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Summary record of the 2673rd meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

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]

[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.*

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA, responding to a statement made by Mr. Pellet (2672nd meeting), said he had been taken aback by his desire to expand the consequences arising under article 42 (Consequences of serious breaches of obligations to the international community as a whole). One of the consequences was *actio popularis*, which would certainly influence one's conduct before the particular court. Problems could arise in terms of establishing jurisdiction. Which court would it be in the case of a serious breach?

2. Mr. Pellet had referred to the transparency of the State and the criminal responsibility of leaders, citing the Hutu-Tutsi conflict. He himself was concerned about a possible blurring of the distinction between the international responsibility addressed in the draft articles and responsibility for crimes against the peace and security of mankind, for which the Rome Statute of the International Criminal Court had been elaborated

3. Mr. PELLET said that, with regard to *actio popularis*, he had merely wished to suggest that, if a serious breach of an obligation to the international community as a whole was committed, any international court that might have jurisdiction could not declare it did not have jurisdiction simply because the wrongdoing State contended that the claimant State had no grounds to proceed. The need for a jurisdictional link had been laid down by ICJ in the *Barcelona Traction* case. There was no need for a chapter on dispute settlement, which was a jurisdictional consequence, not a procedural one.

4. With regard to transparency, when a State committed an internationally wrongful act, in principle its leaders had immunity, the State serving as a screen between its officials and international law. But in the case of a serious breach of an essential obligation to the international community, the screen fell away and officials could be brought before international courts or tried by domestic courts, as in the *Pinochet* case. The reason why officials could in exceptional cases be prosecuted for acts they had committed in their official capacity had to be explained, and the only possible explanation was that the acts were exceptionally serious ones—what were, at the current time, called serious breaches of essential obligations to the international community as a whole. It was a necessary explanation of situations that had actually already occurred, not an academic invention, and he found it unfortunate that such genuine twenty-first century law was not included in the draft.

5. Mr. HERDOCIA SACASA said he fully endorsed Mr. Pellet's defence of Part Two, chapter III (Serious breaches of essential obligations to the international community). Little emphasis had been placed on those provisions, which accounted for the great value of chapter III for human rights, in the best spirit of Article 55 of the Charter of the United Nations and, specifically, in the context of article 1 common to the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. As pointed out in paragraph 47 of the fourth report (A/CN.4/517 and Add.1), chapter III had special significance in the context of forcible denial of the right to self-determination or in the cases of enforced disappearance referred to in General Assembly resolution 47/133 of 18 December 1992 as acts that constituted a grave and flagrant violation of human rights and fundamental freedoms. The Commission must not underestimate the great contribution of chapter III to and support for human rights.

6. Mr. ROSENSTOCK said it was one thing to acknowledge or build upon the individual criminal responsibility of specific persons, but quite a different thing to invent the notion of qualitative distinctions with regard to the responsibility of States. There was no foundation in the responsibility of States for such distinctions. It was important for the Commission to bear that in mind.

7. Mr. CRAWFORD (Special Rapporteur) said he entirely agreed with Mr. Pellet's points based on the *Barcelona Traction* case but thought they were covered in article 49 (Invocation of responsibility by States other than the injured State). On the transparency of the State, the consequences of the attribution to the State of acts such as genocide or aggression could well go beyond normal principles of responsibility, but article 42, paragraph 3, incorporated a reservation concerning such consequences. It was wrong, under normal principles, to attach individual criminal responsibility to the responsibility of the State. Not since Nuremberg had it been regarded as a defence that an international crime had been committed on a State's orders. The sole exception, and it was a partial one, was the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, where it was necessary to show that the person charged had committed torture in his or her official capacity.

8. Mr. DUGARD said that, as far as serious breaches were concerned, he agreed with the Special Rapporteur that articles 41 (Application of this Chapter) and 42 should be retained, though not necessarily in their present form, as they did indeed require some polishing. He disagreed, however, with those who suggested that the language of those articles was too vague. It was the broad, majestic type of language that one found in national bills of rights such as that of the United States of America and there was nothing wrong with it as a vehicle for dealing with an important principle.

9. The Special Rapporteur had rather modestly suggested that States were fairly evenly divided on whether to retain articles 41 and 42, but his own count showed that, while a number of powerful States were opposed, the majority favoured retention.

