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Summary record of the 2662nd meeting

Topic:
State responsibility

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Paragraph 55

104. Mr. CRAWFORD (Special Rapporteur) said that in the last sentence "possible pending" should read "possible or pending".

Paragraph 55, as amended, was adopted.

Paragraphs 56 to 69

Paragraphs 56 to 69 were adopted.

Paragraph 70

105. Mr. BROWNLIE asked whether there was not a word missing between "amounts of interest payable" and "loss of profits", in the fourth sentence.

106. Mr. CRAWFORD (Special Rapporteur) proposed the wording "amounts of interest should not be payable in respect of the period for which loss of profits was awarded".

107. Mr. ROSENSTOCK said that the phrase was correct insofar as interest on the fundamental investment was concerned. If, however, someone had been ordered to make a payment to cover loss of profits and did not make that payment, presumably interest would run throughout the period of default. Care with the formulation was therefore required.

108. Mr. CRAWFORD (Special Rapporteur) proposed that a full stop should be placed after "double recovery". The next sentence would then begin "Moreover, it could not be assumed that the injured party".

Paragraph 70, as amended, was adopted.

The meeting rose at 6 p.m.

2662nd MEETING

Thursday, 17 August 2000, at 10.10 a.m.

Chairman: Mr. Chusei YAMADA

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

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

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE ON SECOND READING

1. The CHAIRMAN invited Mr. Gaja, Chairman of the Drafting Committee, to introduce the report of the Drafting Committee on State responsibility containing the draft articles adopted by the Drafting Committee on second reading (A/CN.4/L.600).

2. Mr. GAJA (Chairman of the Drafting Committee) said that, during the current session, the Drafting Committee had held 27 meetings, 24 of which had been devoted to the topic of State responsibility. It had completed the consideration of the articles which had been referred to it and was now in a position to submit a complete text. It was nevertheless of the opinion that the final adoption of the text should be postponed so that there might be an opportunity to review the articles at the beginning of the next session. In order to provide a complete picture, the report before the Commission incorporated the articles which the Drafting Committee had adopted at the fiftieth[3] and fifty-first[4] sessions of the Commission, with a few minor changes. All the articles had been renumbered followed by the numbers of the articles adopted on first reading in square brackets.

3. The Drafting Committee had taken care of some pending issues in the articles of Part One. First, it had changed the title, which had become "The internationally wrongful act of a State" and was more suited to the content of Part One than the old title, "Origin of international responsibility". Secondly, it had deleted article 22 adopted on first reading in chapter III of Part One, which dealt with the exhaustion of local remedies, since that question was addressed in article 45 [22]. Thirdly, it had moved article A from chapter II of Part One to Part Four, considering that, in the new structure of the draft, that article was better placed in the part on general provisions. Fourthly, it had deleted article 34 bis in chapter V, which was a text proposed by the Special Rapporteur whose paragraph 1 required the State that was invoking a circumstance precluding wrongfulness to give notice as soon as possible to the other States concerned. Having considered the articles on countermeasures, it had come to the conclusion that article 34 bis was unnecessary and that it would be difficult to state a general rule on notice that would apply equally to all the circumstances precluding wrongfulness.

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[*] Resumed from the 2653rd meeting.

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

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

[3] *Yearbook . . . 1998*, vol. I, 2562nd meeting, p. 288.

[4] *Yearbook . . . 1999*, vol. I, 2605th meeting, p. 275.

4. The Special Rapporteur had proposed changes in the structure of the draft articles, with the general support of the Commission. He had divided Part Two in two, separating the provisions dealing with invocation of respon-sibility from those dealing with the content of responsibility. As a result, there was a new Part Two bis (The implementation of State responsibility) which was predicated on the distinction between the secondary consequences which flowed by operation of law from the commission of an internationally wrongful act and the various ways of dealing with those consequences. It related to issues such as the right to invoke responsibility, the admissibility of claims and the rule against double recovery. To avoid confusion with Part Three of the draft on the settlement of disputes, the new part was provisionally called Part Two bis. The Commission would have to reconsider their numbering. All the provisions of a general character had been placed in Part Four.

5. He introduced the articles adopted by the Drafting Committee on second reading at the current session.

6. Article 23 [30] was the only new provision in Part One. The Commission had deferred consideration of that article until all the draft articles on countermeasures, undoubtedly one of the most controversial issues of State responsibility, had been submitted. The prevailing view of the members was that countermeasures could be taken only under specific and well-defined conditions and with certain limitations. However, placing all those elements in one article would have required a very long text that would have been out of proportion with the rest of the articles in chapter V of Part One dealing with other circumstances precluding wrongfulness. The Drafting Committee had therefore decided to include a relatively short article on countermeasures in Part One and link it both in terms of substance and conditions to the relevant articles in Part Two bis.

7. Article 23 [30] began with the same wording as article 30 adopted on first reading and indicated that the wrongfulness of countermeasures was precluded if certain conditions were met. First, they could be justified only in relation to the responsible State. The words "if and to the extent" were intended to specify that condition. Secondly, they could be taken only under the conditions set out in articles 50 [47] to 55 [48]. The Drafting Committee had deliberately emphasized the first condition by using the words "countermeasures *directed towards** the latter [responsible] State", which should take care of some of the concerns expressed in the Commission that countermeasures should not target third States. The word "countermeasures" in the text of this article adopted on first reading had been qualified by the word "legitimate", which the Special Rapporteur had replaced by the word "lawful". The Drafting Committee had been unable to agree on either of those qualifiers and had decided not to qualify countermeasures in any way, but to include a reference to the articles that set out the conditions for their exercise and limitations to them.

8. Part Two had been divided into three chapters and was now entitled "Content of international responsibility of a State". Chapter I, entitled "General principles", consisted of seven articles.

9. The first article was article 28 [36] (Legal consequences of an internationally wrongful act) which corresponded to paragraph 1 of article 36 adopted on first reading. The Drafting Committee had not changed the wording proposed by the Special Rapporteur. It had also retained the revised title proposed by the Special Rapporteur. The article stated a general principle applicable to all the articles contained in Part Two, providing that the international responsibility of a State which arose from an internationally wrongful act in accordance with the provisions of Part One entailed legal consequences as set out in Part Two.

10. Article 29 [36] (Duty of continued performance), corresponded to paragraph 2 of article 36 adopted on first reading and article 36 bis proposed by the Special Rapporteur. Article 36 bis had consisted of two paragraphs. Paragraph 1 had been taken from article 36 and paragraph 2 had combined articles 41 on cessation and 46 on assurances and guarantees of non-repetition, which the Special Rapporteur had proposed placing together in a single article. It would be recalled that several members of the Commission had not agreed with that proposal and had wanted two articles instead of one. The Drafting Committee had followed that suggestion and was therefore submitting articles 29 [36] and 30 [41, 46]. Article 29 [36] was based on the Special Rapporteur's proposal. The Drafting Committee had considered that the new wording was a clearer way of stating the principle that the legal consequences of a wrongful act did not affect the continued duty of the State to perform the obligation it had breached. It had, however, made some changes. It had not used the term "State concerned", as proposed by the Special Rapporteur, and had replaced it by the term "responsible State", which it had found sufficiently clear. That did not mean that that term must necessarily replace the words "State which has committed an internationally wrongful act" throughout the draft. In some cases, the longer formulation was clearer or more elegant. The Committee had also replaced the words "these provisions" by the words "this Part" and the words "international obligation" by the words "obligation breached".

11. Article 30 [41, 46] (Cessation and non-repetition) corresponded to paragraph 2 of article 36 bis proposed by the Special Rapporteur and to articles 41 and 46 adopted on first reading. It thus dealt both with cessation and with non-repetition. As many members had stated during the debate in the Commission, those two elements were logically linked and could be placed in a single article. The Drafting Committee had shared that view. In the opening clause, it had replaced the words "State which has committed an internationally wrongful act" by the words "State responsible for the internationally wrongful act", which had added precision, since a State might not actually have committed the wrongful act itself, but could be held responsible for the act of another State.

12. Subparagraph (*a*) dealt with the obligation to cease the wrongful act and corresponded to article 41 adopted on first reading. Many members had agreed with the Special Rapporteur that the question of cessation should be placed in chapter I of Part Two, instead of in chapter II of that Part. It would be recalled that article 41 adopted on first reading and the revised text by the Special Rapporteur for article 36 bis, paragraph 2 (*a*), had dealt with

cessation in the context of a continuing wrongful act. Some members of the Commission had felt that the wording was unnecessarily restrictive. The Drafting Committee had agreed that subparagraph (*a*) should also apply to situations where a State had violated an obligation on a series of occasions and had taken the view that the term "continuing" could be understood as covering such situations. It had simplified the wording of the subparagraph and the new wording "cease that act, if it is continuing" was broader in scope and therefore preferable.

