogations", whose meaning was purely factual, should be replaced by the words "derogation clauses".

11. Mr. PELLET (Special Rapporteur) said that that proposal was not applicable in French.

12. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to amend the English text on the basis of Mr. Simma's proposal.

It was so agreed.

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

13. Mr. SIMMA said that there was a contradiction between the introductory sentence, which referred to draft guidelines in section 1.4, and the first subparagraph, which referred to draft guideline 1.1.8.

14. Mr. PELLET (Special Rapporteur) proposed that, in order to remove that contradiction, the first subparagraph should be deleted.

Paragraph (9), as amended, was adopted.

Paragraph (10)

15. Mr. SIMMA said that he was not sure what the word "others" meant in the first sentence and whether it would not be better to say "other statements" or "other clauses".

16. Mr. PELLET (Special Rapporteur) said that he would prefer the words "other alternative procedures".

17. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the amendment by the Special Rapporteur.

It was so agreed.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (19)

Paragraphs (11) to (19) were adopted.

Paragraph (20)

18. Mr. SIMMA said there appeared to be a contradiction between paragraph (19), which said that the bilateralization regime could be traced back to the 1947 General Agreement on Tariffs and Trade, and paragraph (20), which implied that the idea of bilateralization dated from 1971.

19. Mr. PELLET (Special Rapporteur) said that there was no contradiction because the drafters of the General Agreement on Tariffs and Trade had been involved in bilateralization without knowing it, before that idea had been theorized in 1971. The apparent contradiction could be explained by a translation problem, since the French word *théorisée* had been translated as “examined” in the last sentence.

20. Mr. BROWNLIE proposed that the word “elaborated” should be used in English.

Paragraph (20), as amended in English, was adopted.

Paragraph (21)

21. Mr. SIMMA said that the words “Below is a list of 23 possible ways” seemed to announce a list which was not to be found anywhere.

22. Mr. PELLET (Special Rapporteur) said that that problem was also caused by a translation error. Those words should read: “This is followed by a list ...”.

Paragraph (21), as amended in English, was adopted.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

23. Mr. SIMMA said that, in the second sentence, the words “difference with” should be replaced by the words “difference from”.

Paragraph (23), as amended in English, was adopted.

Paragraph (24)

Paragraph (24) was adopted.

Commentary to guideline 1.7.2 [1.7.5]

Paragraph (1)

24. Mr. ECONOMIDES proposed that the last sentence should be redrafted by deleting the words “and hardly more than two procedures of this type can be mentioned”, since draft guideline 1.7.2 [1.7.5] contained a list which was only indicative and there were other alternatives to declarations such as unilateral acts. In exchange for that deletion, the word “nearly” might be added between the words “not” and “as”.

25. Mr. PELLET (Special Rapporteur) said that, since the last phrase was a kind of introduction to what followed, he would like the last sentence to be divided in two. There would be a full stop after the words “is nonetheless not as great” and the last sentence would read: “As an indication, two procedures of this type can be mentioned”.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to the amendment by the Special Rapporteur.

It was so agreed.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

27. Mr. SIMMA said that, although the French word *interprète* could mean a jurist who interpreted a legal text, the English word “interpreter” had a much more technical meaning which was not appropriate in the current context.

28. Mr. HAFNER proposed that the words “the interpreter” should be replaced by the words “in the course of interpretation”.

29. Mr. PELLET (Special Rapporteur) said that the easiest solution would be to delete the words “the interpreter”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Section C, as amended, was adopted.

Chapter VII as a whole, as amended, was adopted.

CHAPTER IV. State responsibility (A/CN.4/L.593 and Corr. 1 and Add.1–6)

30. The CHAIRMAN invited the members of the Commission to consider chapter IV of the draft report.

A. Introduction (A/CN.4/L.593)

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Paragraph 10

31. After a debate in which Mr. BROWNLIE, Mr. CRAWFORD (Special Rapporteur), Mr. PAMBOU-TCHIVOUNDA and Mr. PELLET took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to retain paragraph 10.

It was so agreed.

Paragraph 10 was adopted.

Paragraphs 11 to 17

Paragraphs 11 to 17 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.593 and Corr.1 and Add.1-6)

Paragraphs 18 and 19 (A/CN.4/L.593/Corr.1)

Paragraphs 18 and 19 were adopted.

Paragraph 20

32. Mr. CRAWFORD (Special Rapporteur) proposed that the consideration of paragraph 20 should be deferred until the following day.

33. The CHAIRMAN said he took it that the Commission agreed to that proposal.

It was so agreed.

Paragraphs 1 to 12 (A/CN.4/L.593/Add.1)

Paragraphs 1 to 12 were adopted.

Paragraph 13

34. Mr. PELLET, referring to the last sentence, said it was impossible to say that it had been considered preferable to complete the consideration of certain articles at the next session of the Commission and, at the same time, to request the Sixth Committee to provide feedback on the end of the articles at the fifty-fifth session of the General Assembly.

35. Mr. CRAWFORD (Special Rapporteur) said that he was aware of that contradiction and proposed that the sentence should be amended to read: "It was noted that the fifty-fifth session of the General Assembly would give the Commission a last opportunity to obtain feedback from the Sixth Committee on certain questions such as counter-measures and dispute settlement."

Paragraph 13, as amended, was adopted.

Paragraph 14

36. Mr. PELLET said that, in the first sentence of the French text, the word *article* should be replaced by the word *paragraphe*.

Paragraph 14, as amended, was adopted.

Paragraph 15

37. Mr. PELLET, referring to the first sentence, said it should be made clear that reference was being made to paragraph 7 of the report of the Special Rapporteur. The second sentence was awkward and should be redrafted.

38. Mr. CRAWFORD (Special Rapporteur) proposed that the second sentence should be divided in two. The first would end after the words "in the draft" and the second would then begin with the words "Others thought it would be preferable".

Paragraph 15, as amended, was adopted.

Paragraph 16

39. Mr. PELLET said that he would like the French text of paragraph 16 to be rewritten.

40. The CHAIRMAN said that the secretariat would bring the French text into line with the original English text.

Paragraph 16 was adopted on that understanding.

Paragraph 17

41. Mr. PELLET, referring to the first sentence, proposed that the words "including its purpose" should be deleted. In the antepenultimate sentence, it was difficult to say that the quantification of compensation came within the field of diplomatic protection. That was true at best when the victim was a private individual, but it would not be wise for all the problems involved in the determination of the amount to be referred to the topic of diplomatic protection.

42. Mr. CRAWFORD (Special Rapporteur) proposed that the words "were of equal if not greater concern in the field of diplomatic protection" should be replaced by the words "and varied from one context to another".

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

43. Mr. PELLET proposed that, in order to reflect the debate faithfully, the word "Strong" should be added before the word "support".

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

44. Mr. PELLET said that, for the readers' enlightenment, it should be explained to what chapter III, Part Two bis and chapter II bis referred.

45. Mr. CRAWFORD (Special Rapporteur) proposed that, in order to meet Mr. Pellet's concern, the first sentence of the paragraph should be deleted, since the rest of the paragraph was comprehensible.

Paragraph 21, as amended, was adopted.

Paragraph 22

46. Mr. PELLET, referring to the second sentence, said that, as a matter of social convention, the name of the now deceased former Special Rapporteur, should not be preceded by "Mr.", at least not in French. In the same sentence, he proposed that the word *matière* should be replaced by the word *sujet*.

Paragraph 22, as amended in French, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

47. Mr. PELLET said that, in the second sentence of the French text, the word *proposerait* should be replaced by the word *proposait*.

Paragraph 24, as amended in French, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

48. Mr. CRAWFORD (Special Rapporteur), replying to a comment by Mr. Pellet, proposed that, in the last sentence, the words "even if rearranged" should be deleted.

49. Mr. CANDIOTI said that, in the French text, a comma should be added between the word *maintenues* and the word *complétées*.

Paragraph 26, as amended, was adopted.

Paragraph 27

Paragraph 27 was adopted.

Paragraph 28

50. Mr. CRAWFORD (Special Rapporteur) said that the number "28", which did not actually introduce a paragraph, should be deleted and that the following paragraphs should be renumbered accordingly.

Paragraph 29

Paragraph 29 was adopted.

Paragraph 30

51. Mr. PELLET said that the word *réparations* in the last sentence did not mean anything and probably showed how difficult it was to translate the word "remedies".

52. Mr. CRAWFORD (Special Rapporteur) proposed that, in order to solve the problem, the words "of remedies, such as declarations, aimed" should be amended to read: ", for example, of declarations aimed".

Paragraph 30, as amended, was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Paragraph 33

53. Mr. PELLET said he was surprised that the fourth sentence included the words "multilateral obligations". In the case of the injured State, reference should be made to "rights".

54. Mr. CRAWFORD (Special Rapporteur) proposed that the words "multilateral obligations" should be replaced by the words "multilateral legal relations".

55. Mr. KAMTO said that he agreed with the amendment proposed by the Special Rapporteur, but, if it was adopted, the words "by attributing them" would have to be replaced by the words "by attributing the rights".

56. Mr. PELLET said that the reference to countermeasures in the penultimate sentence was irrelevant because paragraph 33 related to the general principle of reparation.

57. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Pellet's comment, proposed that the penultimate sentence should be deleted.

Paragraph 33, as amended, was adopted.

Paragraph 34

58. Mr. PELLET said that, in the fourth sentence, the word "certain" should be added before the word "Governments" and that, at the end of the seventh sentence in the French text, the words *de le faire* should be replaced by the words *d'y procéder*.

59. The CHAIRMAN said that the secretariat would amend the French text.

60. Mr. PELLET asked why the concept of “guarantee” appeared at the end of the antepenultimate sentence.

61. Mr. CRAWFORD (Special Rapporteur) proposed that the word “guarantee” should be replaced by the word “limit”.

Paragraph 34, as amended, was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 36

62. Mr. PELLET said that, in the first sentence, the words “if it was retained” should be added before the words “article 38” because, at the time, it had not been certain whether the Commission would keep that article.

63. Mr. CRAWFORD (Special Rapporteur) said that he agreed with the amendment proposed by Mr. Pellet.

Paragraph 36, as amended, was adopted.

Paragraph 37

64. Mr. CRAWFORD (Special Rapporteur) said that, since paragraph 37 was not a paragraph, the paragraph number should be deleted and the paragraphs that followed should be renumbered accordingly.

Paragraph 38

Paragraph 38 was adopted.

Paragraph 39

65. Mr. PELLET said that “paragraph 50 (c) of the report” should read “paragraph 50 of the report”.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

66. Mr. PELLET said that the last sentence, particularly the phrase “since there could be a pattern of individual breaches not itself separately classified as a wrongful act” was not clear.

67. Mr. CRAWFORD (Special Rapporteur) proposed that the end of the paragraph should be amended to read: “since there could be a pattern of individual breaches which were not continuing breaches, but were a continuation of the pattern. This nonetheless ...”.

Paragraph 42, as amended, was adopted.

Paragraph 43

Paragraph 43 was adopted.

Paragraph 44

68. Mr. PELLET said that, in the last sentence of the French text, the words *On a remis en cause* should be replaced by the words *On a émis des doutes sur*.

69. Mr. BROWNLIE said that, in the second sentence, the comma after the words “While recognizing that” should be deleted.

Paragraph 44, as amended, was adopted.

Paragraph 45

Paragraph 45 was adopted.

Paragraph 46

70. Mr. PELLET, supported by Mr. CRAWFORD (Special Rapporteur), said that, in the third sentence, the words “a law organizing an act of genocide” should be replaced by the words “a law organizing genocide”.

71. Mr. ROSENSTOCK proposed that the end of the last sentence, as from the words “international law” should be amended to read: “since, inter alia, such a text could be implemented in a way consistent with international law”. The fact that provisions could be so implemented was not the only reason why they did not in themselves constitute a breach of international law.

72. Mr. ECONOMIDES proposed that the word “explicitly” in the third sentence should be deleted because it might imply, *a contrario*, that a law implicitly empowering the police to commit torture would not entail the responsibility of the State.

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 49

Paragraphs 47 to 49 were adopted.

Paragraph 50

73. Mr. PELLET, supported by Mr. ECONOMIDES, said that the opinion reflected in paragraph 50 had been his and that of Mr. Economides and that it had not been referred to accurately in the first sentence, which should therefore be amended to read: “Referring to paragraph 1, the view was expressed that it was not logical to speak in Part Two of the consequences of an internationally wrongful act; this consequence was the responsibility itself. Part Two dealt with consequences arising from responsibility.”

Paragraph 50, as amended, was adopted.

Paragraph 51

74. Mr. BROWNLIE said that, in the third sentence, the word “reparations” should be in the singular.

75. Mr. PELLET said that the same was true in the second sentence.

Paragraph 51, as amended, was adopted.

Paragraph 52

Paragraph 52 was adopted.

Paragraph 53

76. Mr. KAMTO said that the words in Latin in the fourth sentence should be translated.

77. Mr. BROWNLIE said that the terms in question were commonly used in some legal systems.

78. Mr. HAFNER confirmed that that was so.

79. Mr. KUSUMA-ATMADJA pointed out that the word “cause” was not an accurate translation of the Latin word *causa*. In his opinion, the use of the Latin was justified in the current case.

80. Mr. PELLET said that, for those not familiar with the common law, the words in question were incomprehensible. He therefore proposed that the list of “causes” should be deleted and that the phrase should read “make a general study of causality”.

81. Mr. GAJA said that he agreed with that proposal.

82. Mr. CRAWFORD (Special Rapporteur) said that he also agreed with the proposal, but indicated that the word “causation” should be used instead of the word “causality”.

Paragraph 53, as amended, was adopted.

Paragraph 54

83. Mr. PELLET said that he did not understand the logic of the second sentence.

84. Mr. CRAWFORD (Special Rapporteur) said that he also found the sentence obscure. He proposed that it should end after the words “compensation and satisfaction”.

Paragraph 54, as amended, was adopted.

Paragraphs 55 and 56

Paragraphs 55 and 56 were adopted.

Paragraph 57

85. Mr. PELLET, supported by Mr. CRAWFORD (Special Rapporteur), said that, in the first sentence, it was

impossible to refer to “grounds for annulling or quantifying obligations”. He proposed that the words “or quantifying” should be deleted.

Paragraph 57, as amended, was adopted.

Paragraphs 58 to 61

Paragraphs 58 to 61 were adopted.

Paragraph 62

86. Mr. KABATSI asked why there was a change of point of view, as indicated by the use of the word “personally” in the last sentence.

87. Mr. CRAWFORD (Special Rapporteur) proposed that the last sentence should be deleted.

Paragraph 62, as amended, was adopted.

Paragraphs 63 to 65

Paragraphs 63 to 65 were adopted.

Paragraph 66

88. Mr. PELLET, referring to the second part of the fourth sentence, said that there was a contradiction between the beginning, which stated that there were very few examples of guarantees of non-repetition, and the rest, which stated that they were common in diplomatic practice.

89. Mr. CRAWFORD (Special Rapporteur) said that the logic of the sentence could be brought out more clearly if the last phrase “even though they were common in diplomatic practice”, was amended to read: “on the other hand, they were common in diplomatic practice”.

Paragraph 66, as amended, was adopted.

Paragraph 67

Paragraph 67 was adopted.

Paragraph 68

90. Mr. CRAWFORD (Special Rapporteur) said that, in the first sentence, the word “causality” should be replaced by the word “causation”.

Paragraph 68, as amended, was adopted.

Paragraph 69

Paragraph 69 was adopted.

Paragraphs 1 to 5 (A/CN.4/L.593/Add.2)

Paragraphs 1 to 5 were adopted.

Paragraph 6

91. Mr. ROSENSTOCK said that paragraph 6 cited as an argument a certain passage of the report by the Special Rapporteur. In accordance with the decision taken earlier in the meeting, some idea should probably be given of the content of that passage.

92. Mr. CRAWFORD (Special Rapporteur) proposed that the reference to paragraph 96 of his report should be amended to read: "... in a number of respects, as noted by the Special Rapporteur in paragraph 96 of his report and as shown in the topical summary of the Sixth Committee ...".

Paragraph 6, as amended, was adopted.

Paragraph 7

93. Mr. PAMBOU-TCHIVOUNDA said that the words *Plusieurs membres ont applaudi* at the beginning of the French text were excessive. He proposed that the usual wording should be used, such as *Plusieurs membres se sont félicités*.

Paragraph 7, as amended, was adopted.

Paragraphs 8 to 10

Paragraphs 8 to 10 were adopted.

Paragraph 11

94. Mr. GAJA, referring to the last sentence, which reflected the view that the expression "international community as a whole" meant the international community of States, recalled that several members who had taken part in the discussion had not shared that opinion. He proposed that the following sentence should be added at the end of the paragraph: "Other members considered that 'international community as a whole' was a wider concept."

95. Mr. SIMMA, referring to the non-governmental organizations mentioned in the third sentence, said he did not think that "which did not have the constituent elements to qualify as States" had to be stated. He proposed that that phrase should be deleted.

96. Mr. CRAWFORD (Special Rapporteur) said that he endorsed those two amendments.

Paragraph 11, as amended, was adopted.

Paragraph 12

97. Mr. SIMMA said that the first sentence was not clear.

98. Mr. CRAWFORD (Special Rapporteur) said that matters would be clearer if the words "while ignoring the international community" were replaced by the words "while ignoring the existing institutions of the international community".

Paragraph 12, as amended, was adopted.

Paragraph 13

99. Mr. CRAWFORD (Special Rapporteur) proposed that the word "However" at the beginning of the paragraph should be deleted because the paragraph did not stand in logical opposition to the paragraph which preceded it.

100. Mr. ECONOMIDES said that the words "applied in practice to such a loose and theoretical characterization" in the first sentence were incomprehensible.

101. Mr. CRAWFORD (Special Rapporteur) proposed that those words should be amended to read: "applied in practice, given such a loose and theoretical characterization".

102. Mr. PELLET said that the word *caractérisation* did not work in French. The word *qualification* should be used instead.

Paragraph 13, as amended, was adopted.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

103. Mr. SIMMA said that he did not understand why in the fourth sentence "all the consequences of international responsibility... should be applied to all States". The point was to make it clear that States must be able to invoke all the consequences of international responsibility.

