Document:-

A/CN.4/SR.2682

Summary record of the 2682nd meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

measures. Moreover, Part Four contained mainly saving clauses or articles explaining the scope of the text, which did not actually apply in the field of responsibility, unlike article 32. The Committee had not, therefore, made any changes to the article and had retained it in its original place.

108. Article 33 [38] had been moved to Part Four and would be introduced in that context. As for article 34 (Scope of international obligations set out in this Part), the Drafting Committee had first considered whether to move it to the beginning of the chapter, on the basis that an article on "scope" might be more appropriate at the beginning. It had nonetheless decided that the article could stay at the end of chapter I, because the whole chapter contained general principles applicable to Part Two as a whole. It had also noted that, with respect to the title of the article, the French term *portée* reflected the aim of the article better than "scope", but no alternative had been found for the English text. The Committee had, however, decided to change the expression "covered by" in the title to "set out in", in order to make it more consistent with the terminology used in the article itself.

109. The Drafting Committee had found that Governments had made only a few drafting suggestions for article 34. One suggestion, relating to the formulation of the expression "international community as a whole", had already been discussed by the Committee in the context of article 26 [33]. Another proposal by a Government had been to delete the last phrase in paragraph 1: "and irrespective of whether a State is the ultimate beneficiary of the obligation". The Committee had noted that the phrase was not strictly necessary and did not add much to the text. The words "content of the international obligation" in fact covered what was intended by the last phrase. It had therefore decided to delete the phrase in order to shorten the text, and to explain its intention in the commentary.

110. The Drafting Committee had also considered a proposal to delete the phrase "depending on the character and content of the international obligation and on the circumstances of the breach" as being superfluous. It had nevertheless considered that there was value in retaining the phrase, and had decided to add the words "in particular" after "depending", to make it clear that the series of factors was not exhaustive and could operate cumulatively or alternatively, as well as to retain flexibility within the provision.

111. The Drafting Committee had considered a proposal by a Government to delete paragraph 2 of article 34. It had noted that the provision concerned the invocation of the rules on State responsibility by a non-State entity and was important for it dealt with the discrepancy between the scope of Parts One and Two. It was therefore necessary to retain the paragraph. In response to a proposal to delete the word "directly", the Committee had decided to soften the wording of the paragraph to read: "which may accrue directly to any person . . . ".

The meeting rose at 1.05 p.m.

2682nd MEETING

Wednesday, 30 May 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING (*continued*)

1. The CHAIRMAN invited the members to continue their consideration of the report of the Drafting Committee containing the titles and texts of the draft articles on responsibility of States for internationally wrongful acts adopted by the Drafting Committee on second reading (A/CN.4/L.602 and Corr.1). He invited the Chairman of the Drafting Committee to complete his introduction of Part Two of the draft articles.

2. Mr. TOMKA (Chairman of the Drafting Committee), introducing Part Two, chapter II, began by indicating that the title had been modified, since the Drafting Committee had found it inelegant to have the same title for the chapter and for article 35 [42] (Forms of reparation). After considering various alternatives, it had settled on "Reparation for injury" for the title of the chapter and had decided to retain the title of the article as adopted at the fifty-second session.

3. In considering article 35 [42], and indeed all of the articles in chapter II, the Drafting Committee had kept in mind its drafting changes to article 31 [42] (Reparation). For example, a Government had proposed to replace the term "injury" by "damage", but, as the Committee had already decided to retain "injury" in paragraph 1 of article 31 [42], it had to be retained in article 35 [42] as well.

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[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*

4. The Drafting Committee had also considered a proposal by a Government to add a second paragraph that would indicate that the determination of reparation would take account of the nature and gravity of the internationally wrongful act. In the view of the Committee, that article was introductory in nature and served the function of pointing out all of the forms of reparation which, when combined, amounted to full reparation as required by article 31 [42]. In addition, the issue of proportionality was already addressed in the context of the individual forms of reparation, taking into account their specific character. For example, in relation to satisfaction, the article dealing with it explicitly referred to "appropriate modality" (art. 38 [45], para. 2). The Committee had therefore concluded that the substance of the proposal was already covered in the draft articles or that, in some cases, the inclusion of such a provision would amount to an overstatement of the principle of proportionality, since it would not always be a determining factor. It would therefore be better explained in the commentary. The Committee had subsequently adopted article 35 [42] in the form finalized at the fifty-second session.

5. Turning to article 36 [43] (Restitution), he said the Drafting Committee had considered a proposal by a Government to reformulate the opening clause to read: " . . . to re-establish the situation which would have existed if the internationally wrongful act would have not been committed". That had already been discussed at the previous session, however, and it had been decided to adopt the current shorter formulation, which stated the general policy that applied to full reparation rather than to restitution as one form of reparation. The Committee had seen no reason to reverse that decision. It had also considered a suggestion made by a Government concerning the application of article 36 to the expropriation of foreign property but had decided that that was a matter for the commentary, as appropriate, especially in the light of the fact that expropriation was a controversial area that was not strictly within the scope of the draft articles. The Committee had also decided not to follow a proposal to reinsert language from subparagraph (*d*) of article 43 as adopted on first reading,[4] concerning serious impairment of the economic stability of the responsible State. The issue was largely covered by subparagraph (*b*) and, in the opinion of the Committee, there was no reason to reopen the debate. In addition, those issues would be elaborated on in the commentary. Finally, the Committee had considered a proposal by a Government to include a new subparagraph (*c*) to limit the provision of reparation where it would entail the violation by the State of some other international obligation. The Committee had already considered that issue at the fifty-second session and had decided not to change the text, for the same reason as at that session: "material" impossibility was intended to address legal impossibility as well. The issue of priority between conflicting obligations depended on the context and on a number of other factors that could not be expressed in a single paragraph, not to mention that it was outside the scope of the articles. The Committee had decided that the issue should be dealt with in the commentary, which would make it clear, inter alia, that the situation envisaged was covered by the reference to material impossibility. The Committee had subsequently decided to adopt article 36 in the form finalized at the fifty-second session.

6. Concerning article 37 [44] (Compensation), paragraph 1 limited compensation to cases when damage was not made good by restitution. The notion of "damage" referred back to article 31, paragraph 2, which spoke of any damage, whether material or moral. The Drafting Committee had considered the meaning of moral damage. It had concluded that, for the purposes of compensation, moral damage meant pain and suffering and did not include moral damage to the State, which some referred to as "legal injury": that was covered under the broad notion of injury and was primarily catered for by satisfaction. The Committee had considered a proposal to clarify the matter further by inserting in paragraph 2 a reference to compensation for "moral damage for pain and suffering", but had decided against it, since it raised additional difficulties relating to the definition of moral damage suffered by individuals. It had decided that those issues should be elaborated on in the commentary. The Committee had also considered a proposal by a Government to extend the proposition in article 36 [43], subparagraph (*b*), to article 37 [44], but had not adopted that proposal, since it could contradict the principle of full reparation in article 31.

7. As to paragraph 2, the Drafting Committee had agreed that the qualification "financially assessable" was also intended to exclude any possibility of granting compensation for moral damage to a State. In addition, the Committee had agreed with the observation by a Government that what was "financially assessable" was to be determined by international law. That would be stressed in the commentary and, in any case, it flowed from article 3 [4] on the predominance of international law. The Committee had also discussed a proposal to replace the words "insofar as" with "if and to the extent that", but had elected to retain the existing formulation, since "insofar as" carried with it the connotation that loss of profits might not be recoverable, depending on the context. The Committee had therefore decided to retain the title and text of article 37 [44] as formulated at the fifty-second session.

