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Summary record of the 2670th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

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.*

consultations had resulted in a consensus in favour of the retention of the chapter.

4. He stressed that, at the current late stage, silence on a particular article might be taken to indicate that it posed no particular problem for Governments, which had not failed openly to express their criticisms on other articles. It was currently for the Drafting Committee to take account of all the comments made and of the changes proposed, which, for the most part, went in the direction of greater economy and precision of language.

5. Mr. HERDOCIA SACASA said that he wished to comment on five aspects of the report, which bore eloquent testimony to the Special Rapporteur's skill and to his ability to give a balanced and accurate presentation of the various points of view concerning complex questions.

6. First, with regard to the commentaries that must accompany the draft articles, he endorsed the Special Rapporteur's approach of presenting more concise texts reflecting the current content of the proposed rule and the case law without depriving the existing texts of their substance.

7. Secondly, with regard to the form of the draft articles, it was extremely difficult to imagine a process which had lasted more than 40 years, and whose purpose had been to lay a cornerstone of contemporary international law, taking any form other than that of a binding legal instrument. Indeed, in his second report on State responsibility, the former Special Rapporteur, Roberto Ago, had indicated that the successive reports on the subject would be "so conceived as to provide the Commission with a basis for the preparation of draft articles, with a view to the eventual conclusion of an international codification convention".[4] Like Mr. Simma, he was receptive to the well-constructed and very realistic arguments put forward in favour of a resolution. That certainly seemed the simplest and most pragmatic way forward, but it was not necessarily the one best suited to fulfilling the Commission's task of contributing to the codification and progressive development of international law, a task that unquestionably constituted an indissoluble whole. It had, of course, been asserted, on the basis of arguments that merited attention, that the draft articles included a number of rules that constituted a progressive development of international law, a circumstance that might possibly stand in the way of their adoption in the form of a convention. In that regard, he noted that, according to article 15 of the statute of the Commission, "the expression 'progressive development of international law' is used for convenience as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States". In May 1947, the Committee on the Progressive Development of International Law and its Codification had noted in its report to the General Assembly that "some of the tasks [of the future International Law Commission] might involve the drafting of a convention on a subject which has not yet been regulated by international law or in regard to which the law has not yet been highly developed or formulated in the practice of States", adding that "the terms employed are not mutually exclusive".[5] Subsequently, in its observations on the review of the multilateral treaty-making process, the Commission had noted that "in practice, however, the functions performed by the Commission proved not to require a method for 'codification' and another for 'progressive development', the draft articles prepared on particular topics incorporating and combining elements of both *lex lata and lex ferenda*";[6] and had gone on to demonstrate in detail that the various conventions adopted up to that date, such as those concerning the law of the sea and consular relations, had constituted both a codification and a progressive development of international law, specifying that it had not been possible to determine to which category a particular provision belonged.

8. It had also been pointed out that it would not be desirable to draw up a convention that would not be ratified by States and which might even constitute a "reverse codification" exercise. That argument, which might be defensible in the case of other topics, could not be defended in the case of State responsibility. The draft articles under consideration had arguably exerted an unprecedented influence in the history of codification processes. Bringing them together in the form of a convention would lend them added weight and, in principle, the signatory States would be obliged not to obstruct the object and purpose of the convention.

9. Furthermore, as Eustathiades had pointed out in a commemorative lecture in honour of Gilberto Amado,[7] the codification process in itself, considered independently of the ratification process, could acquire an importance of its own and have considerable consequences for general international law. A number of the draft articles under consideration were an integral part of customary international law; they were frequently cited by authors and had been invoked by ICJ, for instance, in its judgment in the *Gabčíkovo-Nagymaros Project* case or in its advisory opinion on the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. They had also been cited by members of the Court in their opinions, for example, by the Vice-President in his dissenting opinion attached to the order issued by the Court on the question of the *Legality of Use of Force (Yugoslavia v. Belgium)*. He thus thought that international law would in some way be incomplete if the law of State responsibility had not been codified. Primary rules and secondary rules were indissociable, interdependent and mutually complementary, conferring consistency on the international legal order. To construct an international legal order in which primary rules were comprehensively codified and secondary rules less comprehensively codified and less progressively developed would result in an imbalance. Secondary rules were

[4] *Yearbook … 1970*, vol. II, p. 179, document A/CN.4/233, para. 10.

[5] Report of the Committee on the Progressive Development of International Law and its Codification (*Official Records of the General Assembly, Second Session, Sixth Committee, Summary Records of Meetings,* annex 1, document A/331), p. 175, para. 7.

