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Summary record of the 2652nd meeting

Topic:

State responsibility

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That is also true a fortiori of the month applied by the Secretary-General of IMO which was obviously much too short. Twelve months, on the other hand, was quite long because, for that whole period, States were uncertain as to the fate of the reservation. However, article 20, paragraph 5, of the 1969 Vienna Convention allowed 12 months for objections to reservations, and taking into account also the position of the Secretary-General of the United Nations, he nevertheless proposed setting a time limit at 12 months, rather than 6 months, which he would have preferred.

76. As to the formulation *ratione temporis* of interpretative declarations, late interpretative declarations occurred very rarely, since contrary to the definition of reservations, draft guideline 1.2, which defined interpretative declarations, contained no time element. That meant an interpretative declaration could be made at any time, even though that was not spelled out in any of the draft guidelines adopted so far. However, some treaties placed express limitations on the moment at which interpretative declarations could be formulated. Such was the case with article 310 of the United Nations Convention on the Law of the Sea and article 43 of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. In that case, an interpretative declaration could be late and should be dealt with by analogy like a late reservation. That was made clear in draft guideline 2.4.3, with regard to simple interpretative declarations. Draft guideline 1.2.1 indicated that conditional interpretative declarations could be formulated only at the time of expression of consent to be bound by the treaty. A separate draft guideline would have to be included on conditional interpretative declarations. Since such declarations operated like reservations, he proposed that draft guidelines 2.2.3 and 2.2.4 should be transposed to draft guidelines 2.4.4, 2.4.6 and 2.4.7 for conditional interpretative declarations.

77. With those remarks, he was submitting the 14 draft guidelines contained in chapter III of his fifth report to the Commission for its consideration and expressed the hope that they would be referred to the Drafting Committee.

The meeting rose at 1.10 p.m.

2652nd MEETING

Friday, 4 August 2000, at 10 a.m.

Chairman: *Mr. Chusei YAMADA*

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, 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. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Sepúlveda, 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. TOMKA recalled that, at the fiftieth session, since the Special Rapporteur had unsuccessfully proposed that article 19 and articles 51 to 53 of the draft should be deleted, the Commission had reached a compromise, discussed in paragraph 369 of the third report of the Special Rapporteur (A/CN.4/507 and Add. 1–4), as to the further procedure in considering the issues involved. Although the Special Rapporteur, as apparent from paragraph 371 of the report, had made genuine efforts to discharge his mandate, a number of questions remained unanswered.

2. For example, when the Special Rapporteur dealt in chapter IV of the third report with "responsibility to a group of States or to the international community", was it to be inferred that the responsibility was the same or that the legal consequences of a breach of an obligation to a group of States and an obligation to the international community were the same? Was that concept deemed to replace the unfortunate expression "international crime", used in article 19, when article 19 related more to breaches of obligations to the international community as a whole and not to a group of States?

3. Again, some notions used in the report were, despite the Special Rapporteur's efforts, comparatively "foggy". That was true of *erga omnes* obligations, peremptory norms (*jus cogens*), most serious breaches and collective obligations. In article 40 bis, paragraph 2 (*a*), the Special Rapporteur used the term *erga omnes* to qualify an obligation owed to the international community as a whole. In paragraph 373 of the report, he affirmed that the content of obligations to the international community as a whole was largely coextensive with the content of peremptory norms, that by definition a peremptory norm must have the same status vis-à-vis all States, that they were norms with an *erga omnes* effect and no derogation was permitted. But the Special Rapporteur himself noted that an obligation might exist *erga omnes* yet be subject to modification as between two particular States by virtue of an agreement between them, and it would follow that the obligation was not peremptory. The Special Rapporteur went on to conclude that it would follow that, in the event

[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).

of a derogation, the same obligation was not owed to the international community as a whole. Therefore, the question was why, in article 40 bis, paragraph 2 (*a*), the obligation to the international community as a whole was qualified as an *erga omnes* obligation when it could be derogated, which would mean, in that case, that it was no longer owed to the international community as a whole. Hence it might be preferable to concentrate—when dealing with what was previously covered by the term "crime"—on breaches of peremptory norms, since the language used by the Commission in article 19 implied that the article covered obligations flowing from peremptory norms rather than the broader concept of *erga omnes* obligations. While he shared the Special Rapporteur's views as expressed in paragraphs 374 and 375 of the report, he thought that those issues were dealt with in a rather cursory fashion and a more thorough examination was called for. In addition, he acknowledged that examples of peremptory norms should be cited not in the draft articles but in the commentary. Furthermore, he wondered about the role that the State's consent could play in the context of a breach of peremptory norms, since there could be no derogation from such norms. The introduction of penalties could revive the debate on the criminal responsibility of States, which was not desirable, as the overwhelming majority of States rejected the idea that such responsibility existed in international law. While the Special Rapporteur did cite an interesting example of a penalty imposed by the Court of Justice of the European Communities, it had to be recognized that the Court's competence was based on a particular treaty, something that could not be envisaged in the context of general international law.

4. The report's review of State practice in regard to collective countermeasures was interesting, but not entirely balanced. Admittedly, it revealed that States from different regions had taken similar measures but, in some cases, actions presented as collective countermeasures had been more in the nature of politically motivated retortion. A very interesting example, nevertheless, was that of the legislation adopted by the United States Congress against Uganda, whereby the Congress had recognized that a Government might be involved in a criminal act and that the State bore responsibility if the act was attributable to it. Hence, it could be seen that the position of the Congress was different from that officially expressed by the Government of the United States on the draft articles adopted on first reading.

5. The overall impression he gained from reading chapter IV of the third report was that the Special Rapporteur was indiscriminately covering a number of concepts that fell into slightly different categories, and the confusion was made worse by the idea that the obligations contained in international instruments pertaining to human rights and environmental law were *erga omnes* obligations and, in many instances, even of a peremptory character. However, that was not certain, for even the provisions that defined certain human rights as being underogable related, not to a derogation between States parties, but to the prohibition on a State, when it declared a state of emergency, to derogate from certain basic human rights.

