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Summary record of the 2671st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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.*

Antarctic. That was obviously a breach of the Treaty and it could be said that the rights of all parties to the Treaty were affected, but, arguably, their obligations were not. The example showed that if both rights and obligations had to be affected, a breach of an integral obligation might be very rare. Uncertainty as to the application of the subparagraph would inevitably grow greater, because it would always be necessary to determine whether both elements were present.

5. It was perhaps subversive on his part, but he wanted to ask the more fundamental question whether the category of an integral obligation, theoretically sound as it was, should be retained in article 43. If the rights of States other than the injured State were maintained as currently set out under article 49, then article 43, subparagraph (*b*) (ii), could probably be dispensed with; that would no doubt simplify the understanding of article 43. For example, no issue of compensation for damage caused to a State party to a treaty imposing integral obligations was likely to occur. As the Special Rapporteur noted in paragraph 38 of the report, the other parties to an integral obligation that had been breached may have no interest in its suspension and should be able to insist, vis-à-vis the responsible State, on cessation and restitution. But that was precisely the avenue open to "article 49" States, which were affected by a breach not because there was an integral obligation, but because of a collective interest that was protected by a treaty to which they were a party, or else because of the interest of the international community as a whole.

6. One of the objections to article 49, paragraph 2, that had been raised by several States concerned the proposition that States other than injured States might be entitled to request reparation. It had been argued that that was not in keeping with customary international law and that "article 49" States should only be entitled to request cessation. Yet that would mean that in many instances no State would be entitled to request reparation for the breach of an obligation under treaties established to protect a collective interest or under obligations to the international community as a whole. Take a case of genocide involving only the nationals of the responsible State. If the Commission endorsed the view that "article 49" States could only require cessation, then no State could claim reparation for the victims' benefit. In practice, that would be tantamount to condoning the breaches, even serious ones. Thus, article 49, paragraph 2 (*b*), should be retained. Logically, the fact that in certain circumstances there was also an injured State under article 43 should not affect the right of "article 49" States to request reparation. Why, for instance, should the position of "article 49" States vary in the case of massive pollution of the ocean depending on whether or not a coastal State qualified as specially affected? But as the Special Rapporteur suggested in paragraph 41 of his report, an exception could be provided as a compromise for the case in which there was an injured State.

7. Mr. SIMMA, reacting to a "subversive" point raised by Mr. Gaja suggesting that, in view of article 49, paragraph 1 (*a*), it was possible to dispense with article 43, paragraph 2, reminded Mr. Gaja that the title of article 49 was "Invocation of responsibility by States other than injured States". He saw a problem there, because Mr. Gaja's solution implied that States parties to an integral obligation within the meaning of article 43 would be considered to be States other than injured States. He could not accept that in the case of an integral treaty, such as a disarmament treaty, a serious material breach would not "injure" the other parties within the meaning of article 43.

8. Mr. GAJA said that it was a difficult drafting question the Commission could try to resolve. He agreed that the Commission should not say things that were not theoretically sound, even if the consequences were the same.

9. Mr. SEPÚLVEDA said that he would focus on the draft's legal form and the possible inclusion of a chapter on dispute settlement, which did not mean that he was disregarding the importance of other subjects or comments and suggestions from Governments. The chapter on countermeasures, and collective countermeasures in particular, and the subject of serious breaches of obligations for the international community as a whole deserved special attention, and much time would need to be spent on them if the draft was to be approved by the end of the current session. The Commission should allow sufficient time to prepare rules on dispute settlement, assuming it decided to recommend a convention.

10. In the informal consultations, he had expressed a preference for recommending the adoption of a draft that would take the form of a convention, for a number of sound reasons.

11. First, most Governments were in favour of a convention. Indeed, it was surprising to hear the claim that there was no support from Governments for an international convention. On the contrary: during the discussions in the Sixth Committee, 19 delegations had been in favour of a convention, whereas only 8 had preferred a declaration. Similarly, of the 14 States that had given their views in the comments and observations received from Governments (A/CN.4/515 and Add.1–3), 10 favoured a convention, with only 4 calling for a non-binding instrument.

12. Secondly, the draft articles in their current version were a normative text that imposed rights and obligations on States. While it was likely that in some matters the Commission had prejudged the decision on form in favour of a declaration, the final result of the work was of an eminently legal nature. As it stood, the draft's structure differed considerably from that of a straightforward declaration. The setting-up of a normative system began with the definition of an internationally wrongful act, continued with rules on attribution, determination of the existence of a breach of an international obligation, circumstances precluding lawfulness, the legal consequences of an internationally wrongful act and reparation of damage and concluded with a chapter on how to make State responsibility effective. The scope of the rights and obligations referred to in the draft articles far exceeded—in both language and objectives—what usually constituted a General Assembly declaration, in which it was clear from the outset that the legal effects of the instrument could be relatively benign and that the legal commitment was very lax. The draft did not allow for such latitude. It was composed of rules that must be complied with and rights that could be asserted. A simple declaration could

not provide sufficient validity and effectiveness for what was essentially a treaty, an instrument the Commission had been working to produce from the very beginning.

