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Summary record of the 2674th meeting

Topic:
State responsibility

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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.*

damage nor injury. The question then would be what the purpose of satisfaction was, since restitution and compensation already covered any damage, including moral damage. There would be no room for satisfaction and that would contradict article 35 (Forms of reparation). That interpretation would even raise a contradiction within article 31 itself. If, however, article 31, paragraph 2, was reformulated as suggested, stating that injury included damage, injury would go beyond damage. It could then even be argued that the mere breach of an obligation *erga omnes* would constitute injury to all States bound by that obligation; the States referred to in article 49 would then also qualify as injured States. But it seemed that damage was connected with the definition of the injured State in article 43. It could therefore be argued that injury only entailed damage arising as a consequence of the internationally wrongful act to the State referred to in article 43. Article 31, paragraph 2, could then read: "Injury consists of any damage, whether material or moral, arising in consequence of the internationally wrongful act to a State referred to in article 43." That would be tantamount to saying that injured States were only those that were referred to in article 43; injury occurred only to them. The text of article 43 should make that very clear. A different way of solving the problem would be to change article 43 first to provide a definition of the injured State and then to set out the rights of that State. In that context, he was of the view that the expression "international community as a whole" must be kept in, since it was common in international practice.

4. The use of the terms "damage" and "injury" also gave rise to concern in the context of article 37 (Compensation), paragraph 1, and article 38 (Satisfaction). Article 37 stipulated that it was the damage, including moral damage according to article 31, paragraph 2, that had to be compensated. Article 38 obliged a State to give satisfaction for injury that could not be made good by restitution or compensation. Did that refer to moral damage or to the part of the injury that was neither material nor moral? In the light of the ideas voiced concerning article 31, article 38, paragraph 1, could read: "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the damage caused by that act in so far as it cannot be made good by restitution or compensation." That would mean that moral damage would be addressed by satisfaction. Another possibility would be simply to drop the reference to damage in article 31, paragraph 2, since it contained no definition. In any case, the use of the expression "damages" in article 42 (Consequences of serious breaches of obligations to the international community as a whole) was inappropriate, since it did not correspond to the usage in the other draft articles.

5. Going back to the provisions of article 43 on obligations *erga omnes*, he suggested that they should be inserted in article 49. The essential difference between the States referred to in article 43 and in article 49 was that only the former could request reparation. It was conceivable, however, that States which were bound by obligations *erga omnes* and which suffered damage might be assimilated to the States "specially affected" within the meaning of article 43, subparagraph (*b*) (i). The only drawback in transposing article 43 to article 49 would be that the other uninjured States could not request satisfaction in the context of moral damage.

6. He wondered whether it would not be best to cut out Part Two, chapter III (Serious breaches of essential obligations to the international community) for a number of reasons. First, it dealt with primary rules. Secondly, the proposed definition included many subjective elements that would only give rise to disputes. Thirdly, doubts remained about the particular consequences of such breaches. If there turned out to be a need to keep the chapter, the distinction between the obligations *erga omnes* dealt with in article 49 and those dealt with in article 41 (Application of this Chapter) would have to be retained.

7. The commentary drafted by the Special Rapporteur concentrated more on jurisprudence than on bibliography. He could understand the problem arising from an attempt to include the doctrine. Usually, the works cited in commentaries tended to be those written in English or, to a lesser extent, in French, as if no works had been written on the issue in other languages. It would be too late to include the whole doctrine developed in the different languages. Instead of this, the Commission could add an updated version of the existing international bibliography to the commentary prepared by the Special Rapporteur. That had already been done by the United Nations in connection with the law of the sea. With regard to the content of the commentaries, the Commission could add a general plan of the concepts of State responsibility used as the foundation of the draft articles to the introduction to the commentaries or in the commentary to the first articles. Lastly, pointing out that the comments by the United Kingdom on articles 24 and 25 in the comments and observations received from Governments were in line with the draft that had been prepared by the Special Rapporteur, but had not been adopted on second reading, he said it might be useful for the Drafting Committee to reconsider the matter.

