Document:-

A/CN.4/SR.2683

Summary record of the 2683rd meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

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.

Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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).

2. Mr. KAMTO said that, from his point of view, Part Three of the draft raised the most difficulties. He particularly regretted the retention of the phrase "as far as possible" in article 50 [47] (Object and limits of countermeasures), paragraph 3, because of the risk of contradicting paragraph 2. The implicit admission that in certain cases countermeasures might be taken in such a way as not to permit the resumption of performance of the obligations in question could conflict with the idea in paragraph 2 that countermeasures were limited to non-performance "for the time being". As currently worded, paragraph 3 was illogical and an example of faulty legal drafting. The Chairman of the Drafting Committee had stated, at the previous meeting, that it was impossible to guarantee the irreversibility of certain countermeasures. He did not agree: States must be able to give such a guarantee, and were not free to take whatever action they chose in the guise of countermeasures. In that sense, countermeasures differed from other measures.

3. As to article 53 [48] (Conditions relating to resort to countermeasures), he regretted the omission of paragraph 4 in the form in which it had been provisionally adopted at the previous session. The former paragraph 4 had been drafted to balance out former paragraph 3. Urgent countermeasures might indeed be necessary in some cases, but the new wording of article 53 was unacceptable. It meant that countermeasures could be taken even while negotiations were being pursued in good faith, thus providing a legal basis for unlawful or excessive acts by States and creating inequality among States. The former paragraph 4 should be reinstated.

4. He approved of the deletion of article 54 adopted at the previous session, which was not in line with State practice, and its replacement by a safeguard clause. The progressive development of international law should not be treated as synonymous with the creation of prospective law.

5. Mr. ECONOMIDES, commenting on article 50, said it involved an even more serious contradiction than the one mentioned by Mr. Kamto, namely with article 29 [36] (Duty of continued performance). The phrase "as far as possible" in article 50, paragraph 3, exempted a State taking countermeasures from the requirement to permit continued performance at all times. Generally speaking, it was easier for a State taking countermeasures than for the responsible State to monitor its own conduct and to decide whether its actions complied with international law. It would be preferable either to delete the words "as far as possible" from article 50, paragraph 3, or to add them to article 29.

6. He interpreted the word "validly" in article 46 (Loss of the right to invoke responsibility), to mean that an injured State could not, either explicitly or implicitly, waive its claim arising from a serious breach as defined in article 41 (Application of this chapter) until the case had been finally resolved in accordance with the rules of international law. According to the Special Rapporteur, that principle was to be spelt out in the commentary, but he would have preferred it to be incorporated into article 46.

7. Paragraphs 2, 3 and 4 of article 53 were currently seriously unbalanced. The obligation of dispute settlement was among the most fundamental obligations of the international legal order and it must not be made to give way before the unilateral act of a State in the form of countermeasures. Under paragraph 2 an injured State could, without notification, take urgent countermeasures to preserve its rights and it might reasonably be supposed that, in such a case, the State would itself decide what measures to take. What was worse, as a result of the deletion of the former paragraph 4, an injured State could take fresh countermeasures, urgent or otherwise, after notifying the responsible State and even if negotiations had begun in good faith. That opened the door wide to arbitrary action by States and breached the obligation of peaceful settlement of disputes. Moreover, it placed unlimited confidence in a State that might merely be alleging an injury and condemned in advance a State that was allegedly responsible but might not in fact be so, or not entirely. Those three paragraphs were unacceptable and he hoped the General Assembly or a conference of plenipotentiaries would redress the balance. As for the deleted article 54, he had been in favour of retaining it as expressing the primacy to be given to the organized international community, but could accept the compromise solution adopted. Lastly, he emphasized that the draft as a whole, and especially the provisions on countermeasures, still stood in great need of an appropriate system of dispute settlement.

