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Summary record of the 2672nd meeting

Topic:
State responsibility

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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.*

than the injured State). The real problem derived from the fact that, in terms of customary law, the regime of countermeasures was only partly developed and did not fit easily into the usual classification of *lex lata* and *lex ferenda*. The current version of the chapter on countermeasures (Part Two bis, chapter II) in a sense dealt with the modalities of a notion whose central element was not clearly defined. "Ordinary" countermeasures had at least four different purposes: to induce resort to a procedure of dispute settlement; in a generalized way, as a reprisal; as a deterrent and to induce abandonment of a policy; as a form of self-defence, an interim unilateral protection of the rights of the injured State. The Special Rapporteur had not taken a clear decision as to which purpose was to be legitimated and it would probably be an unusual form of self-help to bring about both cessation of the wrongful act and reparation without any dispute settlement procedure. The Special Rapporteur had rightly argued in respect of that notion that it was better to "cage the animal", but only by carefully studying the animal's features and behaviour could the dimensions (reversibility, proportionality, etc.) of its cage be designed.

2. Article 54, on "collective" countermeasures, was an entirely different subject. In paragraphs 386 to 406 of his third report,[4] the Special Rapporteur, describing State practice in the area, acknowledged that it concerned only a small number of mainly Western States, that it was highly selective, i.e. effective in some cases and merely verbal in others, and that it was not always officially designated as countermeasures. The Special Rapporteur nevertheless stressed that there was strong support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. In reality, article 54 constituted neither the law nor its potential progressive development. Progressive development related to some existing foundations, but practice was inconsistent in the extreme. Faced with the same allegation, State A risked economic sanctions and even armed attack, whereas State B would not even have to accept the presence of observers. In addition to that inconsistent practice, there was no evidence of an *opinio juris* in the material. In any case, leaving aside practice, article 54 was flawed in other respects. First, it provided a superficial legitimacy for the bullying of small States on the claim that human rights must be respected. Although article 54 referred only to non-forcible countermeasures, it would install a "do-it-yourself" sanctions system that would threaten the security system based on Chapter VII of the Charter of the United Nations. It added to circumstances precluding wrongfulness a new category that sooner or later might extend to the use of force. Including article 54 in the chapter on "ordinary" countermeasures provided "collective" countermeasures with legitimacy by association, although in reality there was no real connection whatsoever. But the defects of article 54 did not invalidate the general treatment of the question of countermeasures in the draft and it should not be difficult to take moderating action, such as by producing a strengthened and more comprehensive version of article 23 (Countermeasures in respect of an internationally wrongful act), deleting article 54 and perhaps including a savings clause instead. In reality, article 54 was not about countermeasures: it was about sanctions, it was incompatible with the Charter and it was neither *lex lata* nor *lex ferenda*. Perhaps a new category would need to be invented for it: *lex horrenda*.

3. Mr. ELARABY endorsed Mr. Brownlie's remarks on article 54, the scope of which extended to questions which fell under Article 41 of the Charter of the United Nations while circumventing the security system which the latter had set up to safeguard the rights of all States. The fact that the use of force was not included in countermeasures left untouched the question of what was meant by force. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[5] for example, had expanded the notion of force to include economic sanctions. Article 54 should be deleted.

4. Mr. SIMMA said that the condemnation of article 54 went too far. The provision was not supported by consistent practice, but that was the case for countermeasures in general. Likewise, it was an exercise in futility to demand an *opinio juris* on the question: clearly, the *opinio juris* of a State taking countermeasures could not be that of the target State. Regarding Mr. Brownlie's characterization of article 54 as a "do-it-yourself" sanctions system, he said that there was not a single provision on countermeasures that was not governed by the "do-it-yourself" principle. As for Mr. Brownlie's argument that article 54 would introduce a broad spectrum of economic countermeasures which would induce States to go further and use or threaten to use force, the effect might be the other way around. The example of Kosovo showed that a State, in that case the United Kingdom of Great Britain and Northern Ireland, could consider economic sanctions illegal and then resort to the use of force. Thus, legitimizing economic sanctions might have the effect of reducing the risk of a spillover into military sanctions. Lastly, it was not true that economic countermeasures, whether individual or collective, were in breach of the Charter of the United Nations.

5. Mr. BROWNLIE said that the fundamental point of his argument was that there was a qualitative distinction between "collective" countermeasures and bilateral or plurilateral countermeasures. The *casus belli* was not the same in each case. The question of ordinary countermeasures had been insufficiently developed, but had a degree of familiarity and was supported by some practice. It had been carefully examined by a major court of arbitration, as well as in the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case. As for "collective" countermeasures, that term was a neologism that designated a category which itself had had to be completely invented and the practice included in the Special Rapporteur's third report was classified *ex post facto*. Thus, it would be very harmful to transpose the logic of ordinary countermeasures to "collective" countermeasures and vice versa.

