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Summary record of the 2605th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1999, **vol. I**

which the commentary went from general considerations to detailed explanations.

The commentary to Part II, as amended, was adopted.

Commentary to article 20

53. Mr. PELLET said that he had doubts about several footnotes. In his opinion, it was a bad idea, in a final commentary, to refer the reader to earlier reports, which either provided important information and should be reproduced or were not relevant and should be passed over in silence. The commentary must be a text that could stand on its own. Perhaps the Rapporteur could make some changes along those lines.

54. Mr. SIMMA said that Mr. Pellet's point was well taken, but some footnotes referred to over 25 paragraphs. It would be very difficult to summarize, much less reproduce, such lengthy passages of earlier reports. Using "op. cit." was also open to criticism because it was not always easy to know which work was being referred to.

55. Following an exchange of views on the presentation of footnotes and bibliographical references in which Mr. CRAWFORD, Mr. KATEKA and Mr. SIMMA took part, the CHAIRMAN said that the system used in the United Nations was well established and practically impossible to change.

56. Mr. PELLET said that, although it was understandable that the Commission should condense its commentaries as much as possible, they might be less helpful for those in the practice of international law. In any event, referring to lengthy passages of earlier reports was not the usual procedure, since that was tantamount to endorsing paragraphs which had not been reconsidered and on which some members might have reservations to formulate.

57. Mr. ROSENSTOCK (Rapporteur) said that, in his view, the commentary must be easy to use and therefore as concise as possible. Footnotes provided guidance for readers who wanted to go into greater detail on particular points.

58. Mr. SIMMA said that all the footnotes which referred to old reports dealt with paragraphs describing State practice. If every example of such practice was to be included, the commentary would double in volume and would be much less easy to use, as Mr. Rosenstock had pointed out.

59. The CHAIRMAN said that the Commission might adopt the commentary under consideration, on the understanding that the footnotes referring to some passages of earlier reports meant not that it endorsed the contents of those reports, but that it simply wanted to refer to examples illustrating the recent practice of States.

The commentary to article 20 was adopted.

The meeting rose at 1.15 p.m.

2605th MEETING

Monday, 19 July 1999, at 10.05 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. Mr. CANDIOTI (Chairman of the Drafting Committee), introducing the report of the Drafting Committee on the draft articles on State responsibility (A/CN.4/L.574 and Corr.1 and 3), said that the Committee had held 26 meetings at the current session of the Commission and that 13 of them had been devoted to State responsibility.

2. At the fiftieth session, the Drafting Committee had begun the second reading of the draft articles on State responsibility and had been able to complete work on all the articles referred to it at that session.[4] It was the Commission's practice not to take action on articles received from the Committee in the absence of commentaries and also to defer the adoption of articles on second reading until the Committee had considered all the articles on the topic. The Committee was thus able to make changes in earlier articles, if necessary, in the light of subsequent articles. It was transmitting the articles to the Commission on that understanding, and recommending that it should take note of its report.

3. At the current session the Drafting Committee had had before it the articles in chapters III (Breach of an international obligation), IV (Responsibility of a State in respect of the act of another State) and V (Circumstances precluding wrongfulness) of part one of the draft. The Commission had discussed those chapters extensively and, in preparing the articles, the Committee had taken account of the comments and decisions made.

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* Resumed from the 2600th 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, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.

[4] For the text of the draft articles, see *Yearbook ... 1998*, vol. I, 2562nd meeting, p. 287, para. 72.

4. The titles and texts of the draft articles adopted by the Drafting Committee at the fifty-first session read:

CHAPTER III

BREACH OF AN INTERNATIONAL OBLIGATION

Article 16. Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 17

[Deleted]

Article 18. International obligation in force for the State

An act of a State shall not be considered a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 19

1. [Deleted]

. . .

Article 20

[Deleted]

Article 21

[Deleted]

Article 22

[See article 26 bis]

Article 23

[Deleted]

Article 24. Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with what is required by that obligation.

Article 25. Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful, occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

Article 26

[Deleted]

Article 26 bis

. . .

CHAPTER IV

RESPONSIBILITY OF A STATE IN RESPECT OF THE ACT OF ANOTHER STATE

Article 27. Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 27 **bis.** *Direction and control exercised over the commission of an internationally wrongful act*

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) The act would be internationally wrongful if committed by that State.

Article 28. Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) The coercing State does so with knowledge of the circumstances of the act.

Article 28 **bis.** *Effect of this Chapter*

This Chapter is without prejudice to the international responsibility, under other provisions of the present articles, of the State which commits the act in question, or of any other State.

CHAPTER V

CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 29. Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 29 **bis.** *Compliance with peremptory norms*

The wrongfulness of an act of a State is precluded if the act is required in the circumstances by a peremptory norm of general international law.

Article 29 **ter.** *Self-defence*

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 30

[Countermeasures in respect of an internationally wrongful act]

. . .

Article 31. Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) The occurrence of force majeure results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(*b*) The State has assumed the risk of that occurrence.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question had no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) The situation of distress results, either alone or in combination with other factors, from the conduct of the State invoking it; or

(*b*) The act in question was likely to create a comparable or greater peril.

Article 33. State of necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) Is the only means for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) The international obligation in question arises from a peremptory norm of general international law;

(*b*) The international obligation in question excludes the possibility of invoking necessity; or

(*c*) The State has contributed to the situation of necessity.

Article 34

[See article 29 ter]

Article 34 bis

. . .

Article 35. Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness under this Chapter is without prejudice to:

(*a*) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) The question of compensation for any material harm or loss caused by the act in question.

5. The Commission's general view, also expressed by some Governments, was that chapter III was unnecessarily detailed and created difficulties in interpretation. In his summary of proposals concerning chapter III, in paragraph 156 of his second report on State responsibility (A/CN.4/498 and Add.1-4), the Special Rapporteur had substantially reduced the number of articles.

6. The first article in chapter III was article 16 (Existence of a breach of an international obligation). The Special Rapporteur had proposed that articles 16, 17, paragraph 1, and 19, paragraph 1, should be amalgamated. The Drafting Committee had found the new structure to be economical, coherent and logical. In addition, taking into account a suggestion made in the Commission, the Committee had incorporated the ideas expressed in articles 20 and 21 in article 16.

7. Articles 20 and 21 dealt with the distinction between obligations of conduct and of result, but the Special Rapporteur had suggested their deletion on the grounds that the obligations could not always be divided as specified by the articles, that the distinction appeared to have no consequences for the rest of the draft articles and that the words "obligations of conduct" were misleading, while the words "obligations of means" would be more accurate. Most members of the Commission had supported that analysis and the idea of deleting articles 20 and 21. Some, however, had expressed concern, since the fact that the distinction had gained currency and acceptance in international law suggested that it should be retained somewhere in the draft. In order to address those concerns, the Drafting Committee had agreed that the description of various forms of obligations could be made in the commentary, while the text should refer only to the "character" of the obligation, replacing the reference to "content" of the obligation proposed by the Special Rapporteur. The new phrase not only brought the substance of article 19, paragraph 1, into article 16 but also provided a vehicle by which the notions of obligations of means and result could be explained in the commentary. The commentary would also explain why the Commission had not entirely ignored the distinction between different types of obligations: in some instances, it could be conceptually useful, even though it was of no apparent normative utility for the purposes of the draft. The commentary would also explain the different types of obligations and the reasons for looking at them slightly differently, including the change in the name of the obligation of "conduct" to obligation of "means".

8. The Drafting Committee had decided to delete article 23. The views expressed in the Commission concorded with the Special Rapporteur's conclusion that article 23 was confusing and that the obligation of prevention

was a form of obligation of result. The commentary to article 16 would also deal with that issue.

