Document:-

A/CN.4/SR.2615

Summary record of the 2615th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2000, vol. I

assurances and guarantees to a greater degree than in other cases. What was important, for example, in the case of the illegal occupation of a territory, would be a declaration by a court that such an occupation was illegal. Assurances and guarantees of non-repetition were also needed in cases in which the legislation of a State and its application led to grave violations which, although not continuing, were recurrent. In such a case, it made perfect sense for an international court to declare that certain assurances and guarantees of non-repetition were to be given, without necessarily going so far as to call for the repeal of the legislation at issue.

60. Mr. CRAWFORD (Special Rapporteur) said that he did not really have in mind any example of a court decision concerning the granting of assurances and guarantees of non-repetition. In State practice, however, such assurances and guarantees were frequently given, for example, by the sending State to the receiving State concerning the security of diplomatic premises.

61. Mr. TOMKA pointed out that guarantees of non-repetition did not exist only in judicial practice. Some authors had considered that certain measures contained in peace treaties signed after the Second World War contained guarantees of non-repetition.

62. Mr. KAMTO said that, although guarantees of non-repetition could be regarded as part of the progressive development of international law, they were nonetheless useful. It must be asked, however, who gave the guarantees: was it the court before which the case had been brought or the State which had been guilty of the internationally wrongful act? On the basis of the discussion, he had the impression that it was the court which had to give such guarantees, but, in fact, it was the State that had to do so. The question then arose whether the State must give the guarantees before the court, during the proceedings, or outside the proceedings. Both alternatives were conceivable. Returning to the example of the violation of international law through use of force, to which he had referred earlier, he said that it was in such an instance that guarantees of non-repetition were most necessary. They could be given in the form of a declaration before the court, and might or might not be included in the court's ruling, or in the form of a diplomatic declaration, which would not necessarily be made during the proceedings. In either case, guarantees of non-repetition were only an undertaking in addition to the one initially violated by the State concerned. When a State was asked to put a stop to its wrongful conduct, it was actually being asked to comply with its international undertaking or, in other words, to give a guarantee of non-repetition. The legal effect of guarantees of non-repetition was thus basically only psychological. Except in a few cases, materially speaking, there was no definite guarantee that the State would not violate its commitment in the future. He gave as an example the case of State A, that had on its territory a military training camp situated near its border with State B. If nationals of State A or foreigners in training in that camp crossed the border from time to time to commit crimes or take military action in the territory of State B, the international responsibility of State A could be invoked. By taking measures to stop such acts, State A put an end to an internationally wrongful act attributable to it. However, it could also have given guarantees of non-repetition consisting, for instance, of a commitment to dismantle the military training camp or move it away from the border in question. A provision on guarantees of non-repetition certainly had a place in the draft articles under consideration.

63. Mr. GAJA (Chairman of the Drafting Committee) announced that the Drafting Committee on the topic of "State responsibility" was composed of the following members: Mr. Crawford (Special Rapporteur), Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Pellet, Mr. Rosenstock and Mr. Rodríguez Cedeño as ex officio member.

The meeting rose at 1.05 p.m.

2615th MEETING

Thursday, 4 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Idris, Mr. Illueca, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HAFNER said that he would concentrate on the most salient issues addressed in the third report (A/CN.4/507 and Add.1–4) before turning to draft articles 36 to 38. He reserved his position on articles 40 and 40 bis.

2. He supported most of the views expressed by the Special Rapporteur in the report. For example, paragraph 6 clearly demonstrated the linkage between the form of the draft articles and the peaceful settlement of

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

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

disputes, and paragraph 7 dealt with the reflexive nature of the provisions and the question of secondary norms. Personally, he did not understand what problems that qualification posed, since it was clear that the function of a norm in a given context determined whether it was of a primary or secondary nature. Similarly, the question could be raised whether the 1969 Vienna Convention applied to that Convention itself. The difficulty in answering that query resulted from its provision on non-retroactivity, a clause which did not in any case apply in the current context, otherwise there would be no problem to apply the Convention to itself. Hence it had to be assumed that State responsibility amounted to a sum of obligations resulting from a breach of international law. If one of those obligations was not honoured, State responsibility arose on grounds of non-compliance with that rule of State responsibility. In such a case, the rules of State responsibility applied to rules of State responsibility themselves. The rule violated acted as a substantive or primary norm and the rules applicable to that breach were secondary norms or meta-norms. For example, if a State committed a delict of an instantaneous nature and did not fulfil the duties ensuing therefrom under the regime of State responsibility, a new delict of a continuous nature would take place. He saw no need to spell out that idea in the articles; a comment would suffice.

3. As paragraph 9 rightly indicated, the first draft totally ignored the particularities when a plurality of the States was involved. Nevertheless, the Commission had to deal with that matter, since the increasing integration of the community of States meant that a wider range of States would be affected by a single breach of international law. In the case of a multiplicity of injured States, it was necessary to identify the States which were entitled to react, the type of reaction that would be appropriate and the relationship between those States. In the case of a multiplicity of author States, it was necessary to determine which States were under an obligation, to what extent (joint or joint and several liability) and what the relationship was between them, for instance, the case could occur that one of them was entitled to compensation from another.