6. Mr. ROSENSTOCK said that Mr. Brownlie's analysis went too far as concerned countermeasures in general, but his comments on article 54 were unarguably accurate

[4] *Yearbook . . . 2000*, vol. II (Part One), document A/CN.4/507 and Add.1–4.

[5] See 2668th meeting, para. 9.

and useful. Article 54 did not take the Commission in a direction in which it needed to go or had any basis for going. Ordinary countermeasures existed and they were corroborated by important arbitral decisions. Article 54 was a separate issue and should be deleted.

7. Mr. PELLET said that, during the consideration of the Special Rapporteur's third report at the fifty-second session of the Commission, the term "collective" countermeasures had been harshly criticized and the Special Rapporteur had himself agreed that it was not very judicious. Article 54 dealt not with "collective" countermeasures, but with countermeasures that would be taken by States other than the injured State in the strict sense of the draft articles. Those countermeasures could be collective, just as ordinary countermeasures could be. If it was borne in mind that the term had been abandoned, it would help in understanding the real scope of article 54.

8. Mr. CRAWFORD (Special Rapporteur) said that article 54 covered two types of situation. One situation was where States other than the injured State took action with its permission and on its behalf in the context of a serious breach of international law, as had been done in the conflict over the Falkland Islands (Malvinas) or the case concerning *United States Diplomatic and Consular Staff in Tehran*. The other situation was one in which there might be no injured State within the meaning of the draft articles, such as genocide committed by a Government against its own people, where measures might be taken by other States to comply with an obligation to the international community. Thus, Mr. Pellet was right on the question of terminology, but, on the question of substance, Mr. Brownlie had raised a real problem, which was that the field was thoroughly undeveloped. Different inferences could be drawn from the Yugoslav experience which also showed that, very often in that type of intervention, the measures taken were condemned or legitimated retrospectively, depending on the results. Hence the extreme difficulty in defining the subject matter of article 54 in any detail. On the other hand, it was impossible to exclude the subject because it could not be categorically asserted that the States referred to in article 49 (Invocation of responsibility by States other than the injured State) could not take countermeasures. The question was whether the monopoly on the use of force of the collective security system of the United Nations also applied to other areas. Arguing that that was the case, as the United Kingdom had done—although it had apparently abandoned that view in that particular case—was a defensible position. As it could neither exclude the subject nor regulate it in detail, the Commission should err on the side of *lex lata* or a moderate progressive development.

9. Mr. LUKASHUK said that he endorsed the Special Rapporteur's comments on article 54. Cooperation by States on countermeasures was a growing practice and it did not seem possible to exclude it. Thus, the question was how to prepare relevant and judicious provisions on the subject.

10. Mr. YAMADA, referring to the three substantive issues identified by the Special Rapporteur in chapters II to IV of the fourth report (A/CN.4/517 and Add.1), said that the first had to do with terminology. There was some ambiguity, inconsistency and confusion in the use of the terms "damage", "injury" and "injured State" in articles 31, 35 to 40, 43 and 49. In particular, the notion of "injured" in the expression "injured State" seemed to be much wider in scope than the notion of "injury" as defined in article 31. He trusted that those problems could be sorted out in the Drafting Committee.

11. Article 43 (The injured State) gave rise to two problems. First, the Special Rapporteur was wrong to reject the suggestion by several States—France, Mexico, Slovakia, the United Kingdom and others—that the phrase "international community as a whole" should be replaced by "international community of States as a whole". Certainly, the international community included entities other than States and a State could be responsible for a wrongful act not only towards other States, but also towards international organizations, non-governmental organizations and even individuals. However, the Commission was dealing only with State-to-State relations. The second problem related to article 43, subparagraph (*b*) (ii), which dealt with so-called "integral obligations" and which expanded unnecessarily the scope of the term "injured State". On several occasions, the Special Rapporteur had cited obligations deriving from disarmament treaties as examples of obligations falling into that category. However, agreements on disarmament and arms control were very special in nature and could not readily be governed by general rules. In that area, the central issue was compliance with obligations in order to preserve the totality of the arrangement. Major disarmament treaties and even the bilateral arms control agreements between the United States of America and the former Union of Soviet Socialist Republics had set up elaborate mechanisms for verifying compliance with obligations, including confidence-building measures and verification by technical means such as on-site inspections. Such arrangements were self-contained regimes in which the draft articles on State responsibility had no real role to play. The disarmament treaties were *lex specialis* in relation to the draft. As for the outer space treaties and the Antarctic Treaty, it was hard to see which central obligation in those treaties warranted the description "integral". He was therefore in favour of the deletion of article 43, subparagraph (*b*) (ii).