13. In short, the obligations and rights peculiar to international responsibility required a set of rules that could only be envisaged in a binding instrument, in other words, as a convention. A declarative mechanism would abandon the original intention and objectives, which called for a general system of legal rules.

14. Thirdly, normative innovation would gradually be accepted. The ability of States to adapt to new circumstances and needs should not be underestimated. It had been asserted that Governments would not accept norms that represented a progressive development of international law they regarded as too bold. Yet that interpretation was not borne out by the facts. In 1958, some had thought that the three-mile limit for the territorial sea was inviolable. In 1969, a regime for the seabed and ocean floor had been considered absurd. In the beginning, there had been little support for establishing an exclusive economic zone so that coastal States would benefit from the ocean resources within a 200-mile limit. In the early 1960s, *jus cogens* had been a very strange legal concept. Until recently, an international criminal court had seemed impossible. Many other examples could be cited. The Commission should not prejudge whether or not the rules it eventually proposed in the draft were ripe for acceptance by States. That depended on circumstances and decisions that did not fall within the Commission's purview. The Commission must produce the most comprehensive articles possible on what it deemed the law of State responsibility should entail.

15. Special attention should be given to the final text, which, by its very nature, would have legal status and would be generally recognized in international law. As had already happened, the final version of the articles and the commentary would be cited by law courts and arbitral tribunals, would establish criteria for the conduct of States and serve as a source of inspiration for new legal doctrines. It would therefore be a very bad idea to weaken the content of the draft by arguing that the articles set out rules that presupposed a progressive development of international law. Expurgating the text because of imaginary fears of political issues would be prejudicial to the Commission's work.

16. Fourthly, in principle States acted in a responsible manner. It had been repeatedly argued that, if the Commission recommended the adoption of a convention, there would be a serious risk that a preparatory committee and a diplomatic conference would mutilate the work that the Commission had accomplished over so many years. That implied that Governments usually acted against their own interests. Surely, many States were convinced that it was possible to agree on norms on international responsibility, and they were prepared to engage in political negotiations to produce satisfactory results. If that argument was not valid, then neither a declaration nor a convention would be legally operative.

17. It was contended that a diplomatic process for elaborating a convention on State responsibility entailed a risk, but it would be equally dangerous, and might have even more disastrous consequences, to recommend the adoption of a declaration. There was no guarantee that the text would be maintained as a whole and would follow, article by article, the draft finally adopted by the Commission. In fact, it was likely that Governments, although many of them did not give greater legal validity to declarations, would prefer to water down the text to ensure the adoption of a completely inoffensive resolution that would neutralize obligations and eliminate legal innovations.

18. Nor was it possible at the current time to guarantee that a convention would be a faithful reflection of the Commission's text. If the prime concern was for the integrity of the draft, the two options entailed the same risk, but with a declaration it might be easier to undermine the obligations set out in the draft.

19. It was wrong to assume that the text would automatically be damaged beyond repair if it formed the subject of diplomatic negotiations. One example of responsible conduct among States was the Third United Nations Conference on the Law of the Sea, whose results, despite legal, political and economic complexities and conflicting interests, were far from negligible. It would likewise be difficult to object to the final product of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, namely the Rome Statute of the International Criminal Court.

20. Fifthly, recommending a declaration presupposed the same problems as a convention, but without the advantages. It was not inconceivable that, in recommending the adoption of a declaration on State responsibility, the Commission would open the door to a diplomatic process, with the convening of a conference in the General Assembly to review and approve a politically acceptable text. Nor was it inconceivable that such a text would differ from one that emerged from the Commission. In addition, it would be difficult to accept that such a declaration would need to be approved unanimously or by consensus, and that would give rise to escape clauses so that those States that had voted against the declaration would not feel bound by any political or legal commitment. It should be recalled that the Charter of Economic Rights and Duties of States[4] had been approved by an overwhelming majority of Governments in the Assembly. The few Governments that had not endorsed the resolution had clearly announced their inability to go along with the majority decision. The same situation might arise with a declaration on State responsibility.

21. That example also served to illustrate the concern expressed at the possibility that a convention might not attract a sufficient number of ratifications and the risk that it might not enter into force in the immediate future. The same risk was inherent in the case of a declaration. However, even without the necessary number of ratifications, the legal value of a convention was infinitely superior to that of a declaration.

