Document:-

A/CN.4/SR.2668

Summary record of the 2668th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

13. The question of the form to be taken by the draft was an important one, requiring an early decision at the current session. A wide range of views had been expressed, both in the Commission and in the Sixth Committee. The crux of the problem was whether the Commission should opt for a binding legal instrument in the form of a treaty or something non-binding like a General Assembly resolution. The advantages and disadvantages were fairly evenly balanced.

14. In view of the reluctance of States to ratify treaties, particularly when they contained as many controversial issues as did the draft articles, and of the time-consuming preliminaries to any diplomatic conference that would lead to a treaty, he was inclined to the view that a General Assembly resolution was the more practical approach. He agreed, however, that the Assembly should do more than simply take note of the text. The status of the instrument should be enhanced, but whether that could be done by endorsement or consensus without lengthy and divisive discussion in the Sixth Committee was hard to predict. It would depend on many factors, including whether the draft articles struck the proper balance. The Commission could make recommendations on the form of the draft articles, but how the substance of the text was reviewed was entirely in the hands of the Sixth Committee. He would like to hear the views of other members of the Commission on that subject.

15. The Commission had so far refrained from proposing in the articles any provisions on dispute settlement. If the draft was envisaged as an international convention, then there was some point to including such provisions. It had been suggested that the question of dispute settlement should be reviewed on its own merits, and paragraph 20 of the fourth report set out another idea that was worthy of consideration.

16. Part Three of the draft as adopted on first reading had consisted of a set of articles on dispute settlement, but the procedures had involved excessive detail and had in many respects been unbalanced. They had drawn criticism from Governments and had been discarded on second reading. States were in general reluctant to accept compulsory dispute settlement, but the total absence of such provisions in a legal instrument such as the one on State responsibility was not appropriate. State responsibility was a topic of exceptional importance, involving the rights and obligations of States as well as their vital interests. It covered a broad and sensitive area of international law in which disputes could easily arise. To deal with that situation, it seemed proper to include in Part Four a general provision on dispute settlement, modelled on Article 33 of the Charter of the United Nations and laying emphasis on the principles of free choice and peaceful settlement. Such an addition would make the whole set of draft articles more complete, even if it took the form not of a treaty but of a General Assembly resolution.

17. Mr. BROWNLIE, addressing the question of form, said that two specific factors strongly militated against adopting a convention. The draft articles included major elements of progressive development and the response of a number of States would clearly be problematic. In fact, not only major Powers but also small States would have reasons for caution. The proposed adoption of a convention could be expected to result in the convening of a preparatory conference or some other arrangement that might seriously threaten to unravel the carefully devised scheme of the draft.

18. Two further considerations were in order. The 1969 Vienna Convention did not provide a useful or, indeed, accurate analogy to the draft articles. Its adoption as a convention had been impressive at the time, but its content could not be likened to that of the draft articles. Just as the Commission did not ignore the views of individual Governments, it should certainly not ignore the possible reaction of the collectivity of Governments known as the General Assembly.

19. He agreed with the Special Rapporteur's conclusions on the question of dispute settlement, especially as set out in paragraphs 17 to 19 of the fourth report. In general terms, he did not consider that there was a practical necessity to include provisions on compulsory settlement. Such inclusion would not change the attitude of States in general or of individual States to compulsory jurisdiction by ICJ or other tribunals. A provision along the lines of Article 33 of the Charter of the United Nations was an attractive option but not strictly necessary, since the position under the Charter was preserved by article 59 of the draft.

The meeting rose at 12.45 p.m.

2668th MEETING

Thursday, 26 April 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/L.602 and Corr.1 and Rev.1)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the Special Rapporteur's fourth report (A/CN.4/517 and Add.1).

2. Mr. HAFNER, congratulating the Special Rapporteur on his fourth report and referring to the form the draft articles should take, said that the Commission must make a decision on that question and submit a recommendation to the General Assembly in accordance with article 22 of its statute.

3. He did not think the Commission should recommend that the text should take the form of a convention. As Mr. Brownlie had noted, there was no comparison to be drawn with the 1969 Vienna Convention because it dealt with matters of formal structure of international law, whereas the topic of State responsibility had more to do with the essence of international law. It was difficult to see how the basic elements of international law could be stated in a convention. Moreover, if the instrument on State responsibility was a convention ratified by about one third of the world's States, it was unclear what the effects would be, both for the States which had ratified it and for the majority of States which had not. The formulation of reservations would also give rise to problems because it would be unthinkable for reservations to be permissible in a field such as that of State responsibility.

4. If the Commission's draft on State responsibility were to take the form of a convention, moreover, the text would have to be subjected to the scrutiny of States, which might amend it to the extent of substantially changing over 40 years' work by the Commission and producing an instrument which would scarcely resemble the text the Commission had adopted. The outcome of negotiations on a draft convention was never certain. A good reminder was that the system of reservations which was provided for in the 1969 Vienna Convention and which was currently giving rise to so many problems was the result of negotiations. More recently, it had been seen to what extent the Rome Statute of the International Criminal Court differed considerably from the draft prepared by the Commission. If the aim was to prevent the text on State responsibility from subsequently being redrafted, it would therefore be better not to plan on it becoming a convention.

5. Another question that arose was whether the Commission should work without regard for the views expressed in the General Assembly. It was possible that, if the Commission took no notice of the past and future reactions of States in the Assembly, it might lose the support of the international community and eventually deprive its work of any chance of success. To ensure that that did not happen, it was therefore important for the Commission to anticipate the possible reactions of States in the Assembly on the basis of the comments they had already submitted.