12. With regard to article 49, he said the question of the relationship between the responsible State and the injured State was the core issue in the codification of the regime of State responsibility. The question was thus what responsibility the injured State should bear to which State and what responsibility the injured State could invoke against which State. While recognizing that there were some obligations in the modern world whose fulfilment had to be guaranteed through the cooperation of all member States of the international community, he wondered whether that issue was really one to be covered within the framework of State responsibility. Was it an established rule of customary law that a State other than the injured State could claim reparation before an international court in the interest of an injured State, as article 49, paragraph 2 (*b*), seemed to imply? On reading paragraph 41 of the report, it appeared that the Special Rapporteur himself had serious doubts on that point. Moreover, article 49, paragraph 2, was closely linked to articles 41 (Application of this Chapter) and 54, with which he had serious problems. He was therefore for the deletion of article 49.

At the same time, as he did not reject the valuable opinion that there were certain circumstances in which action by a State other than the injured State could contribute to the re-establishment of the legality of the norms which had been breached and as he did not wish to close the door on any evolution which might take place in line with article 49, he thought the inclusion of a "without prejudice" clause might be desirable.

13. As to the question of serious breaches of essential obligations towards the international community as a whole in chapter III of Part Two, he was fully aware that article 41 was the product of a compromise, resulting from a protracted discussion of the former article 19 on international crimes. He did not deny the existence of such breaches, but, if the Commission singled them out, it must define their specific legal consequences, which must be different from those arising from "ordinary" breaches. Otherwise, the category of serious breaches would have no *raison d'être* in the regime of State responsibility. However, they did not appear to have any special legal consequences because the damages mentioned in article 42 (Consequences of serious breaches of obligations to the international community as a whole), paragraph 1, were not to be interpreted as "punitive damages". Moreover, article 42, paragraph 2, placed an obligation on all other States not to recognize as lawful the situation created by the serious breach in question, not to render aid or assistance to the responsible State in maintaining the situation so created and to cooperate as far as possible to bring the breach to an end. Those were minimal obligations that were not specific to serious breaches. In that sense, article 42 did not offer sufficient grounds for keeping a separate article on serious breaches. Moreover, article 41 had an undesirable link with article 54, paragraph 2, which gave any State the right to resort to countermeasures. He would therefore urge the deletion of the whole of chapter III, but, to avoid prejudicing the development of rules on "serious breaches", he was willing, in that case as well, to agree to the inclusion of a "without prejudice" clause.

14. The draft articles on countermeasures gave rise to many problems. First, in relation to article 50 (Object and limits of countermeasures), paragraph 1, inducing a State responsible for an internationally wrongful act to comply with its obligations was not the only purpose of countermeasures. Secondly, with regard to the proportionality of countermeasures in article 52 (Proportionality), it must be in line with the purpose of countermeasures. Thirdly, the procedural conditions in article 53 (Conditions relating to resort to countermeasures) for resorting to countermeasures were too strict. Fourthly, the "provisional and urgent" countermeasures in article 53, paragraph 3, might create a loophole. Lastly, and above all, he had a serious problem with the notion of collective countermeasures in article 54, paragraph 2, because like Mr. Brownlie, he believed that customary rules on countermeasures not involving the use of force had not been developed and were not yet ripe for codification. For all those reasons, he was in favour of the deletion of the whole of the chapter on countermeasures, namely, chapter II of Part Two bis, and the retention of article 23 in chapter V of Part One (Circumstances precluding wrongfulness).

15. He was convinced that, in its work on State responsibility, the Commission should focus on the codification of existing rules, State practice and doctrine. He was fully aware that the progressive development of international law was also part of its mandate, but, in setting out *lex ferenda*, it should be careful not to step beyond the limit of progressive development into the area of excessive legislation.

16. He was by no means a "destructionist" and he assured the Commission, and the Special Rapporteur in particular, that he would cooperate fully in working out a consensus text.

17. Mr. GOCO said that he was concerned about Mr. Yamada's comments, in the context of the regime of countermeasures, on the *locus standi* of a State other than the injured State. He wondered whether a regional organization could take part in countermeasures, or initiate them, if one of its members was injured by an internationally wrongful act.

18. Mr. YAMADA said that everything depended on whether the organization in question had a joint defence agreement. Such an agreement would be *lex specialis*.

19. Mr. SIMMA, commenting briefly on the draft articles as a whole, said that he was categorically opposed to any bending of the criteria for deciding on aid or assistance for the commission of a wrongful act: the criterion of knowing the circumstances of the wrongful act must be retained. In article 30 (Cessation and non-repetition), subparagraph (*b*) on assurances and guarantees of non-repetition should also be retained. Like the Government of the United Kingdom, he thought that the Commission should spell out what was meant by the phrase "invocation of the responsibility of a State".

