

Document:-  
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**Summary record of the 2650th meeting**

Topic:  
**State responsibility**

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87. Lastly, with reference to the order of the articles, he suggested that the provisions limiting the right to resort to countermeasures should appear together, separately from those dealing with questions of procedure. The two kinds were mixed up in the articles as they stood.

88. Mr. GOCO noted that, according to paragraph (4) of the commentary to article 48, the term “interim measures of protection” was inspired by procedures of international courts or tribunals that might have the power to issue interim orders or otherwise indicate steps that should be taken to preserve the respective rights of the parties in dispute. Under the version proposed by the Special Rapporteur, however, the injured State might provisionally implement such countermeasures unilaterally. Moreover, interim measures were not intended to be full-scale countermeasures, yet article 48, paragraph 2, appeared to cover countermeasures that went beyond interim measures of protection. The question thus arose as to whether there was a real distinction between such measures and provisionally implemented countermeasures. With regard to the former, there was, of course, an analogy with domestic law or even international tribunals: a petition for an injunction to stop a particular act was a recognized procedure. Moreover, within that procedure was the equally recognized ancillary remedy for injunctive relief for the respondent to desist from continuing the act. That injunctive relief was analogous to the interim measures of protection. Interim measures could be retained in a reformulation of article 48, paragraph 2, but some further refinement might be needed to clarify the point of including them.

89. Mr. BROWNLIE said he did not have a well formed set of opinions on countermeasures, which were a very intractable subject. He saw some value, however, even at such a late stage, in examining the nature of the task facing the Commission. It was worth considering what the existing position was in international law. The Commission was not a mere codifying body; it could make or propose new law. It was nonetheless useful to test the depth of the water it was trying to navigate. He discerned, from the report and from the debate, an easy assumption that non-forcible countermeasures were recognized in general international law. That proposition was both true and untrue. Non-forcible countermeasures were indeed recognized as one of the circumstances precluding wrongfulness, which was how article 30 had, unsurprisingly, come into being. There was, however, a qualitative difference between the two-dimensional, low-profile status of an institution that figured as one of a list of circumstances precluding wrongfulness—other examples being consent, compliance with peremptory norms and self-defence—and the construction of a three-dimensional institution, namely, countermeasures legitimized by provisions that might involve giving legitimacy to elements that had not previously been recognized as part of general international law.

90. Countermeasures had a multitude of purposes, not in the legal sense but in terms of the political behaviour of States. They were used as an inducement to another State to resort to a dispute settlement procedure; as a reprisal; as a deterrent; as an inducement to abandon a policy; as a form of self-defence (in which case interim measures would apply); or as self-help in order to achieve a settle-

ment. Despite the high calibre of his current work, the fact remained that neither the Special Rapporteur nor his predecessor had produced a clear decision as to which of those purposes was to be legitimated under the draft articles, although the implication of articles 47 and 48 was that it was self-help. In that context, the purpose appeared to be to bring about cessation and reparation, but doing so without any procedure of peaceful settlement.

91. He was not raising the question of linkage but simply analysing the apparent effect of those articles. After all, without any actual procedure of peaceful settlement intervening, the draft articles would legitimate what was, in the final analysis, self-help, even if it was non-forcible. The Special Rapporteur’s approach was empirical, as though the topic was a wild animal that had to be tamed. There was, however, a direct link between the choice of purposes to be legitimated and the technical questions of proportionality and “reversibility”: the latter issues could not be adequately tackled unless their context was clear. For that reason, he believed that even at the current stage in the examination of the topic, more thought should be given to the legitimate purposes of such a form of self-help. It was not simply a question of the long-standing debate about linkage. Rather, it was a question of whether pressure applied in order to achieve a peaceful settlement should be legitimated. Perhaps that was what the Commission aimed to achieve, but, if so, it should be clear about its aim; and that clarity seemed to him to be lacking.

*The meeting rose at 1 p.m.*

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## 2650th MEETING

*Wednesday, 2 August 2000, at 10 a.m.*

*Chairman:* Mr. Chusei YAMADA

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to introduce chapter IV of his third report (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that the part of chapter IV which dealt with the invocation of responsibility to a group of States or to the international community related to issues that the Commission had already considered on second reading in the context of his first report,<sup>3</sup> with its examination of article 19 of Part One and at the beginning of the current session in the context of the debate on the second part of article 40, contained in chapter I of his report. Chapter IV therefore completed the process of considering the issues in question, which were obviously extremely controversial. The Commission could not be said to be engaged in codification. The text adopted on first reading had introduced the controversial concept of “crime” as defined in article 19 and, by combining articles 40 and 47, had established a regime of countermeasures in respect of not directly injured States, which was wholly untenable, since it gave third States the right to take countermeasures in respect of any breach of, for example, individual human rights.

3. The problem was that, in completing its work, the Commission was not only engaged in a form of development—whether progressive or not remained to be seen—of the law of State responsibility, but was doing so against the background of a much wider form of development, clearly non-progressive, that had taken place on first reading. The question was what the next step should be. The Commission ought to be able, with the assistance of the Drafting Committee, to produce a complete text by the end of the current session, so that, by the next, it would have before it comments from the Sixth Committee and Governments in order to make final decisions. It should try to formulate the proposals appearing in chapter IV in a way that was broadly acceptable. He therefore invited members to confine their comments to the proposed articles and to avoid a replay of the animated debate on article 19 at the fiftieth session which had resulted in a decision, appearing in paragraph 369 of the third report, that had facilitated and would facilitate progress along the lines indicated in paragraph 371, with a “disaggregation” of the concept of “crime”. He emphasized that, in adopting the draft articles at the current session, the Commission would not be taking a final decision. There would be ample time to do so at the next session.

4. Although the notion of obligations to the international community as a whole had been recognized, there were some outstanding issues. First, it should be recognized that

the law of State responsibility was not the primary means of resolving the problem of breaches, referred to in article 19. The idea that, in cases of genocide or an invasion, for example, the rules of State responsibility were sufficient in themselves, without the accompaniment of any coordinated action by the international community, was a myth, as he indicated in paragraph 372. In fact, conduct defined as “crime” in article 19 related overwhelmingly to the conduct of Governments that were unaccountable to their people. The latter should therefore be protected from any sanctions that might be applied. In that connection, it was significant that, partly owing to the Commission’s initiative and partly for other reasons, the international community was starting—through the Rome Statute of the International Criminal Court, which, though it had not yet entered into force, had been adopted in 1998—to recognize the concept of individual responsibility in such crimes. States were, of course, responsible for their acts, but that responsibility had only an ancillary role, as chapter IV tried to show.