6. Accordingly, he wondered whether the Commission should endorse the draft articles or continue elsewhere the consideration of breaches of peremptory norms, settling the situation by a saving clause indicating that the draft articles did not prejudge any possible consequence of a breach of a peremptory norm of international law. The Commission could also arrange to conduct such an examination as a separate topic on its programme of work, provided the States Members of the United Nations approved of that procedure and the proposal.

7. As to Part Four, containing general provisions, he generally endorsed the content of new article 37, although the wording could nonetheless be improved by the Drafting Committee, as well as that of draft articles A and B. Article 39, concerning the relationship to the Charter of the United Nations, should be deleted. If the Commission ultimately recommended that the General Assembly should adopt the draft articles in the form of a declaration, there would be no room for such a provision, and if the Commission recommended their adoption in the form of a convention, the question of the relationship to the Charter would in any case be settled by Article 103 of the Charter itself.

8. Mr. KAMTO said that the Special Rapporteur deserved all the greater congratulations for chapter IV of the third report inasmuch as he displayed the same courage and the same concern for balance as in chapter III and did not hesitate to engage in bold development of international law or attempt to codify widely differing and comparatively ill-established practice. Some brief observations were none the less called for on certain concepts, and on an innovative and sometimes unexpected terminology. For example the notion of "victim State" could create confusion with that of "injured State", which was clearly defined elsewhere, and which it would be better to keep to, if only for the sake of consistency. Similarly, he had some doubts as to the conceptual relevance of the notion of "collective countermeasures", in which the Special Rapporteur included both what he called "punitive damages" and "penalties" in paragraph 380 of the report, and various other forms of reactions to wrongful acts ranging from an economic embargo to suspension of air traffic. They were what was largely known in the doctrine as "international sanctions". Actually, whereas the difference between "individual countermeasures", which the Commission had considered in the context of articles 47 to 50, and collective countermeasures, should lie in their individual character on the one hand and collective on the other, yet it was apparent that the content of a countermeasure was not the same, according to whether they were taken individually or collectively or multilaterally. Consequently, the same term or the same concept could not be used to designate two different legal realities. In his opinion, apart from measures of retortion and measures of reciprocity, any reaction to a wrongful act in the international context constituted a sanction. A large part of legal writings defined sanctions on the basis of domestic legal criteria, placing the emphasis on the perpetrator of the infringement, the characterization of the infringement, the legal predictability or legal predetermination of the sanction to be taken, but the notion of a sanction in international law should be defined on a wider basis, drawing to some extent on the existing concept in internal law but also taking account of the reality of a poorly structured international society where the same type of institutions as in the domestic legal system did not exist. That was why, as he had pointed out in connection with the consid-

eration of articles 47 to 50, the element of the addressee's perception of the countermeasure or of the reaction was of considerable importance in the definition of a sanction.

9. As to the practice presented by the Special Rapporteur, the examples might perhaps have been better chosen but, above all, they would have gained from being presented in such a way as to be exploited to the best in legal terms. In that regard, it would have been extremely useful to indicate, in each case, the initial obligation breached by the responsible State before mentioning the sanction or countermeasure taken by the injured State. The Special Rapporteur had done so in the case of the United States with regard to Uganda in 1978, of the measures taken against Argentina and those against Iraq. On the other hand, it was surprising to see that, in the case of Poland and the Union of Soviet Socialist Republics, the mere movement of Soviet troops along the frontier and not across the frontier or within Polish territory had justified "countermeasures" against the USSR and that, in the case of the Federal Republic of Yugoslavia, what everybody called a "humanitarian crisis", without any further indication of the international obligation or obligations breached, had justified countermeasures. Moreover, in the latter case, the reason invoked by the United Kingdom Government[3] was surprising to say the least, since it was based on "moral and political reasons" in order to justify Yugoslavia's loss of its rights stipulated in a bilateral treaty. Hence, a need arose for clarification, so that the Commission would not convey the impression, either that it was following suit in a dubious practice or that it did not intend to indicate very clearly the conditions in which the taking of countermeasures was permissible.

10. As to the notion of a crime, he was under the impression that the Commission sometimes liked to scare itself, since it was a well-established notion in legal language, one which some of the most important States in the international community used to justify some of their acts. In that connection, the position adopted by the United States Congress in 1978 was not to be considered as a negligible factor, even though opinions had since changed. It was a factual argument, but there were also other arguments which showed that the concept of an international crime was already to be found among the legal concepts of the international legal system. For example, the fact that the Special Rapporteur himself had conceived of punitive damages strengthened the idea that there were infringements of a special character that warranted a special characterization. Moreover, crimes such as genocide or apartheid were also committed by States or by means of institutions or instruments of the State. For instance, it was not possible to speak of the crime of genocide in Rwanda and overlook the means the State had used to assist in the commission of that crime. Hence, if the Commission could, for the purpose of balance and conciliation, but not for considerations of a legal nature or of reality, set aside the term "crime", it could not in any event reject the content of the term. It was, moreover, possible to turn the notion of transparency around and consider that when a crime of an individual was established, it was a presumption of a crime by the State, the point of departure for reverting to a State crime. All those reasons implied that the concept of a crime did exist and that the Commission should make proper use of it in the draft articles.

11. He endorsed Mr. Economides's proposals (2651st meeting) to secure a compromise in connection with article 51 and make sure that the Commission, without using the terminology, endeavoured to exploit the content of article 19 to the full.

12. With regard to article 50 A, the expression "at the request and on behalf of an injured State" should be replaced by the formulation "at the request, on behalf and in place of an injured State", so that an injured State which had requested another State to take countermeasures could not keep back the possibility of itself resorting to countermeasures again or later on. It was important to make sure, in connection with multilateral countermeasures and, by analogy, that the *non bis in idem* rule applied so as to prevent a proliferation of sanctions for one and the same breach, something that would amount to overlooking the element of proportionality which should apply in that case too.