20. Turning to the issues raised in the fourth report, and beginning with the relationship between the concepts of "damage" and "injury", he said that the problem could not be solved simply by replacing the words "consists of" in the English version of article 31, paragraph 2, by the word "includes". The problem required more thought. According to the current wording of article 31, any and every injury could and should be made good by reparation, which would necessarily take the form of restitution, compensation or satisfaction. As the Government of Japan had rightly noted in the comments and observations received from Governments (A/CN.4/515 and Add.1–3) however, it might be that the only kinds of reparation available in the case of an integral obligation were cessation and non-repetition. He had no wish to drop the category of "integral obligations" from the draft articles, but, purely for the sake of logic, to revise the concept of "injury". Accordingly, as proposed by the Government of Japan in its option 1, the word "injury" in article 31, paragraph 1, should be replaced by the words "damage, whether material or moral" and paragraph 2 should be deleted altogether.

21. With regard to the relationship between article 43 and article 49, he did not agree with Mr. Yamada that the regimes introduced by disarmament and other arms control treaties could be described as "self-contained". The procedures for execution established in those treaties did not of themselves rule out recourse to treaty law or to the law on State responsibility if the system collapsed or if

there was a material breach. In that connection, he still believed that the Special Rapporteur had been too conciliatory in agreeing that the word "or" in article 43, subparagraph (*b*) (ii), should be replaced by the word "and" and he fully agreed with the comments Mr. Gaja had made on that point (2671st meeting). As to the proposal which Mr. Gaja had made at that time and which was also the position of the Government of Japan, namely, that article 43, subparagraph (*b*) (ii), should be deleted in view of what was said in article 49, paragraph 1, he believed that that would be a systematic rupture. Article 49 was entitled "Invocation of responsibility by States other than the injured State"; the category of uninjured States could not be made to include States which were in fact injured. He was therefore in favour of adopting the suggestion of the French Government and transposing article 49, paragraph 1 (*a*), to article 43 as a new subparagraph (*c*). That would make it possible to take account of violations of human rights treaties in the highly likely event that article 54 was deleted.

22. Some of the elements of chapter III of Part Two (Serious breaches of essential obligations to the international community) were highly problematic, such as the definition, the proportionality of damages, the obligations incumbent on all States, the invocation of responsibility by the specially affected State and all other States and the countermeasures which the specially affected State and all other States were authorized to take. The question was how to preserve the essence of that chapter without creating too much resistance. If chapter III were deleted, that would not do away with the rules applicable to the invocation of responsibility in the case of serious breaches, the possibility of countermeasures being taken by specially affected and seriously affected States and, even if article 54 were retained, the possibility for all States to take countermeasures. That would, however, do away with the definition—which would not be so serious and would be remedied by adopting the suggestion of the French Government for article 49—and with the reference to damages, which would be no bad thing, since it was vague and misleading. In fact, appropriate saving clauses could usefully replace chapter III.

23. On the question of countermeasures, he referred to the solutions proposed by the Special Rapporteur in paragraph 60 of his fourth report and explained that he was in favour of the second one, namely, the retention of chapter II of Part Two bis with some drafting improvements, which might go quite far, but would not change the system as a whole. For example, on the proportionality criterion and article 53, it would be useful to adopt the suggestions of the United States Government contained in the comments and observations received from Governments.

24. Lastly, although he would certainly prefer to keep article 54, he also would not object to its deletion.

25. Mr. PAMBOU-TCHIVOUNDA, referring to the comments by Mr. Brownlie on article 54 and those by Mr. Yamada on article 49, said that he wondered whether the Drafting Committee of which they were both members could consider the two articles together, not so much with a view to deleting them as to making them intelligible. There were undeniably problems of terminology involved that should not be ignored.

26. Moreover, to delete chapter III, as Mr. Yamada had suggested, would mean going backwards and shutting one's eyes to serious breaches, which were not the same as "customary", "ordinary" or "usual" breaches. He was therefore against the deletion of chapter III, an idea that it would be difficult to defend to States. He suggested that Mr. Yamada should instead make a proposal taking account of all the concerns expressed and giving greater weight to article 42.

27. Mr. CRAWFORD (Special Rapporteur) said that he would not comment on Mr. Simma's remarks about injury and damage because that question could be discussed in the Drafting Committee.

28. He agreed that the wording of article 43 could be improved and that it was necessary to be more specific in defining the category of integral obligations, but he was strongly opposed to the inclusion of article 49, paragraph 1 (*a*), in article 43. He thought that disarmament treaties might in some respects be *lex specialis*, but not necessarily in all cases. But where the Antarctic Treaty was concerned, for example, the "fundamental obligation" in article IV actually consisted of the obligation on the part of States not to claim territorial sovereignty. The reason why States parties had refrained from doing so was that they had all agreed not to. If a State claimed territorial sovereignty, the other parties to the Treaty would be individually injured because they would have refrained from doing something they could otherwise have done. That was the real meaning of the "integral obligation" provided for in article 60 of the 1969 Vienna Convention. The concept should therefore find a place in article 43.