9. With regard to substance, the Commission had discussed the relationship between wrongfulness and responsibility in the context of article 16, in other words, the relationship between chapters III and IV. The Special Rapporteur had proposed inserting the words "under international law" to qualify the reference to the act of the State in article 16. The words were intended to stress the point that the requirement that the State had to comply with an obligation derived not only from the obligation itself but from a system of international law that imposed that obligation, a system that also addressed the questions of conflicting obligations, circumstances precluding wrongfulness and the hierarchy of the rules of international law. Views in the Commission had differed on the necessity or utility of including the phrase "under international law". After lengthy discussion, the Drafting Committee was of the view that the reference was potentially confusing. Article 4 (Characterization of an act of a State as internationally wrongful) already provided that the characterization of an act as wrongful was governed by international law. The relationship between article 4 and chapter V would be established in the commentary to the article.

10. In terms of drafting, article 16 as proposed by the Drafting Committee was basically the same as the one adopted on first reading. The Special Rapporteur had suggested the replacement of the words "is not in conformity with" with the words "does not comply with", but the Committee had found the language of the article as adopted on first reading more felicitous. The words "regardless of its origin" in the text proposed by the Committee were taken from article 17, paragraph 1, and made it clear that secondary rules did not distinguish between customary, conventional or other sources of the obligation or between obligations *ex contractu* or *ex delictu*. The phrase was a useful addition. The Committee had also agreed that the word "origin", as used in the text of article 17 as adopted on first reading, was broader than "source" as proposed by the Special Rapporteur. The Committee had deleted the words "whether customary, conventional or other" from article 17, paragraph 1, taking the view that they could be used and explained in the commentary and that keeping them would have made the text unnecessarily cumbersome. The title of article 16 remained unchanged, and because of the new formulation of the article, articles 17, 19, paragraph 1, 20, 21 and 23 were deleted.

11. Article 18 (International obligation in force for the State) dealt with the principle of inter-temporal law in State responsibility. As adopted on first reading, article 18 had consisted of five paragraphs. Paragraph 1 had stated the general principle of inter-temporal law, paragraph 2 had set out an exception to that principle with respect to peremptory norms and paragraphs 3 to 5 had addressed the inter-temporal consequences of breaches having a continuing character or involving composite and complex acts. The Special Rapporteur had suggested retaining paragraph 1 but reformulating it as a positive guarantee as opposed to a conditional statement, covering the issues addressed in paragraph 2 in the context of chapter V and moving paragraphs 3 to 5 to articles 24 and 25, which dealt with the same classifications as were identified in paragraphs 3 to 5.

12. The Drafting Committee had agreed to the divide of article 18 but had redrafted the text proposed by the Special Rapporteur for paragraph 1. The new version was simpler and it more clearly stated the principle of inter-temporal law: that an act of a State would not be considered a breach of an international obligation unless the State was bound by the obligation in question at the time the act occurred. The title of article 18 had also been simplified. Article 19, paragraph 1, and articles 20 to 23 had been deleted; the remaining paragraphs of article 19 had not yet been referred to the Committee.

13. Article 24, as adopted on first reading, had comprised one paragraph. The Special Rapporteur had thought it should be reformulated, combining the essential elements of articles 25, paragraph 1, 26 and 18, paragraph 3. The new article 24 (Extension in time of the breach of an international obligation) consisted of three paragraphs: paragraph 1 on the question of the completion of a wrongful act not having a continuing character, paragraph 2 on the duration of a wrongful act having a continuing character, and paragraph 3 on the beginning and duration of the violation of an obligation to prevent a given event.

14. Article 24, paragraph 1, corresponded to article 24 as adopted on first reading. It described what had been referred to as an "act not extending in time" and what the new version referred to as an act "not having a continuing character". The redrafted text was simpler and made a distinction between the completion of the act and the continuation of the effect. It included the notion of completed acts, meaning any act not having a continuing character, even if not necessarily completed in a single instance. The text adopted on first reading had drawn a distinction between an act completed at a given moment and acts that continued in time. Acts of States usually took some time to be completed, however, and the critical distinction was between the act that had not yet stopped and the one that was finished. The Drafting Committee had therefore opted for the text proposed by the Special Rapporteur, with two minor changes. It had added the words "at the moment" after the word "occurs", an addition made to provide a more precise description of the time frame when a wrongful act was performed. The Committee had also deleted the word "subsequently" at the end of the paragraph, since it was superfluous. It had felt that the commentary adopted on first reading should be reconsidered, since it used a series of concrete examples of instantaneous or continuing acts that was misleading, in that the characterization of those acts depended not only on primary rules but also on collateral circumstances.

15. Article 24, paragraph 2, described the continuing wrongful acts dealt with in article 21, paragraph 1, and article 18, paragraph 3, as adopted on first reading. The Special Rapporteur's revised text merged the two sentences of article 25, paragraph 1, for elegance. The insertion of the introductory phrase "Subject to article 18" had been criticized as being unnecessary because article 18 was overriding. The Drafting Committee had agreed and had deleted the phrase, believing that the commentary could explain the relationship more adequately. The Com-

mittee had also agreed with the idea of joining the two sentences of the paragraph and had made some drafting changes. The new text avoided the reference to the beginning of a wrongful act that had been used in the text adopted on first reading: it was difficult, in the abstract, to determine at what point a wrongful act began, and the answer to the question depended on collateral circumstances, as would be explained in the commentary. Otherwise, the text before the Commission incorporated the substance of articles 25, paragraph 1, and 18, paragraph 3.

16. Article 24, paragraph 3, corresponded to article 26 adopted on first reading, which had described as a continuing wrongful act a breach of an international obligation requiring a State to prevent a given effect. The Special Rapporteur had indicated that the presumption on which the article was based was flawed: some breaches might be continuing acts, but others not, depending on the context. The new formulation addressed only the question of continuing breaches of obligations of prevention. It, too, was subject to article 18, but since it had been decided to avoid cross-referencing, the relationship with article 18 would be explained in the commentary. The Drafting Committee had deleted the phrase "its continuance" as unnecessary, but no other changes had been made to the wording proposed by the Special Rapporteur.

17. The new title of article 24 as proposed by the Drafting Committee corresponded to the new content. With the article's new formulation, article 26 was deleted.

18. Article 25 (Breach consisting of a composite act) dealt with the composite wrongful acts that had previously been covered in articles 25, paragraph 2, and 18, paragraph 4, adopted on first reading. In the original version, the notion of a composite act applied to an obligation breached by a series of actions relating to different cases. The text proposed by the Drafting Committee limited the notion of composite acts to when the primary norm defined the wrong by reference to a systematic or composite character.

19. Paragraph 1 dealt with a situation where a series of actions or omissions occurred which, taken together, were sufficient to constitute a composite wrongful act. The discussion in the Commission had indicated support for the principle set out in that paragraph, but there had been difficulties with the drafting and the Drafting Committee had made changes to prevent misinterpretation. The term "composite act" was not used in paragraph 1, as it would have caused drafting difficulties, but it was retained in the title of the article. The Committee had also avoided using the word "established", as in the text adopted on first reading, since it could confuse the question of evidence of conduct with the description of the conduct. Since paragraph 1 was concerned with the essential elements that, taken together, constituted the breach, the Committee had preferred the word "constitute".

20. The new text of paragraph 1 described a composite act as a series of actions or omissions defined in aggregate as wrongful, such as apartheid, genocide or systematic breaches prohibited by a trade agreement. It did not exclude the possibility that every single act in the series could be wrongful in accordance with another norm, nor did it affect the temporal element in the commission of the acts: a series of acts or omissions could occur at the same time or sequentially, at different times. Those issues would be explained in the commentary.