5. At the beginning of the current session, the Commission had approved, in principle, the right of every State to invoke responsibility for any kind of breach of obligations to the international community as a whole. It remained to be determined how far that right should go. Clearly, it should extend to cessation and, as a corollary, to the right to seek declaratory relief and restitution on behalf of the victims.

6. The question was therefore what limitations should be imposed on such rights, bearing in mind other considerations. He invited the Commission to consider three different categories of situation. First, in cases where the primary victim was a State that was the target of aggression or whose population was the victim of a war crime committed by another State, it was for the injured State to take the appropriate action; any response by other States should be secondary, with regard to both the invocation of responsibility and countermeasures. Secondly, in situations where there was no injured State—usually in the context of a population or part of a population falling victim to, for example, an act of so-called “autogenocide”—it was evident that no State could act on its behalf. The international community should be able to intervene in such cases, irrespective of the views of the responsible State, and to seek cessation, satisfaction and restitution. It should also be able to seek reparation, but that was not possible with the existing machinery. It was obvious that third States could not seek reparation on their own account. The third situation was one in which no one—or perhaps everyone—was the victim of the breach. That applied in certain environmental cases which could have long-term effects, but no specific impact, such as global warming or the thinning of the ozone layer. In such cases, member States of the international community should, by virtue of their membership, be able to seek cessation and satisfaction, although in many cases it would be difficult to seek restitution as such.

7. The question was whether the Commission could proceed beyond that position. If it intended to elaborate a regime of “crime”, properly so-called, that would involve, as a minimum, the notion of penalties. That question was dealt with in paragraphs 380 et seq., and in particular paragraph 382, in which he recounted the case of the

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

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

<sup>3</sup> *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/490 and Add.1–7.

*Commission of the European Communities v. Hellenic Republic* in which, for the first time in its history, the European Court of Justice—which, if not worldwide, had a Europe-wide jurisdiction—had imposed a fine on a member country for a continuing breach of European law. He analysed the procedure in paragraphs 383 to 385 in order to see what lessons could be drawn at the international level. When international law did not permit the establishment of collective procedures, it tried to establish individual ones. The same applied, at a certain level, to countermeasures. Two cases could be envisaged in that context. First, when the State victim itself had the right to take countermeasures as the result of a breach of an obligation to the international community as a whole, or indeed of any multilateral obligation, other States parties to the obligation should be able to assist that State, at its request, in taking countermeasures, within the limits that they could have taken countermeasures themselves. Such a procedure was directly analogous to that of collective self-defence. The other, more difficult, case concerned collective countermeasures taken in response to breaches when there was no State victim. Practice was limited in that regard, but it existed nonetheless. It was reviewed in paragraphs 391 et seq. and the conclusions drawn from that review were contained in paragraph 396, to which he referred the Commission. Practice was obviously embryonic, controversial and extremely difficult to qualify as universal. Moreover, until recently, it had not been supported by any *opinio juris*. A case could be made, in those circumstances, that the Commission should merely adopt a saving clause and leave any development of the law in that area to the future. That had been his own tentative view at the fiftieth session. He had come to believe, however, that the Commission had no need to be prudent, unless the Sixth Committee so required. The least that could be done was to submit the proposal, contained in paragraphs 401 et seq., that the States parties to an obligation to the international community in its entirety should have the right to take collective countermeasures in response to gross and well-attested breaches.

8. After analysing, in paragraphs 407 et seq., the additional legal consequences flowing from the commission of a “crime” under Part Two, as adopted on first reading, he considered that they were not worthy of being regarded as responses to crimes, for the reasons set out in the report. It was, however, arguable that, in the case of an egregious breach of an obligation to the international community, when there was no injured State, the other States members of the international community should be able to seek aggravated damages from the responsible State on behalf of the actual victims. To that extent, the draft articles constituted a progressive development of international law. He had therefore proposed a new version of article 53, which appeared in paragraph 412, with an additional paragraph using less dramatic wording, without the word “crime”, which could lead to the further development of criminal law. The result was new article 51, entitled “Consequences of serious breaches of obligations to the international community as a whole”, which constituted the only article in the new chapter III, entitled “Serious breaches of obligations to the international community as a whole”.

9. He also referred the Commission to a footnote to paragraph 413, which contained all the basic concepts that could be incorporated in article 40 bis. Furthermore, he put

forward a proposal for two articles on countermeasures, article 50 A, entitled “Countermeasures on behalf of an injured State”, and article 50 B, entitled “Countermeasures in cases of serious breaches of obligations to the international community as a whole”.

10. He considered it most important that the text submitted by the Commission to the Sixth Committee should, as far as possible, be a consensus text. If the Commission appeared to be split down the middle concerning a concept as controversial as that of “crime”, it would condemn the entire text of the draft articles to obsolescence. That was why the action he proposed, over-ambitious though it might be, was, bearing in mind the decision taken by the Commission at its fiftieth session, the maximum tenable proposition. With regard to Part Four, relating to general provisions, the Commission had agreed that it should contain a *lex specialis* article, as article 37 adopted on first reading had been. He had proposed a reformulation of that article, since it was not enough that a text, such as a treaty, existed to deal with a particular point; the text should deal with that point in such a way that, on interpreting the relevant provision, it could be said that it was intended to exclude all other consequences.

11. The second saving clause, adopted at the fiftieth session, remained unchanged, in the form of article 50 A.

12. The third was article 39, which concerned the relationship between the draft articles and the Charter of the United Nations. The article had been vigorously criticized by, among others, his predecessor as Special Rapporteur. He agreed with those criticisms and had therefore proposed a much simpler version of the article, which would not look like a covert amendment of the Charter.

13. A saving clause was also needed on to the law of treaties to specify that the draft articles on State responsibility were not concerned with the existence or the content of a primary obligation, but dealt solely with the consequences of a breach. He had therefore tried to formulate article 50 B in general terms so that it would apply both to customary international law and to the law of treaties.

14. Those were the only saving clauses that were currently needed. For the reasons stated in paragraph 428, a saving clause was not necessary for diplomatic protection and the relationship between that topic and State responsibility could be stated in the commentary. Nor did the draft articles deal with the questions of invalidity and non-recognition. Non-retroactivity need not be mentioned and a definition clause was not necessary.