8. Mr. CRAWFORD (Special Rapporteur) said that he had deliberately left all references to the literature out of the commentaries because that had been the practice followed in previous commentaries and because such references currently appeared very dated, whereas the references to jurisprudence were still relevant. There was also the problem of the selection of works to appear in the commentary. If it was necessary to include references to the literature, a single footnote could be included for each article, citing the salient pieces of literature for the subject of the article. A further alternative, contrary to established practice, would be to include a selective bibliography, such as the one annexed to the first report of the Special Rapporteur,[4] which was quite comprehensive.

9. Mr. MELESCANU said that he would be circulating a draft structure for the commentaries to the draft articles and that he hoped that the members of the Commission would give him their comments on it.

10. Mr. BROWNLIE said that the references to literature had been extremely useful. The Special Rapporteur's

[4] *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/490 and Add.1-7.

contention that the works cited were dated was completely unfounded. Some articles published many years previously remained definitive. He was opposed to the deletion of references to the literature and was not persuaded by the grounds suggested for doing that.

11. Mr. LUKASHUK said that the deletion from the commentaries of references to the literature was not justified. The bibliography already prepared by the Special Rapporteur could perhaps be annexed to the commentaries. Guidance must be provided for those who would use the draft. The commentaries must be concise and should refer to positive law.

12. Mr. SIMMA said that he opposed the inclusion of references to the literature in the footnotes, but thought that a separate bibliography could be prepared, since bibliographies inevitably involved questions of vanity.

13. The CHAIRMAN said that an informal meeting would be held to discuss issues relating to the commentaries and that would provide an opportunity to consider such matters.

14. Mr. GALICKI said that he would focus his comments on two very controversial questions that, in his view, were of great importance for shaping the final product of the Commission's work on the subject, namely, serious breaches of essential international obligations to the international community as a whole and countermeasures. The provisions on those questions had fervent supporters, but also fierce adversaries, the latter demanding their complete deletion from the draft articles. Removing those provisions entirely would in reality be tantamount to avoiding a settlement of unquestionably difficult but crucially important questions and, in so doing, would diminish the work carried out by the Commission for such a long time and mean that it was unable to find solutions to complicated and controversial problems. In actual fact, the provisions on those two points were among the most valuable of the entire draft because they reflected the Commission's creative approach to seeking acceptable solutions in a difficult area in which the progressive development of international law prevailed over simple codification. The Commission must have the courage to defend the product of its work, but to say that provisions on serious breaches of obligations to the international community and on countermeasures must be retained certainly did not mean that they could not be improved or corrected.

15. On the first point, the scope of which was defined in article 41, it must be agreed that the concept of "serious breaches of essential obligations to the international community" was a reasonable solution to the problems posed by the former, and highly criticized, concept of international crimes advocated in former article 19. Article 41 brought together both substantive and procedural elements—*jus cogens* and obligations *erga omnes*. But were the proposed criteria for determining whether the breach in question was serious really objective and sufficient? In particular, it seemed that the application of the criteria contained in article 41, paragraph 2, might create serious difficulties in practice. The provisions dealing with serious breaches in Part Two bis (The implementation of State responsibility), also contained shortcomings. As could be seen in the comments by States, it must be clarified whether, in the case of obligations *erga omnes*, reparation could be claimed by each State, by all States acting together or by the international community as a whole. There was also a need to define clearly what claims could be formulated by States not affected by the breach of international law and whose legal interest affected by the breach was of a different nature.

16. As for the provisions on countermeasures, he was in favour of retaining a separate chapter II on the subject in Part Two bis; on no account was article 23 an adequate replacement of that chapter. However, the practical application of article 54, did give rise to a problem, not so much with regard to the countermeasures taken at the request and on behalf of the injured State under paragraph 1 as to those set out in paragraph 2. As a number of States had correctly pointed out, that paragraph suggested that, in cases of serious breaches of essential obligations to the international community as a whole within the meaning of article 41, every State could individually have recourse to countermeasures to force the perpetrator of the breach to comply with the obligations deriving from its responsibility as a State and that, in taking that decision, its only obligation would be to consult with other States which had also taken countermeasures. There was clearly a trend in that direction in contemporary law, but in practice that development was encountering strong opposition in the international community. It therefore seemed that article 54, paragraph 2, was still too premature even for fervent supporters of the notion of the progressive development of international law.