21. Paragraph 1 did not purport to suggest that the whole series of wrongful acts had to be committed in order to fall into the category of composite wrongful acts. The series of actions or omissions might be interrupted, so that it was never completed. The commentary would make that issue clear as well.

22. Article 25, paragraph 2, was a simplified version of the same paragraph adopted on first reading, with no change in substance. It dealt with the extension in time of the composite act. Once a sufficient number of acts had occurred, producing the result of the composite act as such, the breach was dated to the first of the acts in the series. The status of that first act was equivocal until enough of the series had occurred to establish the wrongful act, but at that point the act was regarded as having occurred over the whole period. In order for a single act to be wrongful, it had to be part of a series, and the series had to remain not in conformity with the international obligation. That was the reason for the addition of the word "remain" in the final part of the paragraph. The opening phrase, "In such a case", referred to the case mentioned in paragraph 1. Paragraph 2 was subject to the provisions of article 18, a matter that would be explained in the commentary.

23. Article 25, paragraph 3, adopted on first reading, had been deleted. It had dealt with the notion of complex acts also addressed in article 18, paragraph 5, which the Commission had found unnecessary.

24. Article 27 (Aid or assistance in the commission of an internationally wrongful act) had originally covered both aid and assistance and direction and control. Following the debate in the Commission, the Special Rapporteur had proposed that the two should be separated, with direction and control now being covered in article 27 bis (Direction and control exercised over the commission of an internationally wrongful act). Article 27 assumed the existence of an internationally wrongful act of a State which was aided or assisted. The wrongful act was that of aiding or assisting. The matter should not be seen as vicarious liability of the assisting State for the assisted State. The assisted State was still responsible for its own act, while the assisting State was responsible for the aid or assistance it had given, and only to the extent of such aid or assistance.

25. The Drafting Committee had considered the advisability of qualifying the phrase "aids or assists" with the word "materially", but had felt that the qualifier was not absolutely necessary in view of the support in the Commission for limiting the provision to cases where the act would have been internationally wrongful if committed by the State itself. The Committee had decided to deal with the issue in the commentary, which would discuss the threshold of "aid or assistance". As to the necessity of using both verbs, while "assists" was marginally stronger than "aids", which on its own could have the connotation of foreign aid programmes, the Committee had felt that the two terms complemented each other and had decided to retain them in the article and in the title. The phrase "by

the latter" had been included in the *chapeau* in order to indicate that the provision did not cover the question of co-participants, which was dealt with in chapter II (The act of the State under international law), on the attribution of a wrongful act to a State. The reference in article 27, subparagraph (*a*), to "knowledge of the circumstances" required that the assisting State have knowledge of the circumstances of the act and not necessarily of its wrongfulness. It also served to limit the risk of the State that provided aid to another State which, unbeknownst to it, used that aid to finance an unlawful activity. If the aiding State was unaware of the circumstances in which the aid was used, it was not responsible.

26. In article 27 bis, the word "control" referred to a case where one State controlled another in doing something, bearing in mind that the underlying assumption of the draft, namely that each State was responsible for the acts attributable to it under chapter II. The word was not meant to refer to control in the sense of someone exercising an oversight function. Similarly, the word "directs" meant not mere incitement or suggestion but rather direction in the strong sense. While it could be subsumed under control, that was not always the case. The word "directs" alone might not be enough to establish the responsibility envisaged in the provision, and the Drafting Committee had therefore decided that the two words should be retained, with the conjunction "and". The article was limited to direction and control in the commission of an internationally wrongful act and was not a reference to more general direction and control of the State.

27. As to the distinction between articles 27 and 27 bis, the State providing aid or assistance was responsible only for doing so, in other words, to the extent of such aid or assistance. Under article 27 bis, however, the State which directed and controlled another State in the commission of an international wrongful act was responsible for the act itself because it had controlled the whole of the act. One of the effects of that formulation was that reparations in the case of aid or assistance in the context of article 27 were limited to the extent of the aid or assistance, whereas under articles 27 bis and 28 (Coercion of another State), they were determined by reference to the act itself. As for the responsibility of the directed State, the mere fact that it had been directed to do something unlawful was not an excuse under chapter V. It was incumbent on the State to decline to comply with the direction. The defence of superior orders did not exist as such for States in international law. If a State was coerced into doing something, then article 28 would apply, with the possibility of the force majeure defence envisaged in article 31. The title of the article had been amended to include a reference to direction and control "exercised over", so as to convey the connotation of domination over the commission of an internationally wrongful act.

28. The Drafting Committee had decided that article 28, would require neither that the coercion itself be unlawful nor that the act be unlawful if committed by the coercing State itself. It had favoured that approach over a narrower one requiring responsibility to be subject to the condition either that the coercion was unlawful or that the conduct coerced would have been unlawful if it had been committed by the coercing State itself. Indeed, article 28, as reflected in subparagraph (*a*), differed from articles 27 and 27 bis in that it expressly did not allow for an exemption from responsibility for the act of the coerced State in a situation in which the coercing State was not itself bound by the obligation in question. It should, however, be noted that in deciding on that approach, the Committee had worked on the assumption that coercion in article 28 was to be equated with force majeure in chapter V, and nothing less.

29. The Drafting Committee had borne in mind that the purpose of the exercise had been to determine not who was responsible for the coercion itself, but the wrongful act resulting from the action of the coerced State. Hence, the responsibility for the coercion itself would be that of the coercing State vis-à-vis the coerced State, whereas responsibility under article 28 was the responsibility of the coercing State vis-à-vis an injured third State. Indeed, article 28 bis (Effect of this Chapter) made it clear that chapter IV was without prejudice to the responsibility of the coercing State for the coercion, if that coercion was wrongful. In the latter case, it should be taken into account that chapter V applied equally to chapter IV. Consequently, the coercing State could itself rely on one of the circumstances precluding wrongfulness, for example necessity, as the basis for the lawfulness of its coercive act.

30. From a drafting standpoint, the Drafting Committee had decided to clarify article 28 by placing the two conditions in two subparagraphs, namely that the act would, but for the coercion, be an internationally wrongful act of the coerced State and that the coercing State did so with knowledge of the circumstances of the act. That approach had been seen to have the virtue of employing a formulation and structure similar to articles 27 and 27 bis. Although the knowledge element had been placed first in the other articles, it had been deemed preferable to place it in article 28 as the second condition, since the question of knowledge would not arise if the strict "but for the coercion" requirement in subparagraph (*a*) was not satisfied.

31. The words "but for the coercion" had been inserted so as to make article 28 apply only in the narrowest of circumstances, i.e. where coercion was the reason for the wrongful act, and as such was to be equated with force majeure, as envisaged in article 31. Only then would the coercing State be responsible for the act of the coerced State. The "but for the coercion" construction posited a fiction, namely an act which would have been wrongful had it not been for the coercion giving rise to the force majeure defence on the part of the coerced State. Thus, the act was not described in the opening clause of article 28 as an "internationally wrongful act", as had been done in the case of articles 27 and 27 bis, where no comparable defences existed for precluding the wrongfulness of the act of the assisted or controlled State. The Drafting Committee had considered various alternative formulations, but decided to retain the original.

32. The Drafting Committee had been mindful of some borderline cases where the coerced State might not be entirely excluded, for example where the coercion was not sufficient to satisfy the test of the force majeure defence for the coerced State under article 31, but it was sufficient to incur responsibility for the coercing State

under article 28. That narrow situation would be dealt with in the commentary and fell under article 28 bis.