10. His main reason for advocating articles 41 and 42, however, was that it would be a retrograde step to tamper with or delete them. The Commission was at the current time in the same position as at the eighteenth session, when it had decided to include article 50, on *jus cogens*, in its draft articles on the law of treaties. In its commentary to the article, it had said:

The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in the process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of the rule to be worked out in State practice and in the jurisprudence of international tribunals.[4]

The Commission had resisted proposals that it give examples of *jus cogens* norms, first, because that might lead to problems in respect of those norms that were not expressly mentioned, and secondly, because it would take the Commission beyond the subject of the law of treaties.

11. The Commission had been bold in taking that stance: the concept of *jus cogens* had been in its infancy and there had been little doctrine, no State practice and no judicial decisions. Almost simultaneously with that decision, ICJ had handed down its extraordinary rulings in the *South West Africa* cases which had directly refuted the notion of obligations *erga omnes* and by implication had denounced its twin brother, *jus cogens*. In the light of the strong Japanese opposition to articles 41 and 42, it was interesting to recall that the Japanese judge on the Court had written a strong dissent, which to some extent had inspired the whole doctrine of obligations *erga omnes*.

12. Today, the Commission was called upon to behave much less boldly. It was simply asked to codify the concept of obligations *erga omnes* within the framework of the secondary rules of State responsibility. That was not particularly innovative and lay somewhere between codification and cautious progressive development. The concept had been endorsed by ICJ in the *Barcelona Traction* case, in which it had gone out of its way, in an *obiter dictum*, to repudiate the judgment in the *South West Africa* cases. The notion had been reaffirmed elsewhere, notably in the *East Timor* case. There was thus judicial opinion in support of the action by the Commission.

13. As far as State practice was concerned, developments in the field of international criminal law made it clear that international criminal responsibility was engaged when an individual committed an internationally wrongful act constituting a serious breach by a State of an obligation owed to the international community: acts such as genocide, crimes against humanity, war crimes, torture or apartheid. If international law had developed sufficiently to recognize the criminal responsibility of the individual under international law, surely it had developed sufficiently to recognize the delictual, or civil, responsibility of the State for conduct of such a kind. In the evolution of the law, delictual responsibility normally preceded criminal responsibility.

14. It was difficult to follow the arguments of the United States on that point. It had declared that there were no qualitative distinctions between wrongful acts, but how could that be reconciled with the dictum in the *Barcelona Traction* case, namely that an essential distinction should be drawn between the State's obligations towards the international community as a whole in cases like aggression, genocide, slavery, torture and crimes against humanity, and cases arising vis-à-vis another State in the field of diplomatic protection, such as denial of justice to a national or expropriation of property?

15. The United States conceded that there were violations of international obligations that could constitute serious breaches but argued that they should be dealt with by international criminal law. Everyone agreed that State officials should bear international criminal responsibility in such instances, but surely there should also be international delictual or civil responsibility for the State whose officials had committed such crimes. In addition, some obligation should be imposed on third States to take action: it could not simply be left to the Security Council, because of the veto problem.

16. The objection to article 19 adopted on first reading[5] had been that the article sought to impose criminal responsibility in such cases. That had been rejected, to the relief of most States and to the despair of some academic lawyers, article 19 having already become part of the language of international law. The Commission had behaved wisely and cautiously, however, in removing the notion of State criminal responsibility for serious breaches of international law. If it abandoned the idea of delictual responsibility for serious breaches at the current time, it would be seen to be too timid, unprepared to include within the framework of State responsibility a concept that had the support of judicial opinion, State practice and doctrine. In articles 41 and 42, the Commission was simply codifying a concept that was an accepted part of international law. The wording might be improved, but the Commission should not accept the suggestion by the Netherlands in the comments and observations received from Governments (A/CN.4/515 and Add.1–3) that it should list examples of serious breaches. That would invite the type of criticism that had been levelled against the examples set out in the former article 19 and represent an incursion into the field of primary rules.

17. He agreed that countermeasures must be covered in the draft. Articles 50 to 53 and article 55 must be retained, although work was needed by the Drafting Committee to bring them into line with the arbitration in the *Air Service Agreement* case. Article 54 (Countermeasures by States other than the injured State), paragraph 2, had been opposed by many States and, if necessary, he would support its deletion, provided there was a saving clause and the commentary explained that the idea was in an embryonic stage of development. He experienced difficulties, however, with the assertion that article 54, paragraph 2, was unsupported by State practice. In his third report,[6] the Special Rapporteur had provided evidence of such practice. Evidence could also be found in certain decisions taken, not by the Security Council under Chapter VII of the Charter of the United Nations, but by the General Assembly: for example, to urge States to impose sanctions against South Africa which in fact violated agreements they had made with that country. He was thinking specifically of decisions by the United States and the United Kingdom to terminate an aviation agreement and a defence pact, respectively. The recommendation of such action by the Assembly or the Council

[4] *Yearbook . . . 1966*, vol. II, p. 248, document A/6309/Rev.1 (part II).