8. Regarding article 38 [45] (Satisfaction), the Drafting Committee had first considered a proposal that, in paragraph 1, the word "injury" should be replaced by the word "damage". In view of the modified definition of injury in article 31, paragraph 2, the Committee had decided to retain the word "injury" in that article, where it meant moral damage to the State itself. The reference was to circumstances in which there might be nothing to restore or compensate for, yet there had been a breach that was exceptional and amounted to an affront to the State. It was in those circumstances that satisfaction could be offered, even if it was nominal. The commentary would make that clear and, in particular, indicate that satisfaction was not intended to be punitive in character and did not include punitive damages. The Committee had next considered the concluding phrase, "insofar as it cannot be made good by restitution or compensation". Article 38 [45] was subject to the phrase "either singly or in combination" in article 35 [42]. Satisfaction was therefore not required "in addition" to restitution or compensation, although the concluding phrase reaffirmed the point that

[4] See 2665th meeting, footnote 5.

restitution and compensation were more common forms of reparation and enjoyed a certain priority. It was only in cases when they had not provided full reparation that satisfaction might be required. The matter would be explained in the commentary.

9. As to paragraph 2, the Drafting Committee had had before it a proposal by several Governments that the list of modes of satisfaction should be extended to include nominal damages or that the words "of a similar character" should be added, as well as another proposal made in the Commission in plenary that the words "formal regrets" should be included. As to nominal damages, the Committee had decided at the fifty-second session not to include such a reference, particularly because it was a concept that was difficult to translate into other languages. At any rate, paragraph 2 was intended only to indicate some of the sorts of satisfaction that were available and its non-exhaustive nature was confirmed by the words "or another appropriate modality". As to the inclusion of the words "of a similar character", insofar as they were intended to limit satisfaction, the word "appropriate" covered the idea. Its inclusion would have the effect of limiting the concluding phrase "or another appropriate modality", which the Committee had adopted at the previous session as a compromise, having regard to the views of those members who wanted to see references to other modes of satisfaction, such as taking disciplinary or penal action against individuals whose conduct had caused the internationally wrongful act. The Committee had also considered the order of the modalities of satisfaction and had discussed the possibility of placing formal apology before expression of regret. In the end, it had felt that there was no hierarchy between the modalities. The commentary would state that they were simply examples and that it was the context that should determine the most appropriate form of satisfaction. Lastly, the Committee had considered the use of the word "may", which indicated that the list was not exhaustive and that it was not up to the responsible State to choose the form of satisfaction, which was left to the individual circumstances.

10. The Drafting Committee had noted that there was strong support for paragraph 3 in the Sixth Committee, even though some had spoken against it. As to the comment made by a Government that the term "humiliating" was imprecise, the Committee considered that historical examples of "humiliating" forms of reparation could certainly be cited and some of the speakers in the Sixth Committee had had such examples in mind. The Committee had considered another proposal to replace the concluding phrase by "impairing the dignity of the responsible State", but had felt that the new wording was neither clearer nor more readily understood than the existing text.

11. The Drafting Committee had therefore adopted the article and its title in the form finalized at the fifty-second session, with some minor drafting amendments.

12. Turning to article 39 (Interest), he said the Drafting Committee had considered a proposal by some Governments to reinsert it into article 37 [44]. The matter had been considered extensively at the previous session and it had been decided to maintain a separate article because of the importance of the issue of interest. The Committee had felt that there was no reason to reverse that decision. It was of the view that the provision, as currently drafted, struck a suitable compromise between those who wanted more details on the issue of interest and those who wanted to reduce the provision to a mere reference in the context of compensation, as had been done in the draft articles adopted on first reading. The Committee had decided to retain article 39 and its title in the same form as at the fifty-second session.

13. With regard to article 40 [42] (Contribution to the injury), which concerned, in a generalized form, what in some systems was termed contributory negligence, the Drafting Committee had noted that that was one of the balancing factors in the context of reparation. It had first considered two proposals to replace the opening phrase, "[i]n the determination of reparation", by "[i]n the determination of the amount of reparation" or by "[f]or the purpose of the contribution to damage and in relation to the question of the determination of reparation". The Committee had decided not to adopt either proposal. In the first, the reference to "amount" was unnecessarily restrictive, since the provision applied both to amount and to form; in other words, the individual or the injured State might have waived the right to restitution and opted for compensation alone. In addition, the Committee had considered possible alternatives to the words "in relation to whom", a formula which was phrased generally in order not to prejudice the approach to be taken under the item on diplomatic protection, on which the Commission had not yet taken a decision, and could apply to a variety of different situations, not all of them covered by diplomatic protection. The Committee had decided to retain the phrase "in relation to whom", but to adopt *au titre de laquelle* instead of *par rapport à laquelle* in the French text. The Committee had also brought the text into line with the preceding article by substituting the word "injury" for "damage", which could be read as limiting the applicability of article 40 [42] in the case of satisfaction, which was not the intention. It was clear that the behaviour of the injured person or entity was relevant to satisfaction as well as to other forms of reparation. The Committee had also considered a proposal made by some Governments to place the article in chapter I, possibly as a third paragraph to article 31 [42], as an aspect of the principle of full reparation. The principle in article 40 [42] had initially been expressed in the predecessor to article 31, namely, article 42 as adopted on first reading, but, at the fifty-second session, the Committee had decided to place it in a separate article so as to simplify what was at the current time article 31 [42] containing the general principle of reparation. In addition, in practice, the primary function of article 40 [42] was the determination as between the forms or the amount of reparation. It therefore belonged in chapter II and it had accordingly been decided to keep it in its current place. The Committee had thus adopted article 40 with the single drafting amendment to the French text and with the title "Contribution to the injury".

14. Introducing Part Two, chapter III (Serious breaches of obligations under peremptory norms of general international law), he pointed out that at the fifty-second session it had been the subject of lengthy discussions in the Commission and by Governments. In the end, the Com-

mission had agreed to proceed with a compromise involving the retention of the chapter, with the deletion of article 42, paragraph 1, concerning damages reflecting the gravity of the breach. As part of the compromise, the previous references to a serious breach of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests, which dealt primarily with the question of the invocation of responsibility, as expressed by ICJ in the *Barcelona Traction* case, would be replaced by a reference to peremptory norms. The notion of peremptory norms was well established in the 1969 Vienna Convention and had been referred to by the Court. In certain circumstances, there might be minor breaches of peremptory norms that would not be the concern of chapter III, but serious breaches would be covered. The Drafting Committee had been asked to give further consideration to the consequences of serious breaches as contained in article 42, in order to simplify it, avoid excessively vague formulas and narrow the scope of its application to cases falling under chapter III. It was on that basis that the Committee had considered chapter III. The new title of chapter III reflected the understanding reached in the Commission in plenary.

15. The Drafting Committee had further considered the reference to "peremptory norms of general international law" in the context of its decision to maintain the phrase "international community as a whole" in various articles. In the light of that decision, the reference to peremptory norms in the draft articles might well be broader than that found in article 53 of the 1969 Vienna Convention, which used the more limited expression "international community of States as a whole". The Committee was of the view that article 53 related primarily to the definition of peremptory norms for the purposes of the Convention, something that was done by the international community of States as a whole, a subset—albeit the most important one—of the international community as a whole. It should be stressed that the draft articles on the responsibility of States were not concerned with the definition of peremptory norms and, as such, did not conflict with the relevant provisions of the Convention.

16. The Drafting Committee had reformulated article 41 (Application of this chapter) in the light of the compromise just mentioned. The language of paragraph 1 was limited, referring to a "serious breach by a State" to avoid the implication that States could be responsible for serious breaches of peremptory norms committed by other States in situations not specified in the text. Paragraph 2 defined the word "serious". It was the same as the previous text with the deletion of the final phrase, "risking substantial harm to the fundamental interests protected thereby". By definition, if peremptory norms were involved and a serious breach was committed, there was a risk of substantial harm to such fundamental interests and the phrase was accordingly superfluous. The Committee had found the new text of paragraph 2 preferable to that of the previous session because it was shorter and avoided yet another reference to interest. The word "serious" signified that the violation must be of a certain order of magnitude. It was not intended to designate some types of violations as more serious than others or to attribute a punitive character to the violation or reparation, which might ensue. The commentary would elaborate on that issue. The title remained unchanged.