104. Mr. CRAWFORD (Special Rapporteur) proposed that the fourth sentence should be replaced by the following: "It was further suggested that all States should be entitled to invoke responsibility in respect of all its consequences, except perhaps that of compensation, in cases of such serious breaches. Of particular importance was the principle of restitution in the form of a return to the *status quo ante*."

105. Mr. ROSENSTOCK proposed, that the words "or any qualitative distinction among wrongful acts" should be added at the end of the last sentence.

Paragraph 15, as amended, was adopted.

The meeting rose at 1 p.m.

2661st MEETING

Wednesday, 16 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

CHAPTER V. *Diplomatic protection* (concluded)* (A/CN.4/L.594)

B. *Consideration of the topic at the present session* (concluded)*

Paragraphs 68 to 72 (*concluded*)*

1. The CHAIRMAN announced that the Rapporteur had held consultations with members who had expressed views on the paragraphs and had drafted a new version that was acceptable to all. In paragraph 70, the words “It was” should be replaced by the phrase “Those members who supported article 6”.

It was so agreed.

2. The CHAIRMAN said that, in paragraph 71, the first two sentences and the first part of the third, up to and including “starting point for the analysis”, should be replaced by the words: “Other members supported the rule of non-responsibility of States in respect of their own nationals and raised several arguments in favour of this rule. Particular emphasis was placed on”. The remainder of the third sentence would remain unchanged, and the last sentence would be replaced by: “It was not legitimate for a dual national to be protected against a State to which it owed loyalty and fidelity.”

3. Mr. ROSENSTOCK, supported by Mr. SIMMA, said that in the proposed new last sentence, the word “it”, referring to a dual national, was not grammatically correct and should be replaced by “he/she”.

It was so agreed.

4. The CHAIRMAN said that the opening phrase in paragraph 72, “However, as shown by the Special Rapporteur,” should be replaced by “These members acknowledged that”. The fifth sentence, the first word of the sixth sentence (“Furthermore,”) and the eighth sentence should be deleted.

It was so agreed.

Paragraphs 68 to 72, as amended, were adopted.

Paragraph 73 (*concluded*)*

5. The CHAIRMAN said that paragraph 73 should be deleted.

It was so agreed.

Paragraph 74 (*concluded*)*

Paragraph 74 was adopted.

Paragraph 74 bis

6. The CHAIRMAN read out a proposal for a new paragraph 74 bis: “Supporters of article 6 reiterated that article 6 reflected current thinking in international law and rejected the argument that dual nationals should be subjected to disadvantages in respect of diplomatic protection because of the advantages they might otherwise gain from their status as dual nationals.”

Paragraph 74 bis was adopted.

Paragraph 87 (*concluded*)*

7. The CHAIRMAN said that paragraph 87 should be replaced by: “Some members contended that diplomatic protection should not be exercised against the State of nationality of the refugee in respect of claims relating to matters arising prior to the granting of refugee status, but they accepted that there should be no hesitation with regard to claims against the State of nationality arising after the refugee had been granted such status.”

Paragraph 87, as amended, was adopted.

Paragraph 87 bis

8. The CHAIRMAN read out a proposal for a new paragraph 87 bis: “Members who were concerned about the burden that diplomatic protection for refugees might place on the host State suggested that UNHCR should provide ‘functional’ protection for refugees in the same way that international organizations provided functional protection to their staff members.”

Paragraph 87 bis was adopted.

Section B, as amended, was adopted.

Chapter V, as amended, was adopted.

* Resumed from the 2659th meeting.

CHAPTER IV. *State responsibility (continued)* (A/CN.4/L.593 and Corr.1 and Add. 1-6)

B. *Consideration of the topic at the present session (continued)*

Paragraph 16 (A/CN.4/L.593/Add.2)

9. Mr. SIMMA suggested that in the second sentence the words “without having been directly injured” should be inserted between the words “international obligation” and “would make it possible”.

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

Paragraph 19

10. Mr. PELLET said that the last words in inverted commas, “to which it is a party,” in the second sentence, seemed misplaced and inaccurate.

11. Mr. SIMMA, supported by Mr. CRAWFORD (Special Rapporteur), proposed that those words should be deleted.

It was so agreed.

Paragraph 19, as amended, was adopted.

Paragraph 20

12. Mr. SIMMA proposed that in the second sentence the words “without being directly injured” should be inserted between “legal interest” and “to enable”.

It was so agreed.

13. Mr. ECONOMIDES drew attention to an editing correction required in the French version.

Paragraph 20, as amended, was adopted.

Paragraph 21

14. Mr. PELLET said that the second sentence expressed what seemed to him to be an incomprehensible notion. He proposed that the word “since” should be deleted and the word “mean” should be replaced by the phrase “lead to the result”.

15. Mr. ROSENSTOCK said that if the amendment was adopted, a semi-colon must be inserted in the English version after the word “damage”.

It was so agreed.

16. Mr. KAMTO proposed that also in the second sentence the word “wrongdoing” should be replaced by

“responsible”, to ensure concordance with the rest of the text.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

17. Mr. SIMMA proposed that the words “it was”, in the first sentence, should be replaced by “some members”.

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

18. Mr. SIMMA said that the second sentence expressed a concept that was incomprehensible to him. He would like some clarification.

19. Mr. CRAWFORD (Special Rapporteur) said he favoured deletion of that sentence.

20. Mr. HAFNER said the sentence reflected comments he had made that were indeed incomprehensible when read in isolation from the part of the Special Rapporteur’s report to which they referred. He had no objection to the proposed deletion.

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

Paragraph 27

21. Mr. ROSENSTOCK drew attention to the second sentence, “States that were not directly affected, although they could not invoke responsibility, could call for cessation of a breach by another State.” To call for cessation was, in fact, to invoke responsibility: the sentence made no sense. He proposed that the word “responsibility” should be replaced by “reparation”.

22. Mr. SIMMA endorsed that proposal and suggested concomitant replacement of the word “invoke” by the word “claim”.

23. Mr. LUKASHUK said that Mr. Rosenstock had raised a very important point, but if the word “responsibility” was removed, the sentence no longer had any meaning or foundation in law. He would prefer the sentence to read: “States that were not directly affected could invoke responsibility to achieve the cessation of a breach by another State.”

24. After a brief discussion in which Mr. CRAWFORD (Special Rapporteur), Mr. PELLET and Mr. SIMMA

took part, Mr. ROSENSTOCK, supported by Mr. CRAWFORD (Special Rapporteur), said that the degree to which responsibility could be invoked was not a function of the demands that could be made. In human rights matters, for example, full responsibility could be invoked and the party would have the right to cessation, but not to reparation.

25. Mr. SIMMA said that paragraph 27 should be viewed in the light of the relevant draft article, under which States were entitled to do much more than merely call for cessation.

26. Mr. ECONOMIDES said that the existing text should be respected as much as possible and that changes should be kept to a minimum. He therefore suggested that the second sentence should be amended to read: "Such States, although not directly affected, could at least call for cessation of a breach by another State."

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraph 28

27. Mr. SIMMA said that the first sentence was clumsily worded. He suggested the formulation: "... important to distinguish between the existence of an obligation and its beneficiary".

28. Mr. CRAWFORD (Special Rapporteur) said he welcomed the "distinguish between" formulation. At the end of the sentence, however, he preferred the phrase "the beneficiary of the obligation". In view of that change, it would make sense to delete the next word, "Therefore", and to divide the next sentence, which was too long, into two. The comma after the word "benefit" should be replaced by a semi-colon and the next phrase should read: "this was particularly important in the context of human rights obligations infringed by a State with regard to its own nationals ...".

29. Mr. GOCO stressed the importance of retaining the phrase: "The right to invoke ... should be given to all the States that had a legal interest," in the second sentence.

30. Mr. Sreenivasa RAO sought clarification as to whether the "certain obligation" constituted an additional requirement on States or whether it simply emphasized an existing *erga omnes* obligation.

31. Mr. CRAWFORD (Special Rapporteur) said that the latter interpretation was the correct one.

Paragraph 28, as amended, was adopted.

Paragraphs 29 and 30

Paragraphs 29 and 30 were adopted.

Paragraph 31

32. Mr. CRAWFORD (Special Rapporteur) said that in the second sentence, in the phrase "to State responsibility

as between States", the word "State" should be deleted as being superfluous.

33. Mr. HAFNER drew attention to the typographical error, "savings clause", in the last sentence.

Paragraph 31, as amended, was adopted.

Paragraphs 32 and 33

Paragraphs 32 and 33 were adopted.

Paragraph 34

34. Mr. PELLET said that in the first sentence of the French version the word *et* should be replaced by *mais*, to reflect the fact that there had been little support for article 40 as adopted on first reading.

35. Mr. SIMMA said that, according to his recollection, no one had supported article 40. Even the use of the word "few" confused the issue.

36. Mr. CRAWFORD (Special Rapporteur) said that part of the problem lay in the translation. The French version used the word *quelques* for the English word "few". The alternative "... several supporters but" would be acceptable; or, still better, "had little support and".

37. Mr. PELLET suggested that the whole sentence should be replaced by the simple statement that "The Special Rapporteur noted that the deficiencies of article 40 as adopted on first reading had been generally recognized."

It was so agreed.

38. Mr. ROSENSTOCK said that it was unclear what the word "likewise" in the second sentence referred to. It should be deleted.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraph 35

39. Mr. SIMMA requested clarification of the second half of the third sentence.

40. Mr. CRAWFORD (Special Rapporteur) said that the phrase in question, which was the relic of an earlier text, was indeed confusing. There was no need to go into the distinction between suspension and termination. He therefore suggested that the whole phrase "against a background ... not with individual States" should be deleted.

41. Mr. HAFNER, speaking with reference to the first part of the same sentence, questioned the correctness of stating that the Commission had distinguished between bilateral and multilateral obligations, rather than treaties, since it had done so in the context of the law of treaties.

42. Mr. CRAWFORD (Special Rapporteur) said that the thought had been excessively compressed. The word "obligations" should be replaced by the word "treaties". A new sentence should then be added, to read: "An analogy

could be drawn for obligations in the field of State responsibility.”

43. After a brief discussion in which Mr. CRAWFORD (Special Rapporteur), Mr. GOCO and Mr. KUSUMA-ATMADJA took part, the CHAIRMAN suggested a formulation to replace the whole of the third sentence: “The Commission, in the context of the law of treaties, had distinguished between bilateral and multilateral treaties and had emphasized that the State specially affected by a breach of a multilateral treaty should be able to invoke that breach. An analogy could be drawn for obligations in the field of State responsibility.”

Paragraph 35, as amended, was adopted.

Paragraph 36

44. Mr. MOMTAZ drew attention to two typographical errors which made nonsense of the French version. The first sentence should read ... *introduire dûment dans le projet d'articles la distinction*

45. Mr. CRAWFORD (Special Rapporteur) said that, in addition, the word *introduire* should be replaced by the French equivalent of the word “incorporate”. Some would say that the distinctions in question already existed, so they could not be “introduced”.

46. Mr. LUKASHUK said that it made no sense to speak of distinctions between obligations and breaches: the two were completely separate issues and in any case did not directly relate to State responsibility.

47. Mr. CRAWFORD (Special Rapporteur) said that the comparators in the sentence were implicit: the distinctions were between obligations to the international community as a whole and other obligations, and between serious breaches and other breaches. He suggested that the phrase “incorporate proper distinctions between” should be replaced by the phrase “deal adequately with”.

48. Mr. ROSENSTOCK said that the word “adequately” misrepresented the tenor of the sentence, which was merely to recognize that some members favoured a particular approach, not to endorse that approach.

49. Mr. CRAWFORD (Special Rapporteur) suggested, as an alternative, the word “address” instead of the phrase “incorporate proper distinctions between”.

50. Mr. SIMMA asked what the word “it” in the phrase “if it existed” at the end of the third sentence referred to.

51. Mr. CRAWFORD (Special Rapporteur) agreed that the sentence was confusing. He suggested that it should be replaced by the following: “But, in terms of the right to invoke responsibility, it was not necessary to refer to grave breaches of obligations owed to the international community as a whole. Once it was established ...”. The more inclusive category did away with the need for the more limited one.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraph 37

52. Mr. GALICKI proposed that, in the interests of clarity, the pronoun “He”, at the start of the last sentence, should be replaced by the words “The Special Rapporteur”.

Paragraph 37, as amended, was adopted.

Paragraph 1 (A/CN.4/L.593/Add.3)

Paragraph 1 was adopted.

Paragraph 2

53. Mr. TOMKA proposed amending the words “compensate for the injury”, in the third sentence, to read “make good the injury”.

54. Responding to a question by Mr. HAFNER, Mr. CRAWFORD (Special Rapporteur) proposed ending the third sentence with the word “injury”, deleting the word “since”, and starting a new sentence with the word “Otherwise”.

Paragraph 2, as amended, was adopted.

Paragraph 3

Paragraph 3 was adopted.

Paragraph 4

Paragraph 4 was adopted with an editing change to the French version.

Paragraphs 5 to 7

Paragraphs 5 to 7 were adopted.

Paragraph 8

55. Mr. PELLET asked what was meant by the term “‘expressive’ damages”, in the first sentence.

56. Mr. CRAWFORD (Special Rapporteur) said that the expression, which was one used by the Chairman of the Drafting Committee on first reading, referred to exemplary as distinct from punitive damages, a distinction that was not recognized in some legal systems. He had placed it in inverted commas in order to make the point, while avoiding the term “exemplary”, that in the context of satisfaction reference was being made to the expression of an injury, rather than to the quantification of a loss.

57. Mr. Sreenivasa RAO said that, if retained, such new and abstruse terminology called for explanation in a footnote.

58. Mr. CRAWFORD (Special Rapporteur) proposed the formulation “exemplary or ‘expressive’”.

59. Mr. LUKASHUK asked what was meant by the expression “normal breaches”. A term such as “common breaches” seemed preferable.

60. Mr. MOMTAZ said that in his view the term *expressifs* was meaningless in French.

61. Mr. GOCO said that in some legal systems “exemplary” could mean “punitive”, in the sense of “making an example” of the party against whom the damages were awarded.

62. Mr. HE pointed out that placing the word in inverted commas served as a reminder that a source was being quoted.

63. Mr. SIMMA suggested specifying that it was the previous Special Rapporteur who was being quoted. In any case, the Special Rapporteur should have the last word regarding the choice of terminology.

64. Mr. CRAWFORD (Special Rapporteur) reiterated his preference for the formulation “exemplary or ‘expressive’”. As to Mr. Goco’s point, it was clear from the latter part of the paragraph that the damages referred to were not punitive. As for Mr. Lukashuk’s very valid point, it would be better to replace the term “normal breaches” by the term “ordinary breaches (not involving gross infringement)”.

65. Mr. PELLET said that the term *violations courantes* was acceptable in French. As for Mr. Simma’s second point, if the Special Rapporteur used words whose meaning was incomprehensible to everyone else, it was incumbent on him to explain the sense in which they were used.

66. Use of the formulation “exemplary or ‘expressive’” would give rise to a problem in the sentence that followed, for the implication would be that the “exemplary” damages referred to therein were distinct from “expressive” damages. A new formulation was needed, such as: “The notion of ‘exemplary’ damages awarded, where appropriate, would nevertheless exclude punitive damages ...”.

67. Mr. CRAWFORD (Special Rapporteur) said that, in view of members’ misgivings, it would be best to omit the term “expressive” and to speak simply of “the award of exemplary damages in general”.

68. Mr. SIMMA said that the word “ordinary” had a neutral connotation that rendered it unsuitable to qualify the noun “breaches”. He therefore proposed the compromise formulation “in respect of breaches not involving gross infringement”.

69. Mr. CRAWFORD (Special Rapporteur) proposed amending the second sentence by replacing the words “exemplary damages, where appropriate” with “substantial damages, where appropriate”, meaning that the award of exemplary damages could lead to the award of a substantial sum of money, while excluding punitive damages.

70. Mr. ROSENSTOCK said that the picture should be completed by adding the words “, often described as ‘satisfaction’”.

71. Mr. PELLET said that a better formulation would be: “often described as one possible form of satisfaction”. The word “substantial” needed to be further qualified by the

addition of the words “that is, more than nominal”, though the resulting sentence was certainly unwieldy.

72. Mr. BROWNLIE said he was opposed to Mr. Rosenstock’s proposal, which was a distortion of the Special Rapporteur’s thinking. Moreover, the inclusion of so many disparate elements in one sentence resulted in a witches’ brew that was well-nigh incomprehensible even to members of the Commission.

73. Mr. CRAWFORD (Special Rapporteur) said he had no strong feelings about Mr. Rosenstock’s proposal, and that he could accept Mr. Pellet’s proposal to add the words “that is, more than nominal”. However, if either new element was included, and still more if both were included, a new sentence would clearly be required, beginning: “This would exclude punitive damages ...”.

74. Mr. RODRÍGUEZ CEDEÑO (Rapporteur) said that the original text of paragraph 8 had now been so heavily amended that the Special Rapporteur should prepare and circulate a new text, so as to avoid any possibility of confusion.

75. Mr. CRAWFORD (Special Rapporteur) said he would prepare a new version of paragraph 8 for consideration at the next meeting.

76. The CHAIRMAN said he would take it that the Commission wished to defer consideration of paragraph 8.

It was so agreed.

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted.

Paragraph 13

Paragraph 13 was adopted with an editing change to the French version.

Paragraph 14

Paragraph 14 was adopted.

Paragraph 15

Paragraph 15 was adopted with a minor editing change.

Paragraph 16

Paragraph 16 was adopted with a minor editing change to the French version.

Paragraph 17

77. In response to a point raised by Mr. SIMMA, Mr. CRAWFORD (Special Rapporteur) proposed amending the words “such as the international community as a whole, and even non-entities”, in the penultimate

sentence, to read “or towards the international community as a whole”.

Paragraph 17, as amended, was adopted.

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

78. In response to a point raised by Mr. SIMMA, Mr. CRAWFORD (Special Rapporteur) proposed replacing the words “a simple rule”, in the last sentence, by “an ordinary rule”.

79. Mr. ROSENSTOCK proposed replacing the words “It was noted”, at the beginning of the paragraph, by “Some members noted”, and inserting the words “, according to this view,” after “The concept of crimes”, in the third sentence.