33. As to the scope of the knowledge element in article 28, subparagraph (*b*), what was required was that the coercing State knew all the circumstances which would be necessary and sufficient to decide that the act was unlawful. The reference to "circumstances" was to the situation and not to the judgement of legality. Hence, while ignorance of the law was no excuse, ignorance of the facts would be material in determining responsibility. The words "of the act" had been added after "circumstances" to make that even clearer. Moreover, the commentary would explain that it must be the act which was coerced that would have been wrongful and not any subsequent or indirectly related act.

34. The shorter formulation "knowingly" had also been considered as an alternative for the knowledge requirement, but that would require the coercing State to be aware that the act would be wrongful for the coerced State. Consequently, responsibility would only arise if the coerced State was aware that the act would be wrongful as far as it was concerned. That approach had been deemed too broad and it had been felt that some limit should be placed on shifting responsibility to a State which coerced another State, since that coercion might be effected in a lawful manner. Instead, the prohibition focused not on knowledge of the circumstances of the coercion itself, but on that of the act which would have been unlawful when committed by the coerced State. The Drafting Committee had eventually decided on the shorter title "Coercion of another State".

35. Article 28 bis was a "without prejudice" clause. Its origin lay in article 28, paragraph 3, adopted on first reading. In paragraph 212 of his second report, the Special Rapporteur had proposed the formulation of that paragraph as an independent article, applicable to the whole chapter. The article aimed to avoid any *a contrario* implications arising from chapter IV in respect of responsibility stemming from primary rules which precluded certain forms of assistance or, under chapter II, for acts otherwise attributable to States. It covered both the implicated State and the acting State, and it also helped to show that the entire chapter was dealing only with situations in which the act that lay at the origin of the wrong was the act committed by one State and not by the other. If both States committed the act, then that fell within the realm of co-perpetrators, as dealt with in chapter II. Chapter IV was linked to chapter II, because it addressed special situations in which several States were involved, albeit not as co-perpetrators.

36. The Drafting Committee had decided to insert the word "international" before "responsibility" in line with previous formulations and to retain the phrase "under other provisions of the present articles" as a reference, inter alia, to article 31 which might affect the question of responsibility. It also drew attention to the fact that other provisions might be relevant to the State committing the act in question and that chapter IV in no way prejudged the issue of its responsibility in that regard.

37. The Special Rapporteur's proposal had contained two subparagraphs. The Drafting Committee had decided that subparagraph (*b*) of the proposal was too abstract and could be replaced by the reference to "or of any other State" at the end of the provision, which would cover, for example, the position of third States, together with an appropriate explanation in the commentary. The Committee had decided to retain subparagraph (*a*) with that further addition and to formulate it as a single sentence.

38. The provisions of chapter V established justifications for conduct which would otherwise be wrongful.

39. In paragraph 356 of his second report, the Special Rapporteur's proposal had been to delete article 29 (Consent) as adopted on first reading. However, the Commission had decided to keep it and refer it to the Drafting Committee, which had then produced a text based on paragraph 1 of the article adopted on first reading and deleted paragraph 2, considering it to be both inaccurate and unnecessary.

40. A number of issues had been raised by Governments and in the Commission with regard to paragraph 1 of the text adopted on first reading. One of the comments had been the lack of clarity in the words "consent validly given". There had been a request to elaborate on the elements of validity of consent, but the Drafting Committee had been of the view that the text of the article was not the proper place to spell out the circumstances under which consent would be considered valid. Consent in article 29 touched on a wide variety of issues, for example whether such consent was envisaged expressly or by inference in the primary rules, who could give consent, for what purpose, the question of ostensible authority and local authority, whether consent was given freely, etc. A related question had been whether consent was given with respect to a breach, for which the State had had the right to consent. For example, a State had no right to consent to violations of certain types of human rights, the commission of genocide and so on. That had raised the issue of consent to violations of peremptory norms. Hence, a determination on the validity of consent was complex and required consideration of a number of issues which were addressed by a body of law outside the framework of State responsibility. By including the words "valid consent", the article drew attention to an important issue that must be dealt with. The commentary to the article would elaborate on those questions.

41. Article 29 was also concerned with bilateral relations between two States and the obligation that one State owed to another. The reference to consent should therefore be understood only in respect of such a narrow bilateral relationship. Thus, a State could only consent to a wrongful act towards itself and not towards a third State. That issue would be addressed in the commentary.

42. As drafted, article 29 dealt only with prior consent. However, consent could be given at the time the breach was occurring or subsequently, which would not always fall in the category of waiver. Those issues would also be taken up in the commentary. With respect to consent ex post facto, the Drafting Committee had noted that consideration might be given to its inclusion somewhere in the draft, perhaps in part three.

43. Article 29 had to do with valid consent to the commission of a "given act" and was a redrafting of the article

as adopted on first reading, which had spoken of a "specified act". The new text was clear and more precise. The words "given act" were intended to narrow the consent and relate it to a class of conduct. The word "commission" also included "omission". That question would also be explained in the commentary. The words "within the limits of that consent" at the end of the article were intended to minimize the abuse of consent by confining it not only to a "given act" but also to the limits within which consent was given.

44. As drafted on first reading, paragraph 2 had prohibited consent with respect to peremptory norms. In the Drafting Committee's opinion, such a categorical proposition was inaccurate, because there were some peremptory norms in the application of which the consent of a particular State was relevant and might be decisive, e.g. the rule prohibiting the use of force on the territory of another State. A State could not consent to conduct inconsistent with some peremptory norms, such as genocide or forced labour by prisoners of war, but it might consent to others. For example, a State might consent to military intervention on its territory. When it met the test in article 29, such consent would preclude wrongfulness. Therefore, the proposition set out in the original paragraph 2 had been inaccurate.

45. Article 29 bis (Compliance with peremptory norms), was new and was identical to the one proposed by the Special Rapporteur in his second report, except for the deletion of one phrase.

46. Some doubts had been expressed in the Commission with respect to the need for article 29 bis. The Drafting Committee had worked on the basis of the decision in the Commission that, although the issues raised in the article would rarely occur, it would be useful to have an article that recognized the primacy of peremptory norms. Article 29 bis also emphasized the Commission's view that the obligations to which the draft as a whole was addressed were not always relations of specific rights and duties between particular States; the draft articles were potentially of a general nature, and the specific obligations would also be tested for conformity with higher norms of international law. The article also stressed that the notion of peremptory norms existed outside treaty relationships. The article did not purport to address the question of conflicting peremptory norms, but only an obligation as compared with a peremptory norm. The Committee considered that the possibility of a conflict occurring between peremptory norms was so rare as not to affect the principle set forth in that article.

47. The Drafting Committee had deleted the phrase "not in conformity with an international obligation of that State" in the article proposed by the Special Rapporteur in his second report. The issue had been raised in the Commission as to whether the articles of chapter V should make a distinction between the wrongfulness of an act and international responsibility for an act. In the context of the article, where the State conduct was in conformity with peremptory norms, the State had not committed a wrongful act. The same analysis applied to the next article, article 29 ter (Self-defence). Therefore, the phrase "not in conformity with an international obligation of that State" qualifying the act of the State was inapplicable and confusing. However, with respect to the other articles of chapter V, on force majeure, distress, state of necessity, etc. the act in question was not in conformity with the international obligation of that State, and the phrase was retained.

48. In the context of article 29 bis, the issue had been raised of a new definition for peremptory norms which would rely less heavily on the law of treaties. The Drafting Committee had not been in a position to take a decision in the absence of guidance from the Commission. The Special Rapporteur had, however, stated that he would consider the matter in the context of obligations *erga omnes* in his next report.