8. Mr. SIMMA said the draft was a great improvement over the one adopted on first reading at the forty-eighth session.[4] He particularly approved of the replacement of former article 40 [42] by articles 43 [40] (Invocation of

[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] See 2665th meeting, footnote 5.

responsibility by an injured State) and 49 (Invocation of responsibility by a State other than an injured State), and also the express treatment of "integral" obligations in article 43. He welcomed the provision for what might be termed "article 49 States" to claim not only cessation and assurances and guarantees of non-repetition but also reparation in the interest of non-State victims. The provision represented progressive development of the law inasmuch as it clarified existing law. As for the relevance of non-State actors in the context of State responsibility, and especially in Part Three of the draft, the notion of the "international community" must vary depending on the context in which the term was used. The context of article 53 of the 1969 Vienna Convention was that of law-making, which in a formal sense was still the prerogative of States and of States cooperating in the framework of international organizations, whereby *jus cogens* could emerge. That had justified using the term "the international community of States as a whole". However, States also bore a responsibility towards non-State entities, including individuals, and that broader concept of the international community was also relevant in the context of the draft articles.

9. With regard to Part Two, chapter III (Serious breaches of obligations under peremptory norms of general international law), from a systematic viewpoint the criticism of the replacement of obligations *erga omnes* by peremptory norms was justified. However, in the process of codification the two kinds of rules became two sides of the same coin, having the effects in the case of *jus cogens* of invalidating consent to the contrary and creating an interest for every State in their observance. In the context of State responsibility, it was clearly the latter aspect that was relevant and it had rightly retained its place in article 51 [50] (Obligations not affected by countermeasures). The new article 41 was narrower than the former one, because the range of peremptory norms was narrower than that of obligations *erga omnes*. However, the serious breaches singled out in article 41 would, for all practical purposes, always involve obligations *erga omnes*.

10. He welcomed the retention of chapter II (Countermeasures). On its own, the solution in article 23 [30] (Countermeasures in respect of an internationally wrongful act) would have given too much leeway to countermeasures and to States inclined to use them. He was also pleased with the drafting of article 51, because the obligations expressly mentioned were those that, in the past, had been most often violated through countermeasures. The deletion of article 54, especially paragraph 2, was regrettable. However, he was willing to sacrifice article 54 in exchange for a saving clause, rather than jeopardize the chances of the draft being accepted.

11. Mr. HAFNER said he saw the draft as a major achievement, although there might be some problems of interpretation. For example, the definition of the injured State in article 43, subparagraph (*b*) (ii), could result in a plurality of injured States from the same breach, with resulting complexities such as incompatible claims by those States. Article 47 (Plurality of injured States) attempted to address that issue, but identified only one aspect, namely, the right of each injured State separately to invoke responsibility. That in turn raised the possibility of incompatible claims. He therefore regretted that it had not been possible to draft articles dealing with a plurality of injured States. Notwithstanding article 47, there remained a need to cooperate with the injured State; otherwise, one breach could become the seed of further conflict. Cooperation with the injured State must, however, be clearly distinguished from joint invocation of State responsibility, which, as already explained, was subject to specific regimes.

12. Article 49, paragraph 2 (*b*), referring both to the injured State and to the beneficiary of the obligation breached, could cause difficulty. For instance, in the event of a breach of a norm in the legal regime on foreigners, the interests of the State of which the foreigner was a national, possibly itself the injured State, and the foreigner himself could diverge. Furthermore, if the word "or" was intended to provide for an alternative, it seemed that the State would have to decide which interests should prevail. He recognized, however, that it was not always feasible to provide through a rule for the settlement of all conceivable conflicts, and could accept the text as it stood.

13. Article 51, paragraph 1 (*d*), should not be interpreted as meaning that all other norms referred to in the preceding subparagraphs were necessarily peremptory norms. The question was left open. He welcomed article 55 bis (Measures taken by States other than an injured State), but queried the discrepancy between "cessation of the breach and reparation in the interests of the beneficiaries of the obligation breached" and the reference in article 49, paragraph 2 (*b*), to "the interest of the injured State or of the beneficiaries of the obligation breached". He asked whether it was intentional.