80. Mr. TOMKA queried the expression “delicts of consequences”, in the second sentence.

81. Mr. CRAWFORD (Special Rapporteur) explained that, during the first reading, a number of members had expressed the view that Part Two should have been organized differently, with delictual consequences confined to one section, and a separate section on the consequences of international crimes as defined in article 19. Mr. Tomka’s point could be resolved by placing commas after “inclusion” and “delicts”, so that the phrase read “which had resulted in the inclusion, in the part referring to delicts, of consequences ...”.

Paragraph 19, as amended, was adopted.

Paragraphs 20 to 23

Paragraphs 20 to 23 were adopted.

Paragraph 24

82. Mr. CRAWFORD (Special Rapporteur) said that in the fifth sentence the words “for reparation” should be deleted.

Paragraph 24, as amended, was adopted.

Paragraphs 25 and 26

Paragraphs 25 and 26 were adopted.

Paragraph 27

83. Mr. ROSENSTOCK said that the word “unlawfulness”, in the fourth sentence, should be changed to “wrongfulness”. The formulation “it was doubted”, in the fifth sentence, was infelicitous. “Doubt was expressed” would be more elegant.

Paragraph 27, as amended, was adopted.

Paragraph 28

Paragraph 28 was adopted.

Paragraph 29

84. Mr. PELLET drew attention to the fact that “international society”, in the last sentence, should be changed to “international community”.

85. Mr. SIMMA expressed the view that “crime”, in the same sentence, needed to be qualified.

86. Mr. CRAWFORD (Special Rapporteur) suggested the phrase “‘crime’ in the sense of article 19”.

Paragraph 29, as amended, was adopted.

Paragraph 30

Paragraph 30 was adopted.

Paragraph 31

87. Mr. SIMMA said that “legal nationalization” should be amended to “lawful nationalization” in the third sentence. He pointed out that the compensation referred to in the penultimate sentence was compensation in accordance with a primary rule of international law.

88. Mr. CRAWFORD (Special Rapporteur) proposed deleting the word “legal” in the third sentence and replacing “compensation” in the penultimate sentence by “payment for the property taken”.

Paragraph 31, as amended, was adopted.

Paragraph 32

89. Mr. SIMMA recommended adding the words “for instance” after “arose”, in the second sentence, because the situation described was not the only imaginable case of legal and material impossibility.

90. Mr. MOMTAZ said that, in the French version, the third sentence should read *Il existait des limites au changement de la situation juridique*.

91. Mr. CRAWFORD (Special Rapporteur) said that the corresponding phrase in English was also too compressed to convey a proper meaning. He proposed “There were limits to changes that could be made under some legal regimes. For example ...”.

92. Mr. HAFNER wondered whether it would not be better to insert “national” before “legal regimes”.

93. Mr. RODRÍGUEZ CEDENO (Rapporteur) said that, in his opinion, in the last sentence, the terms used in the various languages for “overturned” should be harmonized, as they were not exact equivalents.

94. Mr. KUSUMA-ATMADJA said that he preferred the original text, because otherwise the Commission would be approving a procedure enabling States to shirk their international obligations.

95. Mr. CRAWFORD (Special Rapporteur) pointed out that the Commission could not approve anything; it could merely express a view. The situation in question was one in which there had been a miscarriage of justice as a result of a final Supreme Court decision. The effects of the decision could be reversed by the offer of a pardon, but the Constitution could not be amended so as to say that the decision had never been taken. Of course, in international law, the position was clear. Situations of legal impossibility could arise.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

96. Mr. ROSENSTOCK pointed out that the words “should not rely”, in the first sentence, should be changed to “could not rely”.

It was so agreed.

97. Mr. GALICKI, referring to the last sentence, said that the Special Rapporteur’s conclusion was based not on the text of article 41 of the European Convention on Human Rights, but on the practice of the European Court of Human Rights.

98. Mr. SIMMA endorsed the point made by Mr. Galicki and said that perhaps the last sentence could be deleted, because there was no need to refer to a regional development.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 38

Paragraphs 35 to 38 were adopted.

Paragraph 39

Paragraph 39 was adopted with minor editing changes.

Paragraph 40

99. Mr. PELLET drew attention to the fact that the Commission had never discussed “harm”. At most, it might have referred to injury or damage. The first sentence should therefore be amended accordingly.

100. Mr. BROWNLIE said that the word “such” should be inserted between “provision” and “as”, in the second sentence.

Paragraph 40, as amended, was adopted.

Paragraph 41

Paragraph 41 was adopted with minor editing changes.

Paragraphs 42 to 44

Paragraphs 42 to 44 were adopted.

Paragraph 45

101. Mr. SIMMA said that there had been a lengthy debate on compensation in the context of nationalization and expropriation but, at the end of the discussion, a number of members had forcefully expressed the view that compensation was unrelated to State responsibility. Perhaps it would be more discreet to delete the entire paragraph, because some members had obviously ventured into subject matter that was not pertinent to the topic.

102. Mr. BROWNLIE said that he would prefer to retain a full account of the Commission’s deliberations.

103. Mr. CRAWFORD (Special Rapporteur) said that he agreed with Mr. Brownlie.

Paragraph 45 was adopted.

Paragraphs 46 and 47

Paragraphs 46 and 47 were adopted.

Paragraph 48

Paragraph 48 was adopted with a minor editing change.

Paragraphs 49 and 50

Paragraphs 49 and 50 were adopted.

Paragraph 51

Paragraph 51 was adopted with minor editing changes to the Spanish version.

Paragraph 52

Paragraph 52 was adopted.

Paragraph 53

Paragraph 53 was adopted with minor editing changes to the French version.

Paragraph 54

Paragraph 54 was adopted with minor editing changes.

Paragraph 55

104. Mr. CRAWFORD (Special Rapporteur) said that in the last sentence “possible pending” should read “possible or pending”.

Paragraph 55, as amended, was adopted.

Paragraphs 56 to 69

Paragraphs 56 to 69 were adopted.

Paragraph 70

105. Mr. BROWNLIE asked whether there was not a word missing between “amounts of interest payable” and “loss of profits”, in the fourth sentence.

106. Mr. CRAWFORD (Special Rapporteur) proposed the wording “amounts of interest should not be payable in respect of the period for which loss of profits was awarded”.

107. Mr. ROSENSTOCK said that the phrase was correct insofar as interest on the fundamental investment was concerned. If, however, someone had been ordered to make a payment to cover loss of profits and did not make that payment, presumably interest would run throughout the period of default. Care with the formulation was therefore required.

108. Mr. CRAWFORD (Special Rapporteur) proposed that a full stop should be placed after “double recovery”. The next sentence would then begin “Moreover, it could not be assumed that the injured party”.

Paragraph 70, as amended, was adopted.

The meeting rose at 6 p.m.

2662nd MEETING

Thursday, 17 August 2000, at 10.10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility¹ (*concluded*)* (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,² A/CN.4/L.600)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING

1. The CHAIRMAN invited Mr. Gaja, Chairman of the Drafting Committee, to introduce the report of the Drafting Committee on State responsibility containing the draft articles adopted by the Drafting Committee on second reading (A/CN.4/L.600).

2. Mr. GAJA (Chairman of the Drafting Committee) said that, during the current session, the Drafting Committee had held 27 meetings, 24 of which had been devoted to the topic of State responsibility. It had completed the consideration of the articles which had been referred to it and was now in a position to submit a complete text. It was nevertheless of the opinion that the final adoption of the text should be postponed so that there might be an opportunity to review the articles at the beginning of the next session. In order to provide a complete picture, the report before the Commission incorporated the articles which the Drafting Committee had adopted at the fiftieth³ and fifty-first⁴ sessions of the Commission, with a few minor changes. All the articles had been renumbered followed by the numbers of the articles adopted on first reading in square brackets.

3. The Drafting Committee had taken care of some pending issues in the articles of Part One. First, it had changed the title, which had become “The internationally wrongful act of a State” and was more suited to the content of Part One than the old title, “Origin of international responsibility”. Secondly, it had deleted article 22 adopted on first reading in chapter III of Part One, which dealt with the exhaustion of local remedies, since that question was addressed in article 45 [22]. Thirdly, it had moved article A from chapter II of Part One to Part Four, considering that, in the new structure of the draft, that article was better placed in the part on general provisions. Fourthly, it had deleted article 34 bis in chapter V, which was a text proposed by the Special Rapporteur whose paragraph 1 required the State that was invoking a circumstance precluding wrongfulness to give notice as soon as possible to the other States concerned. Having considered the articles on countermeasures, it had come to the conclusion that article 34 bis was unnecessary and that it would be difficult to state a general rule on notice that would apply equally to all the circumstances precluding wrongfulness.

* Resumed from the 2653rd meeting.

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, chap. III, sect. D.

² Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

³ *Yearbook . . . 1998*, vol. I, 2562nd meeting, p. 288.

⁴ *Yearbook . . . 1999*, vol. I, 2605th meeting, p. 275.

4. The Special Rapporteur had proposed changes in the structure of the draft articles, with the general support of the Commission. He had divided Part Two in two, separating the provisions dealing with invocation of responsibility from those dealing with the content of responsibility. As a result, there was a new Part Two bis (The implementation of State responsibility) which was predicated on the distinction between the secondary consequences which flowed by operation of law from the commission of an internationally wrongful act and the various ways of dealing with those consequences. It related to issues such as the right to invoke responsibility, the admissibility of claims and the rule against double recovery. To avoid confusion with Part Three of the draft on the settlement of disputes, the new part was provisionally called Part Two bis. The Commission would have to reconsider their numbering. All the provisions of a general character had been placed in Part Four.
5. He introduced the articles adopted by the Drafting Committee on second reading at the current session.
6. Article 23 [30] was the only new provision in Part One. The Commission had deferred consideration of that article until all the draft articles on countermeasures, undoubtedly one of the most controversial issues of State responsibility, had been submitted. The prevailing view of the members was that countermeasures could be taken only under specific and well-defined conditions and with certain limitations. However, placing all those elements in one article would have required a very long text that would have been out of proportion with the rest of the articles in chapter V of Part One dealing with other circumstances precluding wrongfulness. The Drafting Committee had therefore decided to include a relatively short article on countermeasures in Part One and link it both in terms of substance and conditions to the relevant articles in Part Two bis.
7. Article 23 [30] began with the same wording as article 30 adopted on first reading and indicated that the wrongfulness of countermeasures was precluded if certain conditions were met. First, they could be justified only in relation to the responsible State. The words “if and to the extent” were intended to specify that condition. Secondly, they could be taken only under the conditions set out in articles 50 [47] to 55 [48]. The Drafting Committee had deliberately emphasized the first condition by using the words “countermeasures *directed towards** the latter [responsible] State”, which should take care of some of the concerns expressed in the Commission that countermeasures should not target third States. The word “countermeasures” in the text of this article adopted on first reading had been qualified by the word “legitimate”, which the Special Rapporteur had replaced by the word “lawful”. The Drafting Committee had been unable to agree on either of those qualifiers and had decided not to qualify countermeasures in any way, but to include a reference to the articles that set out the conditions for their exercise and limitations to them.
8. Part Two had been divided into three chapters and was now entitled “Content of international responsibility of a State”. Chapter I, entitled “General principles”, consisted of seven articles.
9. The first article was article 28 [36] (Legal consequences of an internationally wrongful act) which corresponded to paragraph 1 of article 36 adopted on first reading. The Drafting Committee had not changed the wording proposed by the Special Rapporteur. It had also retained the revised title proposed by the Special Rapporteur. The article stated a general principle applicable to all the articles contained in Part Two, providing that the international responsibility of a State which arose from an internationally wrongful act in accordance with the provisions of Part One entailed legal consequences as set out in Part Two.
10. Article 29 [36] (Duty of continued performance), corresponded to paragraph 2 of article 36 adopted on first reading and article 36 bis proposed by the Special Rapporteur. Article 36 bis had consisted of two paragraphs. Paragraph 1 had been taken from article 36 and paragraph 2 had combined articles 41 on cessation and 46 on assurances and guarantees of non-repetition, which the Special Rapporteur had proposed placing together in a single article. It would be recalled that several members of the Commission had not agreed with that proposal and had wanted two articles instead of one. The Drafting Committee had followed that suggestion and was therefore submitting articles 29 [36] and 30 [41, 46]. Article 29 [36] was based on the Special Rapporteur’s proposal. The Drafting Committee had considered that the new wording was a clearer way of stating the principle that the legal consequences of a wrongful act did not affect the continued duty of the State to perform the obligation it had breached. It had, however, made some changes. It had not used the term “State concerned”, as proposed by the Special Rapporteur, and had replaced it by the term “responsible State”, which it had found sufficiently clear. That did not mean that that term must necessarily replace the words “State which has committed an internationally wrongful act” throughout the draft. In some cases, the longer formulation was clearer or more elegant. The Committee had also replaced the words “these provisions” by the words “this Part” and the words “international obligation” by the words “obligation breached”.
11. Article 30 [41, 46] (Cessation and non-repetition) corresponded to paragraph 2 of article 36 bis proposed by the Special Rapporteur and to articles 41 and 46 adopted on first reading. It thus dealt both with cessation and with non-repetition. As many members had stated during the debate in the Commission, those two elements were logically linked and could be placed in a single article. The Drafting Committee had shared that view. In the opening clause, it had replaced the words “State which has committed an internationally wrongful act” by the words “State responsible for the internationally wrongful act”, which had added precision, since a State might not actually have committed the wrongful act itself, but could be held responsible for the act of another State.
12. Subparagraph (a) dealt with the obligation to cease the wrongful act and corresponded to article 41 adopted on first reading. Many members had agreed with the Special Rapporteur that the question of cessation should be placed in chapter I of Part Two, instead of in chapter II of that Part. It would be recalled that article 41 adopted on first reading and the revised text by the Special Rapporteur for article 36 bis, paragraph 2 (a), had dealt with

cessation in the context of a continuing wrongful act. Some members of the Commission had felt that the wording was unnecessarily restrictive. The Drafting Committee had agreed that subparagraph (a) should also apply to situations where a State had violated an obligation on a series of occasions and had taken the view that the term “continuing” could be understood as covering such situations. It had simplified the wording of the subparagraph and the new wording “cease that act, if it is continuing” was broader in scope and therefore preferable.

13. Subparagraph (b) corresponded to article 46 on assurances and guarantees of non-repetition adopted on first reading. The Commission had agreed with the Special Rapporteur’s analysis that that question should be addressed in the context of chapter I rather than that of chapter II. Several members had pointed out that assurances and guarantees of non-repetition were not appropriate in all circumstances. They should be required especially in circumstances where there was apprehension of repetition. Subparagraph (b) related to single acts, series of acts and continuing acts. Assurances and guarantees of non-repetition took different forms and covered different situations. Assurances were normally given verbally, while guarantees of non-repetition involved something else, i.e. certain preventive actions. Assurances and guarantees of non-repetition were appropriate only if the repetition of the wrongful act was likely to occur. They were measures for exceptional circumstances. That was what the words “if circumstances so require” at the end of subparagraph (b) were intended to convey. Like the Commission, the Drafting Committee had been fully aware that, in the past, guarantees of non-repetition had involved demands that were far-reaching, but it had taken the view that guarantees could not be dropped from the articles simply because some demands had been excessive. It might be reasonable, in some exceptional circumstances, to say that verbal assurances were inadequate.

14. With regard to article 31 [42], he recalled that on the basis of the comments by Governments on the overlap between article 42 and articles 43 to 45 adopted on first reading and on the lack of clarity in article 42 itself, the Special Rapporteur had proposed revised versions of the articles dealing with reparation and its various forms. The proposed article 37 bis had been based in part on article 42, paragraph 1, adopted on first reading. In view of the new structure of Part Two, the Drafting Committee had found it useful to define the scope of article 31 [42], stating the obligation of the responsible State for full reparation for injury caused by the wrongful act and then stating the notion of injury. The proposed article thus contained two paragraphs.

15. As to paragraph 1, the Drafting Committee had first considered the question of “full” reparation. It had been proposed in the Commission that it should be deleted, but the Committee had decided to retain the wording of the article adopted on first reading as a statement of the general principle of reparation. That text had, however, not addressed the question of injury. Article 42, paragraph 1, had provided for full reparation, but had not indicated for what full reparation should be given. In addition, the article had been couched in terms of the entitlement of the injured State and the Special Rapporteur had drafted it from the viewpoint of the obligation of the responsible

State. For further clarity and also in order to deal with the question of causality, he had used the phrase “consequences flowing from that act” as the object of full reparation. The Drafting Committee had nevertheless found those words misleading. The notion of “consequences” flowing from a wrongful act was broader than the object of full reparation. Reparation was in fact only for injury and did not cover all the consequences which might flow from a wrongful act.

16. Paragraph 2 defined “injury” as any damage, whether material or moral, arising in consequence of an internationally wrongful act of a State. Injury thus was understood in its broad sense. There had been some discussion as to whether there was any distinction between the terms “injury” and “damage”. Some members of the Drafting Committee had held the view that there was a difference between the two terms, but had not agreed what that difference was. The Committee had finally decided to define injury as consisting of any damage. The reference to “moral” damage in addition to “material” damage was meant to allow a broad interpretation of the word “injury”. “Moral” damage could be taken to include not only pain and suffering, but also the broader notion of injury, which some might call “legal injury” and had been done to States. The definition of injury in paragraph 2 therefore encompassed not only those types of injury giving rise to obligations of restitution and compensation, but also those which might entail an obligation of satisfaction.

17. Paragraph 2 also dealt with another issue that had been raised during the debate in the Commission, namely, the question of a causal link between the internationally wrongful act and the injury, which had not been referred to in the articles adopted on first reading. That paragraph pointed to the causal link by using the phrase “[injury] ... arising in consequence of the internationally wrongful act of a State”. The Drafting Committee had considered a number of suggestions for qualifying that causal link, but, in the end, it had taken the view that, since the requirements of a causal link were not necessarily the same in relation to every breach of an international obligation, it would not be prudent or even accurate to use a qualifier. The need for a causal link was usually stated in primary rules. It sufficed to state that the injury should be the consequence of the wrongful act. The commentary would, however, elaborate on the issue of the causal link.