17. Consistent with the understanding reached in the Commission, article 42 (Particular consequences of a serious breach of an obligation under this chapter) began with a reference to the obligation to bring to an end through lawful means any serious breach within the meaning of article 41. That applied, in effect, in the context of the cessation of a wrongful act, which was the subject of paragraph 1. That paragraph corresponded to paragraph 1 and paragraph 2 (*c*) of the previous text, but no longer used the words "as far as possible", referring instead to "lawful means". In addition, the modalities of "cooperation" were not specified. They could include coordinated actions by a group of States or all States, although unilateral actions by States were not excluded. The commentary would elaborate on those issues.

18. Paragraph 2 corresponded to paragraphs 2 (*a*) and 2 (*b*) of the previous text. It addressed unlawful situations arising by virtue of a serious breach and expressed the obligation of non-recognition or rendering of aid or assistance in relation to such situations. That paragraph, of course, did not apply when the breach under article 41 was not continuing and when no unlawful situation was created thereby, something that was conceivable, although unlikely, in respect of the types of wrongful acts covered by the article. It was intended to apply in *Namibia*-type situations and reflected the findings of ICJ in the *Namibia* case on the obligation of non-member States of the United Nations. The redrafted paragraph no longer spoke of "other States", a phrase that, in the previous text had been intended to refer to States other than the responsible State. Under the new formulation, "[n]o State" could recognize the situation created by a serious breach as lawful. Accordingly, even the responsible State was under an obligation not to sustain the unlawful situation, an obligation consistent with article 30 (Cessation and non-repetition). The Drafting Committee had considered the question whether an injured State could waive its right to invoke the responsibility of another State for breaches referred to in article 41. It had been noted that, while an injured State clearly could not waive the right of another State that was entitled to invoke responsibility, there was nothing to prevent it from waiving its own right to invoke responsibility. In any event, that issue was not relevant to the paragraph under consideration and therefore did not need to be addressed.

19. Paragraph 3, which corresponded to paragraph 3 of the text adopted at the previous session, provided that the article was without prejudice to the other consequences referred to in Part Two, which included reparation, and to such further consequences that a breach to which chapter III applied might entail under international law. Of course, that did not exclude the applicability of the provisions of Part Four. The commentary would elaborate on the meaning of the paragraph. The title of the article was not the same as in the previous text.

20. Mr. KATEKA expressed his dismay at the further weakening of chapter III of Part Two, which was apparently due to an attempt to exorcize the ghost of international crimes. The Drafting Committee had changed the title of chapter III from "Serious breaches of essential

obligations to the international community" to "Serious breaches of obligations under peremptory norms of general international law". Equally, in article 41, paragraph 1, the phrase "international community as a whole and essential for the protection of its fundamental interests" had been deleted. The deletion by the Committee might have been made in response to criticism by some States that article 41 was full of ambiguous terms such as "essential", but the expression "peremptory norms" was also not without ambiguity. One member of the Committee had suggested introducing a definition of the concept of a peremptory norm. It seemed that the Committee had avoided that pitfall, since, according to article 53 of the 1969 Vienna Convention, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole . . . ".

21. The Drafting Committee had studiously avoided referring to the "international community of States", but, if there was only one international community, why had there been a retreat from the notion of the "international community as a whole" to the vaguer and, whatever the Chairman of the Committee might say, more controversial concept of peremptory norms? The Republic of Korea, for example, had suggested that the relationship of obligations covered by article 41 to obligations *erga omnes* and peremptory norms should be clarified. In paragraph 49 of his fourth report (A/CN.4/517 and Add.1), the Special Rapporteur had stated that there was no necessity for the Commission to take a general view as to the relations between peremptory norms and obligations to the international community as a whole. He had gone on to say that the two concepts substantially overlapped but that, whereas, in the context of peremptory norms, the emphasis was on the primary rule itself and its non-derogable or overriding status, the emphasis with obligations to the international community was on the universality of the obligation and the persons or entities to whom it was owed. It should therefore be asked whether, by choosing to refer to peremptory norms, the Committee had not decided to emphasize the primary rules, even though the Commission had decided that State responsibility should be dealt with under secondary rules. The Special Rapporteur had already provided an answer to that question by saying, in his report, that, since chapter III related to the consequences of a breach, the appropriate notion was obligations to the international community as a whole. The Committee should have heeded his remarks, particularly since the phrase was widely used throughout the draft articles, including the section on countermeasures. Its exclusion from chapter III of Part Two could therefore not be because it was vague, but because it was inconvenient for some members.

22. The changes made by the Drafting Committee to article 42 had further weakened the "middle ground" which could have produced consensus. For example, the reference in paragraph 1 to "damages reflecting the gravity of the breach" had been deleted. The Special Rapporteur had previously referred to "penal or other consequences", but the Committee had decided to delete the expression at the previous session in order to remove any possible implication of punitive damages. In doing so, it had put paid to the Special Rapporteur's attempt to give the draft articles some real substance concerning serious breaches. And as if that retrograde step were not enough, there had been a call that the draft articles should state—presumably in the commentary—that punitive damages were not recognized under international law, thus accentuating the tendency for the commentary to be the last refuge of the disaffected. The advocates of the concept of international crimes had been pilloried by their opponents, but the spirit of article 19 as adopted on first reading lingered on and might haunt the Commission in the future. The Committee had done a disservice to the international community as a whole by its drastic overhaul of chapter III of Part Two. He was left wondering whether it had not exceeded its mandate.

23. Mr. PELLET said that, apart from chapter III, the text of Part Two of the draft submitted by the Drafting Committee was overall far superior, in both form and content, to that adopted on first reading. Chapters I and II, however, contained some elements that gave him pause. First, although the Commission should take account of the jurisprudence of ICJ, it should not simply echo the views of the Court. It was therefore inappropriate for it to await a decision by the Court before taking a decision on article 30, subparagraph (*b*). Secondly, article 34 (Scope of international obligations set out in this Part) harked back oddly to the character and content of a breach of an international obligation, even though the provisions of Part One on that point had been largely, and regrettably, deprived of any substance. Thirdly, the provision that was open to the strongest objections, apart from chapter III, was article 36: given that the object of restitution, as of any other form of reparation, was full reparation for damage, the situation to be re-established was not that which had existed before the wrongful act had been committed, but that which would have existed if the wrongful act had not been committed; that was the only way of fully restoring the consequences of an internationally wrongful act. As it stood, article 36 was not compatible with article 31, paragraph 1. Moreover, the Committee had unfortunately rejected the French proposal for the addition of a subparagraph (*c*), which would have supplied an easy and logical solution to the problems raised by the conjunction of incompatible obligations. As for the text of article 40, it might be asked whether, when a State gave diplomatic protection to one of its nationals, it could properly be said to be acting on that person's behalf. The Commission had perhaps not taken sufficient care with regard to the relationship between the topic under consideration and the topic of diplomatic protection.