14. Mr. MOMTAZ said it was inconceivable that countermeasures could be instigated merely on the basis of a subjective evaluation of the situation by the State claiming to be injured. Before countermeasures could be taken, it must be certain that the allegations advanced to justify them were well founded. He had consistently argued for the inclusion in the draft of a dispute settlement mechanism to which both the putative injured State and the State allegedly responsible could have recourse to establish the facts. He therefore regretted the absence from the draft of any clear prior condition of recourse by both States to dispute settlement mechanisms, although article 51, paragraph 2 (*a*), went some way to filling the gap. It was also to be regretted that countermeasures could be taken while negotiations were in progress.

15. Mr. CRAWFORD (Special Rapporteur) commented, in reply to Mr. Kamto, that the formulation of article 53 had been the subject of an explicit understanding in the informal consultations reported to the Drafting Committee.

16. Mr. ROSENSTOCK said that when the Commission had considered the report of the Drafting Committee on the draft articles relating to countermeasures on first reading,[5] wreckage had occurred and a great deal of effort had been required to put the pieces back together. He was beginning to believe that certain Governments had been right in suggesting that all circumstances preclud-

[5] See *Yearbook . . . 1996*, vol. I, 2452nd and 2454th to 2459th meetings.

ing wrongfulness should be listed as in article 23 and that it was not prudent to disturb the balance by elaborating the content of self-defence, countermeasures or any of the other circumstances precluding wrongfulness. A logical argument could certainly be made for not trying to go into any details beyond what was in article 23.

17. So far as article 50, paragraph 2, was concerned, the term "non-performance" did not refer to a non-event: it meant not doing what one was obligated to do, which in some cases meant doing nothing when one should do something, and in others, the reverse. Given the language of the draft articles, it should come as no surprise that a State did not have at its command countermeasures that were fully reversible and resorted to some that were not. One could not always restore things in their entirety.

18. The phrase "as far as possible […] in such a way as to permit", in article 50, paragraph 3, struck the right note with regard to the effort that should be made by an injured State when responding to an injury. The contention that countermeasures might be taken when no injury had occurred was tantamount to impugning the right of self-defence because all States invoked it when going to war. Countermeasures were no worse than self-defence. Both were necessary but had been claimed abusively.

19. In terms of the attempt to balance differing views on countermeasures, article 51 had no basis in State practice, doctrine or anything else. Was it really such a bad thing for a State to have at its command fairly extreme measures when dealing with genocide or apartheid? As long as proportionality was maintained, a case could be made for not otherwise restraining countermeasures in sufficiently heinous situations. In that sense, article 51, paragraph 1, was an effort to reach a middle course between the law as it stood at the current time and some of the concerns that had been expressed.

20. Article 51, paragraph 2, was a further example of the draft articles going far to meet concerns and going beyond law or logic. If a dispute settlement process was capable of ordering the cessation of conduct, it was almost presumptuous to require the injured party to cease engaging in a certain conduct automatically. The existing text on countermeasures was more restrictive than the established law as reflected, inter alia, in the *Air Service Agreement* case.

21. Mr. DUGARD said he supported Part Three and was pleased to see that articles 45 [22] (Admissibility of claims) and 46 did not prejudge issues that would have to be addressed in the draft articles on diplomatic protection. Article 45, subparagraph (*b*), in particular, adopted neutral terminology in relation to the rule on the exhaustion of local remedies, to be considered in some depth in the context of diplomatic protection. Article 49 was an historic step forward that, once and for all, did away with the philosophy advanced by ICJ in the *South West Africa* cases and as such, he thought it would be widely welcomed.

22. The Commission had achieved the proper balance on countermeasures. Most of the provisions were in the nature of codification, although some could be described as progressive development. For that reason, he thought they would be accepted. He supported Mr. Hafner's views on the interpretation of article 51, paragraph 1 (*d*), namely that the reference to "other obligations under peremptory norms of international law" did not mean that the obligations referred to in paragraph 1, subparagraphs (*b*) and (*c*), were necessarily peremptory in character.