13. Lastly, for the reasons explained by Mr. Momtaz (ibid.), he was wholly in favour of deleting article 39, which contributed nothing but could well add to the confusion and create problems of interpretation.

14. Mr. CRAWFORD (Special Rapporteur), said he wished to confirm what he had stated in the footnote to paragraph 399 of the report, namely, that in citing certain examples he did not judge or intend to make the Commission judge the substance of the measures taken in those situations. The fact of citing particular examples of measures—countermeasures, retortion or others—did not imply any judgement of their merits. They were simply examples of State practice which sought to set the context of the situation.

15. Mr. PELLET congratulated the Special Rapporteur on his *tour de force* and, in keeping his promise, in succeeding at the current session in finishing the review of the entire draft when he had made the risky decision of leaving the most controversial aspects, namely countermeasures, crimes and the relationships between the law of responsibility and the law of the Charter of the United Nations, to the end. It was nonetheless true that it was preferable for States to be able to express their reactions for the last time in the Sixth Committee and, in order to do so, for them to have an idea of the solutions—whether or not they were compromises—towards which the Commission was headed. However, the Special Rapporteur should perhaps have started with that and concluded by discussing the more technical questions. The Drafting Committee would, in any event, have to take its time, since it was at the next session, not the current session, that the Commission would be adopting the final draft.

16. In terms of substance, it should be noted that the Special Rapporteur had apportioned the meanest share to the question—one which was fundamental—of the relationship between the draft articles and the Charter of the United Nations, or more generally between the law of the international responsibility of States and the law of the maintenance of international peace and security. It had been done in article 39, which appeared in Part Four. He was in no sense opposed to the idea behind the draft

[3] See 2650th meeting, footnote 4.

article, but could not fail to note that the draft on State responsibility, on the one hand, and the Charter, on the other, were two different things.

17. At most, the Charter of the United Nations could be considered as enunciating primary rules, a breach of which entailed, as did any breach of primary rules, the responsibility of the State to which the breach was attributable, whereas the draft under consideration was or should be concerned only with the secondary rules—on the understanding conversely, that it did not mean the Charter mechanisms could not, in some cases, be of assistance in the implementation of responsibility. But they would only be fortuitous cases, for the prime function of the United Nations was to ensure not respect for international law but, chiefly and in all cases, to maintain international peace and security. The least one could say was that the relationship between those two bodies of rules was extremely complex, as a number of States, particularly the United Kingdom, had emphasized. Contrary to two opinions expressed in the course of the meeting, he did not believe that it was a reason to evade the problem. He nonetheless thought that more prudence was called for than had been displayed by the Special Rapporteur in the formulation of article 39, which was, all in all, very restrictive and separated those two bodies of rules only from a very special standpoint, that of the hierarchy of rules, something which, as Mr. Tomka had said, would be of value only if the draft articles were to take the form of a treaty—and that, in his view, seemed quite pointless.

18. Article 39 was restrictive in two respects. First, the saving clause was confined to the "legal consequences of an internationally wrongful act", and he failed to see why. The Charter of the United Nations could also, and assuredly did, have an impact on the origin of an internationally wrongful act, for example, through the creation of obligations stemming from the adoption of the resolutions of the General Assembly, the Security Council or other United Nations bodies. Secondly, it was confined to Article 103 of the Charter, and again he failed to see why. In the 1969 Vienna Convention, such a limitation, referred to in article 30, paragraph 1, was conceivable, for Article 103 of the Charter, like indeed other comparable provisions of the constituent instruments of international organizations, related to the hierarchy between treaties: the Charter was a treaty and the Convention was also one. But that did not apply in the current instance. Why Article 103 of the Charter and not another article? The important thing was that the law of responsibility, on the one hand, and the law of the Charter on the other, were on two completely different planes. It would be enough simply to word article 39 so as to read: "These draft articles are without prejudice to the Charter of the United Nations." It would be dangerous to mention Article 103 alone, for there were risks of incompatibility in other respects.

19. Again, as far as Part Four was concerned, he endorsed articles A and B proposed by the Special Rapporteur, but did not share his position regarding diplomatic protection. It seemed necessary for the draft to include a provision specifying that the draft did not deal with diplomatic protection. Such a step would considerably simplify the Commission's work whenever, in questionable provisions, the Special Rapporteur or other members wished to draw the Commission into the field of damage caused to non-State entities—indirect damage. In that case, it was the law on diplomatic protection that applied. The "without prejudice" clause concerning diplomatic protection should appear in Part Two.

20. He endorsed article 37 as proposed by the Special Rapporteur, with one small reservation: the adverb "exclusively" seemed inappropriate. In fact, other rules of international law might well apply partially to a particular kind of wrongful conduct, but, as for the rest, the law on responsibility applied. Moreover, the adverb in question was not compatible with the expression used in article 37: "where and to the extent" and he would therefore like it to be deleted.

21. With reference to chapter III of Part Two, in other words, to article 51 and, first of all, the question of crimes, he reaffirmed that he upheld the concept of an international crime of the State, as did other members of the Commission. In his opinion the word "crime" was perfectly suitable to designate particularly serious breaches of international obligations essential for the protection of the fundamental interests of the international community as a whole, or perhaps particularly serious breaches of norms of *jus cogens*. He also believed that the word did not have in international law the penal connotation it had in internal law. Lastly, he believed that the word was suitable precisely for the reasons that Mr. Kabatsi had given (2651st meeting) in order to reject it: it cast opprobrium on the State in question, and rightly so. A genocidal State was a criminal State. It was not embarrassing to say so even though the consequences of such criminality were not consequences of a penal type. Nevertheless, he noted with satisfaction that in actual fact the Special Rapporteur had been "converted to crime", by following more or less the same route as his predecessor, Mr. Arangio-Ruiz. Both had started by loudly proclaiming their opposition to the concept of crime as theorized in article 19. Then, both had come to recognize that it answered an absolute need for a quite simple and obvious reason: it was impossible to deal in the same way with the crime of genocide, a crime that could be committed by a State, and with a regrettable but ultimately banal breach of a bilateral or multilateral trade treaty—a "delict" within the meaning of article 19—and personally he would definitely not regret the removal of the term "crime".