18. Article 32 [42] (Irrelevance of internal law) corresponded to article 42, paragraph 4, adopted on first reading and article 37 ter proposed by the Special Rapporteur. Article 42, paragraph 4, provided that a State that had committed an internationally wrongful act could not invoke the provisions of its internal law as a justification for failure to provide full reparation. The Special Rapporteur had deleted that paragraph because article 3 [4] dealt with the same issue and covered the point. In the discussion in the Commission, it had become clear that that was not the case. Article 3 [4] referred to the irrelevance of internal law in the characterization of an act as wrongful, but did not cover the issues dealt with in Part Two. Consequently, the Drafting Committee had decided to propose article 32 [42]. It had made some drafting changes to the text adopted on first reading in order to adapt it to the new structure of Part Two. The substance of the text had also been expanded: it dealt with the irrelevance of inter-

nal law to compliance with obligations set out in Part Two. That was partly owing to the new structure of Part Two, which considered assurances and guarantees of non-repetition as separate from reparation.

19. Article 33 [38] (Other consequences of an internationally wrongful act) corresponded to article 38 adopted on first reading. Unlike the Special Rapporteur, the Drafting Committee had been of the view that it was useful to keep the article because it had two functions: first, to preserve the application of rules of customary international law of State responsibility that might not be entirely reflected in the draft articles; and secondly, to attempt to preserve some effects of a breach of an international obligation which did not flow from the rules of State responsibility proper, but stemmed from the law of treaties or other areas of international law. That, and the distinction between that case and the *lex specialis* principle, would be explained in the commentary.

20. Article 34 (Scope of international obligations covered by this Part) concluded the provisions of chapter I. Paragraph 1, proposed by the Special Rapporteur in article 38 bis, pointed out that identifying the States towards which the responsible State's obligations in Part Two existed depended both on the primary rule establishing the obligation that had been breached and on the circumstances of the breach. For example, pollution of the sea might, according to the circumstances, affect the international community as a whole or else one or more coastal States. Paragraph 1 simply indicated that the responsible State's obligations might exist towards another State, several States or the international community as a whole. The reference to "several States" included the case in which a breach affected all the other parties to a treaty or to a legal regime established under customary law. For instance, when an obligation could be defined as an "integral" obligation, as might be the case of obligations under a disarmament treaty, its breach by a State necessarily affected all the other parties to the treaty. When an obligation of reparation existed towards a State, reparation was not necessarily to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights might exist towards all the other parties to the treaty, but the individuals affected must be regarded as the ultimate beneficiaries and, in that sense, as the holders of the right to reparation.

21. Paragraph 2 had been proposed by the Special Rapporteur as article 40 quater. It was intended to make it clear that, while Part One applied to all the cases in which a wrongful act might be said to have been committed by a State, subject to the exceptions set out in Part Four, Part Two had a more limited scope. It did not apply when an obligation of reparation arose towards an entity other than a State.

22. Chapter II of Part Two (The forms of reparation) was composed of six articles. The first was article 35 [42] (Forms of reparation) which corresponded to paragraph 1 of article 42 adopted on first reading and paragraph 2 of the revised text of article 37 bis proposed by the Special Rapporteur. The Drafting Committee had decided to start chapter II with an introductory article, which simply listed all the forms of reparation, with the articles on each form of reparation describing the content of that particular form

of reparation and the way it applied. The commentary to that article would also explain that full reparation was not always necessary or possible by means of one form of reparation. It might require all or some of them, depending on the nature and the extent of the injury that had been caused. In the view of the Committee, moreover, the primary rule could play an important role with regard to the form and the extent of reparation. That issue should be fully explained in the commentary. Since the notion of injury was already defined in article 31, paragraph 2, the wording of article 35 [42] had been simplified. It did not use the term "consequences", but referred to "Full reparation for the injury caused".

23. Article 36 [43] (Restitution) corresponded to article 43 adopted on first reading, the opening clause of which it used, except that, like other articles in chapter II, it was formulated in terms of the obligation of the State that had committed an internationally wrongful act and thus began: "A State responsible for an internationally wrongful act is under an obligation". There had been discussions in the Commission about whether the article should say only that the responsible State was under an obligation to make restitution or should also include the words "to re-establish the situation which existed before the wrongful act was committed", which had already appeared in the text adopted on first reading. It had been pointed out that those words stated the general policy that applied to full reparation rather than to restitution as one of the forms of reparation. Since both articles 31[42] and 35 [42] referred to "full reparation", the words in question should be understood in a narrow sense and should be intended only to cover cases such as the return of stolen cultural property. The Drafting Committee had also been aware of the complexity of the concept of restitution, which could, for example, include replacement or refer to the restoration of rights. Those issues could be discussed in the commentary. The Committee had therefore decided to retain the said words.

24. Two other questions had arisen in the same context. First, it had been suggested that reference should be made to "the situation which would have existed if the wrongful act had not been committed". The Drafting Committee had seen problems with that wording because it was synonymous with full reparation. With regard to the second question, namely, the time frame meant by the phrase "before the wrongful act was committed", the Committee had been of the view that the time frame depended to some extent on the factual situation and the context. For example, if there was justifiable apprehension that a wrongful taking of property was about to be committed, that might have consequences for the value of the property concerned. Thus, the time frame would normally be the time of the commission of the wrongful act, but, in some circumstances, it could be an earlier time. Those issues would be discussed in the commentary.

25. The Drafting Committee had decided to use the term "restitution" instead of the term "restitution in kind", which was narrower. The words "provided and to the extent that restitution", which had also appeared on first reading, allowed for partial restitution and made it clear that restitution had priority over compensation, subject to the conditions set out in the article itself.

26. Whereas the text of the article adopted on first reading had provided for four exceptions to the general rule, the text proposed by the Drafting Committee contained only two. There had been general support for the exception in subparagraph (a) and the Committee had retained it. In its view, material impossibility was intended to cover a range of situations, including certain situations of legal impossibility, such as cases in which the legitimate rights of third parties would be infringed. Subparagraph (a) did not, however, deal with conflicting international obligations, as those were outside the scope of article 36 [43]. Those matters would be explained in the commentary. The Committee had deleted the exception of peremptory norms which had appeared as subparagraph (b) on first reading because it had considered not only that the contingency that restitution could violate a peremptory norm was remote, but also, in view of article 21 of Part One on compliance with peremptory norms, that it was clear that peremptory norms by their very character overrode all other rules in conflict with them. Moreover, an express mention of peremptory norms with regard to restitution might be taken as implying *a contrario* that the same exception did not apply in relation to other obligations stated in the draft articles. Subparagraph (b) proposed by the Committee corresponded to subparagraph (c) adopted on first reading with some minor drafting changes, such as the deletion of the words “injured State”. Those words were not felicitous, first, because there might have been more than one injured State and, secondly, because the evaluation of benefits might have to be made not in connection with the State as such, but with the individuals who might be the ultimate beneficiaries of restitution. Those concerns had been met by the shorter expression “benefit deriving from restitution”. With regard to the exception under subparagraph (d) adopted on first reading and providing that restitution should not seriously jeopardize the political independence or economic stability of the responsible State, the Committee had been of the view that those cases also were to be regarded as rare and would anyway be covered by subparagraph (b).

27. The Drafting Committee had concluded that specific performance orders that could be requested from a court or an arbitral tribunal did not fit into the classification of remedies adopted for Part Two. The same applied to judicial declarations of rights. Those were essentially procedural remedies that should be referred to in the commentary.

28. Article 37 [44] (Compensation), the title of which had not been amended, corresponded to article 44 adopted on first reading, which had also dealt with the question of interest and loss of profit. Based on comments by Governments, the Special Rapporteur had suggested that the question of interest should be dealt with in a separate article and treated more extensively because of the importance of the issues involved. The Drafting Committee had followed those suggestions. Article 37 [44] dealt with compensation and loss of profit, but not with interest, which was covered in article 39. Like the text adopted on first reading, article 37 [44] consisted of two paragraphs. Paragraph 1 set out the general principle of compensation, while paragraph 2 provided more detail as to what should be compensated.

29. The Drafting Committee had accepted the Special Rapporteur’s suggestion that paragraph 1 should be recast in the form of an obligation imposed on the responsible

State rather than in the form of an entitlement of the injured State, as had been the approach adopted on first reading. In addition, the Committee had replaced the words “the State which has committed an internationally wrongful act” by the words “[t]he State responsible for an internationally wrongful act” in order to bring the wording into line with that of the preceding article. Initially, the Committee had considered qualifying damage, in paragraph 1, as “economically” or “financially” assessable. However, it had decided that such qualification was more appropriate in paragraph 2 as a means of indicating what compensation should amount to. The Committee had thus opted for a more general reference to “damage caused thereby”, which seemed to read better while still maintaining the causal link between the act and the damage. Following the Special Rapporteur’s suggestion, the Committee had also replaced the words “if and to the extent that the damage is not made good by restitution in kind” adopted on first reading by the words “insofar as such damage is not made good by restitution”. The effect, however, remained the same. Restitution in full might not always be possible and, even in cases where it was possible, only partial restitution might be agreed on by the States concerned or else might have been opted for by the injured State, when that State was entitled to make such a choice. The reference to “restitution in kind” at the end of the paragraph adopted on first reading had been shortened to “restitution” as a necessary consequence of the Committee’s decision on the wording of article 36 [43]. As in the case of the text adopted on first reading, the article did not deal with the question of a plurality of injured States, which could be referred to in the context of the commentary on article 47.

30. Paragraph 2 had been retained by the Drafting Committee despite the Special Rapporteur’s initial proposal that it should be deleted. The Committee had taken the view that the debate in the Commission had demonstrated support for the approach of the draft article as adopted on first reading, which had included a paragraph 2. The Committee had therefore attempted to improve the text of paragraph 2 as adopted on first reading. Aside from the question of interest, two other issues had been considered in the context of paragraph 2: the qualification of the concept of damage or injury and the inclusion of a reference to loss of profits. In the view of the Committee, the distinction between damage or injury covered under compensation, and damage or injury referred to under satisfaction, as adopted on first reading, as well as in the proposed text by the Special Rapporteur, did not seem entirely accurate or helpful. The concept of “moral damage” suffered by a State was to some extent elusive. Furthermore, taking into account the broad definition of the term “injury” already included in article 31 [42], paragraph 2, the Committee had found it more useful to differentiate between damage or injury relevant for the purposes of compensation and damage or injury relevant for the purposes of satisfaction by a more categorical criterion avoiding overlap between compensation and satisfaction. According to that approach, the main distinction that arose between article 37 [44] and article 38 [45] (Satisfaction), related to whether the damage in question could be assessed in financial terms. The Committee had therefore settled for a formulation which, for the purposes of article 37 [44], qualified damage or injury as that which

was financially assessable, as opposed to that arising in the context of satisfaction, which was not financially assessable. As to the drafting, the Committee had noted that the text adopted on first reading, which had referred to “economically assessable” damage, had not been disapproved by Governments. After some discussion, however, it had decided on “financially assessable” as being more accurate. Following suggestions made in the Commission, the Committee had also decided to include a reference to loss of profits in paragraph 2. It had agreed that requiring compensation for loss of profits was not always required for full reparation. That partly depended on the content of the primary rule which set the obligation that had been breached. The Drafting Committee had considered the practice of tribunals, which had approached the granting of compensation for loss of profits with circumspection. That basic idea was expressed by the words “as appropriate” used in the text adopted on first reading. The Committee had attempted to provide a less vague criterion which would limit speculative claims. Having discussed various terms, it had finally settled for “established”. The commentary would elaborate on that issue and explain that there were situations where loss of profits was covered and others where it was not.

31. Article 38 [45] dealt with the last form of reparation, satisfaction, and corresponded to article 45 adopted on first reading. There had been an extensive debate on that article in the Commission and in the Drafting Committee, which had agreed that satisfaction was not a common form of reparation. In most cases, if injury caused by an internationally wrongful act of a State could be fully repaired by restitution or compensation, there was no place for satisfaction. The Committee had also been of the view that satisfaction could be granted only for non-financially assessable injury caused to the State and that, taking into account some unreasonable forms of satisfaction which had been demanded in the past, some limitations to satisfaction had to be established.

32. The article consisted of three paragraphs. Paragraph 1 defined the legal nature of satisfaction and the injury for which it could be granted. To take account of the fact that several members of the Commission had had difficulty with the use in the proposal by the Special Rapporteur of the word “offer”, which had not appeared to fit in with the legal nature of the obligation to provide satisfaction, the Drafting Committee had amended paragraph 1 to read: “The State responsible for an internationally wrongful act is under an obligation to give satisfaction . . .”. The new wording thus brought the opening clause into line with the previous articles of chapter II. The last part of paragraph 1, which read: “injury caused by that act insofar as it [the injury] *cannot** be made good by restitution or compensation”, underscored the type of injury for which satisfaction could be granted and the rather exceptional nature of satisfaction. Satisfaction was the remedy for injuries which were not financially assessable and which amounted to an affront to the State. It was frequently symbolic in nature.

33. Paragraph 2 described the modalities of satisfaction and basically corresponded to paragraph 2 of the article adopted on first reading and the Special Rapporteur’s proposed revised paragraphs 2 and 3. Taking into account the comments made in the Commission, the Drafting Commit-

tee had been of the view that the text adopted on first reading and the Special Rapporteur’s text were unnecessarily detailed in listing types of satisfaction that might be granted. While it seemed useful to give examples, an extensive list was unnecessary. The paragraph proposed by the Committee provided that “satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality”. The words “another appropriate modality” indicated the non-exhaustive nature of the list and made it clear that the appropriate modality of satisfaction could depend on the circumstances of the breach. The question whether article 38 [45] should refer, among the modalities of satisfaction, to disciplinary or penal action against the individuals whose conduct had caused the internationally wrongful act had given rise to divergent views in the Commission and in the Drafting Committee and, since paragraph 2 was not intended to provide an exhaustive list, the Committee had decided not to mention disciplinary or penal action in the text. The appropriate explanation would be given in the commentary. Consistent with the comments made in the Commission, the list did not include punitive damages, the possibility of which had been alluded to in paragraph 2 (c) adopted on first reading and had again been discussed in relation to the Special Rapporteur’s proposal concerning a particular category of breaches in article 41.

34. Paragraph 3 corresponded to paragraph 3 of the article adopted on first reading and was based on the text proposed by the Special Rapporteur. It set the limits on satisfaction, in the light of past abuses incompatible with the sovereign equality of States, on the basis of two criteria: first, the proportionality of satisfaction to the injury and, secondly, the requirement that satisfaction should not be humiliating to the responsible State. The Drafting Committee had been aware that the requirement of proportionality was not specific to satisfaction, but it had considered that proportionality could not be regarded as a general criterion applied in the same way to different situations and had found it useful to state that criterion as a way of emphasizing its importance to satisfaction.

35. Article 39 (Interest) corresponded to article 45 bis proposed by the Special Rapporteur in response to comments by a number of Governments, whereas the text adopted on first reading had not included a separate article and had referred to interest only in article 44, paragraph 2. The debate in the Commission had clearly shown that interest was not an autonomous form of reparation and was not necessarily part of compensation in every case, but might be required in order to provide full reparation. That was why the text proposed by the Drafting Committee, which was based on the Special Rapporteur’s proposal with some drafting changes, used the words “principal sum”, which was distinct from “compensation”.

36. The wording of paragraph 1, which stated that “Interest . . . shall be payable when necessary in order to ensure full reparation”, was flexible enough to avoid the understanding that the payment of interest was automatic. That approach was also compatible with the tradition of various legal systems and the practice of international tribunals.

37. Paragraph 2 indicated that the date from which the interest was to be calculated was the date when the principal sum should have been paid and that the interest ran until the date the obligation to pay had been fulfilled. That article did not, as such, deal with post-judgement interest, but was concerned with interest that went to make up the amount that a court or tribunal should award. The commentary would make it clear that interest could not be cumulated with compensation for loss of profit if the injured State would thereby obtain a double recovery.

38. Article 40 [42] (Contribution to the damage) essentially dealt with contributory negligence, an issue addressed in article 42, paragraph 2, adopted on first reading. The Special Rapporteur had felt that the issue was of sufficient importance to be treated in a separate article, for which he had proposed a text as article 46 bis. The article proposed by the Drafting Committee did not deal with mitigation of responsibility. It assumed that responsibility had arisen. The text was based on subparagraph (a) of the Special Rapporteur's proposal, which had, in turn, relied on the text adopted on first reading. It contained a single paragraph, which provided that "In the determination of reparation, account shall be taken of the contribution to the damage by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought". According to that article, as well as the text adopted on first reading, not every action or omission was relevant, but only those that were wilful or negligent. Also as in the text adopted on first reading, the action or omission in question could be that of the injured State or of any person or entity in relation to whom reparation was sought. The words "in relation to whom reparation is sought" differed from the text adopted on first reading and the Special Rapporteur's proposal, which both read: "on whose behalf the claim is brought". The reference to a claim had appeared for the first time in that article. It had seemed to the Committee to be out of place in chapter II.

39. The article was flexible. The word "negligent" was not qualified by any adjective. The relevance of negligence to reparation depended on the degree to which it had contributed to the damage and on the factual circumstances of each case, which were matters that could more appropriately be explained in the commentary. The words "account shall be taken of" meant that the article dealt with factors that were capable of reducing reparation. Subparagraph (b) of the article proposed by the Special Rapporteur had been deleted because, in the view of the Committee, it was not certain that an obligation to mitigate damage existed in international law. It would therefore be explained in the commentary that, if there were any measures that an injured State could take to mitigate the damage, it should take them, and that its failure to do so in appropriate cases might be taken into account in the determination of reparation.

40. With regard to chapter III of Part Two (Serious breaches of essential obligations to the international community), the Drafting Committee had had a difficult choice to make. The draft adopted on first reading had dealt with "international crimes", and that had proved controversial both in the Commission and among Governments. The Special Rapporteur had suggested moving away from that approach and concentrating instead on obligations to the international community as a whole and on the conse-

quences that their serious breach would entail. On the basis of that approach, he had submitted some proposals to the Commission. Those proposals had included the deletion of article 19 adopted on first reading and the addition of a new article which dealt with the consequences of breaches of obligations to the international community as a whole. Those consequences corresponded in large part to those envisaged in the articles adopted on first reading for international crimes. Nevertheless, the Special Rapporteur's proposals had not been able to solve all the problems to which the supporters and the opponents of the concept of international crimes had drawn attention. Taking into account the comments made in the Commission, the Drafting Committee had basically followed the Special Rapporteur's approach. The references to international crimes of States had been removed, but some special consequences had been identified for the case of serious breaches of obligations to the international community as a whole. That seemed to be the middle ground on which it could be hoped to reach a consensus. However, some members of the Committee had expressed reservations, especially with regard to article 42 [51, 53] (Consequences of serious breaches of obligations to the international community as a whole), paragraph 1.