6. Another possible scenario, in order to win the support of States more readily, would be for the Commission to propose a text from which all the points in dispute or still in abeyance had been removed. That was the so-called "two-track" approach recommended by Austria a few years previously. He thought that it was too late to use it at the current time because the Commission had already spent an enormous amount of time studying all the issues arising in connection with State responsibility and States themselves would not accept a truncated text. That approach would also mean continuing to discuss the unresolved issues after defining the ones on which agreement existed and the Commission no longer had time to do that.

7. It should also not be forgotten that the topic of State responsibility was to some extent a grey area of international law and a person would have to be very shrewd indeed to say with any certainty what the existing generally accepted law was. To focus the draft articles on existing law might therefore be an impossible task.

8. The only way to keep intact the text on State responsibility adopted by the Commission would be for the General Assembly to take note of it by recommending, for example, that States should take it into consideration in individual cases. On the basis of the text, State practice would then show what they thought international law was or should be.

9. In some quarters, an instrument such as a declaration inevitably carried less weight than a convention. He emphasized, however, that even a declaration gave rise to a *praesumptio juris*, so that States which were opposed to it, had the burden of proving that it was not binding. It should also not be forgotten that soft law instruments had a decisive impact on international relations and the conduct of States. ICJ had demonstrated that by referring in its decisions to General Assembly resolution 2625 (XXV) of 24 October 1970, on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, and resolution 3314 (XXIX) of 14 December 1974, on the Definition of Aggression. The thrust of those resolutions reflected customary international law, although to some extent it could be argued that they departed from traditional concepts of existing law.

10. It might also be thought that the 1969 Vienna Convention would have had almost the same effect and the same success if it had been adopted as a declaration annexed to a General Assembly resolution. Although it had been ratified by fewer than 100 States, its influence was at least as far-reaching as that of the Convention on the Rights of the Child, which had been ratified by almost all States. The number of ratifications of a convention and whether an instrument was a convention or a declaration were thus perhaps not key factors in the influence it was likely to have on international relations. He reiterated his own view that there would be no harm in the Commission

[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*

recommending that the Assembly should not consider the draft articles on State responsibility as a draft convention.

11. He did not think there was any reason to include the question of the settlement of disputes in an instrument on State responsibility, and not only because of his objection to the text taking the form of a convention. As the Special Rapporteur had pointed out, any conflict could be said to incur the responsibility of States. If a system or mechanism was provided for the settlement of disputes, it had to be applicable to disputes of any kind. The question that would then arise was which mechanism was most appropriate, bearing in mind that it would follow on many others that already existed. In recent years, mechanisms had been established by a number of conventions (for example, the conciliation commissions in the annexes to the Vienna Conventions, which were also provided for in many other codification conventions, the mechanism in the United Nations Convention on the Law of the Sea or the Court of Conciliation and Arbitration of the Organization for Security and Cooperation in Europe, which had never yet been applied) and were adapted to certain kinds of disputes and particular cases. It would therefore be difficult to find a system of settlement, which suited all kinds of disputes among States. It had been suggested that the problem could be dealt with by using a general formulation, such as that contained in Article 33 of the Charter of the United Nations, but, on close reading, it was obvious that the scope of that Article was not contributing very much. In conclusion, it would not be desirable to contemplate a dispute settlement mechanism except for countermeasures, a matter on which he reserved the possibility of speaking later.

12. Mr. ECONOMIDES thanked the Special Rapporteur for his fourth report, which was as stimulating as the previous ones, and for his efforts, which gave the Commission the hope of completing its work on State responsibility before the end of the current session.

13. With regard to the form of the draft articles, he had always argued, both in the Commission and in the Sixth Committee of the General Assembly, that the most appropriate form would be an international convention. There were several reasons in favour of that solution. First, as Mr. Momtaz had pointed out during the informal consultations on the subject, the Commission stated the law and that could only be done through binding texts of a conventional nature, not through mere declarations, which at best could provide only some approximate indications of the content of a legal rule. Secondly, the Commission's firmly established tradition pointed to the same conclusion: all its major drafts had become international conventions, including the 1969 Vienna Convention. The draft on State responsibility was even more important than that Convention and amply deserved the same treatment, namely, to acquire the status of an international convention.

14. Where State responsibility was concerned, moreover, there was a regrettable gap in international law that ought to be filled—and that was why the General Assembly had entrusted the consideration of the question to the Commission. The gap could be filled only by a binding convention, not by a declaration in the nature of a recommendation. It was well known that the impact of a convention, even unratified, on the practice of States was far more significant than a mere declaration by the Assembly could ever be. He was convinced that the draft articles on State responsibility, which had definite merits deriving from several decades of work and would obviously be very useful, would gradually be ratified by States if they became a convention. There was no common ground between the draft articles on State responsibility on the one hand, and the 1978 and 1983 Vienna Conventions on the other, or the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission on second reading at its fifty-first session;[4] it was a mistake to compare things which were radically different.

15. Another argument along the same lines was that many States had already said that they were in favour of an international convention. The ground was therefore prepared for the Commission to submit a recommendation on a convention. A recommendation in favour of a non-conventional form would have a doubly negative effect: it would detract from the importance of a crucial question of international law, that of State responsibility, and would indicate that the Commission itself lacked confidence in the value of its work.