22. Sixthly, it had been suggested that adoption in the form of a declaration would constitute a diplomatic effort to confer on the draft articles a political solemnity

[4] See 2668th meeting, para. 37.

that would lend them additional legal weight. But that ceremonial aspect would not constitute the legal basis for the text, with its generalized acceptance of rights and obligations. The best way of achieving that aim, notwithstanding the problems it posed, was the adoption of a multilateral treaty. It should also be recalled that, despite the solemn circumstances attending the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[5] some States still did not acknowledge the legal effects of that resolution.

23. As the Special Rapporteur pointed out in his fourth report, only if the draft articles were to be adopted as an international convention would there be any point in including a chapter on third-party settlement of disputes. Personally, in arguing in favour of a binding instrument, he endorsed the proposal to elaborate a system for settlement of disputes, the characteristics of which would have to be defined by the Commission. That new text would have to be different from the previous one, eliminating the obvious defects to be found in the draft adopted on first reading.[6]

24. In the debate in the Sixth Committee during the fifty-fifth session of the General Assembly, eight States had favoured including a chapter on dispute settlement, while only three had opposed such a course. In the comments and observations received from Governments, however, three Governments had favoured incorporating a section on dispute settlement, and three had opposed it. Other Governments had recommended awaiting the submission of a new text before stating their position.

25. Certainly the system proposed at the forty-eighth session of the Commission, and particularly the mechanism linking countermeasures with compulsory dispute settlement, was open to a number of objections, conferring, as it did, undue and disproportionate advantages on the responsible State. But that did not mean, as had been claimed, that a majority of Governments thought it inexpedient to include provisions on dispute settlement.

26. Bearing in mind the substantial changes incorporated in the text provisionally adopted on second reading, it seemed advisable to embark on the task of elaborating a chapter on dispute settlement reflecting the insertions in the text and the obvious needs of the new instrument. In that way, the rights and obligations set forth in the new draft articles could be elucidated if, as might prove to be the case, conflicts arose in the definition of the nature and scope of the provisions.

27. It was not easy to pronounce in favour of or against a system of dispute settlement. Undoubtedly, the earlier text had suffered from a number of defects. But, as yet, no finalized new text existed with which to compare it. The Commission could take a reasoned decision concerning the merits and drawbacks of a third-party dispute settlement mechanism only by examining the possible options for a new text, purged of the defects of the previous draft articles and incorporating a new mechanism.

28. In that regard, it was interesting to note the comment by the Government of China that they did not agree with the simple deletion of all the articles concerning dispute settlement. They stated that since the question of State responsibility involved rights and obligations between States as well as their vital interests, it was a sensitive area of international law in which controversy arose easily. In order to deal with these questions properly, it was necessary to set out general provisions to serve as principles for the settlement of disputes arising from State responsibility. In paragraph 20 of his fourth report, the Special Rapporteur rightly pointed out that such a provision, which could be modelled on Article 33 of the Charter of the United Nations, would go part of the way towards meeting the concern that claims of State responsibility not be the occasion for coercive unilateral measures by any State.

29. The object of the exercise was to establish a set of rules governing State responsibility based on a system of legal certainty, something that could best be achieved through a binding instrument containing, in a new chapter, a regime for dispute settlement.

30. As to other matters addressed by the Special Rapporteur in his fourth report, to avoid additional confusion it was important to standardize the use of terms in all languages. In the Spanish text of the fourth report, the terms *lesión* and *perjuicio* were used interchangeably to denote the English "injury". On the other hand, the term used in the draft articles was *perjuicio*, the term that should be used in all the texts, thereby making clear the distinction between injury (*perjuicio*) and damage (*daño),* in line with the wording of article 31, paragraph 2. Again, in paragraph 31 of the fourth report, the Special Rapporteur expressed concern at the overlapping of the terms "injury" and "damage", but that concern was resolved in the wording of the Spanish and French versions.

31. Nor could he concur with the proposal to retain the concept of "international community as a whole". The purpose of the draft was to establish a set of rules governing State responsibility, and the addressees of the rights and obligations were those subjects of international law. If the intention was to establish a legal regime applicable to the European Union, the United Nations or ICRC, on the assumption that those bodies also formed part of the international community, that aim would be achieved by drafting a text regulating the responsibility of international organizations. Hence the need to use the more precise term "international community of States as a whole". Even then, the question of what constituted "a serious breach by a State of an obligation owed to the international community" of States "as a whole and essential for the protection of its fundamental interests", to borrow from the wording of article 41, remained undefined. Much work was needed to clarify the legal nature of those concepts.