15. In conclusion, he recommended that the new draft articles should be added to the text on State responsibility, so that if, by some accident or miracle, the Drafting Committee could complete its consideration during the current session, they could be examined by the Sixth Committee at the next session of the General Assembly and by the Commission itself at its fifty-third session.

16. Mr. KATEKA said that the Special Rapporteur’s presentation had been extremely enlightening and, personally, he too hoped that the Commission would reach a consensus on the issues under consideration.

17. The term “collective countermeasures” was a misnomer. In fact, what was envisaged was action by a State, or group of States, in response to a violation of collective obligations. It would be less confusing if some other terminology could be found. Although he was against countermeasures, he could well see that “collective” countermeasures might be used in a situation where equally powerful States were involved, for, while the embrace of someone of the same stature was not dangerous, a bear-hug from a giant could be suffocating. He could therefore contemplate the adoption of countermeasures in a regional context. For example, countries in the Great Lakes region of Africa had taken countermeasures against one State in the region which had been violating human rights in order to induce the wrongdoer to sit down at the negotiating table and settle governance problems. Much time had been needed, but a “peace agreement” was to be signed shortly. Another, more delicate example was that of the measures initiated by the European Union against Austria. He did not know whether they would produce the desired effect, but he would like to hear the Special Rapporteur’s opinion on the matter. He was not sure whether the Commission was in a position to draw up provisions catering for regional circumstances.

18. When reviewing State practice, the Special Rapporteur had cited several examples of collective countermeasures, the first of which concerned a State engaged in genocide. That illustrated the dilemma of countermeasures, which were a politically sensitive issue, especially in view of the fact that they were not applied uniformly. The situation in the former Yugoslavia and the massacres which had occurred in Rwanda in 1994 were sad cases in point. In his analysis, the Special Rapporteur had concluded that it was necessary to limit the circle of States entitled to take collective countermeasures. In his own opinion, that right had to be restricted to a group of States linked to a particular region.

19. In article 51, relating to the consequences of serious breaches of obligations to the international community as a whole, the Special Rapporteur had tried to solve the conundrum posed by the related articles 19 and 53 adopted on first reading. In paragraph 374 of his report, he suggested that consideration should be given to those few norms which were generally accepted as universal in scope and non-derogable. He cited the dictum of ICJ in the *Barcelona Traction* case, but added that it was unnecessary and indeed undesirable for the draft articles to quote examples of such norms. He personally disagreed with the Special Rapporteur on that point. Some of the examples he had given were already in article 19. They were merely illustrative and did not purport to be exhaustive. They should therefore be retained. The examples cited by the Special Rapporteur were the prohibition of the use of force in international relations, the prohibition of genocide and slavery, the right of self-determination and non-derogable human rights and humanitarian law obligations. He had wisely avoided controversial issues such as aggression or massive pollution. Nevertheless, examples of serious breaches on which there was general agreement should be included in the draft articles. The Special Rapporteur had likewise taken the welcome step of avoiding the use of the Latin terms *erga omnes* and *jus cogens*. Relegating examples to the commentary would, however, be unjust

to those who, like him, were diehard proponents of article 19.

20. In article 51, paragraph 2, the Special Rapporteur provided for “punitive damages”, but had put the term in square brackets. The same was true of subparagraph (c) in the provision contained in a footnote to paragraph 413, which he proposed to add to article 40 bis. It would seem that the square brackets were prompted by the view expressed by the Special Rapporteur in paragraph 380 of his report that punitive damages did not exist in international law, but, in his own opinion, the Commission should remove the brackets. Even if punitive damages were to be used for the benefit of the victims of the breach, that was a good starting point for recognizing the existence of crimes.

21. It was to be noted that, in article 51, the Special Rapporteur had echoed the language of article 53 adopted on first reading, in that he had replaced the word “crime” by the words “serious breach” or “breach”. He did not understand what the Special Rapporteur meant in paragraph 412 when he said that since the proposed chapter III was self-contained, and since article 19 adopted on first reading played no role whatever in Part One, if chapter III was adopted, article 19 itself could be deleted.

22. Article 50 A on countermeasures on behalf of an injured State called for the same reservations as the situation in which one State exercising self-defence issued an “invitation” to another for assistance. The same applied to intervention following an “invitation” in a humanitarian crisis. Great care was required in such circumstances and, when a State did not suffer direct harm, its involvement should be limited, as stated in paragraph 402 of the report. Article 50 A did not, however, really establish any restrictions and could give rise to misuse. The Drafting Committee should examine it in detail.

23. Article 50 B had the same drawback as article 50 A. Intervention in the form of countermeasures worried small States. There was no mechanism because the Commission had not elaborated one. In any case, even existing collective security institutions faced difficulties and it was doubtful whether countermeasures would fare any better. Of course, an attempt could be made to seek cessation through the exertion of pressure on the wrongdoing State by recourse to those provisions, but they might not be sufficiently explicit in that respect.

24. As for Part Four, on general provisions, he supported the redrafting by the Special Rapporteur of the articles in question, especially article 37, on the *lex specialis*, and article 39, on the relationship of the articles on responsibility with the Charter of the United Nations. Article A was a saving clause of the responsibility of international organizations, a topic which the Commission could study in the future if it accepted the report of the Working Group on the Long-Term Programme of Work.

25. Mr. HAFNER, referring to Mr. Kateka’s comment on what he had called the “measures by the European Union against Austria”, emphasized that those had not been measures by the European Union, but measures by 14 members of the European Union, and that they did not fall within the scope of the draft articles because Aus-

tria had not committed any breach and State responsibility was therefore not involved. They were not countermeasures or sanctions, but measures which must be judged on their own, under European Union law and under general international law.

26. Mr. CRAWFORD (Special Rapporteur) said that he agreed entirely with Mr. Hafner.

27. With regard to the penultimate sentence of paragraph 412 of the report, to which Mr. Kateka had referred, he indicated that it meant that, if there had to be an equivalent of article 19, it must be included in chapter III. Article 19 played absolutely no role in Part One of the draft and did not belong there. If the Commission decided to give examples of the breaches referred to in article 50, it must do so in chapter III and not in Part One.