49. Article 29 ter corresponded to article 34 adopted on first reading. The Special Rapporteur had proposed two paragraphs for that article. Paragraph 1 contained article 34 adopted on first reading, and paragraph 2 had been an addition dealing with self-defence and peremptory norms. The purpose of new paragraph 2 had been to address important issues not dealt with in the commentary to the article adopted on first reading.

50. For example, the commentary to article 34 adopted on first reading[5] did not consider the substantive content of self-defence. It failed to distinguish between self-defence as part of the primary rules on use of force under international law and self-defence as a justification for a breach of an obligation other than Article 2, paragraph 4, of the Charter of the United Nations. Nor did it mention that there were certain rules which could not be breached even in self-defence, such as international humanitarian law. There had been no disagreement with the substance of article 29 ter, paragraph 2, as proposed by the Special Rapporteur, but it had been regarded as covered by implication and by general understanding in paragraph 1. The issues to be covered by a new paragraph 2 would be more appropriately elaborated in the commentary. The Commission had therefore referred paragraph 1 to the Drafting Committee on the understanding that the issues raised in paragraph 2 as proposed by the Special Rapporteur would be addressed in the commentary.

51. In respect of paragraph 1, the general view in the Commission had been that, since the text had been in existence for so long, any changes might raise doubts as to the meaning of the article. A number of suggestions had been made, such as replacing the words "lawful measures ... taken in conformity with the Charter" by others. However, the Drafting Committee had considered that, if there were concerns that no changes be made to the article on self-defence, then no further changes should be made. The Committee had also been of the opinion that the words "in conformity with the Charter" were appropriate. The Charter of the United Nations did not confer the right to self-defence, it merely recognized it as inherent. Moreover, the references to self-defence in the Charter were operative references in international law. The Charter established limitations on self-defence which could not be modified in any way by the current articles. Article 29 ter corresponded to article 34 adopted on first reading less the phrase "not in conformity with an international obligation of that State" which had been deleted.

[5] See 2587th meeting, footnote 12.

52. Article 30 (Countermeasures in respect of an internationally wrongful act) had been referred to the Drafting Committee only after the Committee had concluded its work for the current session, along with a new text proposed by the Special Rapporteur in paragraph 392 of his second report. Hence, the Committee had not taken any action on article 30.

53. Article 30 bis (Non-compliance caused by prior non-compliance by another State) proposed by the Special Rapporteur in his second report had not been referred to the Drafting Committee. The Commission had decided to come back to the question of retaining that article after consideration of chapter III (Countermeasures) of part two.

54. The Special Rapporteur had proposed a revised title and text for article 31 (Force majeure), which had been entitled "Force majeure and fortuitous event" as adopted on first reading, and the Commission had indicated support for a new text. Paragraph 1 proposed by the Drafting Committee merged the two sentences of the Special Rapporteur's text, thereby reducing the length of the article without affecting its content. Paragraph 1 identified the essential elements of force majeure as the irresistibility of the force, its unforeseeability, its being beyond the control of the State and the fact that it made it materially impossible in the circumstances for the State to perform the required obligation. The word "external" was unnecessary. The commentary to the article adopted on first reading[6] had not explained what that word meant. In any event, the words "beyond the control of the State" meant the same thing. On the other hand, if "external" implied that the circumstance of force majeure came from outside the territory of the State, it would be incorrect. Hence, the Drafting Committee had deleted it. The commentary would emphasize that the situation of force majeure should be genuinely beyond the control of the State invoking it and that it did not apply to situations in which the State brought force majeure upon itself either directly or by negligence.

55. The words "unforeseen event" should be interpreted objectively. That did not include circumstances in which the performance of the obligation had become difficult due to economic or financial crises. Of course, force majeure occurred as a result of natural or physical events and the acts of third parties. Thus, it was not limited to physical phenomena; other forms could also meet the test set in the article. Those issues would be discussed in the commentary, which would also explain that certain situations of duress involving force imposed on the State that was irresistible and met the other requirements of article 31 could amount to force majeure. The commentary would also elaborate on the examples of the various forms of duress or coercion which could amount to force majeure, such as the coercion of a State representative to commit a wrongful act.

56. Paragraph 2 was an exception to paragraph 1. Paragraph 2 (*a*) corresponded to paragraph 2 of article 31, adopted on first reading, which had stipulated that force majeure did not apply if the State in question had contributed to the occurrence of the situation of material impossibility. The Special Rapporteur had proposed changing the word "contributed", adopted on first reading, to "results", which set a higher threshold. The Commission had generally supported that change. The Drafting Committee had followed suit and, as a result, force majeure must not be a circumstance precluding wrongfulness if it resulted from the conduct of the State invoking it, either alone or in combination with other factors. The new wording allowed for force majeure to be invoked in situations in which a State might have unwittingly contributed to the occurrence of force majeure. For paragraph 2 (*a*) to apply, the State's role in the occurrence of force majeure must be substantial.

57. The Drafting Committee had deleted the word "wrongful", because it had been creating confusion. There was no requirement that the conduct of the State that resulted in the occurrence of force majeure be wrongful. The point was to have a direct link between the conduct of the State and the occurrence of force majeure.

58. Paragraph 2 (*b*) dealt with situations in which the State had already accepted the risk of the occurrence of force majeure in the context of an obligation, conduct or unilateral act. Once a State accepted the consequences of such a risk, it could not then claim force majeure in order to avoid responsibility. Paragraph 2 (*b*) had not been part of article 31 adopted on first reading. The idea expressed in it was often tied in with the obligation of prevention and was also covered by the primary rule and by *lex specialis*. The Commission had agreed in general with the Special Rapporteur's view on the utility of paragraph 2 (*b*) in making clear that it was also an aspect of the law of force majeure. The Drafting Committee had made some changes for the sake of clarity. The commentary to article 31 would specify that the assumption of risk under paragraph 2 (*b*) was towards those to whom the obligation was owed.

59. The Special Rapporteur's proposal for article 32 (Distress) had been substantially the same as the formulation proposed on first reading, but the Commission had indicated support for certain drafting changes suggested by the Special Rapporteur.

60. With regard to paragraph 1, the Drafting Committee had agreed to delete the word "extreme" before "distress" on the grounds that distress had been defined in the article and "extreme" appeared to add a further criterion which had not been intended and created confusion. In addition, the word "distress" had been used in a similar context without further qualification in article 18, paragraph 2, of the United Nations Convention on the Law of the Sea. The Special Rapporteur had further proposed that the State agent whose action had been in question must have reasonably believed, on the basis of the information that had been or should have been available, that life was at risk. The criterion of "reasonably believed" had not been included in the text adopted on first reading. The Committee had agreed with the Special Rapporteur that, in situations in which the State agent was in distress and had to act to save lives, there should be a certain degree of flexibility in the assessment of the condition of distress. One could not use a completely objective test as had been done in the text adopted on first reading. The Committee had agreed with the idea that there should be some, but not too

[6] Ibid., footnote 8.

much flexibility in article 32. It had therefore revised the Special Rapporteur's proposal to read that "the author of the act in question had no other reasonable way, in a situation of distress".

61. Three issues should be emphasized in connection with article 32. First, it was the author of the act, and not the State, that was in distress. Secondly, the "no other reasonable way" criterion provided some flexibility regarding choices of action by its author in saving lives. The commentary would explain that the words "reasonable way", while allowing for some flexibility, should nevertheless be narrowly construed, having regard to the exceptional nature of the circumstance. Thirdly, the choice of the act by the author was for the purpose of saving lives. Hence, any comparison of alternatives available to the author in distress had to take into account the object of the act in question.