17. Mr. KAMTO, taking the floor for the first time on the subject and referring to the question of the recommendation which the Commission was to make to the General Assembly on the form the draft articles on State responsibility should take, said that he was wholeheartedly in favour of a convention because there were no advantages in a declaration, a resolution or a simple decision to make note of the draft articles. But there were other reasons as well: for one thing, he did not think, more generally, that the Commission should regard its work as so sacred that States did not have the right to make changes to it where necessary, especially since States had sufficient respect for the Commission's technical authority that they would not mangle its proposals without sufficient cause. Concerning more particularly the draft articles on State responsibility, which, as everyone agreed, contained a number of provisions involving the progressive development of international law, it would be perfectly normal for the addressees and sponsors of the draft articles, namely, States, to ensure that the legal advances outlined therein reflected the objective trends of modern-day international law and that they were not simple extrapolations, intuition or anticipation, or even a leap into the unknown of future law. Furthermore, by opting for a convention, the Commission was not making the draft articles run any risk other than that of a possible renegotiation because, even if the convention process came to nothing, the legal status of the draft articles would not represent a step backwards in relation to the current body of customary rules, which were for the most part given concrete form in codification and liable at some point to be enshrined by ICJ, which had already referred to the draft articles even

before their finalization, just as, in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, it had invoked rules of the "new law of the sea", although the Third United Nations Conference on the Law of the Sea had still been at the stage of the informal composite negotiating text. If the Commission did not want to take it upon itself to propose the form of a convention, it could very well send the draft articles to the General Assembly and let it decide what form they should take. After all, article 23 of the statute of the Commission merely said that it "*may** recommend to the General Assembly".

18. With regard to the terminology in the draft articles, several general observations were called for on the various terms and expressions used in Part Two, chapter III, and in Part Two bis. First, the insertion of the words "of States" in the phrase "international community as a whole" was not superfluous because it avoided the opening implicitly made for individuals, groups of individuals, peoples or non-governmental organizations. Such an opening did not seem to be legally necessary because, even if an obligation was essential for one of the above-mentioned categories, its breach would not entail State responsibility unless that obligation was required of the State. Such was the regime of obligations *erga omnes* invented by ICJ in the *Barcelona Traction* case. Consequently, the international community concerned could only be that of States. The system of criminal responsibility of individuals, particularly as set out in the context of the Rome Statute of the International Criminal Court, was parallel or supplementary to the system of State responsibility, but it was important not to confuse the two.

19. Another term that gave rise to problems, including for many States, was that of "essential obligations", which the draft articles did not define. Defining such obligations would be tantamount to enunciating primary rules, which successive Special Rapporteurs had always refused to do, with good reason. But did not the very creation of that category of obligations also involve a primary rule? Creating such a category in a sense meant also establishing a hierarchy between obligations in the manner of *jus cogens*, whereas it was up to States themselves to say whether such a category existed or should exist. That was an additional reason why it was a good idea for States to have an opportunity to consider the draft articles. For want of a definition, those so-called essential obligations would be a mutant category whose introduction would confer upon States that invoked the responsibility of other States on behalf of the international community an independent power for assessing and defining acts which might lead to abuses. If those "essential obligations" were synonymous with *jus cogens*, then that was a further reason to speak of the "international community of States as a whole", otherwise there was a risk of indirectly modifying the definition of that notion as contained in article 53 of the 1969 Vienna Convention.

20. With regard to the content of the draft articles, he pointed out that the disputes which might arise from the interpretation and application of articles 41 to 55, in particular, were such that it seemed impossible to retain those provisions without adding a dispute settlement mechanism, which could be designed only in a flexible manner, similar to that set out in article 287 of the United Nations Convention on the Law of the Sea. Concerning article 42 more specifically, the damages to which it referred would hold only if the notion of essential obligation was clarified. The question then arose whether it was conceivable that those damages, whether "punitive" or not, could be paid to States other than the injured State. As for article 49, the *actio popularis* that seemed to be its logical extension might in some cases cause practical difficulties in that it involved the *locus standi* of States other than the injured State. That showed the practical limits of the notion of "essential" obligations applied to State responsibility because, bearing in mind the principle of State continuity, that notion would lead to prosecuting a State for a genocide which had in fact been committed, but whose current leaders had been its former victims. The transparency of the State in that area was a source of confusion between the regime of State responsibility and that of the international criminal responsibility of individuals, which was all the more harmful because the latter responsibility could not be assumed: even if it was proved that the State had committed a serious breach of an essential obligation, it could not automatically be deduced that all the leaders of that State were guilty. Such guilt must itself be established on a case-by-case basis.