23. Like Mr. Simma, he had favoured the retention of article 54, paragraph 2, but could go along with article 55 *bis*, which was an important saving clause.

24. Mr. TOMKA (Chairman of the Drafting Committee), responding to comments on Part Three, said the highest priority of the Drafting Committee had been to complete the work on the draft articles. After 45 years, it had certainly seemed to be time to do so. The Committee had proceeded on the basis of understandings reached in the Commission in plenary or during the informal consultations whose results had been reported to the Commission.

25. There had been a danger, it must be recalled, that the draft would contain no provisions on countermeasures and there would be only a basic reference to them in article 23. The majority in the Commission had clearly not wanted that to be the case, however. Accordingly, based on a decision taken in plenary, the Drafting Committee had elaborated a separate chapter on countermeasures.

26. Article 51 had been drafted with a view to State practice, and accordingly it contained specific provisions, not general principles that could be subjected to different interpretations by practitioners or academics. The Drafting Committee had adopted it without taking a position as to whether or not obligations for the protection of fundamental human rights and obligations of a humanitarian character prohibiting reprisals were peremptory norms. No one disputed the fact that the obligation to refrain from the threat or use of force was a peremptory norm, however.

27. Article 53 had been redrafted along the lines of the *Air Service Agreement* case and other case law, based on an understanding which the Special Rapporteur had reported to the Commission in plenary. The major criticism had been that, when a case was the subject of judicial proceedings or negotiations, that did not have the effect of preventing a State from taking countermeasures. That position was not supported by case law, however. ICJ had considered the question of whether a certain measure undertaken by a State was or was not a countermeasure. The measure had continued to be taken during judicial proceedings, and at the same time, negotiations between the parties to settle the matter out of court had been ongoing. The Court had not rejected the notion that the measure might be a countermeasure on the grounds that judicial proceedings were in progress and there was no possibility of the parties negotiating in good faith. One might dream of a better world, but article 53 had been drafted to reflect customary international law.

28. The difference in the wording used at the end of article 55 *bis* and in article 49 was unintentional, probably due to pressures of time and it could be corrected, although no amendment would be made.

29. Mr. KATEKA said that it had been unfair of the Chairman of the Drafting Committee to use his response to comments on Part Three to go beyond points of clarification to question the position of members of the Commission. It was not his role and he hoped the Chairman of the Committee would confine his remarks henceforth to clarification alone.

30. Mr. TOMKA (Chairman of the Drafting Committee), introducing Part Four of the draft articles, said the Drafting Committee had decided to retain the title, "General provisions", since there had been no objection to it.

31. The Drafting Committee had considered several proposals for the inclusion of additional issues. The first had involved a suggestion that the reflexive nature of the draft articles be made clear, and that would be done in the commentary. Next, the Committee had considered a proposal to move paragraph 2 of article 34 (Scope of international obligations set out in this Part), dealing with the position of non-State entities, into Part Four, but had decided that it was not necessary. It had also considered a proposal to move the provisions on internal law, in articles 3 [4] (Characterization of an act of a State as internationally wrongful) and 32 [42] (Irrelevance of internal law), into Part Four, but had decided against it for reasons explained during his discussion of article 32.

32. With regard to article 56 [37] (*Lex specialis*), the Drafting Committee had noted that there was strong support both for its content and for its placement in Part Four. One Government, however, had made a proposal to move the article back to Part Two. Such a move would be undesirable, particularly because many of the issues in Part One and Part Three could also be subject to the *lex specialis* principle.

33. In addition, the Drafting Committee had noted the concern that the article applied only to Parts One and Two and not to Part Three because of the inclusion of the phrase "existence of an internationally wrongful act or its legal consequences" in the text adopted at the fifty-second session. There was no intention that the article should not apply to Part Three. Indeed, the issues dealt with in Part Three were often, although not necessarily exclusively, covered by special regimes. The Committee had decided to make the point clearer by incorporating abbreviated versions of the titles of the Parts of the draft. It should be noted that it was not the mere coexistence of specific rules that was sufficient to trigger the provision, but rather the coexistence of specific rules to the exclusion of general rules. The more detailed version made that aspect clearer. In addition, the provision was designed to cover both "strong" forms of *lex specialis*, such as self-contained regimes, and "weaker" forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution.