41. Chapter III consisted of two articles. Article 41 (Application of this chapter) corresponded to article 51 proposed by the Special Rapporteur and provided that the chapter applied to State responsibility for serious breaches of obligations owed to the international community as a whole and essential for the protection of its fundamental interests. There were thus three conditions. First, obligations must be owed to the international community as a whole. Secondly, obligations must be essential for the protection of the fundamental interest of the international community as a whole. And, thirdly, breaches must be serious. Admittedly, those criteria were general and not very precise, but they were intended to provide guidelines indicating the overall quality of the obligations and breaches dealt with in chapter III.

42. In an attempt to clarify further the concept of a "serious" breach, article 41, paragraph 2, established two criteria. First, the breach involved "a gross or systematic" failure by the responsible State to fulfil the obligation. Secondly, such a breach would "[risk] substantial harm to the fundamental interests protected thereby", i.e. to fundamental interests of the international community as a whole mentioned in paragraph 1. The word "gross" emphasized the quality and severity of the failure of the responsible State by defining a criterion that moved beyond simple negligence. The word "systematic" also emphasized the quality of the failure of the responsible State by drawing attention to the repetitiveness of the failure. Clearly, the paragraph did not cover minor, trivial, incidental or doubtful breaches. In addition, the consequences of such failure must be "risking substantial harm". The Drafting Committee had considered the word "irreversible" harm proposed by the Special Rapporteur, but had found that it was not always appropriate. For example, in cases of aggression, the situation could be called reversible if the aggressor withdrew. The Special Rapporteur had also proposed the term "manifest breach", but the Committee had been unable to agree with it out of concern that it would exclude serious violations commit-

ted in such a subtle way that they could not be characterized as “manifest”.

43. The other article in chapter III was article 42 [51, 53], which corresponded to articles 51 and 53 adopted on first reading. It was based on the proposal by the Special Rapporteur which had appeared as article 52 and dealt in a simplified way with the consequences of the serious breaches referred to in the preceding article.

44. Paragraph 1 provided that such serious violations could involve, for the responsible State, damages reflecting the “gravity of the breach”. The Committee had discussed that paragraph at length, taking account of the view expressed in the Commission that there should be no punitive damages even for the breach of the obligations in question. Different opinions had been expressed as to whether in fact damages reflecting the “gravity of the breach” were the same as “punitive damages”. The latter were exceptional in practice and often subject to special regimes. However, there might be situations in which the gravity of the breach called for heavy financial consequences. The word “may” was intended to convey that understanding. The paragraph was intended to leave open the question whether damages reflecting the gravity of the breach were additional to those that were owed by the responsible State under article 37 [44].

45. Paragraph 2 dealt with the obligations for other States. Those obligations were designed to provide further negative consequences for the responsible State. Some of the obligations identified in that paragraph could also apply in the case of other wrongful acts. The commentary would elaborate on that point. The enumeration of such obligations for third States was intended to emphasize their particular importance with regard to that special category of breaches. Under paragraph 2 (a), other States had an obligation not to recognize as “lawful” the situation created by the breach and the commentary would explain that the question of recognition was closely connected with, but different from, that of “validity”. Paragraph 2 (b) was a logical consequence of paragraph 2 (a) and provided that other States must not render aid or assistance to the responsible State in maintaining the situation created by the breach. Rendering aid or assistance implied the taking of positive acts, but did not necessarily imply responsibility for the wrongful act under article 16 [27]. The words “situation so created” were a reference to the specific situation created as the result of the wrongful act. The commentary would elaborate on those issues. Paragraph 2 (c) required cooperation of other States to bring the breach to an end. That requirement was, however, qualified by the words “as far as possible” in order to take account of circumstances such as legal obligations that were binding on some States and that might prevent them from cooperating, such as some obligations under the law of neutrality.

46. Paragraph 3 was a without prejudice clause. It said that chapter III was without prejudice, first, to the consequences of chapter II and, secondly, to such other consequences that might arise under international law. Those consequences could occur with regard either to all serious breaches of obligations to the international community as a whole or to breaches of some of those obligations. The text proposed by the Special Rapporteur had referred to “penal or other” consequences. The Drafting Committee

had deleted those words because they were unnecessary in the text of the article. The commentary would elaborate on those points. Paragraph 3 simply recognized that the law in that area was developing and was not prejudiced by the draft articles.

47. Part Two bis (The implementation of State responsibility) contained two chapters. Chapter I (Invocation of the responsibility of a State) consisted of seven articles. With regard to the question of the definition of “injured State”, he recalled that the Commission had held an extensive discussion on article 40 bis as proposed by the Special Rapporteur. That article was a reformulation of article 40 as adopted on first reading, on the definition of “injured State”. The difficulty with the text as adopted on first reading was that the definition of “injured State” was very wide and partly inconsistent. As Governments had stressed in their comments, many States could claim to have been injured and thus to be entitled to claim the whole range of remedies available under the articles. The Special Rapporteur’s redraft therefore made an attempt to differentiate between States that had suffered “injury” and those that had only “legal interests”. In the view of a number of members of the Commission, that proposal was not fully successful in making the distinction sufficiently clear and also gave rise to other difficulties. The use of the terms “injured” States and States having a “legal interest” was not satisfactory since injured States also had legal interests. However, the idea of distinguishing between different categories of States towards which a wrongful act had been committed and which were entitled to specific remedies was generally considered appropriate. While agreeing on the Special Rapporteur’s approach, some members of the Commission had made written proposals in an attempt to provide alternative ways of drawing the distinction. In the light of the comments and proposals made, the Drafting Committee had adopted the view that any definition of injured States should take account of the various types of wrongful acts that could be committed and adversely affect States. The first category of States should be differentiated from the second category of States in terms of the types of legal consequences to which they were entitled.

48. Paragraph 3 of article 40 bis, as proposed by the Special Rapporteur, would exclude injured entities other than States from the scope of the draft article. The Commission had supported that idea in view of the difficulty of addressing those complex issues, which had not been dealt with in the articles adopted on first reading.

49. The Drafting Committee had agreed with the general opinion expressed in the Commission that too many important and difficult issues were addressed in a single article and had deemed it preferable to split the issues up and deal with them individually in separate articles, namely, article 43 [40] (The injured State) and article 49 (Invocation of responsibility by States other than the injured State), the question of injured entities other than States being excluded from the scope of the draft articles, as indicated in article 34, paragraph 2.

50. Articles 43 [40] and 49, the first and last articles of chapter I of Part Two bis, dealt with the two categories of States that might be affected by an internationally wrongful act. In the view of the Drafting Committee, the identi-

fication of an injured State in any particular case depended, to some extent, on the primary rules concerned and on the circumstances of the case; in the context of the secondary rules, what could be done was to identify the categories of affected States and their entitlement to invoke responsibility and specific remedies. The Drafting Committee had avoided the term "legal interest" used in earlier texts in order not to cause terminological problems with regard to the terms "injured State" and "State having a legal interest": since all injured States also had a legal interest, that did not form a distinct category. The Drafting Committee had also avoided the use of the term "obligations *erga omnes*", preferring the term "obligations towards the international community as a whole". Articles 43 [40] and 49 were couched in terms of the right or entitlement of a State to invoke the responsibility of the wrongdoing State. The phrase "A State is entitled as an injured State to invoke ... responsibility ...", at the beginning of article 43 [40], was intended to make a distinction between that State and the other category of States entitled to invoke the responsibility of a wrongdoing State dealt with in article 49. Articles 43 [40] and 49 talked of a "State" in the singular, but did not preclude the possibility of there being more than one injured State.

51. Article 43 [40] dealt with the injured State in the narrow sense of the term. Subparagraph (a) considered the breach of an obligation in a bilateral relationship, as the category of injured States was easiest to identify in that case. The most common examples were breaches of obligations under a bilateral treaty or under a multilateral treaty that gave rise to a number of bilateral relations. It was more difficult to identify the injured States in a multilateral relationship, whether the obligation concerned was based on a treaty or on customary law. In a multilateral relationship, the wrongful act could specifically affect one or more of the States to which the obligation was owed. Those States could then be considered as having been specially affected by the wrongful act. Other States parties to the same multilateral relationship might also be concerned about the performance of the obligation.

52. Subparagraph (b) dealt with the obligations owed to a number of States or to the international community as a whole. The phrase "the obligation ... owed to a group of States *including that State**" signified that the obligation was owed to that group, also in a given circumstance, in other words, having regard to the circumstances of the case. Subparagraph (b) first dealt with the breach of an obligation in a multilateral relationship which specially affected one or more States belonging to the group of States to which that obligation was owed. The word "specially", in subparagraph (b) (i), emphasized the special adverse effect of the wrongful act on the injured State. Several examples could illustrate that point. In the case of aggression, one could make a distinction between the State that had been targeted and other States in terms of their interest in, and entitlement to, the maintenance of the international public order. The differences in the effects of the wrongful act would also distinguish between those States in terms of what they were entitled to claim from the responsible State. For a State to be considered as belonging to the category of States referred to in article 43 [40], subparagraph (b) (i), there must be a special adverse effect that set it apart from all the other States which had also been affected by the wrongful act. The Drafting Commit-

tee had considered several alternatives for the word "specially" ("directly", "particularly", "necessarily"), but had decided that "specially" was the most suitable, especially as it was used in article 60, paragraph 2 (b), of the 1969 Vienna Convention, although, in that context, it also referred to the case of the breach of an obligation under a multilateral treaty that affected only one State. The words "affects" and "affect" in subparagraphs (b) (i) and (b) (ii) indicated that there were adverse and negative effects, as would be explained in the commentary. Subparagraph (b) also dealt with the obligations in a multilateral relationship that had been called "integral" obligations because the breach of one of them would affect the enjoyment of the rights or the performance of the obligations of all the States belonging to the relevant group. All the States to which the obligation was owed became, in effect, specially affected States. Subparagraph (b) (ii) dealt with the case in which every State was affected because every State was complying with its obligations only on the assumption that other States were doing the same; such was the case of obligations under a disarmament treaty, for example. The phrase "affect the enjoyment of the rights or the performance of the obligations" of all the States concerned was based on article 41, paragraph 1 (b) (i), of the Convention. The special character of integral obligations, the breach of which could affect the enjoyment of rights or the performance of obligations of the members of the group, would be explained in the commentary. The words "States concerned" clearly referred to the group of States towards which the "integral" obligation was owed.

53. Article 49 (Invocation of responsibility by States other than the injured State) incorporated the notion of collective interest. Article 43 [40], subparagraph (b) (i), and article 49, paragraph 1, might refer to the same wrongful act which affected different categories of States in different ways, but, whereas article 43 dealt with the injured State, as it were, in its individual capacity, article 49, paragraph 1, dealt with a State which was affected in its capacity as a member of a group of States to which the obligation breached was owed or as a member of the international community. Article 49, paragraph 1 (a), dealt with situations where the obligation breached was owed to a group of States, including the injured State, and where the obligation was established for the protection of a collective interest. Once again, the phrase "the obligation breached is owed to a group of States *including that State**" signified that, in a specific case, the obligation was owed to all members of the group. The obligation breached must meet two criteria to be included in that category of obligations. First, it must be owed to the group and, secondly, it must have been established for the protection of a collective interest. Paragraph 1 (b) dealt with the breach of an obligation owed to the international community as a whole.

54. Article 49, paragraphs 2 and 3, would be introduced after the remaining articles of chapter I had been explained.

55. Article 44 (Invocation of responsibility by an injured State), which corresponded to article 46 *ter* proposed by the Special Rapporteur, dealt with some substantial and procedural issues involved in the invocation of responsibility by an injured State, such as the choice of

the form of reparation and the admissibility of claims, which were issues that had not been dealt with fully in the draft adopted on first reading. As the general view in the debate in the Commission had been that, because of their importance, those issues should be addressed in separate articles, the Drafting Committee had divided the Special Rapporteur's proposal for article 46 *ter* in two. Article 44 was based on paragraph 1 of article 46 *ter* and consisted of two paragraphs. Under paragraph 1, the injured State as defined in article 43 [40], which invoked the responsibility of another State was required to give notice of its claim to that State. The relationship between the notice given by the injured State and the obligation to provide reparation had been discussed in the Commission and concerns had been expressed that the requirement for giving notice, especially in writing, would place an undue burden on the injured State. However, in the view of the Drafting Committee, in normal circumstances, when a State wanted to invoke the responsibility of another State, it should give that State notice. It would be explained in the commentary that such notice did not need to be given in writing and was not a condition for the obligation to provide reparation which immediately arose when the wrongful act was committed. The elements of notice set out in paragraph 2 were optional, for use at the discretion of the injured State. Paragraph 2 (*a*) provided that the injured State might indicate the conduct that the responsible State should adopt in order to cease the wrongful act. That was, of course, not binding on the responsible State. The injured State could only require the responsible State to comply with its primary obligation. However, it would be useful for the responsible State to have some idea of what would satisfy the injured State, as that might facilitate the settlement of the dispute. Paragraph 2 (*b*) dealt with the question of the choice of the form of reparation, an issue on which opinions had been divided, with some members defending the right to choose the form of reparation, while others had not been so sure and had not seen it as an absolute right. The Committee, for its part, did not believe that the article should set forth the right to choose the form of reparation in an absolute form. Paragraph 2 (*b*) was purely for the guidance of the injured State.

56. Article 45 [22] (Admissibility of claims) corresponded to paragraph 2 of article 46 *ter* proposed by the Special Rapporteur and basically dealt with two requirements: first, that of the nationality of claims and, secondly, that of the exhaustion of local remedies, which had been the subject of article 22 adopted on first reading. Both requirements were to be considered with regard to the admissibility of claims, as opposed to judicial admissibility. The draft did not exclude the possibility that, in some cases, a wrongful act might occur only when local remedies had been exhausted. The article provided that the responsibility of a State could not be invoked in two cases: (*a*) when the claim had not been brought in accordance with any applicable rule relating to the nationality of claims (the article did not specify which rules as that question should be settled in the context of diplomatic protection); and (*b*) when the claim was one to which the rule of exhaustion of local remedies applied and not every available and effective local remedy had been exhausted, which was basically what the Special Rapporteur had proposed. The wording of the latter provision was sufficiently flexible to cover all situations and took account of the fact that

the rule of the exhaustion of local remedies applied only to certain types of claims. The words "available and effective" would be explained in the commentary. The Commission would also be called on to consider the issue of the exhaustion of local remedies in the context of diplomatic protection, although the local remedies rule might have a broader scope.

57. Article 46 (Loss of the right to invoke responsibility) was a rewording of article 46 *quater* proposed by the Special Rapporteur, that dealt with the loss of the right to invoke responsibility, an issue not dealt with in the draft articles adopted on first reading. Subparagraph (*a*) dealt with the waiver of the claim. A waiver was effective only if the injured State had validly waived the claim in an unequivocal manner. In the text proposed by the Special Rapporteur, the reaching of a settlement had been one of the grounds for the loss of the right to invoke responsibility. However, taking into account the views expressed in the Commission, the Drafting Committee had agreed that settlement could not be taken as grounds for the loss of the right to invoke responsibility. A settlement was the subject of an agreement between the parties which altered the legal situation. The commentary would deal with that point, if necessary, and would set out the conditions for validity of a waiver. Subparagraph (*b*) dealt with unreasonable delay amounting to prejudice. This subparagraph had been discussed extensively in the Commission. Some members had objected to it on the grounds that the text proposed by the Special Rapporteur appeared to state a general rule on the limitation of claims that would certainly not apply in all cases, while others had been in favour of retaining a modified version of that provision, which built on the notion of prejudice to the responsible State. The Committee had agreed with the latter view and had redrafted the article in a way that avoided addressing the issue of the limitation of claims. The Committee had stressed the conduct of the State, which could include, where applicable, unreasonable delay, as the determining criterion for loss of the right to invoke responsibility. The wording it was proposing was closer to that of article 45, subparagraph (*b*), of the 1969 Vienna Convention. The issue of delay would be dealt with more generally in the commentary, where it would be pointed out that delay as such was not a basis for the loss of rights and where it would also be explained that subparagraphs (*a*) and (*b*) could apply to part of a claim, as well as to the whole of it.

58. Article 47 (Invocation of responsibility by several States) was a modified version of article 46 *quinqües* proposed by the Special Rapporteur. It set forth the principle, which had not been adequately addressed in the draft articles adopted on first reading, that, where there were several injured States, each of them could separately invoke the responsibility of the State that had committed the internationally wrongful act. The Drafting Committee had inserted the word "separately" to make that point quite clear and it had also replaced the words "two or more States" contained in the text proposed by the Special Rapporteur by the words "several States". The article did not deal with the case where injured States took different attitudes to the forms of reparation, as that seemed to be a problem of limited practical importance. Such cases, if they arose, were likely to present special features and to be significantly affected by the content of the obligation breached.

59. Article 48 (Invocation of responsibility against several States) was based on article 46 *sexies* proposed by the Special Rapporteur. Paragraph 1 provided that, where several States were responsible for the same internationally wrongful act, the responsibility of each State could be invoked in relation to that act. Paragraph 2 provided two safeguards. Subparagraph (a) stipulated that the injured State could not recover, by way of compensation, more than the damage suffered. The principle of prohibiting double recovery was designed to protect the responsible State, whose obligation to compensate was limited to the damage suffered. The issue had been raised as to whether it would be better to talk of “reparation” rather than “compensation”; the Drafting Committee had taken the view that, under normal circumstances, the prohibition of double recovery, which was a well-established rule frequently applied by tribunals, applied to monetary forms of reparation. It had also deleted the reference to a “person or entity” in the text proposed by the Special Rapporteur, as Part Two of the draft articles dealt only with the responsibility of States towards other States. It would be explained in the commentary that the principle of the prohibition of double recovery applied in general, no matter who was the beneficiary of the recovery. Subparagraph (b) stipulated that paragraph 1 was without prejudice to any right of recourse towards the other responsible States. That was simply a reminder that the articles did not address the question of how responsibility was shared when several States were responsible for the same wrongful act.