[6] *Yearbook . . . 1979*, vol. II (Part One), p. 187, document A/CN.4/325, para. 13.

[7] C. Th. Eustathiades, "Unratified Codification Conventions", lecture delivered on 11 July 1973.

in no sense minor or lower-ranking rules. The former Special Rapporteur, Roberto Ago, had stated to the Commission that secondary rules were so-called not because they were less important than primary rules, but because they determined the legal consequences arising out of failure to perform obligations set forth in the primary rules.[8] In that light, a resolution whereby the General Assembly confined itself to taking note of the draft articles, without envisaging the subsequent conclusion of a convention or specifying that some of its provisions reflected customary international law, would lack cohesiveness and would fail to take account of the historical dimension of the work in which the Commission had been engaged for almost 50 years or of the support that the drafting of a convention undoubtedly commanded, since, according to the Special Rapporteur himself, the fundamental structure of the draft and most of its provisions, taken individually, were broadly acceptable. As ICJ had noted in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value" [para. 70]. It had reached the same conclusion, as Mr. Momtaz had pointed out, in its order in the case concerning *Military and Paramilitary Activities in and against Nicaragua*. Consequently, it was necessary to draft a binding instrument. State responsibility called for a new international legal regime, additional to and complementing the existing regime, and only a convention would seem capable of fulfilling that role. As there were clearly two positions in the Commission on the question, it was worth drawing attention to the fact that, according to the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session (A/CN.4/513, para. 24), delegations had proposed a phased approach with a view to reaching a compromise, a proposal which, in his view, must infallibly and indisputably point to the conclusion of a convention.

10. Thirdly, with regard to the settlement of disputes, he endorsed the Special Rapporteur's view expressed in paragraph 10 of the report. The question had not been tackled in the most appropriate fashion. The approach set forth in article 58, paragraph 2, adopted on first reading[9] whereby there was a unilateral right to submit a dispute to arbitration, was far from balanced and compromised the principle of a dispute settlement regime open both to the injured State and to the State alleged to have committed an internationally wrongful act, as well as the principle of free choice of means. It would thus be wiser to delete Part Three and the two annexes, leaving those questions to the existing rules, regulations and procedures. To establish a special regime for the settlement of disputes in the framework of State responsibility might result in overlapping and lead to fragmentation and the proliferation of mechanisms, given the close link between the primary and secondary obligations of State responsibility and the fact that the law of State responsibility was an integral part of the global structure of international law as a whole. However, he would not be hostile to rules taking account of and based on the general principles applicable to any regime of dispute settlement as a whole, as provided for in Article 33 of the Charter of the United Nations.

11. Fourthly, regarding the regime of countermeasures, the current text of Part Two bis, chapter II, represented a fragile balance whose essential structure must not be tampered with. Despite certain inequalities between States, it was undeniable that countermeasures existed, but it was necessary to provide a strict framework for them, so that they did not give rise to abuses. The draft articles devoted to them made due provision for that. He endorsed the Special Rapporteur's proposal for the deletion of article 54.**

12. Fifthly, with regard to serious breaches of essential obligations to the international community, he was in favour of the retention of Part Two, chapter III, as a compromise solution. Crimes such as enforced and involuntary disappearances, aggression and genocide were unfortunately not a thing of the past. It was clearly important to spell out their consequences in each case, for such conduct affected the international community as a whole. However, he agreed with the Special Rapporteur that it must be clearly established that the obligations set forth in article 42, paragraph 2, must be neither exhaustive nor mutually exclusive.

13. Mr. PELLET said he regretted that, once again, the Commission had had to meet on 1 May, Switzerland and the United Nations having decided not to follow the internationalist trend.

14. Mr. Herdocia Sacasa's remarks were somewhat contradictory. He had begun by proving that the impact of a draft was not a function of its form, showing in a very learned and detailed explanation that the draft articles adopted on first reading had had a considerable impact on State practice and the jurisprudence of ICJ—something which was perfectly true—but had then paradoxically concluded that the draft articles should take the form of a convention.

15. He disagreed with the assertion of many members of the Commission who seemed to think that a codification exercise automatically led to the elaboration of a convention. Nothing could be further from the truth. Article 23 of its statute provided that the Commission could recommend to the General Assembly: to take no action, the report having already been published (that approach would be wise in the current case); to take note of or adopt the report by resolution; to recommend the draft to Member States with a view to the conclusion of a convention; or to convoke a conference to conclude a convention. The elaboration of a convention was thus merely one of several possibilities. He was somewhat surprised to hear certain members imperturbably defend the idea that the Commission's task was to elaborate conventions. That was not what was stated in its statute, which the Commission could not change.