13. Subparagraph (*b*) corresponded to article 46 on assurances and guarantees of non-repetition adopted on first reading. The Commission had agreed with the Special Rapporteur's analysis that that question should be addressed in the context of chapter I rather than that of chapter II. Several members had pointed out that assurances and guarantees of non-repetition were not appropriate in all circumstances. They should be required especially in circumstances where there was apprehension of repetition. Subparagraph (*b*) related to single acts, series of acts and continuing acts. Assurances and guarantees of non-repetition took different forms and covered different situations. Assurances were normally given verbally, while guarantees of non-repetition involved something else, i.e. certain preventive actions. Assurances and guarantees of non-repetition were appropriate only if the repetition of the wrongful act was likely to occur. They were measures for exceptional circumstances. That was what the words "if circumstances so require" at the end of subparagraph (*b*) were intended to convey. Like the Commission, the Drafting Committee had been fully aware that, in the past, guarantees of non-repetition had involved demands that were far-reaching, but it had taken the view that guarantees could not be dropped from the articles simply because some demands had been excessive. It might be reasonable, in some exceptional circumstances, to say that verbal assurances were inadequate.

14. With regard to article 31 [42], he recalled that on the basis of the comments by Governments on the overlap between article 42 and articles 43 to 45 adopted on first reading and on the lack of clarity in article 42 itself, the Special Rapporteur had proposed revised versions of the articles dealing with reparation and its various forms. The proposed article 37 bis had been based in part on article 42, paragraph 1, adopted on first reading. In view of the new structure of Part Two, the Drafting Committee had found it useful to define the scope of article 31 [42], stating the obligation of the responsible State for full reparation for injury caused by the wrongful act and then stating the notion of injury. The proposed article thus contained two paragraphs.

15. As to paragraph 1, the Drafting Committee had first considered the question of "full" reparation. It had been proposed in the Commission that it should be deleted, but the Committee had decided to retain the wording of the article adopted on first reading as a statement of the general principle of reparation. That text had, however, not addressed the question of injury. Article 42, paragraph 1, had provided for full reparation, but had not indicated for what full reparation should be given. In addition, the article had been couched in terms of the entitlement of the injured State and the Special Rapporteur had drafted it from the viewpoint of the obligation of the responsible State. For further clarity and also in order to deal with the question of causality, he had used the phrase "consequences flowing from that act" as the object of full reparation. The Drafting Committee had nevertheless found those words misleading. The notion of "consequences" flowing from a wrongful act was broader than the object of full reparation. Reparation was in fact only for injury and did not cover all the consequences which might flow from a wrongful act.

16. Paragraph 2 defined "injury" as any damage, whether material or moral, arising in consequence of an internationally wrongful act of a State. Injury thus was understood in its broad sense. There had been some discussion as to whether there was any distinction between the terms "injury" and "damage". Some members of the Drafting Committee had held the view that there was a difference between the two terms, but had not agreed what that difference was. The Committee had finally decided to define injury as consisting of any damage. The reference to "moral" damage in addition to "material" damage was meant to allow a broad interpretation of the word "injury". "Moral" damage could be taken to include not only pain and suffering, but also the broader notion of injury, which some might call "legal injury" and had been done to States. The definition of injury in paragraph 2 therefore encompassed not only those types of injury giving rise to obligations of restitution and compensation, but also those which might entail an obligation of satisfaction.

17. Paragraph 2 also dealt with another issue that had been raised during the debate in the Commission, namely, the question of a causal link between the internationally wrongful act and the injury, which had not been referred to in the articles adopted on first reading. That paragraph pointed to the causal link by using the phrase "[injury] … arising in consequence of the internationally wrongful act of a State". The Drafting Committee had considered a number of suggestions for qualifying that causal link, but, in the end, it had taken the view that, since the requirements of a causal link were not necessarily the same in relation to every breach of an international obligation, it would not be prudent or even accurate to use a qualifier. The need for a causal link was usually stated in primary rules. It sufficed to state that the injury should be the consequence of the wrongful act. The commentary would, however, elaborate on the issue of the causal link.

18. Article 32 [42] (Irrelevance of internal law) corresponded to article 42, paragraph 4, adopted on first reading and article 37 ter proposed by the Special Rapporteur. Article 42, paragraph 4, provided that a State that had committed an internationally wrongful act could not invoke the provisions of its internal law as a justification for failure to provide full reparation. The Special Rapporteur had deleted that paragraph because article 3 [4] dealt with the same issue and covered the point. In the discussion in the Commission, it had become clear that that was not the case. Article 3 [4] referred to the irrelevance of internal law in the characterization of an act as wrongful, but did not cover the issues dealt with in Part Two. Consequently, the Drafting Committee had decided to propose article 32 [42]. It had made some drafting changes to the text adopted on first reading in order to adapt it to the new structure of Part Two. The substance of the text had also been expanded: it dealt with the irrelevance of inter-

nal law to compliance with obligations set out in Part Two. That was partly owing to the new structure of Part Two, which considered assurances and guarantees of non-repetition as separate from reparation.

19. Article 33 [38] (Other consequences of an internationally wrongful act) corresponded to article 38 adopted on first reading. Unlike the Special Rapporteur, the Drafting Committee had been of the view that it was useful to keep the article because it had two functions: first, to preserve the application of rules of customary international law of State responsibility that might not be entirely reflected in the draft articles; and secondly, to attempt to preserve some effects of a breach of an international obligation which did not flow from the rules of State responsibility proper, but stemmed from the law of treaties or other areas of international law. That, and the distinction between that case and the *lex specialis* principle, would be explained in the commentary.

20. Article 34 (Scope of international obligations covered by this Part) concluded the provisions of chapter I. Paragraph 1, proposed by the Special Rapporteur in article 38 bis, pointed out that identifying the States towards which the responsible State's obligations in Part Two existed depended both on the primary rule establishing the obligation that had been breached and on the circumstances of the breach. For example, pollution of the sea might, according to the circumstances, affect the international community as a whole or else one or more coastal States. Paragraph 1 simply indicated that the responsible State's obligations might exist towards another State, several States or the international community as a whole. The reference to "several States" included the case in which a breach affected all the other parties to a treaty or to a legal regime established under customary law. For instance, when an obligation could be defined as an "integral" obligation, as might be the case of obligations under a disarmament treaty, its breach by a State necessarily affected all the other parties to the treaty. When an obligation of reparation existed towards a State, reparation was not necessarily to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights might exist towards all the other parties to the treaty, but the individuals affected must be regarded as the ultimate beneficiaries and, in that sense, as the holders of the right to reparation.

21. Paragraph 2 had been proposed by the Special Rapporteur as article 40 quater. It was intended to make it clear that, while Part One applied to all the cases in which a wrongful act might be said to have been committed by a State, subject to the exceptions set out in Part Four, Part Two had a more limited scope. It did not apply when an obligation of reparation arose towards an entity other than a State.

22. Chapter II of Part Two (The forms of reparation) was composed of six articles. The first was article 35 [42] (Forms of reparation) which corresponded to paragraph 1 of article 42 adopted on first reading and paragraph 2 of the revised text of article 37 bis proposed by the Special Rapporteur. The Drafting Committee had decided to start chapter II with an introductory article, which simply listed all the forms of reparation, with the articles on each form of reparation describing the content of that particular form of reparation and the way it applied. The commentary to that article would also explain that full reparation was not always necessary or possible by means of one form of reparation. It might require all or some of them, depending on the nature and the extent of the injury that had been caused. In the view of the Committee, moreover, the primary rule could play an important role with regard to the form and the extent of reparation. That issue should be fully explained in the commentary. Since the notion of injury was already defined in article 31, paragraph 2, the wording of article 35 [42] had been simplified. It did not use the term "consequences", but referred to "Full reparation for the injury caused".

23. Article 36 [43] (Restitution) corresponded to article 43 adopted on first reading, the opening clause of which it used, except that, like other articles in chapter II, it was formulated in terms of the obligation of the State that had committed an internationally wrongful act and thus began: "A State responsible for an internationally wrongful act is under an obligation". There had been discussions in the Commission about whether the article should say only that the responsible State was under an obligation to make restitution or should also include the words "to re-establish the situation which existed before the wrongful act was committed", which had already appeared in the text adopted on first reading. It had been pointed out that those words stated the general policy that applied to full reparation rather than to restitution as one of the forms of reparation. Since both articles 31[42] and 35 [42] referred to "full reparation", the words in question should be understood in a narrow sense and should be intended only to cover cases such as the return of stolen cultural property. The Drafting Committee had also been aware of the complexity of the concept of restitution, which could, for example, include replacement or refer to the restoration of rights. Those issues could be discussed in the commentary. The Committee had therefore decided to retain the said words.

24. Two other questions had arisen in the same context. First, it had been suggested that reference should be made to "the situation which would have existed if the wrongful act had not been committed". The Drafting Committee had seen problems with that wording because it was synonymous with full reparation. With regard to the second question, namely, the time frame meant by the phrase "before the wrongful act was committed", the Committee had been of the view that the time frame depended to some extent on the factual situation and the context. For example, if there was justifiable apprehension that a wrongful taking of property was about to be committed, that might have consequences for the value of the property concerned. Thus, the time frame would normally be the time of the commission of the wrongful act, but, in some circumstances, it could be an earlier time. Those issues would be discussed in the commentary.

