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**Summary record of the 2640th meeting**

Topic:  
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“crime”, as it had been neither “massive” nor “systematic” in character. Both those elements were, in his opinion, integral to the definition of crimes, although he conceded that, as now worded, article 19—which he did not regard as obsolete, but which certainly warranted further serious debate—contained neither element, except as implied in the examples cited in its paragraph 3.

53. Mr. GOCO said he welcomed the more prominent role accorded to apology as a form of satisfaction in the proposed new article 45. *Pace* Mr. Simma’s reservations in that regard, apology could serve as a valuable tool in the volatile world of international diplomatic relations.

54. Mr. Sreenivasa RAO said that, more often than not, States attempting to resolve a protracted dispute would be seeking reconciliation, rapprochement and new forms of cooperation, and would thus show flexibility in choosing from a range of available options in the light of a political assessment of the situation. The object of the current exercise should thus be to set out a range of political options and entitlements open to States, rather than a rigid sequence of consequences and obligations that would inevitably follow the commission of an internationally wrongful act. In its current over-schematic formulation, however, chapter II took no account of such political niceties, instead giving the misleading impression that an internationally wrongful act automatically triggered just such a rigid sequence of consequences, one that must be followed mechanically. Yet apology, for example, was just one of a number of options open to States, not an indispensable component in a package of measures together amounting to full reparation, as the proposed new article 45 implied.

55. Turning to specifics, he said he had no difficulty in accepting the Special Rapporteur’s proposal to replace the term “moral damage” by “non-material injury”. In his view, article 45, paragraph 3 (a), referring to nominal damages, should be retained, as a useful additional option for States, perhaps as an alternative to a formal apology. The commentary should, however, stress that the forms of satisfaction set out in paragraph 3 were alternatives, not mandatory consequences.

56. If the opening phrase of article 45, paragraph 3 (b), were to be deleted, the deletion should be without prejudice to future consideration by the Commission of the issue of punitive damages. As reformulated, paragraph 3 (b) seemed to relate to the sphere of compensation rather than satisfaction. The Drafting Committee should consider the question further. He had few problems with article 45 bis, or with article 46 bis, which should be retained and further refined if necessary. Many of the problems relating to interest should be left to the discretion of the courts. Injury was not always so easily quantifiable as Mr. Rosenstock asserted, nor was it necessarily helpful, in the broader context of satisfaction, to insist on compensation to the last penny. Lastly, in any consideration of the consequences of an internationally wrongful act, due weight must be given to the rights of the accused.

57. Mr. ROSENSTOCK said that in domestic societies most disputes were settled by negotiation, and were thus compromises. Doubtless that was also true at the international level—perhaps more so. That being the case, there was still a need for vigorous criteria with which to measure the loss. The absence of such criteria was bound, in the

long run, to place the injured State at a disadvantage with regard to compensation for the damage suffered. That was why it was useful to have a rigorous format within which negotiations could be conducted.

58. Mr. KUSUMA-ATMADJA thanked colleagues for their enlightening contributions to the debate. In particular, he endorsed Mr. He’s view that inquiry had its place in the article on satisfaction; Mr. Pellet’s remarks concerning the independence of members of the Commission; and Mr. Sreenivasa Rao’s comments on the need for a more flexible procedure in article 45. He also expressed doubts as to whether the arrangement proposed in article 45 bis, paragraph 2, was workable in practice.

59. The CHAIRMAN said that a decision on referring articles 45, 45 bis and 46 bis to the Drafting Committee would be taken following the conclusion of the debate on those articles at the next plenary meeting. Meanwhile, if he heard no objection, he would take it that the Commission agreed to authorize the Chairman of the Drafting Committee to take informal account of the contributions made to the plenary debate thus far when the Committee considered those articles at its meeting that same afternoon.

*It was so agreed.*

*The meeting rose at 1 p.m.*

## 2640th MEETING

*Friday, 14 July 2000, at 10 a.m.*

*Chairman:* Mr. Chusei YAMADA

*Present:* Mr. Addo, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Illueca, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

[Agenda item 3]

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

<sup>2</sup> Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of articles 45, 45 bis and 46 bis, contained in chapter I, section B, of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. HERDOCIA SACASA welcomed the fact that the Special Rapporteur had considered it useful on a number of occasions to quote judgements of courts on the American continent, including the Inter-American Court of Human Rights and the Central American Court of Justice.

3. Latin American experience had not been uniformly good when it came to satisfaction. At the previous meeting, two members of the Commission had already requested the retention of article 45, paragraph 4, which stated that satisfaction must not take a form humiliating to the responsible State. The truth of the matter was that weak countries had had to bow down before foreign flags and offer satisfaction without having the opportunity, even for the most serious of reasons, of having their own colours saluted in turn. At that level, the law must operate as an instrument for ensuring balance and equality between strong and weak countries. He illustrated the point by referring to the Eisenstuck-Leal case, which stemmed from an incident that had taken place in 1878 between a Nicaraguan citizen and his wife, who was the daughter of the consul of a great Power. As a result of the incident, the great Power had lodged protests, supported by a number of gunboats. One day, which the historians had dubbed a day of shame and humiliation, Nicaragua had had to parade a regiment before the foreign flag in question. It therefore seemed all the more necessary for the draft to contain a provision on the principle of the sovereign equality of States, whether in paragraph 4 of new article 45 or in a more general article.

4. Consideration of satisfaction must be based on the fundamental distinction between non-material damage caused to the State and moral injury caused to private individuals. As the Special Rapporteur advised in paragraph 181 of his report, the term “non-material” proposed by Dominicé should be used.<sup>3</sup> Moral injury must come under article 44, dealing with compensation. As the Inter-American Court of Human Rights had said in the *Velásquez Rodríguez* case, moral injury was also entitled to compensation, especially where it involved a violation of human rights. Non-material damage was of a quite different order.

5. The wording of article 45, paragraph 1, should be amended, as Mr. Gaja had said, so that the State was obliged not to “offer”, but to “give” satisfaction.

6. Paragraphs 2 and 3 should be merged into a single provision, which would not be of an exhaustive nature and would deal with the modalities of satisfaction. Paragraph 3 (b) on damages reflecting the gravity of the injury should be in article 44, dealing with compensation, and refer to article 19, which defined a State crime. It would be better if paragraph 3 (c) referred not to disciplinary or penal action against those responsible, but to opening an

inquiry to determine responsibilities for the wrongful act and to communicating the results of such an inquiry. In fact, the opening of an inquiry could in itself be a form of reparation.