16. The proponents of a text in the form of a declaration used political arguments, rather than legal ones, which were not convincing: first, questions involving the progressive development of international law could not be separated in any firm and absolute way from those relating to codification. In all the Commission's drafts, there were inevitably provisions falling into both categories at the same time. For the sake of security in legal relations, it was essential to have written rules, which were either customary or new, as specific as possible and binding in character. Secondly, the draft on State responsibility did not a priori come more within the realm of progressive development than the 1969 Vienna Convention, which had, however, been the first instrument to embody the fundamental—and at the time revolutionary—concept of a peremptory norm of international law in articles 53, 64 and 71.

17. In his view, the Commission was, as an independent legal body, bound to opt for a binding legal form. If the General Assembly did not follow its recommendation and chose the solution of a resolution, that would not be surprising. It was obvious that, as a political body, the Assembly would take the final decision, but, even in that case, the Commission's draft would have greater status, since it would be a draft convention proposed by the Commission, and not just a draft resolution. If however the opposite were to happen, i.e. if the Commission decided in favour of a resolution and the Assembly opted for a convention, a political body would be giving a lesson in law to an independent legal body.

18. With regard to the question of the settlement of disputes, since he was in favour of the adoption of an international convention on State responsibility, he was also in favour of the adoption of a general system for the settlement of any disputes that might arise out of the

[4] See 2665th meeting, footnote 8.

interpretation and implementation of the future convention. He also thought that it would be useful at the same time to introduce a flexible and speedy system for the settlement of disputes relating to countermeasures, which would be similar to the system used by States to evaluate the lawfulness of interim emergency measures. On that question, he could therefore not agree with the Special Rapporteur and, unlike him, believed that it was necessary to improve and strengthen Part Three of the draft adopted on first reading,[5] for the following reasons.

19. The first was that the draft dealt with a number of difficult and complex issues. A mechanism for the settlement of disputes would therefore be extremely useful. Secondly, it would be valuable to have the capacity to develop the law of State responsibility further through jurisprudence. Thirdly, the General Assembly had often recommended that any significant convention, as the one on State responsibility would be, should itself provide the means of settling disputes that might arise from the interpretation or implementation of its provisions. Fourthly, the fact that the draft articles on State responsibility could cover a large number of questions of international law, including those not governed by particular rules, warranted giving a place to conciliators, arbitrators or courts. It was time to introduce some democracy in the international system. A society without a binding system of justice, as international society was at present, was anti-democratic and primitive and based primarily on force rather than on law.

20. Mr. GOCO said that he would like Mr. Economides and Mr. Hafner to indicate what criteria made an instrument a convention or a declaration. In an attempt to see whether the content of conventions and declarations differed, he listed a number of declarations and conventions contained in a recent United Nations publication.[6] Noting that there was the Convention on Offences and Certain Other Acts Committed On Board Aircraft, the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, as well as the Declaration on Measures to Eliminate International Terrorism,[7] he wondered whether it should be concluded that a convention was intended to cover a more restricted field than a declaration and that a declaration had to be broader and more general in scope.

21. Mr. ECONOMIDES, speaking metaphorically, said that, if a convention and a declaration were two women to be wooed by a lawmaker, his preference would have to be for a convention as being more settled and beautiful and having more of a future than a declaration. If, however, it proved impossible to adopt a convention, then a declaration might be a satisfactory solution.

22. Mr. HAFNER said that the difference between a convention and a declaration lay mainly in their effects. A declaration had an immediate effect, even in respect of States that had not endorsed it. A convention, on the other hand, created obligations only for the States that had ratified it. At the same time, a declaration had less legal force: a domestic court would not apply a text annexed to a General Assembly resolution, whereas it would apply a convention. There were many examples in United Nations history of cases when a topic had first been the subject of a declaration and then of a convention. The successive documents were sometimes slightly different in content––as in the case of the Universal Declaration of Human Rights[8] and the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights––and sometimes they were nearly identical.

23. Mr. SIMMA said that the Special Rapporteur had produced an excellent, concise and clear report. As to the form of the draft articles, ideally, a convention would be preferable, but, in view of all the problems and difficulties to which a convention would inevitably give rise, he took the view that the text should take the form of a General Assembly resolution or declaration.

24. It was true that the General Assembly would have the last word on the fate of the draft, but it was expecting to receive recommendations from the Commission in that regard. Mr. Tomka had already mentioned several cases when the Assembly had not followed the Commission's recommendations concerning form. In all the cases cited, the Assembly's decision had not gone quite as far as the recommendation made. There was therefore no need to expect, as Mr. Economides did, that the Assembly might reproach the Commission for not having proposed a convention.

25. With regard to the connection between the innovative nature of the text and its form, some members had suggested that, since the text contained elements of progressive development of international law, a convention was necessary. On the other hand, Mr. Brownlie had stated that, precisely because the text did contain such elements, caution was required and a convention should not be proposed. The argument that the form of the text depended on the absence or presence of innovative elements was thus not valid.

26. Referring to the analogy with the Rome Statute of the International Criminal Court, he pointed out that, since the aim in that case had been to establish an international organization, recourse to a non-binding instrument had not been possible. In the case of State responsibility, however, no member of civil society or non-governmental organization would exert pressure in favour of a binding text. The analogy with the 1969 Vienna Convention was also not relevant. That instrument should be regarded as a guide.

27. The Sixth Committee was unlikely to be enthusiastic about the draft, but the General Assembly should, at worst, take note of it or, at best, endorse it. That would be enough for the text to play its role.