[5] See 2665th meeting, footnote 5.

[6] See 2672nd meeting, footnote 4.

was simply a confirmation of what was enunciated in article 54, paragraph 2, namely that States had the right to take countermeasures where a State had committed a serious breach of an international obligation.

18. In short, he believed that article 54, paragraph 2, could be included as an example of legitimate progressive development of international law. The article nonetheless raised serious policy issues and he would be prepared to compromise on including it, but omitting articles 41 and 42 would be most unfortunate.

19. Mr. SIMMA said he sympathized broadly with Mr. Dugard's views but did not agree that there was nothing wrong with using "majestic" language in article 41. Unlike a national bill of rights or constitution, the article would be applied on a regular basis by courts, and vague, lofty and general phrases would therefore be inappropriate.

20. Mr. YAMADA said that he acknowledged the qualitative difference between serious and ordinary breaches and was able to state that the Japanese Government did too, and it felt strongly that serious breaches should be prevented. However, the question was whether any particular legal consequences arose from serious breaches. He did not think so. In advocating the deletion of article 41, he was not saying that serious breaches should be placed outside the scope of State responsibility, but rather, that they were already covered by the existing text.

21. Mr. BROWNLIE said that he was deeply sceptical about the evidence suggested by Mr. Dugard for State practice in support of article 54. If a State did something by virtue of a General Assembly resolution, there was no *opinio juris* linked to a candidate rule of customary international law. If, however, the Member States that had voted for the resolution explained that they thought the resolution referred to a principle of general international law, that would be evidence. Resolutions as such were ambiguous.

22. Mr. Sreenivasa RAO said that, although he appreciated the clarity with which Mr. Dugard had presented his position for the retention of articles 41 and 42, he agreed with Mr. Simma's point that there was a qualitative difference between ordinary and serious breaches. It was the State, and not individuals, that took action in the interest of society. In the case of the international community, an institution already existed: the United Nations. The Charter of the United Nations contained many of the general concepts to which reference should have been made and which had been developed through State practice, General Assembly resolutions and Security Council decisions and actions. He was opposed to bypassing and undermining the United Nations, then complaining that it was ineffective and giving States a unilateral right to exercise countermeasures without any accountability and legal limitations. Thus, legal, mandated responses by States could not be reduced to communities of States. That was where the gap had to be bridged. It was difficult to see how that could be done, but in the meantime, genocide or other serious breaches could not be condoned. Indeed, institutions were being set up to deal with such matters, and it was hoped that they would fill the gap, but until they did, the Commission could not enlarge the scope of the draft to permit arbitrary acts, selectiveness or double standards. That kind of development was not to be equated with conferring universal jurisdiction for crimes on States which could prosecute as they saw fit when they apprehended an offender. The proposals in articles 41 and 42 came close to conferring a universal right to intervene, but in the present context, a distinction must be drawn between universal jurisdiction and universal right.

23. Mr. SEPÚLVEDA said that Mr. Dugard was raising a question of legitimacy. The topic had to do with action that the General Assembly could legally and legitimately take on the basis of a previously established legal system, whereas action by a group of States acting outside the legal system created by the United Nations could not be legitimized. To cite an example, in 1956 three States had considered that the nationalization of the Suez Canal had been an illegal act and had taken collective measures. That had not been the position of the Organization, which had undertaken its first peacekeeping operations under the Charter of the United Nations. Those were radically different situations involving the question of legitimacy.

24. Mr. LUKASHUK said the issue was that the articles might let someone loose who was brandishing a stick and using it. The Commission's job was not to legalize the stick, but to limit the possibilities for its being used. Hence the importance of the article on countermeasures.

25. Both Governments and the Commission had referred to a gap: the most serious human rights violations were being enunciated, but it turned out that the means for a special implementation process could not be defined. The point was that the Commission could not establish special measures, because that would go beyond existing positive law, especially as a definite step was being taken towards recognizing a special category for the most serious human rights violations.

26. Mr. KUSUMA-ATMADJA commended Mr. Yamada for raising a number of important points that had given rise to a lively debate.

27. The number of members in favour of the work of the Commission leading to a diplomatic conference appeared to have increased. That raised the risk of resurrecting certain ghosts, presumably something that members did not really want. The Special Rapporteur had gone out of his way to be receptive to views that did not support his own position, which was gratifying.