7. Turning to the question of the autonomy of satisfaction, he said that, while autonomy certainly existed, it was relative. The principle of full reparation could be expressed by a single form of satisfaction or by several, which could supplement other forms of reparation or be sufficient in themselves according to whether or not they ensured full reparation, met conditions which might have been agreed between the parties or corresponded to the request of the injured State, as made by France in the “*Carthage*” and the “*Manouba*” cases and by New Zealand in the “*Rainbow Warrior*” case. As Dominicé had said, satisfaction was autonomous in the sense that, depending on the circumstances, it could either constitute the entire reparation or be additional to another form of reparation.

8. In general, he thought that the text under consideration, like the other draft articles on which the Commission was working, must make a distinction between general principles and rules which applied specifically to the subject-matter in question, avoiding useless repetition. It was enough to establish the rules once and for all so that they functioned together rather than repeating them in some cases and omitting them in others. For example, full reparation, proportionality of reparation and other aspects which had appeared during the debate—such as taking account of the primary rule, the causal link between reparation and the internationally wrongful act, the fixing of the date at which the injury must be redressed and the sovereign equality of States in respect of the various forms of reparation—must be considered, if possible, as general principles and treated separately. In that way, the various forms of reparation could be presented in their most refined form, with their constituent elements and substantial content.

9. Mr. GALICKI said that, on a few questions, he was not satisfied with some rules proposed in article 45 on satisfaction. The text of article 45 as proposed by the Special Rapporteur, although appearing to be much longer and more exhaustive than the previous version, suffered from one serious shortcoming in that it limited the application of the institution of satisfaction to non-material or moral injury, whereas, previously, it had been applicable to all injury, and particularly moral injury. That narrow approach might create problems. Did it mean, for example, that the injured State was not entitled to satisfaction in a case of material injury? Must there be a simultaneous non-material injury in order to justify the existence of a right to satisfaction on the part of the injured State? Such an approach would be somewhat artificial.

10. That narrow approach was in fact identical to the one adopted in article 44. At first, compensation was limited to economically assessable damage sustained by States and individuals and understood as being only material damage. Later, however, in the Drafting Committee, a proposal had been made to extend compensation to moral injury sustained by private individuals and, lastly—and on that point provisional agreement seemed to have been reached—compensation should now apply

<sup>3</sup> See 2635th meeting, footnote 3.

to all economically assessable damage, whether material or moral, sustained by a State or an individual. That development seemed fully justified in that it reflected what was fairly clearly recognized in the "*Rainbow Warrior*" case, i.e. that satisfaction could not be considered as the only form of reparation for non-material injury.

11. If the Commission had decided not to limit compensation to material injury, should it not also accept that a State which had sustained not only a moral injury, but also a material injury should have the right to demand satisfaction? An affirmative answer to that question would create the desired balance between compensation and satisfaction, giving both forms of reparation the same scope and flexibility in application. They could therefore apply just as much to material damage as to moral injury, through measures that were specific to each of them. In connection with that specificity, careful consideration should be given to the question whether so-called "punitive damages" should remain in the realm of satisfaction, should be placed within the sphere of compensation or should figure in the provisions dealing with crimes.

12. In conclusion, he said that the critical remarks he had made did not detract from the admiration and respect he had for the excellent work the Special Rapporteur had done on the topic.

13. Mr. GOCO said that article 45 should be seen in the light of the articles that went before it and that satisfaction was necessary to obtain full reparation for injury, in addition to restitution or compensation.

14. Mr. CRAWFORD (Special Rapporteur), summing up the debate on chapter I, section B, of his report, said that he would deal first with articles 45 bis and 46 bis, which raised fewer problems than did the others.

15. Article 45 bis was concerned with interest. Some members saw the need for a separate article on interest, while others regarded interest as an aspect of compensation. The previous Special Rapporteur had proposed a separate article on interest, and all the members of the Commission who had spoken on the article at the time had agreed that interest would have to be payable. The problem had been that the article proposed had not stated that principle: it had set out secondary principles about such matters as compound interest and the calculation of interest. The article had accordingly not been adopted. He believed it could be concluded from the current debate that a majority of the members of the Commission considered that there should be a separate article on interest, though interest was merely an adjectival form of reparation. In his own view, the provisions on interest must not be incorporated into the article on compensation because there might be circumstances when, for example, interest was payable in respect of principal amounts that were due, not by way of damages in the context of compensation, but under primary rules. There had been relatively little disagreement with the first sentence of paragraph 1 of article 45 bis, while some doubts had been expressed about the other parts of the article. They were all drafting issues, however, and he had nothing to add on those points.

16. Turning to article 46 bis, on the mitigation of responsibility, he said the point had been made that the title did not correspond to the content of the article and the Draft-

ing Committee could well consider some other title. Although the primary function of the propositions contained in the article was to mitigate the amount of compensation payable, circumstances could be imagined in which they would have some other effect. For example, cases had occurred when, because of a delay in making a demand for payment, a tribunal had said that interest should not be payable. Factors such as the conduct of the responsible State or of the person on whose behalf the State was submitting a claim could thus be relevant in relation to aspects of reparation other than compensation.

17. Article 46 bis, subparagraph (a), was essentially the same as the text adopted on first reading and as accepted by Governments in their comments. It embodied a well-established principle, namely, that account could be taken of the conduct of a person on whose behalf a State was submitting a claim in determining the amount of reparation. It was true that the principle was sometimes associated with the "clean hands" doctrine, but whether that doctrine was autonomous in international law was open to question. On balance, the majority of the members of the Commission seemed to be in favour of the retention of subparagraph (a).

18. There had been a certain tension in the debate, reflecting the tension between civil law and common law, between those who wished the provisions to be fairly extensive and those who wanted them to be as concise as possible, and he had tried to steer a middle course. The propositions set out in both of the subparagraphs of article 46 bis were well enough established in the literature and in judicial decisions to be worth including in the draft articles. A balance must be struck between the injured State's desire to achieve full reparation and the need for the amount of reparation not to be excessive.

19. The question had been asked whether article 46 bis, subparagraph (b), reflected a positive duty to mitigate damage. The Commission did not need to take a position on that point because that would depend on the circumstances in each case.

20. To sum up on articles 45 bis and 46 bis, he had heard no opposition to their being referred to the Drafting Committee, where the comments made on them could be considered.

21. Unlike the other two articles, article 45 had given rise to a major difference of opinion, and almost a divergence of philosophies, on the role of reparation. There was also a major question of method. It was clear that the notion of satisfaction existed in the literature and in case law. To remove satisfaction as a form of reparation and to redistribute its functions to other forms of reparation would be a significant change, but there was no reason not to do that if there were good analytical reasons for it. The elimination of an unnecessary or confusing concept could, after all, be an appropriate form of progressive development of the law.