25. The Drafting Committee had decided to use the term "restitution" instead of the term "restitution in kind", which was narrower. The words "provided and to the extent that restitution", which had also appeared on first reading, allowed for partial restitution and made it clear that restitution had priority over compensation, subject to the conditions set out in the article itself.

26. Whereas the text of the article adopted on first reading had provided for four exceptions to the general rule, the text proposed by the Drafting Committee contained only two. There had been general support for the exception in subparagraph (*a*) and the Committee had retained it. In its view, material impossibility was intended to cover a range of situations, including certain situations of legal impossibility, such as cases in which the legitimate rights of third parties would be infringed. Subparagraph (*a*) did not, however, deal with conflicting international obligations, as those were outside the scope of article 36 [43]. Those matters would be explained in the commentary. The Committee had deleted the exception of peremptory norms which had appeared as subparagraph (*b*) on first reading because it had considered not only that the contingency that restitution could violate a peremptory norm was remote, but also, in view of article 21 of Part One on compliance with peremptory norms, that it was clear that peremptory norms by their very character overrode all other rules in conflict with them. Moreover, an express mention of peremptory norms with regard to restitution might be taken as implying *a contrario* that the same exception did not apply in relation to other obligations stated in the draft articles. Subparagraph (*b*) proposed by the Committee corresponded to subparagraph (*c*) adopted on first reading with some minor drafting changes, such as the deletion of the words "injured State". Those words were not felicitous, first, because there might have been more than one injured State and, secondly, because the evaluation of benefits might have to be made not in connection with the State as such, but with the individuals who might be the ultimate beneficiaries of restitution. Those concerns had been met by the shorter expression "benefit deriving from restitution". With regard to the exception under subparagraph (*d*) adopted on first reading and providing that restitution should not seriously jeopardize the political independence or economic stability of the responsible State, the Committee had been of the view that those cases also were to be regarded as rare and would anyway be covered by subparagraph (*b*).

27. The Drafting Committee had concluded that specific performance orders that could be requested from a court or an arbitral tribunal did not fit into the classification of remedies adopted for Part Two. The same applied to judicial declarations of rights. Those were essentially procedural remedies that should be referred to in the commentary.

28. Article 37 [44] (Compensation), the title of which had not been amended, corresponded to article 44 adopted on first reading, which had also dealt with the question of interest and loss of profit. Based on comments by Governments, the Special Rapporteur had suggested that the question of interest should be dealt with in a separate article and treated more extensively because of the importance of the issues involved. The Drafting Committee had followed those suggestions. Article 37 [44] dealt with compensation and loss of profit, but not with interest, which was covered in article 39. Like the text adopted on first reading, article 37 [44] consisted of two paragraphs. Paragraph 1 set out the general principle of compensation, while paragraph 2 provided more detail as to what should be compensated.

29. The Drafting Committee had accepted the Special Rapporteur's suggestion that paragraph 1 should be recast in the form of an obligation imposed on the responsible State rather than in the form of an entitlement of the injured State, as had been the approach adopted on first reading. In addition, the Committee had replaced the words "the State which has committed an internationally wrongful act" by the words "[t]he State responsible for an internationally wrongful act" in order to bring the wording into line with that of the preceding article. Initially, the Committee had considered qualifying damage, in paragraph 1, as "economically" or "financially" assessable. However, it had decided that such qualification was more appropriate in paragraph 2 as a means of indicating what compensation should amount to. The Committee had thus opted for a more general reference to "damage caused thereby", which seemed to read better while still maintaining the causal link between the act and the damage. Following the Special Rapporteur's suggestion, the Committee had also replaced the words "if and to the extent that the damage is not made good by restitution in kind" adopted on first reading by the words "insofar as such damage is not made good by restitution". The effect, however, remained the same. Restitution in full might not always be possible and, even in cases where it was possible, only partial restitution might be agreed on by the States concerned or else might have been opted for by the injured State, when that State was entitled to make such a choice. The reference to "restitution in kind" at the end of the paragraph adopted on first reading had been shortened to "restitution" as a necessary consequence of the Committee's decision on the wording of article 36 [43]. As in the case of the text adopted on first reading, the article did not deal with the question of a plurality of injured States, which could be referred to in the context of the commentary on article 47.

30. Paragraph 2 had been retained by the Drafting Committee despite the Special Rapporteur's initial proposal that it should be deleted. The Committee had taken the view that the debate in the Commission had demonstrated support for the approach of the draft article as adopted on first reading, which had included a paragraph 2. The Committee had therefore attempted to improve the text of paragraph 2 as adopted on first reading. Aside from the question of interest, two other issues had been considered in the context of paragraph 2: the qualification of the concept of damage or injury and the inclusion of a reference to loss of profits. In the view of the Committee, the distinction between damage or injury covered under compensation, and damage or injury referred to under satisfaction, as adopted on first reading, as well as in the proposed text by the Special Rapporteur, did not seem entirely accurate or helpful. The concept of "moral damage" suffered by a State was to some extent elusive. Furthermore, taking into account the broad definition of the term "injury" already included in article 31 [42], paragraph 2, the Committee had found it more useful to differentiate between damage or injury relevant for the purposes of compensation and damage or injury relevant for the purposes of satisfaction by a more categorical criterion avoiding overlap between compensation and satisfaction. According to that approach, the main distinction that arose between article 37 [44] and article 38 [45] (Satisfaction), related to whether the damage in question could be assessed in financial terms. The Committee had therefore settled for a formulation which, for the purposes of article 37 [44], qualified damage or injury as that which

was financially assessable, as opposed to that arising in the context of satisfaction, which was not financially assessable. As to the drafting, the Committee had noted that the text adopted on first reading, which had referred to "economically assessable" damage, had not been disapproved by Governments. After some discussion, however, it had decided on "financially assessable" as being more accurate. Following suggestions made in the Commission, the Committee had also decided to include a reference to loss of profits in paragraph 2. It had agreed that requiring compensation for loss of profits was not always required for full reparation. That partly depended on the content of the primary rule which set the obligation that had been breached. The Drafting Committee had considered the practice of tribunals, which had approached the granting of compensation for loss of profits with circumspection. That basic idea was expressed by the words "as appropriate" used in the text adopted on first reading. The Committee had attempted to provide a less vague criterion which would limit speculative claims. Having discussed various terms, it had finally settled for "established". The commentary would elaborate on that issue and explain that there were situations where loss of profits was covered and others where it was not.

31. Article 38 [45] dealt with the last form of reparation, satisfaction, and corresponded to article 45 adopted on first reading. There had been an extensive debate on that article in the Commission and in the Drafting Committee, which had agreed that satisfaction was not a common form of reparation. In most cases, if injury caused by an internationally wrongful act of a State could be fully repaired by restitution or compensation, there was no place for satisfaction. The Committee had also been of the view that satisfaction could be granted only for non-financially assessable injury caused to the State and that, taking into account some unreasonable forms of satisfaction which had been demanded in the past, some limitations to satisfaction had to be established.

32. The article consisted of three paragraphs. Paragraph 1 defined the legal nature of satisfaction and the injury for which it could be granted. To take account of the fact that several members of the Commission had had difficulty with the use in the proposal by the Special Rapporteur of the word "offer", which had not appeared to fit in with the legal nature of the obligation to provide satisfaction, the Drafting Committee had amended paragraph 1 to read: "The State responsible for an internationally wrongful act is under an obligation to give satisfaction . . . ". The new wording thus brought the opening clause into line with the previous articles of chapter II. The last part of paragraph 1, which read: "injury caused by that act insofar as it [the injury] *cannot** be made good by restitution or compensation", underscored the type of injury for which satisfaction could be granted and the rather exceptional nature of satisfaction. Satisfaction was the remedy for injuries which were not financially assessable and which amounted to an affront to the State. It was frequently symbolic in nature.

33. Paragraph 2 described the modalities of satisfaction and basically corresponded to paragraph 2 of the article adopted on first reading and the Special Rapporteur's proposed revised paragraphs 2 and 3. Taking into account the comments made in the Commission, the Drafting Committee had been of the view that the text adopted on first reading and the Special Rapporteur's text were unnecessarily detailed in listing types of satisfaction that might be granted. While it seemed useful to give examples, an extensive list was unnecessary. The paragraph proposed by the Committee provided that "satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality". The words "another appropriate modality" indicated the non-exhaustive nature of the list and made it clear that the appropriate modality of satisfaction could depend on the circumstances of the breach. The question whether article 38 [45] should refer, among the modalities of satisfaction, to disciplinary or penal action against the individuals whose conduct had caused the internationally wrongful act had given rise to divergent views in the Commission and in the Drafting Committee and, since paragraph 2 was not intended to provide an exhaustive list, the Committee had decided not to mention disciplinary or penal action in the text. The appropriate explanation would be given in the commentary. Consistent with the comments made in the Commission, the list did not include punitive damages, the possibility of which had been alluded to in paragraph 2 (*c*) adopted on first reading and had again been discussed in relation to the Special Rapporteur's proposal concerning a particular category of breaches in article 41.

