

Check against delivery

RESPONSIBILITY OF STATES FOR INTERNATIONAL WRONGFUL ACTS
[STATE RESPONSIBILITY]
Addendum

Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka

Mr. Chairman,

You will recall that when I introduced the report of the Drafting Committee on this topic in May, I indicated that article 30, subparagraph (b) and part of article 48, paragraph 2(a) dealing with assurances and guarantees of non-repetition were placed in square brackets and that the Commission would come back to this issue in the second part of the session because the issue at that time was *sub judice*.

During the second part of the session, the Drafting Committee held two additional meetings in order to address that pending issue and also to look more closely at the language of the articles for the purposes of consistency. Because of the bad flu I was stricken with, Professor Gaja, at my request, chaired the two Drafting Committee meetings. I wish to take the opportunity to thank him warmly. In fact this is Professor Gaja's report that I am presenting to the Plenary.

Mr. Chairman,

You will recall that on second reading, the Committee considered that assurances and guarantees of non-repetition were akin to cessation rather than reparation because they concerned future rather than past conduct, and probably future conduct in cases other than the case which has given rise to the dispute. Accordingly, such assurances and guarantees should be included in article 30 (b). This position had been generally endorsed.

The Committee began with the understanding that while some Governments questioned the existence of a normative basis of a provision on assurances and guarantees of non-repetition, other Governments did not express objections to the inclusion of such a text.

The question of assurances and guarantees of non-repetition was raised as a central issue in the *LaGrand* case and understandably, the discussion in the Drafting Committee evolved around the interpretation of the judgment of the Court in that case. Some members of the Drafting Committee found the judgment of the Court as a support for the retention of article 30 (b). However, not all members of the Drafting Committee agreed that the International Court of Justice had taken a clear position on the obligation to provide assurances and guarantees of non-repetition. Some members of the Committee were of the view that the Court avoided taking a clear-cut position on this matter and simply took note of the measures taken by the respondent which in the Court's view satisfied the request of the claimant State. Some others felt that the

Court had mainly envisaged the consequences of a hypothetical wrongful act that could occur in the future.

The Committee, however, agreed that while the ICJ decision in the *LaGrand* case was important, it was not the only basis on which the Committee should decide on the issues relating to the assurances and guarantees of non-repetition. At the end, the Committee decided to retain article 30, subparagraph (b) and article 48, paragraph 2(a) on the grounds that the provisions were drafted with great flexibility and introduced a useful policy. In particular the words “if circumstances so required” clearly indicated that such guarantees and assurances did not form a necessary part of the legal consequences of all internationally wrongful acts.

Some members of the Committee, however, held that the provision lacked substantial roots in existing State practice, and that there was no clear evidence of an emerging principle of international law in this direction.

The Committee also reconsidered the question of the relationship between assurances and guarantees of non-repetition, on the one hand, and satisfaction as a form of reparation on the other. The Committee while reiterating the view that such assurances and guarantees were generally related to cessation, agreed that in certain instances, such assurances and guarantees could form part of the remedy of satisfaction. This possibility existed because of the flexible character of satisfaction which could take many different forms. Therefore, the commentary to article 38 on satisfaction should indicate that sometimes such assurances and guarantees could be provided as a form of the remedy of satisfaction.

Mr. Chairman,

The Drafting Committee took a further look at the articles for the purposes of what is traditionally called “toilette finale” and consistency in the language versions of the text. The Committee made some minor editorial changes to some of the articles. In addition the Committee reviewed the articles with multiple paragraphs or subparagraphs and inserted the words “or” or “and” in order to clarify whether they should be understood as alternatives or as cumulative requirements.

Three language groups were set up and further reviewed the text that emerged from the Drafting Committee in French, Russian and Spanish for their consistency with English which was the original drafting language. I wish to thank those members of the Commission who participated in these three groups.

As a result a revised version of the report of the Drafting Committee under the symbol A/CN.4/L.602/Rev.1 has been issued. You will note that in the revised text the articles are renumbered sequentially and in their final form.

It is my recommendation that the Commission once more adopt this document which includes the subsequent changes to the draft articles made after the Commission took a decision on them during the first part of the session.

Thank you Sir.