32. The provisions in article 49 were controversial, as was demonstrated by the reactions of Governments and the debate in the Sixth Committee, since invocation of responsibility by States other than the injured State gave rise to problems and confusion. For instance, paragraph 1 (*a*) provided that a State other than an injured State was entitled to invoke the responsibility of another State if the

[5] *Ibid*., para. 9.

[6] See 2665th meeting, footnote 5.

obligation breached was owed to a group of States including that State. In such circumstances, it would seem more logical to assume that the situation of an injured State or group of States was the one applicable, in which case article 43 would apply, and paragraph 1 (*a*) of article 49 would be redundant.

33. Another question requiring definition was what was meant by an obligation breached that had been established for the protection of a collective interest. Such an important right should not be conferred on a State other than the injured State on the grounds that a collective interest was protected without providing a fully reasoned justification. Otherwise, that right could be used as a pretext for the adoption of arbitrary measures, on the grounds that a collective interest was being protected.

34. The most contentious question, however, was the link between articles 49 and 54, whereby a State other than the injured State might take countermeasures at the request and on behalf of any State injured by the breach. More serious still, more than one State other than the injured State or States could jointly take countermeasures. He had had occasion to voice his objections about collective countermeasures at the previous session. Suffice it to say that determination of the existence of a serious breach by a State of an obligation owed to the international community of States as a whole and essential for the protection of its fundamental interests was, in principle, a matter regulated by Chapter VII of the Charter of the United Nations, which established a universally accepted legal system governing the adoption of enforcement measures.

35. In conclusion, while commending the work done by the Commission and its Special Rapporteur in the field of State responsibility, he would stress the need for the Commission to redouble its efforts if it was to complete its consideration of the topic at the current session, and to come up with a comprehensive and generally acceptable set of draft articles.

36. Mr. TOMKA said he shared the Special Rapporteur's view that a system of optional dispute settlement would add little or nothing to what already existed. A system of compulsory third-party dispute settlement would—as the Special Rapporteur had demonstrated—have the effect of instituting third-party dispute settlement for the whole domain of international law. States could not realistically be expected to readily accept such a compulsory system. Just one third of the States Members of the United Nations (63 out of 189) had accepted the compulsory jurisdiction of ICJ by a general declaration under Article 36, paragraph 2, of the Statute of the Court, a number of them with reservations. If States were willing to accept the compulsory jurisdiction of the Court for the purposes of State responsibility, they could do so by making a declaration under Article 36, paragraph 2, since subparagraphs (*c*) and (*d*) covered just such issues of State responsibility, namely, conferring jurisdiction on the Court in relation to disputes concerning, respectively, the existence of any fact which, if established, would constitute a breach of an international obligation, and the nature or extent of the reparation to be made for the breach of an international obligation.

37. He thus concurred with the Special Rapporteur's view that Part Three and the two annexes adopted on first reading should be deleted. Furthermore, it was not necessary to add a general provision inspired by Article 33 of the Charter of the United Nations. The Charter was part of general international law, and such an article would add nothing to the text.

38. As to the final form of the draft, the views expressed by a number of members appeared to reflect what States would like to hear, rather than what was feasible or realistic. Unfortunately, however, States were divided in their views. His own analysis of the comments and observations received from Governments suggested that nine States favoured a convention, while six preferred a non-binding form, usually involving the General Assembly taking note of the text and commending it to States' attention. Members' views might also have been influenced by the fact that, on a number of occasions in the past, the Commission's advice had not been followed. The Assembly had declined to follow the Commission's recommendations on at least five occasions. Thus, at its tenth session, in 1958, the Commission had recommended adoption of the draft articles on model rules on arbitral procedure,[7] but the Assembly, in paragraph 1 of its resolution 1262 (XIII) of 14 November 1958, had instead simply taken note of that text. In the case of the draft articles on most-favoured-nation clauses, the Commission had recommended the Assembly to commend the draft articles to Member States with a view to the conclusion of a convention on the subject.[8] Yet more than 10 years later, the Assembly had instead adopted decision 46/416 of 9 December 1991 to bring the draft articles to the attention of Member States. A similar situation had arisen in the case of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, where the Commission had proposed the convening of an international conference to conclude a convention on the subject.[9] Instead, however, several years later the draft had simply been drawn to the attention of Member States.[10] Then, at its fifty-first session, in 1999, the Commission had recommended to the Assembly that it adopt the draft articles on nationality of natural persons in relation to the succession of States, in the form of a declaration.[11] The Assembly, in paragraph 2 of its resolution 55/153 of 12 December 2000, had taken note of the draft articles, the text of which had, in an innovative development, been annexed to the resolution; and had invited Governments to take into account, as appropriate, the provisions contained in the articles in dealing with issues of nationality of natural persons in relation to the succession of States. At its forty-third session, in 1991, the Commission had recommended the convening of an international conference to examine the draft articles concerning the jurisdictional immunities of States and their property and to conclude a convention on the subject.[12] That matter was still pending, and a working group on the topic would yet again be convened at its fifty-fourth session, in 2002.