4. He endorsed the new structure of the draft proposed by the Special Rapporteur in paragraph 10. The only debatable point was whether chapter III of Part Two did not belong in Part Two bis. Perhaps the rules on a plurality of States could be divided. Chapter II dealt with the obligations of the author State, so the question of plurality should be addressed there. Chapter II bis was concerned with the rights of injured States, so the rules on a plurality of those States should be included in that chapter. Another possibility would be to list all the rules on plurality in a separate chapter.

5. There had been some discussion of the issues which should be included in or omitted from the draft articles in view of the brevity of the remaining time. The Commission should not attempt the impossible, but should endeavour to complete the exercise at the fifty-third session, since States stood in urgent day-to-day need of the articles and were already applying some of the existing draft articles from Part One. Furthermore, there had been a shift in paradigms in international relations and law, accompanied by the emergence of different kinds of responsibilities, such as the responsibility of and to international organizations, individual responsibility and responsibility for violations of human rights, all of which had specific features which could not be dealt with comprehensively in the foreseeable future. He therefore favoured restricting the subject matter to State responsibility as between States and, for that practical reason, did not subscribe to Mr. Pellet's proposal (2613th meeting) to refer to subjects of international law. Nor was he in favour of regarding damage as a constituent element of State responsibility, although it was undoubtedly a criterion which had to be taken into account when deciding the amount of reparation. Another question which had to be excluded was the validity of acts giving rise to State responsibility. A checklist ought to be made of issues that could be covered.

6. A middle way had to be found between the approaches of Mr. Brownlie and Mr. Pellet to detailed rules on reparation. It had to be remembered that the more detailed the rules were, the less likely it was that reparations would fully comply with them, something that would in turn engender further cases of State responsibility. As the Commission's aim was not to create the conditions for more breaches of international law but to settle the issue, some flexibility was required in the rules on reparation. Nevertheless, the ultimate goal as spelled out in the *Chorzów Factory* case had to be borne in mind. Of course, cases of State responsibility would usually be dealt with through negotiations, rather than by an international court. While it was therefore necessary to provide an injured State with some guidelines on the reparations it could expect, detailed provisions would not be conducive to the settlement of such questions. The real issue of such negotiations was not normally the amount of State reparations, but whether a wrongful act had occurred. If a State was accused of having committed a wrongful act and was confronted with that situation, it would be easier for that State to admit that it had acted wrongfully when there was a margin of discretion in assessing reparations.

7. The new formulation of article 36 posed no major problems. Former article 42, paragraph 3, could not be applied to reparation in full, but it might apply to compensation. Similarly, in the light of those considerations, the existence of article 4 would appear to render article 42, paragraph 4, redundant. He endorsed the separation of article 36 and article 36 bis and the latter's structure. The duty of cessation was not a separate duty following a breach of international law. If the courts declared a duty of cessation, then the main gist of such a finding was not that there was a duty to refrain from wrongful activities, but rather an acknowledgement that the activity was wrongful and, only as a consequence, that the rules of international law had to be observed. He would, however, agree to including that duty in the field of State responsibility, if the formulation used in the draft article was employed and provided it was made clear that the duty did not relate solely to continuing wrongful acts.

8. The duty to provide assurances and guarantees of non-repetition should not be included in the same provision as the duty of cessation. He shared Mr. Kamto's view (2614th meeting) that there was a major difference between those duties, despite the fact that the Special Rapporteur had referred to the forward-looking nature of both obligations. The new additional duties of author

States imposed by assurances and guarantees were triggered by the breach, whereas the duty to stop wrongful activities was not a new one prompted by the breach. At the same time, he concurred with the Special Rapporteur that, as the duty to offer appropriate assurances did not belong to the field of reparations, it should be covered separately, perhaps in an article following article 37 bis.

9. Although doubts had been expressed about the need for such an article, practice justified it and indeed the Special Rapporteur had referred to cases of diplomatic immunity where frequent demands had been made for such assurances. An article of that kind was particularly necessary when national law obliged State organs to violate international law. Since the delict would have been accomplished only in application of national law, that law itself did not amount to a delict. A declaration that the State had breached international law would not affect the national statute. A device was therefore needed to oblige the State to bring the domestic statute into conformity with international law. The best illustration of such a situation was article 36 of the Vienna Convention on Consular Relations. The visiting rights provided for in that article were frequently denied, with the result that assurances and guarantees had to be requested. On the other hand, the categorical character of the new text should not be maintained. He supported the formulation "if circumstances so require" proposed by the Czech Republic and then by Mr. Simma (2614th meeting), which would certainly answer the point made by Mr. Gaja.

10. The position of article 37 had still to be debated. He subscribed to the idea reflected in article 37 bis that reparation should be deemed a duty or obligation of the wrongdoer instead of a right of the injured State. That approach would leave open the question of the legal position of the injured State and of third States with regard to the wrongful act. The question of causality and remote causes was an extremely thorny issue. National criminal and civil law took different views on the matter. Sooner or later the Commission would have to make a general study of *causa proxima*, *causa remota*, *causa causans*, *causa sine qua non*, as well as concurrent, intervening and superseding cause. As there were few precedents in international law, each case had to be judged on its merits. In that respect, he shared the view expressed in the commentary to article 44,[3] which was mentioned in paragraph 32 of the report. As to Mr. Kamto's proposal (ibid.) to replace "eliminate", in article 37 bis, paragraph 2, by a different expression, it was a question of eliminating the consequences of the wrongful act and not the act itself, which clearly could not be undone, and the new formula would no longer convey the original meaning.