28. Turning to dispute settlement machinery, he said he held the same view as the Special Rapporteur and thought that, on the assumption that new procedures could be created, they must be specially adapted to specific conven-

[5] *Ibid*., footnote 5.

[6] *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

[7] General Assembly resolution 49/60 of 9 December 1994, annex.

[8] General Assembly resolution 217 A (III) of 10 December 1948.

tions. A new across-the-board jurisdiction did not have to be established. ICJ already played that role.

29. Mr. GALICKI said that, with regard to the form of the text, the choice was between a legally binding convention and a non-binding document, some types of which were mentioned in article 23 of the statute of the Commission. The choice made by the Commission would be without prejudice to the final decision by the Sixth Committee and the General Assembly, which would reflect the political will of Governments. The reaction of Governments, which were not entirely in favour of the drafting of a convention, must not be ignored, however. Both legal idealism and political realism had to be taken into account. Ideally, the Commission's work should result in a draft convention combining elements of the codification and progressive development of international law. It was true that article 1 of the statute of the Commission drew a distinction between "progressive development of international law" and its "codification" and that that distinction was developed in article 15, where the term "progressive development" was associated with the preparation of draft conventions, while the idea of "codification" was associated with "the more precise formulation and systematization of rules of international law in fields where there has already been extensive State practice, precedent and doctrine". However, as the Commission had already pointed out in its report to the General Assembly on the work of its forty-eighth session, "the distinction between codification and progressive development is difficult if not impossible to draw in practice, especially when one descends to the detail which is necessary in order to give more precise effect to a principle. Moreover it is too simple to suggest that progressive development, as distinct from codification, is particularly associated with the drafting of conventions. Flexibility is necessary in the range of cases and for a range of reasons."[9] The report's conclusion that "The Commission has inevitably proceeded on the basis of a composite idea of 'codification and progressive development'"[10] applied to its work on State responsibility, which was a good example of what had been described as "the elaboration of multilateral texts on general subjects of concern to all or many States, such texts seeking both to reflect accepted principles of regulation and to provide such detail, particularity and further development of the ideas as may be required".[11]

30. A real danger deriving from the choice of a convention was the possible negative reaction of Governments, especially in respect of the elements of progressive development of international law contained in the text. Practice showed that States were in general not in favour of such elements being included in internationally binding instruments and preferred the Commission to play its codification role. It was highly likely that elements of progressive development would be eliminated from the draft convention by any future preparatory committee or working group established by the Sixth Committee. If the Commission chose the form of a convention for the draft and in order to avoid lengthy preparatory work, it should consider eliminating the most controversial provisions, such as those on countermeasures. To retain the form of a convention would be to stress the importance of the topic, but the process might be a very prolonged one and the Commission's draft would probably be changed by the bodies responsible for examining it. After so much work by legal experts within the Commission, the draft was worthwhile retaining in its original form insofar as possible.

31. That was why a non-binding document such as a General Assembly resolution seemed to be the most appropriate form for the text. That in no way diminished the value and importance of its content, namely, the legal principles concerning State responsibility. Many Assembly declarations and resolutions, starting with the Universal Declaration of Human Rights, had played a fundamental role in the development of international law. It seemed that such a role could be played much better by an Assembly resolution or declaration adopted unanimously than by a convention adopted after many years of preparatory work and ratified by a small number of States. Furthermore, it would be easier to retain all the elements, both of codification and of progressive development, in the form of a resolution rather than of a convention, providing an opportunity to develop the work further in future.

32. He hoped that a consensus could soon be reached between those in favour of a realistic approach and those who had more idealistic views, so that the Commission could continue its work.

33. Mr. LUKASHUK said that, while he understood the importance of the question of form, the discussion must come to an end at the current time so that the content of the draft articles could be addressed.

34. Mr. OPERTTI BADAN said that the form to be taken by the text was a political choice, which must be made by a political body, the General Assembly, based on the history of the issue and the consensus that seemed to be taking shape on the text. The Commission was a technical body that must remain impervious to the political impact of its work. It must find a balance between technical and political aspects and leave the responsibility of making the text into a convention or a resolution to the Assembly. Furthermore, it seemed unacceptable to state the principle that the United Nations considered the possibility of drafting conventions only when non-governmental organizations and civil society were likely to exert pressure on States. That would amount to saying that Member States were less important than civil society, yet it was precisely they that had the primary responsibility for the elaboration of instruments. To give the Commission the job of deciding whether there was enough consensus on a text for it to be made into a convention would be to devalue the Commission's role. It should leave the task of choosing one of the possible forms to the Assembly and must not prejudge a decision that was essentially political in nature. Lastly, it was not appropriate to distinguish between codification and progressive development or to diminish the value of a text whose drafting had taken many years by a recommendation that it should simply be turned into a resolution.

35. Mr. MOMTAZ said that the time had come for the Commission to decide on two questions: the form in

[9] *Yearbook . . . 1996*, vol. II (Part Two), para. 156.

[10] *Ibid.*, para. 157.