22. The difference between the previous Special Rapporteur and the current one was that the latter was more careful in revealing his conversion. Knowing that he would obtain neither consensus within the Commission nor approval from most of the major Western States which tried to dictate their law in the Sixth Committee, and often succeeded in doing so, the Special Rapporteur had cheerfully sacrificed the word "crime" but had kept the thing, going so far as to improve somewhat the legal regime for what the draft had called a "crime" and which had now become a nameless concept, if not a somewhat laborious and not quite accurate circumlocution, namely "serious breaches of obligations owed to the international community as a whole". The formula was not quite exact, because it was not enough for an obligation to be "owed to the international community as a whole" for the rules set out in chapter III to apply. It was to be, or should be—and that was precisely what the draft failed to do—concluded that those obligations were regarded as essential

by that selfsame "international community as a whole", according to the selfsame system as the one applicable to the determination of *jus cogens*. The rule in question should also be one that protected the fundamental interests of the international community, and not just any interest. However, that idea was better expressed in article 19, paragraph 2, as adopted on first reading, than in the rather pallid and ultimately much broader formulation now proposed. Actually, the Special Rapporteur was considerably opening up a notion that he (Mr. Pellet) had always deemed necessary, but had also deemed it necessary to confine to breaches of truly fundamental obligations. Moreover, the Special Rapporteur rightly insisted on the fact that the breach should be serious. In that regard, for his part he did not very much like the adjective "flagrant", which raised the question of proof.

23. By combining the text adopted on first reading and the new text proposed, it should be possible to arrive at a very satisfactory solution consisting, as other members of the Commission had proposed, in detaching paragraph 1 from new article 51 and turning it into a separate article, placed at the head of chapter III, and probably not in Part One. In that regard, he agreed with the Special Rapporteur that the definition of a crime was useful only to draw the particular consequences thereof: it was enough for it to appear in that chapter. The article should be drafted more or less as Mr. Economides had proposed (ibid.), but with one important difference. He was strongly opposed to reproducing in the article itself the examples in article 19, paragraph 3, for examples had no place in a codification text. The simplest and most satisfactory course would be to use a formulation of the kind: "This chapter applies to international crimes of the State", and then give the definition of those crimes. If the word "crime" really was to be done away with, despite the fact that it had been consecrated for a quarter of a century, it would be possible to use a formulation such as: "This chapter applies to responsibility incurred by a serious breach by a State of an international obligation considered by the international community as essential for the protection of its fundamental interests", or, to simplify, "… of an obligation essential for the protection of the fundamental interest of the international community", or again "… of the peremptory norms of general international law". They were nonetheless, fundamental drafting problems. In any event, he feared that with the vague formulation proposed by the Special Rapporteur, the Commission would apply a regime of aggravated responsibility to internationally wrongful acts which did not warrant such turmoil. The formulation of article 19 was more precise but, paradoxically, more prudent.

24. In the matter of consequences, first of all he did not regret the disappearance of article 41, which had been superfluous. Secondly, he was not opposed to the idea that crimes could entail an obligation to pay aggravated damages, although he had been vigorously against it during the consideration of article 45. However, he did not believe it essential to use the adjective "punitive", which had a pointlessly provocative penal connotation. In his opinion, it would be sufficient to use the second expression placed in square brackets in article 51, paragraph 2, namely "damages reflecting the gravity of the breach". Moreover, in the French version in any event and doubtless in the English version, the phrase was unsound: one could not say that the breach "entails … damages"; at best, it entailed an obligation to pay damages. It was not simply a drafting problem, but something that led to a somewhat more serious problem. Actually, he did not believe that such aggravated damages were inevitable and payable in all cases. In the case of crimes they were a possibility (totally ruled out for other breaches) when necessary for full reparation. In fact, it was rather surprising that aggravated damages should be mentioned immediately, as early as paragraph 2, as it would be more suitable to transfer the beginning of paragraph 2 to the new article that ought to be drafted on the basis of paragraph 1 and to place the possibility of any aggravated damages at the end of article 51, or in a separate article.

25. Subject to more thorough consideration, unlike other members he thought that paragraph 3 and its three subparagraphs were acceptable as proposed. On the other hand, he was greatly hostile to paragraph 4, more particularly to qualifying any additional consequences as "penal or other". He would accept a saving clause stating that there might be other consequences, but in no case could he accept the idea of penal consequences. In that regard, he noted that the Special Rapporteur had discussed at length the issue of the penalty payments provided for in article 228 of the Treaty establishing the European Community (revised numbering in accordance with the Treaty of Amsterdam). For his part, he very much doubted whether such penalty payments were genuinely penal in character. Then, and above all, as the Special Rapporteur himself acknowledged, such a thing did not exist in international law. Penal sanctions were not inflicted on States—at least in context of the law of international responsibility. While criminal States like Nazi Germany or Iraq, which had aggressed a sovereign State, had been "punished", they had been punished not in the context of the law of international responsibility but that of the "law of war" or of the "law of the Charter of the United Nations". Article 39, provided it was properly drafted, was enough or should be enough. In the current state of the development of general international law, there was no penal State responsibility and the wording of article 51, paragraph 4, was very dangerous in that it implied the opposite. If, as the Special Rapporteur contended in paragraph 411 of the report, it was necessary to preserve the possibility of future developments, it was enough to say that paragraphs 2 and 3 were without prejudice to additional—without any other further qualification—consequences that the breach produced an international law. That left every possibility open for the future. For the moment, and doubtless for a long time to come, the international responsibility of the State was not penal, and hence the wording of paragraph 4 was formidably misleading.

26. Admittedly, paragraph 4 could be read otherwise and any penal consequences could be considered as constituting consequences not for the State itself but for the individuals through whom the State acted. In that case, he would agree, for he continued to think that one of the main consequences of the concept of an international crime of the State (or a serious breach by a State of an international obligation considered by the international community as essential for the protection of its fundamental interests) was that, in that instance, the State became transparent. In that regard, he concurred with Mr.

Gaja's comments (2650th meeting): it meant that the State's leaders were no longer covered by their immunities and they could be made directly and personally responsible for wrongful acts that they had committed or caused to be committed in the name of the State. The State façade vanished, because they were very special breaches that constituted crimes. But that idea, which was extremely important and was a consequence of a "serious breach…" that was rapidly gaining ground, should be expressly enunciated in a formulation of the kind: "such a breach entails the international responsibility of the agents of the State who commit the internationally wrongful act". He was very attached to that idea, which lay at the core of the debate, and would be ready to request a vote for it to be included.

27. Chapter III had two gaps. The first concerned the initiation of an *actio popularis* as a result of the commission of a crime, in the spirit of the celebrated *dictum* of ICJ in the *Barcelona Traction* case, which went back on its position four years earlier in the *South West Africa* cases. Naturally, the commission of a crime or of a "serious breach …" could not in itself constitute an autonomous basis for competence for international jurisdictions and courts and the draft was not concerned with the competence of the courts. But if such competence did exist, the perpetration of a crime gave all members of the international community an interest to act, and it should be specified in the draft. The second gap was a problem the Commission had already discussed at length in connection with articles 43 to 45 adopted on first reading. The existence of a crime had an impact on the choice of the mode of reparation. In particular, the directly injured State could not in that case renounce *restitutio in integrum* for compensation, as in doing so it would use rights that did not belong to it but belonged to the international community as a whole. Again, above all the injured State could not, for the same reason, renounce reparation, whereas it could easily do so in the case of a straightforward breach. It was a fundamental consequence and one that the draft articles could not ignore. Suppose, for example, that a State that was a victim of aggression lost half of its territory. It was totally inconceivable that it could request the international community to give up any action. The rule prohibiting aggression was a rule that protected the interests of the international community as a whole.

28. It was regrettable that the question of countermeasures was dealt with in two separate articles, articles 50 A and 50 B. The Special Rapporteur expended boundless ingenuity to try and convince members that two separate cases were involved. Personally, he was still convinced that it was a marginal distinction and basically quite artificial. The common and fundamental point of departure was that the breach related to a rule of essential importance to the international community as a whole and that explained and justified the right of reaction that lay with all States members of that community. Accordingly, regardless of whether there was a specially injured State, the right of reaction was the same. The other States did not intervene under article 50 A "on behalf of" the injured State: they always did so as members of the international community whose interests were under threat. In addition, he was not convinced by the example of the case concerning *Military and Paramilitary Activities in and against Nicaragua*, to which the Special Rapporteur referred at some length in paragraph 400 of the report. The point at issue had been not the law of the Charter of the United Nations properly speaking, because of the United States reservation, but the "law of the maintenance of peace", which was quite clearly separate from the law of the international responsibility of States. That rapprochement made by the Special Rapporteur in emphasizing yet again the *Gab Ź kovo-Nagymaros Project* case seemed very artificial. In his opinion, it did not involve the law of State responsibility. For all those reasons, he very seriously questioned the cogency of a provision like article 50 A, at any rate as a completely separate hypothesis from the one evoked in article 50 B.

29. On the other hand, he was not unaware that the modalities, or more accurately the purpose, of such reactions differed, depending on whether the State was directly injured or not, in the sense that only the State or States specially injured could obtain reparation, within the meaning of Part Two of the draft, for themselves. But that only came in at a later stage. Initially, the injured State reacted as a member of the international community whose interests were under threat. Subsequently, if it had suffered personal individualizable damage, it was then entitled to demand all the consequences set out in chapter II of the draft. In his view, articles 50 A and 50 B contained the essential elements to be taken into consideration, but they were not presented from the proper standpoint. First, the underlying idea should be that all States, in a situation of that kind, could react; secondly, it should be stated that they could do so, naturally, within the limits generally fixed for countermeasures to be lawful, bearing in mind that principle of overall proportionality, in other words, the more serious the breach, the higher the threshold of reaction could be; thirdly, it should be indicated that those reactions could, in all cases, aim at cessation of the breach, guarantees of non-repetition—which should be mentioned—and reparation in the interest of the victims, and not of the victim States; and fourthly, it should be indicated either at the end of a single article or in a separate article that, in addition, the directly injured State as defined in the draft could directly and personally claim reparation within the meaning of Part Two. In that way, the draft that the Commission would be adopting on second reading would be a very marked advance over the current draft, regardless of whether or not the word "crime" was kept. In short, what did the word matter provided the thing remained? Even though the draft proposed by the Special Rapporteur was far from perfect, it did pinpoint better the consequences of a crime than had the draft adopted on first reading, and if the Special Rapporteur continued to display the same broad-mindedness, the Drafting Committee could still improve the text considerably.

30. He therefore endorsed referral to the Drafting Committee of the draft articles under consideration and also of the missing draft articles he had briefly spoken about. He could have gone into those at much greater length, for their importance warranted much more thorough-going discussion than was the case in the current circumstances.

31. Mr. CRAWFORD (Special Rapporteur) said that the situation dealt with in article 50 A was completely different from the one envisaged in article 50 B. It covered a case in which the obligation breached was owed to a

group of States or in which a State of that group was specially injured. The other parties to the obligation could take collective countermeasures on behalf of that injured State and to the extent that that State agreed. Article 50 A was not concerned with obligations owed to the international community as a whole. If one followed Mr. Pellet's interpretation, article 50 A could be deleted and the conclusion would be that the only situations in which countermeasures could be taken by a State other than the injured State, within the meaning of article 40 bis, paragraph 1, were those covered by chapter III.