24. The new title of chapter III was, all things considered, satisfactory, if only because it had the dual virtue of both removing the ambiguity concerning the allegedly penal nature of such breaches and then of linking the concept—which the Commission had not invented, but had established—with that of *jus cogens*, which was well established. The link, however, posed a problem: since the draft articles gave no definition of *jus cogens*, they implicitly endorsed the generally accepted definition, contained in article 53 of the 1969 Vienna Convention, which was that it was a norm recognized by the international community of States as a whole. Yet the rest of the draft articles referred to a wider international community not limited to that constituted by States. That wider concept of the international community was intellectually

admissible and indeed it was even possible to accept that the two concepts, with their distinct aims, could coexist. The problem lay in the fact that the coexistence was not explained, but implicit in the draft articles. It would have been preferable to make them clearer by sticking throughout to the concept of the international community of States as a whole. Also, article 42 was undoubtedly extremely cautious. Its content was unexceptionable and the deletion of paragraph 1, which had contained rather strange provisions on damages, was no loss. It might have been useful to establish the concept of punitive damages in cases of serious breaches under chapter III, but, given the opposition aroused, it was better to say nothing on the subject than to retain such a vague provision. The problem with article 42 lay in its nearly complete silence on the real consequences of such serious breaches of obligations arising from peremptory norms of general international law. Paragraphs 1 and 2 of the new text of the article set out some of the real consequences, but there were many other more important and fundamental points that ought to have been made, for example, with regard to State transparency, the *actio popularis* that could, when a jurisdictional link existed, ensue from the commission of such acts and the effects of circumstances precluding the wrongfulness of such serious breaches, a matter which the Commission persisted in refusing to consider. Such serious breaches were undoubtedly governed by a different regime from that governing circumstances precluding wrongfulness; and article 26 *bis* was not adequate to solve the problem. Moreover, given the fact that article 42, and the draft articles as a whole, said nothing about the effect of serious breaches in the context of possible countermeasures, the loss of article 54 (Countermeasures by States other than the injured State) adopted at the fifty-second session, constituted an extremely serious problem and deprived the concept of serious breaches of a very large measure of its substance. However, the "without prejudice" clause in paragraph 3 would allow the future to take its natural course, putting in place the possibility of development or even of acknowledging the existence of other consequences of positive law. That said, the decision not to advance beyond the minimum was undoubtedly regrettable and, together with the deletion of article 54, constituted the greatest weakness in the draft articles. That should not, however, prevent the Commission from reaching a final consensus.

25. Mr. ECONOMIDES said that he still had reservations about some elements of the draft articles. In Part Two, he was particularly concerned about the deletion of paragraph 1 of article 42, which he considered most regrettable. In that it had provided that the responsible State should pay damages corresponding to the gravity of the breach, the article had had considerable dissuasive force and had therefore been one of the most useful and progressive of all the draft articles.

26. Mr. MOMTAZ said he also regretted that chapter III had been deprived of some of its provisions, but was particularly concerned about the question of punitive damages. In the Sixth Committee, many States had made much of the fact that article 37 made no provision for punitive damages. It would therefore be appropriate to state, at least in the commentary, that articles 37 and 39 did not provide for any such damages, despite the deletion of paragraph 1 of article 42, which was a commendable change.

27. Mr. HAFNER said that, according to his understanding of some of the provisions in Part Two of the draft, the change to article 29 [36] (Duty of continued performance) was satisfactory, since the duty provided for reflected what was ultimately the binding nature of international law. Its effects were therefore not the result of State responsibility alone. As for the group of provisions made up of articles 31, 37 and 38, the existing text made possible an understanding of damage and injury and the relationship between them in the following way: according to article 31, paragraph 2, injury seemed to go beyond damage, whether material or moral, whereas article 38 left open the question whether the article covered moral damage or a further element of injury which was neither moral nor material damage. Either way, it should be quite clear that injury and/or damage was linked exclusively with the States referred to in article 43 [40] (Invocation of responsibility by an injured State) and not with those under article 49 (Invocation of responsibility by a State other than an injured State).

28. As for the effects of article 19 adopted on first reading, it was necessary to state that article 26 *bis* of the current draft, if read in conjunction with article 41, could not be interpreted as implying that, in cases of distress or *force majeure*, a State would run the risk of a breach of article 41, if the other conditions concerning the circumstances precluding wrongfulness were met. As for article 42, paragraph 1, the duty to cooperate was limited by the legal constraints imposed on the State. Such constraints should, however, result only from international law and not from national law, otherwise the word "shall" would make no sense. A State could not set off the duty of cooperation by a unilateral act. The paragraph also reflected a basic shift in the paradigm of current international law from individualism to a certain collectivism with regard to the guarantee and assurance of international law. For that reason, the limits on the duty to cooperate should be interpreted in a very strict sense, otherwise the objective of the provision would be seriously impaired.

29. Mr. LUKASHUK noted with regret that the category of serious breaches, which was widely recognized and established by doctrine, had been whittled down to the point where even the concept of "international community as a whole" had disappeared. Yet the facts must be faced and the text proposed by the Drafting Committee represented the most on which it had been possible to reach agreement. One point remained unclear, however, with regard to article 38, which gave the impression that the obligation to give satisfaction applied only in cases where no restitution or compensation was made. Yet satisfaction could stand on its own: in virtually every case it was right for a State to acknowledge the breach, express regret or issue a formal apology, for example. That should be stated in the commentary. He added that the statement in article 38, paragraph 3, that satisfaction should not be out of proportion to the injury amounted to the enunciation of a general principle—that of proportionality—and should therefore not be contained in a specific provision.

30. Mr. KAMTO said that he considered the new version of chapter III more acceptable than its predecessor

because the controversial concepts, little used in international law, that had appeared in the earlier version had been replaced by terminology that was more familiar and widely accepted in positive law. The concept of "peremptory norms", for example, offered a way out of the choice between "international community" or "international community of States". Nevertheless, a more precise formulation could have been useful in order to avoid the use of two different terms in the same text to designate the same thing. Admittedly, article 53 of the 1969 Vienna Convention defined a "peremptory norm" for its own purposes, but, by borrowing the expression, the Commission was also necessarily borrowing the definition. Recourse to the terminology used in the *Barcelona Traction* case did not solve the problem, in that there was no question in that case, by contrast with the Convention, of defining *jus cogens*.

31. The deletion of paragraph 1 of article 42 could not be regretted, given the extreme practical difficulty of obtaining punitive damages. The general reparations regime could, in any case, provide sufficiently for reparation—especially in financial terms—for serious breaches.

32. Mr. ROSENSTOCK said that nothing in chapter II or chapter III implied support for the notion that punitive damages could be imposed. He hoped that the commentary would say as much, thus leaving the way open for the withdrawal of any objections to chapter III, which, although it lacked clarity, introduced a qualitative distinction between wrongful acts that was founded in neither practice nor logic. Other aspects of article 42 should also be treated with great care in the commentary, so that there could be no possibility of inferring that the consequences in question applied only to the vague and anecdotal category of serious breaches, whereas in fact many such consequences applied in a far larger range of categories and should not be used in an argument *a contrario*. Taken as a whole, chapter III seemed simply to add further confusion, but its lack of clarity was such that it would probably cause no harm.

33. Mr. TOMKA (Chairman of the Drafting Committee) said that the Drafting Committee had worked on chapter III on the basis of a compromise reached following informal discussions and approved in the Commission. The deletion of the paragraph that dealt with damages reflecting the gravity of a breach had resulted from a decision by the Commission in plenary and not the Committee.

34. Turning to Part Three of the draft (The implementation of the international responsibility of a State), he said that it corresponded to Part Two *bis* (The implementation of State responsibility) proposed by the Special Rapporteur in his third report.[5] Its title had been aligned more closely with the new title of the draft articles as a whole and with that of Part Two (Content of the international responsibility of a State).

35. The Drafting Committee had shortened the title of chapter I (Invocation of the responsibility of a State), at any rate in the English version. On the concept of "invocation", the Committee had considered a general comment regarding the need to be clear about the meaning. It had noted that invocation should be understood as taking measures of a relatively formal nature, which, without necessarily involving the commencement of legal proceedings, included it. A State did not invoke the responsibility of another State by simply reminding it of a breach or even by protesting. For the purposes of the articles, protest as such was not an invocation of responsibility; it had a variety of forms and motivations, for example, the reservation of rights, and was not limited to cases involving State responsibility. On the other hand, certain diplomatic exchanges, such as the lodging of a formal claim, would amount to invocation. The Committee had decided to retain that concept and to leave the explanation of its meaning and parameters for the commentary.