[11] *Ibid.*

which it wished the draft articles to be adopted and the substantive issue of whether to include provisions on dispute settlement in the draft. The first question was also a political issue, on which it would thus be for the General Assembly to decide; but, under article 23 of its statute, the Commission was empowered to make recommendations, which were not devoid of weight. The Commission was still divided between proponents of two possible forms: that of a resolution adopted by the Assembly and that of a convention adopted by a conference of plenipotentiaries. The latter course was undoubtedly lengthy, fraught with hazards and unpredictable in outcome and was liable to result in the delicate balance of the text being called into question and its innovative aspects eliminated. That notwithstanding, the adoption of the draft articles in the form of an Assembly resolution, besides providing no sure protection against those dangers, would be tantamount to a devaluation of the results of the Commission's work. Even if adopted by consensus in the form of a declaration, an Assembly resolution could not have the same normative value as a treaty. ICJ had had to rule on the normative value of Assembly resolutions on two occasions. In 1986, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, the Court had found, with regard to the normative value of Assembly resolution 2625 (XXV) adopted by consensus in 1970 in the form of a declaration, that "the adoption by States of this text affords an indication of their *opinio juris* as to customary international law on the question" [para. 191] and that "this *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions" [para. 188]. The Court had thus showed extreme caution and refused to recognize a parity between resolutions and conventions. Ten years later, called upon to give an advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court had broadly reiterated its previous findings, even though on that occasion it had assigned a greater role to General Assembly resolutions in the formation of law than it had previously done, since, in its view, a resolution could only provide indications or evidence. By confining itself to providing indications or evidence regarding State responsibility, the Commission would be failing in its mission, which was to say what the law was and to guide States through the labyrinthine subject of State responsibility. By recommending that the Assembly should adopt the draft articles in the form of a resolution, the Commission would implicitly acknowledge that it had not been able to ascertain the law in that field and its recommendation might be interpreted as an admission of failure.

36. The substantive question of the desirability of including provisions on dispute settlement in the draft articles was closely linked to the question of countermeasures. Given that countermeasures could be legitimate only if they were directed against the State that had committed the wrongful act, they could not be based on a unilateral subjective assessment by the allegedly injured State. Countermeasures were inconceivable without an objective mechanism making possible a prior determination with all the necessary guarantees, of a breach of a rule of international law, together with the establishment of equality between the allegedly injured State and the State alleged by the latter to be responsible for the breach. Provisions on dispute settlement would make it possible to establish such a mechanism.

37. Mr. KATEKA said that he favoured making the draft articles a binding instrument, for the reasons set forth in paragraph 22 of the fourth report. Opponents of that approach claimed that the Sixth Committee might unravel the work the Commission had taken nearly 50 years to accomplish, but the Sixth Committee was in any case free to take what action it chose in response to the recommendations made by the Commission. Others cited the element of progressive development of international law included in the draft articles, but progressive development was only one of the two parts of the Commission's mandate and the Commission would render the international community a disservice by confining itself to codifying existing State practice. Others again expressed concern that that approach might result in the adoption of an instrument that influential States might not be prepared to ratify. Yet, in the first place, the Commission was a subsidiary body of the General Assembly and was thus duty bound to take account of the interests of all Member States. Furthermore, the adoption of the draft in the form of a non-binding instrument would by no means guarantee that all Member States would accept it. Many important resolutions–for example, Assembly resolutions 1803 (XVII), of 14 December 1962, on permanent sovereignty over natural resources, and 3281 (XXIX) of 12 December 1974, on the Charter of Economic Rights and Duties of States, were flouted by States that did not like their content. The problem was thus one of the acceptability of the substance of an instrument, rather than of the form it took.

38. Some members of the Commission considered that the question whether to include provisions on the settlement of disputes in the draft articles was one both of form and of substance. Personally, he favoured the inclusion of some form of dispute settlement provisions in the draft articles, for the reasons given in paragraph 13 of the fourth report, concerning the major standard-setting treaties that provided for compulsory dispute settlement mechanisms. In that regard, account should be taken of the proposal by China cited in paragraph 20 of the report.

39. Mr. PELLET said that he entirely agreed with the Special Rapporteur on the two points under consideration, namely, the future form of the draft articles and the question of dispute settlement, although he was rather less enthusiastic about some points of substance. That being said, there was no reason for the Commission to start the session by engaging in informal consultations on the matter. States and researchers alike were entitled to know what the members of the Commission thought and said and only when an impasse had been reached did the Commission have recourse to consultations or a working group in order to come up with compromise solutions. There was no justification for adopting either of those courses, as there was no reason to expect deadlock on the two points under consideration.

40. The question of dispute settlement was undoubtedly a fundamental problem in itself, a general problem on which the Commission might one day, in the framework of its long-term programme of work, prepare some sort of model clauses on dispute settlement for insertion

in the codification conventions. But there was certainly no reason to deal with them in the context of the draft articles on State responsibility, to the detriment of more important matters of substance. The problem was actually a twofold one, covering both the question whether the draft articles should contain special provisions on dispute settlement and also the question of dispute settlement with specific regard to countermeasures. Dispute settlement clauses should be avoided even more in the specific context of countermeasures than in the general context. The Commission had undoubtedly taken a wrong turning when, in the draft articles adopted on first reading, it had relied on dispute settlement to attenuate and contain the regime of countermeasures, even though, on the pretext that it was establishing a compulsory regime of dispute settlement concerning countermeasures, it had shown great laxity with regard to the substantive rules applicable to those countermeasures. Such reasoning allowed two things to be overlooked. First, former Part Three had been conceivable only if it was included in a convention in force between the two protagonists. Yet, 30 years after its adoption, the 1969 Vienna Convention, which some took as a model, still bound rather fewer than half the world's States. If the same were to be true of the future instrument on State responsibility, the protection afforded by the dispute settlement provisions in the case of countermeasures would be illusory indeed. Secondly, that protection would also be illusory even for States that had ratified the instrument, if the regime of countermeasures contained therein was a lax one, as had been the case in the draft articles adopted on first reading and as to some extent remained the case in the text submitted by the Drafting Committee at the preceding session. What was important was not the principle of dispute settlement, but its dissuasive effect. From that standpoint, the provisions adopted at the forty-eighth session had been sheer wishful thinking and, instead of repeating the same mistake, the Commission should focus on the core issue of the normative framework of countermeasures. As for the general problem of dispute settlement, to state the Special Rapporteur's view in more brutal terms, it was not for a handful of experts to revolutionize international law. In effect, either the Commission said nothing beyond what was contained in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, in which case its work would be completely futile, or else it tried to impose an innovative (in other words, binding) system of dispute settlement, in which case it would stray from the framework of progressive development to bring about a radical and revolutionary change in international law, something it was not mandated to do.