28. Mr. SIMMA said that, at least, in principle, he was satisfied with the results the Special Rapporteur had arrived at in chapter IV of his report, namely, the proposed draft articles, but the presentation of the issue was singularly heterogeneous and too detailed for some secondary issues, such as the reference to the case of *Commission of the European Communities v. Hellenic Republic*, whereas others were hardly dealt with at all, such as those referred to in article 51. It was also strange that the provisions designed to respond to the criticism of article 40 were contained in a footnote, i.e. a footnote to paragraph 413. He hoped that the acceptance of the draft articles would not suffer thereby and that the commentaries the Special Rapporteur was to prepare would deal systematically and in depth with the issues that had been passed over in silence, especially in view of the abundant literature, which the Special Rapporteur did not, moreover, mention anywhere in his footnotes.

29. With regard to the historical compromise which the Commission had reached at the fiftieth session and which was reproduced in paragraph 369 of the report, it might be considered that a systematic development by the Special Rapporteur of obligations *erga omnes* and peremptory norms would be a satisfactory replacement for article 19. He regretted the absence of such a development, but the final result was acceptable, although only barely. Fortunately, the scope of the regime currently sketched out would be very limited because a number of special regimes in place made it a kind of “second-rate” regime. For example, Chapter VII of the Charter of the United Nations defined the regime applicable to aggression, as well as to gross breaches of human rights, which the Security Council currently regarded as threats to international peace. In that connection, there were also increasing numbers of treaty regimes, such as the Fourth ACP-EEC Convention (Lomé Convention), which made respect for human rights a condition for the performance of obligations by the European Union States. There was a self-contained international trade regime and there were special environmental regimes.

30. There was some uneasiness about allowing countermeasures by not directly injured States, but such uneasiness was only a reflection of uneasiness about countermeasures in general. On the one hand, the Commission was afraid of creating a monster, but, on the other, it could not allow gross and egregious breaches of interna-

tional law to go unsanctioned. The exercise might prove to be somewhat artificial, particularly in the case of “victimless” breaches. The Special Rapporteur had given global warming as an example of such breaches, but, in his own view, the idea that States could combat global warming by countermeasures was quite simply ludicrous.

31. It was, however, to be welcomed that collective countermeasures would be subject to the limitations that the Drafting Committee was in the process of putting together. Secondly, only serious, manifest and well-attested breaches would be subject to that type of countermeasure. Thirdly, the practice of States showed that not directly injured States were far from abusing countermeasures in the event of a breach of human rights and other obligations *erga omnes* and that they were in fact hardly concerned with such breaches, in respect of which selectivity was widespread. Great care must in any event be taken in assigning obligations to third States, as was done in article 51. Lastly, leaving it up to the “organized international community”, i.e. the United Nations, to react to breaches of obligations *erga omnes* bordered on cynicism.

32. It must be stressed in the commentary that, whenever possible, the decision to take collective countermeasures must also be collective.

33. The Commission must not forget that it was devising a regime of non-forcible countermeasures which would help avoid situations where States claimed that they had exhausted all peaceful means and adopted the attitude which had been taken by the United Kingdom in the context of the collective measures adopted against Yugoslavia in 1998.<sup>4</sup> If the Commission defined a feasible regime of pacific collective countermeasures, States would be less likely to adopt another course, such as the regrettable one taken in Kosovo.

34. The case studies on collective countermeasures contained in the report were extremely interesting, but perhaps the Special Rapporteur could have referred to the laws which the United States had adopted in the 1970s and which made military, economic and technical assistance subject to a particular human rights performance. Some of the laws in question even provided that the findings of ICRC must be taken into account as a basis for the evaluation of that performance and the Commission might consider such a procedure. The reference to European Community penalties was too long and the conclusion he had drawn was that, since it had taken as densely integrated an institution as the European Community 40 years to arrive at the Maastricht Treaty providing for such sanctions, it might take many decades for the international community to come up with a regime of countermeasures worthy of the name. With regard to punitive damages, there had to be a procedure for coordinating the demands of States.

35. In his opinion, the provisions which the Special Rapporteur proposed to add to article 40 bis in a footnote

<sup>4</sup> See G. Marston, ed., “United Kingdom materials on international law 1998”, *The British Year Book of International Law*, 1998, vol. 69, pp. 580–581.

to paragraph 413 of his report should be included in a separate article. Subparagraph (a) should mention guarantees of non-repetition, which were referred to several times in the relevant paragraphs of the report.

36. As far as third States were concerned, article 50 A should refer to the gravity of the breach because, as it stood, it appeared to allow assistance to an injured State regardless of how serious the breach was.

37. The title of article 50 B was too broad and, as it stood, the provision also covered the situations dealt with in article 50 A. There was a mistake in paragraph 1, which should refer to article 51. Moreover, the categories defined in paragraphs 377 to 379 of the report were not to be found in the text of that article.

38. As to article 51, the Commission must decide once and for all how to qualify the breaches it had in mind. Article 51 referred to "serious and manifest" breaches, whereas the text of the report described them as "gross and egregious" and, at times, as "well attested". In introducing his report, the Special Rapporteur had referred to "well-attested" breaches and he personally would prefer that term or the term "reliably attested", which was widely used in the human rights context and had the advantage of referring to the evaluation of an objective third party. The wording of paragraph 1 might also be closer to that of article 19, paragraph 2, as adopted on first reading.

39. The obligation provided for in paragraph 3 (a) was relatively settled and did not give rise to any problem, whereas paragraph 3 (b) posed the theoretical, although minor, problem of its relationship with article 27. However, paragraph 3 (c) on the obligation to cooperate was probably the most problematic of all the provisions under consideration. In a situation such as that in Kosovo in late 1997 and early 1998, a State which wanted to play the role of the leader in the taking of countermeasures could ask other States to cooperate, but there was nothing to indicate to whom the obligation to cooperate was owed: was it owed to the international community, to the victim or to the State which requested cooperation? In any event, the Commission could not make it an obligation of every State to cooperate at the request of the State taking the lead.

40. In paragraph 4, the reference to penal consequences was not clear. Did it mean individual criminal responsibility or did it refer to the absurd idea of the direct criminal responsibility of States? It must also be asked whether the procedural conditions defined in article 48 could all apply to collective countermeasures.

41. With regard to the proposed general provisions, the words "to the extent" in article 37 should be deleted because they were logically incompatible with the word "exclusively". There was no such thing as a scale of exclusivity. The new wording of article 39 was much better than that adopted on first reading.

42. Mr. LUKASHUK said that he had some doubts about article 50 B, paragraph 2, which dealt with cooperation between States and embodied a rule which was in the nature of a general principle, representing "soft" law. It nevertheless reflected the principle of cooperation, which was one of the fundamental principles of international law.