36. The Drafting Committee had noted that Governments had expressed two concerns as to the substance of article 43 [40]: the first related to the need for a more direct link with article 31 and the second to the concept of integral obligations found in subparagraph (*b*) (ii) of the previous draft. Having ascertained that the *chapeau* of the article was clear and provided a sufficient link with article 31 and that no Government had proposed any drafting amendments to that clause or to subparagraph (*a*), the Committee had decided to leave the text unchanged, save for a drafting amendment in the French version. As for subparagraph (*b*), the Committee had examined a comment by one Government that the expression "group of States" implied some form of entity with legal personality. It had considered the possibility of replacing it by the words "several States", but had concluded that the first expression conveyed most accurately the sense of the provision, which referred to a community of States. The commentary would make it clear that that provision did not purport to attribute legal personality to a group of States. The category of States referred to in subparagraph (*b*) (i) had not given rise to any objections and the Committee had therefore retained it as well. However, the Committee had found that subparagraph (*b*) (ii) had created some confusion among Governments. It had noted that the notion of integral obligations originated in article 60, paragraph 2 (*c*), of the 1969 Vienna Convention. That category of obligations was more familiar and more frequently encountered in the context of obligations resulting from international treaties than in other contexts. In addition, the provision in question, in the field of State responsibility, dealt with collective interest, a matter already covered by article 49, paragraph 1 (*a*). For those reasons and in view of criticism by Governments that that provision was too vague, the Committee had considered deleting it. On balance, however, it had felt that there was merit in retaining a provision on integral obligations for such a category of obligations, although narrow, did exist and some parallelism with article 60, paragraph 2 (*c*), of the Convention must be preserved. In its opinion, any misunderstanding on the part of Governments could be attributed to the poor drafting of the provision and, in particular, to its excessive breadth, which was likely to foster confusion with article 49, paragraph 1 (*a*). It had therefore decided to keep the provision, but to narrow the definition of integral obligations by aligning it more closely with the wording of article 60, paragraph 2 (*c*), of the Convention. Hence the text of article 43, subparagraph (*b*) (ii), read: "Is of such a character as radically to

[5] See 2672nd meeting, footnote 4.

change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation."

37. The Drafting Committee had amended the title of the article in order to reflect its content more faithfully. It had taken the view that the definition of the injured State, although not expressly defined in the text, was inferred from the content of the article. The new title "Invocation of responsibility by an injured State", which was that of former article 44, was more fitting for article 43.

38. Bearing in mind the new title of article 43, the Drafting Committee had amended that of article 44 to read: "Notice of claim by an injured State", which also reflected more closely the content of the provision and would be more in line with article 45 [22] (Admissibility of claims). It had maintained paragraph 1 as it stood, since it had not prompted any objections or proposed amendments by Governments, other than one comment on the meaning of "invocation", which had already been answered. The Committee had studied the suggestion by a Government that all the remedies available to an injured State should be listed in paragraph 2. It had added the words "in accordance with the provisions of Part Two" at the end of subparagraph (*b*) to make it quite clear that an injured State had all the remedies provided for in Part Two. The Committee had also considered a proposal to expand paragraph 2 by adding another subparagraph on the nature and characteristics of the claim. Nevertheless, in the light of the view expressed during previous discussions that the article should be as flexible as possible, it had believed that it would be unnecessary to elaborate on the characteristics of the claim in the body of the text, but that that could be done in the commentary.

39. As for article 45 [22], the Drafting Committee had studied a proposal by a Government that the words "by an injured State" should be inserted in the *chapeau* after the words "it may not be invoked". It had decided not to do so, for those words would be inconsistent with the scope of the article, which applied to both injured States and States other than the injured State which were entitled to invoke responsibility. With regard to subparagraph (*a*), it had first examined a proposal by a Government to return to the rule on nationality of claims contained in article 22 adopted on first reading. It had also taken note of the fact that the issue of nationality essentially related to the admissibility of claims and had decided that, as the new subparagraph (*a*) introduced some flexibility, it would not be appropriate to revert to the previous text. It had then considered the comment of one Government that the "nationality of claims" was an unfamiliar concept in French legal terminology and that the expression should be redrafted to refer to an applicable rule relating to nationality in the context of the exercise of diplomatic protection. The Committee had decided to retain the text as it stood, even in the French version. It had recalled that the term "nationality of claims" had been used in 1949 by ICJ in the advisory opinion that it had delivered in French and English in the *Reparation for Injuries* case, with the French text being the official text. The Committee had also noted that the nationality of claims rule did not apply only in the field of diplomatic protection. The Committee had made no amendments to subparagraph (*b*), since Governments had generally endorsed it.

40. The title of article 46 (Loss of the right to invoke responsibility) had presented problems for some Drafting Committee members who would have preferred the word "renunciation" to the word "loss" (of a right) in English. The Committee had made that change in the French version, but had retained the English title as it stood, since it considered the word "loss" better than the word "renunciation".

41. With regard to subparagraph (*a*), the Drafting Committee had examined the proposals by some Governments to exclude the ability to waive a claim arising from a breach of a peremptory norm or an *erga omnes* obligation. It had felt that, in the context of chapter V of Part One (Circumstances precluding wrongfulness), the word "validly" referred to both the procedural and the substantive validity of the waiver of the claim. In that article, the Committee had been unable to settle the question of the circumstances in which a claim relating to a breach of an obligation under a peremptory norm could be waived, for the reasons already explained when introducing article 42, paragraph 2. The Committee had likewise considered a suggestion by one Government that the word "validly" should be deleted, since it was redundant. It had thought it essential to uphold the principle that a claim had been validly renounced, in order to take account of situations in which an injured State might waive its claim under duress or coercion, because such renunciation should not be regarded as a sufficient waiver. The Committee had also studied the proposal from one Government to delete the words "in an unequivocal manner", which might hamper the application of the article. It had noted that the expression was not strictly necessary and that the adverb "validly" rendered the idea adequately. It had therefore deleted the expression and agreed to explain the point in the commentary. The Committee had maintained subparagraph (*b*) without any changes, since no Government had submitted any comments on it.

42. Taking its cue from a proposal by the French Government, the Drafting Committee had amended the title of article 47 to read: "Plurality of injured States", which was, in its opinion, more consistent with the content of the article itself. The article had been generally accepted by Governments. The Committee had wondered whether the article should specify that States could invoke responsibility collectively and separately. It had, however, found that the word "separately" had been expressly included in the text to show that States could invoke responsibility individually and that it went without saying that injured States could act together. In such circumstances, however, each State would be acting in its own right and not on behalf of any group or community. The provision did not deal with the issue of joint actions, which was governed by a separate body of law. That point could be explained in the commentary.

43. The Drafting Committee had amended the title of article 48 to read: "Plurality of responsible States". In paragraph 1, it had first looked into the question raised by a Government whether the article recognized the principle of joint and several responsibility. It had noted that the general rule in international law was that a State bore responsibility for the wrongful acts it had committed and that article 48 reflected the rule well. The commentary would clearly explain that that provision must not be

construed as recognizing the rule of joint and several responsibility. If States wished to establish such a regime, they could do so. The Committee had further considered a Government's proposal to include the concept of attribution by changing the last part of paragraph 1 to read "the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State's conduct". It had noted that introducing the notion of attribution would create confusion with Part One and that the words "in relation to that act", which appeared in the text, would achieve the same objective. That point would be explained in the commentary.