29. On the other hand, the obligation established for the protection of a collective interest, as dealt with in article 49, had the same general character as obligations owed to the international community as a whole. The only difference was that, in the former case, the obligation would not be universal but might arise, e.g. towards certain States in a given region. There was a tendency to forget that, in the second phase of the *South West Africa* case, the obligation in question was not an obligation towards the international community as a whole, but towards the Members of the League of Nations. It was covered by the concept of the protection of a collective interest, as expressed in article 49.

30. The question whether a threshold should be set in article 49 might be open for discussion. However, the two situations covered in article 49 were essentially the same. The obligations imposed by regional human rights instruments were caught by paragraph 1 (*a*), whereas human rights obligations towards the international community corresponded to paragraph 1 (*b*). It would therefore be a mistake to separate the two and even more regrettable to do so with the idea of preserving the right of States to take countermeasures in the event of a breach of the obligations concerned, as Mr. Simma seemed to have in mind.

31. It might well be that article 54 could not survive in its present form, which was causing a lot of difficulty and was of concern not only to States which often took countermeasures, but also to those which might perceive themselves as targets of countermeasures. In any event

and in the light of the discussions, if article 54 was deleted, it would not be replaced by a prohibition against resorting to countermeasures. Mr. Yamada had proposed inserting in its place a general saving clause. However, he hoped that the members of the Commission would not take advantage of their concerns about article 54 to request changes to chapter I of Part Two bis.

32. He was pleased that, apart from a few problems of terminology, the Commission had managed to complete articles 43 and 49 at its previous session. The distinctions in those articles had been broadly supported by many States and had not given rise to any particular criticism. The Commission must therefore seek to preserve the distinction already made, whatever happened to the chapter on countermeasures.

33. Mr. SIMMA said he could agree that the distinction between articles 43 and 49 should be retained. He was merely proposing that article 43 should include one of the categories of obligations that was currently contained in article 49. From both a theoretical and a legal point of view, moreover, France's view that article 49, paragraph 1 (*a*), should be placed after article 43, subparagraphs (*a*) and (*b*), was entirely tenable. As France had written in its observations on the subject, it appeared that a breach of an obligation which protected a collective interest injured each of the States belonging to the whole group of States for whose benefit the obligation had been introduced, so that each of them had more than a mere legal interest in ensuring the performance of the obligation.

34. Mr. ECONOMIDES, referring to the comments by Mr. Simma and Mr. Crawford, said that, although the obligation specified in article 49, paragraph 1 (*a*), was a case of injury which could be placed in article 43, the same should apply, a fortiori, to the obligation referred to in paragraph 1 (*b*), but that would mean that the Commission was going back to the concept of an international crime, in which all States were regarded as being injured States. Consequently, if the Commission wanted to preserve the balance it had achieved at the previous session and avoid taking a step backwards, it must keep to the articles it had already prepared. Moreover, he could not agree that, in the event of a breach of a disarmament treaty, all States would be regarded as injured, whereas, in the case of serious breaches contrary to the interest of the international community as a whole, all States would have merely a legal interest to act. He hoped the Commission would proceed with caution on the points he had mentioned.

35. As to the other questions discussed in the Special Rapporteur's fourth report, he believed, first, that the concepts of "damage" and "injury" did not give rise to any great difficulty. It could be explained in the commentary that, in certain cases, damage was what incurred international responsibility, while, in other cases, that condition was not required, since State responsibility existed independently of damage of any kind and took the form not of reparation, but of the cessation of the internationally wrongful act or perhaps of the offer of assurances and guarantees of non-repetition and sometimes of satisfaction. As the Special Rapporteur had said, everything depended on the primary rule concerned. The Commission nevertheless had a duty to place the bar as low as possible in order to cover all cases and that was what it had done with article 1 (Responsibility of a State for its internationally wrongful acts).

36. On that first question, he did not agree with the Special Rapporteur's statement, in paragraph 32 of his report, that assurances and guarantees of non-repetition were exceptional remedies. What could be said with certainty was that they were not automatic and depended on the circumstances of each breach. Obviously, the circumstances could not be foreseen in advance, so that the remedies might in some cases be exceptional and, in others, might be applied more often. Article 31, paragraph 2, should therefore read: "Injury consists of any damage, whether material or moral, caused by the internationally wrongful act of a State".

37. The distinction between the injured State and other States entitled to invoke responsibility was crucial to the draft articles and represented the basis of the compromise achieved at the previous session. The same was all the more true of the concept of serious breaches of essential obligations owed to the international community as a whole. Unlike some members of the Commission, he believed chapter III of Part Two was vital to the overall balance of the draft articles.