It was therefore of particular importance in connection with collective countermeasures and must be retained.

43. Mr. PAMBOU-TCHIVOUNDA thanked Mr. Simma for having drawn the Commission's attention to a flaw in the structure of article 51, which referred to two things: paragraph 1 dealt with a "breach of an international obligation" or, in other words, what was covered by the title of chapter III of Part One, while paragraphs 2 to 4 corresponded to the title of the article, i.e. the type of breach which was measured by the yardstick of seriousness and gave rise to certain consequences, and to the consequences themselves. Justice must be done to the Commission and its efforts to make a distinction between "crimes" and "delicts", to use Roberto Ago's terminology, based on that concept of seriousness.<sup>5</sup> There had been lengthy discussions of that two-pronged use of terms and it had been discovered that it caused more problems than what it referred to. In the text under consideration, those terms had disappeared, even if their purpose had been maintained, and that was a good thing. Article 51, paragraph 1, thus retained the content of the former article 19, paragraph 2, even though it did not say so.

44. In order to bring out the distinction in the structure proposed by the Special Rapporteur, it might be necessary, for the sake of symmetry, to divide article 51 into two parts. Paragraph 1 would be a specific article, which would be entitled, for example, "Serious and manifest breach of an obligation to the international community as a whole" and incorporated in Part One following article 25 of chapter III, which was entitled "Breach of an international obligation". The second part would symmetrically contain the consequences of that specific provision, namely, paragraphs 2 and 3 of the new article 51. That configuration would take care of concerns that had been weighing on the Commission for a long time.

45. Mr. SIMMA said he agreed with Mr. Pambou-Tchivounda that there was a certain lack of symmetry between the regime applicable to breaches which might be termed "normal" and the one that was applicable to breaches of obligations *erga omnes*. He therefore suggested that chapter III should be enriched because, with its single provision on a serious breach of fundamental obligations to the international community, it was a bit meagre. There would be an article on injury in general, the remedies available to injured States, the countermeasures available to injured States, the regime applicable to obligations to the international community, the content of the provisions in a footnote to paragraph 413 and then articles 50 A, 50 B and 51. That would be a dignified regime for a very important issue.

46. Mr. CRAWFORD (Special Rapporteur) said that he would readily agree to split article 51 in two and include new elements in it, but he was strongly opposed to including it in Part One, where it would perform absolutely no function. If it was so included, moreover, it would be necessary to consider the rules for the attribution of responsibility applicable to that category of breach. Its

<sup>5</sup> See fifth report (*Yearbook* . . . 1976, vol. II (Part One), p. 3, document A/CN.4/291 and Add.1 and 2), p. 39, para. 117.

place was therefore in chapter III. He had no objection to the structure proposed by Mr. Simma.

47. Mr. PAMBOU-TCHIVOUNDA, explaining his idea, said that it must be clear at the end of Part One whether there was only one type of breach or several. It might not be understood why there were several regimes in Part Two relating to the consequences of a wrongful act.

48. Mr. TOMKA said that he agreed with the Special Rapporteur. Part One must relate to breaches of international law as such, without distinction. The distinction would be drawn in terms of the consequences of the breach: there would first be the “usual” consequences and then the consequences of “serious breaches of obligations to the international community as a whole”. In order to flesh out chapter III, the solution might be to make paragraph 1 of new article 51 a separate article, to be followed, in another article, by paragraphs 2, 3 and 4.

49. Mr. GAJA said that the content of the provisions in a footnote to paragraph 413 gave an indication of what States other than the injured State could seek in the event of the breach of an international obligation to the international community as a whole. The Special Rapporteur had recalled—as clearly stated in the text of subparagraph (b) proposed in the footnote—that, in that particular situation, non-injured States could seek restitution in the interests of the injured person or entity and also damages for the victims of the breach, but the latter only in the event of a serious and manifest breach of an obligation *erga omnes*. For example, in the event of a serious and manifest violation of human rights, it was possible to seek compensation from the responsible State, but what would happen if the violation was not serious and manifest? In practice, it could be said that there was no obligation to provide compensation because the obligation of the responsible State would simply be theoretical. No State could invoke respect for that obligation. The same was true in other cases as well, such as that of the pollution of the oceans. In some cases, even when there was an injured State, the damage could go beyond the injury suffered by that State. Perhaps the Commission should make way for that eventuality and consider the possibility of seeking more than the injured State itself was entitled to claim.

50. He was also of the opinion that the distinction made in general in paragraph 374 between derogable and non-derogable human rights was not entirely relevant. If an obligation existed under customary international law with regard to human rights, it did not make much difference which of those rights had been violated, at least from the point of view of the obligation to make reparation.

51. Concluding his comments on that point, he was of the opinion that the provision proposed in a footnote to paragraph 413 was only partially satisfactory and that something else should be added. Account should be taken of the possibility that any State could seek reparation, although not for its own benefit, when there was no injured State.

52. Referring to the question of international crimes, he recalled that there had been a logical explanation for the idea of putting article 19 in Part One and it had been

clearly stated by Roberto Ago in his fifth report<sup>6</sup> and in the Commission’s discussions. According to the original approach, international crimes of States were not regarded as serious breaches of obligations which would entail the ordinary consequences of wrongful acts, plus some other consequences. The original idea had been that there would be two sets of consequences. It had therefore been necessary to include something on crimes in Part One. However, the Commission had gradually moved towards the idea that international crimes were basically wrongful acts which entailed some additional consequences. There was then no reason to refer to international crimes in Part One.

53. New article 51 did not seem to add much to what had been provided on first reading. What was essentially new was paragraph 2, i.e. the idea of punitive damages. He had nothing against that as an exercise in the progressive development of international law, but he did have doubts about the practical implementation of that principle. How would a State obtain punitive damages? That would have to be linked to the possibility of an institutionalized way of responding to the international crimes of States.

54. He shared Mr. Simma’s view on new article 51, paragraph 3. Paragraph 3 (b) should be read in conjunction with article 27, which already covered the content of paragraph 3 (b). It was true that article 27 dealt with the commission of a wrongful act and paragraph 3 (b) with the maintenance of the wrongful act, but, in one way or another, that contributed to the wrongful act and, if rendering aid or assistance had the consequence of entailing international responsibility, it was hard to see how States could say that, in the event of a serious or manifest breach of an international obligation, they would not have the same kind of obligation as that implied in article 27. Paragraph 3 (b) did no harm, but should at least contain a reference to article 27.