34. Paragraph 3 corresponded to paragraph 3 of the article adopted on first reading and was based on the text proposed by the Special Rapporteur. It set the limits on satisfaction, in the light of past abuses incompatible with the sovereign equality of States, on the basis of two criteria: first, the proportionality of satisfaction to the injury and, secondly, the requirement that satisfaction should not be humiliating to the responsible State. The Drafting Committee had been aware that the requirement of proportionality was not specific to satisfaction, but it had considered that proportionality could not be regarded as a general criterion applied in the same way to different situations and had found it useful to state that criterion as a way of emphasizing its importance to satisfaction.

35. Article 39 (Interest) corresponded to article 45 bis proposed by the Special Rapporteur in response to comments by a number of Governments, whereas the text adopted on first reading had not included a separate article and had referred to interest only in article 44, paragraph 2. The debate in the Commission had clearly shown that interest was not an autonomous form of reparation and was not necessarily part of compensation in every case, but might be required in order to provide full reparation. That was why the text proposed by the Drafting Committee, which was based on the Special Rapporteur's proposal with some drafting changes, used the words "principal sum", which was distinct from "compensation".

36. The wording of paragraph 1, which stated that "Interest … shall be payable when necessary in order to ensure full reparation", was flexible enough to avoid the understanding that the payment of interest was automatic. That approach was also compatible with the tradition of various legal systems and the practice of international tribunals.

37. Paragraph 2 indicated that the date from which the interest was to be calculated was the date when the principal sum should have been paid and that the interest ran until the date the obligation to pay had been fulfilled. That article did not, as such, deal with post-judgement interest, but was concerned with interest that went to make up the amount that a court or tribunal should award. The commentary would make it clear that interest could not be cumulated with compensation for loss of profit if the injured State would thereby obtain a double recovery.

38. Article 40 [42] (Contribution to the damage) essentially dealt with contributory negligence, an issue addressed in article 42, paragraph 2, adopted on first reading. The Special Rapporteur had felt that the issue was of sufficient importance to be treated in a separate article, for which he had proposed a text as article 46 bis. The article proposed by the Drafting Committee did not deal with mitigation of responsibility. It assumed that responsibility had arisen. The text was based on subparagraph (*a*) of the Special Rapporteur's proposal, which had, in turn, relied on the text adopted on first reading. It contained a single paragraph, which provided that "In the determination of reparation, account shall be taken of the contribution to the damage by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought". According to that article, as well as the text adopted on first reading, not every action or omission was relevant, but only those that were wilful or negligent. Also as in the text adopted on first reading, the action or omission in question could be that of the injured State or of any person or entity in relation to whom reparation was sought. The words "in relation to whom reparation is sought" differed from the text adopted on first reading and the Special Rapporteur's proposal, which both read: "on whose behalf the claim is brought". The reference to a claim had appeared for the first time in that article. It had seemed to the Committee to be out of place in chapter II.

39. The article was flexible. The word "negligent" was not qualified by any adjective. The relevance of negligence to reparation depended on the degree to which it had contributed to the damage and on the factual circumstances of each case, which were matters that could more appropriately be explained in the commentary. The words "account shall be taken of" meant that the article dealt with factors that were capable of reducing reparation. Subparagraph (*b*) of the article proposed by the Special Rapporteur had been deleted because, in the view of the Committee, it was not certain that an obligation to mitigate damage existed in international law. It would therefore be explained in the commentary that, if there were any measures that an injured State could take to mitigate the damage, it should take them, and that its failure to do so in appropriate cases might be taken into account in the determination of reparation.

40. With regard to chapter III of Part Two (Serious breaches of essential obligations to the international community), the Drafting Committee had had a difficult choice to make. The draft adopted on first reading had dealt with "international crimes", and that had proved controversial both in the Commission and among Governments. The Special Rapporteur had suggested moving away from that approach and concentrating instead on obligations to the international community as a whole and on the consequences that their serious breach would entail. On the basis of that approach, he had submitted some proposals to the Commission. Those proposals had included the deletion of article 19 adopted on first reading and the addition of a new article which dealt with the consequences of breaches of obligations to the international community as a whole. Those consequences corresponded in large part to those envisaged in the articles adopted on first reading for international crimes. Nevertheless, the Special Rapporteur's proposals had not been able to solve all the problems to which the supporters and the opponents of the concept of international crimes had drawn attention. Taking into account the comments made in the Commission, the Drafting Committee had basically followed the Special Rapporteur's approach. The references to international crimes of States had been removed, but some special consequences had been identified for the case of serious breaches of obligations to the international community as a whole. That seemed to be the middle ground on which it could be hoped to reach a consensus. However, some members of the Committee had expressed reservations, especially with regard to article 42 [51, 53] (Consequences of serious breaches of obligations to the international community as a whole), paragraph 1.

41. Chapter III consisted of two articles. Article 41 (Application of this chapter) corresponded to article 51 proposed by the Special Rapporteur and provided that the chapter applied to State responsibility for serious breaches of obligations owed to the international community as a whole and essential for the protection of its fundamental interests. There were thus three conditions. First, obligations must be owed to the international community as a whole. Secondly, obligations must be essential for the protection of the fundamental interest of the international community as a whole. And, thirdly, breaches must be serious. Admittedly, those criteria were general and not very precise, but they were intended to provide guidelines indicating the overall quality of the obligations and breaches dealt with in chapter III.

42. In an attempt to clarify further the concept of a "serious" breach, article 41, paragraph 2, established two criteria. First, the breach involved "a gross or systematic" failure by the responsible State to fulfil the obligation. Secondly, such a breach would "[risk] substantial harm to the fundamental interests protected thereby", i.e. to fundamental interests of the international community as a whole mentioned in paragraph 1. The word "gross" emphasized the quality and severity of the failure of the responsible State by defining a criterion that moved beyond simple negligence. The word "systematic" also emphasized the quality of the failure of the responsible State by drawing attention to the repetitiveness of the failure. Clearly, the paragraph did not cover minor, trivial, incidental or doubtful breaches. In addition, the consequences of such failure must be "risking substantial harm". The Drafting Committee had considered the word "irreversible" harm proposed by the Special Rapporteur, but had found that it was not always appropriate. For example, in cases of aggression, the situation could be called reversible if the aggressor withdrew. The Special Rapporteur had also proposed the term "manifest breach", but the Committee had been unable to agree with it out of concern that it would exclude serious violations commit-

ted in such a subtle way that they could not be characterized as “manifest”.

43. The other article in chapter III was article 42 [51, 53], which corresponded to articles 51 and 53 adopted on first reading. It was based on the proposal by the Special Rapporteur which had appeared as article 52 and dealt in a simplified way with the consequences of the serious breaches referred to in the preceding article.

44. Paragraph 1 provided that such serious violations could involve, for the responsible State, damages reflecting the “gravity of the breach”. The Committee had discussed that paragraph at length, taking account of the view expressed in the Commission that there should be no punitive damages even for the breach of the obligations in question. Different opinions had been expressed as to whether in fact damages reflecting the “gravity of the breach” were the same as “punitive damages”. The latter were exceptional in practice and often subject to special regimes. However, there might be situations in which the gravity of the breach called for heavy financial consequences. The word “may” was intended to convey that understanding. The paragraph was intended to leave open the question whether damages reflecting the gravity of the breach were additional to those that were owed by the responsible State under article 37 [44].

45. Paragraph 2 dealt with the obligations for other States. Those obligations were designed to provide further negative consequences for the responsible State. Some of the obligations identified in that paragraph could also apply in the case of other wrongful acts. The commentary would elaborate on that point. The enumeration of such obligations for third States was intended to emphasize their particular importance with regard to that special category of breaches. Under paragraph 2 (*a*), other States had an obligation not to recognize as “lawful” the situation created by the breach and the commentary would explain that the question of recognition was closely connected with, but different from, that of “validity”. Paragraph 2 (*b*) was a logical consequence of paragraph 2 (*a*) and provided that other States must not render aid or assistance to the responsible State in maintaining the situation created by the breach. Rendering aid or assistance implied the taking of positive acts, but did not necessarily imply responsibility for the wrongful act under article 16 [27]. The words “situation so created” were a reference to the specific situation created as the result of the wrongful act. The commentary would elaborate on those issues. Paragraph 2 (*c*) required cooperation of other States to bring the breach to an end. That requirement was, however, qualified by the words “as far as possible” in order to take account of circumstances such as legal obligations that were binding on some States and that might prevent them from cooperating, such as some obligations under the law of neutrality.

46. Paragraph 3 was a without prejudice clause. It said that chapter III was without prejudice, first, to the consequences of chapter II and, secondly, to such other consequences that might arise under international law. Those consequences could occur with regard either to all serious breaches of obligations to the international community as a whole or to breaches of some of those obligations. The text proposed by the Special Rapporteur had referred to “penal or other” consequences. The Drafting Committee had deleted those words because they were unnecessary in the text of the article. The commentary would elaborate on those points. Paragraph 3 simply recognized that the law in that area was developing and was not prejudiced by the draft articles.