[7] *Yearbook . . . 1958*, vol. II, p. 83, document A/3859, para. 22.

[8] *Yearbook . . . 1978*, vol. II (Part Two), para. 73.

[9] *Yearbook . . . 1989*, vol. II (Part Two), para. 66.

[10] General Assembly decision 50/416 of 11 December 1995.

[11] *Yearbook . . . 1999*, vol. II (Part Two), para. 44.

[12] *Yearbook . . . 1991*, vol. II (Part Two), para. 25.

39. There had been a good deal of discussion about the role of unratified codification conventions and that of declarations, and as to whether States should be given an opportunity to endorse a text proposed by the Commission. In his view, it was States that determined the law; the role of the Commission was to advise and to prepare drafts. In the past, no text of the Commission had ever been simply rubber-stamped by States; changes had invariably been introduced during the negotiation process at the codification conference, or, in some cases, in the Sixth Committee. Unratified conventions could play an important role, as was demonstrated by the 1969 Vienna Convention, which, although adopted in 1969, had entered into force only in 1980. Yet by the 1970s ICJ was already expressing views on whether particular articles and parts of the Convention reflected customary international law. Nonetheless, it was important to distinguish between unratified conventions and ill-conceived conventions, the distinction residing in the degree of unanimity attending the adoption of a given convention. In that regard, there was a significant difference between the 1978 Vienna Convention and the 1983 Vienna Convention.

40. The Commission was thus faced with two possibilities: the first would allow States some say concerning the text. In that case the most appropriate course would be to advise States to convene a codification conference—though not necessarily one preceded by a preparatory committee process, *pace* the Special Rapporteur, to judge from paragraph 24 of his fourth report. The preparatory process preceding the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court had been an exception, due to the unusual nature of the exercise, in which the international community had decided to establish a new institution, the International Criminal Court. In the past, codification of international law had not involved a preparatory process, except in the case of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (hereinafter "the 1986 Vienna Convention"), for which a consultation process had been organized one year before the conference. Accordingly, a preparatory committee should be avoided and the conference itself should be attended by high-level legal advisers to States, rather than by legal advisers to permanent missions to the United Nations. His own clear preference was for a recommendation to convene a codification conference. Failing that, the Commission should recommend that the General Assembly take note of the text and commend the annexed draft articles to the attention of States; for it was unrealistic to recommend adoption of a declaration unaccompanied by a process of negotiation between States.

Mr. Hafner (Vice-Chairman) took the Chair.

41. Mr. SIMMA said that a majority of those opposed to a convention favoured instead whatever form was most likely to ensure that the draft articles remained intact. The best alternative was thus to recommend that the General Assembly simply take note of the text. The fate suffered by the draft articles on jurisdictional immunities of States and their property at the hands of the Assembly over the past 10 years offered a salutary lesson in that regard.

42. Mr. SEPÚLVEDA said that, should the Commission decide to recommend that the General Assembly simply take note of the draft articles, it was totally unrealistic to suppose that the Assembly would do so without first substantially amending them. Given their possible political effects, there was absolutely no chance that the draft articles would survive intact.

43. Mr. TOMKA said that recommending that the General Assembly take note of the draft articles was the only way to ensure that they would survive intact. A number of States had advocated that course of action precisely because they would not thereby be precluded from arguing in the future that the draft articles did not represent their own legal position, since they did not constitute part of customary international law.

44. Mr. ECONOMIDES said past experience showed that codification conferences tended to make very few changes to texts prepared by the Commission, as amendments needed to be voted through by a two-thirds majority, a majority it was virtually impossible to obtain. Accordingly, if the Commission wished to ensure that its text remained intact, a codification conference was the best way of securing that end. On the other hand, to propose that the General Assembly simply take note of a text that had occupied the Commission for the best part of 50 years would be to cast doubts on its validity. He entirely endorsed the arguments advanced by Mr. Sepúlveda.

45. Mr. GOCO, in reply to the observation by Mr. Tomka, said that "taking note" did not necessarily imply approval. Under article 23, paragraph 1 (*b*), of its statute, the Commission could recommend to the General Assembly "to take note of or adopt the report by resolution". Those were two different alternatives. The Commission could recommend both, namely that the Assembly should not merely take note of its report, but also adopt it by a resolution.