22. The first point to note was that satisfaction was a hybrid concept. In the eighteenth century, the term had been practically synonymous with reparation. There were traces of that equivalence in article 41 of the European Convention on Human Rights and in the phrase "accord and satisfaction" used in the common law. He accepted

the point made by some members of the Commission that he had not analysed that problem in sufficient detail. On the other hand, satisfaction was well established in the literature and had been put to use in recent practice.

23. Moreover, States were rather special entities in some respects. They represented communities and the values at stake in many international conflicts could simply not be quantified. The immaterial aspects of international disputes were often the most important aspects and one of the functions of third parties was to permit a dispute to be settled in a way that gave a measure of satisfaction to both sides. Mr. Gaja had thus been entirely correct in saying that satisfaction had to result from some form of an agreement; that aspect of satisfaction was implicit in the use of the term “offer” in article 45.

24. As Mr. Herdocia Sacasa had said, the notion of satisfaction had been used in the past to inflict grave abuse. That was not sufficient reason to abolish the concept, but it must be carefully re-examined to ensure that it performed appropriate functions in the modern world.

25. The main problem with article 44 as adopted on first reading was that it made no provision for the quintessential form of satisfaction, namely, the acknowledgement by a State that it had committed a breach and, in judicial proceedings, the declaration that there had been a breach. Indeed, in contemporary practice, the standard form of satisfaction was the declaration that there had been a breach of international law and the best example thereof was the *Corfu Channel* case. Satisfaction could play a role in the settlement of a dispute alongside compensation for material injury and moral damage and restitution. Expressions of regret and formal apologies could imply an acknowledgement of a breach and could have the same function. It was clear that those forms of satisfaction continued to exist: there were recent and important examples. That was why he had tried to “partition” satisfaction by drawing a distinction between what he regarded as its “standard” form, namely, an acknowledgement by the responsible State or a declaration by a tribunal, and exceptional forms. He would therefore regret a decision to merge article 45, paragraphs 2 and 3, as some members wished, because he thought the distinction should be preserved.

26. The forms of satisfaction outlined in paragraph 3 had essentially an “expressive”, and thus symbolic, role. There were cases, of which the “*I’m Alone*” was the best example, when a tribunal had awarded substantial sums by way of satisfaction. If a category equivalent to that defined in article 19 was recognized, punitive damages could be imposed, but the subject at hand was “expressive” damages in relation to serious affronts to a State, which were not limited to any conceivable category of crime. Deplorable though it was, the “*Rainbow Warrior*” incident had not involved a crime as defined in article 19 and yet substantial damages still had a role to play, the question being whether it was to be under article 44, as Mr. Brownlie and some others had suggested, or under article 45. On first reading, the Commission had decided in favour of the second solution, but had limited it in a manner that was unsatisfactory and inconsistent with the literature and case law by rejecting the comparison with moral damage to private individuals. One way of responding to concerns about the

repetition of past abuses of satisfaction would be to acknowledge that that form of non-material injury could also be compensated in the context of article 44. “Expressive” damages for *injuria* could be awarded under that article. Practitioners of the common law would be happy to do that because they had a relatively undifferentiated concept of damages. That would mean that article 45 was concerned solely with the non-monetary and “expressive” elements of dispute settlement.

27. He had no strong views as to whether the reference to nominal damages should be retained.

28. Inquiry, another form of satisfaction brought up by Mr. He, was well worth mentioning because actually finding out what happened could be an important aspect of the settlement of a dispute.

29. The question was whether the provisions in article 45, paragraph 3 (c), should be retained. It could be argued that the situations it addressed were essentially covered by the primary rules and were not a major function of satisfaction. A non-exhaustive list of the forms of satisfaction could be included in paragraph 3.

30. With regard to article 45, paragraph 4, some members of the Commission had criticized the first part and others, the second. Some had been emphatic about the need to avoid humiliating States, as had been the case in the past, but there had been general agreement about the notion of proportionality, an aspect of which was linked to each of the forms of satisfaction and to countermeasures. Paragraph 4 was aimed at ensuring that demands for satisfaction were not excessive, with the underlying spectre that the State which had received restitution and compensation would nonetheless take countermeasures because it had not received satisfaction.

31. The Drafting Committee had a major task ahead of it with article 45; a moderate version of that article nevertheless had a role to play in the modern law of reparation.

32. Mr. PELLET said that the discussion had convinced him that certain positions he had adopted had not been well founded, and he wished to rectify them.

33. With regard to interest, the Special Rapporteur had convinced him that, in cases when the principal sum was payable by way of restitution, interest was payable. Since the words “moral damage” were used only for individuals, he had no objection to using the words “non-material damage” to refer to what was traditionally known as “moral damage to the State”, as long as the Commission spelled that out in the commentary.

34. He had taken a fairly rigid stance with regard to the last part of article 45, paragraph 4, but had been surprised to discover during the discussion that the practices of the past had left deep marks in the collective unconscious of the nationals of States that had been victims of those practices. Although that provision was hardly rational, it was perhaps useful, especially as the list of forms of reparation towards which the Commission was heading would not be exhaustive. On the other hand, he thought it was incorrect to state that the very fact of acknowledging a breach of international law was a humiliation, as some members had contended.

35. He still disagreed with the Special Rapporteur on the first part of paragraph 4, relating to proportionality.

36. He was concerned to see that, like Mr. He, the Special Rapporteur seemed to believe that inquiry was in itself a form of satisfaction. Certainly, an inquiry could be part of a process that resulted in satisfaction, as could recourse to some third party, but that was not in itself satisfaction. Institutional machinery should not be introduced into provisions that were intended to be prescriptive.

37. He was also concerned about the position taken by the Special Rapporteur, mirroring that of Mr. Gaja, according to whom satisfaction was given in the context of an agreement. The element of agreement was no more present in satisfaction than in the other forms of reparation, to which it would then have to be added, something that would completely change the very nature of the entire exercise. In any case, that element was by no means exclusive to satisfaction.

38. Mr. BROWNLIE said that the idea of partitioning article 45 was justified, in his view, by the fact that separating out the different elements made it possible to examine them properly. There were three elements: the moral damage to the State, in the legal sense, which related to compensation; the consequences of the internationally wrongful act, which related to cessation and non-repetition; and what might be termed political measures.