55. He also agreed to some extent with Mr. Simma’s comments on paragraph 3 (c) that States had to cooperate in the application of measures designed to bring the breach to an end. That meant—and was thus going a bit far—that States were under an obligation to cooperate in the application of countermeasures, even when such measures were taken unilaterally by a State. The need for cooperation was understandable, but it should not be expressed in those terms. Paragraph 3 (c) should at least be redrafted.

56. Since new article 51 did not say much, he proposed something should be added to the consequences of serious and manifest breaches of international obligations to the international community as a whole. In that connection, he was referring to the barrier that international law set up to the attribution to individuals of the legal consequences of their conduct as organs of the State. The basic rule was that a State could not regard such conduct as individual conduct, but, rather, as State conduct, with some exceptions, particularly that of international crimes committed by individuals. If a head of State made that State commit genocide, he could not claim that his individual act had

<sup>6</sup> Ibid.

been an act of the State; international law then made it possible to punish his conduct. However, not all breaches of obligations of States to the international community as a whole implied that individuals acting on behalf of the State committed an international crime. It would therefore not be reasonable to define all conduct which led the State to commit a serious and manifest breach of an obligation towards the international community as an international crime of an individual. His own proposal would be much more limited in scope. It would simply give States the possibility of uncoupling the individual from the State so that the individual whose conduct had given rise to a serious and manifest breach of an obligation of that State to the international community as a whole could not use as a defence in a criminal or a civil case the fact that he had acted as an organ of that State. The inclusion of a provision along those lines would make it possible to add an element of deterrence to relations between States.

57. With regard to paragraph 4, he was of the opinion that it would be wise to leave the further consequences of breaches to future developments of the law, whether or not they involved an institutional response. Such developments might well relate to the category of serious and manifest breaches in general, as the report suggested, but it was more likely that they would relate to specific breaches. There might thus be a system for one type of breach and not for another. It would be useful to indicate that account was being taken not only of a general development, but also of a specific development which would, technically speaking, come under a *lex specialis*, since that was probably the form it would take. The international community would react to some of those breaches and not necessarily to others, which might be regarded as equally serious, but which might require a different response for which international society was not yet ready.

58. The last part of his statement related to countermeasures. He appreciated the survey of State practice in relation to countermeasures in the event of breaches of obligations to the international community as a whole. However, the conclusion to which it led and the text of proposed articles 50 A and 50 B did not correspond exactly to what such practice seemed to suggest. In most of the cases referred to and probably in all cases, the only purpose of countermeasures was to bring about the cessation of an allegedly wrongful act. There was no evidence that States used collective countermeasures to obtain reparation. Even if States were entitled to seek reparation, practice appeared to justify the adoption of countermeasures only in relation to cessation. There was thus no perfect parallel, and that was entirely comprehensible and must be seen in a positive light because the Commission was not trying to extend countermeasures to the full range of uses to which they might be put. Countermeasures should thus be regarded as admissible only to the extent that their purpose was cessation. That also had another advantage because it was not necessary to obtain the consent of the injured State, if there was one. As the Special Rapporteur had recalled, the injured State had no possibility in that case of allowing a derogation from the obligation and another State could demand cessation. Thus, in the case of the military occupation of part of the territory of a State, even if that State did not make a protest for one reason or another, the other States could still press for an end to the military

occupation. It would then be reasonable for them to use countermeasures to bring about that cessation.

59. Mr. CRAWFORD (Special Rapporteur) said it was possible that new article 51, paragraph 3 (b), overlapped with article 27 of chapter IV of Part One. In article 27, the emphasis was on the commission of the wrongful act, whereas, in article 51, paragraph 3 (b), it was on the maintenance of the situation created by the wrongful act. Did that difference, which obviously dated from the first reading, change anything? It could be assumed that, in many cases, the primary obligation, which was, of course, a continuing obligation, would be breached in relation to the continuing situation. There might, however, be cases where that was not so. For example, when conduct amounting to a crime against humanity led a population to flee to another State and then ceased, the question was whether the population must be allowed to return home. It was not clear whether failure to allow it to return home was in itself a crime against humanity. There might well be a situation in a context like that where there was some room for article 51. That was why it was rather difficult to limit collective countermeasures to cessation. There might well be situations of restitution after the wrongful act had ceased which were analogous to cessation and it was not certain that a clear-cut distinction should be made between the two. He fully agreed with the way in which Mr. Gaja viewed the situation, namely, that cessation was meant in all cases. Moreover, the system of penalties provided for by European Community law, as it was currently applied, focused primarily on cessation. Whether or not it should be so limited was a matter for consideration. He himself would have no difficulty in accepting a more stringent limitation, obviously, but there was a problem in the case of restitution following, for example, a crime against humanity where the crime had ceased and the Government which had committed it had gone out of office, but the consequences, such as millions of displaced persons, continued to exist. The ratification of those consequences might amount in a curious sort of way to the *ex post facto* ratification of the crime. That situation might not be covered by chapter IV of Part One.

60. There was also the problem of the "transparency" of the State, a concept which Mr. Gaja had tried to operationalize by saying that, in the case of gross breaches, an individual was not entitled to rely on his status as an organ of the State during the subsequent individual prosecution. He took it that the provision Mr. Gaja was proposing did not involve creating any new criminal offence. Rather, it involved the disabling of reliance on an immunity, a question which had hovered over the "*Rainbow Warrior*" case without ever coming quite out into the open.

61. In his own opinion, that question was not properly a matter of State responsibility, but one of individual responsibility. He was not at all convinced by the idea that the State became "transparent" only in extreme circumstances. As far as breaches of international law were concerned, the State was always transparent. In other words, it was always accountable for its acts and a private individual was always accountable for his acts, whether or not he had any official function. It was generally not a good idea to try to link the two.

62. The only historical example of the principle of the transparency of the State was given by the category of “criminal organizations” defined in article 9 of the Charter of the Nürnberg Tribunal,<sup>7</sup> in which there had been a separate procedure for identifying certain organizations as criminal per se. Individuals had then been treated as criminals by reason of their membership of those organizations, although there had been a second-stage procedure during which the accused had been able to plead in mitigation in respect of their membership of those organizations. Two things could be said about that historical experience: first, that it had never been repeated, since the crime of “guilt by association” did not appear in any later text; and, secondly, that the principle had been applied not to the German State or to the German Government, but to organizations, such as the SS.