47. Part Two bis (The implementation of State responsibility) contained two chapters. Chapter I (Invocation of the responsibility of a State) consisted of seven articles. With regard to the question of the definition of “injured State”, he recalled that the Commission had held an extensive discussion on article 40 bis as proposed by the Special Rapporteur. That article was a reformulation of article 40 as adopted on first reading, on the definition of “injured State”. The difficulty with the text as adopted on first reading was that the definition of “injured State” was very wide and partly inconsistent. As Governments had stressed in their comments, many States could claim to have been injured and thus to be entitled to claim the whole range of remedies available under the articles. The Special Rapporteur’s redraft therefore made an attempt to differentiate between States that had suffered “injury” and those that had only “legal interests”. In the view of a number of members of the Commission, that proposal was not fully successful in making the distinction sufficiently clear and also gave rise to other difficulties. The use of the terms “injured” States and States having a “legal interest” was not satisfactory since injured States also had legal interests. However, the idea of distinguishing between different categories of States towards which a wrongful act had been committed and which were entitled to specific remedies was generally considered appropriate. While agreeing on the Special Rapporteur’s approach, some members of the Commission had made written proposals in an attempt to provide alternative ways of drawing the distinction. In the light of the comments and proposals made, the Drafting Committee had adopted the view that any definition of injured States should take account of the various types of wrongful acts that could be committed and adversely affect States. The first category of States should be differentiated from the second category of States in terms of the types of legal consequences to which they were entitled.

48. Paragraph 3 of article 40 bis, as proposed by the Special Rapporteur, would exclude injured entities other than States from the scope of the draft article. The Commission had supported that idea in view of the difficulty of addressing those complex issues, which had not been dealt with in the articles adopted on first reading.

49. The Drafting Committee had agreed with the general opinion expressed in the Commission that too many important and difficult issues were addressed in a single article and had deemed it preferable to split the issues up and deal with them individually in separate articles, namely, article 43 [40] (The injured State) and article 49 (Invocation of responsibility by States other than the injured State), the question of injured entities other than States being excluded from the scope of the draft articles, as indicated in article 34, paragraph 2.

50. Articles 43 [40] and 49, the first and last articles of chapter I of Part Two bis, dealt with the two categories of States that might be affected by an internationally wrongful act. In the view of the Drafting Committee, the identi-

fication of an injured State in any particular case depended, to some extent, on the primary rules concerned and on the circumstances of the case; in the context of the secondary rules, what could be done was to identify the categories of affected States and their entitlement to invoke responsibility and specific remedies. The Drafting Committee had avoided the term "legal interest" used in earlier texts in order not to cause terminological problems with regard to the terms "injured State" and "State having a legal interest": since all injured States also had a legal interest, that did not form a distinct category. The Drafting Committee had also avoided the use of the term "obligations *erga omnes*", preferring the term "obligations towards the international community as a whole". Articles 43 [40] and 49 were couched in terms of the right or entitlement of a State to invoke the responsibility of the wrongdoing State. The phrase "A State is entitled as an injured State to invoke … responsibility …", at the beginning of article 43 [40], was intended to make a distinction between that State and the other category of States entitled to invoke the responsibility of a wrongdoing State dealt with in article 49. Articles 43 [40] and 49 talked of a "State" in the singular, but did not preclude the possibility of there being more than one injured State.

51. Article 43 [40] dealt with the injured State in the narrow sense of the term. Subparagraph (*a*) considered the breach of an obligation in a bilateral relationship, as the category of injured States was easiest to identify in that case. The most common examples were breaches of obligations under a bilateral treaty or under a multilateral treaty that gave rise to a number of bilateral relations. It was more difficult to identify the injured States in a multilateral relationship, whether the obligation concerned was based on a treaty or on customary law. In a multilateral relationship, the wrongful act could specifically affect one or more of the States to which the obligation was owed. Those States could then be considered as having been specially affected by the wrongful act. Other States parties to the same multilateral relationship might also be concerned about the performance of the obligation.

52. Subparagraph (*b*) dealt with the obligations owed to a number of States or to the international community as a whole. The phrase "the obligation … owed to a group of States *including that State**" signified that the obligation was owed to that group, also in a given circumstance, in other words, having regard to the circumstances of the case. Subparagraph (*b*) first dealt with the breach of an obligation in a multilateral relationship which specially affected one or more States belonging to the group of States to which that obligation was owed. The word "specially", in subparagraph (*b*) (i), emphasized the special adverse effect of the wrongful act on the injured State. Several examples could illustrate that point. In the case of aggression, one could make a distinction between the State that had been targeted and other States in terms of their interest in, and entitlement to, the maintenance of the international public order. The differences in the effects of the wrongful act would also distinguish between those States in terms of what they were entitled to claim from the responsible State. For a State to be considered as belonging to the category of States referred to in article 43 [40], subparagraph (*b*) (i), there must be a special adverse effect that set it apart from all the other States which had also been affected by the wrongful act. The Drafting Committee had considered several alternatives for the word "specially" ("directly", "particularly", "necessarily"), but had decided that "specially" was the most suitable, especially as it was used in article 60, paragraph 2 (*b*), of the 1969 Vienna Convention, although, in that context, it also referred to the case of the breach of an obligation under a multilateral treaty that affected only one State. The words "affects" and "affect" in subparagraphs (*b*) (i) and (*b*) (ii) indicated that there were adverse and negative effects, as would be explained in the commentary. Subparagraph (*b*) also dealt with the obligations in a multilateral relationship that had been called "integral" obligations because the breach of one of them would affect the enjoyment of the rights or the performance of the obligations of all the States belonging to the relevant group. All the States to which the obligation was owed became, in effect, specially affected States. Subparagraph (*b*) (ii) dealt with the case in which every State was affected because every State was complying with its obligations only on the assumption that other States were doing the same; such was the case of obligations under a disarmament treaty, for example. The phrase "affect the enjoyment of the rights or the performance of the obligations" of all the States concerned was based on article 41, paragraph 1 (*b*) (i), of the Convention. The special character of integral obligations, the breach of which could affect the enjoyment of rights or the performance of obligations of the members of the group, would be explained in the commentary. The words "States concerned" clearly referred to the group of States towards which the "integral" obligation was owed.

53. Article 49 (Invocation of responsibility by States other than the injured State) incorporated the notion of collective interest. Article 43 [40], subparagraph (*b*) (i), and article 49, paragraph 1, might refer to the same wrongful act which affected different categories of States in different ways, but, whereas article 43 dealt with the injured State, as it were, in its individual capacity, article 49, paragraph 1, dealt with a State which was affected in its capacity as a member of a group of States to which the obligation breached was owed or as a member of the international community. Article 49, paragraph 1 (*a*), dealt with situations where the obligation breached was owed to a group of States, including the injured State, and where the obligation was established for the protection of a collective interest. Once again, the phrase "the obligation breached is owed to a group of States *including that State**" signified that, in a specific case, the obligation was owed to all members of the group. The obligation breached must meet two criteria to be included in that category of obligations. First, it must be owed to the group and, secondly, it must have been established for the protection of a collective interest. Paragraph 1 (*b*) dealt with the breach of an obligation owed to the international community as a whole.

54. Article 49, paragraphs 2 and 3, would be introduced after the remaining articles of chapter I had been explained.

55. Article 44 (Invocation of responsibility by an injured State), which corresponded to article 46 ter proposed by the Special Rapporteur, dealt with some substantial and procedural issues involved in the invocation of responsibility by an injured State, such as the choice of

the form of reparation and the admissibility of claims, which were issues that had not been dealt with fully in the draft adopted on first reading. As the general view in the debate in the Commission had been that, because of their importance, those issues should be addressed in separate articles, the Drafting Committee had divided the Special Rapporteur's proposal for article 46 ter in two. Article 44 was based on paragraph 1 of article 46 ter and consisted of two paragraphs. Under paragraph 1, the injured State as defined in article 43 [40], which invoked the responsibility of another State was required to give notice of its claim to that State. The relationship between the notice given by the injured State and the obligation to provide reparation had been discussed in the Commission and concerns had been expressed that the requirement for giving notice, especially in writing, would place an undue burden on the injured State. However, in the view of the Drafting Committee, in normal circumstances, when a State wanted to invoke the responsibility of another State, it should give that State notice. It would be explained in the commentary that such notice did not need to be given in writing and was not a condition for the obligation to provide reparation which immediately arose when the wrongful act was committed. The elements of notice set out in paragraph 2 were optional, for use at the discretion of the injured State. Paragraph 2 (*a*) provided that the injured State might indicate the conduct that the responsible State should adopt in order to cease the wrongful act. That was, of course, not binding on the responsible State. The injured State could only require the responsible State to comply with its primary obligation. However, it would be useful for the responsible State to have some idea of what would satisfy the injured State, as that might facilitate the settlement of the dispute. Paragraph 2 (*b*) dealt with the question of the choice of the form of reparation, an issue on which opinions had been divided, with some members defending the right to choose the form of reparation, while others had not been so sure and had not seen it as an absolute right. The Committee, for its part, did not believe that the article should set forth the right to choose the form of reparation in an absolute form. Paragraph 2 (*b*) was purely for the guidance of the injured State.