39. There were three such measures constituting satisfaction: first, symbolic damages, which seemed anomalous and perhaps unimportant. Secondly, there was apology, although in that regard there was no consistent practice or *opinio juris*. There were cases in which no apology had been given or asked for. There had, of course, been some dramatic instances where powerful States had expressed their apologies to weaker States. That might, however, have been an act of good conduct; it did not follow that it was a matter of law. The third of the political measures was the requirement of the trial of individuals responsible for the original wrongful act. Such trials, however, were not necessarily connected with any question of State responsibility. For example, there might be a situation where aliens were mistreated, but there had been no brutality or abuse of power on the part of the officials involved; no crime had been committed under domestic law. The demanding State would, nevertheless, require the disciplining of those responsible, but for political rather than legal reasons, since there had been no crime.

40. Paragraph 4 presented a particular difficulty. It seemed to suggest that, if humiliation was applied, it should be proportionate to the wrongful act, as though it were possible for humiliation to be relative. In his view, the measures that he had described as political had precisely that aim, to humiliate the wrongdoing State. More generally, he thought that the Commission paid more attention to what it believed to be the case than to reality itself and to tend to convert every subject into a human rights issue.

41. Mr. ECONOMIDES, referring to the Special Rapporteur's suggestion that satisfaction might not be a unilateral act, said that, in his view, the very opposite was the case. Admittedly, satisfaction often resulted from consultations or even a formal agreement between the States con-

cerned, but in itself it officially remained a unilateral act, certainly to a greater extent than restitution and compensation, which necessarily implied an agreement between the parties. In any case, the Commission's role was not to settle such a minor point, but, rather, to establish the rights of the victim State and the obligations of the responsible State in order to facilitate the arrangements made between them.

42. As for paragraph 4, if the humiliation in question resulted from the use of a generally recognized form of satisfaction, it should be accepted: that was how the rules of the game worked. If, however, the satisfaction was simply intended to be offensive to the other State, it became intolerable.

43. Mr. LUKASHUK said that satisfaction was such a specific form of reparation that its relationship with the other forms—compensation and restitution—should be determined. Indeed, it should be given a precise definition to indicate that it was equivalent to moral reparation.

44. One member had said that satisfaction was applicable only if the damage which had given rise to it was immaterial in nature. Satisfaction could constitute only an acknowledgement of a breach. That was an interesting point of view which should be reflected in the commentary, where satisfaction should be treated as a separate topic.

45. Mr. SIMMA said that he wondered whether, contrary to what some other members had said, satisfaction was not always based on a deal between the parties. All reparations, whatever form they took, were founded on negotiations and, in that regard, satisfaction was no exception. The Israeli attack on United States personnel during the 1967 Six Day War, and the attack on the Chinese Embassy in Belgrade, for example, had given rise to intensive discussions. On the other hand, there were instances where satisfaction had been given or offered without any underlying agreement.

46. As for disciplinary action or punishment of those guilty of the internationally wrongful act, it was wrong to become fixated on cases where such demands had been made in an abusive or humiliating way. There were many instances where such demands had been made in an entirely proportionate way, when the conduct had been egregious. It was perfectly possible for satisfaction to take an appropriate form.

47. Mr. GAJA said that, in his statement (2638th meeting) in relation to article 45, paragraph 1, he had pointed out that, whereas in articles 43 and 44 a State was obliged to "make restitution" and "compensate", in article 45, it only had to "offer" satisfaction. He had suggested that in article 45 the obligation to give satisfaction should be stated.

48. It was not, in his view, satisfaction itself that depended on agreement between the parties, but rather the modalities of that satisfaction, which, unlike compensation and restitution, the content of which was known in advance, were a matter for negotiation. There were grounds for negotiation because apologies, to take just one example, could take many forms.

49. Mr. KABATSI, referring to article 45, paragraph 3 (c), said that Mr. Pellet had been right to say that it was the results of the inquiry that might lead to satisfaction, not the inquiry itself. There was nothing more satisfactory than a demonstration of good faith at the very beginning of a dispute. It prepared the ground for the settlement of that dispute and, by leaving the parties free to invoke the other provisions of paragraphs 2 and 3, might be sufficient in itself to resolve the dispute.

50. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 45, 45 bis and 46 bis to the Drafting Committee.

*It was so agreed.*

51. The CHAIRMAN invited the Special Rapporteur to introduce chapters II and III of his third report.

52. Mr. CRAWFORD (Special Rapporteur) said that, during the discussion on the structure of the draft articles, the Commission had provisionally agreed that there should be a separate segment dealing with the rights of an injured State to invoke responsibility and, in that context, it had accepted the distinction for which he had argued between the injured State, or State victim of the breach, and those States with a legitimate juridical concern in invoking responsibility, even though they were not themselves specifically affected by the breach. He had attempted to define the two categories of State in article 40 bis. Chapter III contained a series of proposals in respect of the invocation of responsibility by the injured State, as defined in article 40 bis, paragraph 1, without prejudice to a further set of provisions dealing with the right of those States falling within the category of paragraph 2, to invoke responsibility. He looked forward to hearing the reaction of members of the Commission, once they had read the chapter. Meanwhile, he wished to highlight certain aspects.

53. With regard to the right of the injured State to elect the form of reparation, contained in chapter III, section A, entitled “General considerations”, it was clear that, in ordinary circumstances, the injured State could choose between restitution and compensation. That said, he did not entirely agree with the proposition that the injured State could elect the form of satisfaction, although it was entitled to insist on the basic form of satisfaction in terms of a declaration. As for the real point—the choice between restitution and compensation—there might in certain cases be limits on the right of the injured State to choose the form of reparation and he had briefly considered those cases in the report. They were exceptional in nature and were dealt with in the context of the continuing performance of the primary obligation rather than of the choice of reparation. By analogy with article 29 of Part One, dealing with consent, the problem could be settled by referring to a “valid” choice by the injured State.

54. With regard to formal requirements for the invocation of responsibility, which were considered in paragraphs 234 to 238, the basic theme was that it was important not to over formalize the procedure. Nonetheless, on the analogy of article 65 of the 1969 Vienna Convention, a provision—article 46 ter—had been inserted, which simply required notice of the claim. Certain consequences arose from not giving such notice; for example,

the State might, if it persisted in that position, be deemed to have waived the claim.

55. The admissibility of claims, which was covered in paragraphs 239 to 242 relating to the exhaustion of local remedies and the nationality of claims, was a question not of judicial admissibility but of the admissibility of the claim in the first place. The provisions concerned therefore took the form of a kind of checklist of the relevant considerations.