16. Mr. IDRIS said that, over the years, the draft articles under consideration had achieved a degree of consistency and covered a broad range of questions, thus representing an exercise in both the codification and the progressive development of the law of State responsibility. He was

[8] See *Yearbook . . . 1974*, vol. I, 1251st meeting, para. 2.

[9] See 2665th meeting, footnote 5.

** Unless otherwise indicated, the numbers refer to the draft articles as provisionally adopted by the Drafting Committee on second reading (see footnote 1 above).

grateful both to the current Special Rapporteur for his wisdom and his commitment to promoting and protecting the interests of the international community as opposed to the interests of States and to the past Special Rapporteurs for their important contribution to the development of the topic at various stages.

17. The general issues in abeyance which the Special Rapporteur, in his fourth report, had asked the members of the Commission to address, namely, the settlement of disputes concerning State responsibility (Part Three of the draft articles adopted on first reading) and the form of the draft articles, must be considered separately, without subordinating one to the other.

18. Part Three of the draft articles adopted on first reading had essentially instituted an optional procedure, except for a conciliation commission that could issue a final report embodying its "evaluation of the dispute … and its recommendations for settlement" (art. 57, para. 5, adopted on first reading). The optional procedure would cover the entire area of the topic of State responsibility and disputes "regarding the interpretation or application" of the articles (art. 54 adopted on first reading). In that connection, the Special Rapporteur had alerted the Commission, in paragraph 14 of his fourth report, to the possibility that the scope of any regime of compulsory settlement would not be limited to disputes as to the specific application of particular provisions of the draft articles themselves and that it would extend to the application and interpretation of primary rules, i.e., those laying down obligations for States breach of which entails their responsibility. For those and other reasons set out in paragraphs 15 and 16 of the report, it was fair to agree that there was no realistic possibility of convincing States to accept such a wide and comprehensive obligation of compulsory dispute resolution in the area of State responsibility for the structure of general international law as a whole and that there was no need to set up an optional system of dispute settlement, which was, in any case, available to States in one form or another whenever they wished.

19. Concerning the related question of a binding dispute settlement regime for the use of countermeasures, the Special Rapporteur had enumerated the difficulties he had encountered in putting such a system in place. The arguments against such a system were well known and had been brought forward by a number of States. But the Commission must be aware of the sentiments of members of the Commission past and current, as well as States, which continued to favour such a system as a condition for accepting the lawfulness of countermeasures. Hence the need to strike a fair balance in the draft articles.

20. Turning to the question of the form that the draft articles should take, he endorsed the Special Rapporteur's suggestion, in paragraph 26 of his report, that the Commission might return to the question later in the session, in the light of the balance eventually achieved in the text and, in particular, any decision reached as to the fate of current Part Three. To suggest that the draft should be adopted as a convention gave rise to practical difficulties and would be unrealistic, given the reluctance of States to adopt several provisions which were admittedly in the nature of progressive development of law.

21. On the other hand, it would be disappointing to recommend that the General Assembly should simply take note of the draft articles, which the Commission had worked on for more than four decades. Nor could the Commission leave the adoption and application of the draft articles to the whim of States. Exposing them to a "pick and choose" development and application would neither serve the interests of the international community nor do justice to the Commission's balanced approach.

22. As the decision on form was one of policy to be taken by States, the Commission might adopt an innovative approach and consider recommending several flexible options, including the adoption of draft articles in the form of a declaration. The Commission could also take an à la carte approach to the five options set out in article 23 of its statute rather than commit itself to any one option in an irreversible way.

23. Mr. ELARABY said that he recognized the validity and relevance of certain arguments for and against the codification of the draft articles. He acknowledged that most of the texts that the Commission had recommended to the General Assembly had been ratified by only a small number of States, that the procedure for adopting a convention was complex and that the draft articles could continue to have an impact even if they did not take the form of a convention. Nevertheless, he did not think that those arguments were decisive.

24. Referring to Article 13 of the Charter of the United Nations, he said that the Commission had been created to promote the progressive development of international law and its codification. The form given to draft articles depended on their nature and, in certain cases, it was sufficient to take note of them. But the draft articles on State responsibility deserved better treatment. Moreover, if the Commission did not recommend their codification, the General Assembly would be influenced in its decision because its options would be more restricted. On the other hand, if it recommended the codification of the draft articles, the Assembly would have complete latitude to decide. There was thus no reason to restrict the Assembly's freedom of movement by recommending that it should take note of the draft articles.