34. As a consequence of the new formulation, the Drafting Committee had considered that there was some difficulty in saying that the implementation of responsibility could be "determined" by special rules. One possibility had been to say that the "conditions for implementation… are determined", but that would have resulted in a double reference to "conditions". Instead, the Committee had opted to replace the word "determined" by "governed".

35. Article 56 *bis* (Questions of State responsibility not regulated by these articles) had been adopted at the fifty-second session as article 33 [38] (Other consequences of an internationally wrongful act). Governments had made two types of suggestions. The first related to whether there was a need for the article at all, and if so what form it should take, and the second related to its placement. The Drafting Committee had deemed the article necessary, in particular because the draft did not, and could not, state all the consequences of an internationally wrongful act, and because there was no intention of precluding the further development of the law on State responsibility. The article was intended to include customary international law as well as the application of treaties. The concerns of some Governments as to what else in customary international law was not addressed in the draft articles were covered in the commentary to the article.

36. As regards the placement of the provision, the Drafting Committee had noted that there was a direct link between article 33 and article 56, which had in previous drafts been in Part Two, preceding article 33. The Committee had agreed with the views expressed by some Governments that there was no reason to limit the application of the article to the legal consequences of wrongful acts and that the article should apply to the whole regime of State responsibility set out in the articles. It had therefore decided to move the article to Part Four and had considered that the most logical place was after article 56. Once placed in Part Four, the article would need to be drafted more broadly so as to be applicable to the entire text. The Committee had agreed on the current form of language, which drew on a preambular paragraph of the 1969 Vienna Convention. While the article was certainly applicable to the entire draft, it was most relevant to Part Two and the commentary would explain that point. The title of the article had been changed to reflect the new text.

37. Article 57 (Responsibility of an international organization) was a without prejudice clause dealing with two issues. It excluded any question of the responsibility of an international organization under international law and of the responsibility of a State for the conduct of an international organization, in other words, when the international organization was the actor and the State was said to be responsible by virtue of its involvement in the conduct of the organization. It had been proposed that the wording should be broadened so as not to prejudice the position of the law on the matter, but the Drafting Committee had been reluctant to introduce any language that could potentially expand the second part of the article. Any expansion of the article would introduce a significant escape clause whereby a State could exempt itself from the scope of the draft articles by arguing that it would not have done the act had it not been acting at the behest of an international organization. If a State had done the act, it was responsible for it. In certain circumstances, the State could also be responsible for acts of international organizations, but that was excluded as falling within the realm of the law of international organizations.

38. The Drafting Committee had considered the phrase "that may arise in regard to" in comparison with other suggested versions, including "relating to" and "concerning", and had settled on the even shorter phrase "any question of the responsibility . . . ", which conformed to the formula used in article 58 (Individual responsibility). As to the title of the article, the Committee had considered the formulations "Conduct of an international organization" and "Questions relating to the responsibility of an international organization" but had settled for "Responsibility of an international organization".

39. With regard to article 58, the Drafting Committee had considered a proposal to render the phrase "individual responsibility" as "responsibility of individuals" under international law, since the term "individual responsibility" could imply the individual responsibility of States. Other suggested formulations had included "personal responsibility" and "the responsibility of a person". The Committee had decided to retain the phrase "individual responsibility", however, as it had acquired an accepted meaning in the light of the Rome Statute of the International Criminal Court and various Security Council resolutions and had thus become a term of art.