56. As for the limits on recovery of reparation, which were covered in paragraphs 243 to 249, the first dealt with the *non ultra petita* principle, which had been broadly recognized by the courts, whereby, in relation to an international claim, a court could not give a State more than it had claimed. He considered that, since the principle was really a manifestation of the underlying doctrine of election, there was no need for a specific recognition of the principle in the text. The second issue related to the rule prohibiting double recovery, which had been recognized by courts and tribunals. The issue arose largely in cases where the same claim, or essentially the same injury, was complained of by the injured State against several States, although other situations could be envisaged. Bearing in mind, however, that the Commission did not intend to deal with all the procedural ramifications of cases of responsibility, it had seemed sufficient that the rule prohibiting double recovery should be mentioned in the context of the provision relating to a plurality of responsible States, namely article 46 sexies.

57. Turning to the question of the loss of the right to invoke responsibility, contained in paragraphs 250 to 262, he said that, although such a provision might be deemed superfluous, it had seemed appropriate at least to make a proposal, on the analogy of the provisions of article 45 of the 1969 Vienna Convention. Having considered a series of possible grounds for the loss of the right to invoke responsibility—waiver, delay, settlement and termination or suspension of the obligation breached—he had definitively retained only two of those grounds in article 46 quater, whereby responsibility might not be invoked if the claim had been waived—including by such means as the conclusion of a settlement—and if there had been an unreasonable delay in notifying, amounting to a form of acquiescence with a loss of the claim.

58. With regard to the question of a plurality of States and the vexed issue of the character of responsibility when more than one State was involved, he stressed the frequent tendency for people to use terminology with which they were familiar, especially in relation to “joint and several responsibility” or “solidary responsibility”. Indeed, such phrases were sometimes incorporated in treaties. For example, the Convention on International Liability for Damage Caused by Space Objects expressly used the phrase “joint and several liability” (art. IV, para. 2), spelling out its exact meaning in the context of the launching of space objects. Apart from such cases, however, bearing in mind the many different regimes of solidary responsibility, it was important to be extremely cautious about the use of national law analogies.

59. With regard to a plurality of injured States, he had put forward a relatively simple proposal in article 46

quinquies, given that the definition of an injured State was that contained in draft article 40 bis, paragraph 1, and the expression “State which has committed the internationally wrongful act” might later be replaced by “responsible State”.

60. The case of a plurality of States responsible for the same internationally wrongful act was obviously different from a case in which a series of States had separately done damage to a given State or in which each of them was responsible for the damage it had caused. Only the first instance—of which the classic example was the *Corfu Channel* case—was addressed, in another relatively simple provision under article 46 sexies, paragraph 1. The principle embodied therein was qualified, however, in two ways by the provisions of paragraph 2, first, by the principle prohibiting double recovery and, secondly, by the fact that the question of the contribution among the responsible States should be settled among them. In his view, the proposed provisions in article 46 sexies were in line with the judgment of ICJ in the *Corfu Channel* case and in any event were supported both by the general principles of law and by considerations of fairness.

#### **Reservations to treaties<sup>4</sup> (continued)\*(A/CN.4/504, sect. B, A/CN.4/508 and Add.1–4,<sup>5</sup> A/CN.4/L.599)**

[Agenda item 5]

#### **DRAFT GUIDELINES PROPOSED BY THE DRAFTING COMMITTEE**

61. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft guidelines adopted by the Drafting Committee (A/CN.4/L.599), the titles and texts of which read:

##### **1.1.8 Reservations made under exclusionary clauses**

A unilateral statement made by a State or an international organization when that State or organization expresses its consent to be bound by a treaty, in accordance with a clause expressly authorizing the parties or some of them to exclude or to modify the legal effect of certain provisions of the treaty in their application to those parties, constitutes a reservation.

##### **1.4.6 [1.4.6, 1.4.7] Unilateral statements made under an optional clause**

1. A unilateral statement made by a State or by an international organization, in accordance with a clause in a treaty expressly authorizing the parties to accept an obligation that is not otherwise imposed by the treaty, is outside the scope of the present Guide to Practice.

2. A restriction or condition contained in such statement does not constitute a reservation within the meaning of the present Guide to Practice.

\* Resumed from the 2633rd meeting.

<sup>4</sup> For the text of the draft guidelines provisionally adopted by the Commission at its fiftieth and fifty-first sessions, see *Yearbook . . . 1999*, vol. II (Part Two), p. 91 et seq., para. 470.

<sup>5</sup> See footnote 2 above.

##### **1.4.7 [1.4.8] Unilateral statements providing for a choice between the provisions of a treaty**

A unilateral statement made by a State or an international organization, in accordance with a clause contained in a treaty that expressly requires the parties to choose between two or more provisions of the treaty, is outside the scope of the present Guide to Practice.

##### **1.7 Alternatives to reservations and interpretative declarations**

##### **1.7.1 [1.7.1, 1.7.2, 1.7.3, 1.7.4] Alternatives to reservations**

In order to achieve results comparable to those effected by reservations, States or international organizations may also have recourse to alternative procedures, such as:

(a) The insertion in the treaty of restrictive clauses purporting to limit its scope or application;

(b) The conclusion of an agreement, under a specific provision of a treaty, by which two or more States or international organizations purport to exclude or modify the legal effects of certain provisions of the treaty as between themselves.

##### **1.7.2 [1.7.5] Alternatives to interpretative declarations**

In order to specify or clarify the meaning or scope of a treaty or certain of its provisions, States or international organizations may also have recourse to procedures other than interpretative declarations, such as:

(a) The insertion in the treaty of provisions purporting to interpret the same treaty;

(b) The conclusion of a supplementary agreement to the same end.

62. Mr. GAJA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee, said that the Committee had devoted three meetings to the topic during the last week of the first part of the current session, during which, largely thanks to the cooperation of the Special Rapporteur and of members of the Committee, it had been able to complete its consideration of draft guidelines 1.1.8, 1.4.6 to 1.4.8 and 1.7.1 to 1.7.5. Accordingly, the Committee was submitting to the Commission, for adoption, the texts of the five draft guidelines it had adopted. They were organized in accordance with the structure of the guidelines already adopted by the Commission, but had been renumbered. For purposes of clarity, the numbering of the draft guidelines initially proposed by the Special Rapporteur was, as usual, given in square brackets.