63. In his view, trying to find a link between State responsibility and individual responsibility politicized the question of the charge against the individual and the existing rule of international law that individuals, including State officials, were responsible for crimes under international law regardless of their State position was itself a rule on transparency which applied regardless of the category of the act in question and its attribution to the State.

64. Mr. GAJA said he agreed that, in the case of an international crime attributable to individuals, the rule of transparency did not have to be stated because it followed from general principles. There could, however, also be problems of civil liability or cases where international law as it currently stood had not reached the stage of considering a certain activity as criminal. His proposal was therefore designed not to deal with the question of responsibility of individuals, but was something which would govern only relations between States, but which would also have a deterrent effect on individuals.

65. Mr. CRAWFORD (Special Rapporteur) said he agreed that the problem was a real one and one which had, for example, been hovering over the Pinochet case. The question was, however, whether, as a matter of law, it was one of responsibility. In his opinion, the argument was valid in the context of immunity, but it could be asked whether, as a matter of principle, the Commission should become involved in that area. In that connection, he noted that the Commission had been extremely conservative at its fifty-first session about dealing with that question in the field of immunity. He also wondered whether the text was not already overcharged. He nevertheless encouraged Mr. Gaja not to withdraw his proposal, which might be supported by other members of the Commission.

66. Mr. DUGARD said that, as Special Rapporteur on the topic of diplomatic protection, he supported the approach the Special Rapporteur had adopted in respect of diplomatic protection in paragraph 428 (b) of his report. Secondly, he was of the opinion that, if the Commission planned to adopt the draft articles in the form of a declaration, it should make no mention of the subject of retroactivity, in the hope that the draft articles would be construed

as being as declaratory of existing law and would therefore have a retroactive effect. As to the idea expressed in paragraph 396 that practice with regard to reactions to breaches of collective obligations was dominated by the Western countries, there were examples to show that that was not accurate. Thus, the 1973–1974 Arab oil boycott had been interpreted, in particular by Shihata, as a response to Israel’s illegal occupation of the West Bank and Jerusalem and to the Western States’ support for that occupation.<sup>8</sup> Another example was that of the reaction of African States to apartheid in South Africa and to minority rule in Rhodesia, which had, of course, resulted not in the breach of treaties, but in breaches of customary international law, with States, particularly neighbouring States, allowing the liberation movements to set up bases in, and operate from, their territories. That was an example of the reaction by African States to the breach of collective obligations relating to human rights and self-determination.

67. In his opinion, the 1966 judgment of ICJ in the *South West Africa* cases had been a major setback for international law, since the Court had affirmed that States could act only where their national interests were involved. The Court had remedied its position somewhat in the *Barcelona Traction* case, but, in the *East Timor* case, it had seemed to revert, in fact, if not in law, to its earlier position. He therefore particularly welcomed the Special Rapporteur’s bold denunciation, in article 50 B and in several paragraphs of the report, of the principle stated by the Court in 1966. He was proud to be associated with the final rejection of that principle.

68. He also noted that, out of politeness or perhaps in a spirit of compromise, the members of the Commission had been avoiding the question of article 19 and recalled that, at the fiftieth session, the question of the possible retention of that article in the draft had shown that the members of the Commission had been very evenly divided in their views. Chapter IV of the report was therefore a brilliant exercise in compromise which gave the supporters of article 19 the toys of *jus cogens* and obligations *erga omnes* to play with and which satisfied the enemies of article 19 by abandoning the word “crime”. He was, however, not completely satisfied with the way in which the exercise had been conducted. Of course, article 19 itself should go, but the concept of crime should not be eliminated completely. It could, for example, be referred to if a sentence was added at the end of new article 51, paragraph 1, stating that such an act, resulting from the gross and systematic breach by a State of an international obligation essential for the protection of fundamental interests of the international community, constituted a crime. The wording of that sentence would be largely based on that of article 19, to which it would add the concept of a “gross and systematic breach of an international obligation”, as referred to by the Special Rapporteur in paragraphs 404 and 405 of his report. No further changes would have to be made to article 51. He realized, however, that there could be a number of objections to that idea. As the Special Rapporteur had stressed, if the Commission adopted the concept of international crime, it

<sup>7</sup> Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, No. II-251, p. 279), p. 290.

<sup>8</sup> I. F. I. Shihata, “Destination embargo of Arab oil: its legality under international law”, *AJIL*, vol. 68, No. 4 (October 1974), p. 591.

would have to deal with the question in a more systematic way, particularly by defining specific rules on justification and due process and also considering the question of penalties. However, some members might find a reference to the word "crime" in the draft articles to be quite simply unacceptable.

69. On the other hand, there might be advantages to such a course. In the first place, that solution would certainly be better than retaining article 19, which, as nearly everyone agreed, was particularly badly drafted, especially as it listed a number of examples, even though it was not normal to legislate by way of example. Another advantage would be the retention of the word "crime", since the Commission must face the fact that, whether it liked it or not, the concept of State crime was currently part of the language and idiom of international law. To abandon the concept completely might be seen by many quarters and perhaps even in the Sixth Committee as a step backwards. In paragraph 391 of his report, the Special Rapporteur himself cited an example in which the United States had described the conduct of the Ugandan Government as constituting the "international crime of genocide", and had referred explicitly to the State itself. Everyone knew, moreover, that, in the case of South Africa during the apartheid era, the international community had repeatedly condemned apartheid as an international crime and had described the State as criminal. Apart from its political consequences, that position had also had an effect in law in that it had given some legality or a semblance of legality to the use of force by national liberation movements. It could, moreover, be asked what was in a name and he did not see why the conduct described by the Special Rapporteur in paragraph 372 as constituting "gross breaches of fundamental obligations" could not be called an "international crime". Examples of the reaction of States in such cases also indicated that the description of the action of States was unclear. Thus, when the Government of the Netherlands had decided to suspend its assistance to Suriname, it had stated that the case involved a fundamental change of circumstances.<sup>9</sup> Other States had characterized their action as collective countermeasures against serious breaches of fundamental obligations. He pointed out that new article 51, paragraph 2, already referred to "punitive damages" and paragraph 3, referred to the concept of non-recognition, both of which had a criminal flavour about them. If the Commission wanted to retain the word "crime" simply because it had become part of the language of international law, it could do so very easily in article 51 without reintroducing article 19. That might satisfy the supporters of article 19 more than the compromise proposed by the Special Rapporteur.