11. Article 38 was placed in square brackets, but it was needed, since the draft might not cover all the legal consequences of wrongful acts. If it was argued that it did, what would be the position with regard to individual responsibility, opposability of illegal acts and succession in responsibility? Would it not be wise to make an explicit reference to article 73 of the 1969 Vienna Convention, since the commentary did not mention it? In his opinion, a reference to that article ought to be incorporated in the commentary.

12. Mr. ECONOMIDES said that he would largely focus on articles 36, 36 bis, 37 bis and 38, but would begin with some general observations. He fully supported the view expressed by the Special Rapporteur in paragraph 3 of the report and thought that it should be possible to present the complete text of the draft to the Sixth Committee of the General Assembly at its fifty-fifth session, provided the Commission worked hard.

13. With reference to paragraph 6 of the report, the only form the text could take was that of an international convention, which would clearly call for a general, comprehensive system for the settlement of any disputes that might arise from the interpretation or application of the draft as a whole. If, however, the introduction of such a system were to prove difficult, it would be necessary to revert to the idea of setting up a dispute settlement procedure at least for disputes entailed by countermeasures.

14. He commended the Special Rapporteur's efforts to find a compromise solution to article 19. The definition in article 19, paragraph 2, had to be taken up by the Special Rapporteur, since it was vital to such a compromise. The definition, which brought to the forefront the concept of an international community, constituted substantial progress towards the development of international law and an international community.

15. As the Special Rapporteur pointed out in paragraph 17, the draft covered all international obligations of the State and not only those owed to other States. Hence it might serve as a legal basis when other subjects of international law, such as international organizations, initiated action against States and raised issues of international responsibility. That question deserved careful examination. Personally, he had nothing against extending State responsibility to encompass international organizations.

16. As far as paragraph 7 (*a*) and paragraph 42 of the report were concerned, if the intention was that the circumstances precluding wrongfulness, set out in Part One, should also apply to obligations stemming from Part Two, that fact had to be stated explicitly in the draft. A reference thereto in the commentary was inadequate and on that point he fully agreed with Mr. Pellet (2613th meeting). For his own part, he did not think the question should be regulated; it should be left to customary international law. On the other hand, article 42, paragraph 3, which stipulated that in no case should the population be deprived of its means of subsistence, should be maintained. As article 4 did not seem to cover the cases referred to in article 42, paragraph 4, it might be wise to keep the latter, whereby internal law could not be invoked as justification for failure to provide full reparation, a provision which followed the example of article 27 of the 1969 Vienna Convention. Alternatively, the scope of article 4 might be broadened in order expressly to deal with such cases.

17. In his opinion, the title of Part Two should be worded "Legal consequences of international responsibility". Logically speaking, the internationally wrongful act came first and gave rise to the State's international

[3] See paragraph (13) of the commentary to former article 8 (*Yearbook . . . 1993*, vol. II (Part Two), p .70).

responsibility. Once the latter had come into being, it entailed a number of consequences, which were in fact set out in Part Two. As article 36 clearly stated, the consequences in question were therefore those of international responsibility and not those of the wrongful act.

18. As to article 36, he was not entirely satisfied with the title, which should be reviewed by the Drafting Committee. The assurances and guarantees of non-repetition mentioned in article 36 bis should be demanded when the worst breaches occurred, especially those covered by article 19. Owing to the reasons he had stated earlier for amending the title of Part Two, article 37 bis, paragraph 1, should read "An internationally responsible State is under an obligation to make full reparation for the consequences of the internationally wrongful act that it has committed". As it stood, the wording of the article completely ignored international responsibility, although it was the essential element.

19. He agreed with Mr. Kamto's proposal (2614th meeting) regarding the title of article 38 and also that the article should be placed in Part Four. Lastly, it would be advisable to amalgamate the contents of articles 37 (*lex specialis*) and 38 in one provision.

20. Mr. LUKASHUK said that the Commission had to rise to the challenges of the new millennium, and none was more important than that of completing the draft articles on State responsibility. The Sixth Committee had underscored the need to do so in the current quinquennium, and the Special Rapporteur had demonstrated his determination to fulfil that obligation. He supported the proposals set out in the very detailed report and found the fact that the footnotes contained full publishing information, not just the authors and titles of works, to be especially welcome.

21. In formulating the draft, the Commission must take account, not only of legal obligations, but also of other types of international obligations and of the corresponding responsibility. There were numerous uses in the literature of the phrase "non-binding agreements". That did not mean the same thing as agreements that were binding but not in the legal sense; it often referred to obligations under the instruments, of OSCE, which were clearly defined as being political in nature. That was why he had found article 16,[4] which spoke of an international obligation "regardless of its origin or the character", so unsatisfactory. Each individual article should clearly refer to international responsibility in the legal sense.