25. Those opposed to codification argued that, even in incomplete form, the draft articles already had an influence because they were cited by ICJ. It must be borne in mind, however, that a non-codified text was usually cited in support of a point of view, whereas it was unlikely that it would be referred to as a rule of international law. On the other hand, a codified text would undoubtedly be more authoritative than a text that had merely been taken note of. For those reasons, the Commission should recommend that the General Assembly adopt the draft articles in the form of a convention.

26. With regard to the question of dispute settlement, he recalled the Special Rapporteur's point of view that the Commission should not make provision for a dispute settlement mechanism unless the draft articles were envisaged as an international convention and the Commission might return to the question later in the light of the proposal by China.

27. Lastly, he disagreed with Mr. Rosenstock's assertion (2668th meeting) that the General Assembly did not have legislative power. That ignored recent developments in international law in both doctrine and practice. Since 1945, the Assembly had acquired legislative power in financial, administrative and organizational matters. Moreover, as the Charter of the United Nations was a constitutional document, member States were entitled to expand, restrict or redirect the scope of its provisions. Such a development was perceptible, for example, in the decisions taken in the area of peacekeeping. Today, there was general recognition that, in certain cases, Assembly resolutions could reflect what many distinguished jurists had termed spontaneous custom. Hence, it could not be asserted absolutely and definitively that the Assembly did not have legislative power.

28. Mr. GALICKI said that, if he understood Mr. Elaraby correctly, any form other than that of a convention which the draft articles might take would not fall within the scope of codification. He personally thought that, if the Commission recommended that the General Assembly should adopt the draft articles in the form of a declaration, it would also be engaging in work of codification. Everything that the Commission did and decided, regardless of the form the draft articles ultimately took, was part of the codification and progressive development of international law.

29. Mr. ELARABY said it was undeniable that, even if adopted in a General Assembly resolution, the draft articles would have a definite impact; but, given their content, they should take the form of a convention.

30. Mr. MELESCANU, noting that State responsibility, which had been dealt with more than 70 years earlier, in the work of the Preparatory Committee for the Conference for the Codification of International Law, held at The Hague in 1930, said that the subject had reached a crucial phase, that of deciding on its definitive form, and he commended the Special Rapporteur on his excellent work.

31. In his view, the ongoing discussion on the form that the draft articles on State responsibility should take served no purpose because it was clear that there were two divergent positions in the Commission: some members advocated the adoption of the draft articles as an international convention, whereas others favoured the adoption of a resolution by the General Assembly, in which it would take note of the results of the Commission's work or, alternatively, the adoption of the draft articles in the form of a declaration rather than a simple resolution. Article 23 of its statute clearly specified that the Commission could recommend to the Assembly: to take no action on the Commission's report; to take note of or adopt the report by resolution; to recommend the draft to members with a view to the conclusion of a convention; to convoke a conference to conclude a convention. As could be seen, both positions expressed in unofficial discussions and in the Commission were correct and were in keeping with the Assembly's guidelines. However, if the real possibilities open to the Commission were considered, it would seem that the first and last options could be ruled out from the start, namely, recommending that the Assembly take no action and recommending that it convoke a conference to conclude a convention. There did not seem to be any consensus possible on either of those two options. The solution was thus to be found in one of the two intermediate options.

32. Since the beginning, his country, Romania, had supported the efforts made to draw up and adopt an international convention on State responsibility because of the crucial significance of the institution of responsibility as the most important legal means of implementing and enforcing norms of international law. He wholeheartedly endorsed that view because, together with the 1969 Vienna Convention, the Commission would have two fundamental pillars of public international law. The best solution would thus be for the draft articles on State responsibility to take the form of a convention. Sometimes it was better to let well enough alone, however, and that was the case at the current time. All the discussions had shown that, at the current stage of the development of international law and State practice, the draft articles on State responsibility, which were associated with both the codification and the progressive development of international law, might well suffer from the convention form.

33. The idea that was gaining ground and had emerged in the comments of all the members of the Commission was that it was in the interest of the Commission and the international community as a whole to complete the draft articles and protect their concepts, principles and specific provisions, which represented a remarkable development in the codification of international law out of all proportion with any other effort made. Another aspect to be taken into account was that the Commission had reached a point at which there might no longer be any point in its continuing its work on the question of State responsibility, apart from amending the wording of the text or dispensing with certain provisions whose drafting had required considerable efforts and imagination. He was therefore in favour of any solution which would allow the Commission to submit the results of its work to the General Assembly by the end of the year and to obtain the assurance that those results would materialize in the near future. Consequently, he suggested setting up without delay a working group to make a specific proposal on the most acceptable way of completing the work on State responsibility.