56. Article 45 [22] (Admissibility of claims) corresponded to paragraph 2 of article 46 ter proposed by the Special Rapporteur and basically dealt with two requirements: first, that of the nationality of claims and, secondly, that of the exhaustion of local remedies, which had been the subject of article 22 adopted on first reading. Both requirements were to be considered with regard to the admissibility of claims, as opposed to judicial admissibility. The draft did not exclude the possibility that, in some cases, a wrongful act might occur only when local remedies had been exhausted. The article provided that the responsibility of a State could not be invoked in two cases: (*a*) when the claim had not been brought in accordance with any applicable rule relating to the nationality of claims (the article did not specify which rules as that question should be settled in the context of diplomatic protection); and (*b*) when the claim was one to which the rule of exhaustion of local remedies applied and not every available and effective local remedy had been exhausted, which was basically what the Special Rapporteur had proposed. The wording of the latter provision was sufficiently flexible to cover all situations and took account of the fact that the rule of the exhaustion of local remedies applied only to certain types of claims. The words "available and effective" would be explained in the commentary. The Commission would also be called on to consider the issue of the exhaustion of local remedies in the context of diplomatic protection, although the local remedies rule might have a broader scope.

57. Article 46 (Loss of the right to invoke responsibility) was a rewording of article 46 quater proposed by the Special Rapporteur, that dealt with the loss of the right to invoke responsibility, an issue not dealt with in the draft articles adopted on first reading. Subparagraph (*a*) dealt with the waiver of the claim. A waiver was effective only if the injured State had validly waived the claim in an unequivocal manner. In the text proposed by the Special Rapporteur, the reaching of a settlement had been one of the grounds for the loss of the right to invoke responsibility. However, taking into account the views expressed in the Commission, the Drafting Committee had agreed that settlement could not be taken as grounds for the loss of the right to invoke responsibility. A settlement was the subject of an agreement between the parties which altered the legal situation. The commentary would deal with that point, if necessary, and would set out the conditions for validity of a waiver. Subparagraph (*b*) dealt with unreasonable delay amounting to prejudice. This subparagraph had been discussed extensively in the Commission. Some members had objected to it on the grounds that the text proposed by the Special Rapporteur appeared to state a general rule on the limitation of claims that would certainly not apply in all cases, while others had been in favour of retaining a modified version of that provision, which built on the notion of prejudice to the responsible State. The Committee had agreed with the latter view and had redrafted the article in a way that avoided addressing the issue of the limitation of claims. The Committee had stressed the conduct of the State, which could include, where applicable, unreasonable delay, as the determining criterion for loss of the right to invoke responsibility. The wording it was proposing was closer to that of article 45, subparagraph (*b*), of the 1969 Vienna Convention. The issue of delay would be dealt with more generally in the commentary, where it would be pointed out that delay as such was not a basis for the loss of rights and where it would also be explained that subparagraphs (*a*) and (*b*) could apply to part of a claim, as well as to the whole of it.

58. Article 47 (Invocation of responsibility by several States) was a modified version of article 46 quinquies proposed by the Special Rapporteur. It set forth the principle, which had not been adequately addressed in the draft articles adopted on first reading, that, where there were several injured States, each of them could separately invoke the responsibility of the State that had committed the internationally wrongful act. The Drafting Committee had inserted the word "separately" to make that point quite clear and it had also replaced the words "two or more States" contained in the text proposed by the Special Rapporteur by the words "several States". The article did not deal with the case where injured States took different attitudes to the forms of reparation, as that seemed to be a problem of limited practical importance. Such cases, if they arose, were likely to present special features and to be significantly affected by the content of the obligation breached.

59. Article 48 (Invocation of responsibility against several States) was based on article 46 sexies proposed by the Special Rapporteur. Paragraph 1 provided that, where several States were responsible for the same internationally wrongful act, the responsibility of each State could be invoked in relation to that act. Paragraph 2 provided two safeguards. Subparagraph (*a*) stipulated that the injured State could not recover, by way of compensation, more than the damage suffered. The principle of prohibiting double recovery was designed to protect the responsible State, whose obligation to compensate was limited to the damage suffered. The issue had been raised as to whether it would be better to talk of "reparation" rather than "compensation"; the Drafting Committee had taken the view that, under normal circumstances, the prohibition of double recovery, which was a well-established rule frequently applied by tribunals, applied to monetary forms of reparation. It had also deleted the reference to a "person or entity" in the text proposed by the Special Rapporteur, as Part Two of the draft articles dealt only with the responsibility of States towards other States. It would be explained in the commentary that the principle of the prohibition of double recovery applied in general, no matter who was the beneficiary of the recovery. Subparagraph (*b*) stipulated that paragraph 1 was without prejudice to any right of recourse towards the other responsible States. That was simply a reminder that the articles did not address the question of how responsibility was shared when several States were responsible for the same wrongful act.

60. It should be pointed out that the Drafting Committee had not retained paragraph 2 (*b*) (i) of article 46 sexies, which had dealt with the admissibility of proceedings, as it had agreed with the majority of members of the Commission that that issue was outside the scope of the draft articles. It could, however, be addressed in the commentary.

61. With regard to article 49 (Invocation of responsibility by States other than the injured State), paragraph 1 had already been examined in connection with the distinction between that category of States and the category of injured States. Following the proposal by the Special Rapporteur and taking into account the views expressed in the Commission, the Drafting Committee had concluded that any State in the category in question was entitled to request cessation of the wrongful act and, where necessary, assurances and guarantees of non-repetition and that it should also be entitled to claim reparation from the responsible State in accordance with the provisions of chapter II of Part Two. While the Special Rapporteur had envisaged that only restitution could be claimed, the Committee considered that the States in question should also be entitled to seek other forms of reparation, as that would ensure that there were States entitled to claim in all cases of a breach of obligations towards the international community as a whole. However, a claim could be made only in the interest of an injured State or of other beneficiaries of the obligation breached. All those issues were addressed in article 49, paragraph 2. Paragraph 3 simply provided that the conditions and limitations that applied to the invocation by the injured State of the responsibility of another State also applied in cases where the State belonged to the other category of States referred to.

62. Chapter II of Part Two (Countermeasures) dealt with the purpose of countermeasures and the conditions under which they could be taken, as well as with the limitations applying to them. It was composed of six articles, which had been the subject of long discussions in the Commission, especially because, under the corresponding articles adopted on first reading, disputes relating to State responsibility would have been indirectly submitted to a compulsory dispute settlement procedure when counter-measures had been taken. Countermeasures were indeed very controversial. The Special Rapporteur and, later, the Drafting Committee had attempted to reconcile the divergent views expressed by designing an operational system with conditions and limitations attached that were intended to keep countermeasures within generally acceptable bounds.

63. Article 50 [47] (Object and limits of countermeasures) defined the purpose of countermeasures and some of the conditions referred to in article 23 [30]. It corresponded to article 47 adopted on first reading and consisted of three paragraphs. Paragraph 1 specified that the purpose of countermeasures was to induce a State responsible for an internationally wrongful act to comply with its obligations under Part Two, and that meant that countermeasures did not have a punitive purpose. It also set out the first condition for taking countermeasures. The responsible State must have failed to comply with its obligations under Part Two. The wording "*may only** take countermeasures" indicated their exceptional nature. As some members of the Commission had suggested in plenary that the wrongful act should be qualified, the Drafting Committee had discussed the matter at length, but had finally concluded that it would be better not to do so. Paragraph 1 was therefore a simple statement based on an objective criterion. Countermeasures could be taken when a wrongful act had actually been committed. It was clear that a State taking countermeasures did so at its own peril, if it turned out that its view of the wrongfulness of the act was not well founded.

64. Paragraph 2 defined the legal nature and bilateral character of countermeasures. Countermeasures were limited to the "suspension of performance" of one or more international obligations of the State taking the countermeasures "towards" the responsible State. As in the case of article 23 [30], the bilateral character of countermeasures enabled third States to be protected. The term "suspension of performance" of the obligation included both acts and omissions. Moreover, the word "suspension" was intended to emphasize the temporary nature of countermeasures. All of that would be explained in the commentary, where it would also be explained that countermeasures were not measures of retortion and hence that the limitations and conditions for taking countermeasures did not apply to retortion.

65. Paragraph 3 drew on article 72, paragraph 2, of the 1969 Vienna Convention, which provided that, when a State suspended the operation of a treaty, it must not, during the suspension, do anything to preclude its resumption. The paragraph referred to what some Commission members had called the "reversibility" of countermeasures. The Drafting Committee did not think that all countermeasures were or ought to be reversible in the strict sense of the word. That would have been an unrea-

sonable limitation. The consequences of countermeasures could not always be reversible. Countermeasures could sometimes cause irreversible collateral damage, even after they had been lifted, although it might be possible to resume compliance with the underlying obligation. For example, the suspension of a trade agreement might lead to the bankruptcy of a company in the State targeted by the suspension. However, such an effect did not preclude the resumption of the trade agreement between the two States after the suspension of countermeasures.

66. The phrase "as far as possible" in paragraph 3 indicated that, if the injured State had a choice between a number of lawful and effective countermeasures, it should select those which did not prevent the resumption of performance of the "obligations in question", in other words, those which had been suspended as a result of countermeasures.