28. The Commission should proceed with caution. Otherwise, the issue would drag on endlessly. The General Assembly had appreciated the work of the Commission to date. While he preferred a diplomatic conference, the danger was that changes might upset the careful balance that the Special Rapporteur had achieved. Thus, with apologies to those in favour of a diplomatic conference, he was changing sides and joining those who wanted the Assembly to take note of the draft articles.

29. Mr. HE said that, under present international law, for the purposes of State responsibility there were in fact no unified definitions of the terms "injury" and "damage" applicable to all circumstances. Used in legal instruments, the terms were tailored to meet the particular requirement of each case. They should be employed in a broad and general way while maintaining internal consistency.

He therefore endorsed the Special Rapporteur's proposal, in paragraph 33 of his fourth report, to change article 31, paragraph 2, to read: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act."

30. On the other hand, further clarification was needed with regard to article 37 (Compensation), paragraph 2. According to the explanation in paragraph 34 of the report, which stressed the marginal difference between financially assessable damage and economically assessable damage, it was not certain that financially assessable damage did not include moral damage as part of compensation. If it did, it seemed necessary to say as much in the main body of article 37, paragraph 2, or at least give an explanation in the commentary, because omitting moral damage as part of compensation for the injury would be inconsistent with the international jurisprudence that compensation be awarded for moral damage.

31. As to invocation of State responsibility, article 46 (Loss of the right to invoke responsibility), subparagraph (*b*), raised the question of what kind of conduct by a State was needed for the conduct to be deemed valid. Did it require a reasonable time frame or other action? Again, clarification was called for.

32. As the notion of "collective interest" was difficult to define, article 49, paragraph 1 (*a*), should be further qualified and more carefully drafted so as to be confined to breaches which actually impaired the interests of the States to which that obligation was owed.

33. With regard to articles 41 and 42, the introduction of serious breaches of obligations to the international community as a whole might be acceptable. The new text replaced the concept of "State crimes", thus avoiding the protracted controversy over article 19 on first reading. The rejection of the concept of "State crime" would in no way diminish the personal legal responsibility of the person committing such a crime. Chapter III represented a compromise for discarding former article 19 and it should not be deleted.

34. However, problems still remained with articles 41 and 42. The proposed terms and phrases, such as "serious breaches", "essential for the protection of its fundamental interests", "a gross or systematic failure by the responsible State" and "risking substantial harm", all required further elaboration to clarify what they meant. If the two articles were to be applied, more detailed information would be needed on what was essential or non-essential and fundamental or non-fundamental. What was the standard for "a gross or systematic failure", and how should "risking substantial harm" be interpreted? All those terms should be brought into line with the principles underlying the text as a whole, so as to ensure that they were used consistently throughout the draft.

35. Countermeasures had long been one of the most controversial issues of the regime of State responsibility and had been a bone of contention in the Commission. It was generally accepted that, with due respect for the basic norms of international law and international relations, countermeasures could be one of the means that was available to a State injured by an internationally wrongful act in order to redress an injury and protect its interests. The existence of countermeasures in international law had been noted in the *Gabčíkovo-Nagymaros Project* case. But in view of past and possible future abuses, the provisions on countermeasures set out in the draft articles provisionally adopted by the Drafting Committee on second reading must be improved to make sure that recognition of the right of an injured State to take countermeasures was accompanied by appropriate restrictions that struck a balance between their legitimacy and the need to curb their misuse.

36. Accordingly, difficulty might arise with article 54, a provision that was tantamount to introducing "collective countermeasures" and "collective sanctions" into the regime of State responsibility. That would be inconsistent with the principle that countermeasures should be taken by the State injured by an internationally wrongful act. Countermeasures in response to violations of community obligations fell within the domain of the Charter of the United Nations and should be taken through the United Nations. As article 54 complicated the already complex question of countermeasures, making it even more controversial, the best solution would be to delete it, as Mr. Brownlie and others had suggested.

37. It was all too plain that the draft could not be submitted to the General Assembly until the difficult issue of countermeasures was resolved and a proper balance struck.