44. The Drafting Committee had retained paragraph 2 as it stood, apart from some editorial modifications.

45. The Drafting Committee had noted that only one Government had proposed the deletion of article 49. It had considered a proposal to delete the expression "subject to paragraph 2" from the opening clause of paragraph 1, but had concluded that it would be better to replace it by "in accordance with paragraph 2". The Committee had examined the comment of a Government, which thought it necessary to clarify the concept of collective interest in paragraph 1 (*a*). It had decided to narrow the provision by adding the words "of the group" after the words "collective interest". That wording did not, however, rule out the possibility of a group of States entering into an obligation in the common interest of a larger community. For example, a group of States with rainforests in their territory might undertake to protect and preserve those forests, not only in their own interest, but also for the benefit of the international community as a whole. In the view of the Committee, that situation was also covered by the subparagraph. The commentary would elaborate on that issue. The Committee had made no changes to paragraph 1 (*b*) because Governments had found it generally acceptable.

46. In paragraph 2, the Drafting Committee had replaced the words "a State" by "any State" so as to be consistent with paragraph 1. Similarly, in the English version, it had replaced "may seek" by "may claim". The Committee had then examined a suggestion by a Government that a saving clause should be included to indicate that non-State entities might also be entitled to invoke State responsibility, but had considered that it was pointless to do so, since that matter was already dealt with in article 34, paragraph 2. The Committee had then noted that the inclusion of the reference to "assurances and guarantees of non-repetition" in paragraph 2 (*a*) depended on the decision taken on article 30, subparagraph (*b*), and had therefore decided to place those words in square brackets in the intervening period. The reference to the cessation of the internationally wrongful act did not give rise to any problems. A number of Governments had queried the substance of paragraph 2 (*b*). In particular, they had wondered whether the States in question in that article were entitled to ask for more than the cessation of the wrongful act and whether their right to demand reparation was recognized by international law. The Committee had further noted that some Governments were unsure how the invocation of responsibility by several States under that provision could be reconciled with conflicting or divergent demands. The Committee had found that that provision was a clear example of the progressive development of international law and its utility should be evaluated from a policy perspective. It had noted that the right of the States referred to in article 49 to adopt countermeasures for the sake of the collective interest in the event of breaches of obligations, which had been embodied in article 54 of the previous draft, was highly controversial. The general view of the Commission had been that that article should be replaced by a saving clause, even if that might have the effect of weakening the protection of the collective interest. Under those circumstances and on balance, the Committee had reached the conclusion that, while that provision represented the progressive development of international law, it established a wise and useful principle worth retaining. It had nevertheless replaced the words "under chapter II of Part Two" by the words "in accordance with the preceding articles" in order to emphasize that the States referred to in article 49 could not demand reparation on behalf of an injured State that had chosen to waive its right to do so in accordance with article 46. The commentary would elaborate on the question of the procedure to be followed in the event of conflicting or divergent demands by the States referred to in article 49. At the beginning of paragraph 2 (*b*), the Committee had replaced the words "[c]ompliance with" by the words "[p]erformance of" in the English version in order to bring it into line with the French text.

47. Finally, with regard to paragraph 3, the Drafting Committee had discussed the proposal of one Government to add "*mutatis mutandis*" after "under articles 44, 45 [22] and 46 apply", but it had concluded that the intent of the provision was clear and that there was no need to amend its wording. Since the paragraph had been generally deemed acceptable by Governments, the Committee had retained it without any changes.

48. Turning to Part Three, chapter II (Countermeasures), he said that that part of the text had attracted much criticism from Governments and Commission members. Taking into account the compromise reached in the Commission, it had been found undesirable to overload article 23 (Countermeasures in respect of an internationally wrongful act) by incorporating in it most of the articles on countermeasures. Article 23 would therefore remain in chapter V of Part One. The chapter on countermeasures would remain in Part Three, but article 54 of the draft at the previous session, which had been highly controversial, would be deleted and replaced by a saving clause which took account of all the positions on that issue. Article 53 [48] (Conditions relating to resort to countermeasures) of the previous draft would also be reconsidered and the distinction between countermeasures and provisional countermeasures would be removed. That article should also be simplified and brought into line with the decisions of the arbitral tribunal in the *Air Service Agreement* case and the decision of ICJ in the *Gabčíkovo-Nagymaros Project* case. Articles 51 [50] (Obligations not affected by countermeasures) and 52 [49] (Proportionality) should also be reconsidered, as necessary, in the light of the various comments made. On that basis, the Drafting Committee had considered chapter III and article 23 [30] as it was related to that chapter.

49. With regard to article 50 [47] (Object and limits of countermeasures), the Drafting Committee had taken note of the fact that, while Governments had not objected

to it, they had questioned its balance and that was the issue it was trying to resolve.

50. According to paragraph 1, the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations to cease the breach and provide reparation. Countermeasures were not punishment. One Government had suggested that the sole aim should be to bring about the cessation of the wrongful act, but, in the view of the Drafting Committee, reparation was necessary in situations where damage had already been done. That conception of countermeasures was therefore too restrictive and not supported by State practice. The Committee had felt that the restriction implied by the word "only" in the English version applied to both the target of countermeasures, i.e. the responsible State, and the purpose of those countermeasures, which was to persuade the responsible State to comply with its obligations.

51. The Drafting Committee had likewise considered a suggestion that countermeasures to guarantee satisfaction should be ruled out, since satisfaction played only a minor, symbolic and supplementary role in the entire range of forms of reparation and could not alone justify the imposition of countermeasures. It was inconceivable that a State that had met its obligation to cease the wrongful act and had provided compensation could be made the target of countermeasures. The Committee had felt that the notion of proportionality addressed that concern and that it was unnecessary to make arbitrary distinctions in that paragraph.

52. In paragraph 2, the Drafting Committee had considered the use of the expression "suspension of performance of one or more international obligations", which some considered too close to the language used in the context of treaty obligations and which might convey the impression that the paragraph was confined to that kind of obligation. The words "one or more international obligations" had also been criticized, but the Committee had noted that a countermeasure could well result in the breach of several different obligations coexisting under a variety of arrangements and that the more exact wording "or more" was therefore justified. The Committee had thus done no more than make purely drafting changes to the previous text by replacing the words "suspension of performance of one or more international obligations" by the words "the non-performance for the time being of international obligations" because the term "for the time being" accurately reflected the temporary nature of the countermeasure. Lastly, the Committee had examined the suggestion by a Government that the text did not sufficiently protect third States' rights, which might be infringed by countermeasures in some situations, but it had considered that, in view of State practice, it was impossible to introduce a provision which would restrict the right of the injured State to adopt countermeasures for that reason.

53. In paragraph 3, the Drafting Committee had turned its attention to a point raised by some Governments concerning the irreversible consequences of countermeasures. In its opinion, it would be impossible to prevent irreversible effects in all cases, but States could at least be required "as far as possible" to take countermeasures with reversible effects. For the sake of greater clarity, the Committee had made some drafting changes to the paragraph by replacing the words "not to prevent" by the words "to permit" and by deleting the words "obligation or" in order to achieve consistency with paragraph 2, which referred only to "obligations". The title of the article remained unchanged.

54. As to article 51 [50], although one Government had proposed its deletion on the grounds that it dealt with issues covered by the Charter of the United Nations or by the article on proportionality, whereas others had wished to supplement it, the Drafting Committee had taken the view that it usefully clarified certain issues and had largely reproduced the text of the previous version with a few amendments; for example, it had slightly altered the wording of paragraph 1 by replacing the words "involve any derogation" by the word "affect" in the opening clause because some Governments had rightly been of the opinion that the use of the term "derogation" created confusion with human rights derogation clauses. As far as substance was concerned, in paragraph 1 (*c*), it had deleted the reference to any form of reprisals against persons protected by obligations because it believed that there was no need to be more specific, since the text relied on *lex specialis*. As at the fifty-second session, it was the understanding of the Committee that paragraph 1 (*d*) did not qualify the obligations referred to in the previous subparagraphs, especially those in paragraph 1, subparagraphs (*b*) and (*c*), which might or might not be peremptory. The subparagraph on diplomatic and consular inviolability had not prompted any criticism by Governments. According to one Government, however, the obligation in question should be considered peremptory. The Committee did not share that viewpoint because a State might waive the inviolability of its own personnel, premises and documents. The purpose of that subparagraph was directly linked with that of paragraph 2, for, in order to settle a dispute successfully, it was essential to keep diplomatic channels open between the States concerned. That was why the Committee had transferred that subparagraph to paragraph 2.