40. As to the formulation "agent of a State", which had appeared in the version provisionally adopted at the fifty-second session, the Drafting Committee had been concerned with its potential inconsistency with some of the formulations currently used in Part One, chapter III. Another concern had been the difficulties that could arise in referring to "agency" at that point in the draft, which hitherto had not analysed the issue of attribution in terms of "agency". Suggestions had included "acting as an organ or otherwise on behalf of the State", "the acts of which are attributable to a State" and simply ending the sentence after "of any person". The Committee had eventually settled on "acting on behalf of a State". To the extent that an individual was responsible under international law, for example under international criminal law, the fact that the act had been undertaken on behalf of a State did not serve to exonerate the individual from responsibility. The title remained unchanged.

41. Drawing attention to the last article of the draft, article 59 [39] (Charter of the United Nations), he said the Drafting Committee had considered a proposal to delete it as unnecessary, for two reasons: first, because the General Assembly might take note of the draft, and secondly, and perhaps more fundamentally, because the article was redundant in the light of Article 103 of the Charter and that its inclusion might give rise to an *a contrario* interpretation with regard to other agreements where such a clause did not exist. The Committee, while agreeing that the provision was not strictly necessary, had decided to retain it so as to confirm that the draft articles were to be interpreted in conformity with the Charter: the provision was expository and just a useful reminder.

42. As to the drafting, the Drafting Committee had considered that the opening phrase, "The legal consequences of an internationally wrongful act of a State under", as adopted at the previous session, had to be consistent with the new, longer formula currently in article 56 [37], or alternatively that it could be deleted, leaving the text to read only: "These articles are without prejudice to the Charter of the United Nations". In adopting the shorter alternative, the Committee had been of the view that article 59 played a slightly different role than did article 56 in relation to the text and that the shorter form was therefore acceptable.

43. The Drafting Committee had also considered the observation made by several Governments that the phrase "without prejudice to the Charter of the United Nations" could be made more precise, although how that could be done was not clear. It had not accepted a suggestion to include a reference to peremptory norms and had decided to adopt a shorter version for the title.

44. In concluding his introduction of the report of the Drafting Committee, he recalled that the Committee was recommending that the Commission should adopt the draft. He expressed appreciation to the members of the Committee for their active participation in its work and to the members of the secretariat, in particular Ms. Arsanjani, Ms. Khalastchi and Mr. Pronto, who had assisted it in its task.

45. He apologized for the length of his statement, but due to the importance of the subject, he had felt it necessary to have a written record of the way in which the Drafting Committee had addressed the many comments by Governments and members of the Commission, including the reasons for accepting or rejecting them.

46. Mr. AL-BAHARNA said that he joined other members in paying tribute to the Special Rapporteur and the Chairman of the Drafting Committee for their completion of the topic of State responsibility, which constituted one of the greatest achievements in the history of the Commission. But like Mr. Kateka, he found that the drastic changes made in respect of articles 41 and 42 of the text of the draft articles provisionally adopted by the Committee on second reading were regrettable. Replacing the title of chapter III "Serious breaches of essential obligations to the international community as a whole" by "Serious breaches of obligations under peremptory norms of general international law" weakened the text and did not entail the same damages as envisaged in article 42. The phrase "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests" in article 41 had been deliberately taken from article 19 adopted on first reading as the price for its deletion. The Commission appeared to be going back on its agreement to substitute the words "serious breaches" for "crimes" or "State criminal responsibility".

47. In view of the divisive issues in Part Two, chapter III, and the wide range of positions of States, which were set out in paragraphs 43 and 44 of the fourth report (A/CN.4/517 and Add.1), and bearing in mind the Special Rapporteur's own view in paragraph 49 of his report, it might be asked why the Commission should adopt the stricter and much weaker rule of peremptory norms in preference to the much more widely accepted principle of the international community as a whole, given that the Drafting Committee had already adopted current articles

41 and 42 as an essential compromise in exchange for dropping article 19 adopted on first reading.