38. Mr. OPERTTI BADAN, after briefly reviewing the wide range of views expressed by members on the question of form, said his own position was that the draft had the merit of being incremental. The articles met the Commission's expectations. The best example of that was Part Two, chapter III, which clearly reflected the progressive development of contemporary international law and the progress made in the past year on article 54. In any case, the draft was more in keeping with a convention than with another type of international act. The Commission should be able to agree that its work in preparing principles and rules on State responsibility had made progress in overcoming remaining differences and why not assume as a reasonable prospect that that work should be recognized by the General Assembly in a "maximalist", rather than a "minimalist" way? There had, of course, been new proposals, such as the one formulated by Mr. Brownlie and supported by other members on the need to improve on article 23 (Countermeasures in respect of an internationally wrongful act) and delete article 54. Mr. Pellet had also made lucid, provocative proposals regarding Part Two, chapter III, but as he saw it, if chapter III were deleted, it would remove an essential part of the future convention. It was also gratifying that mention had been made of the concept of "communitarization". It was an important step that went beyond the traditional terrain of States, entering that of the international community, a term that perhaps had not yet been properly defined. In his opinion, international law should follow the terms of article 53 of the 1969 Vienna Convention, which spoke of the "international community of States". The scope of the concept of "the international community as a whole" should not be further broadened. While non-governmental organizations represented a potent and effective force within civil society—not only in the field of human rights,

as evidenced by their contribution to the drafting of texts such as the Rome Statute of the International Criminal Court, but also in the more prosaic context of the trade liberalization negotiations at the Third WTO Ministerial Conference, held at Seattle from 30 November to 3 December 1999, and at the Third Summit of the Americas, held at Quebec City, from 20 to 22 April 2001—the best way of safeguarding their activities was to exclude them from an area reserved for States.

39. Like other members—and also like the Special Rapporteur himself, to judge from paragraph 2 of the fourth report—he thought that while the text of the draft articles might be improved, its substance must be retained and defended both in the Commission and in the Sixth Committee. He also agreed on the need to harmonize terminology.

40. Not only States but also members of the Commission had a responsibility to base their actions on the Charter of the United Nations. Accordingly, he again called for the deletion of article 54, with its legitimation of collective countermeasures. The task facing the Commission was not simply to consolidate existing law but to exert real influence on the regulation of contemporary international relations. Much work had gone into the drafting of the articles on State responsibility. In view of their intrinsic importance, and also to enable the Commission to pursue other very important and sensitive topics included in its programme of work, the draft articles on State responsibility should now be transmitted to the General Assembly without further delay.

41. Mr. ADDO said he regarded Part Two, chapter III, as an exercise in progressive development within a narrow compass, as indicated by the Special Rapporteur in his report. In his view, it also represented an acceptable compromise by the proponents and opponents of crimes of States and, as such, must be retained in the draft.

42. Part Two bis, chapter II (Countermeasures), had a place in the draft, but was like an unruly horse that must be ridden with care. The rules elaborated in articles 50 to 53 and article 55 accomplished that task adequately. Article 54, however, was an unpredictable beast, the demise of which would not be missed, even by the most ardent proponents of countermeasures, for its retention might lead to more problems than it solved. Since, as the Special Rapporteur pointed out, general international law on that question was still embryonic, the Commission should not mar the good work it had done on countermeasures by an injured State by retaining article 54. For the reasons already given by Mr. Brownlie, article 54 should be deleted.

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

[Agenda item 1]

43. The CHAIRMAN said that an open-ended informal working group, convened to consider outstanding issues on State responsibility under the chairmanship of the Special Rapporteur, would meet the following week.

44. As previously announced, the Bureau had proposed the establishment of a working group, comprised of no more than 10 members, to review the commentaries to the draft articles on State responsibility. The Working Group would be composed of Mr. Melescanu (Chairman), Mr. Crawford (Special Rapporteur), Mr. Brownlie, Mr. Candioti, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Sepúlveda, Mr. Tomka and Mr. He (ex officio).

45. If he heard no objection, he would take it that the Commission agreed to the establishment of a Working Group to review the commentaries to the draft articles on State responsibility.

It was so agreed.

Cooperation with other bodies

[Agenda item 8]

Statement by the Observer for the Inter-American Juridical Committee

46. The CHAIRMAN welcomed Mr. Trejos Salas, Observer for the Inter-American Juridical Committee, and invited him to take the floor.

47. Mr. TREJOS SALAS (Observer for the Inter-American Juridical Committee) said he would confine his remarks to just two topics the Committee had considered at its most recent sessions. At its fifty-seventh regular session, held at Rio de Janeiro, from 31 July to 25 August 2000, a proposal had been submitted to include on the Committee's agenda the preparation of a draft declaration or other instrument defining democracy. After a heated discussion, in the course of which some members had expressed concern that such an initiative might be unacceptable to OAS member States, the proposal had been withdrawn. However, at a meeting of the Committee held in Ottawa at the invitation of the Canadian Government shortly before the Third Summit of the Americas, the Committee had again heard the arguments in favour of drafting such an instrument. Among those arguments was the fact that observers sent to monitor elections in OAS member States needed sound criteria on which to base their conclusions.