62. Article 32, paragraph 2, was similar to article 31, paragraph 2, and was an exception to paragraph 1. His explanations for the structure and drafting of paragraph 2 (*a*) of article 31 applied equally to paragraph 2 (*a*) of article 32. Paragraph 2 (*b*) was identical to the last sentence of paragraph 2 of article 32 adopted on first reading, except for the change of the word "conduct" to "act" to avoid any confusion with the word "conduct" in paragraph 2 (*a*). Paragraph 2 (*b*) stipulated that distress did not apply if the act in question was likely to create a comparable or greater peril. That provision struck a balance with paragraph 1 by providing an objective test for assessing and limiting the standard of "reasonable way" in paragraph 1. The commentary would explain the words "comparable or greater peril", which must be assessed in connection with the saving of lives. The title of article 32 remained unchanged.

63. Article 33 (State of necessity), as proposed by the Special Rapporteur, had closely resembled the version adopted on first reading, save for some minor amendments, such as the use of the present, instead of the past, tense. It was the only article in chapter V drafted in the negative. While it had been considered to be one of the most controversial articles of part one when the Commission had adopted it at its thirty-second session, in 1980, it had provoked little comment from Governments. The first sentence of paragraph 1 was identical to that adopted on first reading, except for the replacement of the words "state of necessity" with the word "necessity".

64. In the light of comments that the text adopted on first reading had been too narrowly drafted, the Special Rapporteur had revised the article to extend the concept of necessity to the protection of a common interest, but it was still not fully compatible with contemporary international law. Many members had supported the idea that it ought to be possible to invoke necessity in order to protect the essential interest not only of the State but also of the international community. Nevertheless, such a provision would have to be drawn up with great care so as to guard against abuse. The Drafting Committee had therefore revised paragraphs 1 (*a*) and 1 (*b*). The purpose of paragraph 1 (*a*) was no longer to safeguard solely the essential interest of a State in a bilateral context, but embraced a wider interest. That concept would be elucidated in the commentary, which would explain that the word "means" was not limited to unilateral action, but might also comprise other forms of conduct available to the State through cooperative action with other States or through international organizations. Nevertheless, in order to understand the scope of paragraph 1 (*a*) it should be read together with paragraph 1 (*b*), where the words "or States" were intended to cover situations where the cumulative impact of an act on States towards which an obligation existed was such that it outweighed the benefit to the acting State.

65. The Drafting Committee considered that the phrase "an essential interest ... of the international community as a whole" in paragraph 1 (*b*) might overlap with the notion expressed in paragraph 2 (*a*). Nevertheless it elected to retain the phrase in paragraph 1 (*b*), since it was a broader concept than that of peremptory norms contained in paragraph 2 (*a*). An essential interest of the international community as a whole might or might not be a peremptory norm. There might be an essential interest of the international community as a whole which was not embodied in peremptory norms. The commentary would also explain that some treaties had already addressed the question of necessity in the treaty itself, so necessity could not be invoked as an additional ground for a breach of the obligations imposed by such treaties.

66. To avoid abuse, the commentary would make it clear that the action of a State under paragraph 1 (*a*) would have to be warranted by some relationship between the acting State and the essential interests being protected, although such interests were not entirely subjective. Nonetheless, the act would have to be the only means by which the State could protect that interest. If there were other means of protecting the essential interest through cooperative action or action by international organizations, then that alternative course of action should be followed. The essential interest of a State which would be impaired would not necessarily have to be an essential interest connected with the obligation. It could be some other essential interest of the States towards which the obligation existed. The Drafting Committee was therefore of the view that the vagueness of the words "or of the international community as a whole" would be acceptable. Thus paragraph 1 (*a*) was a ground for precluding reliance on necessity and had to be as restrictive as possible.

67. Paragraph 2 precluded reliance on necessity. Paragraph 2 (*a*) prohibited any action in the name of necessity that breached a peremptory norm. Paragraph 2 (*b*) covered situations where the obligation itself ruled out the invocation of necessity, for example, non-derogable obligations under humanitarian law. Those issued would be explained in the commentary. Paragraph 2 (*b*) no longer retained the words "explicitly or implicitly", because the text was no longer confined to the exclusion of necessity by a treaty and applied to any such exclusion under international law. The commentary would clarify the relevance of the notion of "explicitly or implicitly" in relation to paragraph 2 (*b*) and, in particular, with reference to its application to treaty obligations.

68. In paragraph 2 (*c*) the qualification of "materially" contributing to the situation of necessity had been deleted on the understanding that the commentary would explain that the contribution of the State should be serious and

substantial. Paragraph 2 (*c*) did not parallel paragraph 2 (*a*) of article 31, which dealt with a similar issue. The Drafting Committee considered that lack of consistency to be justified. Force majeure was a rarer occurrence than the state of necessity, which had to be construed narrowly. Furthermore, the Committee believed that the scope of the article on the state of necessity should be narrowly delimited. The title of the article remained unchanged.

69. The Drafting Committee had renumbered article 34 adopted on first reading as article 29 ter. Article 34 as such had therefore been deleted. In the Committee's view, article 34 bis was closely related to the articles of part two on countermeasures and to issues concerning dispute settlement in part three. The text of that article would therefore be significantly affected by deliberations on countermeasures and, conceivably, by what the Commission might decide in respect of *jus cogens* norms, given the special connection between dispute settlement and the *jus cogens* provisions of the 1969 Vienna Convention. The Committee would consequently review the article after the Commission had considered countermeasures and dispute settlement.

70. Article 35 (Consequences of invoking a circumstance precluding wrongfulness) was a "without prejudice" clause. The text adopted on first reading had contained a reservation on compensation for harm arising from four of the circumstances precluding wrongfulness. The Special Rapporteur had suggested that the article be reworded in order to make it clear that chapter V had a merely preclusive effect. When a circumstance precluding wrongfulness ceased or stopped having a preclusive effect for any reason, the obligation in question (if it was still in force) again had to be honoured. As the Commission had supported that idea, the new text had two subparagraphs. Subparagraph (*a*) addressed the question of what would happen when a condition preventing compliance with an obligation no longer existed or gradually wound down. The words "and to the extent" were intended to provide for situations in which the conditions preventing compliance with an obligation gradually became less and allowed for partial performance of the obligation. Although the text was a reformulation of the version proposed by the Special Rapporteur in his second report, the substance had not changed. The Drafting Committee believed that the revised text was clearer, comprehensive and more elegant. The commentary to the article would indicate that compliance with an obligation also included cessation of the wrongful act.

71. Subparagraph (*b*) was similar to the article 35 adopted on first reading. The Commission had supported the idea behind the Special Rapporteur's text, which proposed that the possibility of compensation be restricted to situations of distress or a state of necessity and also limited financial compensation to actual harm or loss, in order to avoid confusion as to whether the subparagraph dealt with the question of restitution or compensation for moral damage. Nevertheless, there were difficulties in restricting the possibility of compensation to only two of the circumstances precluding wrongfulness and so the Drafting Committee had deleted any reference to an article in subparagraph (*b*). Similarly it had deleted the word "financial" before the word "compensation" because compensation in cases covered by that provision might not be limited to pecuniary compensation but might also include equivalent compensation. Since the word "compensation" was used in part two in a narrow sense, the commentary would explain what remedies under that provision were covered by the term "compensation". The use of the term might have to be reconsidered when the relevant articles of part two had been examined. Subparagraph (*b*) likewise limited compensation to "material harm or loss". The Special Rapporteur had made it clear in his second report that the question of compensation was limited to material harm and did not include moral harm. That idea would also be explained in greater detail in the commentary. Lastly, payment of the compensation referred to in article 35, subparagraph (*b*), was not limited to the State most directly affected. It was sufficiently general to extend to third States as well. The title of the article, as proposed by the Special Rapporteur in his second report, had remained unchanged.