22. The Special Rapporteur had rightly devoted a great deal of attention to the structure of the draft articles and his proposal could be adopted, subject to minor revision when all the draft articles were in final form. The articles were not supposed to codify the entire law of international responsibility, which was still too young to warrant such treatment. The objective was rather to lay down a foundation for a new branch of law—the law of international responsibility. The Special Rapporteur's emphasis on the formulation of general provisions was therefore of particular importance: the details and nuances would be worked out in future as practice in the field evolved.

23. The report raised a significant point: that reparation must not result in depriving the population of a State of its own means of subsistence. That could be of critical importance for developing countries, since the adoption of countermeasures could have heavy consequences for their unstable economies. A provision on the subject must be retained, in his view. Assurances and guarantees of non-repetition were an integral part of responsibility. When a child was punished for bad behaviour, it exclaimed, "I won't do it any more!", thereby acknowledging that it had acted wrongfully and promising to behave properly in future. The same reaction occurred in inter-State relations.

24. As Mr. Economides had already pointed out, the draft articles equated similar but differing concepts the legal consequences of internationally wrongful acts and international responsibility, thus obscuring their real relationship of cause and effect. The title proposed by the Special Rapporteur for Part Two referred to the legal consequences of internationally wrongful acts, but those consequences constituted responsibility, although the word was not used. Similarly, article 37 bis stated that a State which had committed an internationally wrongful act was under an obligation, but said nothing about responsibility. On the other hand, the proposed new version of article 36, in paragraph 119, was correctly worded in that it referred to international responsibility which entailed legal consequences.

25. Many members of the Commission supported the retention of article 38, but he agreed with the Special Rapporteur that there were no grounds for doing so. Such a provision would typically be included in a convention: witness the Vienna Conventions. But there was significant doubt as to whether the draft articles would ultimately be transformed into a convention. In the new field of international law covered by the draft, a very general provision like the one in article 38 could generate a great many questions and doubts.

26. Mr. PELLET said that Mr. Economides and Mr. Lukashuk had raised an extremely important issue: it was not logical to speak in Part Two of the consequences of an internationally wrongful act, because responsibility was engaged by the internationally wrongful act, and it was from the responsibility that the consequences stemmed. That approach, it must be said, went a step further from the stance taken by Special Rapporteur Ago, who had considered that responsibility was the entire set of consequences of an internationally wrongful act. If the new approach was adopted, as he believed it should be, article 37 bis should be reformulated along the lines of "A State responsible for an internationally wrongful act is under an obligation to make full reparation for the consequences flowing from that act". The Drafting Committee could deal with that matter.

27. He remained unconvinced, however, by the proposal advanced by Mr. Economides regarding the title of Part Two. If it was to be "Legal consequences of State responsibility", the problem he had raised (2613th meeting) of the relationship between Part Two and Part

[4] For the draft articles adopted by the Drafting Committee at the fifty-first session of the Commission, see *Yearbook ... 1999*, vol. I, 2605th meeting, p. 275, para. 4.

Two bis remained unresolved, since Part Two bis also dealt with the consequences of State responsibility, including probably the possibility of recourse to countermeasures.

28. Mr. HAFNER, referring to Mr. Lukashuk's contention that article 38 would have no place in a non-binding agreement because it was typical of conventions, pointed out that the 1969 Vienna Convention, among others, contained an equivalent, not in the substantive part but in the preamble, which was not binding.

29. Mr. LUKASHUK said the fact that a provision was in the preamble did not deprive it of significance. According to article 31 of the 1969 Vienna Convention, the context of the terms of a treaty comprised the text itself including its preamble and annexes. More important than whether article 38 would typically be placed in a convention or in some other instrument was the fact that such an unspecific formulation could raise numerous extraneous questions and complications, and that was why he thought it should not be retained.

30. Mr. ECONOMIDES thanked Mr. Pellet for his constructive comments and said that his own proposal regarding the title of Part Two was merely a preliminary formulation, since the title would be reviewed once all the provisions in that Part had been finalized. He endorsed the comments just made by Mr. Lukashuk: the preamble was an essential element of any treaty and in some specific cases incorporated extremely serious commitments. As a reflection of the will of the parties, the preamble created legal obligations that were just as binding as those in other parts of the treaty.

31. Mr. HE expressed appreciation to the Special Rapporteur for an excellent report which provided a good basis for moving forward as planned at the start of the current quinquennium. He could basically go along with the proposed structure of the draft articles from Part Two onwards and welcomed the fact that the draft articles in Chapter I of Part Two had been reformulated in terms, not of the rights of the State, as in the version adopted on first reading, but of the State's obligations. That would make it possible to solve some difficult issues.

32. Part One was concerned with internationally wrongful acts, in other words the focus was on the State responsible for the conduct in question. Part Two was concerned with the rights of the injured State, but the link between obligation and right was abrupt. The notion of obligations *erga omnes* which had been implied in article 40, paragraph 3, as adopted on first reading and now appearing in article 40 bis, did not easily translate into the language of rights. With the reformulation of the articles in Part Two in terms of obligations, the injured State could now be classified according to whether the obligation breached was owed to the State individually or to the international community as a whole (in other words, *erga omnes*), and the concept of obligations *erga omnes* could be introduced in the new article 40 bis.