60. It should be pointed out that the Drafting Committee had not retained paragraph 2 (b) (i) of article 46 *sexies*, which had dealt with the admissibility of proceedings, as it had agreed with the majority of members of the Commission that that issue was outside the scope of the draft articles. It could, however, be addressed in the commentary.

61. With regard to article 49 (Invocation of responsibility by States other than the injured State), paragraph 1 had already been examined in connection with the distinction between that category of States and the category of injured States. Following the proposal by the Special Rapporteur and taking into account the views expressed in the Commission, the Drafting Committee had concluded that any State in the category in question was entitled to request cessation of the wrongful act and, where necessary, assurances and guarantees of non-repetition and that it should also be entitled to claim reparation from the responsible State in accordance with the provisions of chapter II of Part Two. While the Special Rapporteur had envisaged that only restitution could be claimed, the Committee considered that the States in question should also be entitled to seek other forms of reparation, as that would ensure that there were States entitled to claim in all cases of a breach of obligations towards the international community as a whole. However, a claim could be made only in the interest of an injured State or of other beneficiaries of the obligation breached. All those issues were addressed in article 49, paragraph 2. Paragraph 3 simply provided that the conditions and limitations that applied to the invocation by the injured State of the responsibility of another State also applied in cases where the State belonged to the other category of States referred to.

62. Chapter II of Part Two (Countermeasures) dealt with the purpose of countermeasures and the conditions under which they could be taken, as well as with the limitations applying to them. It was composed of six articles, which had been the subject of long discussions in the Commission, especially because, under the corresponding articles adopted on first reading, disputes relating to State responsibility would have been indirectly submitted to a compulsory dispute settlement procedure when counter-measures had been taken. Countermeasures were indeed very controversial. The Special Rapporteur and, later, the Drafting Committee had attempted to reconcile the divergent views expressed by designing an operational system with conditions and limitations attached that were intended to keep countermeasures within generally acceptable bounds.

63. Article 50 [47] (Object and limits of countermeasures) defined the purpose of countermeasures and some of the conditions referred to in article 23 [30]. It corresponded to article 47 adopted on first reading and consisted of three paragraphs. Paragraph 1 specified that the purpose of countermeasures was to induce a State responsible for an internationally wrongful act to comply with its obligations under Part Two, and that meant that countermeasures did not have a punitive purpose. It also set out the first condition for taking countermeasures. The responsible State must have failed to comply with its obligations under Part Two. The wording “*may only*” take countermeasures” indicated their exceptional nature. As some members of the Commission had suggested in plenary that the wrongful act should be qualified, the Drafting Committee had discussed the matter at length, but had finally concluded that it would be better not to do so. Paragraph 1 was therefore a simple statement based on an objective criterion. Countermeasures could be taken when a wrongful act had actually been committed. It was clear that a State taking countermeasures did so at its own peril, if it turned out that its view of the wrongfulness of the act was not well founded.

64. Paragraph 2 defined the legal nature and bilateral character of countermeasures. Countermeasures were limited to the “suspension of performance” of one or more international obligations of the State taking the countermeasures “towards” the responsible State. As in the case of article 23 [30], the bilateral character of countermeasures enabled third States to be protected. The term “suspension of performance” of the obligation included both acts and omissions. Moreover, the word “suspension” was intended to emphasize the temporary nature of countermeasures. All of that would be explained in the commentary, where it would also be explained that countermeasures were not measures of retortion and hence that the limitations and conditions for taking countermeasures did not apply to retortion.

65. Paragraph 3 drew on article 72, paragraph 2, of the 1969 Vienna Convention, which provided that, when a State suspended the operation of a treaty, it must not, during the suspension, do anything to preclude its resumption. The paragraph referred to what some Commission members had called the “reversibility” of countermeasures. The Drafting Committee did not think that all countermeasures were or ought to be reversible in the strict sense of the word. That would have been an unrea-

sonable limitation. The consequences of countermeasures could not always be reversible. Countermeasures could sometimes cause irreversible collateral damage, even after they had been lifted, although it might be possible to resume compliance with the underlying obligation. For example, the suspension of a trade agreement might lead to the bankruptcy of a company in the State targeted by the suspension. However, such an effect did not preclude the resumption of the trade agreement between the two States after the suspension of countermeasures.

66. The phrase “as far as possible” in paragraph 3 indicated that, if the injured State had a choice between a number of lawful and effective countermeasures, it should select those which did not prevent the resumption of performance of the “obligations in question”, in other words, those which had been suspended as a result of countermeasures.

67. Article 51 [50] (Obligations not subject to countermeasures) corresponded to article 50 on prohibited countermeasures adopted on first reading. The Special Rapporteur had dealt with prohibited countermeasures in two articles, articles 47 bis and 50, but, during the debate in the Commission, many members had stated a preference for merging the two articles because the issues they addressed were closely linked.

68. Article 51 [50] was worded differently from the text adopted on first reading and comprised two paragraphs. Paragraph 1 provided that countermeasures could not involve any derogation from the obligations listed in the article. The verb “involve” was intended to cover both the object and the consequences of countermeasures; it gave the opening clause a broader meaning than the opening clause of article 50 adopted on first reading.

69. The word “derogation” was intended to convey that each of the obligations listed in the article was imposed by other rules and that article 51 was not intended to override them or, for that matter, to define them. It meant that countermeasures should in no way affect compliance with those obligations.

70. Subparagraph (a) corresponded to subparagraph (a) of article 50 adopted on first reading and dealt with the prohibition of the threat or use of force as embodied in the Charter of the United Nations. The text concerned forcible countermeasures. The Commission had discussed at length economic and political coercive measures, but there had been no agreement on their inclusion. In the view of the Drafting Committee, the concern that subparagraph (b) adopted on first reading had intended to address was covered in other provisions of the article, including the new subparagraph (b).

71. Subparagraph (b) corresponded to subparagraph (d) adopted on first reading. The Drafting Committee was concerned that, given the wide meaning acquired by the concept of human rights, resort to countermeasures would be severely limited unless the reference to human rights was qualified. In the English text, the term “basic human rights” had been replaced by the term “fundamental human rights”. The commentary would explain the scope of the qualifier “fundamental”. As in the text adopted on first reading, the important thing was that the effects of countermeasures should essentially be limited to the

injured State and the responsible State and should have only minimal effects on individuals. In particular, fundamental human rights must remain inviolable.

72. Subparagraph (c), which dealt with obligations of a humanitarian nature that prohibited reprisals, had not been included as a separate subparagraph in the text adopted on first reading. It had been subsumed in the subparagraph dealing with the protection of basic human rights. The view in the Commission had been that reprisals in respect of humanitarian law were a separate issue that could not be covered under the general concept of human rights.

73. Subparagraph (d) corresponded to subparagraph (e) adopted on first reading and dealt with peremptory norms of general international law. Some members of the Drafting Committee considered that subparagraphs (a) to (c) covered almost entirely the category of peremptory norms, but the majority had supported the retention of a more general clause. The Committee had also considered the possibility of aligning that subparagraph with article 43 [40] by referring to “any other obligation towards the international community as a whole”, but had found that wording too broad and had preferred the term “peremptory norms”, which was a narrower concept.

74. Subparagraph (e) dealt with the inviolability of diplomatic or consular agents, premises, archives and documents and corresponded to subparagraph (c) adopted on first reading, with some minor drafting changes. That subparagraph was essential, as diplomatic or consular agents were at risk of becoming a target for countermeasures. Without that limitation, relations between States could become very difficult.

75. The order of the categories in paragraph 1 was different from that in the text adopted on first reading. In the latter, the current paragraph 1 (d) on peremptory norms had been placed at the end of the list indicating “any other conduct in contravention of a peremptory norm of general international law”. However, the position of that subparagraph did not imply that all the other obligations listed in the preceding subparagraphs were imposed by peremptory norms. The Drafting Committee had thought it would be clearer to place the subparagraph dealing with peremptory norms immediately after those referring to matters that could be regarded as falling within the scope of peremptory norms, in other words, subparagraphs (a) to (c). Subparagraph (e) did not concern peremptory norms and should therefore be placed after subparagraph (d). That rearrangement strengthened the interpretation of subparagraph (b), on the protection of fundamental human rights, insofar as that subparagraph dealt only with the category of human rights that were protected from any derogation by virtue of their peremptory nature.

76. Paragraph 2 dealt with dispute settlement procedures applicable to the parties and underlined the importance of complying with those procedures when countermeasures were taken. Moreover, it implied that dispute settlement mechanisms could not themselves be the subject of countermeasures.

77. Article 52 [49] (Proportionality), the title of which had not been changed, corresponded to article 49 adopted on first reading. The latter had related proportionality to

the gravity of the wrongful act and the injury suffered. In the discussion in the Commission, the point had been made that, given the purpose of countermeasures, which was to induce the responsible State to comply with its obligations, proportionality should be assessed with reference to that purpose. The Drafting Committee had taken the view that the relevance of the purpose of countermeasures resulted mainly from the context and that it could adopt the language of ICJ in the *Gab Ž kovo-Nagymaros Project* case, according to which countermeasures should be commensurate with the injury suffered, taking into account the “rights in question”.

78. The revised text of the article thus related proportionality primarily to the injury suffered, while taking into account two further criteria: the gravity of the wrongful act and the rights in question. The words “taking into account” were not meant to be exhaustive and other factors might also be relevant in determining proportionality. Those factors had to be identified in the particular context of each case. On the question of deleting the reference to the gravity of the wrongful act, as proposed by some members of the Commission, opinion had been divided in the Drafting Committee, which had not been able to reach agreement on the subject. The reference in question had been retained because it had existed in the text adopted on first reading and had not been criticized by Governments. In addition, in the new text, gravity was only one of the criteria to be taken into account. The “rights in question” were the rights of the injured State and also the rights of the State responsible for the wrongful act. The term could also cover the rights of other States which might be affected. The Drafting Committee had placed that article before article 53 [48] (Conditions relating to resort to countermeasures), because it dealt with substantive issues, like the articles preceding it in chapter II, whereas the remaining articles in the chapter were of a procedural nature.

79. Article 53 [48] corresponded to article 48 adopted on first reading, which the Special Rapporteur had divided in two, incorporating paragraphs 3 and 4 of the text adopted on first reading into article 50 bis, on the suspension or termination of countermeasures. In reconsidering the two articles, the Drafting Committee had taken the view that the first two paragraphs of article 50 bis as proposed by the Special Rapporteur should be moved to article 53 so that all the procedural conditions for resorting to countermeasures were in the same article. In drafting article 53, the Committee had attempted to reconcile the wide differences of opinion expressed in the Commission and, in particular, had taken into account the criticisms made of article 48 adopted on first reading because it had linked countermeasures to compulsory dispute settlement procedures.

80. The Drafting Committee had considered that, before taking countermeasures, an injured State was required to request the responsible State, in accordance with article 44, to comply with its obligations under Part Two. The requirement of notification was covered by paragraph 1. The logic behind that paragraph was that, considering the exceptional nature and the potential consequences of countermeasures, they should not be taken before the injured State had given the other State notice of its claim, even though the time between giving such notice and taking countermeasures might be short. If the injured State

had already notified the responsible State of its claim, in accordance with article 44, it did not have to do so again in order to comply with article 53 [48], paragraph 1, for the purposes of countermeasures. In addition, the notification under paragraph 1 could also refer to the injured State’s decision to take countermeasures and hence fulfil one of the requirements set out in paragraph 2.

81. Paragraph 2 required that, once the injured State had decided to take countermeasures, it must notify the responsible State and also “offer” to negotiate with that State. The Drafting Committee had thus reworded the latter requirement in accordance with the prevailing view expressed in the Commission. Despite the concerns expressed by some members, the Committee had found the requirement in paragraph 2 to be useful and not excessively burdensome for the injured State, considering that countermeasures could have serious consequences for the other State. In addition, once again the temporal relationship between the implementation of paragraph 1 and that of paragraph 2 was not strict. Notifications could be made at fairly short intervals or even at the same time. Provision was also made for the injured State to take provisional and urgent measures to protect its rights. Some Committee members had found that exception unjustified because it was difficult to make a clear distinction between provisional and urgent countermeasures and other countermeasures.

82. Paragraph 3 dealt with what had been called “interim measures of protection” in the text adopted on first reading. In his proposal, the Special Rapporteur had said that the wording could be improved, but he had accepted that some countermeasures could be taken urgently by the injured State when it was necessary to protect its rights. That was why such measures were henceforth referred to as “provisional and urgent countermeasures”. Those countermeasures were not subject to the requirements set out in paragraph 2, but they could not be taken until the injured State had given notice of its claim in compliance with paragraph 1. They were subject to the same limitations as countermeasures in general. Countermeasures were in principle supposed to be provisional, but that characteristic had been emphasized in paragraph 3. The temporal element was also crucial in relation to that paragraph. The injured State could lose the opportunity to protect its rights if it did not act quickly. The commentary would further explain that point and in particular the relationship between paragraphs 1 and 3. The “rights” referred to included the rights of the injured State under Part Two.

83. Paragraph 4 was a revised version of paragraph 3 of article 48 proposed by the Special Rapporteur, which had been the subject of some controversy in debate in the Commission. Its purpose was to discourage countermeasures while the parties were negotiating in good faith. It did not apply to the countermeasures referred to in paragraph 3. Thus, the injured State could take provisional and urgent countermeasures even during negotiations. One member of the Committee had objected to paragraph 4 on the grounds that it did not conform with the views expressed by the arbitral tribunal in the *Air Service Agreement* case and that it was unreasonable.

84. Paragraph 5 dealt with the case in which the wrongful act had ceased and the dispute had been submitted to a court or tribunal with the authority to make decisions that were binding on the parties. Once those conditions had been met, the injured State could not take countermeasures or, if it had already taken some, it must suspend them within a reasonable time. The reasoning behind that was that, once the parties had submitted their dispute to a court, it was for the court to order provisional measures to protect the rights of the injured State, if so requested. The phrase “within a reasonable time” which qualified the suspension of countermeasures was intended to take account of the time that might be necessary to allow the tribunal to be established and to consider the possibility of taking the provisional measures in question or any others that might be necessary. The paragraph assumed that the court or tribunal concerned had jurisdiction over the dispute and also the power to order provisional measures. The reference to “a court or tribunal” was a functional one, referring to any third party dispute settlement mechanism, whatever its designation, with the power to make decisions that were binding on the parties in the case. However, it did not refer to political organs such as the Security Council.

85. Paragraph 6 was based on paragraph 4 of article 48 adopted on first reading and on paragraph 2 of article 50 bis proposed by the Special Rapporteur. However, it was drafted in more general terms and set forth the obligation of the responsible State to comply in good faith with the dispute settlement procedures agreed between the parties themselves. It dealt with the case in which the parties were before a competent court or tribunal and where the court or tribunal had ordered provisional measures or rendered a decision, but the responsible State had not complied with that decision. It also applied to situations in which a State party failed to cooperate in the establishment of the tribunal or failed to appear before it once it had been established. In the circumstances to which it referred, the limitations on the taking of countermeasures under paragraph 5 did not apply.

86. Article 54 (Countermeasures by States other than the injured State) was a new provision that had not appeared in the text adopted on first reading and concerned the countermeasures taken by States other than the injured State that were entitled to invoke the responsibility of a State under article 49. The Special Rapporteur had dealt with that question in his draft articles 50 A and 50 B, dealing, respectively, with countermeasures taken on behalf of the injured State and countermeasures taken in cases of a serious breach of obligations owed to the international community as a whole. After some discussion, the Drafting Committee had concluded that the two articles proposed by the Special Rapporteur did not cover all situations and overlapped to some extent. Moreover, the issue of cooperation, which had been dealt with in article 50 B, was also relevant in the situations provided for in article 50 A. The Committee had therefore decided to merge the two articles.

87. In the view of the Special Rapporteur and the Drafting Committee, when there was no injured State within the meaning of article 43 [40], a distinction had to be made between breaches of obligations affecting several States or the international community as a whole, on the one hand, and serious breaches of obligations owed to the interna-

tional community as a whole that were essential for the protection of its fundamental interests as defined in article 41, on the other. It was only with regard to the latter breaches that countermeasures by States that were not injured States within the meaning of article 43 [40] could be justified. With regard to the other breaches, a State entitled to invoke responsibility under article 49 could take countermeasures only if there was an injured State.

88. When there was an injured State, any other State to which the obligation was owed could take countermeasures, subject to certain conditions. Those conditions were: first, such countermeasures must be taken at the request and on behalf of the injured State and, secondly, the injured State must itself be entitled to take countermeasures. In other words, a form of cooperation with the injured State was provided for. The wishes of the injured State therefore played a significant role in the decision to take countermeasures and in the choice of countermeasures.

89. With regard to the breaches referred to in article 41, the Drafting Committee had been of the view that any State could take countermeasures in the interest of the beneficiaries of the obligation breached. In the text he had proposed on that particular issue, the Special Rapporteur had limited that possibility to cases where there was no injured State within the meaning of article 43 [40]. The members of the Drafting Committee had been divided on the issue. One view had been that, when there was an injured State within the meaning of article 43 [40], its wishes should be paramount in deciding whether to take countermeasures and what form they would take. Another view had been that, in cases of a serious breach of obligations intended to protect the fundamental interests of the international community as a whole, the wishes of the injured State had little or no relevance. The Drafting Committee had concluded that, in the case of such breaches, the injured State did not have the same role as in paragraph 1 and that the words “in the interest of the beneficiaries” implicitly referred to the interests of the injured State. That point would be further explained in the commentary. Those were the two situations dealt with in paragraphs 1 and 2 of article 54.

90. A further issue raised by that article concerned coordination between States when several of them took countermeasures. Like the Commission, the Drafting Committee did not think it would be possible to address that matter in detail. To begin with, any decision on questions of priority and coordination depended on the actual circumstances and a number of other factors. All that could reasonably be required was that States should generally cooperate when they intended to take countermeasures, so that those measures, individually or collectively taken, complied with the conditions laid down in chapter II for taking countermeasures. One of the key concerns had of course been the need for proportionality. Paragraph 3 was couched in general terms and covered the situations dealt with in paragraphs 1 and 2. It could also be applied, at least by analogy, when two or more injured States, as defined in article 43 [40], took countermeasures. Those States should also cooperate in accordance with the principle set out in paragraph 3.