63. With regard to draft guideline 1.1.8, the Drafting Committee had concluded that it was better to retain the idea that exclusionary clauses comprised clauses intended to enable the parties or some of them to exclude certain provisions of a treaty in their application to those parties and also clauses enabling them to modify the legal effect of the provisions of a treaty. The title remained more all-encompassing, as it referred to “reservations made under exclusionary clauses”; the replacement of the word *formulées* in the Special Rapporteur’s draft by the word *faites* had been intended to bring the French text into line with the English text, which seemed more appropriate. As for the wording of the draft guideline, the Committee had considered the phrase “when expressing its consent to be bound”, which had appeared in the Special Rapporteur’s draft. It had studied a proposal to make that phrase more



precise by enumerating the various ways in which States could express their consent to be bound, but had not deemed such an enumeration to be necessary. The Committee had preferred to use a slightly different formulation from that proposed, the new formulation being borrowed from draft guidelines 1.1.5 and 1.1.6 which had been provisionally adopted at the fifty-first session of the Commission. For the same reason, the Committee had also decided to delete the phrase “or by a State when making a notification of succession” from the original draft guideline, as that situation was not expressly envisaged in draft guidelines 1.1.5 and 1.1.6. As the expression “in the treaty”, found in the original draft guideline, was superfluous, it had been deleted, thereby yielding a tighter text.

64. Draft guideline 1.4.6 merged draft guidelines 1.4.6 and 1.4.7 proposed by the Special Rapporteur, combining their content in a single draft guideline devoted to optional clauses. The Drafting Committee had decided to adopt that course in order to simplify the text, with the first paragraph of the new text referring to unilateral statements made under what was generally known as an optional clause and its second paragraph referring to the restrictions States could impose on those statements, restrictions generally known as “reservations”. The paradigm was that of the declarations made by States under Article 36, paragraph 2, of the Statute of ICJ and of reservations to those declarations. The title “Unilateral statements made under an optional clause” reproduced the title proposed for draft guideline 1.4.6, with the word “adopted” replaced by the word “made”, for the same reasons that applied to draft guideline 1.1.8.

65. With regard to the first paragraph and the description of the effects of statements, the Drafting Committee had decided to delete the reference to “entry into force” of the treaty, to be found in original draft guideline 1.4.6, because it was likely to prove ambiguous. Proposals had also been made to refer to “optional obligations” or “additional obligations”, but the Committee had finally opted for a formulation it had considered more precise, namely, “an obligation that is not otherwise imposed by the treaty”. The second paragraph reproduced the wording of original draft guideline 1.4.7, linking it to the text of the first paragraph.

66. Draft guideline 1.4.7 concerned unilateral statements providing for a choice between the provisions of a treaty. It corresponded to former draft guideline 1.4.8 proposed by the Special Rapporteur. The Drafting Committee had considered a proposal that reference should also be made to a choice between “parts” or “chapters” of a treaty. It had, however, considered that the reference to “provisions” was sufficient to cover all contingencies and that in consequence the text should be retained as proposed, with an appropriate explanation in the commentary. The Committee had also decided to leave the title unchanged. It had added two commas to the text of the original draft guideline and had brought the French text, which referred to a *clause expresse*, into line with the English text, which used the adverb “expressly”.

67. With regard to section 1.7, dealing with alternatives to reservations and interpretative declarations, as proposed by the Special Rapporteur, the Drafting Committee had first considered the draft guidelines concerning alternatives to reservations. Since it had been agreed that the draft

guidelines proposed by the Special Rapporteur could be considered too detailed, as noted by the Commission, the Committee had endeavoured to tighten the text. Two possible approaches had been considered: the first, which could be described as the “minimalist” approach, was to retain only draft guideline 1.7.1 proposed by the Special Rapporteur or a variant of that draft guideline, referring the reader to the commentary for a consideration of the hypotheses envisaged in draft guidelines 1.7.2, 1.7.3 and 1.7.4. The other approach was to combine the texts of the four draft guidelines into a single draft guideline, limiting the cases expressly cited to an essential minimum.

68. As the text of draft guideline 1.7.1, if retained in isolation, would have conveyed little, the Drafting Committee had preferred to adopt the other approach, which had resulted in the formulation of new draft guideline 1.7.1. That draft guideline had been adopted by the Committee, not without some hesitation, as some members would have preferred a shorter text.

69. The *chapeau* to the provision reproduced elements of original draft guideline 1.7.1. The new draft guideline went on to mention, for illustrative purposes, two alternative procedures to which States or international organizations might have recourse. They had been chosen because they were often wrongly treated as reservations in practice or defined as such. The idea had been to make it clear that to qualify them in such a manner was incorrect. The first procedure cited, namely, the insertion of restrictive clauses, corresponded to one of the procedures mentioned in original draft guideline 1.7.2, as developed in draft guideline 1.7.3. The second procedure was a version of original draft guideline 1.7.4.

70. The Drafting Committee had begun by considering a proposal concerning the *chapeau*, to replace the word “modify” (*moduler*), proposed by the Special Rapporteur, by the word “restrict” (*restreindre*). The Committee had considered using other variants, such as “attenuating” (*atténuer*) or “rendering more flexible” (*assouplir*). It had also studied the possibility of reproducing the formulation of draft guideline 1.1.1, namely, the phrase “modify the legal effect of certain provisions of a treaty or of the treaty as a whole with respect to certain specific aspects”. But doubts had been expressed as to the wisdom of reproducing that formulation in the context of the draft guideline under consideration. Other formulations had been suggested, among them the achievement of “equivalent effects” (*effets équivalents*), “similar effects” (*effets similaires*), “analogous effects” (*effets analogues*) or “results of a broadly similar character” (*résultats essentiellement de même nature*). Finally, it had been decided to adopt a more general, but more appropriate wording, namely, “achieve results comparable to those effected by reservations”.

71. The Drafting Committee had decided to use the words “alternative procedures” so as to make it quite clear that it was alternatives to reservations that were being referred to. The Committee had also considered the need for the word “also” (*également* in French), implicit in the adjective “alternative”, but had decided to retain it in order to emphasize the subject matter of the draft guideline. The expression “may make use of”, found in the original English version, had been replaced by the

expression “may also have recourse to”, thereby bringing it into line with the French text.

72. With regard to the two examples given in the subparagraphs of the draft guideline, the Drafting Committee had used the expression “such as” at the end of the *chapeau* so as to indicate that the list was far from exhaustive. The text of the first example was based on the wording of original draft guideline 1.7.3, but had been tightened somewhat. The new wording was: “The insertion in the treaty of restrictive clauses purporting to limit its scope or application”. As for the second example, the Committee had decided to retain a provision on so-called “bilateralized” reservations, basically so as to make it clear that the procedures referred to were not in fact reservations. Original draft guideline 1.7.4 had served as the basis for the wording of the text of the second subparagraph currently proposed. Doubts had been expressed concerning the expression “under a specific provision of a treaty”, which some regarded as too restrictive, but the Committee had decided to retain it, as it referred to the most commonly encountered hypothetical situation. With a view to simplifying the wording and avoiding needless recourse to Latin tags, the expression “in their application to their relations *inter se*”, to be found in draft guideline 1.7.4, had been replaced by the words “as between themselves”.