33. The obligation of reparation, the main legal consequence of a State's internationally wrongful act, did not extend to indirect or remote results flowing from a breach, as distinct from those flowing directly or immediately. The customary requirement of a sufficient causal link between conduct and harm should apply to compensation as well as to the principle of reparation. The proposed general article on reparation should be formulated in terms of the obligations of the State which had committed the internationally wrongful act, and the commentary should bring out that relevant point.

34. Cessation and assurances or guarantees of non-repetition were two different concepts. Even if a breach of an obligation had ceased, assurances or guarantees were still needed, as they related to future performance of the obligation. While cessation of continuation of the wrongful act was the negative aspect of future performance, assurances or guarantees of non-repetition could be described as the positive aspect and had a distinct and autonomous function. Unlike the cessation of a breach of an obligation, they were future-oriented and played a preventive rather than remedial role, presupposing the risk of repetition of the wrongful act. Some States, accordingly favoured a strengthened regime of assurances and guarantees of non-repetition. That was why the title of the proposed new article 36 bis seemed inadequate: instead of "Cessation", it should read "Cessation and non-repetition".

35. As to article 38, on other consequences of an internationally wrongful act, although it seemed difficult to specify the precise customary rules in the field, it was possible that the principle of law might generate new consequences in specific instances. It would thus be better to leave room for manoeuvre. The scope should not be limited to the rules of customary international law: rules from other sources might also be relevant. He agreed with other members that article 38 should be retained, subject to the necessary amendments.

36. Mr. GALICKI said he admired the Special Rapporteur's efforts to simplify the material inherited from the Commission's predecessors. He fully supported that approach and endorsed the concept and form of the proposed reformulation of articles 36 to 38 in paragraph 119 of the report.

37. Specifically, he supported the cumulation in article 36 bis of all the existing provisions on cessation. Certainly drafting problems might arise, particularly regarding the offer of appropriate assurances and guarantees of non-repetition, but some such wording must be included. It was not enough to say that a State that had committed an internationally wrongful act was entirely responsible for ceasing that act. A more aggressive attitude should be taken, and proper assurances and guarantees of non-repetition should be sought. There appeared from the report to be a reasonable basis in State practice for including such a formulation in article 36 bis.

38. He approved of article 37 bis in general but would point to some specific problems. Paragraph 2 catalogued ways of exercising full reparation which had not been invented by the Special Rapporteur but rather had been taken from the formula applied before the Second World War by PCIJ in the *Chorzów Factory* case (Jurisdiction). The Court had referred to restitution in kind or, if that was not possible, payment, thereby giving priority to restitution. But the draft placed restitution in kind on exactly the same level as compensation and satisfaction. In his view, and as the Court had indicated, restitution was the best

means of reparation, in that it restored insofar as possible the situation that had existed before the breach of international rules.

39. As the United Kingdom Government had pointed out,[5] the draft deprived the affected State of the opportunity to choose among means of reparation, to insist upon a particular level or kind. If no hierarchy among means of reparation was designated, the choice of such means was left to the State that had committed the internationally wrongful act, to the detriment of the injured State. The Commission should reflect on whether that approach was warranted.

40. The Special Rapporteur had expressed doubts about retaining article 38, but he himself thought it should find a place in the draft for the reasons already advanced by a number of other members.

41. The CHAIRMAN, speaking as a member of the Commission, said that he fully supported the Special Rapporteur's proposed new structure as set out in paragraph 10 of the report. Dividing the question of the obligation of a wrongdoing State and that of how an injured State could invoke the wrongdoing State's responsibility was most appropriate. The new title of Part Two was much better than the previous one. The only problem was that Part Two bis, "The implementation of State responsibility", might also fall in the broader category of legal consequences, but that matter could easily be taken up in the Drafting Committee.

42. He had only a few peripheral questions. Was it necessary to retain article 36 bis, paragraph 2 (*b*), on appropriate assurances and guarantees of non-repetition? Admittedly, in daily diplomatic practice Governments often provided such assurances. As the Special Rapporteur had said earlier, in a case of trespassing on diplomatic premises, the receiving State apologized, promised to provide strengthened police protection and assured the sending State that it would not be allowed to recur. But that kind of statement was given as a political or moral commitment; was it to be regarded as a legal consequence? He agreed with the Special Rapporteur's analysis in paragraph 58 of the report, where he noted that it was unlikely that a State which had tendered full reparation for a breach could be liable to countermeasures because of its failure to give appropriate assurances and guarantees against repetition satisfactory to the injured State. In that case, however, the provision had no legal significance and might as well be deleted.

43. Article 37 bis was now devoid of the provision of article 42, paragraph 3, which stipulated that reparation must not result in depriving the population of a State of its own means of subsistence. That provision had been unpopular, and many Governments, including that of Japan,[6] had objected to it, as it would be abused by States to avoid their legal obligations and erode the principle of full reparation, a principle to which he subscribed. At the same time, he agreed with the comment by Germany that paragraph 3 had its validity in international law.[7] The Special Rapporteur had referred to the case of war reparations demanded from Germany after the First World War. When they had negotiated peace with Japan in 1951, the Allied Powers had had the German case very much in mind. The peace treaty with Japan had recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused during the war, but also that Japan's resources had not been sufficient, if it was to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations. As a result, countries like Indonesia, the Philippines and a number of others in Asia which had been occupied by Japan had received reparation in the form of services, for example assistance in building factories or other construction projects, rather than monetary compensation. All the other Allied Powers had waived all reparation claims. It might be said that that was *lex specialis*, but the Special Rapporteur had cited relevant provisions from human rights treaties.