91. It should be mentioned that one of the issues that had been discussed in the context of that article was

the extent to which the right to take countermeasures should be limited to collective measures taken under the auspices of the United Nations or of a regional organization or whether they should be without prejudice to such measures. The Drafting Committee had not been able to reach agreement on that point. First, it involved complex questions which had not been considered by the Commission or by the Special Rapporteur in his reports and the Committee had not had enough time to study the questions of principle involved adequately. Secondly, it would in any case have been very difficult to state general rules applicable to all situations. Thirdly, any venture in that direction would have taken the Commission very far into the area of progressive development. Fourthly, in the view of some members of the Committee, the matter was in any case outside the scope of the topic.

92. The last article of chapter II was article 55 [48] (Termination of countermeasures) which corresponded to paragraph 3 of article 50 bis proposed by the Special Rapporteur. It dealt with the case where the responsible State had complied with its obligations under Part Two. There were no grounds in such a case for maintaining countermeasures and they should therefore be terminated.

93. Part Four of the draft (General provisions) consisted of four articles.

94. The first was article 56 [37] (*Lex specialis*) which corresponded to article 37 adopted on first reading. The Drafting Committee had simplified the text of the article, the purpose of which was to indicate the relationship between the draft articles and other rules relating to State responsibility, on the assumption that those rules had the same legal rank, if not a higher rank as those embodied in the draft articles. Under article 56 [37], the draft articles did not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its consequences were determined by special rules of international law. The special rule would determine the extent to which it derogated from the more general rules on State responsibility set forth in the draft articles.

95. Article 57 (Responsibility of or for the conduct of an international organization) had not been in the text adopted on first reading. It had been adopted by the Drafting Committee at the fiftieth session of the Commission as article A.⁵ The Committee had changed only the opening clause of the English text to bring it into line with the wording used in other articles. The words "These articles shall not prejudice any question" had been replaced by the words "These articles are without prejudice to any question".

96. With regard to article 58 (Individual responsibility), the Drafting Committee had been unable to accept the proposal made by some members of the Commission that a paragraph should be inserted in article 51, as adopted on first reading, providing for the "transparency" of States in cases of serious breaches of obligations towards the international community as a whole. However, it had found it useful to state in the context of the general provisions that the articles did not address the question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State. While that could already be inferred from the fact that the articles

dealt only with the responsibility of States, the Committee had considered that a specific provision would make the point more clearly. That was the purpose of article 58, which was also a "without prejudice" clause.

97. The Special Rapporteur had proposed an article expressly stating that the articles did not affect the primary rules of which a breach might give rise to State responsibility. That article, article B, had been entitled "Rules determining the content of any international obligation". However, the relationship between primary and secondary rules was complex and it could be held that some articles impinged on questions relating to primary rules. The Drafting Committee had found it impossible to state the proposed principle in a short, concise and clear way. It had therefore decided that it would be preferable to deal with that issue in the commentary to Part One, where it could be explained in greater detail. Article B had therefore been deleted.

98. The last article in Part Four was article 59 [39] (Relation to the Charter of the United Nations) which corresponded to article 39 adopted on first reading. During the second reading, some members of the Commission had found it unnecessary, while others had thought that, since it had acquired special importance in the context of the articles adopted on first reading, it would be better to retain it with some modification. It now took the form of a "without prejudice" clause and was not intended to affect the relationship between the articles and the Charter of the United Nations. In any case, that relationship did not depend on features that could be said to be specific to the issues dealt with in the draft articles.

99. As article 59 [39] was a "without prejudice" clause, the Drafting Committee had found it useful, as suggested by some members of the Commission, to delete the reference to Article 103 of the Charter of the United Nations and to refer to the Charter as a whole.

100. The CHAIRMAN said that, as recommended by the Chairman of the Drafting Committee, the Commission would simply take note of the report of the Drafting Committee and take a decision on the draft articles on State responsibility only at its next session. The substantive discussion on the draft articles would therefore take place at that session.

The meeting rose at 1.10 p.m.

2663rd MEETING

Thursday, 17 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Candiotti, Mr. Crawford, Mr. Dugard, Mr. Economides,

⁵ See footnote 3 above.

Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kamto, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

CHAPTER IV. *State responsibility (continued)** (A/CN.4/L.593 and Corr.1 and Add. 1–6)

1. The CHAIRMAN announced that a brief exchange of views could be held on the desirability of further action regarding the report of the Drafting Committee (A/CN.4/L.600), setting out the draft articles provisionally adopted by the Drafting Committee on second reading.

2. Following a procedural discussion in which Mr. BROWNLIE, Mr. DUGARD, Mr. ECONOMIDES, Mr. GALICKI, Mr. GOCO, Mr. HAFNER, Mr. KUSUMA-ATMADJA, Mr. MOMTAZ, Mr. PELLET, Mr. Sreenivasa RAO, Mr. RODRÍGUEZ CEDEÑO, Mr. ROSENSTOCK, Mr. SIMMA, Mr. TOMKA, and Mr. CRAWFORD (Special Rapporteur) took part, the CHAIRMAN suggested that the Commission might wish to take up the matter briefly at the next meeting.

It was so agreed.

B. Consideration of the topic at the present session (*continued*)*

3. The CHAIRMAN invited members to resume consideration of the paragraphs in chapter IV, section B.

Paragraph 8 (*concluded*)* (A/CN.4/L.593/Add.3)

4. The CHAIRMAN read out a proposal by the Special Rapporteur for a new paragraph 8: “As regards existing paragraph 2 (c), the Special Rapporteur recommended that this simply provide for the award of damages by way of satisfaction where appropriate. The words ‘in cases of gross infringement’ unduly limited the normal functions of satisfaction in respect of injuries which could not be qualified as ‘gross’ or ‘egregious’; such a limitation was contrary to the relevant jurisprudence. In his view, the award of substantial (and not merely nominal) damages in appropriate cases was an aspect of satisfaction. On the other hand, paragraph 2 (c) did not include punitive damages, a subject that would be taken up later in the context of a possible category of ‘egregious breach’. If awards of punitive damages were to be allowed at all, special conditions needed to be attached to them.”

Paragraph 8, as amended, was adopted.

Paragraphs 71 to 74

Paragraphs 71 to 74 were adopted.

Paragraph 75

5. Mr. HAFNER proposed that, in order to record certain objections voiced about article 46 bis, subparagraph (b), a sentence should be added at the end of the paragraph, to read: “However, the view was also expressed that subparagraph (b) could create difficulties insofar as it would require States to take precautionary measures with regard to all possible kinds of breaches of international law in order to obtain full reparation.”

6. Mr. CRAWFORD (Special Rapporteur) endorsed that proposal.

Paragraph 75, as amended, was adopted.

Paragraph 76

Paragraph 76 was adopted.

Paragraph 77

7. Mr. SIMMA proposed that the word “general”, in the third sentence, should be deleted and that the word “taken”, in the fourth sentence, should be replaced by “understood”.

Paragraph 77, as amended, was adopted.

Paragraphs 78 to 82

Paragraphs 78 to 82 were adopted.

Paragraphs 83 and 84

8. Mr. KAMTO suggested editing changes to the French version of both paragraphs.

9. Mr. SIMMA proposed that in the first sentence of paragraph 83, the words “historical abuses” should be replaced by the words “abuses in the past”.

Paragraphs 83 and 84, as amended, were adopted.

Paragraphs 85 to 90

Paragraphs 85 to 90 were adopted.

Paragraphs 1 and 2 (A/CN.4/L.593/Add.4)

Paragraphs 1 and 2 were adopted.

Paragraph 3

10. Mr. PELLET proposed an editing change to the French version of the fourth sentence and deletion of the word “generally”. In the fifth sentence, the words “In the normal case” should be replaced by “However”.

11. Mr. CRAWFORD (Special Rapporteur) endorsed those proposals and said that to ensure concordance of the fourth sentence, the English version should read: “. . . could not absolutely insist on a specific form of

* Resumed from the 2661st meeting.

satisfaction, though it was entitled to insist on some form of satisfaction”.

It was so agreed.

12. Mr. ECONOMIDES said the last part of the last sentence was unclear.

13. Mr. CRAWFORD (Special Rapporteur) said the French version should be aligned on the English, which drew a distinction between continuing performance of the primary obligation and election as between the forms of reparation.

14. In response to a query by Mr. Sreenivasa RAO, he said the discussion outlined in paragraph 3 had been on the different forms of reparation, namely restitution, compensation and satisfaction, within the context of satisfaction. Satisfaction itself could take different forms, and to avoid confusion, they had subsequently been called modalities. The last three sentences of the paragraph addressed the much-debated issue of the extent to which the injured State had the right to elect compensation or restitution. The third and fourth sentences were concerned with whether the injured State was entitled to specify the form of satisfaction it desired: for example, prosecution of a specific official. The Commission had taken the view that the injured State did in general have the right to elect as between the forms of reparation, but that that right was not to be carried to the extent of allowing the injured State to dictate a specific modality of satisfaction, unless that modality was an aspect of performance itself.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 6

Paragraphs 4 to 6 were adopted.

Paragraph 7

15. Mr. PELLET said that the reference to “delay”, in the last sentence, should be to “undue delay”.

Paragraph 7, as amended, was adopted.

Paragraph 8

16. Mr. GALICKI said that the convention mentioned in the paragraph should be properly referred to as the “Convention on International Liability for Damage Caused by Space Objects” as was the case in paragraph 33.

17. Mr. PELLET said there was no reason to use only English terms in the third sentence of the French version when perfectly valid French terms could be employed.

18. Mr. CRAWFORD (Special Rapporteur), referring to Mr. Pellet’s comment, said that it was necessary to check how the term “joint and several liability” was translated in the Convention on International Liability for Damage Caused by Space Objects, as the original wording in both the English and the French would have to be used.

19. The CHAIRMAN said that the secretariat would look into the matter.

Paragraph 8, as amended, was adopted.

Paragraphs 9 and 10

Paragraphs 9 and 10 were adopted.

Paragraph 11

20. Mr. BROWNLIE suggested that, in the third sentence, the phrase “was complained of” should be replaced by “was the subject of complaint”.

Paragraph 11, as amended, was adopted.

Paragraph 12

Paragraph 12 was adopted with a minor editing change.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

Paragraph 14 was adopted with a minor editing change.

Paragraphs 15 to 20

Paragraphs 15 to 20 were adopted.

Paragraph 21

Paragraph 21 was adopted with a minor editing change.

Paragraphs 22 to 25

Paragraphs 22 to 25 were adopted.

Paragraph 26

21. Mr. HAFNER said that the Latin phrase should be *non ultra petita*.

22. Mr. PELLET said that, as the paragraph stood, only the less orthodox opinion was reflected. He therefore suggested that a further sentence should be added at the end, to read: “Other members, however, felt that the principle was an integral part of positive law.”

Paragraph 26, as amended, was adopted.

Paragraphs 27 to 31

Paragraphs 27 to 31 were adopted.

Paragraph 32

23. Mr. SIMMA said that, in the context of the European Convention on Human Rights, it would be more appropriate to refer to an *erga omnes partes* obligation. Secondly, the phrase “in a restrictive sense”, in the fourth sentence, should be deleted, because the Commission had not discussed the right to invoke responsibility in those terms.

24. Mr. GAJA said he was opposed to adding the word *partes*: the obligation could apply in contexts other than that of the European Convention on Human Rights and a gross violation of an *erga omnes* obligation could exist without parties.

25. Mr. PELLET suggested that the paragraph should open with the words “However” rather than “At the same time”. Paragraph 32, after all, was qualifying the views expressed in paragraph 31.

26. Mr. CRAWFORD (Special Rapporteur) endorsed Mr. Pellet’s suggestion. As for Mr. Simma’s points, he agreed about deleting the phrase “in a restrictive sense”. On the other hand, he agreed with Mr. Gaja that the sentence did not relate to the European Convention on Human Rights alone, so the word *partes* was unnecessary. In addition, he would, on second thoughts, delete the end of the third sentence from “while the home State”. The first part of the sentence adequately explained the situation under the Convention and further explanation was unnecessary.

27. Mr. HAFNER said the significance of the phrase “in a restrictive sense” was that the right to invoke responsibility concerned only States with a legal interest. Others had that right only in certain circumstances. The “general regime”, meanwhile, meant the regime of international law and in fact related to the exercise of diplomatic protection. It explained the various rights States had vis-à-vis the one and the same breach of international law.

28. Mr. CRAWFORD (Special Rapporteur) said Mr. Hafner’s explanation had clarified the issue, but the summary remained unclear and, considering the sentence that followed, the proposed deletion was untenable. He therefore suggested a new sentence following the words “inter-State complaint” to read: “In addition the State of nationality had the right to invoke the responsibility of another State for injury to its nationals under general international law.”

29. Mr. ECONOMIDES suggested the following rewording of the second half of the new sentence: “of the State in question under the general regime of responsibility”.

30. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides’ proposed amendment might well be better than his own. He left it to the secretariat to decide.

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

31. Mr. GAJA said that the second sentence seemed to be based on remarks of his, but, as the text stood, it made no sense. He therefore suggested that the sentence should be amended to read: “There may be a plurality of wrongful acts by different States contributing to the same damage.”

32. Mr. Sreenivasa RAO suggested that the same effect would be achieved if the second half of the sentence were simply deleted.

33. Mr. GAJA said that his suggested amendment led on naturally to the example of the *Corfu Channel* case, which could be read in various ways.

Paragraph 34, as amended, was adopted.

Paragraph 35

34. Mr. PELLET said that it was inadequate to say that certain general principles of law “included” domestic law analogies. He would replace the word “included” by the phrase “were based on”. Secondly, the phrase “were of limited relevance” would be an improvement on “are less relevant”.

Paragraph 35, as amended, was adopted.

Paragraph 36

35. Mr. PELLET wondered why only Parts One and Two were mentioned at the end of the paragraph, and not Part Two bis.

36. Mr. CRAWFORD (Special Rapporteur) said that the substantial references were to Parts One and Two, but it would be perfectly acceptable to replace those words by the phrase “the whole of the text”.

Paragraph 36, as amended, was adopted.

Paragraph 37

37. Mr. BROWNLIE said that the word “of” had been omitted between the words “topic” and “diplomatic”, in the second sentence. In that connection, the concepts of “diplomatic protection” and “national legislation” sat oddly together.

38. Mr. CRAWFORD (Special Rapporteur) concurred that the phrase “national legislation” was out of place and suggested deleting it.

Paragraph 37, as amended, was adopted.

Paragraph 38

Paragraph 38 was adopted.

Paragraph 39

39. Mr. PELLET said it would be more accurate to say that the requirement for contribution was a common law

notion not a civil law one. He therefore suggested an amendment to that effect. He also questioned the use of the term *romaniste* in the French text.

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41

Paragraphs 40 and 41 were adopted.

Paragraph 42

40. Mr. PELLET said that the antepenultimate sentence beginning "If the injured State had already suffered financially assessable loss" would be much clearer if those words were followed by the phrase "which had not been fully compensated by restitution".

41. Mr. CRAWFORD (Special Rapporteur) said that, although he did not object to the proposed amendment, the fact was that if a State's property had been seized, for example, the State suffered the loss of that property even if the property was later restored.

Paragraph 42, as amended, was adopted.

Paragraph 43

42. Mr. PELLET queried the phrase *principe de déduction*, in the last sentence of the French version. A better wording would be *cette déduction implicite*.

43. Mr. CRAWFORD (Special Rapporteur) said that the matter was a problem of translation and should be referred to the secretariat.

Paragraph 43 was adopted on that understanding.

Paragraph 44

44. Mr. BROWNLIE said that, in the third sentence, the statement that diplomatic protection was a "compartment" of State responsibility was perhaps excessively dogmatic. It might be better to speak in terms of a relationship or complementarity.

45. Mr. CRAWFORD (Special Rapporteur) suggested that the phrase "it was a compartment of State responsibility" should be replaced by a sentence reading: "A State acting on behalf of one of its nationals was nonetheless invoking State responsibility."

46. Mr. PELLET said that the Special Rapporteur had indeed expressed that sentiment precisely to reassure members such as himself who strongly believed that, as the French text put it, diplomatic protection was an "element" of State responsibility.

47. Mr. KAMTO suggested that the issue might be clarified by saying that "diplomatic protection was not a topic separate from that of State responsibility".

48. Mr. PELLET said that, although Mr. Kamto's phraseology was right in terms of the Commission's own usage, it might confuse the general reader.

49. Mr. CRAWFORD (Special Rapporteur) said that he would prefer the amendment he had proposed earlier.

50. Mr. ECONOMIDES said that there was some mistake in the French text of the next sentence. Perhaps the word *force* should read *fortes*.

Paragraph 44, as amended, was adopted.

Paragraphs 45 and 46

Paragraphs 45 and 46 were adopted.

Paragraph 47

51. Mr. PELLET said that, according to the French version, there were cases where the individual entity injured recovered more than the damage suffered. He found it difficult to envisage such a situation.

52. Mr. CRAWFORD (Special Rapporteur) said that that did not correspond with the English text. It related to the problems that arose when an individual and a State were involved in separate proceedings before different forums, in which case the principle of double recovery would apply. The translation into French was probably inaccurate.

Paragraph 47 was adopted.

Paragraphs 1 and 2 (A/CN.4/L.593/Add.5)

Paragraphs 1 and 2 were adopted.

Paragraph 3

53. Mr. PELLET said that, in the French text, the word *créait* would be preferable to the words *avait créé*, at the beginning of the third sentence.

Paragraph 3, as amended, was adopted.

Paragraphs 4 and 5

Paragraphs 4 and 5 were adopted.

Paragraph 6

54. Mr. LUKASHUK said that the Special Rapporteur had rightly emphasized the importance of the 1969 Vienna Convention, yet had greatly departed from the provisions of the Convention. Justification for such a departure should be given; and he could find none.