67. Article 51 [50] (Obligations not subject to countermeasures) corresponded to article 50 on prohibited countermeasures adopted on first reading. The Special Rapporteur had dealt with prohibited countermeasures in two articles, articles 47 bis and 50, but, during the debate in the Commission, many members had stated a preference for merging the two articles because the issues they addressed were closely linked.

68. Article 51 [50] was worded differently from the text adopted on first reading and comprised two paragraphs. Paragraph 1 provided that countermeasures could not involve any derogation from the obligations listed in the article. The verb "involve" was intended to cover both the object and the consequences of countermeasures; it gave the opening clause a broader meaning than the opening clause of article 50 adopted on first reading.

69. The word "derogation" was intended to convey that each of the obligations listed in the article was imposed by other rules and that article 51 was not intended to override them or, for that matter, to define them. It meant that countermeasures should in no way affect compliance with those obligations.

70. Subparagraph (*a*) corresponded to subparagraph (*a*) of article 50 adopted on first reading and dealt with the prohibition of the threat or use of force as embodied in the Charter of the United Nations. The text concerned forcible countermeasures. The Commission had discussed at length economic and political coercive measures, but there had been no agreement on their inclusion. In the view of the Drafting Committee, the concern that subparagraph (*b*) adopted on first reading had intended to address was covered in other provisions of the article, including the new subparagraph (*b*).

71. Subparagraph (*b*) corresponded to subparagraph (*d*) adopted on first reading. The Drafting Committee was concerned that, given the wide meaning acquired by the concept of human rights, resort to countermeasures would be severely limited unless the reference to human rights was qualified. In the English text, the term "basic human rights" had been replaced by the term "fundamental human rights". The commentary would explain the scope of the qualifier "fundamental". As in the text adopted on first reading, the important thing was that the effects of countermeasures should essentially be limited to the injured State and the responsible State and should have only minimal effects on individuals. In particular, fundamental human rights must remain inviolable.

72. Subparagraph (*c*), which dealt with obligations of a humanitarian nature that prohibited reprisals, had not been included as a separate subparagraph in the text adopted on first reading. It had been subsumed in the subparagraph dealing with the protection of basic human rights. The view in the Commission had been that reprisals in respect of humanitarian law were a separate issue that could not be covered under the general concept of human rights.

73. Subparagraph (*d*) corresponded to subparagraph (*e*) adopted on first reading and dealt with peremptory norms of general international law. Some members of the Drafting Committee considered that subparagraphs (*a*) to (*c*) covered almost entirely the category of peremptory norms, but the majority had supported the retention of a more general clause. The Committee had also considered the possibility of aligning that subparagraph with article 43 [40] by referring to "any other obligation towards the international community as a whole", but had found that wording too broad and had preferred the term "peremptory norms", which was a narrower concept.

74. Subparagraph (*e*) dealt with the inviolability of diplomatic or consular agents, premises, archives and documents and corresponded to subparagraph (*c*) adopted on first reading, with some minor drafting changes. That subparagraph was essential, as diplomatic or consular agents were at risk of becoming a target for countermeasures. Without that limitation, relations between States could become very difficult.

75. The order of the categories in paragraph 1 was different from that in the text adopted on first reading. In the latter, the current paragraph 1 (*d*) on peremptory norms had been placed at the end of the list indicating "any other conduct in contravention of a peremptory norm of general international law". However, the position of that subparagraph did not imply that all the other obligations listed in the preceding subparagraphs were imposed by peremptory norms. The Drafting Committee had thought it would be clearer to place the subparagraph dealing with peremptory norms immediately after those referring to matters that could be regarded as falling within the scope of peremptory norms, in other words, subparagraphs (*a*) to (*c*). Subparagraph (*e*) did not concern peremptory norms and should therefore be placed after subparagraph (*d*). That rearrangement strengthened the interpretation of subparagraph (*b*), on the protection of fundamental human rights, insofar as that subparagraph dealt only with the category of human rights that were protected from any derogation by virtue of their peremptory nature.

76. Paragraph 2 dealt with dispute settlement procedures applicable to the parties and underlined the importance of complying with those procedures when countermeasures were taken. Moreover, it implied that dispute settlement mechanisms could not themselves be the subject of countermeasures.

77. Article 52 [49] (Proportionality), the title of which had not been changed, corresponded to article 49 adopted on first reading. The latter had related proportionality to

the gravity of the wrongful act and the injury suffered. In the discussion in the Commission, the point had been made that, given the purpose of countermeasures, which was to induce the responsible State to comply with its obligations, proportionality should be assessed with reference to that purpose. The Drafting Committee had taken the view that the relevance of the purpose of countermeasures resulted mainly from the context and that it could adopt the language of ICJ in the *Gab Ź kovo-Nagymaros Project* case, according to which countermeasures should be commensurate with the injury suffered, taking into account the "rights in question".

78. The revised text of the article thus related proportionality primarily to the injury suffered, while taking into account two further criteria: the gravity of the wrongful act and the rights in question. The words "taking into account" were not meant to be exhaustive and other factors might also be relevant in determining proportionality. Those factors had to be identified in the particular context of each case. On the question of deleting the reference to the gravity of the wrongful act, as proposed by some members of the Commission, opinion had been divided in the Drafting Committee, which had not been able to reach agreement on the subject. The reference in question had been retained because it had existed in the text adopted on first reading and had not been criticized by Governments. In addition, in the new text, gravity was only one of the criteria to be taken into account. The "rights in question" were the rights of the injured State and also the rights of the State responsible for the wrongful act. The term could also cover the rights of other States which might be affected. The Drafting Committee had placed that article before article 53 [48] (Conditions relating to resort to countermeasures), because it dealt with substantive issues, like the articles preceding it in chapter II, whereas the remaining articles in the chapter were of a procedural nature.

79. Article 53 [48] corresponded to article 48 adopted on first reading, which the Special Rapporteur had divided in two, incorporating paragraphs 3 and 4 of the text adopted on first reading into article 50 bis, on the suspension or termination of countermeasures. In reconsidering the two articles, the Drafting Committee had taken the view that the first two paragraphs of article 50 bis as proposed by the Special Rapporteur should be moved to article 53 so that all the procedural conditions for resorting to countermeasures were in the same article. In drafting article 53, the Committee had attempted to reconcile the wide differences of opinion expressed in the Commission and, in particular, had taken into account the criticisms made of article 48 adopted on first reading because it had linked countermeasures to compulsory dispute settlement procedures.

80. The Drafting Committee had considered that, before taking countermeasures, an injured State was required to request the responsible State, in accordance with article 44, to comply with its obligations under Part Two. The requirement of notification was covered by paragraph 1. The logic behind that paragraph was that, considering the exceptional nature and the potential consequences of countermeasures, they should not be taken before the injured State had given the other State notice of its claim, even though the time between giving such notice and taking countermeasures might be short. If the injured State had already notified the responsible State of its claim, in accordance with article 44, it did not have to do so again in order to comply with article 53 [48], paragraph 1, for the purposes of countermeasures. In addition, the notification under paragraph 1 could also refer to the injured State's decision to take countermeasures and hence fulfil one of the requirements set out in paragraph 2.

81. Paragraph 2 required that, once the injured State had decided to take countermeasures, it must notify the responsible State and also "offer" to negotiate with that State. The Drafting Committee had thus reworded the latter requirement in accordance with the prevailing view expressed in the Commission. Despite the concerns expressed by some members, the Committee had found the requirement in paragraph 2 to be useful and not excessively burdensome for the injured State, considering that countermeasures could have serious consequences for the other State. In addition, once again the temporal relationship between the implementation of paragraph 1 and that of paragraph 2 was not strict. Notifications could be made at fairly short intervals or even at the same time. Provision was also made for the injured State to take provisional and urgent measures to protect its rights. Some Committee members had found that exception unjustified because it was difficult to make a clear distinction between provisional and urgent countermeasures and other countermeasures.

82. Paragraph 3 dealt with what had been called "interim measures of protection" in the text adopted on first reading. In his proposal, the Special Rapporteur had said that the wording could be improved, but he had accepted that some countermeasures could be taken urgently by the injured State when it was necessary to protect its rights. That was why such measures were henceforth referred to as "provisional and urgent countermeasures". Those countermeasures were not subject to the requirements set out in paragraph 2, but they could not be taken until the injured State had given notice of its claim in compliance with paragraph 1. They were subject to the same limitations as countermeasures in general. Countermeasures were in principle supposed to be provisional, but that characteristic had been emphasized in paragraph 3. The temporal element was also crucial in relation to that paragraph. The injured State could lose the opportunity to protect its rights if it did not act quickly. The commentary would further explain that point and in particular the relationship between paragraphs 1 and 3. The "rights" referred to included the rights of the injured State under Part Two.

83. Paragraph 4 was a revised version of paragraph 3 of article 48 proposed by the Special Rapporteur, which had been the subject of some controversy in debate in the Commission. Its purpose was to discourage countermeasures while the parties were negotiating in good faith. It did not apply to the countermeasures referred to in paragraph 3. Thus, the injured State could take provisional and urgent countermeasures even during negotiations. One member of the Committee had objected to paragraph 4 on the grounds that it did not conform with the views expressed by the arbitral tribunal in the *Air Service Agreement* case and that it was unreasonable.