44. He also referred to a Japanese civil procedure rule on measures of constraint. Such items as clothing, bedding, furniture and kitchen utensils which were required for livelihood, food and fuel etc. must be exempted from attachment. Those rules had been adopted on the basis of a more than 100-year-old German model. That legal concept was needed in particular for third-world countries. The matter would be solved by resorting to circumstances precluding wrongfulness, as suggested in paragraph 41 of the report. In any event, he hoped that the commentary to article 37 bis would indicate that the Commission had given careful consideration to that notion.

45. He interpreted the words "flowing from that act" in article 37 bis, paragraph 1, as an attempt to introduce the causal link between an act and damage or harm without actually mentioning damage or harm. The word "flowing" was somewhat unclear, and he preferred the wording "reparation for all the consequences of that wrongful act".

46. Mr. SIMMA said he took issue with the Chairman's comment about appropriate assurances and guarantees of non-repetition. As it currently stood, the text might indeed be rather too broad and lenient, but there were cases in which there was a real danger of a pattern of repetition. Mr. Hafner had referred earlier to two instances in which provisions of multilateral conventions were violated by a number of countries. Some countries simply apologized each time and then went on to continue their violations in an almost routine fashion. That concern could be met by adopting the formulation proposed in the Sixth Committee by the Czech Republic: instead of saying "where appropriate", say "if circumstances so require", because there were undeniably circumstances which required the wrongdoer to do more than merely apologize.

47. Mr. HAFNER said that the State Treaty for the Re-establishment of an Independent and Democratic Austria contained a similar provision on protection of the means of survival. Assuming that the draft articles on State responsibility also applied to obligations ensuring firm State responsibility, he asked whether the case cited

[5] See *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3.

[6] See *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/492.

[7] See footnote 5 above.

by the Chairman might not be covered by article 33, on state of necessity.

48. The CHAIRMAN, speaking as a member of the Commission, said that he could agree to the question being dealt with in that way. It was dangerous to have a provision like the one in question, because it might be abused. But somehow, it must be made known that the Commission had considered that point.

49. Mr. CRAWFORD (Special Rapporteur) said that the Chairman's statement on article 42, paragraph 3, was most notable. He did not think that the position was covered by either necessity or distress, because he himself had been addressing the use of those provisions as grounds merely for postponing the payment of compensation. They were not grounds for annulling obligations. What had happened in the Treaty of Peace with Japan and on a number of other occasions at the end of the Second World War was that the Allied Powers, for a variety of reasons, including the realization that terrible mistakes had been made at the end of the First World War, had decided not to insist on reparations at all. In a sense, it had been an act of generosity, which had since been repaid a thousandfold. But it was also an indication that there was no point in insisting on reparation if it simply beggared the State which had to pay it. Such extreme situations posed a problem that was not addressed by circumstances precluding wrongfulness. The problem facing the Commission was that the wording in article 42, paragraph 3, which had been taken from human rights treaties, was there to express that concern in extreme cases. On the other hand, it had been criticized by a number of Governments from various parts of the world as being open to abuse. The Commission accepted, especially in the context of countermeasures but even in that of the quantum of reparation, that problems could arise and could not all be covered merely by a requirement of directness. The reparations Germany had in theory been required to pay at the end of the First World War had included such matters as pension benefits of the armed forces of the victorious Powers, although those armed forces had of course existed prior to the outbreak of the war, and under no theory of causality could Germany have been required to make those payments as a matter of international law. The position after the Second World War had been different in some respects, as had been the approach adopted. The Drafting Committee would need to consider whether there was some way of reflecting that concern.

50. Mr. GALICKI said that that was precisely the problem with article 42, paragraph 3. The Special Rapporteur himself had acknowledged the need to reflect the growing impact of the humanitarian aspect in international law. In his view, article 33 was insufficient. It dealt with a different problem, that of precluding the wrongfulness of the act, whereas article 42, paragraph 3, was addressing not wrongfulness, but the humanitarian side of things. That was completely different from article 33, and he therefore wanted to bring the problem to the Drafting Committee's attention so that it could be mentioned at some point as a separate difficulty.

51. Mr. GOCO said that he saw two different obligations: the obligation to cease a wrongful act, and the subsequent obligation to offer appropriate assurances and guarantees of non-repetition. Cessation might not be enough for the purpose of article 36 bis. Hence the need for the wrongdoing State to offer such assurances and guarantees, because that had to respond to the cessation aspect.

52. To his mind, implicit in article 37 was the fact that reparation was in full. The word "full" was superfluous and could be deleted.