41. The second question the Commission must address was the form that the draft articles should take. The Commission was entrusted with the task of codifying existing international law, but also of developing it progressively: in other words, within what it saw as reasonable limits, filling the gaps in that law and making it more coherent and effective and bringing it more into touch with international society, without denaturing its spirit. It should thus do its utmost to ensure that States did not seize upon the fruit of 40 years' labour on the topic so as to turn it into a convention. States that advocated that solution were not necessarily all animated by the purest of intentions and there was a considerable risk that the diplomatic conference convened to adopt the convention would destroy the laboriously achieved but broadly satisfactory balance of the draft prepared by the Commission and strip it of its elements of progressive development, ultimately retaining only the law from the "good old days" of the nineteenth century, from which the classical law of State responsibility had emerged and which reflected a serene domination of the rest of the world by a few States that were "more equal than others". The Commission draft did not call that law radically into question––and it would in any case be incompatible with its mandate to do so––but it did at least have the virtue of taking account, perhaps somewhat timidly, of the developments of the late twentieth and early twenty-first centuries. Of course, matters did not always turn out for the worst, but the example of the Rome Statute of the International Criminal Court cited in that regard was somewhat misleading because, in a codification conference on State responsibility, non-governmental organizations would not be present to exert the influence they had exerted in Rome. States would be among themselves and the "most equal" among them would find words to convince the "least equal". If the Commission could manage to safeguard its draft from that danger, State practice would eliminate those elements that smacked too boldly of progressive development and consolidate the rest. Moreover, as the Special Rapporteur pointed out in paragraph 25 of his report, a further reason arguing against a convention was that, unlike legal provisions embodied in treaties, the law of State responsibility did not require to be implemented in national legislation.

42. The best course was thus to recommend to the General Assembly, not to envisage the drafting of a convention or even to adopt a declaration, but simply to take note of the Commission's draft, if possible with approval. Even the draft adopted on first reading had already exerted a decisive influence on the development of international law. The Commission had indisputably improved that text on second reading, at least where Parts Two and Two bis were concerned. As it seemed impossible to achieve consensus on such an allegedly blunt––albeit in fact merely clear-cut––recommendation, if it became apparent that there was a risk of deadlock in the Commission in plenary, then a compromise solution might perhaps be found through informal consultations or the establishment of a working group. If that way, too, proved to be an impasse, then there would be nothing shameful in resorting to a vote, provided it was taken after efforts had been made in good faith by all concerned to find another way out. Lastly, in response to the Special Rapporteur's request for the opinion of the Commission on the future commentaries to the draft articles, he expressed his ardent hope that the level of former Special Rapporteur Ago's commentaries, which constituted definitive models whose value for practitioners was currently universally accepted, would not, as a sacrifice to demagogy or in pursuit of the line of least resistance, be reduced to the very poor level of the commentaries to Part Two.

43. Mr. DUGARD said he was pleased that the members of the Commission shared the common goal of anchoring the law of State responsibility in international law. The only question was how best to do so. That was difficult because it involved legal and political considerations and because there was no real precedent.

44. It had been suggested that the draft articles under consideration should take the form of a convention because that had worked well in the case of the law of treaties and because some draft articles which the Commission had submitted to the Sixth Committee without formulating any specific recommendations on them, such as the draft Declaration on Rights and Duties of States[12] or the draft Code of Crimes against the Peace and Security of Mankind,[13] had achieved very little. It was important, however, to stress that, in the case of the draft articles on the nationality of natural persons in relation to the succession of States, the Commission had in fact recommended that the General Assembly should take note of them in a resolution. Perhaps that example should be followed. Despite the attraction of a convention, on balance, he preferred a declaration or a resolution in which the Assembly took note of the draft articles. There was reason to fear that a convention would not be ratified by many States, and that would undermine it. In any case, the draft articles adopted on first reading had already been very influential and there was no doubt that, on second reading, they would be equally and, indeed, even more so. If the draft articles went to a preparatory committee or a diplomatic conference, anything could happen and the final product might be completely watered down. The work of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court had led to the adoption of the Rome Statute of the International Criminal Court, but it must be borne in mind that non-governmental organizations had had tremendous influence behind the scenes and had succeeded in obtaining the adoption of the more progressive features of the draft articles that had gone beyond the expectations of the Commission itself. That would not happen with the draft articles under consideration and it was very likely that national interests would prevail.