84. Paragraph 5 dealt with the case in which the wrongful act had ceased and the dispute had been submitted to a court or tribunal with the authority to make decisions that were binding on the parties. Once those conditions had been met, the injured State could not take countermeasures or, if it had already taken some, it must suspend them within a reasonable time. The reasoning behind that was that, once the parties had submitted their dispute to a court, it was for the court to order provisional measures to protect the rights of the injured State, if so requested. The phrase "within a reasonable time" which qualified the suspension of countermeasures was intended to take account of the time that might be necessary to allow the tribunal to be established and to consider the possibility of taking the provisional measures in question or any others that might be necessary. The paragraph assumed that the court or tribunal concerned had jurisdiction over the dispute and also the power to order provisional measures. The reference to "a court or tribunal" was a functional one, referring to any third party dispute settlement mechanism, whatever its designation, with the power to make decisions that were binding on the parties in the case. However, it did not refer to political organs such as the Security Council.

85. Paragraph 6 was based on paragraph 4 of article 48 adopted on first reading and on paragraph 2 of article 50 bis proposed by the Special Rapporteur. However, it was drafted in more general terms and set forth the obligation of the responsible State to comply in good faith with the dispute settlement procedures agreed between the parties themselves. It dealt with the case in which the parties were before a competent court or tribunal and where the court or tribunal had ordered provisional measures or rendered a decision, but the responsible State had not complied with that decision. It also applied to situations in which a State party failed to cooperate in the establishment of the tribunal or failed to appear before it once it had been established. In the circumstances to which it referred, the limitations on the taking of countermeasures under paragraph 5 did not apply.

86. Article 54 (Countermeasures by States other than the injured State) was a new provision that had not appeared in the text adopted on first reading and concerned the countermeasures taken by States other than the injured State that were entitled to invoke the responsibility of a State under article 49. The Special Rapporteur had dealt with that question in his draft articles 50 A and 50 B, dealing, respectively, with countermeasures taken on behalf of the injured State and countermeasures taken in cases of a serious breach of obligations owed to the international community as a whole. After some discussion, the Drafting Committee had concluded that the two articles proposed by the Special Rapporteur did not cover all situations and overlapped to some extent. Moreover, the issue of cooperation, which had been dealt with in article 50 B, was also relevant in the situations provided for in article 50 A. The Committee had therefore decided to merge the two articles.

87. In the view of the Special Rapporteur and the Drafting Committee, when there was no injured State within the meaning of article 43 [40], a distinction had to be made between breaches of obligations affecting several States or the international community as a whole, on the one hand, and serious breaches of obligations owed to the international community as a whole that were essential for the protection of its fundamental interests as defined in article 41, on the other. It was only with regard to the latter breaches that countermeasures by States that were not injured States within the meaning of article 43 [40] could be justified. With regard to the other breaches, a State entitled to invoke responsibility under article 49 could take countermeasures only if there was an injured State.

88. When there was an injured State, any other State to which the obligation was owed could take countermeasures, subject to certain conditions. Those conditions were: first, such countermeasures must be taken at the request and on behalf of the injured State and, secondly, the injured State must itself be entitled to take countermeasures. In other words, a form of cooperation with the injured State was provided for. The wishes of the injured State therefore played a significant role in the decision to take countermeasures and in the choice of countermeasures.

89. With regard to the breaches referred to in article 41, the Drafting Committee had been of the view that any State could take countermeasures in the interest of the beneficiaries of the obligation breached. In the text he had proposed on that particular issue, the Special Rapporteur had limited that possibility to cases where there was no injured State within the meaning of article 43 [40]. The members of the Drafting Committee had been divided on the issue. One view had been that, when there was an injured State within the meaning of article 43 [40], its wishes should be paramount in deciding whether to take countermeasures and what form they would take. Another view had been that, in cases of a serious breach of obligations intended to protect the fundamental interests of the international community as a whole, the wishes of the injured State had little or no relevance. The Drafting Committee had concluded that, in the case of such breaches, the injured State did not have the same role as in paragraph 1 and that the words "in the interest of the beneficiaries" implicitly referred to the interests of the injured State. That point would be further explained in the commentary. Those were the two situations dealt with in paragraphs 1 and 2 of article 54.

90. A further issue raised by that article concerned coordination between States when several of them took countermeasures. Like the Commission, the Drafting Committee did not think it would be possible to address that matter in detail. To begin with, any decision on questions of priority and coordination depended on the actual circumstances and a number of other factors. All that could reasonably be required was that States should generally cooperate when they intended to take countermeasures, so that those measures, individually or collectively taken, complied with the conditions laid down in chapter II for taking countermeasures. One of the key concerns had of course been the need for proportionality. Paragraph 3 was couched in general terms and covered the situations dealt with in paragraphs 1 and 2. It could also be applied, at least by analogy, when two or more injured States, as defined in article 43 [40], took countermeasures. Those States should also cooperate in accordance with the principle set out in paragraph 3.

91. It should be mentioned that one of the issues that had been discussed in the context of that article was

the extent to which the right to take countermeasures should be limited to collective measures taken under the auspices of the United Nations or of a regional organization or whether they should be without prejudice to such measures. The Drafting Committee had not been able to reach agreement on that point. First, it involved complex questions which had not been considered by the Commission or by the Special Rapporteur in his reports and the Committee had not had enough time to study the questions of principle involved adequately. Secondly, it would in any case have been very difficult to state general rules applicable to all situations. Thirdly, any venture in that direction would have taken the Commission very far into the area of progressive development. Fourthly, in the view of some members of the Committee, the matter was in any case outside the scope of the topic.

92. The last article of chapter II was article 55 [48] (Termination of countermeasures) which corresponded to paragraph 3 of article 50 bis proposed by the Special Rapporteur. It dealt with the case where the responsible State had complied with its obligations under Part Two. There were no grounds in such a case for maintaining countermeasures and they should therefore be terminated.

93. Part Four of the draft (General provisions) consisted of four articles.

94. The first was article 56 [37] (*Lex specialis*) which corresponded to article 37 adopted on first reading. The Drafting Committee had simplified the text of the article, the purpose of which was to indicate the relationship between the draft articles and other rules relating to State responsibility, on the assumption that those rules had the same legal rank, if not a higher rank as those embodied in the draft articles. Under article 56 [37], the draft articles did not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its consequences were determined by special rules of international law. The special rule would determine the extent to which it derogated from the more general rules on State responsibility set forth in the draft articles.

95. Article 57 (Responsibility of or for the conduct of an international organization) had not been in the text adopted on first reading. It had been adopted by the Drafting Committee at the fiftieth session of the Commission as article A.[5] The Committee had changed only the opening clause of the English text to bring it into line with the wording used in other articles. The words “These articles shall not prejudge any question” had been replaced by the words “These articles are without prejudice to any question”.

96. With regard to article 58 (Individual responsibility), the Drafting Committee had been unable to accept the proposal made by some members of the Commission that a paragraph should be inserted in article 51, as adopted on first reading, providing for the “transparency” of States in cases of serious breaches of obligations towards the international community as a whole. However, it had found it useful to state in the context of the general provisions that the articles did not address the question of the individual responsibility under international law of any person acting in the capacity of an organ or agent of a State. While that could already be inferred from the fact that the articles dealt only with the responsibility of States, the Committee had considered that a specific provision would make the point more clearly. That was the purpose of article 58, which was also a “without prejudice” clause.

97. The Special Rapporteur had proposed an article expressly stating that the articles did not affect the primary rules of which a breach might give rise to State responsibility. That article, article B, had been entitled “Rules determining the content of any international obligation”. However, the relationship between primary and secondary rules was complex and it could be held that some articles impinged on questions relating to primary rules. The Drafting Committee had found it impossible to state the proposed principle in a short, concise and clear way. It had therefore decided that it would be preferable to deal with that issue in the commentary to Part One, where it could be explained in greater detail. Article B had therefore been deleted.

98. The last article in Part Four was article 59 [39] (Relation to the Charter of the United Nations) which corresponded to article 39 adopted on first reading. During the second reading, some members of the Commission had found it unnecessary, while others had thought that, since it had acquired special importance in the context of the articles adopted on first reading, it would be better to retain it with some modification. It now took the form of a “without prejudice” clause and was not intended to affect the relationship between the articles and the Charter of the United Nations. In any case, that relationship did not depend on features that could be said to be specific to the issues dealt with in the draft articles.

99. As article 59 [39] was a “without prejudice” clause, the Drafting Committee had found it useful, as suggested by some members of the Commission, to delete the reference to Article 103 of the Charter of the United Nations and to refer to the Charter as a whole.

100. The CHAIRMAN said that, as recommended by the Chairman of the Drafting Committee, the Commission would simply take note of the report of the Drafting Committee and take a decision on the draft articles on State responsibility only at its next session. The substantive discussion on the draft articles would therefore take place at that session.

The meeting rose at 1.10 p.m.

2663rd MEETING

Thursday, 17 August 2000, at 3.05 p.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides,

[5] See footnote 3 above.