48. Furthermore, at the Third Summit of the Americas, Heads of State and Government had since taken the decision to incorporate in the future treaty on free trade in the Americas a clause excluding States that failed to comply with democratic rules and standards. It was thus all the more surprising that the content of an obligation embodied in the Charter of OAS was nowhere clarified in any international or regional treaty text.

49. On a proposal by the Government of Peru, the Third Summit of the Americas had decided to commission the ministers for foreign affairs of its member States to draft

* Resumed from the 2669th meeting.

an Inter-American democratic charter for submission to the General Assembly of OAS, to be held at San José, Costa Rica, in June 2001. Meanwhile, the Committee had agreed to include the topic on its agenda and to assign two of its members the task of preparing a draft inter-American instrument on democracy, for submission to the fifty-ninth regular session of the Committee, in August 2001.

50. That concern was shared not only by other regional bodies—such as the Council of Europe, which made admission of candidate countries conditional on their acceptance of pluralistic, representative democracy—but also in the broader context of the United Nations system. In that regard he drew attention to a book by Sicilianos, with a preface by Boutros Boutros-Ghali.[7]

51. Such a charter would set out to codify the principles of democracy, and also to innovate to some extent, subject to the approval of States. It should contain, among other principles, the following: free, secret, fair, authentic, pluralistic and periodic elections; a multiparty system; guarantees of fair electoral representation for minorities; separation of powers; subordination of the military to the civilian authorities; economic independence of the judiciary; freedom of the press and respect for fundamental rights and freedoms; and active participation by civil society in public affairs.

52. The charter might innovate by enshrining as an essential principle of democracy an obligation on political parties, as a means of obtaining access to power, to make sure that their internal procedures were conducted democratically. In that regard he cited two recent cases in which the Supreme Electoral Tribunal of Costa Rica had annulled the expulsion of a member of a political party, deeming it to have been undemocratic, and had ruled that a provision of a political party's statute requiring an office holder to have nine uninterrupted years' service was unconstitutional.

53. Another topic discussed at the Ottawa meeting was in vitro fertilization. The Committee had decided to prepare a legislative guide for use by OAS member States, setting out the various options facing legislators in countries that intended to regulate the practice. The Committee had decided that a legislative guide was preferable to a declaration, which would call for a decision on the wide-ranging ethical issues involved. It had refrained from such a decision because of a case brought before the Constitutional Court in Costa Rica, the only country in the world to prohibit by law the practice of in vitro fertilization. The decree prohibiting it was based on article 4 of the American Convention on Human Rights: "Pact of San José, Costa Rica", which protected the right to life from the moment of conception. The Constitutional Court had upheld the existing legislation, immediately sparking off protest by a group of patients intending to seek in vitro fertilization. They had subsequently taken proceedings against Costa Rica in the Inter-American Court of Human Rights, on the basis that the Constitutional Court's ruling deprived infertile people of the possibility of giving life, and likewise infringed article 4 of the Convention. They also argued that the right to life under article 4 was not absolute, since there were other circumstances, such as armed conflict, in which international law allowed the taking of life; moreover, the protection afforded to the foetus by article 4 was framed in "general" terms only, so that the foetus had some rights to life, but not all of them. The Inter-American Court of Human Rights would settle the case in 2002, and his own hope and expectation was that it would rule in favour of the applicants.

54. Mr. BAENA SOARES thanked the Observer for the Inter-American Juridical Committee for the information he had given on the activities of the Committee, and expressed his appreciation of the regular pattern of dialogue and cooperation between the Commission and the Committee. Mr. Trejos Salas had given a valuable insight into the successful practice of democracy in regional organizations. In the draft text on democracy currently under preparation by the Committee, he would like to see some mention of the impact of economic interests on political reality, and of the need for transparency on the part not only of governments, but also of all actors in the democratic process, especially non-governmental organizations.

55. Mr. ECONOMIDES emphasized the importance of democracy, both as a concept and as an institution. Democracy was beneficial and salutary in international society as well as within nations. In the past few years, great strides had been made within States in the practice of democracy, and that was especially evident in the impressive expansion in human rights that had taken place since the Second World War. However, there was still much to be done, because international law remained essentially anti-democratic. For example, there was as yet no binding system of international justice, because the existing system depended on the consent of the parties to each individual dispute. Without a compulsory system, there could be no democracy. Countermeasures too were undemocratic. Greater efforts must be made to bring democracy into operation in international society and to render it more effective.