34. The working group should be given a clear-cut mandate, which should take account of a number of elements. First, the Commission must finalize the draft articles on State responsibility in a form in which they could serve as the basis for a legal instrument for the codification and progressive development of the law in that field. Secondly, the draft must not be "amputated" so that it would be restricted to the mere codification of customary rules. According to article 1 of its statute, the Commission had for its object the promotion of the progressive development of international law and its codification, codification being mentioned second. It would be unacceptable to reduce so many years of efforts on the draft articles to nothing. Thirdly, according to its mandate, the working group was to put forward for the General Assembly a combination of the two possibilities provided for in article 23 of its statute. The Assembly would then be able to take note of the draft articles prepared by the Commission or to adopt the draft, commending it to Member States with a view to

further action aimed at the conclusion of an international convention on the subject. It would decide to convene a conference for that purpose after consulting the Member States. It was understood that the date of the conference would be set once States had had a chance to familiarize themselves with the draft articles and their contents had been assessed and applied by international judicial bodies. The draft articles had already played an important role, but would play an even more important role once they had been adopted and were no longer simply under consideration by the Commission.

35. The flexible solution he was proposing would help bring more than 70 years of work on the topic to a close and would show how States would react. The adoption of that solution would also heighten the importance of the commentaries, which should focus on two questions: the introduction of precedents and other relevant information, including custom, treaties, judicial decisions and legal opinion, and the setting out of conclusions on the extent to which agreement had been reached and the differences of opinion on each point, to enable States to understand the discussion that had led to the agreement. He endorsed the approach to the commentaries proposed by the Special Rapporteur. The content of the commentaries on the first 11 articles corresponded to the basic objectives he had outlined and care should simply be taken to ensure that the commentaries were presented in a balanced manner.

36. Since the discussion on the question of countermeasures had clearly revealed major differences of opinion among the members of the Commission, he suggested that the starting point for reconciling the differing views should be the objective fact that public international law was going through a transition phase. It was not realistic to think that the adoption of rules on the international responsibility of States and the peaceful settlement of disputes would make it possible to do away entirely with countermeasures and to prohibit them. It was, however, not acceptable to give the impression that States could, at their own discretion, take any countermeasures they considered necessary, with no rules or limitations. He was therefore in favour of the inclusion of provisions on countermeasures in the draft articles, but in a separate chapter, not in article 23, the purpose of which was different. He would prefer countermeasures not to involve the use of force, to be carried out individually by the injured State and to be collective only when backed up by a decision of the United Nations or taken in line with agreements between States, as in the case of security pacts.

37. Mr. ADDO, referring to the form of the draft articles, said that his preference was for a binding instrument such as a convention. It was, in fact, nearly impossible to engage in codification without making any changes at all in the law being codified, if only by eliminating ambiguities, favouring one aspect or another of the content, choosing between a broad or restrictive formulation or couching customary rules in written form. Furthermore, codification met urgent needs, which explained why States embarked on it with more than the sole aim of transcribing what already existed. The real aim was to update general international law and to find compromises that could furnish satisfactory responses to current and future needs. For those reasons, codification could not be dissociated from progressive development. Codification that fully satisfied the needs of the international community could not be achieved merely by formulating a non-binding document inviting States to respect a certain number of rules described as forming part of general international law. That type of text would undoubtedly be useful, but it would afford no sure way of remedying the inadequacies of an international customary law that had become uncertain and was a source of tension between opposing conceptions. Custom had to be replaced by written norms recognized by States as peremptory. The elaboration of a convention or treaty seemed to be the solution. Such instruments were binding on the parties, however, and created neither obligations nor rights for a third State without its consent. It had been said that such an instrument would not be ratified, but that might or might not be true. It seemed to him that those who thought the General Assembly should simply take note of the draft were taking a defeatist attitude. Since the Commission was divided on the issue of form, and in the final analysis it was up to the General Assembly to decide, the Commission could leave the matter to the Assembly.

38. The provisions on dispute settlement should be deleted, since dispute settlement procedures were already available for use. The Chinese idea of including a provision modelled on Article 33 of the Charter of the United Nations in the draft articles was attractive and should be explored.

39. The CHAIRMAN announced that, in accordance with the recommendations of the Sixth Committee on cost-saving measures, the Bureau had decided to allocate the first week of the second part of the session to meetings of a working group to review the commentaries to the draft articles on State responsibility. The working group would have a total of 10 members.