55. Mr. CRAWFORD (Special Rapporteur) said Mr. Lukashuk was pointing to a possible deficiency in what he had said in his introduction, which was nevertheless accurately reflected in paragraph 6.

Paragraph 6 was adopted.

Paragraphs 7 to 15

Paragraphs 7 to 15 were adopted.

Paragraph 16

56. Mr. BROWNLIE proposed amending the words “based on that of ICJ” to read “based on the formulation of ICJ” in the last sentence.

Paragraph 16, as amended, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted with a minor editing change.

Paragraph 19

57. Mr. PELLET suggested amending the word *rapportait*, in the first sentence of the French version, to read *résultait du fait*.

58. Mr. MOMTAZ proposed amending the expression *prolifération des régimes juridiques dans la vie internationale*, in the third sentence of the French version, to bring it into line with the English text.

59. Mr. BROWNLIE said that the words “a reflection”, in the first sentence, should be amended to read “an indication”.

Paragraph 19, as amended, was adopted.

Paragraph 20

Paragraph 20 was adopted.

Paragraph 21

60. Mr. ECONOMIDES, supported by Mr. KAMTO, referred to the fourth sentence of the French text and said that not one but a significant number of members had wished to see a return to the linkage of countermeasures with dispute settlement.

61. Mr. CRAWFORD (Special Rapporteur) said there was an error in the French version. In an attempt to introduce some stylistic variety, the English text of the corresponding sentence used the formulation “A preference was expressed”. A better formulation would be: “Several members expressed a preference”.

Paragraph 21, as amended, was adopted.

Paragraph 22

62. Mr. KUSUMA-ATMADJA proposed that the words “the delinkage of countermeasures” in the first sentence should read “that delinking countermeasures”.

Paragraph 22, as amended, was adopted.

Paragraph 23

63. Mr. PELLET said that the word “action” towards the end of the paragraph should perhaps read “countermeasure”.

64. Mr. CRAWFORD (Special Rapporteur) confirmed that the word “action” was incorrect and should in fact read “allegedly wrongful act”.

Paragraph 23, as amended, was adopted.

Paragraph 24

65. Mr. PELLET said the last sentence of the paragraph should reflect the fact that some members, himself among them, had taken the opposite view.

66. Mr. CRAWFORD (Special Rapporteur) proposed inserting a semi-colon after “crimes” and concluding the sentence with the words “others took the contrary position”.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

67. Mr. PELLET proposed adding, at the end of the paragraph, the sentence: “Moreover, one member considered that in actual fact the circumstance precluding wrongfulness was not the countermeasure itself but the internationally wrongful act to which it riposted.”

68. Mr. CRAWFORD (Special Rapporteur), responding to a comment by Mr. ROSENSTOCK, proposed adding the phrase “, and by the Tribunal in the *Air Service Agreement case*”, after the words “*Gab Ž kovo-Nagymaros case*”.

Paragraph 26, as amended, was adopted.

Paragraphs 27 to 31

Paragraphs 27 to 31 were adopted.

Paragraph 32

69. Mr. PELLET said that the use of the term “bilateral” in the last sentence was not strictly correct. The obligations in question might also be multilateral. A better expression would be “obligations in force binding the responsible State and the injured State”.

70. Mr. CRAWFORD (Special Rapporteur) said that the sentence accurately reflected his remarks in the debate, irrespective of the merits of those remarks. The reference was not to bilateral treaties, but to bilateral obligations, which might arise from multilateral treaties but which were by definition not obligations owed to the international community as a whole, and, *a fortiori*, not peremptory norms. All that was required was to delete the definite article before “bilateral”.

71. Mr. SIMMA said that the use of the expression “bilateral obligations in force” was an open invitation to misunderstanding. A better formulation would be: “stating that countermeasures could only affect obligations in force”.

72. Mr. CRAWFORD (Special Rapporteur) said the problem was that an obligation towards the international community as a whole was by definition an obligation in force between the two States. Mr. Simma's formulation needed to be qualified by adding the word "bilaterally" or "exclusively".

73. Mr. SIMMA said he could accept the formulation "obligations in force between the responsible State and the injured State".

Paragraph 32, as amended, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

74. Mr. KAMTO said that the debate on the question as to what happened when there was no dispute settlement clause binding the parties was not reflected in the paragraph.

75. Mr. CRAWFORD (Special Rapporteur) said that the paragraph was concerned with the first of two related but distinct debates. It might, however, be advisable to ascertain whether the debate to which Mr. Kamto had referred was reflected adequately in the relevant paragraph of the report, namely, paragraph 21.

76. Mr. MOMTAZ supported the Special Rapporteur's suggestion with regard to the debate to which Mr. Kamto had referred.

77. The CHAIRMAN said that the secretariat would take note of the suggestion relating to paragraph 21.

Paragraph 34 was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 36

78. Mr. ECONOMIDES said that the end of the paragraph did not provide a proper reflection of the debate. He therefore proposed adding a sentence at the end of the paragraph to read: "This opinion was contested by some other members".

Paragraph 36, as amended, was adopted.

Paragraph 37

Paragraph 37 was adopted.

Paragraph 38

79. Mr. PELLET said that both the French expression *un article 50 confiné* and the English expression "a reunited article 50" left a great deal to be desired. The phrase should be amended to read "a single article combining articles 47 bis and 50".

Paragraph 38, as amended, was adopted.

Paragraphs 39 to 41

Paragraphs 39 to 41 were adopted.

Paragraph 42

80. Mr. ECONOMIDES said that the shortened draft presented by the Special Rapporteur should be reproduced in a footnote.

81. Mr. CRAWFORD (Special Rapporteur) proposed inserting a footnote with a cross-reference to footnote 12.

Paragraph 42, as amended, was adopted.

Paragraphs 43 and 44

Paragraphs 43 and 44 were adopted.

Paragraph 45

82. Mr. GAJA proposed that the word "minimum" should be deleted from the second sentence.

Paragraph 45, as amended, was adopted.

Paragraphs 46 to 48

Paragraphs 46 to 48 were adopted.

Paragraph 49

83. In response to a comment by Mr. MOMTAZ, Mr. CRAWFORD (Special Rapporteur) proposed that the first sentence should be amended to read: "The Special Rapporteur recalled that most States had, either reluctantly or definitively, accepted ...".

Paragraph 49, as amended, was adopted with an additional editing change to the French version.

Paragraph 50

Paragraph 50 was adopted.

Paragraph 51

84. Mr. PELLET, referring to the last sentence of the paragraph, said he was still at a loss to grasp what "underlying idea" lay behind the proposal to make a distinction between articles 47 bis and 50.

85. Mr. CRAWFORD (Special Rapporteur) proposed that the last sentence should be deleted.

Paragraph 51, as amended, was adopted.

Paragraphs 52 to 54

Paragraphs 52 to 54 were adopted.

Paragraph 55

86. Mr. PELLET asked what was meant by “commensurability”.

87. Mr. ROSENSTOCK said that the paragraph could be redrafted so as better to reflect the underlying idea that countermeasures must be both proportional to and commensurate with the situation created by the initial wrongful act.

Paragraph 55, as amended, was adopted.

Paragraph 56

Paragraph 56 was adopted.

The meeting rose at 6.05 p.m.

2664th MEETING

Friday, 18 August 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

Draft report of the Commission on the work of its fifty-second session (concluded)

CHAPTER IV. State responsibility (concluded) (A/CN.4/L.593 and Corr.1 and Add.1–6)

B. Consideration of the topic at the present session (concluded)

1. The CHAIRMAN invited members to resume consideration of chapter IV, section B.

Paragraphs 1 to 6 (A/CN.4/L.593/Add.6)

Paragraphs 1 to 6 were adopted.

Paragraph 7

2. Mr. BROWNLIE said that the word “Yet”, at the beginning of the paragraph, should be deleted.

Paragraph 7, as amended, was adopted.

Paragraph 8

3. Mr. PELLET, supported by Mr. CRAWFORD (Special Rapporteur), said that the words *il fallait* in the first sentence, should be replaced by *il faudrait*.

Paragraph 8, as amended, was adopted.

Paragraph 9

Paragraph 9 was adopted.

Paragraph 10

4. Mr. PELLET said that the expression “collective countermeasures” was misleading and, in order to avoid any recurrence of controversy, it should be briefly defined in paragraph 10. He therefore proposed that the word “collective”, in the third sentence, should be placed between quotation marks and the end of the sentence should be recast to read: “in that they could be taken by any of the States involved in some collective interest, and had a direct analogy to collective self-defence”.

Paragraph 10, as amended, was adopted.

Paragraphs 11 and 12

Paragraphs 11 and 12 were adopted.

Paragraph 13

5. Mr. ECONOMIDES said that, in his opinion, the expression “acting in a fiduciary capacity”, in the second sentence, was not clear. It should be replaced by “acting on behalf of the latter” or a similar expression.

6. Mr. CRAWFORD (Special Rapporteur) said that, like Mr. Economides, he thought the expression “in a fiduciary capacity” was not clear, but proposed that it should be replaced by a broader expression, namely “or the international community as a whole”.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 20

Paragraphs 14 to 20 were adopted.

Paragraph 21

7. Mr. BROWNLIE said that the word “as” should be inserted after “magnitude”, in the last sentence, in the English version.

Paragraph 21, as amended, was adopted.

Paragraph 22

8. Mr. BROWNLIE said that the word “well-foundedness”, in the penultimate sentence, should be replaced by “lawfulness”.

9. Mr. PELLET said that in the fourth sentence the word “retortions” was not felicitous, as the measures involved were lawful. He proposed that it should be replaced by the word “measures”.

10. Mr. RODRÍGUEZ CEDEÑO (Rapporteur), speaking as a member of the Commission, said that the opinion he had expressed during the debate was not properly reflected in paragraph 22 and he would like a new sentence to be inserted after the fourth sentence. It would read: “This view did not reflect a universal opinion among States, or the decisions of, for example, the Commission on Human Rights.”

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Paragraph 24

11. Mr. PELLET said that the fourth and fifth sentences were obscure and proposed that they should read: “Furthermore, the term ‘collective countermeasures’ was considered a misnomer, since it implied a link to bilateral countermeasures. Instead, the action envisaged was a reaction to a violation of collective obligations, and could be undertaken by a single State or a group of States.”

12. Mr. KAMTO, referring to the beginning of the third sentence, proposed that it should say that the principle of *non bis in idem* “could be applied by analogy”, instead of “should apply”.

13. Mr. CRAWFORD (Special Rapporteur) said that he endorsed those two proposals.

Paragraph 24, as amended, was adopted.

Paragraph 25

Paragraph 25 was adopted.

Paragraph 26

14. Mr. RODRÍGUEZ CEDEÑO (Rapporteur), said that, generally speaking, the paragraph was far too long. The second part, setting out the Special Rapporteur’s opinion, ought to appear in the passage on the Special Rapporteur’s presentation of the articles in question.

15. Mr. CRAWFORD (Special Rapporteur) said that the opinion set out in that part of the paragraph had been expressed in the course of the discussion. Accordingly, it had its place in paragraph 26. However, since the paragraph

was indeed too long, he proposed that it should be split in two, about halfway through, at the sentence starting: “By contrast the Special Rapporteur pointed out that Article 50 . . .”, which formed a kind of natural break.

16. Mr. ECONOMIDES said the antepenultimate sentence was obscure, in terms of both content and placing. In his opinion, it should be deleted.

17. Mr. PELLET said that it would be enough to place the sentence in question between the eighth and ninth sentences.

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

Paragraph 26, as amended, was adopted.

Paragraph 27

19. Mr. MOMTAZ said that he would like the secretariat to check the date and exact title of the *South West Africa* cases, mentioned in the first sentence.

20. Mr. DUGARD referring to a comment by Mr. KAMTO, who wondered about the use of the word “philosophy” in the first line, said it was indeed the term he had used in the course of the discussion, and he proposed that it should be retained.

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

Paragraph 27, was adopted subject to the check by the secretariat.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

22. Mr. PELLET proposed that the second sentence should be made clearer by splitting it in two, to read: “While the commission of a crime could not in itself be a basis for the autonomous competence of international courts, it opened the way for an *actio popularis*. Furthermore, it was possible to foresee a form of dispute settlement on the analogy of article 66 of the 1969 Vienna Convention.”

Paragraph 30, as amended, was adopted.

Paragraphs 31 to 36

Paragraphs 31 to 36 were adopted.

Paragraph 37

23. Mr. PELLET said that the second sentence should be made clearer by adding the words “with regard to States” at the end of the sentence.

Paragraph 37, as amended, was adopted.

Paragraph 38

24. Mr. GAJA said that the first sentence was inadequate. It should be replaced by a broader formulation reading: “It was further suggested that provision be made in article 51 to the effect that individuals involved in the commission of a serious breach by a State would not be entitled to rely, in criminal or civil proceedings in another State, on the fact that they had acted as State organs.”

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

Paragraph 38, as amended, was adopted.

Paragraph 39

26. Mr. ECONOMIDES said he failed to understand what was meant by the expression “and their breach therefore significant”, in the penultimate sentence, and it should read “their breach concerned all States”.

Paragraph 39, as amended, was adopted.

Paragraphs 40 to 52

Paragraphs 40 to 52 were adopted.

Paragraph 53

27. Mr. ECONOMIDES noted that, contrary to the practice followed so far, the text of the article in question did not appear as a note, something that would facilitate consultation.

28. The CHAIRMAN asked the secretariat to fill in that gap.

Paragraph 53 was adopted on that understanding.

Paragraphs 54 to 60

Paragraphs 54 to 60 were adopted.

29. The CHAIRMAN invited members to decide on the paragraphs in chapter IV, section B, that had been left in abeyance.

Paragraph 21 (*concluded*) (A/CN.4/L.593/Add.5)

30. Further to a proposal by Mr. KAMTO, Mr. CRAWFORD (Special Rapporteur) suggested that the English version of the proposal should read: “It was suggested that account should be taken of situations where there was no dispute settlement procedure between the States concerned.”

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 21, as amended.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 20 (*concluded*) (A/CN.4/L.593/Corr.1)

32. The CHAIRMAN said that paragraph 20 should read:

“At its 2662nd meeting, on 17 August, the Commission took note of the report of the Drafting Committee (A/CN.4/L.600) on the entire set of draft articles provisionally adopted by the Drafting Committee on second reading, and which are reproduced in the annex to this chapter.”

If he heard no objection, he would take it the Commission agreed to that proposal.

It was so agreed.

Paragraph 20, as amended, was adopted.

33. The CHAIRMAN further invited members to discuss what should be done, first, with the draft articles provisionally adopted by the Drafting Committee, and secondly, with the *in extenso* record of the report of the Chairman of the Drafting Committee.

34. Further to an exchange of views in which Mr. BROWNLIE, Mr. ECONOMIDES, Mr. GAJA, Mr. KUSUMA-ATMADJA, Mr. PELLET, Mr. ROSENSTOCK, Mr. SIMMA and Mr. MIKULKA (Secretary to the Commission) took part, the CHAIRMAN suggested that all of the draft articles should be annexed to chapter IV of the Commission’s report, with a footnote indicating that the draft had been provisionally adopted by the Drafting Committee, and to request the Secretariat to transmit as soon as possible to Governments the *in extenso* record of the report of the Chairman of the Drafting Committee, along with the entire set of draft articles, with a covering note giving the status of the draft and inviting Governments to transmit their comments and observations on the draft by the end of January 2001. If he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

Chapter IV, as amended, was adopted.

CHAPTER IX. *Other decisions and conclusions of the Commission* (A/CN.4/L.598 and Add.1)

A. **Programme, procedures and working methods of the Commission, and its documentation** (A/CN.4/L. 598)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

35. The CHAIRMAN said that the paragraph should be supplemented to read: “At its 2664th meeting, on 18 August”.

Paragraph 4, as so supplemented, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

36. Mr. PELLET said that it would be best to specify that each of the selected topics was assigned to a member “of the Commission”.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 9

Paragraphs 7 to 9 were adopted.

Paragraph 10

37. Mr. SIMMA said he would like the expression “was not similar to the”, in the first sentence, to be replaced by “was different from”.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

B. Date and place of the fifty-third session

C. Cooperation with other bodies

Paragraphs 15 to 20

Paragraphs 15 to 20 were adopted.

Sections B and C were adopted.

D. Representation at the fifty-fifth session of the General Assembly

Paragraph 21

Paragraph 21 was adopted.

Paragraph 22

38. The CHAIRMAN said the Bureau recommended that Mr. Sreenivasa Rao, Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities), should attend the work of the Sixth Committee. If he heard no objection, he would take it that the Commission agreed to that recommendation.

It was so agreed.

Paragraph 22, as supplemented, was adopted.

Section D, as amended, was adopted.

E. International Law Seminar (A/CN.4/L.598/Add.1)

F. Gilberto Amado Memorial Lecture

Paragraphs 1 to 15

Paragraphs 1 to 15 were adopted.

Sections E and F were adopted.

Chapter IX, as amended, was adopted.

CHAPTER III. Specific issues on which comments would be of particular interest to the Commission (A/CN.4/L.592)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

39. The CHAIRMAN suggested that the first sentence should be deleted and that the paragraph should be recast as a single sentence, reading: “The Commission would appreciate receiving from Governments comments and observations on the entire text of the draft articles provisionally adopted by the Drafting Committee, in particular on any aspect which it may need to consider further with a view to its completion of the second reading at its fifty-third session, in 2001.” If he heard no objection, he would take it that the Commission wished to adopt that proposal.

It was so agreed.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 6

Paragraphs 3 to 6 were adopted.

Chapter III, as amended, was adopted.

Chapter II. Summary of the work of the Commission at its fifty-second session (concluded)* (A/CN.4/L.591)

Paragraph 6 (concluded)*

40. The CHAIRMAN said that, since the Planning Group’s report on the long-term programme of work had been presented, he would suggest that, if he heard no objection, the Commission should adopt paragraph 6 of chapter II, which had been left in abeyance.

It was so agreed.

Paragraph 6 was adopted.

Chapter II, as amended, was adopted.

The draft report of the Commission on the work of its fifty-second session, as a whole, as amended, was adopted.

Closure of the session

41. After the usual exchange of courtesies, the CHAIRMAN declared the fifty-second session of the International Law Commission closed.

The meeting rose at noon.

* Resumed from the 2655th meeting.