56. Mr. GALICKI welcomed the regular reports received by the Commission on the legal work being done in the regions, which in turn influenced international treatment of the same topics. Democracy was a political term, but it also influenced legal regulation: for instance, the Council of Europe had made the practice of democracy a condition of entry. It would be interesting to see how the obligation to exercise democracy developed in future. It would certainly call for a legal definition of democracy, which would be an important element in the progressive development of international law. A codification of the principles of democracy on a regional level, together with an expanded catalogue of those principles, would have great influence on similar codification efforts both regionally and, perhaps, internationally. The ministerial conference entitled "Towards a Community of Democracies", hosted by Poland, was held in Warsaw in June 2000. The conference and its recommendations had attracted worldwide interest.[8]

[7] L.-A. Sicilianos, *L'ONU et la démocratisation de l'État* (Paris, Pedone, 2000).

[8] See A/55/328.

57. The work on the ethical problems which had found a place in the work of OAS and of the Inter-American Juridical Committee helped to develop concepts of human rights, especially the right to life, which was the most important of all. It also offered useful guidelines to the Commission and to other legal bodies for their work in the future.

58. Mr. PAMBOU-TCHIVOUNDA said that democracy and democratization were fashionable subjects, but he distrusted the attempt to impose, not merely rules, but a kind of standard model of democracy on everyone. States should be on their guard against standard formulas, which could endanger the prospects of successful democratization. He doubted whether the principles of democracy could be codified at all, especially at the international level. How could there be a convention on democracy, and how could the Third Summit of the Americas ponder the choice between that and a declaration? All countries had to proceed towards democracy at their own pace and in the light of their own history and development. The Americas formed a vast continent, and there were glaring disparities between North, South and Central America; how could the countries of those regions be expected to manage democracy in the same way at all times? An OAS meeting might well issue a declaration discriminating against Cuba, for instance, which would be deeply regrettable given that the essence of democracy was tolerance and respect for differences. The North American model of democracy was a formal one, enshrining the separation of powers, periodic elections and multipartyism, but those institutions had to take root in the life of each nation. The North American system of government had little in common with the systems in Panama, Costa Rica or Honduras. It would be noted that the Charter of OAS did not allow for a free choice by each State of its own system; perhaps the OAS should consider revising it.

59. As for the other topic mentioned by the Observer for the Inter-American Juridical Committee, the protection afforded by article 4 of the American Convention on Human Rights: "Pact of San José, Costa Rica" to the right to life of the foetus took no account of difficult situations such as malformations of the foetus which might in turn endanger the life of the mother.

60. Mr. RODRÍGUEZ CEDEÑO expressed his appreciation of the work of codification within the Inter-American Juridical Committee. A declaration defining democracy would have valuable and far-reaching legal effects and would also influence the process of regional integration. Certain existing instruments, such as the Santiago Declaration, signed at the Second Summit of the Americas, in Santiago de Chile in 1998, and the Washington Declaration, signed at the meeting of the North Atlantic Council in Washington, D.C. in 1999, could prove useful in the task of definition and in stabilizing and strengthening the democratic system.

61. Mr. OPERTTI BADAN said he disagreed with the view expressed by Mr. Pambou-Tchivounda that it would not be feasible to devise a democratic charter for the Americas. Within the inter-American institutions, successful endeavours had already been made to frame rules of democratic political conduct for member States, for example in the Southern Cone Common Market (MERCOSUR), through the Ushuaia Protocol on Commitment to Democracy in MERCOSUR, the Republic of Bolivia and the Republic of Chile, which applied to Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, and through the Protocol of Amendment to the Charter of the Organization of American States (Protocol of Washington). The inter-American region as a whole was anxious to progress both economically and politically, by embracing democratic systems and enshrining them in institutional practice. Naturally, it was important to take account of economic and other disparities among different countries in the region, but the commitment to multipartyism did not require the imposition of any standard model. Both the Charter of OAS and the Protocol of Amendment to the Charter of the Organization of American States (Protocol of Cartagena de Indias) legitimized representative democracy as a tenet of positive law for the Americas. The ministerial conference, "Towards a Community of Democracies", had performed a valuable function by drawing attention to the fact that, although there were different levels of socio-economic development, democracy was possible wherever human rights flourished, especially civil and political rights, and impossible without them. His own country had a long democratic tradition, dating back some 100 years, which had been interrupted for only 11 years, and then only because the rule of law had been attacked on the pretext that it ran counter to formal democracy. No truly democratic system, in either the political or the economic sense, could exist unless human rights and multipartyism were respected.