53. Mr. Sreenivasa RAO, referring to the current wording of article 36, paragraph 1, noted that the Special Rapporteur explained that it covered all international obligations, including human rights violations. In that sense, it included the case of entities, individuals and international organizations, even when the primary beneficiary of the obligation was not a State itself. The point was well taken, but at the same time, as Mr. Gaja had observed, the matter could be left to the primary obligation when it came to those other entities and, even when it fell under State responsibility, only inasmuch as the primary obligation so specified. That would also need to be contrasted with the manner in which human rights obligations were to be implemented through reporting requirements, domestic legal forums and many other avenues. That structure could not be displaced by a not so well appreciated system of State intervention, but there was probably scope for such action when violations were massive, continuing and of a nature that they might affect international peace and security.

54. The trend was well recognized, and within those parameters, the Commission could find some place for State responsibility also to play a role. To lump them all together and put them on the same level as State-to-State obligations, without appropriate qualifications attached, might convey a wrong impression, which he hoped would be avoided. The commentary to the articles could clarify those points.

55. His second remark had to do with the reference in article 37 bis, paragraph 1, to full reparation. Presumably the goal was not full reparation, but as much reparation as possible, for there seemed to be a number of instances in which full reparation would not apply. The Special Rapporteur had rightly noted that the population should not be deprived of the means of subsistence, that the responsible State's ability to pay must be taken into account, and that a State must not be beggared. States tended to be pragmatic in dealing with such matters. Like Mr. Goco, he wondered whether the word "full" was really needed, and he agreed with Mr. Brownlie that, ultimately, reparation would always have to be seen in relation to actual cases; intentional wrongs and other aspects would then be factored into the kind of reparation demanded. The basic point was that reparation must be as complete as possible in order to remedy the consequences of the wrongful act.

56. Reparation, it was said, was a right of the injured State, and the commentary to article 42 stated that it was by a decision of the injured State that the process of implementing that right in its different forms was set in motion.[8] He agreed. However, the statement that obligation of reparation arose automatically, without some

[8] See paragraph (4) of the commentary to former article 6 *bis* (*Yearbook ... 1993*, vol. II (Part Two), p. 59).

linkage to the question of who could set in motion the claim could give rise to difficulties. More particularly if the concept of differently injured States was brought into play, certain complications would be created if States had differing degrees of injury and the State most directly affected decided not to set in motion the process of reparation, whereas other States were in favour of doing so. That matter should be looked into further, and at any rate by the Drafting Committee.

57. As for the issue of remoteness of damage, the point was made in paragraph 29 of the report that there was an element, or complex of elements, over and above that of natural causality and that should be reflected in the proposed statement of the general principle of reparation. But it was also observed that remoteness of damage was not part of the law. The two situations had to be reconciled without doing violence to the economy of the draft.

58. With respect to the duty to mitigate as an exception to adequate reparation, a point well explained in the report, the question again arose whether full reparation was at all times the sole criterion. The requirement to make reparation could be continuously modified by the circumstances of the case and by the failure of the affected party to take appropriate and reasonable measures which it was expected and had the capacity to take, as was illustrated by the *Zafiro* case.

59. As for the problem of concurrent causes, he agreed that in a situation where, even though the wrongful act was substantially attributable to one party, more than one cause had interacted to produce a cumulative effect, the extent of the reparation would again be affected. Thus, his conclusion was that "full" reparation was never full, a point already made by the Chairman and others, who had pointed out that the means of subsistence of the injured State must be balanced against those of the responsible State.

60. That point emerged even more clearly in the context of the initial postulation of the quantum of the damages. Full reparation was possible only in the case of straightforward commercial contracts where damages were quantifiable. In the broader scheme of inter-State relations, where issues such as aggression and human rights violations arose, the concept was not appropriate. Rather than the approach advocated by the Special Rapporteur, whereby full reparation was assigned and a secondary set of mitigating criteria then introduced, he favoured factoring in a more humanitarian approach at the initial stage of allocating responsibility and the consequences thereof, having regard to such important considerations as the State's ability to pay.

61. He agreed with the Special Rapporteur that the issue of cessation of the breach and continued performance of an international obligation would have to be addressed, but doubted the wisdom of linking the two concepts. Paragraph 2 of the new version of article 36 proposed by France[9] appeared to be reflected in the new article 36 bis, paragraph 1, proposed by the Special Rapporteur in paragraph 119 of his report. But something in the French proposal was still lacking from the Special Rapporteur's formulation. The French proposal emphasized the linkage to primary obligations, whereas the Special Rapporteur's formulation placed more emphasis on continuation of the consequences of wrongfulness. The Special Rapporteur and the Drafting Committee needed to pay further attention to that issue.

62. As to assurances and guarantees of non-repetition, he endorsed the view expressed by the Special Rapporteur in paragraph 59 of his report that much must depend on the precise circumstances, including the nature of the obligation and of the breach. The question arose whether a specific proposition was needed in the set of draft articles, posited in the form of a legal, as opposed to a moral, obligation. The issue should certainly not be treated on the same level as consequences such as reparation. Mr. Brownlie and Mr. Pellet were of the opinion that little support existed in State practice for embodying the idea in a concrete legal formulation. Mr. Hafner and Mr. Simma, on the other hand, appeared to be of the view that the idea needed to be reflected in the draft articles. They were rightly concerned about a State that did not give assurances of non-repetition of wrongful conduct, which in some cases required an amendment to national legislation to implement international standards agreed upon or applicable to the State. That problem however could not be canvassed within the modest scope of the provision under review, and should be dealt with at a different level. At the current juncture, a moderate and flexible formulation along the lines suggested by the Special Rapporteur might be the most appropriate solution.