55. When considering paragraph 1, the Drafting Committee had wondered whether it would be useful to keep it general, with no listing of specific obligations. The advantage of such a formula was that the scope of the paragraph would remain within the realm of secondary rules and would avoid the possibility of excluding any of the obligations against which countermeasures might not be taken. On the other hand, the fact of listing some of the "prohibited countermeasures" had the advantage of removing uncertainty, at least about those for which there should be no ambiguity. On balance, the Committee had considered that the second approach was preferable, even though the provision would have to draw on primary rules.

56. Paragraph 2 was a merger of paragraph 2 and paragraph 1 (*e*) (on diplomatic and consular inviolability) of the article at the previous session. In the context of its consideration of that paragraph, the Drafting Committee had looked into the question of the meaning of the expression "applicable dispute settlement procedure in force" between the injured State and the responsible State and had confirmed its understanding that it was intended to be construed narrowly and to refer only to dispute settlement procedures that were applicable to the dispute in

question. For that reason, the Committee had considered it useful to change "applicable" to "relevant". In any event, the issue would be made clear in the commentary. Also, the title of the article had been modified.

57. The need for article 52 [49] had not been questioned by Governments, but a number of suggestions had been made affecting both the drafting and the substance of the article. With regard to the drafting, some Governments had proposed adopting the phrase "not disproportionate" or, in the English version, replacing the word "commensurate", which seemed to suggest a more restrictive meaning, by the word "proportional". The Drafting Committee, consistent with its general approach of avoiding double negatives, had not found the first proposal acceptable. Considering that the words "proportional" and "commensurate" were interchangeable, it had opted for the latter because it was the word ICJ had used in the *Gabčíkovo-Nagymaros Project* case. The Committee had also considered a proposal by some Governments that countermeasures should be considered justified to the extent that they were necessary to induce compliance with the obligation that had been breached. Therefore, proportionality should be linked to the purpose of countermeasures. Along the same line, other Governments had proposed replacing the words "the rights in question" by the words "the effects of the internationally wrongful act on the injured State". In the view of the Committee, the purpose of countermeasures having been already described in article 50, it was unnecessary to repeat it. As for the words "the rights in question" adopted by the Committee at the previous session, they came from the decision of the Court in the *Gabčíkovo-Nagymaros Project* case and had a broad meaning, which included the effect of a wrongful act on the injured State. On that issue, he referred to the statement made by Mr. Gaja. Article 52 [49] was intended to identify the factors that had to be taken into account in deciding on the type of countermeasures to adopt and their intensity. It captured the necessary and relevant elements identified by the arbitral tribunal in the *Air Service Agreement* case. Those issues would be explained in the commentary. The title of the article remained unchanged.

58. Article 53 [48] was central to the compromise by the Commission. The most delicate aspect of the provision was the relationship between countermeasures and dispute settlement. To address that difficulty, the Drafting Committee had deleted paragraph 4 of the previous text, essentially prohibiting countermeasures while negotiations were being pursued in good faith, but had retained paragraph 5 dealing with the suspension of countermeasures where the dispute was before a tribunal with the power to make decisions binding on the parties.

59. Paragraph 1 was a merger of paragraphs 1 and 2 of the previous text. Subparagraph (*a*) required the injured State to request the responsible State to comply with its obligations under Part Two, namely, the cessation of the wrongful act and the reparation of injuries caused. Subparagraph (*b*), which corresponded to paragraph 2 of the previous text, required the injured State to notify the responsible State of any decision to take countermeasures and to offer to negotiate with that State. Under the new formulation, the notification should be given before the taking of countermeasures.

60. Paragraph 2 was essentially the same as paragraph 3 of the previous text. It permitted the taking of urgent countermeasures without prior notification to the responsible State. The Drafting Committee had deleted the reference to "provisional" countermeasures, since the notion of reversibility of countermeasures was already covered by article 50, paragraph 3. Therefore, by definition, all countermeasures were provisional and the term "provisional" therefore lacked specific meaning. The Committee had also changed the words "countermeasures as may be necessary to preserve its rights" to "countermeasures as are necessary to preserve its rights" in order to establish a link with the purpose of countermeasures as set out in article 50.

61. Paragraph 3 was identical to paragraph 5 of the previous text with only one drafting change in the opening clause; the words "within a reasonable time" had been replaced by the words "without undue delay", which merely drew attention to the importance of suspending countermeasures when they were no longer necessary. As Mr. Gaja had said at the previous session, for the Drafting Committee, tribunal or court meant any third party dispute settlement mechanism. The court or tribunal in question should also be established and operating and should have the competence to make decisions binding on the parties, including decisions regarding provisional measures. The rationale behind the paragraph was that the injured State could request such a court or tribunal to order provisional measures to protect its rights that would have the same effect as countermeasures and therefore make countermeasures unnecessary.

62. Paragraph 4 was identical to paragraph 6 of the previous text. It stated that, if the responsible State failed to implement the dispute settlement procedure in good faith, paragraph 3 relating to the requirement of the suspension of countermeasures would not apply. The title of the article remained unchanged.

63. Article 55 [48] (Termination of countermeasures), was identical to the previous text and simply provided for when the countermeasures should be terminated. Governments had generally supported the article and the Drafting Committee had made no changes to its text or title.

64. The last article in the chapter, article 55 *bis* (Measures taken by States other than an injured State), replaced article 54 (Countermeasures by States other than the injured State) of the previous draft. That article, which had been much criticized, had been deleted as part of the compromise in the Commission and replaced by a saving clause reserving the position of all those who believed that the right to take countermeasures should be granted to States other than the injured State with regard to the breaches of obligations established to preserve collective interests and those who believed that only injured States should have the right to take countermeasures. That saving clause was the subject of article 55 *bis*, which stated that the chapter on countermeasures did not prejudice the right of any State, entitled under article 49, paragraph 1, to invoke the responsibility of another State to take lawful measures against the responsible State to ensure the cessation of the breach and reparation in the interests of the injured State or the beneficiaries of the obligation

breached. It should be noted that the expression used was "lawful measures" and not "countermeasures" so as to respect all points of view. With that saving clause, the Commission was not taking a position on the issue and had left the matter to the development of international law.

65. He then introduced article 23 [30] (Countermeasures in respect of an internationally wrongful act) of chapter V of Part One, which dealt with countermeasures as circumstances precluding wrongfulness. It corresponded to the text of the same article in the previous draft with a minor drafting change in that the reference to "conditions set out" in the articles of the chapter on countermeasures was replaced by the general reference "in accordance with chapter II of Part Three". That redrafting had been made necessary by the insertion of article 55 *bis*, which did not deal in so many words with countermeasures and did not set out any conditions for taking countermeasures, since it was a saving clause. Article 23 did not intend to include the measures referred to in article 55 *bis*, since they were not countermeasures, but it would not rule out the possibility of those measures precluding wrongfulness either. It contained an implied without prejudice clause with regard to article 55 *bis* measures. The commentary would elaborate further upon those issues.

66. Mr. PELLET said that, in general terms, if chapters I and II of Part Three represented a slightly improved version in terms of form compared with the version that had resulted from the work of the previous session, the way countermeasures were dealt with was, in his view, quite a big step backwards.