21. Turning to article 53 (Conditions relating to resort to countermeasures), the words "provisional countermeasures" in paragraph 3 not only seemed redundant, but were also a potential source of confusion. The Special Rapporteur had pointed that out briefly in his fourth report, but had not drawn the consequences. As countermeasures were by definition provisional, he suggested using the words "provisional and urgent measures" or "urgent countermeasures".

22. Lastly, he noted that article 54 raised important questions for a number of members of the Commission and States. Notwithstanding lasting trends in international relations, its paragraph 2 seemed unacceptable in the current international context. The Commission could not allow itself to give a legal basis to the uncontrolled power of a few States or to the risk of arbitrary conduct that that entailed. The Commission did not codify Charter law, but it could not ignore the fact that a number of United Nations bodies had powers under the Charter of the United Nations that in principle permitted them to administer certain situations that the Commission was trying to regulate through the codification of State responsibility. Although the Security Council was powerless if the author of a breach of an obligation, even if essential to the international community, was a permanent member of the Council or a protégé of that permanent member, it was also clear that those same permanent members and their allies were the only ones which had the means of taking the measures which the breach of such an obligation imposed. Recent history had shown that those States that had the means to act did not necessarily do so, whether in the context of the United Nations or in some other framework. The risk of a deadlock, double standards or even arbitrary action thus remained. It was therefore not by increasing the power organized, structured and controlled within the United Nations, but by legally authorizing unorganized and even anarchic power for a group of States that were capable of taking independent action, that there would be a reversion to the international system that had existed prior to the United

Nations. At the fifty-second session of the Commission, attention had been drawn in the Drafting Committee to the need to give in-depth consideration to the question of relations between the work of the Commission on State responsibility and the Charter, bearing in mind the risk of interference or overlapping between the two topics which had appeared at the end of the work of the Committee. The Commission would do well to focus on that problem or at least to opt for the solution of the saving clause (without prejudice to) suggested by a number of members.

23. Mr. TOMKA said that the draft articles should contain provisions on countermeasures, an institution recognized as part of international law, as ICJ had confirmed in its judgment in the *Gabčíkovo-Nagymaros Project* case. Consequently, the reference to countermeasures in article 23 was not sufficient. As circumstances precluding wrongfulness, countermeasures with respect to an internationally wrongful act differed from other circumstances of that type, such as *force majeure*, state of necessity or self-defence, in that they played a determining role in the implementation of responsibility, for their purpose was to induce the wrongdoing State to comply with its obligation not only of cessation, but also of reparation. He was thus opposed to the first option proposed by the Special Rapporteur in paragraph 60 of his report, namely, the deletion of chapter II and the addition of corresponding provisions in article 23; and he was in favour of the retention of a separate chapter on countermeasures in the draft articles.

24. With regard to the actual articles on countermeasures, he thought that article 50 (Object and limits of countermeasures) correctly reflected the purpose of countermeasures and their reversibility and that it required no major change. However, the drafting of article 51 (Obligations not subject to countermeasures) might be improved to ensure that its paragraph 2 was not interpreted as meaning that, before taking countermeasures, a State had to resort to dispute settlement procedures in force between it and the responsible State. Article 52 (Proportionality) should reflect the fact that it was the effects of countermeasures, not the countermeasures themselves, that should be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question. That was also the position adopted by ICJ in the judgment in the *Gabčíkovo-Nagymaros Project* case, in which it also confirmed the condition set forth in article 53 whereby, before resorting to countermeasures, the injured State must first call upon the State committing the internationally wrongful act to discontinue its wrongful conduct or to make reparation for it. In view of the comments made by a number of Governments and the jurisprudence of ICJ and arbitral tribunals, it seemed that the Commission accorded too important a role to negotiations in relation to entitlement to take countermeasures, either by preventing the injured State from taking countermeasures or, if they had already been taken, by requesting it to suspend them; the same applied to the impact of the judicial or arbitral procedures envisaged in article 53, paragraph 5 (*b*). The arbitral award in the *Air Service Agreement* case and the judgment of the Court in the *Gabčíkovo-Nagymaros Project* case showed that the Commission should not continue in its effort to revolutionize the law of countermeasures on those points, and should instead base itself on customary law on the question.

25. Still on article 53, he noted that there seemed to be some inconsistency between its paragraph 5 (*a*), read in conjunction with paragraph 1, and article 50, paragraph 1. According to article 50, paragraph 1, the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations under Part Two, namely, to cease the wrongful act and to make full reparation for the injury caused and, in certain cases, to offer appropriate assurances and guarantees of non-repetition. Article 53, paragraph 1, provided that, before taking countermeasures, the injured State must call on the responsible State to fulfil those obligations. Yet under the terms of article 53, paragraph 5 (*a*), the injured State was under an obligation to suspend the countermeasures it would have taken, if the internationally wrongful act had ceased, irrespective of whether the wrongdoing State had made reparation or at least offered to make reparation. In his view, the latter provision limited the object of countermeasures and he therefore wondered whether it was a correct reflection of the current law on countermeasures.

26. With regard to article 54, it was his view that its paragraph 2 might be deleted, so as not to disadvantage small States that would not normally have the possibility of availing themselves of the measures envisaged therein: it would be better to leave those measures to the United Nations, in its capacity as an institutional international community—the course of action originally envisaged by the former Special Rapporteur, Roberto Ago.

27. Mr. ROSENSTOCK said that the topic of State responsibility was, in several important ways, different from other topics with which the Commission had dealt, in that it covered the entire scope of international law, in that it covered secondary rather than primary rules and, most significantly, in that the Commission had already made a singularly important contribution to the topic. It would be hard to imagine a topic of greater importance both for the immediate future of international law and for that of the Commission.

28. There was an existing corpus of work on the topic, which the Commission had helped to build and which it must be careful not to weaken or compromise. An agreed statement *de lege lata*, of which the General Assembly could take formal note, would be a major contribution to the codification of the law. The fact that the preliminary work of the Commission had shaped thinking in that field and had been relied upon so far should allay concerns that such an instrument would lack authority and impact.

29. On the question of countermeasures, articles 50 to 55 were unnecessary and, more seriously, in significant regards did not reflect the state of the law or the logic of the role of countermeasures. The clearest and most authoritative statement of the relevant law was contained in the arbitral award in the *Air Service Agreement* case, due in large part to Willem Riphagen, the then Special Rapporteur on the topic. The existence of and need for countermeasures as a recognition and consequence of the primitive state of the international legal system were no stronger at the current time than they had been in the 1970s, when the arbitral award had stated that, "If a situation

arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures'" [para. 81], going on to explain why the existence of negotiations or a dispute settlement proceeding did not terminate the right to seek recourse to countermeasures. The award made it clear that to terminate the right to take countermeasures would disadvantage the victim State, inter alia, and also weaken pressure towards dispute settlement. Some, while recognizing the need for countermeasures, suggested that they benefited the strong more than the weak. Of course, the strong could be more effective in the exercise of their right of self-defence, under Article 51 of the Charter of the United Nations, but that did not mean that Article 51 benefited the strong more than the weak. The same was true of countermeasures. Indeed, the strong had many alternatives to countermeasures, such as retortion, sanctions and economic pressure. Countermeasures provided a means of responding to a wrongful act. Articles 51, 53, 54 and 55 of the draft contained unnecessary and unacceptable details. There was no need to repeat that the Charter prevailed (Art. 103). Article 53, paragraph 4, flew in the face of the award in the case cited and invited the wrongdoing State to delay the imposition of measures and thus the pressure to terminate the wrongful act. The same was true of paragraph 5 of that article.