38. He also agreed with the Special Rapporteur that the expression "the international community as a whole" was preferable to "the international community of States as a whole", for the reasons explained in the report. Article 42, paragraph 1, was extremely useful. The damages referred to in it were not really a form of reparation, but they reflected the gravity of the breach, which must always be a serious one within the meaning of article 41. To strengthen the provision, the words "may involve" should at least be replaced by the word "involve" and, if that term was not accepted, the words "where appropriate" could be added.

39. It should be made clear in the text of article 42, paragraph 2, that the list was only an indicative one and paragraph 2 (*c*) should be developed and explained. The words "as far as possible" should be deleted.

40. With regard to countermeasures, he was in favour of retaining chapter II of Part Two bis, subject to some substantive improvements. First, in article 53, priority should be given in all cases to the settlement of disputes. The current distinction between provisional and urgent countermeasures, on the one hand, and other countermeasures, on the other, was not only vague and irrelevant from a legal point of view, but, above all, it could lead to the gravest abuses. If the settlement of disputes was to take priority over countermeasures, however, a dispute settlement mechanism must be specially provided for countermeasures and it must be a flexible and extremely swift procedure, similar to the system used within States for interim measures of protection. If it was difficult to devise such a system at the current time, the dispute settlement system provided for in Part Three of the draft adopted on first reading[6] should be retained, with improvements to the parts that had attracted criticism. A working group or the Drafting Committee could be authorized

[6] See 2665th meeting, footnote 5.

to undertake that task. There was also no doubt that the intervention of a neutral third party acting in good faith was to be preferred to the archaic system by which the parties settled matters between themselves and which obviously favoured the strong over the weak.

41. The second improvement related to article 54 dealing with countermeasures by "States other than the injured State". That article was the cause of some concerns, which were largely legitimate. However, it was obvious that it was an extremely useful, indeed a necessary provision, especially for the serious breaches dealt with in article 41. For those reasons, he was in favour of retaining article 54, but increasing the guarantees against possible abuse. For that purpose, preference should be given as far as possible to action that could be taken by organized international society rather than to countermeasures that could be taken individually by one or more States. A fourth paragraph should therefore be added to article 54, possibly reading: "The foregoing paragraphs do not apply where the organized international community itself takes action or authorizes the taking of action against the responsible State."

42. He had submitted some proposals to the Drafting Committee for drafting amendments to Part One of the draft, relating mainly to the French text. However, he also had a substantive proposal to make on article 20 (Consent), which dealt with consent of a State as a circumstance precluding wrongfulness. In his view, that article should include an explicit limitation for obligations arising from peremptory norms of general international law. A State should not be able to give its consent to another State for the latter to commit a grave breach covered by article 41 and, if it did so, both it and the State committing the breach should be held entirely responsible for the breach.

43. Mr. PELLET said that he was in favour of referring Part One of the draft, except article 23, to the Drafting Committee for a final *toilettage*, since the Committee had already provisionally adopted the text on second reading. The draft, which the Commission had included in its report, had drawn criticism from Governments, most of it fairly mild, with the possible exception of Japan and France, although some comments, nearly all of them from the same political or ideological quarters, occasionally bordered on intimidation. The Commission should not let itself be intimidated, however. True, it was at the service of the international community, which was made up primarily of States, and it was a subsidiary body of the General Assembly, which was made up exclusively of States. But it was not at the service of a handful of States and its job was not to make States happy. Rather, it was to codify international law and to develop it progressively in the light of recent trends in international society and it therefore had to propose coherent and balanced drafts. The final decision obviously lay with States, but the Commission must not bend to their wishes. He was convinced that the draft provisionally adopted by the Drafting Committee on second reading was fully in keeping with the scientific requirements that must be the Commission's only guidelines and that the temptation to overhaul a text adopted after such in-depth discussion should be resisted.

44. In chapter II of his report, the Special Rapporteur went into a long disquisition on the distinction to be drawn between "damage" and "injury". That really related only to the English text, since the problem apparently arose neither in French nor in Spanish, and the English text could only benefit from being aligned with the Spanish and French versions of draft article 31, paragraph 2. Whatever the distinction between those two terms in certain domestic legal systems might be, it had no place in international law, if only because there was no correlation among national legal systems and it was therefore impossible to derive general principles of law from them. In the absence of established practice, reference could also not be made to customary rules. He believed that it would have been sufficient, in article 31, paragraph 2, to say "Injury [or damage] may be material or moral", but he could also go along with Mr. Simma's proposal. To his mind, the problem was a non-issue and, if there was any real difficulty in English, it should be solved by the Commission's English-speaking members. In any event, in French the words *dommage* and *préjudice* referred to the same thing.