67. As for chapter I, he considered article 44, paragraph 2, to be useless and misleading. It was in fact always regrettable in a codification exercise when examples were given of what might be done. That meant introducing elements in the draft itself that belonged or should belong in the commentary. He deplored the fact that, in the current case, what had been done was to follow the approach adopted, and criticized, in respect of article 19 adopted on first reading. Likewise, article 45 posed a real problem for him and it was also a problem of general principle. It made the admissibility of a claim subject to two conditions and it was clear that, if one of them was not met, the claim was not admissible. As currently worded, the text did not include the word "or", whereas the Drafting Committee seemed to be agreeable to the Special Rapporteur, with the help of the secretariat, giving systematic and case-by-case consideration to that kind of problem and adding "or" or "and" as needed. That did not appear to have been done and he wished to remind the Commission that it should have been. Furthermore, he maintained his firm opposition to the expression "nationality of claims", which meant nothing in French legal language, as the French Government had pointed out. It was a matter of concern that an English-speaking majority was imposing its views on the French-speaking minority; notwithstanding the authority argument invoked by the Chairman of the Committee and regardless of what ICJ might have thought in 1949 (see para. 39 above).

68. More fundamentally, he once again welcomed the new orientation the Special Rapporteur had given to Part Three—which the Commission had endorsed and the Drafting Committee had not altered—which involved looking at things from the point of view of invoking responsibility and avoiding the very artificial construction of the first draft, which had consisted of very artificially extending the notion of "injured State" to States which had in fact suffered no injury in the real sense of the term. The distinction made in articles 43 and 49 between injured States and those that were not injured, but which had a right to act, a legal interest in acting, consequently seemed apposite, even if it should perhaps be regarded as an element of the progressive development of international law. It was nevertheless a step forward, although he had some doubts about the wording of article 43, subparagraph (*b*) (ii).

69. It would be an understatement to say that chapter II left him less than enthusiastic. He remained very sceptical about the idea that a countermeasure might, intellectually speaking, be a circumstance precluding wrongfulness. It was the consequence of a circumstance which precluded wrongfulness and that circumstance which precluded the wrongfulness of the countermeasure was the initial internationally wrongful act. He regretted that, on that point, the Commission had never managed to call into question the analysis by the former Special Rapporteur, Roberto Ago, which, to his own way of thinking, had been erroneous. The problem was one of intellectual consistency. Those who supported the power politics which such private justice necessarily implied had once again, as at the previous session, obtained far too much satisfaction, particularly with the very flabby wording of article 50, paragraph 3, from which the expression "as far as possible" should have been deleted. Likewise, he particularly noted with concern that article 53, paragraph 2, opened the way to many potential abuses and deplored the use in paragraph 3 of the expression "without undue delay".

70. He found article 51 intellectually appalling. The relegation of diplomatic inviolability to paragraph 2 (*b*) was a useful rationalization, but that was not the case with the implausible listing in paragraph 1, where it would have been so simple to make a general reference to the peremptory norms of general international law. Nothing in the article as it was drafted enabled one to say whether paragraph 1, subparagraphs (*a*), (*b*) and (*c*), related to breaches which were breaches of a *jus cogens* obligation. It seemed to him that much too much importance was attached to human rights and humanitarian law, whereas the principle of the right of peoples to self-determination, which the Drafting Committee had refused to include, was just as deserving of attention. He would not have been in favour of the inclusion of the right of peoples to self-determination if other examples had not been included. It was always the excesses of "human rightism" that led to the adoption of technical procedures that he found unacceptable. He regretted that ideological considerations and concern for current fashions had prevailed. Lastly and above all, he was one who deplored the deletion of former article 54 and particularly its paragraph 2. For example, the draft gave no guidelines about what should be done in cases of genocide or apartheid. Non-law prevailed, whereas former article 54 had the great merit of giving indications as to where the juridical framework began. It was a serious step backwards from the previous text and created a considerable imbalance in the draft.

On that point, the Commission was not engaging in the progressive development of international law, but in its regressive or recessive development, under the threat of a handful of, frequently conservative, States. He found that deeply regrettable.

71. He admitted that he had hesitated to support chapter III and had seriously considered requesting a vote on the issue. But he had not done so because article 55 *bis* adequately safeguarded the future, and even the current time, even though it provided States with no guidelines on how to proceed in the hypothetical cases in question. In his opinion, it was a non-law clause rather than a saving clause. It dealt with the unknown. In that respect, he recalled that saving clauses led in the end to non-codification and the non-progressive development of international law. By shying at serious obstacles, the Commission was neglecting the task entrusted to it, which was to make law and to tell States either what rules were in force or what tack should be taken in the context of the progressive development of international law. It had missed an opportunity, but at least had not compromised the future, and that was very important. In conclusion, he considered the draft taken as a whole to be acceptable.

72. Mr. LUKASHUK said that he welcomed the notable improvement that the Drafting Committee had made to the text, and particularly to article 51 [50] on obligations for the protection of fundamental human rights.

73. The question raised by Mr. Pellet in connection with the meaning of the expression "nationality of claims" in French was also a problem in Russian, but it would be dealt with without resorting to the Commission.

74. He had two difficulties with chapter II of Part Three. First, in article 52 [49], no mention was made of an important aspect, namely, that countermeasures must be sufficient not only to constitute reparation, but also to guarantee the fulfilment of obligations. The point could be made in the commentary. Also, the urgent countermeasures referred to in article 53 [48], paragraph 2, did not correspond to the definition of countermeasures given in article 50 [47]. That article stated that an injured State might take countermeasures only in order to induce the State responsible for an internationally wrongful act to comply with its obligations, whereas according to article 53 [48], paragraph 2, it could take them "to preserve its rights". Paragraph 3 implied that provisional measures were not involved. If account was taken, for example, of cases where assets were frozen, it was clear that the effects of the measure were not provisional. It therefore seemed improper to speak of countermeasures in that case and such matters should be clarified.

75. Mr. KATEKA said that he remained opposed to the principle of countermeasures despite the changes made to chapter II of Part Three because they continued to be a threat to small and weak States and gave the more powerful States another weapon. The Drafting Committee had certainly taken a step in the right direction by deleting article 54, but had reintroduced the notion through the back door by the saving clause in article 55 *bis*, which he found difficult to accept.

76. With regard to article 51 [50], he noted that the provision relating to the obligation to respect the inviolability of diplomatic or consular agents, premises, archives and documents currently appeared in paragraph 2. He considered that on that point the Drafting Committee should have followed the comment made by Mexico that obligations in the field of diplomatic and consular relations had acquired a peremptory character. He noted that the Committee had not taken account of the wishes of certain members of the Commission and certain Member States of the United Nations, which wanted to reintroduce the prohibition of extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which had committed the internationally wrongful act. Some States favoured a simple reference to the prohibition of any conduct that could undermine the sovereignty, independence or territorial integrity of States. The Committee had told them that the point was covered by article 52 [49], but that argument had not been invoked in respect of obligations under the Charter of the United Nations or fundamental human rights. It was to be hoped that the commentary would elaborate on the scope of article 51 [50], paragraph 1 (*d*), on other obligations under peremptory norms of general international law, for economic and political coercion undermined the right to self-determination, which was a principle of the Charter

77. As for article 53 [48], he was of the view that countermeasures of any kind should not be taken while negotiations were being pursued in good faith and had not been unduly delayed. Taking account of observations made by members of the Commission, the Drafting Committee had deleted the reference to "provisional" countermeasures while retaining the reference to "urgent" countermeasures. He recalled that, in paragraph 69 of his fourth report, the Special Rapporteur acknowledged that the distinction between urgent and definitive countermeasures did not correspond with existing international law. He shared the concern expressed on that matter by Mr. Lukashuk.

The meeting rose at 1 p.m.

2683rd MEETING

Thursday, 31 May 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr.