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Summary record of the 2653rd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

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).

and Add.1–4), in which the Special Rapporteur specified the two main groups of issues dealt with in chapter IV: the responsibility of a State towards a group of States, and the residual and saving clauses envisaged for Part Four of the draft. Paragraph 369 recalled that, following an extensive debate on the issues raised in respect of "international crimes" by articles 19 and 51 to 53 as adopted on first reading, the Commission had provisionally decided that "a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19".[3] It was in that context that the Special Rapporteur was submitting to the Commission articles 51, 50 A and 50 B.

2. Article 51 had attracted sharp criticism, especially from members who did not seem to be convinced that article 19 would not play any role in chapter III of Part Two. In the hopes of gaining acceptance for a less controversial provision, he was therefore proposing that article 51 be redrafted. In keeping with the comments by Mr. Dugard, supported by Mr. Economides, on the need to retain in article 51 the concept of an international crime, and building on Mr. Simma's reference to article 19, paragraph 2, article 51 would be split into two: the first, article 51, amounting to a definition of serious breaches of an obligation to the international community as a whole, and the second, article 51 bis, on the consequences of serious breaches of such obligations.

3. In his reformulation, article 51 would read:

> "This chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an international obligation essential for the protection of fundamental interests of the international community as a whole. Such a breach may constitute an international crime under contemporary international law."

Article 51 bis would be worded:

> "The serious and manifest breach defined in article 51 entails:
>
> "1. For the State responsible for the breach, all the legal consequences of any other internationally wrongful act and, in addition, punitive damages or any other damages reflecting the gravity of the breach.
>
> "2. For all other States, the following further obligations:
>
> "(*a*) Not to recognize as lawful the situation created by the breach;
>
> "(*b*) Not to render aid or assistance to the State which has committed the breach in maintaining the situation so created.
>
> "3. Paragraphs 1 and 2 are without prejudice to such further penal or other consequences that the breach may entail under general international law."

4. In his proposal he had included in the definition contained in article 51 the principle of protection of fundamental interests of the international community as a whole and the concept of an international crime, with the addition of the word "may" before the word "constitute". As Mr. Dugard had said, in order to leave the door open to reconsideration in the future, the Commission should not abandon the concept of an international crime. The concept was kept alive, perhaps in name only, in his proposal, without entailing any criminal or penal consequences for the State as a legal person. Article 51 bis, paragraph 1, specified clearly the legal consequences of a breach in terms solely of punitive damages and referred to breaches, not to crimes. In addition, his proposal inserted the phrase "under contemporary international law" after the expression "an international crime" in article 51.

5. The reference to an international crime might not satisfy Mr. Economides, who would like the crime of aggression to be mentioned in article 51. But that article spoke of breaches, not crimes, and it would not be appropriate to refer there, or anywhere else in the draft articles, to aggression or the other crimes mentioned in article 19, paragraph 3. The crime of aggression should be left to the Security Council to deal with under Chapter VII of the Charter of the United Nations, subject, of course, to the right of self-defence which was open to the injured State itself and to other States that might assist the injured State individually or collectively. That right was accorded under the provisions of the Charter, and article 29 ter of the draft recognized it as one of the circumstances precluding wrongfulness.

6. The Special Rapporteur did not seem to reject the concept of crimes within State responsibility, for in paragraph 410 he affirmed that they were broadly acceptable, but only so long as they did not carry *a contrario* implications for other breaches which might not be egregious, systematic or gross. His own proposal bridged the gap, he believed, between an ordinary breach and a serious and manifest breach of such gravity that it culminated in or constituted an international crime, within the meaning of article 19, paragraph 2. The reference to international crime was supported by a number of members of the Commission, and a majority endorsed splitting article 51 in two. Article 51 might, however, need further discussion in the Drafting Committee and in the Commission at its fifty-third session.

7. Otherwise, he agreed with the Special Rapporteur's arguments in paragraphs 408 and 410 concerning the content of articles 51 to 53 as adopted on first reading, with his idea of consolidating those articles and with his inclination to do away with article 52. The replacement of the word "crime" by the more appropriate word "breach" in new article 51, paragraphs 3 (*a*) to 3 (*c*), proposed by the Special Rapporteur was understandable and necessary. Paragraph 3 (*c*) consolidated perfectly sub-paragraphs (*c*) and (*d*) of article 53 adopted on first reading. Unlike some members, he agreed with the principle of cooperation introduced in new article 51, paragraph 3 (*c*), but thought its implementation might require some form of coordinated procedure. New paragraph 4, was necessary in order to accommodate in the future the criminal or penal consequences of the breach under international law.

8. Articles 50 A and 50 B were acceptable on the whole, although it was noteworthy that they did not use the term

[3] *Yearbook . . . 1998*, vol. II (Part Two), p. 77, para. 331.

"collective countermeasures" that appeared repeatedly in paragraphs 386 to 390 of the report. The Special Rapporteur had elected to discuss under that rubric cases where States legitimately asserted a right to react against breaches of collective obligations to which they were parties, even if they were not injured States. However, the review of State practice in paragraphs 391 to 394 and 397 showed no clear evidence that the reactions of States described therein had been termed countermeasures. Some States, instead of relying on a right to take countermeasures, had asserted a right to suspend the treaty because of a fundamental change of circumstances. In other cases, States had asserted a right to take countermeasures, but their actual responses had fallen short of being countermeasures. No clear conclusions could thus be drawn as to the existence of a right of States to resort to countermeasures in the absence of injury in the sense of article 40 bis, paragraph 1.

9. Article 50 A clearly concerned countermeasures taken by a State other than the injured State under article 40 bis, paragraph 2, where such a State had a legal interest in the performance of an obligation, but did not indicate that the countermeasures could be taken by more than one State at the request of the injured State, even though such a request would most likely be addressed to more than one State. In the midst of an emergency, an injured State was unlikely to be in a position to lay down conditions. The phrase "subject to any conditions laid down by that State" was therefore unnecessary. Article 50 B, paragraph 2, should apply to article 50 A as well as to article 50 B, paragraph 1, and might require some coordinated procedure for implementing the necessary cooperation. As Mr. Brownlie had said, the Special Rapporteur should cite further examples of State practice in order to make articles 50 A and 50 B more acceptable to the Sixth Committee—or at least, less debatable there.

10. As to the proposed general provisions and saving clauses, new article 37, with the change of title, was acceptable, but either the word "or" or the words "the legal consequences" should be deleted. Article A was also acceptable, although the brevity of the title might be sacrificed for greater clarity. He experienced no difficulty with article B but would like to see the words "under general international law" added at the end. New article 39, on the relationship to the Charter of the United Nations, was preferable to the text adopted on first reading and took into account the view of former Special Rapporteur Arangio-Ruiz quoted in a footnote to paragraph 426.[4] He did not agree with other members that the article should be deleted.

11. Mr. BAENA SOARES congratulated the Special Rapporteur on his balanced and excellent chapter IV. Some provisions were being considered for the first time, meaning that the views of Governments had not yet been heard. As the Special Rapporteur pointed out, however, the Commission could always return to those provisions, and to others, if necessary, at its next session.

[4] G. Arangio-Ruiz, "Article 39 of the ILC draft articles on State responsibility", in *Rivista di diritto internazionale*, vol. 83, No. 3 (2000), pp. 747–769.

12. The far-reaching political consequences of some of the provisions would certainly be taken into account by the Sixth Committee of the General Assembly. He welcomed the fact that many members of the Commission had rightly expressed concern about the impact of sanctions on civilian populations. The provisions related to collective measures that were not of an institutional character, as the Special Rapporteur pointed out in paragraph 387 of the report. It was one more reason for displaying caution in the indispensable task that had been described as taming the beast, namely the beast of abuse of power. The more stringent the disciplinary rules on collective countermeasures, the better the Commission would have done its work. Everyone seemed to agree that the monster must be checked, not fed.

13. Caution had already been exercised during the elaboration of the articles and in the discussion in the Drafting Committee, but the concerns he had just expressed should continue to be kept in mind for future drafting work. Some members who did not at all approve of countermeasures, whether collective or not, and others who encountered difficulty with the concept, had agreed to discuss it, on the grounds that it was the only way of limiting the scope of such measures. Uppermost in everyone's mind was the crucial question that had divided the Commission in the past: it would now have to be addressed if the Commission was to finish its work. He agreed with those who considered that article 19 was justified and useful—those who preferred to call a spade a spade—but he could join with others who advocated compromise formulas, as long as the formulas truly promoted agreement and preserved the content of the concept in article 19.

14. A number of proposals had already been made, with laudable efforts by the Special Rapporteur and very useful contributions by Mr. Economides, which he endorsed. The Drafting Committee would, he hoped, find the appropriate solution, one that would be suitably rigorous and precise. Article 37 was useful and should be retained. It had its place in the draft, though perhaps in a different formulation, such as the one proposed by Mr. Pellet. In his opinion it was time to refer the draft articles to the Drafting Committee.

15. Mr. RODRÍGUEZ CEDEÑO said that the Commission's work on State responsibility, on the basis of the reports by the Special Rapporteur and his predecessors, went far beyond codification and began to attain the progressive development for which the Commission was bound to strive when appropriate and, above all, possible. Progressive development, however it was defined, should focus on the general behaviour of States, not only of those in favour of such development but also those against it, as they often represented a substantial majority that the Commission could not afford to overlook.

16. The Special Rapporteur had suggested that consensus was the best way forward; but such consensus should take account of all the concerns that had been expressed. It should be clearly recognized that, even if consensus was achieved on the basis of agreement on certain criteria, there was no guarantee it would be accepted by States. The Commission should therefore show caution in reaching its conclusions.

17. The proposed draft articles avoided the use of the word "crime". That could, however, by no means imply a disregard for the notion of an international crime, which was still closely tied in with a specific category of international obligations that should be governed by a particular regime.

18. As the Special Rapporteur had said, agreement should be reached concerning article 19. There was no question of imposing it, still less of deleting it, but an acceptable formula should be found that would recognize the existence of fundamental obligations and the importance to be attached to their breach, especially in the most serious cases, which should therefore entail, at the very least, well-defined consequences. The obligations he had in mind—which should be defined in Part Two of the draft and should, of course, take into account the thrust of article 19—were those it was in everybody's interest to respect. Any State should be able to insist on such respect and, at the very least, require cessation of the breach. That did not mean, however, that such interest was unlimited, since it differed from that of an injured State, particularly if that State had suffered material damage.

19. New article 51 was essentially a revision of articles 51 to 53. Paragraph 1, which defined the scope of application, should, as Mr. Pambou-Tchivounda had said, become a provision standing on its own, since the text did not correspond to the title of the draft article. Paragraph 2, which provided for punitive damages, supplemented the earlier text which, despite the arguments put forward in paragraph 380 of the report, would have been acceptable, at any rate in the case of serious breaches. The concept of punitive damages would nonetheless need to be precisely defined, as he was not sure that the expression carried the same meaning in all the various legal systems. Paragraph 3 laid down further specific obligations arising out of serious breaches of obligations owed to the international community as a whole: two negative and one positive. The paragraph was an improvement on its predecessor. Paragraph 3 (*c*), in particular, which successfully conflated subparagraphs (*c*) and (*d*) of the text adopted on first reading, reflected, up to a point, the international solidarity required in confronting international crimes or, if that term was to be avoided, serious breaches of fundamental obligations. The obligation to cooperate in the application of measures, provided for in paragraph 3 (*c*), did not introduce a new concept: the same obligation had been included in the Rome Statute of the International Criminal Court in relation to individual criminal responsibility, which was another factor that should always be taken into consideration, as a separate provision, in the context of breaches. The new paragraph 4 contained a clause allowing for legal consequences not provided for in the article. In that context, it should be understood that the "penal … consequences" in question must relate only to individual criminal responsibility.

20. With regard to the issue of collective countermeasures, which posed serious difficulties owing both to its legal complexity and its political implications, the right to take countermeasures, collectively or otherwise, should be governed by extremely precise and balanced rules enabling the countermeasures to achieve their objective but at the same time ensuring that they were not abused, to the particular detriment of smaller countries. Article 50 B, based on article 43, paragraph 3, adopted on first reading, involved a delicate issue. One of the concerns regarding the countermeasures regime, i.e. in the case of a serious breach of fundamental obligations, was the excessive leeway given to States to identify or determine a serious breach. The Special Rapporteur submitted a number of conclusions in paragraphs 401 and those following, based on an examination of existing practice. The latter was, however, too close to politics than it was to law to demonstrate that any such right existed. Other reactions should be taken into account. He had in mind those of many of the States in the Commission on Human Rights to collective action against human rights violations in various countries. Although such reactions related to the use of force, they revealed the existence of criteria quite different from those confronting the International Law Commission. It had been contended that such action conflicted with the principles of non-interference and territorial integrity, and even involved the abuse of power by a country or group of countries in placing their own interpretation on the interests of the international community. In his view, there was no foundation for equating the right to demand cessation with the right to apply countermeasures, even if the case of a violation was serious, systematic and continuous.

21. It was, of course, important to establish some form of regulation. States should be given the means to ensure respect for obligations, other than through the use of force, but any regime should be balanced and realistic, based on universally accepted practice. There should be detailed provisions relating not only to the nature of the obligation but also to the seriousness of the breach and the extent to which it was systematic and continuous. That would enable the provisions to be properly interpreted and would prevent their abuse.

22. Mr. ROSENSTOCK said that, in considering chapter IV of the third report, the Commission was faced with enormously complex issues, yet had little time, at the current session, to ponder them or to seek common ground. The Special Rapporteur's proposals involved departing from previous informal understandings, creating entirely new notions and, above all, legislating, purely and simply: not codifying or even seeking to coax existing practice forward by proposals *de lege ferenda*. Hasty action must be avoided.

23. With regard to the specific issues before the Commission, he wished to reiterate his view that "crimes of States" was an idea without any foundation, one which, if pursued, would be likely to cause confusion and could impede the variously developing field of the criminal responsibility of individuals, to which the Commission had made a significant contribution. Paragraph 380 of the report was particularly cogent in that context. Moreover, the Commission had decided to focus on secondary rules, not to invent new primary rules. It was and should be outside the Commission's scope to entertain—as article 51 sought to do—the notion of a qualitative distinction among acts or omissions by States that triggered State responsibility. To do so was little different from creating new rules. The attempt to establish categories of "seriousness" smacked of the alchemist's labours. New article 51, paragraph 2, referred glibly to "punitive damages". Only an alchemist could achieve such an outcome. As for the

phrase "damages reflecting the gravity of the breach", he wondered what it added to the quantum of responsibility of the wrongdoing State. If nothing, why bother? If it did add something, it meant that qualitative distinctions were being applied again.

24. There were more mundane problems regarding new article 51, some of which might be ameliorated if not totally cured by the Drafting Committee. For example, what was the distinction in paragraph 1 between a "serious" and, by inference, a non-serious breach? He doubted that there was a precedent for such a distinction. Perhaps it was the same, by analogy, as "material" as opposed to "non-material", only with occasionally more dangerous consequences. If the aim was to make the injured State whole, he questioned the need for such a distinction. If anything, the term "systematic" was preferable to "serious", since at least it was quantitative not qualitative. The word "manifest" could also raise difficulties. The implication was that open misbehaviour by a State was qualitatively worse than subtle misbehaviour, with correspondingly different rights for other States. It was an invitation to States to indulge in clandestine misbehaviour. He doubted that that had been the intention of ICJ in its judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Was a border incident involving a violation of Article 2, paragraph 4, of the Charter of the United Nations more or less grave or serious than a chemical explosion caused by a lack of due diligence, when notice could have been given to the leeward State but, owing to the laxity of the wrongdoing State, had not? The Commission could follow Mr. Galicki's advice and, by providing definitions, clarify some of the issues. On the other hand, it might thereby get caught up in a process it could never end.

25. He had no particular problems with new article 51, paragraphs 3 (*a*) and 3 (*b*) but he would be interested to hear the views of other members on the use of the term "obligation" and whether it was always appropriate or only sometimes; and, if the latter, how the distinction should be made. Indeed, fine tuning—and modest ambition—concerning the indirectly injured State might be worth considering further as a way of avoiding some of the problems. He was far from certain that paragraph 4 was necessary. The reference to "penal" consequences, meanwhile, was neither necessary nor desirable, though in some respects it might be perceived by some as a wink to the cognoscenti, assuring them that qualitative distinctions still existed but were temporarily in abeyance.

26. He continued to favour the initial view expressed by the Special Rapporteur that article 19 should be extirpated, not given some euphemistic substitute, possibly with a saving clause. That did not mean countermeasures need be removed from Part Two or that the role of the indirectly injured State could not be dealt with more adequately than did the draft adopted on first reading. As paragraph 375 made clear, all States had a legal interest in securing cessation and assurances against repetition.

27. The Commission was in danger of getting carried away. Members—including the Special Rapporteur—should reread paragraph 411, with its cautionary language. The process seemed to have begun with the establishment of some rules, but that had led to attempts to create a new system of public order. Mr. Brownlie's comment in that connection had struck a chord. Mr. Opertti Badan's statement (2652nd meeting), with its political perspective, had been sobering. It had contained warning signals which, if ignored, would endanger the entire set of draft articles. Premature efforts to create rules about collective countermeasures could damage both the draft and the general development of such new notions.

28. A strong case could be made for limiting the discussion of countermeasures to Part One, if that was necessary to avoid taking up a position on the issue. Part Two did not deal with any of the other circumstances precluding wrongfulness, partly because to do so would blur the line between primary and secondary rules and partly because the Commission accepted that its draft declaration was not a prescription for saving the world but a series of interrelated legal rules, the elucidation of which could help States resolve some—but not all—problems. Problems concerning *erga omnes* obligations might not, in themselves, be sufficient grounds for deleting countermeasures from Part Two, but other grounds for doing so were probably proliferating in the discussions of the Drafting Committee.

29. On the other hand, a careful further examination of the role of the not-directly-injured State might, if undertaken on the clear understanding that there was no question of creating qualitative distinctions among wrongful acts, and with modesty in response to the remarks of Mr. Brownlie and Mr. Opertti Badan, could make it feasible and possibly even worthwhile to include the issue of countermeasures in Part Two. There was, however, a danger that the draft articles could collapse or become deadlocked in such a way that the declaration or treaty on State responsibility would be repeatedly deferred after efforts by various working groups failed to achieve any status whatsoever for it.

30. Incidentally, using the term "sanction" in connection with Chapter VII of the Charter of the United Nations was questionable, to say the least. The decision to use the term "measures" rather than "sanctions" in that Chapter had been very carefully considered and very deliberate.

31. The Special Rapporteur's proposal for general provisions in Part Four posed no problems, beyond relatively minor drafting changes. Some of the discussion of article 39 within the Commission had been disturbing, reflecting as it did an excessively limited view of the sweep and impact of Article 103 of the Charter of the United Nations. It was therefore right that a paragraph along the lines suggested by the Government of France[5] or the Special Rapporteur should be included.

32. The Commission had come a long way. The problems confronting it were essentially finite in nature. If they were approached on the basis of existing State practice, with modesty and determination, the Commission should be able to offer the world an important and useful product in a year's time.

33. Mr. SEPÚLVEDA said that the Special Rapporteur was to be congratulated on his third report, the culmina-

[5] See 2615th meeting, footnote 5.

tion of a series of reports that had gradually overcome obstacles that barely four years previously had seemed insurmountable, such as the vexing question of international crimes and delicts. It was still too early to tell whether the solution proposed in that regard would meet with the support of States, but there could be no doubt that it constituted an important contribution to the progressive development of international law.

34. In order to understand what had been achieved in chapter IV of the third report, it was necessary to refer back to earlier concepts, which formulated working hypotheses that, if they proved acceptable, would facilitate acceptance of the proposals contained in the chapter. One example was proposed article 40 bis, which established the circumstances in which a State would have the right to invoke the responsibility of another State. That definition of the conditions whereby a State would be injured by an internationally wrongful act of another State enabled the obligation breached to be regarded, not just as an individual obligation, but as an obligation to the international community as a whole. That broadening of the connotation of what constituted an injured State would give States a legal interest in the performance of an international obligation to which they were parties, when that obligation had been contracted with the international community as a whole, or had been established to protect the collective interests of a group of States.

35. It was a provision that undoubtedly represented a step forward in the regulation of international affairs. However, the basis for the rule would have to be confirmed by State practice. It would have to be determined whether it was generally acknowledged that a State could suffer injury merely because an obligation owed to the international community had not been performed. It would also be essential to specify the real nature of the legal consequences of State responsibility which States injured to varying degrees could invoke. For example, in the case of a breach of *erga omnes* obligations, it was not clear what mechanism would be used to enable States that had a legal interest but that were not directly injured to secure cessation, restitution, compensation, satisfaction or, in extreme cases, the application of collective countermeasures. That question was tied in with the effectiveness of the application of a rule that presupposed the creation of an abstract principle.

36. Countermeasures, as an instrument necessary to induce the responsible State to comply with its international obligations, were one aspect of the right of a State to invoke the responsibility of another State. He had originally been opposed to including countermeasures in the draft articles, as tantamount to the legal recognition of a practice based on abuse of power: by including them, the Commission would be embodying a principle based on coercion and unilateral use of force, one that should be anathema to any balanced legal order. Nonetheless, he had to acknowledge that the drafting of the rules regulating the purpose and content of countermeasures, obligations not subject to countermeasures, conditions relating to resort to countermeasures, proportionality, prohibited countermeasures and the suspension and termination of countermeasures when certain requirements were fulfilled had taken a turn in the right direction. The proposed new articles 47 to 50 bis represented a significant advance in the definition of the nature and scope of countermeasures, establishing a regime that could impose the requisite legal safeguards against abuses of power.

37. One innovation was the introduction of the concept of collective countermeasures, which, in a sense, flowed naturally from the acceptance of the rules set forth in article 40 bis. The question posed by the Special Rapporteur was whether States had a legal right to react to a breach of a collective obligation to which they were parties, even where they were not directly injured in the strict sense. According to the Special Rapporteur, those cases were not limited to situations in which a group of States acted in concert, but also included the possibility that the collective element might also be supplied by the fact that the reacting State was asserting a right to respond in the public interest to a breach of a multilateral obligation to which it was a party, although it had not been individually injured by that breach. Thus, a distinction was being drawn between, on the one hand, individual countermeasures, whether taken by one State or by a group of States each acting within its own competence and through its own organs, and, on the other, institutionalized collective measures taken under Chapter VII of the Charter of the United Nations.

38. The problem with accepting such a hypothesis was that the distinction was not sufficiently clear, and seemed to involve an overlapping of other existing institutions, such as collective self-defence and collective security, particularly in the context of regional collective security pacts such as the Inter-American Treaty of Reciprocal Assistance, the North Atlantic Treaty or the now defunct Treaty of Friendship, Co-operation and Mutual Assistance (Warsaw Pact).

39. In the case of collective self-defence, the vital interest of various States was breached and those States would exercise collectively what was undoubtedly their individual right. In the case of collective security, the vital interest of a State was affected, and other States, in an act of solidarity, came to its assistance. In the case of collective countermeasures, the nature of the obligation breached, in other words, the definition of the legal interest of the State that, without being the State directly injured, was an affected State, could easily be confused with the nature of the right implicit in collective self-defence or collective security. It was thus indispensable to differentiate clearly between the constituent elements of those categories of rights so as to circumscribe and limit the scope of collective countermeasures.

40. For example, article 50 A, determining what countermeasures could be taken by a third State on behalf of an injured State, seemed closely to resemble the type of measures taken over the last 50 years in the context of regional collective security pacts. Even more notable was the case of the countermeasures that could be taken in the case of a serious breach of an obligation to the international community as a whole, as provided for in proposed article 50 B. A breach of such obligations *erga omnes* could constitute a wrongful act of such magnitude that it would inevitably prompt measures under Article 51 of the Charter of the United Nations or an act of collective security. In those circumstances, there was extraordinarily

little room for the establishment of a new legal institution of "collective countermeasures".

41. The basis for and validity of collective countermeasures depended on the type of rights affected and the type of obligations established on behalf of the injured State and of the States assisting it in invoking the responsibility of a State. But the other essential element was the general recognition that those measures were accepted as lawful and legitimate by the community of States as a whole, and not just by a section thereof. Consequently, it was essential that there should be a general principle in State practice, enabling the concept of collective countermeasures to be accepted by a significant number of States as a legal notion belonging to a commonly recognized normative system, and thus as a contribution to the international legal order.

42. However, the analysis of State practice presented by the Special Rapporteur did not demonstrate the existence of a group of legal measures accepted by all States, that could justify establishing collective countermeasures as a new legal institution. In the first place, the examples provided were extraordinarily few in number. Furthermore, the illustrations referred to countermeasures taken by a small number of States, all of them industrialized nations. The third report provided no example of the taking of collective countermeasures by a group of non-industrialized States. He himself could not, on the spur of the moment, provide an example of the invocation or exercise of collective countermeasures by Latin American States.

43. Of the six cases referred to by the Special Rapporteur, three were in some way subject to the terms and rules set forth in Chapter VII of the Charter of the United Nations. That again showed the difficulty of establishing a clear demarcation between collective security, collective self-defence and collective countermeasures.

44. The provisions concerning the consequences of serious breaches of obligations to the international community as a whole, to be found in new article 51, again presupposed the establishment of a system of collective sanctions of an essentially punitive nature, identifiable with the enforcement measures provided for in the Charter of the United Nations. There seemed to be no imperative need to create a parallel system, alongside the constitutional norms already in force, and with no organized and centralized institutional mechanism in place, to replace the one that had already demonstrated its advantages and shortcomings.

45. Lastly, even accepting the Special Rapporteur's arguments for dissociating the system of countermeasures from that of peaceful settlement of disputes, it was not desirable to delete from the draft a chapter establishing rules for the settlement of disputes between States in the highly sensitive area of international responsibility, one which would undoubtedly be a continuing source of controversy in the years ahead.

46. Mr. PELLET said that, by launching a fierce attack on so-called "collective countermeasures", Mr Sepúlveda and others were tilting at windmills, by criticizing the institution of countermeasures taken collectively by States, which was not, however, the phenomenon the Special Rapporteur was seeking to target. The Special Rapporteur, for his part, was playing the sorcerer's apprentice by labelling the phenomenon "collective countermeasures", when in point of fact it was no such thing. The real question was whether, where an exceptionally serious breach such as genocide—which affected the international community as a whole and which thus concerned all States individually—had been committed, any State of the international community was entitled to react individually, even when not directly injured by the breach. In his view, the answer was emphatically in the affirmative. That did not mean, however, that the reaction must necessarily be collective, still less that it must involve the use of force. He thus agreed entirely with the Special Rapporteur on the substance, but considered the use of the term "collective countermeasures" most unsatisfactory in that context.

47. Mr. HE pointed out that the issue of State crimes had again arisen in connection with breaches of *erga omnes* obligations and violations of the collective interests of States. He did not, however, believe that the concept of State crime had been established in the context of international law on State responsibility since, unlike the position with regard to individual criminal responsibility, there was no State practice or international jurisprudence to support it.

48. The treatment in article 51 of the consequences of serious breaches of obligations to the international community as a whole rested on the categorization of international obligations in articles 40 bis and ter. Yet, as Mr. Hafner had emphasized, there was a substantial difference between the breaches addressed in article 51 and the crimes referred to in article 19. According to some commentators, while acts affecting the fundamental interests of the international community were to be considered as wrongful acts *erga omnes*, the reverse was not true. Accordingly, crimes, even if they did exist, were not covered by article 51. Thus, the suggestions made by Mr. Dugard, Mr. Economides and Mr. Pellet would completely change the scope of the article and endanger the whole exercise. Since the concept of State criminality was not recognized by international law, it seemed futile for the Commission to embark on such a grandiose endeavour.

49. Paragraph 1 of new article 51 was acceptable and, in paragraph 2, the alternative "damages reflecting the gravity of the breach" was preferable. As far as paragraph 3 (*a*) was concerned, Mr. Brownlie had been quite right to refer to the question of validity. On the other hand, Mr. Kabatsi, referring to the words "as lawful", held that no situation created by a breach could be deemed lawful. Consequently, it would be appropriate to make the point in the commentary that "reality" had to be taken into account as a factor in non-recognition of the situation.

50. Paragraph 4 was superfluous. He endorsed the Special Rapporteur's view that it would be desirable to leave room for further developments, given the rapid advances being made in the field of community obligations. Similarly, it was necessary to await developments in the concept of "crime". It would therefore be better to have a general without prejudice clause on the issue in Part Four, rather than in article 51, which dealt only with the consequences of serious breaches of obligations *erga omnes*.

51. The proposal set out in the footnote to paragraph 413 of the report should certainly be incorporated, partly in article 40 bis and partly in a separate article, as proposed by Mr. Candioti, Mr. Hafner and Mr. Simma, and the word "non-repetition" should be inserted in article 36 ter. He agreed that articles 50 A and 50 B should be placed in chapter II of Part Two bis, because they dealt with issues of a different nature, with different content. Lastly, it would be useful to retain article 37, as worded in paragraph 429, irrespective of whether the draft took the form of a declaration or a convention.

52. Mr. CRAWFORD (Special Rapporteur) explained that the concordance which had just been circulated to members offered an informed guess at the order in which the articles would ultimately be placed in the draft that the Drafting Committee would propose to the Commission for adoption and submission to the Sixth Committee of the General Assembly.

53. He anticipated in the light of the remarks by Mr. Economides and others that the Drafting Committee might well wish to split article 51 in two. It was assumed that the proposal contained in the footnote to paragraph 413 of the report would appear as a subsection of new article 49 together with article 40 bis, paragraph 2. The new article would deal with a broader group of States with a legal interest in obligations of a collective or multilateral character.

54. He had endeavoured to make legal sense of the miscellaneous proposals put forward in connection with chapter IV. The comments by Mr. Al-Baharna, Mr. Economides and Mr. Pellet had been extremely constructive and he had been particularly impressed by the statements of Mr. Opertti Badan and Mr. Tomka, both of whom had wide experience of the constituency to which the Commission reported. They had expressed considerable scepticism about the scope for moving ahead with the substantive matters covered in chapter IV of the report. Mr. Tomka's stance was similar to his own position back at the fiftieth session, namely, that the whole of the article 19 issue could be handled in a saving clause, and indeed that was an option open to the Sixth Committee. Nevertheless, he believed that the Commission should tend more towards the compromise suggested, not only in order to obtain the comments of the Sixth Committee, but also because it reflected a reasonable central position between the very strongly contrasting views within the Commission.

55. While the time was not yet ripe for an elaborated regime of crimes properly so called, it was vital to express the basic idea that States held a small number of obligations to the international community as a whole. Those obligations were, by definition, serious and a breach of them was, by definition, significant. Trivial breaches of such obligations might occur, but in some cases, for example genocide and aggression, the definition of the obligation was such as to exclude trivial breaches. The attempt to embody that notion in new article 49 on the invocation of responsibility in the collective interest seemed to meet with general approval.

56. There had been a surprising amount of agreement in respect of some of the other issues. He fully appreciated the concerns eloquently expressed by Mr. Sepúlveda in relation to the whole question of "collective" countermeasures, although the term "multilateral" countermeasures might well be preferable. Mr. Pellet had been right to say that responses to breaches of obligations to the international community as a whole could be responses adopted by one State or by a number of States. Their collective character was determined by the nature of the obligations and the breach in relation to which they responded, rather than the fact that they were acting as a group.

57. It seemed that new article 51, as it stood, could be sent to the Drafting Committee for improvement, and he was curious to see what the result of splitting the article would be. It had to be acknowledged that, since practice was limited, the Commission's activity was legislative in nature, notwithstanding the fact that some articles reiterated existing rules, for example in the field of non-recognition and the acceptance of the basic category of obligations to the international community as a whole. Its work could not be described as progressive development, although some of the consequences might be progressive. The Commission would therefore await the Sixth Committee's comments and reconsider the issues involved at its next session. It was a very important aspect of the Commission's deliberations, because it offered the Sixth Committee the opportunity for substantive input and enhanced the relationship between the Commission and the Sixth Committee, which was the goal set in the report of the Commission on the work of its forty-eighth session.

58. He was not enthusiastic about the idea that the title of article 51 should be amended to refer to essential obligations. There were many obligations in international law which were essential, despite the fact that they gave rise to bilateral relationships. The whole body of diplomatic immunities was clearly vital to relations between States and to the international community as a whole, but the individual relationships were still bilateral. The core concept was necessarily that established in the judgment in the *Barcelona Traction* case, namely that there were certain obligations to the international community as a whole and every State, individually, had an interest in compliance with them. The term "essential" did not capture that notion. Of course, by definition, the norm was essential by virtue of its being an obligation to the international community as a whole, but that did not necessarily apply vice versa. The character of the breach could naturally be qualified in addition, because breaches of those obligations could conceivably be relatively minor.

59. He had taken careful note of members' statements and they would be borne in mind by the Drafting Committee. Nevertheless, one or two points required some immediate comment. Some aspects of the definition of the category of breach referred to in new article 51, paragraph 1, could be improved. There might be some material in article 19, paragraph 2, or elsewhere, which would be of assistance, subject to the reservation he had already expressed about the notion of "essential" obligations.

60. Paragraph 4 was not strictly necessary, inter alia, because of article 38, as adopted on first reading (article 33 on renumbering), but it was useful, especially because of the possibility of further developments in that particular

field. Personally, he had no strong feelings about the word "penal", but if it encountered opposition it could be omitted, because deleting it would not affect the operation of the provision. He had been mildly entertained by the vehemence with which Mr. Pellet had advocated the inclusion of the concept and by his consistency in depriving it of any punitive element whatsoever, whether punitive damages or penal consequences. For his own part, he had no objection, because if the Commission was examining obligations to the international community as a whole, the question of punitive consequences could be left to one side.

61. The question of transparency and the alleged consequence of serious breaches of essential obligations involving individual criminal responsibility had no place in the draft articles, because it raised issues pertaining to the category of individual criminal responsibility of persons or, alternatively, the category of State immunity. He was happy to preserve the current legal position, because the matter had recently been considered in the context of the Rome Statute of the International Criminal Court, which contained two relevant provisions. Article 27, on the irrelevance of official capacity, made it clear that any individual charged with, or guilty of a crime under international law, could not in any respect plead his or her official capacity. There was no question that the responsibility of the State was in any sense a prerequisite for the charge. That person was quite simply individually responsible for breaches of criminal rules relating to individuals under international law, as it had always been understood in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[6] Article 27 was combined with article 98, which stipulated, inter alia, that the Court might not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations with respect to the State or diplomatic immunity of the person of a third State. That article therefore refuted the idea that State immunity somehow disappeared when conduct attributable to the State, but carried out by individuals, was a crime. He was not opposed to the general description of genocide as a crime, but the approach adopted by the Rome Statute to the question of immunity was inconsistent with its abolition. When the Commission had dealt with State immunity the year before, its approach to the question had been extremely conservative. There was therefore a need for consistency. The Commission should not be so carried away by its fondness for the *Barcelona Traction* category of obligations as to attribute to a breach any consequences it was not prepared to allow when discussing other areas of international law.

62. He had been slightly surprised by the favourable response to articles 50 A and 50 B, notwithstanding the concerns expressed by Mr. Sepúlveda and other members. When a State was individually injured and individually entitled to take countermeasures, another State with a legal interest in the norms violated should be able to assist. There was clear practice to that effect. Hence article 50 A was not outside the scope of the current exercise. Article 50 B was obviously quite different, although it was a considerably modified and reduced form of the version which had existed on first reading. It had been broadly accepted, including by a number of members who had seemed to favour countermeasures only when they were multilateral. He disagreed with Mr. Kateka that such actions could conceivably be limited to multilateral reactions in a single region, although he did accept his point that they might well be a reflection of a local community concern within that area. Nevertheless, inequalities of power existed as much at the regional as at the global level.

63. There had been general approval for the referring of Part Four, as it stood, to the Drafting Committee, even though a number of individual drafting suggestions had been made. For the reasons given by a number of members, he was disinclined to delete article 39 completely, having regard to the massive debate prompted by the earlier version. On the other hand, a simplified version seemed appropriate.

64. With reference to Part Four, the broad approval of article B was gratifying. As far as article 37 was concerned, Mr. Pellet had suggested that the word "exclusively" was unnecessary in the light of the phrase "and to the extent that". The Commission had to accept, however, that the mere fact that a particular norm entailed a particular consequence was not by itself sufficient to trigger the *lex specialis* principle. He had tried to convey the notion that a further condition was required by the word "exclusively". Perhaps the word was too strong. That was a matter for the Drafting Committee to resolve.

65. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer the draft articles, together with those contained in the footnotes to paragraphs 407 and 413 of the report, to the Drafting Committee.

It was so agreed.

The meeting rose at 11.50 a.m.

2654th MEETING

Thursday, 10 August 2000, at 12.10 p.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. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka.

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[6] *Yearbook . . . 1950*, vol. II, pp. 374–378, document A/1316, paras. 95–127.