70. He was nevertheless aware that, if the Commission followed that course, it would not be in a position to complete the draft articles during the current quinquennium. The Special Rapporteur had made an impassioned appeal for compromise on that issue and he agreed that a lack of compromise would have serious consequences for the draft articles and perhaps also for the Commission's reputation. The compromise proposed by the Special Rapporteur was brilliant and he would therefore be prepared to accept it, provided that the Commission should not be seen

to be simply abandoning the concept of international crime. He took the view that there was a place for the concept of international crime in the contemporary international order, but that place was not in the draft articles on State responsibility. He therefore insisted that, if the Commission dropped article 19, it should include a study of international crime in its long-term programme of work. It would also be wise for the Commission to make that proposal at the time when it referred the draft articles to the Sixth Committee so that it would not give the impression that it was abandoning an important concept that was currently deeply entrenched in international law.

71. In conclusion, he said that he was prepared to accept the compromise on the terms he had indicated.

72. Mr. ROSENSTOCK said that he did not want silence to suggest that the term "international crimes of States" had become part of the language of international law. It was, rather, an oddity. He did not understand how it could have found its way into the Commission's work; at no time during the past decade had it been supported by at least half of the Commission's members. He also did not think that it was reasonable to expect, as the price to be paid for taking on the legislative proposals put forward by the Special Rapporteur, to have to accept the concept of crimes. The Commission must decide whether or not it wished, and at what price and to what extent, to imperil everything that had been done to date on the topic of State responsibility by flights of fantasy. The Special Rapporteur's proposals were interesting, worth considering and must definitely be referred to the General Assembly, on a first-reading basis, in order to obtain reactions and indications as to whether there was support for continuing the work along the proposed lines. If the Commission went beyond that, however, it would be taking the enormous risk of imperilling the entire exercise it had been carrying out. Statements characterizing certain types of conduct as "criminal" were essentially political in nature and, in the current context, the concept of crime was not meant in any normal sense of the term as used by lawyers.

73. Mr. HAFNER said that, in his opinion, the expression "international crimes of States" was accepted in the terminology of international law, but was not understood by everyone in the same way. As the law now stood, there were at least three different interpretations and that made the question a very sensitive one.

74. Mr. ECONOMIDES said that, in his opinion, article 19 was a key provision of the draft and all the more valuable in that it also reflected the progressive development of the law. The Commission currently had before it another proposal, which was the result of the Special Rapporteur's enormous efforts to find a basis for consensus. He personally was, however, not convinced that the ideal balance had been found. Mr. Dugard had made a realistic proposal which should be considered with a great deal of attention in order to arrive at a balanced solution. Perhaps other proposals would be made in order to reach a more satisfactory compromise, but he could not agree with the apparently negative position taken by Mr. Rosenstock. The work carried out over a period of many years must naturally be safeguarded, but not at the expense of one part of the Commission.

<sup>9</sup> See *Netherlands Yearbook of International Law*, vol. XV (1984), p. 321.

75. Mr. CRAWFORD (Special Rapporteur) said that article 51, paragraph 4, used the word “penal” in all possible connotations because the Commission could not exclude the possibility and the contingency of decades of the development of international law.

76. With regard to the submission of the draft articles to the Sixth Committee, it would be desirable for the Committee to have an integrated text so that it could see how the various articles related to each other and for the Commission, in its report to the General Assembly on the work of the current session, to distinguish between the aspects of the report on which substantive comments had been made by Governments and were representative of many years of work and those which were essentially new.

77. Mr. SIMMA noted that, when he had said that the text of article 51 should be brought closer to that of article 19, he had not been referring to article 19 as a whole, but only to article 19, paragraph 2, describing the obligations article 19 had in mind, and that he certainly had no intention of proposing that the word “crime” should be added as part of that approximation.

78. Mr. BROWNLIE said that the exercise the Commission was engaged in involved the codification of State responsibility, which was a long-established part of customary law that would survive regardless of the outcome of the Commission’s work. The Commission was also ambitiously trying to construct a system of multilateral public order by merely normative means. For that and other reasons, it must look at State practice, which would show, for example, that it was not only Western States that had gone in for multilateral sanctions.

79. Referring to article 19, he did not agree with the approach of saying that the fact that the Commission was setting aside article 19 would in a way amount to abandoning the concept of international crime. Indeed, some members of the Commission held the view that article 19 was a weak version of the international crime concept and was in the wrong place. It was an inappropriate article that did not belong in the draft in any event.

80. For the time being, the Commission’s concern should be to transmit an integrated draft to the Sixth Committee in order to obtain feedback.

81. With regard to more specific aspects of the report, the references to State practice could be developed and rounded out. As to terminology, he took the view that the concept of collective countermeasures might give rise to misunderstandings, not least because of its association with bilateral countermeasures. Collective countermeasures were essentially collective sanctions and they were often parallel rather than collective. Although it was difficult to find an alternative, he would prefer the term “multilateral sanctions”.

82. It was inaccurate to say, as the Special Rapporteur did, that the obligation of non-recognition referred to in article 51 was in the sphere of progressive development. There again, the Commission must be scrupulously careful to establish a link between its work and what had existed for decades. The principle of non-recognition had first been affirmed by the Assembly of the League of Nations in the early 1930s, and that should be acknowledged in the

commentary. The report should also at least mention the problem of invalidity because, apart from being a political sanction in some cases, non-recognition was, in a more legal context, a reaction to the invalidity of an act.

83. He did not think that the term “serious and manifest breach by a State of an obligation” in article 51 was as objective as it seemed, since breaches committed by permanent members of the Security Council usually tended not to be seen as manifest.

*The meeting rose at 1.10 p.m.*

## 2651st MEETING

*Thursday, 3 August 2000, at 10 a.m.*

*Chairman: Mr. Chusei YAMADA*

*Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.*

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

[Agenda item 3]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. GOCO said that, during his period of office as his country’s Solicitor-General, he had handled a number of cases with international ingredients. He was, however, rooted in the study and analysis of national law and in advocacy. He had therefore found the Special Rapporteur’s third report (A/CN.4/507 and Add. 1-4) particularly illuminating. Any doubts he had had about certain issues were largely dispelled.

2. The use of the expression “legal interest” in paragraphs 375 and 376 of the report raised the important

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

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