48. In particular, the deletion from former paragraph 1 of article 42 of "damages reflecting the gravity of the breach" could not in any sense be replaced by article 42 proposed by the Drafting Committee, a provision devoid of any substantive remedies for reflecting the gravity of the breach. In fact, none of the principles of cooperation, non-recognition and others contained in the three paragraphs of article 42 as currently proposed, controversial as they were, provided proper and equitable remedies commensurate with the seriousness of the breaches of obligations contemplated in the version proposed by the Drafting Committee.

49. He was convinced that those States that, in principle, were hostile to Part Two, chapter III, could hardly be persuaded to accept articles 41 and 42 even in its current milder form relating to serious breaches of obligations under peremptory norms of international law.

50. On the whole, he was prepared to join other members in approving the proposed draft articles adopted by the Drafting Committee, but reserved his position with regard to articles 41 and 42 for the reasons he had mentioned. On the question of dispute settlement, he would like to see the current draft contain a form of optional settlement of disputes, perhaps along the lines of the suggestion by the Government of China.

51. Lastly, in order to ensure their stability, conformity and continuity, he was in favour of the draft articles taking the form of a convention.

52. Mr. PELLET said that he had no serious objections to the draft articles in Part Four, but had three comments to make. Referring first to Mr. Kamto's expression of concern (2681st meeting) during the discussion on Part One, about the absence of any reference to State succession, in his own opinion the lacuna was more general, and the draft lacked a provision similar to that of article 73 of the 1969 Vienna Convention. The members of the Commission would have done well to follow the cautious example of their predecessors. Mr. Kamto's point on the problem that State responsibility could pose with regard to State succession, regardless of whether others shared that view, showed that something was missing.

53. Secondly, he had already expressed his regret on several occasions at the failure to include in the draft a saving clause concerning diplomatic protection.

54. Thirdly, he was in favour of the broad wording of article 59, but the draft was not very consistent on the relationship between the law of State responsibility and the law of the Charter of the United Nations. Admittedly, it was said that the draft was without prejudice to the Charter, which was only as it should be. Yet the law of State responsibility and Charter law or, more broadly, the law on the maintenance of international peace and security, were two distinct branches of international law, even if not unrelated. Article 59 rightly stated that fact that the draft had nothing to do with the Charter, which was the source of primary obligations that could give rise to the application of the rules of States responsibility. But in that case, why mention the Charter, as had been done in, for example, article 22 [34] (Self-defence) or article 51, paragraph 1 (*a*)? His was not a major criticism, but such a reference to the Charter was not logical and such confusion might cause practical difficulties on what were very important points.

55. In drafting matters, the French version of the text, and apparently the Spanish version as well, still had a number of weaknesses. He asked what the procedure for correcting them was.

56. Wishing to close on a positive and even enthusiastic note, he said that, although he did not like some of the provisions of the draft, which reflected excessive timidity not only *de lege ferenda*, but also *de lege lata*, and although the draft did not go far enough in some areas, it had the great merit of not prejudicing the future. It left the door open to later consolidations and developments and even the possibility of refutation by practice, and that was why he was not in favour of its being immediately transformed into a convention, because that might "freeze" it. The draft was an extraordinary starting point and would be an excellent guideline for State practice. It was important to allow time for such practice to emerge.

57. Expressing gratitude to the Special Rapporteur for his work, he said that he was proud to have been a member of the Commission at a time when it completed its work on the topic.

58. Mr. HAFNER said that he, too, commended the Special Rapporteur and the Chairman of the Drafting Committee for their efforts. He supported the draft articles, but was concerned about a possible interpretation of article 59, the wording of which must in no way be construed as excluding the applicability of the draft articles from activities carried out by States on the basis of an act of a United Nations body, such as a resolution of the Security Council or the General Assembly. Insofar as there were no obligations under the Charter of the United Nations requiring of a State conduct which differed from that required by the draft articles, there was no reason why, in such a situation, the draft articles should not be applied. Hence, the draft articles must be interpreted as not going beyond the substance of Article 103 of the Charter.

59. Mr. LUKASHUK said that he wholeheartedly endorsed Part Four of the draft articles and the draft as a whole and joined other members in commending the Special Rapporteur for his efforts.