32. Mr. PAMBOU-TCHIVOUNDA said that Mr. Pellet's highly condensed statement called for three comments. To begin with, there was a contradiction between the act of engaging in a collective reaction on behalf of the international community as a whole and the act of demanding reparation on behalf of the victims. Secondly, the demand for reparation on behalf of the victims seemed very much like a kind of diplomatic protection exercised by the international community as a whole. Thirdly, and perhaps more importantly, the notion of an organized reaction by the international community as a whole seemed to denote countermeasures. Moreover, one might well wonder whether the interest of the international community as a whole was a concept that had been established once and for all. When one State or another said it was acting in the interests of the international community, it seemed legitimate to ask it to prove its argument. Third-party arbitration might therefore prove necessary and the problem of arranging a dispute settlement mechanism therefore seemed to arise as acutely in the field of serious breaches as in that of countermeasures.

33. Mr. PELLET responding to the Special Rapporteur, said that, if article 50 A did indeed cover a separate situation, it should appear in chapter II, on countermeasures. Article 50 B, on the other hand, had its proper place in chapter III.

34. As to Mr. Pambou-Tchivounda's comments, collective countermeasures were of course subject to all the limits defined for countermeasures in general in chapter II. In that regard, the draft articles on responsibility could in no case justify recourse to armed force.

35. Furthermore, in the case of direct victims of a serious breach owed to the international community as a whole, such as genocide, it was conceivable in the case of Rwanda, for example, that the international community could demand from the Rwandese Government reparation for the victims and that States could do so individually in ICJ if there was a jurisdictional link. As for the problem of the determination of the existence of a crime, the draft should contain a provision similar to article 66 of the 1969 Vienna Convention. The Commission had never departed from that solution, and had even said that it would consider it again, and it could very easily do so at the next session.

36. Mr. GOCO said that, if States did not all react to serious breaches of obligations owed to the international community as a whole, such breaches were generally brought to the attention of the United Nations, which adopted resolutions and, implicitly, did so in the name of the States members of the international community. It was not necessary for States to react individually.

37. Mr. ECONOMIDES, noting that Mr. Pellet had placed an interpretation on articles 50 A and 50 B that the Special Rapporteur had not accepted, said he would like some clarification in that regard. His own interpretation of article 50 A was that it covered both serious breaches and also multilateral breaches in which a State was directly injured. In the case of serious breaches, the other States could react, but on behalf of and at the request of the injured State; it was that State which triggered that reaction. Article 50 B, on the other hand, was concerned only with serious breaches, there was no directly injured State and all States could react in their own name. He asked the Special Rapporteur whether that was how the two provisions were to be construed.

38. Mr. SIMMA, speaking on a point of order, pointed out that at the request of the Chairman, the Commission had decided, in the light of the little time available, not to engage in a discussion of the statements by members. He asked the Chairman whether the Commission had decided to give up that approach.

39. The CHAIRMAN said that he did not wish to prevent members from expressing their views, but he hoped that they would bear in mind the need to show some discipline.

40. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides's interpretation was the right one: article 50 A concerned countermeasures taken on behalf of an injured State because both the State taking them and the injured State were parties to an obligation that was in their common interest. Article 50 B concerned obligations owed to the international community as a whole and was confined to serious breaches; it applied only when there was an injured State within the meaning of article 40 bis, paragraph 1. The two articles overlapped because, obviously, if the obligation breached was owed to the international community as a whole and there was an injured State, article 50 A would apply. In that case, it was the injured State that made the decision. For example, in the case of Iraq's invasion of Kuwait, an obligation owed to the international community as a whole had been breached and Kuwait had been an injured State within the meaning of article 40 bis, paragraph 1; hence, it had been for that State to decide on countermeasures. In such a case, article 50 B could be considered as prevailing over article 50 A, and the question might be discussed, but it was clear that article 50 A was much broader in application.

41. As to the place for those two provisions, when an article that he was proposing replaced an article that already existed, it had the same number as that article. It might be a source of confusion, but since the draft had been restructured, it did not in any way prejudge the part of the draft in which it would appear.

42. Mr. ADDO said that the Special Rapporteur had done an admirable job in endeavouring to solve the problems posed by State crimes and obligations *erga omnes*. Considering that the Special Rapporteur, like himself, had been opposed to the inclusion of crimes, the proposals made in chapter IV of the report were praiseworthy. They were a response to the current needs of the international community, which had never been defined but taken for

granted, rather than a codification of rules from case law and State practice. As the Special Rapporteur noted, despite the substantial debate surrounding article 19 and the notion of international crimes of States, practice was almost entirely non-existent.

43. He agreed with the general thrust of chapter IV of the report. Compromises were proposed and should satisfy both the ardent proponents of the inclusion of the notion of State crimes and also the opponents. Personally, he did not think that a reference to crimes must be made at all costs, at the risk of pointless disputation, since the concept itself had been captured.

44. A feature of international crimes of States was that all States members of the international community, even if not directly injured by the breach, had the right to demand cessation by taking countermeasures, something that was provided for in the draft articles proposed by the Special Rapporteur. Another feature was the duty of States to refrain from condoning the breach and from recognizing the resulting situation as valid. That too was being proposed by the Special Rapporteur. On the whole, chapter III of the draft, as proposed, should be adopted and referred to the Drafting Committee. However, paragraph 3 (*c*) and paragraph 4 of article 51 should be deleted. They did not seem necessary and were indeed superfluous.