40. Mr. RODRÍGUEZ CEDEÑO said that, whatever form the draft articles ultimately took, they must include provisions on dispute settlement. The question was whether the regime to be established should be a general one or whether there should be a special regime to allow for provisions on the delicate issue of countermeasures. Provisions on a general regime of dispute settlement would have to be grounded in the fundamental rules and principles recognized and accepted by States and enshrined in the Charter of the United Nations and the texts adopted by the General Assembly, namely, the obligation to settle disputes by peaceful means, the principle of free choice of means of settlement and the principle whereby the States parties to a dispute must consent to its submission to a mechanism whose decisions were compulsory and legally binding, such as arbitration or judicial settlement. In his view, it would be sufficient to refer to the procedures provided for in the Charter for the settlement of disputes on the interpretation or application of texts in general. As to whether a special regime for countermeasures was needed, it should be recalled that countermeasures were imposed in the context of the unilateral acts of States, which made such measures all the more problematic; hence the need to regulate them in an appropriate manner. If the draft articles took the form of a convention, special dispute settlement procedures must be created to guarantee the effectiveness of countermeasures, which were exceptional measures taken for the

sole purpose of inducing the responsible State to fulfil its obligations and which reflected the development of international relations and the need to improve the structure of the international community.

41. Concerning the final form of the draft, he thought that a distinction should be drawn between the nature of the text and its form. The point was not to take a decision on the legal nature of the draft articles, but to make a recommendation on the form they should take or, in other words, to indicate whether the process should lead to the adoption of a convention, something which, in theory, was best suited to the Commission's mandate, or of an informal text such as a General Assembly declaration. Whether the text was a declaration or a convention, it would have a significant impact in legal terms on relations between States. While it was obvious that a convention was binding on the States parties, it was not clear what status and effectiveness a declaration might have. A declaration was not in itself devoid of legal force; it could not be regarded simply as a political document. Its legal force depended on the terms in which it was drafted and on the will of States which it reflected. The draft articles would inevitably have to be considered by States in the Sixth Committee.

42. The codification and progressive development of international law were indissociable. It would be difficult for a working group to perform the very complex task of determining which rules related more to which category, as had been proposed. The text under consideration covered the existing rules of State responsibility without overlooking the progressive development of international law in that field. It was incorrect to say that the purpose of the exercise in which the Commission was engaged was solely to facilitate the progressive development of international law.

43. The opponents of the adoption of a convention contended that the organization of a diplomatic conference would re-open the discussion on the draft articles, which might then be altered or even stripped of their content. It would seem that States could not oppose such progress in the organization of the international community and must, instead, participate actively in the elaboration of the regime on an equal footing. The Commission could not impose a set of draft articles on States. Some members had also pointed out that a convention that was not ratified by a sufficient number of States would have less force and might even have a "decodifying" effect. That was true, and it was up to the Commission to preserve States from the dangers of such an eventuality. It would nevertheless be unacceptable simply to submit the draft articles to States in the Sixth Committee for their consideration. That would raise doubts about the value of the work done by the Commission.

44. The Commission's discussion clearly showed that a political perspective on legal matters and, in particular, on the codification process was essential and that the Commission could certainly not content itself with studying the topics submitted to it in an exclusively abstract manner, without taking account of political realities and State practice. He believed that the Commission must put the various options available to it before the General Assembly and comment on their implications. That would be the best way of helping States to take a judicious political decision reflecting the idea that, whatever its form, the final text on State responsibility, must be of a legal nature and designed for the sole purpose of regulating relations among States. Lastly, while he supported the establishment of a working group to submit proposals to the Commission, he was not sure that it was appropriate to prepare a draft resolution for the Sixth Committee. That task fell exclusively to States and to the Assembly.

45. Mr. MELESCANU said that Mr. Rodríguez Cedeño had been right to emphasize the importance of the content and language of a declaration by the General Assembly, but it must not be forgotten that the way in which the decision on the question was adopted, whether unanimously, by consensus or by a vote, was no less important and perhaps even more so.

46. Mr. BROWNLIE said that several speakers had stressed the need to produce a legally binding instrument. He wondered how many States would ratify a convention, which would, of course, be binding only for those which had ratified it. The Commission was engaged in codifying an area of general international law comprising well-established elements. State responsibility was the axis of the whole system of obligations. The law of treaties, for instance, was simply a department of State responsibility. If the convention remained unratified or if an identifiable group of States did not ratify it, the result would be highly regrettable. It might even be called "reverse codification".