72. He reiterated that the Drafting Committee recommended that the Commission should only take note of its report.

73. Mr. PELLET said that, if the Commission merely took note of the report and did not discuss it, when the topic came to be re-examined, say two years hence, its content would have been forgotten and a new report would have to be presented in order to refresh members' memories.

74. Mr. CRAWFORD (Special Rapporteur) agreeing with Mr. Pellet, said that concerns about any of the articles were best aired immediately. The reason behind the Drafting Committee's recommendation had been that it might prove necessary to amend the articles in the light of subsequent deliberations and indeed former article 22 (currently article 26 bis) might ultimately be inserted in chapter III of part one. Since it would be helpful to consolidate progress and identify outstanding difficulties, he would have no objection to perusal of the report article by article, so that the Committee could focus on any remaining problems at the fifty-second session of the Commission.

75. Mr. ECONOMIDES pointed out that if the debate was to be productive, a decision had to be taken on whether the report was to be examined as a whole or article by article.

76. Mr. LUKASHUK said that it would expedite the Commission's work if the report was discussed as a whole. Generally speaking, although he could support the articles drafted by the Drafting Committee, he had some doubts about one or two of them. First, with regard to article 27 bis, the Chairman of the Committee had stressed that the control and direction of one State by another referred solely to the commission of a wrongful act and not to a wider context. If so, subparagraphs (*a*) and (*b*) were incomprehensible. If a State was directing another, how could it fail to know about the act in question? With regard to article 29, he believed that from a purely legal point of view, it was hard to justify the adjective "valid", because any legal act had to be valid. If consent was not

valid, it was non-existent. In his opinion, further thought therefore had to be given to the drafting of that article.

77. Again article 29 bis needed to be considered. The Chairman of the Drafting Committee had commented that the article largely dealt with rare, hypothetical cases, but such situations were often encountered in reality. Did Article 103 of the Charter of the United Nations not constitute a peremptory norm? Furthermore, under that Article, Security Council resolutions took precedence over a State's pre-existing obligations. As a result, a breach of an obligation would become lawful if it rested on a Council resolution. And, lastly, what of a regional agreement which provided that other obligations of a State could not run counter to that agreement? Did existing hierarchical norms preclude the wrongfulness of an act? While it did not appear necessary to discuss the articles in detail, the commentary should deal with that specific issue as it was of great practical significance.

78. The CHAIRMAN suggested that the report of the Drafting Committee should be examined chapter by chapter and that comments should be submitted on each cluster, starting with chapter III (arts. 16-26 bis).

79. Mr. PELLET pointed out that the word "deleted" had been added after several articles listed in the report of the Drafting Committee. The contents of some articles, however, had not been deleted but subsumed under other articles. It would therefore be better to put "See ..." and to specify where the notion or phrase was to be found. In article 16, the word "character" had been translated as *caractère* in French, whereas he thought that *nature* would be more appropriate. He disliked the text of article 18. Why was it couched in negative rather than positive terms? With regard to article 24, he simply wished to ask the Special Rapporteur to set out the meaning of a "breach not having a continuing character" in the general article on definitions. An explanation in the commentary was not enough. Article 25, paragraph 1, spoke of a series of actions or omissions "defined" as wrongful. It was not a well-chosen term and "considered" would be more apposite. Furthermore, the remainder of the sentence "occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act" was not an improvement on the earlier text and was almost incomprehensible.

80. Mr. ECONOMIDES said that, unfortunately, he had not been able to attend all the meetings of the Drafting Committee. First, he would like to see the words *en vertu de* replaced by *par* in the French version of article 16, as it seemed both stylistically awkward and semantically not quite correct. He did not agree with Mr. Pellet's proposal to replace the word *caractère*. The word was appropriate, since the article was concerned with acts and obligations all having essentially the same character. It was not a question of differences between their natures.

81. However, he agreed with Mr. Pellet about article 18, the object of which was to set forth a condition, rather than define an exception. He therefore proposed that *à moins que* should be replaced by *si*. As to article 24, *l'événement* should be replaced by *cet événement*, as reference was being made to a specific event.

82. With regard to article 25, it would be difficult to find another term to replace the word "defined", as Mr. Pellet had proposed, although he agreed that it was not ideal. Article 25 was concerned with an occurrence which was wrongful at the international level and which was made up of a series of acts which could be omissions or actions. It was when that series was completed that a wrongful international event occurred. The difficulty was to decide when such a series of actions came to an end and he could accept the wording as it stood.

83. Mr. CANDIOTI (Chairman of the Drafting Committee), replying to comments made on the articles in chapter III, said he would have to seek further guidance as to whether to take up Mr. Pellet's suggestion on including a reference whenever part of a deleted article had been included in an existing article. With regard to Mr. Pellet's proposal to replace *caractère* by *nature* in article 16, he felt that the latter was slightly more open to other interpretations. Having discussed the matter at length, the Drafting Committee had felt that any word used in the context would be ambiguous. It had been a question of selecting a word with sufficiently general applicability. The important consideration would be to formulate a commentary that clarified the meaning of "character" in the context.

84. The negative wording of article 18 was a matter on which the Special Rapporteur should comment, as he had advised on the article's formulation. However, as far as he was concerned, the meaning of the article was clear: the obligation in question could be breached only when it was in force, at the moment the act occurred.

85. As to Mr. Pellet's comments on article 25, the Drafting Committee had spent considerable time attempting to define what constituted a composite act. The use of the word "defined" reflected the Committee's concern to typify a composite act as defined by the actions or omissions of which it was comprised. He thus preferred to retain "defined", as it was more precise than "considered" in the context. Finally, with regard to the proposal by Mr. Economides to amend paragraph 3 of article 24, he thought the wording was sufficiently clear as it stood. The question whether to say *l'événement* or *cet événement* did not affect the substance of the article.

86. The CHAIRMAN said it was his understanding that the inclusion of wording to indicate that an article had been deleted was in keeping with the Commission's custom. The practice had the merit of making clear to the reader that nothing was missing, and especially that nothing had been omitted from the articles which had been adopted. The Commission was not bereft of information on the point which had been raised, since the Chairman of the Drafting Committee had stated in his report that articles 17, 19, 20, 21 and 23 had been deleted as a result of the reformulation of article 16.

87. Mr. CRAWFORD (Special Rapporteur) said he would not comment on matters such as whether the word "nature" should replace "character" in article 16. The Drafting Committee had already debated those matters at some length and had reached its decision. With regard to Mr. Pellet's point about the use of the word "deleted", he sympathized to the extent that material contained in some

of the articles had not been deleted but subsumed under other articles. While it might be helpful to include footnotes explaining that fact, the practical problem was that it was not possible to attach the explanations of the Chairman of the Drafting Committee to the individual articles in the context of the report currently before the Commission.

88. He could see no objection to the drafting proposals in connection with the French text made by Mr. Economides. The Commission could take careful note of them and return to them at the *toilettage* phase of its consideration of the text at the next session.