45. The problems raised by the Special Rapporteur in relation to injured States and the possibilities that might be available to States that were not injured were more serious. The distinction between injured States and States that were not strictly speaking injured, but were nevertheless entitled to react to an internationally wrongful act was one of the major achievements of the draft adopted on second reading. In that connection, he noted that the English word "entitled" would be better translated into French by the words *en droit* than by the term *habilité*. The major contribution of the draft provisionally adopted by the Drafting Committee lay in the recognition of the capacity to respond of States which were not directly injured by an internationally wrongful act, but which nevertheless had a legally protected interest in responding as members of the international community. Under article 49, paragraph 1 (*a*), and article 54, paragraph 1, that capacity was also available to the member States of a more restricted group, some of whose interests were collectively protected. In contrast to what the Special Rapporteur had written in the footnote to paragraph 37 of his report, he did not think that the words "group of States" should be replaced by the words "number of States". What mattered was precisely the collective dimension, which was well conveyed by the word "group" and would be blurred by the proposed change. It was the collective aspect that anchored the draft in the twenty-first century and broke with nineteenth-century international law. Articles 41, 42, 49 and 54 reflected the transition from an international society made up of the simple juxtaposition of "supremely sovereign" States to a still embryonic community that transcended national egotism in the interests of shared values. It was understandable that certain States might not view that transition favourably, but the Commission was meant to be developing international law progressively. The disappearance of the provisions mentioned would put an end to such development once and for all and the Commission would then no longer be carrying out the task entrusted to it, namely, to promote the advancement of international law, not to obstruct it. That did not mean that the draft adopted provisionally could not be amended and improved. Mr. Gaja and

Mr. Yamada had put forward some interesting arguments on article 43, subparagraph (*b*), for example. Perhaps subparagraph (*b*) should be deleted and a reference to the issue should be included in the commentary or perhaps it should be separated from subparagraph (*a*) for the sake of simplicity and clarity. He even wondered whether article 49, paragraph 1 (*a*), could not stand on its own and considered that the rationale put forward by France warranted consideration. He was, however, very much opposed to any "butchering" of article 49, which he saw as a key progressive development component of the draft. In particular, he was adamantly opposed to the deletion of article 49, paragraph 1 (*b*), as suggested by the Special Rapporteur in paragraph 41 of his report, if only because the injured State might be incapable of responding on its own, as was the case when it was the victim of aggression on the part of an invading State. He nonetheless agreed in general terms with the Special Rapporteur that article 49 achieved a certain balance—and not only *de lege ferenda*—between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes and ensuring the certainty of the law.

46. With regard to serious breaches of essential obligations to the international community as a whole, there was nothing surprising about the list of countries opposed to the retention of chapter III (France, Japan, the United Kingdom and the United States). Article 41, which the Drafting Committee at the previous session of the Commission should have indicated was derived from former article 19, and article 42 were, after all, haunted by the ghost of international crimes, as were other draft articles. That was the very essence, the crux of the "communitarianization" of international law. The unenthusiastic States were right to point out that the legal regime for such serious breaches was a disappointment. It must be acknowledged that serious breaches did not yet entail very many specific consequences, but the presence of the provisions was absolutely indispensable in order to leave the door open to future progress. Despite what the Special Rapporteur said in paragraph 47 of his report, those consequences, namely, the obligations not to recognize as lawful the situation created by an aggression, not to render assistance to an apartheid regime and to cooperate in bringing genocide to an end, were not *de lege ferenda,* but well and truly reflected *lex lata*. The only debatable point was perhaps the damages that corresponded to breaches of differing degrees of gravity. The idea of punitive damages was not entirely unknown in traditional international law and was worthy of including in respect of serious breaches of international obligations to the international community. All human rights violations did not fall under chapter III; only certain serious violations of fundamental human rights did. The Special Rapporteur stipulated in his report that punitive damages were not involved, but it was the nature of all damages, irrespective of the obligation breached, to correspond to the gravity, if not of the breach, at least of the injury. That was perhaps the subtle distinction that justified the provision. If so, it should be clearly explained in the commentary.

47. He remained of the view, however, that the consequences of serious breaches were infinitely greater than those set out in article 42 and he regretted the fact that the comments he had made on the subject at the fifty-second session had not been taken into account. Among the consequences that should be included in the draft were, firstly, the general consequence set out in the dictum of ICJ in the *Barcelona Traction* case, namely, "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection" [para. 33]: the possibility of an *actio popularis*. It might be true that article 49 partially illustrated that idea, but it should be pointed out expressly in the commentary at least that, in such cases, the possibility of an *actio popularis* remained open. The second consequence was that the situation created by the breach could not be recognized and, in addition, the victim could not waive his right to demand reparation. Thirdly, there was the "transparency" of the State. The criminal responsibility of Governments could be invoked directly in the case of serious breaches of essential obligations to the international community. That possibility, which was a derogation from ordinary law, could be explained only by the gravity of the breach and the essential nature of the obligation breached. Fourthly, consideration should be given to the effect of the specific nature of such breaches on circumstances precluding wrongfulness. The comments made by Mr. Economides on article 20 went in the right direction on that point. *Force majeure* and state of necessity could never expunge or legally justify an act of genocide or aggression or the suppression by armed force of the right of peoples to self-determination.