60. He had two comments of a purely juridical nature. First, he had doubts about the phrase "to the extent that they are not regulated by these articles" in article 56 *bis*, which suggested that the draft articles, whose initial form would be that of a General Assembly resolution, would change or replace the generally accepted norms of customary law on responsibility. That was not quite right from a legal point of view. Perhaps a juridically more accurate and flexible phrase could be found, such as "the applicable rules of international law which are not reflected in this article . . . ".

61. Secondly, a problem had arisen with regard to article 59. He raised the question of how a General Assembly resolution could possibly cause any prejudice to the Charter of the United Nations. Some other kind of wording needed to be found, something to the effect that "these articles shall be applied in accordance with the purposes and principles of the Charter".

62. Mr. KAMTO said that he endorsed Mr. Pellet's remarks. It might, indeed, be useful to envisage a saving clause regarding the case of State succession. He was not certain that article 56 *bis* covered that situation, but if it did, then his comment was superfluous. He strongly supported the wording of article 59. The Commission must not convey the impression that the law of State responsibility was in any way subject to Charter law. They were two different matters.

63. Despite his reservations about article 53, the draft was a major piece of work by the Commission and he was particularly pleased to have made his own modest contribution to its completion. When adopting the draft articles, he asked whether the Commission might adopt a motion of congratulations for the Special Rapporteur and the secretariat.

64. The CHAIRMAN said that the Commission would have the opportunity to pay formal tribute to Mr. Crawford, as well as to Mr. Sreenivasa Rao and the previous special rapporteurs, when, all being well, the Commission completed their topics at the time of the adoption of the report.

65. Mr. TOMKA (Chairman of the Drafting Committee), replying to a question by Mr. Pellet, said that members who had corrections to make to any of the other language versions should submit a note to that effect in writing to the secretariat.

66. Mr. KATEKA said that, before the draft articles were adopted, he wished to express his strong reservations about Part Two, chapter III and about Part Three, chapter II. He would not stand in the way of the Commission by calling for a vote, but wanted to have it placed on record that he did not support the draft articles in their current form.

67. The CHAIRMAN said he took it that the Commission wished to adopt the titles and texts of the draft articles on responsibility of States for internationally wrongful acts proposed by the Drafting Committee, subject to statements made by Mr. Kateka and others.

It was so agreed.

68. Mr. CRAWFORD (Special Rapporteur) thanked the past and current chairmen of the Drafting Committee, the secretariat and the members of the Commission and paid tribute to the previous Special Rapporteurs, Mr. Ago, Mr. Riphagen and Mr. Arangio-Ruiz.

69. There should be no misunderstanding about the difficulty of the task, because the draft articles on State responsibility covered the whole field of international obligations, both bilateral and multilateral, and the whole area, in general terms, of the qualification of conduct as unlawful by reference to the primary obligations of States and the consequences that flowed therefrom. Time would show the relatively comprehensive nature of the task undertaken, as well as the way in which the door had been left open to further development. He accepted the vision of those members who would like to see the draft articles associated with a system of dispute settlement, more especially in the context of countermeasures, as well as those who would like to see it as a convention. He hoped that the international community of States would some day be able to adopt a convention along those lines by general agreement and to attach to it a system of dispute settlement. That would be a real revolution. It would, however, be a pity if a codification conference were held and it tore the text apart.

The meeting rose at 11.40 a.m.

2684th MEETING

Friday, 1 June 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Lukashuk, Mr. Momtaz, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRMAN welcomed the successful outcome of the work of the Commission during the first part of the session: the Drafting Committee had completed its work on the draft articles on the prevention of transboundary harm from hazardous activities and on the responsibility of States for internationally wrongful acts. The Commission had adopted the draft articles on those topics on second reading. Progress had also been made on the topic of reservations to treaties. The Commission would later consider new reports on reservations to treaties, diplomatic protection and unilateral acts of States.

* Resumed from the 2680th meeting.