45. On the other hand, if the Commission pronounced itself in favour of a restatement of rules and requested the General Assembly to take note of the draft, it might be very demanding and focus on the highest level of customary rules of international law. There was no reason to engage in an exercise of self-censorship. The basic principles on State responsibility were already clear and well established and the Commission should be careful not to repeat the mistake it had made in the case of the draft Code of Crimes against the Peace and Security of Mankind by weakening them.

46. As to whether the Commission should eliminate the more contentious features of the draft articles, it should be noted that Governments themselves were divided on the question. Some were in favour of a restatement, provided that it reflected State practice and discarded the contentious issues, whereas others suggested that the Commission should deal with progressive development and still others thought that the Commission should not embark on that path. The Commission had before it draft articles that, as they currently stood, represented an acceptable form of progressive development. It should pursue its tasks without trying to do the Sixth Committee's work. It should seek to complete a set of responsible and well-balanced draft articles by the end of the current session and explain clearly why, in that particular instance and in principle, there was a case for a restatement of rules rather than a convention so that the General Assembly did not take its recommendation as a failure.

47. As far as Part Three on dispute settlement was concerned, he did not support either its underlying principle or its present form. He unreservedly endorsed the Special Rapporteur's view on that subject, as set out in paragraph 13 of his report. Rather than include dispute settlement articles in the project, the Commission should pay more attention to the provisions on countermeasures.

48. In sum, he said that he was in favour of a restatement of rules on the subject, provided that the Commission refrained from any self-censorship and did not remove from the draft articles the features on progressive development which it currently contained and which it must retain at all costs. Otherwise, he would reverse his position and support the conventional form.

49. Mr. ROSENSTOCK, paying tribute to the Special Rapporteur for his thorough, clear and succinct report, said that he entirely agreed with other members of the Commission on his analysis of the general issues, which must still be addressed. The first issue concerned the form of the draft articles, which the Commission should recommend to the General Assembly in conformity with article 23 of its statute. For a number of positive reasons, and also some negative ones, he was convinced that the Commission, in accordance with article 23, paragraph 1 (*a*), of its statute, should recommend that, subject to a few adjustments and deletions, the Assembly should take note of the articles as a whole, which represented an excellent and enormously useful exercise of codification. If one looked at the state of understanding of the law of State responsibility, it could be seen that the Commission had made considerable progress since it had begun its work, with the help of a succession of Special Rapporteurs. The latest to date, Mr. Crawford, had made a superb contribution in clarifying and focusing the text adopted on first reading.

50. There was widespread agreement on the question of *de lege lata*. If the Commission wanted to go beyond codification and change the existing law or create norms where there were none at present, it should recommend that the General Assembly should convene a conference to produce a convention because the Assembly did not have legislative authority.

51. As far as countermeasures were concerned, the law was authoritatively stated in the arbitral decision handed down in the *Air Service Agreement* case. He would return to that matter and other substantive issues later in the debate.

52. If the Commission were to recommend the elaboration of a convention, it should take up the issue of dispute settlement. To make such an effort worthwhile, it would need to go beyond Article 33 of the Charter of the United Nations, which was binding, and its restatement might be seen by some as suggesting that the articles were insufficient. He did not see the need to proceed in that way. The comments of Governments provided no basis, to say the least, for thinking that they were prepared to take that

[12] *Yearbook . . . 1949*, p. 287.

[13] *Yearbook . . . 1996*, vol. II (Part Two), para. 50.

path. Some might denounce such a cautious approach and insist that codification was not enough and that the Commission must engage in the progressive development of the law of State responsibility at the cost of usurping the legislative capacity involved. They argued "nothing ventured, nothing gained". But that was not true in the present case. The Sixth Committee's current practice of appointing a preparatory committee, the experience with regard to the jurisdictional immunity of States and their property and other similar experiences showed that, if the Commission recommended a convention, it would jeopardize, if not lose instantly, the opportunity to be a part of one of the most important contributions ever made to the codification of international law. It should not allow that to happen. Recommending a convention that did not bear fruit would be the worst possible solution.

53. He reserved the right to speak on the question of creating qualitative distinctions in the law of State responsibility and on the questionable wisdom or utility of treating countermeasures differently from the other issues referred to in article 23 of the draft, much less to do so in a manner inconsistent with existing law. It might, indeed, be a better world if Mr. Momtaz were right about the state of international law and countermeasures. Unfortunately, countermeasures were necessary because of the primitive state of international law, a fact that the Commission could not cure with a declaration or convention on State responsibility.

54. Mr. DUGARD asked Mr. Rosenstock to clarify what exactly he meant by "progressive development": did he think that the Commission should decide at the current stage that the distinction between "ordinary breach" and "serious breach" or the question of countermeasures were so controversial that they went beyond acceptable progressive development and that the Commission should thus discard them or should the Commission consider them on the merits at a later stage?

55. Mr. ROSENSTOCK pointed out that there was no clear distinction between the "codification" and the "progressive development" of international law. But there were clear cases in which the law was being changed or new law created; that was a "legislative" function and the General Assembly did not have the capacity to legislate. That could only be done by a treaty process.

56. Mr. PELLET said he was afraid that the discussion that had just begun was based on a mistaken assumption and that Mr. Rosenstock was confusing two points: the distinction between *lex lata* and *lex ferenda* and the distinction between the codification and the progressive development of law. He was convinced that that was not at all the same thing. Although codification was based on a firm and well-established *lex lata*, what was important in the term "progressive development" was the adjective "progressive". Pursuant to its statute, the Commission was empowered to work not only on codification, but also on progressive development. Progressive development was in line with existing law: it did not break with or contradict it, but filled its gaps and defined it more clearly. For its part, if the General Assembly confined itself to taking note of the draft articles, that was also within its role, because Article 13 of the Charter of the United Nations provided that the Assembly was to make recommendations with a view to "encouraging the progressive development of international law and its codification". It certainly had no legislative function.