48. As to the definition of serious breaches, the one proposed in article 41 was not as vague as had been said. It was certainly more precise than the definition of crimes which had been given in former article 19 and which had been perfectly adequate. Nevertheless, the relationship between fundamental interests, essential interests and collective interests should be clarified and the terminology harmonized to the extent possible. The deletion of the phrase "essential for the protection of its fundamental interests" in article 41, paragraph 1, mentioned by the Special Rapporteur in paragraph 50 of his report, would make the definition less precise.

49. Clearly, one of the essential consequences of serious breaches of essential obligations to the international community as a whole related to the capacity of all States to respond to such breaches, in other words, to take countermeasures. Article 54, though not very bold, was thus crucial to the balance of the draft and paragraph 2, in particular, was vital. Without it, if a State exterminated half its population, for example, other States would be powerless, since they would not be directly injured and the United Nations could not be called in, for two reasons. First, the Commission was codifying the law of international responsibility, not the law of the Charter of the United Nations or peacekeeping. Secondly, if the State in question was one of the five members of the Security Council or one of their protégés, genocide might not be prevented. Some would say that that would pave the way for intervention in the internal affairs of States, but genocide could not be considered an internal affair. According to article 54, paragraph 3, the taking of countermeasures under that article was subordinated to the general restrictions on the right to take counter-

measures and, in particular, to the conditions outlined in article 51 (Obligations not subject to countermeasures), which clearly included the obligation to refrain from the threat or use of force as embodied in the Charter. For cases other than serious breaches of essential obligations to the international community, which were exceptional situations, he would continue to welcome all proposals aimed at limiting recourse to countermeasures, but he was opposed, and firmly opposed, for legal and practical reasons, to the inclusion of such provisions in article 23. Their inclusion would be illogical, for countermeasures were in reality the consequence of an internationally wrongful act and therefore properly came within chapter III, not within "circumstances precluding wrongfulness", strictly speaking. What constituted the circumstance was the internationally wrongful act to which the measures responded, not the measures themselves. Incorporation in article 23 could also not be envisaged for practical reasons, for the article would be far too long.

50. The list in article 51 could be considerably simplified, as proposed by the Special Rapporteur. Article 53 represented a balanced and entirely satisfying compromise and any amendment other than drafting changes was certain to destroy the balance. Lastly, unlike Mr. Brownlie, he thought that article 50 clearly identified the purpose of countermeasures.

51. Mr. LUKASHUK said that Part One, chapter IV (Responsibility of a State in respect of the act of another State), raised a number of questions. Many States had criticized articles 16 to 18, specifically calling for the deletion of the phrase "with knowledge of the circumstances".

52. According to article 16 (Aid or assistance in the commission of an internationally wrongful act), a State which aided or assisted another State in the commission of an internationally wrongful act by the latter was internationally responsible for doing so only if it infringed an obligation that was incumbent on it as well. That was a typically private-law approach to responsibility. If an entity, while assisting another entity, breached the obligations stemming from a contract concluded with a third party, it was not considered to be liable. Even in private law, however, such acts were not deemed to be acts of good faith, something that would be all the more unacceptable in public law. The specific nature of international law and international responsibility certainly had to be borne in mind. Many States had pointed that out in the Sixth Committee, stating that the responsibility of States under international law had a *sui generis* quality and was neither civil nor criminal. It was on that basis that several States, including Israel, had called for the deletion of the provision that the obligation breached must also be binding upon the State that provided assistance.

53. The provisions cited ran counter to the principles of good faith, whose importance as a principle of positive law had been underlined both in the 1969 Vienna Convention and by ICJ. According to article 16, a State which aided or assisted another State in the commission of an internationally wrongful act was not responsible for doing so if the act would not have been internationally wrongful had it committed it itself. That provision essentially legalized aid or assistance provided with the intention of infringing international law. The Special Rapporteur had wrongly referred to articles 34 and 35 of the Convention in that connection. True, those articles provided that a treaty was not binding on third States, but that did not mean that a third State had the right to assist another State in the commission of a breach of the Convention. Acts committed in bad faith were contrary to the Convention.

54. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission wished to refer draft articles 1 to 22 and 24 to 27, contained in Part One, to the Drafting Committee.

It was so agreed.

The meeting rose at 1.05 p.m.

2673rd MEETING

Friday, 4 May 2001, at 10.10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Goco, Mr. Hafner, 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]

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[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.*