73. The last draft guideline, draft guideline 1.7.2, was based on draft guideline 1.7.5 proposed by the Special Rapporteur. Drawing on experience gained from working on draft guidelines 1.7.1 to 1.7.4, the Drafting Committee had embarked on consideration of the draft guideline in question on the basis of a new proposal drafted on the model of new draft guideline 1.7.1. In the first part of the text, it had followed a formulation close to that proposed by the Special Rapporteur for his draft guideline 1.7.5 and had given two illustrative examples. It had retained the title of draft guideline 1.7.5.

74. As for the text, a comparison of the new draft guideline with the one proposed by the Special Rapporteur would reveal that the Drafting Committee had replaced the expression “the contracting parties”, which had seemed inappropriate, by the words “States or international organizations”, thereby also bringing the provision into line with other draft guidelines already adopted.

75. With regard to the first subparagraph, namely, the example of insertion in the treaty of provisions purporting to interpret it, a procedure that the Special Rapporteur had already referred to in his draft guideline, a consensus had emerged in favour of retaining a provision drafted on the model of the first subparagraph of new draft guideline 1.7.1. The Drafting Committee had also deleted the adjective “express” qualifying the word “provisions” and had added the words “the same treaty” at the end of the English version.

76. In the second subparagraph, the Drafting Committee had agreed to retain the reference to “supplementary agreements”, to be found in the original version, but in the singular. It had also considered several variants to replace the word “supplementary”, for instance the adjective “specific”, but had finally decided to retain the word “supplementary”. It had also made a minor amendment to the

English version of the text, replacing the original expression “to that end” with the words “to the same end”.

77. The Drafting Committee recommended that the Commission should adopt the draft guidelines appearing in its report so as to enable the Special Rapporteur to prepare the commentaries thereto.

78. Mr. ECONOMIDES said that, in draft guideline 1.1.8, instead of the words “in accordance with a clause”, the text should read “in accordance with one of its clauses”: in other words, with one of the clauses of the treaty. That change would make the text clearer.

79. At the end of the second subparagraph of draft guideline 1.7.1, the words “of the treaty” should be replaced by the words “of that treaty”, again in the interests of clarity and to stress the fact that the treaties referred to in the subparagraph were one and the same treaty.

80. Mr. HAFNER said he still had doubts as to the applicability of draft guideline 1.1.8 to the case of certain international treaties providing for exceptions without thereby affecting the status of other reservations. However, he would not insist, given the general feeling in favour of adopting the draft guideline as now formulated.

81. As to draft guideline 1.7.1, it was his understanding that the second subparagraph did not go against what was already prescribed in treaty law, namely, that restrictions applied to the treaty in question. That meant that the right to conclude such agreements must be understood as abiding by the limits established by general international law applicable to such instances. That related in particular to the restriction whereby States could not conclude agreements incompatible with the object and purpose of the treaty.

82. Mr. GAJA (Chairman of the Drafting Committee) said that, subject to the agreement of the Special Rapporteur, the two proposals made by Mr. Economides were acceptable.

83. In response to Mr. Hafner, he said that the draft guidelines under consideration did not refer to the question of the validity of reservations and interpretative declarations. The point at issue was not whether the agreements referred to were valid within the meaning of article 41 of the 1969 Vienna Convention or under other principles set forth in that Convention.

84. Mr. HAFNER said he agreed, but stressed that the question of the validity of reservations would still have to be tackled. He feared that, if the Commission were to adopt the current text of the draft guidelines concerning so-called *inter se* treaties or agreements, it would fail to deal with the validity of those instruments in the guidelines to follow. As currently worded, the draft guidelines gave the impression that there was an unlimited right to conclude such treaties and he wished it to be clearly understood that the interpretation to be adopted was that of treaty law.

85. Mr. ROSENSTOCK said that the proposal by Mr. Economides that the words “a clause” should be replaced by the words “one of its clauses” in the English version of

draft guideline 1.1.8 was much less elegant than the current version and might lead to confusion. The clause or clauses in question could be grammatically linked to “a unilateral statement”. He would thus prefer the current wording of the draft guideline to be retained, but he had no problem with the other change proposed.

86. Mr. TOMKA said that the proposal by Mr. Economides was likely to lead to problems of interpretation, as the question might arise whether a single clause was sufficient to exclude or modify a legal effect or whether several were necessary. For his own part, he firmly supported the text proposed by the Drafting Committee.

87. Mr. SIMMA said he thought what Mr. Economides intended was to make it clear that the clause in question must be a clause contained in the same treaty with regard to which a unilateral statement might be made.

88. As for Mr. Hafner’s concerns, in his view, they were covered by the phrase “the conclusion of an agreement, under a specific provision of a treaty”, in draft guideline 1.7.1, which essentially eliminated the risk to which he had referred. He could not imagine that, if an *inter se* agreement could be concluded under specific provisions of a treaty, such specific provisions could authorize the conclusion of agreements contrary to the object and purpose of the treaty.

89. Mr. PAMBOU-TCHIVOUNDA reminded the Commission that the set of draft guidelines had given rise to considerable controversy. He wondered whether, even though considerable effort had been expended on the drafting exercise, the debate on the desirability of including draft guidelines 1.7.1 and 1.7.2 in the Guide to Practice should not be considered closed. A reading of those provisions might create the impression that they constituted an invitation to States and international organizations parties to a treaty to stray from the path they had initially thought they must follow in order to implement a legal instrument. Given that such possibilities ultimately militated against the system whose implementation had initially been sought, he had some reservations as to the desirability of the two draft guidelines.

90. A reading of the text of draft guideline 1.4.6 revealed that its provisions did not fall within the scope of the Guide to Practice. That cast immediate doubt on the value and purpose of its second paragraph, as the guideline itself did not fall within the scope of the Guide. The second paragraph added little and did not constitute a guideline.

91. Mr. PELLET (Special Rapporteur) said that, with regard to alternatives, Mr. Pambou-Tchivounda had merely repeated what he had already said. Now was not the time to reopen the debate. Despite some members’ reservations, it had been agreed that, where a Guide to Practice was concerned, anything was better than nothing.

92. He was, however, a little surprised at Mr. Pambou-Tchivounda’s stance on draft guideline 1.4.6. Mr. Pambou-Tchivounda seemed surprised that the Drafting Committee’s formulation, identical to the one he himself proposed, did not fall within the scope of the Guide to Practice. All the guidelines contained in section 1.4 deal-

ing with definitions were drafted along those lines and, if he wished to get rid of that guideline, it would be necessary to delete the whole of section 1.4, comprising the so-called “zoo”, in other words, the guidelines excluding everything that did not constitute a reservation and that consequently did not fall within the scope of the Guide. On the other hand, interpretative declarations, though not reservations, did indeed fall within the scope of the Guide. Those two clarifications seemed essential, for, otherwise, the entire architecture of the first part would be called into question, and that was unacceptable.