57. Mr. TOMKA said he thought that Mr. Rosenstock's analysis, which was based on the statute of the Commission, was on solid ground, but he was concerned that, by supporting the form of a declaration or other non-binding instrument, the Commission would be sacrificing some aspects of the progressive development of law. Draft articles usually combined elements of both codification and the progressive development of law and, in the present case, the Commission proposed the convening of a diplomatic conference to adopt a convention in conformity with article 23 of its statute.

58. Mr. ECONOMIDES said that Mr. Pellet had drawn a very interesting distinction between *lex lata* and *lex ferenda*, showing that *lex lata* and codification were fully identical and pointing out that, in the case of *lex ferenda*, the problem consisted simply in specifying existing rules or perhaps filling gaps in keeping with existing rules without going further. Thus, *lex ferenda* and progressive development were not the same thing. He rejected that interpretation, which was too restrictive. It was possible to go beyond, and build upon, existing law, but the Commission must not produce rules that were in contradiction with it.

59. Mr. BROWNLIE said that the discussion on the distinction between *lex lata* and *lex ferenda* was not helpful. The problem was applying the distinction when key problems arose, such as that of countermeasures.

60. Mr. CRAWFORD (Special Rapporteur) said that, if the Commission wanted to complete its work on State responsibility at the current session, as the Sixth Committee had asked it to, it would have to proceed in the following manner: first, the Drafting Committee must complete its elaboration of the entire text by the end of the first part of the session. Secondly, the Commission must adopt the commentaries, also by the end of the first part of the session. It would receive the commentaries to articles 1 to 11 very soon and could have them in a short form, if it wished, in order to save time. A working group would be established during the first week of the second part of the session to go through the commentaries systematically. Thirdly, the Commission would have to resolve the outstanding issues, which were numerous and linked, be they questions of form or of substance. It would thus be a good idea to take Mr. Pellet's suggestion for having a working group to come up with acceptable solutions. Fourthly, during the second part of the session, the Commission must adopt the draft articles and the commentaries.

61. With that in mind, he intended to submit an annex to his fourth report shortly and the Commission might refer the articles of Part One, with the exception of article 23 on countermeasures, to the Drafting Committee, together with the suggestions and comments made on them. The Commission should then continue the debate on the remaining issues raised in the report and, once the debate had been concluded, refer all those questions to the working group for it to find an overall solution. Time was short and he appealed to the members of the Commission to be as succinct and specific as possible.

62. The CHAIRMAN said that the Commission would decide at the beginning of the following week on the Special Rapporteur's proposal on how to proceed.

The meeting rose at 1 p.m.

2669th MEETING

Friday, 27 April 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Tomka, Mr. Yamada.

Organization of work of the session (*continued*)*

[Agenda item 1]

Mr. TOMKA (Chairman of the Drafting Committee) said that, following consultations, the Drafting Committee for the topic of State responsibility would be composed of the following members: Mr. Crawford (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Lukashuk, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rosenstock, Mr. Simma, Mr. Yamada and Mr. He (ex officio).

The meeting rose at 10.10 a.m.

* Resumed from the 2666th meeting.

2670th MEETING

Tuesday, 1 May 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Mr. Yamada.

State responsibility[1] (*continued*)* (A/CN.4/513, sect. A, A/CN.4/515 and Add.1–3,[2] A/CN.4/517 and Add.1,[3] A/CN.4/ L.602 and Corr.1 and Rev.1)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

1. Mr. CRAWFORD (Special Rapporteur), introducing the annex to his fourth report (A/CN.4/517 and Add.1), said that it served as an agenda to assist the Drafting Committee in its work of finalizing the draft articles. It brought together suggestions for changes drawn from the comments received, accompanied, in the column headed "Comment", by his own comments, which for the most part were merely indications. The Drafting Committee was free to deal with the latter as it saw fit.

2. It was encouraging to note that, considering the importance of the articles, their scope and their number, the total number of proposals for changes was not excessive. In certain cases, they constituted positive improvements on the existing text; in others, they might be sufficiently covered in the commentaries; and, lastly, in a few cases, they raised fundamental questions of principle, such as that of "serious breaches" of an obligation owed to the international community, or of countermeasures, which were canvassed in the report itself.

3. Since members of the Commission might have specific points they wished to make in plenary, he drew attention to the proposals made on chapter IV of Part One, concerning which there was some divergence between the views of Governments, some wishing to tighten the scope of the chapter, others to expand it and others again to make deletions which would have the effect of expanding the scope of ancillary responsibility, such as the reference to knowledge of the circumstances of the internationally wrongful act. His own view was that chapter IV, as it stood, was very carefully balanced, although it required some clarification of the language and perhaps the introduction of some threshold in respect of materiality of assistance. It would be unwise to expand the scope of chapter IV significantly. Furthermore, the informal

* Resumed from the 2668th meeting.

[1] For the text of the draft articles provisionally adopted by the Drafting Committee on second reading, see *Yearbook . . . 2000*, vol. II (Part Two), chap. IV, annex.

[2] Reproduced in *Yearbook . . . 2001*, vol. II (Part One).

[3] *Ibid.*