45. Lastly, he endorsed the Special Rapporteur's proposals for the general provisions in Part Four.

46. Mr. OPERTTI BADAN said that he appreciated the arguments developed in the course of the plenary meeting, particularly those of Mr. Pellet, which in his opinion deserved to be read very carefully. It was apparent from paragraph 369 of the report that the Special Rapporteur had discharged his mandate, since he had simply obeyed the wishes of the Commission and, making article 19 disappear, had not abandoned the legal interests it had protected. He had simply done away with the wording, but not the content.

47. The Special Rapporteur had said that the role of the general law of State responsibility had been secondary in the field of obligations owed to the international community as a whole. But the role did undeniably exist. It was the very essence of the question that should be raised, namely, to what extent did the interests of the international community belong in the field of State responsibility and to what extent were they part of the system of the maintenance of international peace and security? There was a borderline and it should be clearly defined.

48. It followed from the Commission's work that it was difficult to accept the concept of individual countermeasures, as opposed to that of collective countermeasures, because it was difficult to legitimize the conduct of the injured State vis-à-vis the responsible State, to assess the proportionality and to determine all the consequences that ensued. The current debate had brought out one aspect that could not be overlooked: when the legal interests protected by the whole of the international community were attacked, some States were given a kind of delegation of authority so that, in the framework of ad hoc alliances, they defended the values of that community, outside the institutional mechanisms for the maintenance of international peace and security. He wondered whether such institutional mechanisms could be strengthened in that way. He asked whether it was not more of a method of legitimizing not only individual but also collective or partly collective conduct on behalf of the international community, an ill-defined notion generally encompassed in that of an international organization, although they were two different things.

49. Some specifics were called for. Collective countermeasures were not designed as a solution to the shortcomings of the competent international organizations. Just as individual countermeasures were an exception to the normal operation of international law, collective countermeasures would be taken only when the normal mechanisms did not operate. Such collective countermeasures, taken in the name of international solidarity, should leave an option for resort to the institutional mechanisms. It was something that needed to be said in the text, for otherwise the two fields would be divorced—a divorce that was difficult to accept.

50. The issue of proportionality also arose in regard to collective countermeasures. But proportionality was more difficult to assess when the legal interest to be protected was universal and when more than one actor therefore stepped in to defend it. He therefore agreed with Mr. Pellet that one of the problems of article 19 had been the use of examples of certain legal interests—the environment, the prohibition of genocide, and so on. However, in his opinion, the idea that those values were not examples and that they were the very substance of the article should not be given up.

51. Again, he agreed with Mr. Pellet on the subject of reparation. Reparation should not be seen as the counterpart of a repressive collective action but as a means of offering reparation to the victim—the international community in the current instance—viewed as a value and not as an active subject.

52. The Special Rapporteur had said no firm conclusions could be drawn from practice as to the existence of a right of States to resort to collective countermeasures. Accordingly, the draft articles were ones which the author himself said were based on uncertain foundations. In other words, the Commission was engaged in progressive development, but was not in a position to rely on established practice. His own conclusion from his political experience was that the type of rules that would emerge from that work would be very difficult to accept. Delegating power to a group of countries that would act outside the institutional framework to defend universal common interests would be very difficult for State legislative bodies to accept.

53. In paragraph 411 of the report the Special Rapporteur spoke of future developments, but for his own part he was quite pessimistic about them. The work on reform of the Charter of the United Nations showed how difficult it was to reorganize international life by bringing in a new balance between legal relations and power relations. His experience at the head of the General Assembly for a year did not allow him to believe that the reform of the Security Council would be successful. The ideas seemed therefore, to be that, if it was not possible to develop a political system to protect the integrity of States and the

international community's legal interests, it could be done through the law of State responsibility. One might well ask whether it was the right method.

54. Mr. GALICKI said that chapter III of Part Two of the draft, entitled "Serious breaches of obligations to the international community as a whole", as proposed by the Special Rapporteur, was in fact a compromise solution to the serious problems faced by the Commission at its fiftieth session, when it had considered the distinction between international crimes and international delicts proposed in article 19. Since no satisfactory conclusion had been reached, the Special Rapporteur was now proposing a *sui generis* fragmentation of the problem through the development in the draft articles of such key notions as obligations *erga omnes*, peremptory norms of general international law and, finally, serious breaches of obligations to the international community as a whole. The Special Rapporteur's general approach in order to avoid direct development of the concept of international crime as belonging in fact to the realm of the primary rules seemed acceptable. Instead of using the questionable term "international crimes" and attempting to define it in a narrower or broader way, it seemed much more useful to concentrate in the draft articles on the consequences that might ensue from serious breaches of international obligations.

55. The proposed chapter III nonetheless called for some criticism with regard to both form and substance. First, the expression "serious breaches" in the title of the chapter was different from the formulation used in new article 51, paragraph 1, namely, "serious and manifest breach". The use of such general terms would call for a more detailed definition, such as the one in articles 46 and 60 of the 1969 Vienna Convention.

56. Secondly, although the only article in the new chapter, article 51, was entitled "Consequences of serious breaches of obligations to the international community as a whole", in the article itself those consequences were practically limited to the obligations of the State responsible for the wrongful act or of all other States. The text's silence regarding the other possible consequences, in particular those relating to the rights of "other States", could not be justified by the general "excuse" clause contained in paragraph 4 of article 51. While article 50 B, on countermeasures in cases of serious breaches of obligations to the international community as a whole, had rightly been placed in chapter II of Part Two, it seemed that such an important consequence of serious breaches as countermeasures should at least be mentioned in chapter III of Part Two. Chapter III generally gave an impression of being too limited and unbalanced compared with the other chapters in the draft.

57. The Special Rapporteur's proposed articles 50 A and 50 B were intended to complete the set of provisions on countermeasures in chapter II of Part Two bis. Nevertheless, some loopholes still existed, such as the lack of a formal possibility for a State belonging to a group of States to which the obligation breached had been owed of taking countermeasures at the request and on behalf of an injured State—as provided for in article 40 bis, paragraph 1.