89. As to Mr. Pellet's first point of substance concerning the wording of article 18, it would be incorrect to couch the article in "positive" terms, such as "An act of a State is considered a breach of an international obligation if the State is bound ...", as that excluded the notion of inconsistent conduct. More significantly, the "negative" wording reflected the fact that the article constituted a guarantee against the retrospective application of international law in the area of responsibility. With regard to Mr. Pellet's second point of substance, the drafting of paragraph 1 of article 25 had caused considerable difficulties, with the result that the English and French versions were slightly different. The paragraph in question could apply only to a particular obligation, whereas in the article as adopted on first reading it had constituted a general proposition applicable to any obligation. Thus, the word "define" had been used in the latest version precisely because of the fact that the obligation in question defined the conduct as wrongful, by reference to its composite character. The article should be retained in its narrower form, which reflected the fact that it concerned a particularly important category of obligation. Again, the question whether to replace "define" by a different formulation could be discussed at the next session at the *toilettage* stage.

90. Mr. PELLET said he was satisfied that the proposal by Mr. Economides to replace *en vertu de* by *par* in article 16 would bring the French version into line with the English, in which the word "by" was used. However, it should be borne in mind that the replacement of *à moins que* by *si* in the French version of article 18 would also necessitate the replacement of "unless" by "if" in the English text. Likewise, in article 24, paragraph 3, the introduction of *cet événement* meant that the phrase in question in the English text would have to be modified to read "that event". He was not convinced by the Special Rapporteur's clarification concerning article 18. Surely, a positive text along the lines of "An act of a State shall be considered a breach of an international obligation only if ..." would meet the concerns the Special Rapporteur had expressed. Lastly, although also unconvinced by the explanations he had heard concerning his comments on article 25, he would withdraw his objections.

91. The CHAIRMAN invited the members of the Commission to consider the cluster of articles under chapter IV (arts. 27, 27 bis, 28 and 28 bis).

92. Mr. PELLET said he wished to place on record his continuing preference for the former version of the heading of article 27 bis, which referred to "Direction or control", rather than the latest version which read "Direction and control". Either direction and control amounted to the same thing, in which case there was no need to complicate matters, or there was a difference between the two terms. That being so, a State would not escape its responsibilities whether it exercised direction or whether it exercised control—the use of the word "and" gave the impression that responsibility occurred only when a State exercised both together. The thing missing from the article was that responsibility could only be partial if the direction or the control was not complete. However, a State which exercised direction or control bore responsibility because of the wrongful act.

93. Partial control or direction still engaged State responsibility for the internationally wrongful act. In the case concerning *Military and Paramilitary Activities in and against Nicaragua*, for example, ICJ had probably reasoned wrongly in considering that, as there had not been complete control and direction, the United States of America did not bear at least a part of the responsibility for acts by the contras. He regretted that the article was not aimed at making powerful countries pay for the occasions when they avoided their responsibilities and behaved badly.

94. With regard to article 28 bis, he considered that the phrase "the State which commits the act in question" was not in keeping with the very definition of an internationally wrongful act. The latter could be an action—and in fact one "committed" an act—or an omission. The same problem arose in article 29. There, the Chairman of the Drafting Committee had said that an explanation would be included in the commentary to make it clear that "commission" could also mean "omission". As it made no sense to speak in article 28 bis of committing an omission, he proposed that the text should be amended to read "This Chapter is without prejudice to the international responsibility of the State to which the act in question is attributable". An action or omission was attributable to a State. However, an act (*fait*) could not be committed by a State. Something was committed by a State if it was an action; if it was a question of an omission, then it was not an act that was being committed. Thus, in the final *toilettage*, he would like to see *commet le fait* replaced by *auquel le fait en question est attribuable*. The problem, however, was not one of French, but of logic.

95. Mr. ELARABY said he found that article 28, subparagraph (*a*), gave a somewhat contradictory impression. The same applied to paragraph 2 of article 31 and although the latter, strictly speaking, came under chapter V, he would welcome clarifications on both articles from the Special Rapporteur.

96. Mr. CRAWFORD (Special Rapporteur) said the critical point about article 28, subparagraph (*a*), was that the coercion did not necessarily have to involve the use of force, i.e. it did not necessarily have to be contrary to Article 2, paragraph 4, of the Charter of the United Nations. Subparagraph (*a*) covered any coercive act, subject to the possibility of precluding wrongfulness under chapter V. In that respect, article 28 had not changed since the first reading. Under the terms of the article the State which was

coerced had no choice but to do what it was being coerced to do, by reason of the very strong meaning given to coercion. The defence of that State would be effected on a basis of force majeure, i.e. its defence would be covered by article 31. However, the coercing State would be responsible to the injured State in such a situation. That being so, the effect of article 28 was to transfer liability from the coerced State—which had no choice but to act in any other way—to the coercing State. The problem raised during drafting was that it could not be said, as it had been in the first version of article 28, that the act was an internationally wrongful act of the coerced State, because under article 31 it was not. That was the reason for the current wording of article 28.

97. There were two conditions for the "transferred" responsibility under article 28: first, if the coerced State acted voluntarily, rather than involuntarily, it would have committed a wrongful act. Secondly, the coercing State must be aware of that. If both those conditions applied, responsibility was transferred from the coerced State to the coercing State, irrespective of the character of the coercion. Furthermore, article 28 bis made it clear that that occurred without prejudice to any other basis for the responsibility of the coercing State. Other situations might arise, for instance, if the coercion was intrinsically unlawful, in which case article 28 bis would apply. Article 28 was intended to deal with a situation in which a State was coerced to commit a wrongful act, and the injured State would otherwise be left without redress.

98. It was not normally the case that a State which agreed to have forces placed on its territory was also accepting the risk that those forces would exercise coercion against it. The assumption was that the forces in question would act lawfully. The object of article 31, paragraph 2 (*b*), however, was designed to cover situations in which, for example, one State offered another State a guarantee against the occurrence of an event, such as flooding caused by climatic factors. In such a case, the existence of a guarantee against flooding meant that the guarantor State had accepted the risk of flooding caused by climatic conditions. It could not then claim that the floods had occurred because of exceptional monsoon rains, which were part of the natural order of things. On the other hand, if the floods were caused by the collapse of a dam, and not by the circumstances guaranteed, force majeure might apply.

99. Thus, paragraph 2 (*b*) of article 31 was a standard proviso of the kind found in force majeure provisions in legal systems worldwide. It was certainly not intended to deal with a situation in which, for instance, forces located on the territory of a State stepped outside their mandate and coerced the host State.

The meeting rose at 1 p.m.

2606th MEETING

Monday, 19 July 1999, at 3 p.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Baena Soares, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*concluded*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of the cluster of articles under chapter IV (Responsibility of a State in respect of the act of another State) of the draft articles (arts. 27, 27 bis, 28 and 28 bis) contained in the report of the Drafting Committee on the draft articles on State responsibility (A/CN.4/L.574 and Corr.1 and 3).

2. Mr. ECONOMIDES, referring to article 27 bis, said he agreed with other members that "directs or controls" would be preferable to "directs and controls". He had made the same comment at an earlier plenary meeting.

3. He did not find the wording of article 28 at all satisfactory. Subparagraph (*a*) made a somewhat premature reference to force majeure, namely, chapter V (Circumstances precluding wrongfulness). However, article 28 was intended only to define a State's responsibility in respect of the act of another State, not the wrongfulness of that act. Subparagraph (*a*) did not make that clear. Subparagraph (*b*) was obvious and could very well be deleted. Article 28 should perhaps be condensed into a simple sentence, such as, "A State which coerces another State to commit an internationally wrongful act is responsible for that act".

4. Mr. LUKASHUK said that article 27 bis was somewhat naive in stipulating that a State which directed and

[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, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook ... 1999*, vol. II (Part One).

[3] Ibid.