46. Mr. ROSENSTOCK said that to dismiss the option of recommending that the General Assembly "take note" of the report was to misunderstand the unique role the Commission had played in developing and devising the structure of the law of State responsibility, and its highly innovative work on countermeasures. Properly handled, the procedure of "taking note" could concretize the interaction that had taken place between the Commission and the international community on the topic of State responsibility, and provide a solid foundation for its future development. Such interaction had been especially significant over the past 40 years. The "taking note" approach might therefore be seen as firming up the foundations on which any future development must be based. Any other approach might well undermine the Commission's achievements and jeopardize the development of the law. In that sense, the topic of State responsibility differed from other topics. The practice of the 1960s and 1970s did not necessarily offer a guide to what the Assembly might do in the new millennium. If a preparatory committee were set up, there would be a risk of its undoing the work already done and destroying the foundation on which future progress would be built.

47. Mr. PELLET said the Commission appeared to have reached an impasse. Mr. Tomka had explained its options

very clearly, while eliminating the idea of a declaration, which seemed to combine all the disadvantages of a convention while offering none of the advantages. The extreme view, represented by Mr. Sepúlveda and supported by Mr. Economides, was the classic nineteenth century notion that treaties made the law; the countervailing view, and his own, was that law comprised an endless variety of elements and could progress, as Mr. Rosenstock had suggested, otherwise than by the mechanics of treaty-making. A reasonable solution, underpinned by article 23, paragraph 1 (*b*), of the statute of the Commission, would be to tell the General Assembly that the Commission had two possible outcomes to propose, each with its own advantages and disadvantages—namely, a convention on the topic or a decision by the Assembly to take note of the report—and ask the Assembly to decide between them. For that purpose, it would need to agree on the merits and drawbacks of the two alternatives, and he suggested that a small working group should take on the task of listing them for inclusion in the final recommendation.

48. Mr. LUKASHUK said he agreed with Mr. Pellet, who had expressed himself as a twenty-first century jurist. The Commission had a real opportunity for compromise at the current time, since both alternative views were well founded. He suggested that it could recommend to the General Assembly to examine the conclusions in its report and consider whether to hold a diplomatic conference to prepare a convention. That would enable the Assembly to resolve the issue itself, while avoiding the impression that the Commission had been unable to arrive at a concerted view.

49. Mr. SEPÚLVEDA said Mr. Pellet's reference to nineteenth century notions of the law reminded him of the chapter in Mexican history when French intervention had prompted Mexico to devise a set of basic tenets of State responsibility. To ensure that such experiences were not repeated it was essential to produce a legal text to enshrine State responsibilities and guarantee that they were fulfilled.

50. Mr. TOMKA, summing up the discussion, said there was a difference between taking note of the report and adopting it. Taking note did not imply approval or disapproval. If the General Assembly took note of the draft articles, they would remain a text produced by the Commission, to be drawn upon by ICJ and arbitral tribunals. However, if the draft articles were adopted by the Assembly, they would become an Assembly text, and the Commission could not expect them to remain unchanged in the process.

Mr. Kabatsi resumed the Chair.

51. Mr. Sreenivasa RAO said that the form of the draft articles was not merely a procedural question. The issue had gained its own momentum, a soundly argued case being made for each of the alternative courses of action. Those members of the Commission who favoured adoption of the draft in the form of a convention were saying that that was what a majority of States wanted. Moreover, in view of the length of time taken to finalize the draft articles, a recommendation to take note of them would affect the Commission's reputation as a responsible body of experts. States, they said, needed a definitive text on so complex a topic, otherwise they would be tempted to pick and choose the interpretations they preferred, and there would be many disputes about the respective elements of customary law and progressive development. A convention was needed to address the current difficulties in international relations, in a world characterized by a high degree of integration. It had also been argued that, whatever the Commission's final recommendation, the General Assembly remained sovereign and would dispose of the text as it saw fit. The Commission's role was therefore to produce a balanced set of articles, which might well incorporate an element of progressive development. The notion that few States would choose to ratify a convention was not justified: the extent of ratification would depend on the efforts made during the treaty-making process to involve as many States as possible and to reconcile the interests involved, without imposing particular solutions. That would take time, but a convention concluded in haste would not achieve consensus anyway.

52. Those who opposed the convention format had argued that the draft articles stated conclusions on customary law and thus contained a significant element of codification that should be preserved and protected. Otherwise, they claimed, there would be a risk of confusion and of reverse codification, arising from disagreement on other parts of the draft that represented progressive development. It was also feared that any preparatory committee established by the General Assembly would be highly divisive and might attempt to rewrite the draft articles, a kind of reverse codification which would unsettle the expectations of the international community and do harm to the existing international legal order. According to that view, there was no prospect of a conference to adopt a convention. Even if a convention were to emerge, few States would ratify it, and those that did might enter reservations, which would render it less acceptable.