58. It seemed from article 50 B, paragraph 1, that the purpose of applying countermeasures should be extended not only to obtaining cessation of the breach but also obtaining assurances and guarantees of non-repetition. In the case of reparation, the term "victims", which had some criminal law connotations, should be avoided and replaced by, for instance, "those affected by the breach".

59. Similarly, the expression "collective countermeasures" used by the Special Rapporteur in his report could be replaced by "multilateral countermeasures" which did not suggest any institutional or organized form of reaction.

60. In paragraph 391 of the report, the Special Rapporteur gave a number of examples in which States reacted against breaches of obligations *erga omnes*, recalling among others, a case in 1980 when the Polish Government had imposed martial law and subsequently undertaken measures in breach of fundamental human rights, the countermeasures taken by the United States had included immediate suspension of landing rights of Polish LOT Airlines planes in the United States, rights which the company had enjoyed under a bilateral agreement. Poland had demanded arbitration proceedings on the basis of the agreement, which had in the meanwhile terminated. The United States had agreed, and that could have given rise to an interesting case in which the question of the legality of countermeasures in a situation of that kind would doubtless have been raised. However, that had not been the case because, after a lengthy procedure in establishing an arbitration tribunal, Poland had dropped the case and a new bilateral air services agreement had been concluded with the United States.[4]

61. The Special Rapporteur was also proposing provisions for Part Four of the draft, entitled "General provisions". The title did not correspond with the content of the part in question, since they were mostly saving clauses, and the part could be entitled "Final provisions" or "Final clauses". If the Commission decided that the final product of its work on State responsibility should take the form of a treaty, some provisions would have to be added to the draft, for instance, on non-retroactivity. On the other hand, in that case, article 39 would be pointless, since it simply reflected the priority of obligations under Article 103 of the Charter of the United Nations.

62. He congratulated the Special Rapporteur on successfully finalizing the preparation of the draft articles on responsibility. He was convinced that the draft articles should be referred to the Drafting Committee as soon as possible.

63. Mr. CANDIOTI said that, in his opinion, the draft articles submitted by the Special Rapporteur made it possible to move ahead on the question of "international crimes" of States. Regardless of the final decision on the "penalist" terminology used in the draft articles as adopted on first reading, the main point was that the Special Rapporteur's work in recasting the articles, the existence of a category of particularly serious violations by a State of fundamental obligations to the international

[4] See the Air Transport Agreement between the Government of the United States of America and the Government of the Polish People's Republic, signed on 19 July 1972 (*United States Treaties and Other International Agreements*, vol. 23, part 4 (1972), p. 4269).

community as a whole was still recognized and it was clearly accepted that special rules should apply to that category of breaches as far as the consequences of responsibility were concerned.

64. That category of breaches, therefore, was constituted by the failure to perform obligations generally recognized as being universal in scope and of an intangible content, in respect of which all States had a legal interest, even if they were not directly injured by the breaches. Examples were to be found in the prohibition of the use of force, genocide, enslavement or respect for basic human rights and humanitarian law. In that connection, the Commission should move cautiously in the light of the development and the current structural limits of the international community. As Mr. Brownlie had said, introducing the rule of law at the international level depended to a large extent on the institutional progress of international society, and not only on normative instruments. From that standpoint, the establishment of the International Criminal Court to judge international crimes by individuals, whether or not they were acting as agents of the State, showed that it was possible to move along that path.

65. As to the matter under consideration, the Special Rapporteur's proposal to assign a new chapter to the consequences of serious breaches of obligations owed to the international community as a whole and to incorporate rules giving a substantial and more precise content to those consequences seemed very important. In that respect, the Special Rapporteur's analysis and new article 51, paragraph 2, which provided for punitive damages as a special consequence, were relevant.

66. He also endorsed the idea expressed in paragraph 411 of the report and reflected in article 51, paragraph 4, that it was necessary to reserve to the future such additional consequences, penal and other, which might attach to internationally wrongful conduct by reason of its classification as a crime or as a breach of an obligation to the international community as a whole. Equally appropriate were the distinctions the Special Rapporteur drew between the various possibilities of reaction by other States to the responsible State for that category of breach, depending on whether the main victim of the wrongful act was a State or the population of the responsible State or was not even identifiable.

67. He therefore supported the suggestion by Mr. Simma and other members to incorporate in the chapter on States entitled to invoke responsibility the rule set out in the provision in the footnote to paragraph 413 of the report and to turn it into a separate article that would provide in subparagraph (*a*) for guarantees of non-repetition.

68. The way in which the Special Rapporteur had dealt with countermeasures for that category of breach also helped to clarify the topic, but did not overlook the fact that resort to countermeasures, whether individual or multilateral, would be a solution that would be tolerated only to the extent that States had no other lawful and effective means of bringing about cessation of the wrongful act and ultimately obtaining reparation, and that in no case should the measures adopted include the threat or use of force, which were prohibited under the Charter of the United Nations.

69. A number of interesting ideas had been put forward in the course of the debate on the formulation of the draft articles proposed by the Special Rapporteur, and the Drafting Committee would definitely take them into account. He particularly endorsed Mr. Economides's proposal to turn article 51, paragraph 1, into a separate article to characterize infringements as "serious, established and manifest breaches" of obligations of essential importance to the international community as a whole, in accordance with paragraph 2 of article 19. The more obvious examples of such breaches could be listed, for illustrative purposes, in the commentary.

70. Lastly, an interesting proposal had been made by Mr. Dugard, who would like to include in the Commission's long-term programme of work a study of international crimes of States. He endorsed the content and the wording of the general provisions proposed by the Special Rapporteur for Part Four.

The meeting rose at 12.45 p.m.

2653rd MEETING

Tuesday, 8 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. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, 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 (*concluded*)

1. Mr. AL-BAHARNA drew attention to paragraph 368 of the third report of the Special Rapporteur (A/CN.4/507

[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).