63. Lastly, he noted the Special Rapporteur's preference for omitting article 38. That was also his own preferred solution. He nonetheless respected the position of those members who held that the Commission must try to tackle the issue addressed in that article. He had an open mind as to the form such an approach would take, and would leave it to the Drafting Committee to produce an appropriate formulation.

64. Mr. ROSENSTOCK said that in the interests of an efficient use of time the problems raised should be considered in the Drafting Committee. He wished, however, to comment on the notion that mitigation, if not performed, logically led to a decrease in the reparations. In fact, mitigation led to a decrease in the damage for which the reparation was paid. A rigorous use of terms would help contribute to developing a framework in which disputes between Governments could be resolved over time.

65. Mr. HAFNER said that, in a situation where a law obliged State organs to act in a way contrary to international law, it was the application of that law, not the law itself, that was a breach of international law. Assurances and guarantees of non-repetition constituted a means of obliging a State to bring its laws into conformity with international law. What obligation would be imposed on a State to change its law if the concept of assurances and guarantees of non-repetition were to be omitted from the draft articles?

66. Mr. PELLET said that, while there were legal arguments on both sides, it seemed to him that Mr. Hafner was being overly hasty in claiming that adoption of a law did not engage State responsibility. For instance, a law organizing an act of genocide, if adopted but not

[9] See footnote 5 above.

implemented, would surely still constitute an internationally wrongful act.

67. As to the precise question posed by Mr. Hafner, he was still not convinced that the issue fell within the sphere of guarantees of non-repetition. Admittedly, a repeal of the law in question would constitute such a guarantee. He wondered, however, whether there was any need to make assurances and guarantees of non-repetition an autonomous concept. All the examples cited could be in fact linked either to satisfaction, to performance or to cessation. No one had come up with a concrete example of a different context in which a guarantee was actually owed by virtue of international law, as was stated in the Special Rapporteur's proposed draft article 36 bis, paragraph 2 (*b*).

68. Mr. Sreenivasa RAO said he shared Mr. Pellet's understanding of the concepts under consideration. Clearly, no State could invoke its internal law as an excuse for evading its international obligations. Once a State assumed an obligation, it must implement it effectively through its internal legislation. There was no disagreement between himself and Mr. Hafner on that score. Matters, however, were not so straightforward. The enactment of new legislation about evolving and not so well defined standards would be meaningless, particularly if the State lacked the capacity to implement it. The situation was more complex still where customary international law, and international standards not universally accepted, were involved.

69. Mr. HAFNER said that Mr. Pellet had been right to accuse him of rushing to conclusions. He had intentionally compressed his argument with a view to simplifying matters. Of course some primary norms obliged States to enact certain legislation. On the other hand, other primary norms obliged States to pursue a certain attitude. In such cases a delict was committed only if the internal law was applied and therefore the law itself was not up to that point a breach of an international obligation. He could accept that an article on satisfaction included the right to request assurances or guarantees of non-repetition, provided the fact was made explicit in the text, or at least in the commentary. He could not, however, accept that there was no obligation for a State to change its laws, for in that case internal law would rank higher than international law for that State.

70. Mr. ROSENSTOCK said the fact that it was hard to quantify reparations in a given case did not mean that the rules were invalid. The draft articles called for "full reparation" while recognizing that reparation would never be truly full in an imperfect world.

71. Mr. Sreenivasa RAO said that he and Mr. Rosenstock were in agreement, though looking at the issue from different standpoints. The glass was half full, but it was also half empty.

72. Mr. CRAWFORD (Special Rapporteur) pointed out that the words "full reparation" were to be found in draft article 42 as adopted on first reading, and had not been criticized by Governments.

The meeting rose at 1 p.m.

2616th MEETING

Friday, 5 May 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

later: Mr. Maurice KAMTO

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of articles 36, 36 bis, 37 bis and 38, contained in paragraph 119 of the third report of the Special Rapporteur (A/CN.4/507 and Add.1–4).

2. Mr. TOMKA said that the third report was a highly interesting and useful introduction to the second reading of Part Two of the draft articles.

3. In particular, he agreed with the new structure proposed by the Special Rapporteur, especially the new Part Two bis entitled "The implementation of State responsibility". That approach was faithful in every way to the original intention of the Commission and of the then Special Rapporteur, Roberto Ago, namely, to consider including, after a Part One devoted to the origin of international responsibility and a Part Two devoted to the content, forms and degrees of international responsibility, a Part Three on the settlement of disputes and the implementation of international responsibility.[3]

4. The Special Rapporteur was to be commended on his intention to move the provisions on countermeasures, which were currently located in Part Two, although they bore no relation to the content or forms of international responsibility. Countermeasures were an instrument designed to induce the State that had breached an international obligation to comply with its new obligation

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

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

[3] *Yearbook . . . 1975*, vol. II, pp. 55–59, document A/10010/Rev.1, paras. 38–51.