53. His conclusion was that the Commission should develop and finalize the draft to the best of its endeavours and invite the General Assembly to take note of it with a view to adopting it in the form of a convention as soon as it would be expedient to do so.

54. In the matter of dispute settlement, there was no need for an optional procedure. Countermeasures should not be allowed to be taken under the articles without first compelling the State intending to take them to offer the wrongdoing State a means of settlement of the dispute. Such a provision should be included in the draft, without prejudice to article 53.

55. Mr. GOCO said he agreed with the Special Rapporteur that, according to the comments and observations received from Governments, the text of the articles was generally acceptable and most of the comments and observations were on questions of drafting. The issues that had attracted most attention from Governments were countermeasures and the form of the draft articles. It was generally accepted that countermeasures against a State committing an internationally wrongful act were lawful. However, strong warnings had been issued against vagueness in making provision for countermeasures and about the risk of abuse. One Government had said that provisions on countermeasures must only be made for the sake

of resolving disputes and not in order to exacerbate them. Another had argued that only powerful States were in a position to take countermeasures against weaker ones, and another that the Commission should endeavour to restrain the use of countermeasures by prescribing limits to them, rather than leaving the field open to abuse.

56. Concerning the form of the draft articles, due weight should be given to the Special Rapporteur's view, expressed in paragraph 25 of his report, that a General Assembly resolution taking note of the text and commending it to Governments might be the most practical way forward. His own original view had been that the text should ideally take the form of a convention, because State responsibility covered the entire infrastructure of the international obligations of States. However, genuine concerns had been expressed about that option, such as the time taken to conclude a convention and the risk that there would be too few ratifications, or too many reservations, to render it effective. He shared those concerns, because of his own experience of working on the Preparatory Committee on the Establishment of an International Criminal Court, and of helping to draft the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, which was still not in force. In short, he would prefer the draft articles to take the form of a convention, but recognized the need for pragmatism.

57. A draft elaborated by the Commission that had formed the basis for the 1969 Vienna Convention defined a general multilateral treaty as a multilateral treaty which concerned general norms of international law and dealt with matters of general interest to States as a whole. Such treaties had been described as the nearest thing to general statutes in international law. That reasoning highlighted what a convention on State responsibility would be, namely a set of rules, or law-making. States might be very wary of approving a set of rules on the responsibility stemming from their relations with other States. On the other hand, as the Special Rapporteur said in paragraph 25 of his report, whatever the status of the text, it would be authoritative in the field it covered: it was already frequently cited. The Islamic Republic of Iran had made the pertinent comment that a statement of the law so prepared would be a useful instrument that would guide States in their relations with other States in respect of the commission of internationally wrongful acts, and that adoption of a declaration on State responsibility did not in any way preclude further development of the topic in the future, including the elaboration of a convention on State responsibility.[13] It was a position that seemed to strike a reasonable balance.

58. What was to be done about dispute settlement hinged on whether a binding convention was chosen as the form for the draft articles. Chapter VI of the Charter of the United Nations, on peaceful settlement of disputes, could become applicable in the event of a dispute between States parties, including on the interpretation of provisions on State responsibility. He wished to draw attention in that regard to Mr. He's suggestion that a reference to Chapter VI should be included in the draft. It might not be necessary to develop an entire procedure for dispute settlement: as indicated in paragraph 6 of the report, making provision for third-party settlement was contingent on the draft articles being envisaged as an international convention. Paragraphs 12 to 19 of the report cited certain difficulties with respect to dispute settlement, including the isolation of the domain of obligations under State responsibility as distinct from other fields. Accordingly, questions of dispute settlement in relation to State responsibility should be left to be resolved by existing provisions and procedures.

59. Mr. BAENA SOARES said that the Commission had arrived at the final chapter of a historic work whose completion could be greeted with satisfaction. The time had come to give form to that work. Under article 23 of its statute, the Commission was entitled to recommend one of four options to the General Assembly. The final decision would of course be taken by States, but nothing prevented the Commission from expressing its views regarding the form to be taken by the product of so many years of stimulating and creative work. Indeed, it would be strange for the Commission not to propose a framework for such an important piece of legal carpentry.