47. Codification took place against the background of a great deal of existing customary law. In that respect, the difference between a declaration and a convention was blurred, but it would be a pity to opt for a convention if it was not ratified.

48. Mr. LUKASHUK said that the solution of having the General Assembly take note of the draft of the Commission might also have a negative impact because the Assembly would not be approving the text if it simply took note of it.

49. Mr. RODRÍGUEZ CEDEÑO said that he wondered whether the non-ratification of a convention would mean that its provisions would have no effect in international law. In his view, the risks involved in ratification were much less serious than those that would weaken the entire text if it simply became a declaration, or if the General Assembly simply took note of it.

50. Mr. ECONOMIDES said that the customary rules of international law existed and did not lose their autonomy since their statement in treaty form gave them additional certainty, reliability and binding force. However, when a new rule was introduced, it became a customary rule more quickly if it was part of a convention rather than of a declaration. The approach of ICJ was enlightening in that respect, since it was quick to characterize new treaty rules as customary rules.

51. Mr. DUGARD said that there appeared to have been a shift on the part of those in favour of a convention, who seemed to believe that a convention was desirable even

if it had not been ratified. The 1969 Vienna Convention contained some elements that might encourage States to ratify it, but there was no certainty that the same would be true of a convention on State responsibility. What arguments could a Government legal adviser bring in favour of the ratification of such an instrument?

52. Mr. ROSENSTOCK said that he completely disagreed with Mr. Lukashuk that taking note of the draft would amount to a rejection by the General Assembly. It all depended on the way the question was put to the Assembly. If the draft was put forward as the culmination of 40 years' work by the Commission on the subject, the fact of taking note of it would not have negative consequences. If, however, the draft was presented in the form of a convention in which some elements were thought by States to be unacceptable, that approach would have negative and indeed destructive effects. It was perhaps even true, as Mr. Pellet had suggested, that some States favoured a convention on the subject so that they would not have to ratify it.

53. Mr. ADDO said he thought that States might well ratify a convention which consisted largely of customary law rules that did not cease to have effect merely because the convention was unratified. The examples of the Rome Statute of the International Criminal Court and the United Nations Convention on the Law of the Sea clearly showed that an instrument containing provisions on which States did not agree could well be ratified by over half the States in the world.

54. Mr. ELARABY said that the position of a Government's legal adviser when faced with a convention on State responsibility would depend on three factors. The first had to do with the importance of the subject matter. State responsibility was a sensitive topic, which States tended to approach cautiously. Secondly, it was beyond dispute that a convention, even unratified, carried more weight than a declaration. Thirdly, in the current state of international relations, there was a feeling of fatigue caused by the accumulation of new rules, but that situation might change in future. All things considered, the draft text on State responsibility warranted a recommendation to the General Assembly to adopt it in the form of a convention.

55. Mr. SIMMA said that, although he did not regularly advise his own Government, he could imagine that, in the various ministries of foreign affairs, senior advisers would express positive views about having a convention on State responsibility, but would immediately want to discuss possible reservations. The problem of reservations to human rights instruments would seem quite tame by comparison.

56. Mr. OPERTTI BADAN said the attitude of States towards the draft articles would be decided, in the first place, by the principles embodied in the text and, secondly, by the kind of country concerned, in the sense that it was the weakest countries which needed the protection of the law. In any case, he thought that it was hardly conceivable for a change of government, for instance, to bring about a change in the law on State responsibility.

57. Mr. MOMTAZ said that he had three observations to make. First, the non-ratification of an international legal instrument did not necessarily signify opposition to the provisions it contained. Secondly, when a convention codified firmly established customary rules, legal advisers to Governments were generally disinclined to advise ratifying it, since the State was already bound by the rules it embodied. Lastly, a State could refer to a convention in its international relations without being a party to it.

58. Mr. PELLET said that the example of the United Nations Convention on the Law of the Sea, mentioned by Mr. Addo, did not encourage much optimism because the most powerful countries had removed the most innovative aspects of the text through the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. If he had to advise a powerful State, his advice would be that it should insist on the draft becoming a convention so that its innovative elements could be removed. Then, when it was signed, he would recommend that the Government should formulate as many reservations as possible and that it should not ratify the convention. However, if he were advising a small country, he would tell the Government that the draft produced by the Commission was a balanced one, that, on the whole, it protected the interests of all countries as far as possible, that it went as far as it could along the "communitarian" path of international law and that practice should therefore be allowed to develop on that basis, without giving a handful of powerful States the opportunity to sap the draft of its substance. As for the scenario in which the General Assembly took note of the draft, the Assembly's decision would constitute a disavowal only if that particular scenario had been excluded from the Commission's recommendation. A working group should therefore find flexible and open wording by which the Assembly could not prevent the draft from developing through practice.