93. With regard to Mr. Economides’s proposal on draft guideline 1.1.8 and Mr. Rosenstock’s reservations about its English version, if the Commission were to adopt the formulation “one of its clauses”, the idea that an exclusionary clause might exist in a different treaty would be lost. A situation could be envisaged in which States concluded a treaty and in which, some years later, those same States then concluded another treaty providing for the possibility of excluding the effect of the first treaty. That problem had perhaps never arisen, but the wording proposed by Mr. Economides had the disadvantage of not taking account of the possibility of a clause appearing in a different treaty. There was also the hypothetical situation in which a State might accede belatedly to treaty A when treaty B was already in force and might make that declaration. That being said, it was not the type of hypothesis that had been envisaged and, in order to satisfy Mr. Economides, he could accept the introduction of an element of rigidity which did not seem indispensable. It would, however, be preferable to use a customary formulation encountered elsewhere in the draft guidelines, such as “a clause in the treaty”.

94. The same was true of draft guideline 1.7.1, where “certain provisions appearing in that treaty” would be preferable to “certain provisions of the treaty”. If that wording was retained, whether in draft guideline 1.1.8 or in draft guideline 1.7.1, the problem raised by Mr. Rosenstock would in any case be resolved or eliminated.

95. As for Mr. Hafner, he too had restated the position he had taken in the Commission, which was that of a very small minority. There was thus no need to return to it, particularly as Mr. Simma had provided a very good answer with regard to the second subparagraph of draft guideline 1.7.1. As the agreement was concluded under a specific provision of the treaty, it was hard to see how it could be impermissible. In that instance, but as was ever his wont, Mr. Hafner confused problems of definition and problems of permissibility.

96. Mr. ECONOMIDES said that, in his draft guideline 1.1.8, the Special Rapporteur expressly provided that the statement must be made in accordance with the treaty in question, not in accordance with another treaty. What was referred to were exclusionary clauses interpreted in a very narrow sense and it was not envisaged that another treaty might be taken into account. It was simply necessary to link the treaty with one of its provisions. The wording mattered little and that proposed by the Special Rapporteur (“appearing in that treaty”) was satisfactory.

97. Mr. TOMKA said that, in the interests of uniformity, care should be taken to ensure that the vocabulary used was consistent throughout the draft guidelines. The expression *du traité* could be found not only in draft guideline 1.7.1, but also in draft guidelines 1.4.6 and 1.4.7. He was therefore inclined to favour leaving the text of draft guideline 1.7.1 unchanged.

98. Mr. GAJA (Chairman of the Drafting Committee) added that that formulation appeared in some of the draft guidelines already adopted (1.1.4, 1.1.5 and 1.1.6). The problem raised by Mr. Economides was a general one and it would be advisable to reconsider the draft guidelines as a whole in order to ensure that the formulations were homogeneous and, if necessary, to amend them. Meanwhile, the Commission might adopt the text of the guidelines now proposed without change, subject to verification at a later stage.

99. With regard to the proposal by Mr. Economides on draft guideline 1.1.8, he noted that, if the Commission were to adopt the formulation “with a clause appearing in that treaty”, the word “and” would need to be added before the words “expressly authorizing the parties”, thereby making the text somewhat cumbersome.

100. The CHAIRMAN said it was difficult to deal with drafting matters in a plenary meeting. He proposed that, as the Chairman of the Drafting Committee had suggested, the Commission should endorse the Committee’s recommendation that the draft guidelines under consideration should be adopted in their current form, on the understanding that the finishing touches would be put to them when the remaining draft guidelines had been adopted. If he heard no objection, he would take it that the Commission wished to proceed in that fashion.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

## 2641st MEETING

*Tuesday, 18 July 2000, at 10.05 a.m.*

*Chairman:* Mr. Chusei YAMADA

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

### International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)<sup>1</sup> (*continued*)\* (A/CN.4/504, sect. D, A/CN.4/509,<sup>2</sup> A/CN.4/510<sup>3</sup>)

[Agenda item 4]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. Sreenivasa RAO (Special Rapporteur), introducing his third report (A/CN.4/510) on the subtopic of prevention of transboundary damage from hazardous activities under the broader topic of international liability for injurious consequences arising out of acts not prohibited by international law, began by giving a brief overview of the background against which the Commission was embarking on a second reading of the draft articles on prevention. The topic had originally emerged from the Commission’s consideration of the question of State responsibility arising out of the commission of an internationally wrongful act. The question had arisen of international liability in the event of damage caused by an activity not otherwise wrongful—“wrongful” being, in that context, the antonym not of “lawful”, but of “not prohibited”. The Commission had taken the view that such situations merited consideration from a slightly different angle and, accordingly, had appointed a special rapporteur to consider the new topic. Initially, the Commission had wrestled simultaneously with the topics of liability and prevention. By the forty-fourth session, however, the feeling had emerged that it should deal first with prevention, so as to capture an emerging consensus regarding the duty of due diligence embodied in that concept, before subsequently deciding on the most appropriate course of action with regard to international liability.<sup>4</sup> While that decision had been appreciated as a means of facilitating progress on the topic, concern had been expressed by States in the Sixth Committee about the desirability of a separation of the two topics that might lead to their eventual divorce—an approach which, furthermore, overlooked the main objective of the Commission’s mandate. At its fifty-first session, the Commission had nonetheless taken the decision first to complete its second reading of the draft articles on prevention,<sup>5</sup> and only then to decide whether—and, if so, how and when—to deal with the topic of liability.

2. As the Special Rapporteur on the topic of prevention of transboundary damage from hazardous activities, he had been faced with a number of policy questions. Thus, he had had to consider, for instance, what activities fell within the scope of the topic; what the components of the duty of due diligence were; and what the consequences of failure to perform obligations of due diligence would be. They were difficult matters, on which no consensus had

\* Resumed from the 2628th meeting.

<sup>1</sup> For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1998*, vol. II (Part Two), p. 21, para. 55.

<sup>2</sup> Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

<sup>3</sup> Ibid.

<sup>4</sup> See *Yearbook . . . 1992*, vol. II (Part Two), p. 51, paras. 344–349.

<sup>5</sup> See *Yearbook . . . 1999*, vol. II (Part Two), p. 141, paras. 607–608.