60. The options under article 23, paragraph 1, subparagraphs (*a*) and (*d*), namely, to take no action or to convoke a conference to conclude a convention, could be discarded, leaving a choice between adoption by a resolution and conclusion of a convention. He favoured the latter option and nothing he had heard from the other members of the Commission had made him change his mind. The authority behind the work done, the length of time spent on it and the importance of the topic all made the draft worthy of becoming a convention. Any other approach would be demeaning to the Commission's work. It should also be recalled that, on the topic on international liability, the Commission was working on the draft articles of a convention.

61. It might be thought that adopting the draft in a General Assembly resolution would make it easier to preserve the articles intact. In reality, however, there was no certainty that such would be the case. It was not for the Commission to determine what States could or should do. The most realistic expectation was that, irrespective of the form taken by the draft, States would give it meticulous consideration.

62. He believed there was a need to include in the draft articles provisions on dispute settlement, and all the more so if the draft was to take the form of a convention. In such an event, a new proposal for a more appropriate system for dispute settlement would have to be considered.

63. Mr. PAMBOU-TCHIVOUNDA said that in his fourth report the Special Rapporteur set out his views on controversial issues debated by Governments during the discussion of the draft articles in the Sixth Committee at the fifty-fifth session of the General Assembly. The report tended to recast the issues within the traditional parameters of State responsibility, thereby highlighting the aspect of progressive development of the law of international responsibility.

[13] See *Official Records of the General Assembly, Fifty-fifth Session, Sixth Committee*, 15th meeting (A/C.6/55/SR.15), and corrigendum, para. 18.

64. In connection with countermeasures, such principles of international law as effectiveness, sovereignty, equality and peaceful settlement of disputes were called into question if an injured State was accorded the right to decide, independently or in concert with other States, on ways and means of gaining reparation for harm. He experienced great difficulty with the idea of endorsing a draft that claimed the status of legal provisions yet fell far short of being positive international law. How was it conceivable that a State allegedly responsible for injury should be obliged to accept that the injured State and its friends could automatically resort to ways and means of righting a wrong, without the responsible State being able to question at least the relevance or the nature of the new relationship linking it to the State which argued that its rights had been injured? Any draft that proposed to build a comprehensive regime around the notion of countermeasures yet refused to define them would be difficult to justify and should in any event comprise dispute settlement machinery for dealing with the disputes that would inevitably arise, particularly on the interpretation and application of the articles.

65. The draft adopted on first reading had sought to address such difficulties in Part Three. He did not agree with the Special Rapporteur's remark in paragraph 14 of the report that Part Three incorporated a standard formula.

66. The draft currently under consideration was sometimes more concise and more abstract than the draft adopted on first reading, but both suffered from a penury of lexical precision. Definitions of terms were scattered throughout the various articles, in a departure from the classic structure of multilateral treaties. If time allowed, a set of provisions bringing together the basic terminology on State responsibility could well be elaborated. If that had been done earlier, there would be no need at the current time to examine terms like "damage" and "injury", as the Special Rapporteur did in chapter II of his report.

67. The arguments developed in chapters III and IV of the report considerably broadened the approach to the topic, amounted to progressive development of international law, not just consignment to paper of customary rules, and highlighted the need for a mechanism, not only of dispute settlement, but of what he would call regulation, in order to meet the demands of the international community, a course that would virtually do away with the distinction drawn between primary and secondary obligations of responsibility and thereby warrant the inclusion in the draft of provisions on the maintenance of international public order (*ordre public)*. The idea that general provisions based on the Charter of the United Nations should be incorporated in the articles was worthy of consideration, irrespective of the form to be adopted for the draft.

68. Governments were not in agreement on the question of the final form. He himself favoured the conclusion of a convention and endorsed the arguments already advanced by the proponents of that option. The Commission's work could be enshrined only in a text whose legal nature was in no way open to debate. To adopt any other packaging would be to devalue and weaken the text, which should be binding upon States in and of itself. Far from providing guidance for States, for which purpose resolutions and declarations were perfectly well suited, the text must lay the foundations of international law on State responsibility in conformity with the relevant provisions of the Charter of the United Nations. The Commission should recommend that the General Assembly place State responsibility firmly within the international legal order. As for the dangers of reopening the debate, great-Power manoeuvring or failure to achieve the requisite number of ratifications, they were mere scarecrows being raised, perhaps to frighten the Commission.

The meeting rose at 1.05 p.m.

2672nd MEETING

Thursday, 3 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. 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. BROWNLIE said that, given the structure of the discussion, his comments would focus on the question of countermeasures. The source of the difficulties relating to that notion was often assumed to be the polarity of position between the powerful States and the less powerful, but that distinction did not really exist in practice, since less powerful States often resorted to various forms of countermeasures in the ordinary sense, as opposed to the meaning in article 54 (Countermeasures by States other

[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.*