62. Mr. HERDOCIA SACASA congratulated the Observer for the Inter-American Juridical Committee on his description of the democratic elements of the Charter of OAS. Until recently, democracy had been regarded as part of the reserved domain of internal law, and priority given to the principle of non-intervention or non-interference. However, as a result of human rights violations in Latin and Central American countries in the previous century, democracy was currently regarded as part of the common heritage of the region. He had himself taken part in the Contadora process that had facilitated the pacification process in Central America.[9] That in turn had produced a commitment to democracy through the agreement on "Procedures for the establishment of a firm and lasting peace in Central America",[10] enabling the irregular forces to participate in the electoral process. Those elections had been monitored by the United Nations, for the first time in an independent country. It was the lack of democracy that had precipitated the armed conflict in the first place. He welcomed the trend, reflected equally in the work of the Commission, to seek a better balance between the State, the individual and society.

63. Mr. TREJOS SALAS (Observer for the Inter-American Juridical Committee) said he could not agree with the doubts Mr. Pambou-Tchivounda had expressed about the project being undertaken by the Committee. However,

[9] See *Official Records of the Security Council, Thirty-ninth Year, Supplement for October, November and December 1984*, document S/16775, annex.

[10] *Ibid., Forty-second Year, Supplement for July, August and September 1987*, document S/19085, annex.

it should be emphasized that the document was still in its early stages. He would welcome further information on the resolutions adopted by the ministerial conference, "Towards a Community of Democracies", which could be of value to the work of the Committee.

The meeting rose at 1.10 p.m.

2674th MEETING

Tuesday, 8 May 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Idris, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. 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. HAFNER said that, if he had to advise a Government on whether or not to ratify a convention on State responsibility, he would try first of all to find out which States had already ratified it. If the objective was to gain protection under the convention, the States against which one wanted such protection would also have to be bound by the convention. In terms of the famous "prisoner dilemma", the risk, however, was that such States might adopt the strategy of not cooperating. The most reasonable approach would then be for States to refuse to be bound by the convention. It would not be the first time that States had chosen such a strategy. A large portion of the United Nations Convention on the Law of the Sea had been renegotiated by States in order to satisfy one or two which in the end had failed to ratify the text. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Comprehensive Nuclear-Test-Ban Treaty and the Rome Statute of the International Criminal Court were additional examples. He was accordingly not convinced that one could really expect to receive protection from such a convention.

2. Turning to the question of countermeasures, he said that he had doubts about the proposal made by the United Kingdom, among others, in the comments and observations received from Governments (A/CN.4/515 and Add.1–3) to insert the main limits to countermeasures in article 23 (Countermeasures in respect of an internationally wrongful act). That article and the articles dealing with countermeasures had totally different functions. To insert part of the provisions on countermeasures in it would be to give it a new function, a definitional one. It might also become overloaded, since the object and purpose of the measures, the States entitled to take them and the limits to their use would have to be stated. The text proposed by the United Kingdom, reproduced in a footnote to paragraph 60 of the fourth report of the Special Rapporteur (A/CN.4/517 and Add.1), reflected only a very selective choice of limits and it could be asked why it was only those that were cited. For instance, no mention was made of the State that was entitled to take such measures. It could be asked whether that omission meant that the issue was left open and that there was room for interpretation going beyond even the much criticized article 54 (Countermeasures by States other than the injured State). While article 23, paragraph 1, already referred to lawful countermeasures, the subsequent paragraphs would nevertheless single out certain of the conditions to which they were subjected. It could then be asked whether that set of conditions was exhaustive and, if not, why those particular conditions and not others were mentioned. For those reasons, he strongly preferred to keep the existing order or to live with article 23 as it stood and to delete all the articles on countermeasures. It would be for the General Assembly to propose that the Commission should deal with countermeasures as a separate topic on its agenda. With regard to article 54, he was convinced that an attempt to codify it would do more harm than good, since, in that area, international law was developing in a way that could not be foreseen. A shift was occurring in international relations, a change from bilateralism to a community approach. A saving clause on countermeasures by States other than the injured State would certainly be the best thing.

3. He agreed with the distinction between the States referred to in article 43 (The injured State) and in article 49 (Invocation of responsibility by States other than the injured State). As to article 43, he shared the Special Rapporteur's view that the provisions on integral obligations needed to be redrafted. At the same time, he thought that the use of terms in the draft was not very clear and shared the concerns expressed by Japan in that regard. The word "injury" was used in articles 31, 35, 38 and 52, while the expression "damage" appeared in articles 31, 37, 40, 42 and 48. Article 31 (Reparation), paragraph 2, gave the impression that damage was a factual aspect of the legal term "injury". If so, then the States referred to in article 49 would have to be those that suffered neither

[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.*