59. Mr. SEPÚLVEDA said that, if the draft was adopted in the form of a declaration, he wondered what guarantee the Commission would have that States would not attach interpretative declarations to the instrument when they accepted it. All the arguments put forward against the convention formula were equally valid for the resolution formula. The text proposed by the Commission would necessarily be argued over and analysed in detail by the Sixth Committee and, although a declaration had less legal force than a multilateral instrument, States would take precautions to ensure that the declaration was as innocuous as possible.

60. Mr. GALICKI said he was surprised at the apparent assumption that the General Assembly would accept the solution of a convention if the Commission recommended it. First, nothing could be less certain and, secondly, if the Assembly opted for a convention after all, there was no way of being sure that, after several years of negotiation, the final product would look anything like the Commission's draft or that it would not be burdened with innumerable reservations. In the abstract, a convention would be the ideal result, but, in practical terms, it would not be desirable to give the Assembly the

stark choice between "a convention or nothing"; it should be given as much room for manoeuvre as possible.

The meeting rose at 1.10 p.m.

2671st MEETING

Wednesday, 2 May 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

later: Mr. Gerhard HAFNER

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. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, 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. GAJA said that he would confine his remarks to two controversial questions dealt with in chapters II and III of the fourth report (A/CN.4/517 and Add.1). The first point concerned the consequences of serious breaches. Article 42, paragraph 1, referred to damages, which, according to the Special Rapporteur, were not punitive, but "exemplary or expressive". The distinction was not obvious. As article 42, paragraph 3, made clear, in any case the ordinary consequences of wrongful acts flowed from the breach: those consequences included reparation for the injury. Thus, the gravity of the breach was already reflected in reparation. What further damages did a serious breach entail? Since the draft articles were not designed to entrust a judicial or arbitral body with a discretionary power if it found that a serious breach had been committed, a better course would be to define the consequences of serious breaches more precisely. Paragraph 1 should give some further indication about when a serious breach entailed exemplary or expressive damages and identify those damages more clearly.

2. Article 42, paragraph 2, subparagraphs (*a*) and (*b*), set out the obligation not to recognize as lawful the situation created by a serious breach and the obligation not to render aid or assistance to the responsible State in maintaining the situation so created. Both obligations presupposed the existence of a continuing wrongful act, which had given rise to an unlawful situation, as had been the case with Namibia. As was well known, the two consequences under subparagraphs (*a*) and (*b*) were modelled on what ICJ had found in its advisory opinion in the *Namibia* case, namely that the Member States had been under an obligation "to recognize the illegality of South Africa's presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from … lending support or assistance to South Africa" [p. 58] with reference to its occupation of Namibia. He proposed that paragraph 2, subparagraphs (*a*) and (*b*), should be rephrased to make it clear to which type of serious breach those consequences applied, i.e. only those continuing wrongful acts which had given rise to a wrongful situation.

3. The obligation under subparagraph (*c*) "to cooperate as far as possible to bring the breach to an end" was more general and applied to all continuing wrongful acts. But it could be made even more general and held to apply to cooperation in the presence of a serious breach in order to obtain not only cessation, but also assurances and guarantees of non-repetition and reparation. As he saw it, the main distinguishing feature between a serious breach and a wrongful act was that, in the first case, States were not only entitled, but required to react, if only by cooperating to obtain cessation, assurances and guarantees of non-repetition and reparation. That could be stated more explicitly in a separate paragraph. In any case, article 42, paragraph 3, on the ordinary consequences of a breach and those that might be entailed under international law, should be retained. For the latter consequences, the current "without prejudice" provision was probably the only practical way of referring to consequences that might vary from one type of serious breach to another and thus did not lend themselves to being expressed in more general terms.

4. His second point concerned injured States and invocation of responsibility by States other than those injured. Article 43 contained a definition of integral obligations that had proved controversial. There was some confusion as to what the term meant. The definition should indeed be more precise, but he did not agree with the substantive change suggested in the footnote at the end of paragraph 38 of the report, namely to say "and" instead of "or" in the last phrase so as to require that both "the enjoyment of the rights" and "the performance of the obligations" were affected before a State could be considered injured. For example, suppose a State party to the Antarctic Treaty dumped nuclear wastes on a large scale in the

[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.*