30. As to "serious breaches of essential obligations to the international community", there was no basis for such a notion in State practice. Indeed, there was no basis for any qualitative distinction between wrongful acts of States. If such a notion were to become accepted, would it be a useful addition to the law? In the first place, it would be important to ensure that that invention did not lead to the imposition of "punitive damages" or their equivalent by any other name. It would be necessary to ascertain whether the advantage gained by creating such a notion justified the risk incurred, as well as to assess the extent to which action by States other than the injured State, such as collective action or *actio popularis*, was implicit in or enhanced by such a notion. Could the Commission be serious in saying, as it did in article 42, paragraph 1, that a serious breach "may" involve responsibility reflecting the gravity of the breach, thereby appearing to suggest that, in certain cases, the gravity of the breach mattered, while in other cases it did not? He agreed with Mr. Hafner's comments concerning articles 43 and 49 and considered that his proposed revision of article 43 offered a promising approach.

31. Mr. IDRIS, referring to the question of the definition of injury which, according to article 31, paragraph 2, consisted of any damage, whether material or moral, arising in consequence of the internationally wrongful act of a State, said that, according to one view, there was no need for any specific reference to damage, as it might not be a necessary constituent element of every breach of international law. A threat of harm or a mere failure to fulfil a promise, irrespective of the consequences of the failure at the time, might be sufficient to give rise to a legal injury. On the other hand, there was also the view that questioned the need to refer to injury in the abstract, without relating it to damage, whether material, moral or both, in the context of invoking the responsibility of a State. According to that view, an injured State's right to claim appropriate reparation would depend on the nature of the injury suffered; hence the need to refer to the damage and to specify its type and degree in order to quantify the reparation involved and its proportionality to the injury. That debate appeared to be very general and conceptual. But at another level, the distinction between damage and injury was directly linked to the right of the injured State and hence to its right to invoke the responsibility of a State. Given the lack of agreement on the distinction between injury and damage and its direct relationship to the right to invoke State responsibility, he believed, like several other members of the Commission, that, in article 31, paragraph 2, injury should be defined as meaning any damage, material and moral, arising in consequence of an internationally wrongful act. Compensation as a measure of reparation should cover any financially assessable damage, as provided in article 37, paragraph 2, the intention being, as the Special Rapporteur himself had noted in paragraph 34 of his fourth report, to cover any case in which the damage was susceptible to evaluation in financial terms, even if it involved estimation, approximation or the use of equivalents.

32. Turning to the question whether reference should be made to "integral obligations", a concept incorporated in article 43, subparagraph (*b*) (ii), he noted that there was an understandable confusion about the nature and scope of obligations of that type and their relationship to obligations established for the protection of a collective interest, referred to in article 49, paragraph 1 (*a*). It was his understanding that that was an obligation which had been envisaged under article 60, paragraph 2 (*c*), of the 1969 Vienna Convention, which provided that, in the case of the breach of an integral obligation established by a treaty, any other party was entitled to suspend the performance of the treaty, not merely with respect to the State in breach, but also with respect to all States parties to the treaty. Given that special consequence, he wondered whether it was really necessary to refer to the legal consequences of the breach of an integral obligation in the context of the present draft articles. He was inclined to think that deletion of the reference to the "integral obligations" in article 43, subparagraph (*b*) (ii), might lessen the confusion and promote consensus. He further believed that any legal consequence of a breach of an obligation of that type could be covered by the principle of *lex specialis* under article 56.

33. With regard to serious breaches of essential obligations to the international community, incorporated in articles 41 and 42 of the draft articles, article 41 was a refinement but not a replacement of article 19 adopted on first reading.[5] While it eliminated the concept of international crime, it retained its main elements. Article 41, paragraph 2, further established some thresholds, such as "gross or systematic" failure to perform the obligation, in order further to amplify the criterion of seriousness of the breach. Strong supporters of article 41 were also those who in the past had supported the concept of international crime, whereas those who continued to oppose that concept were also against the present formulation of

[5] See 2665th meeting, footnote 5.

article 41. The arguments for and against the retention of article 41, and of chapter III in general, were captured by the Special Rapporteur in paragraphs 43 and 44 of his report.

34. Article 41 had special significance. It was undeniable that the international community had long recognized aggression, genocide, apartheid and colonial domination as crimes. The Special Rapporteur, while dropping article 19 and formulating the concept of serious breaches, had indicated that he would refer to those examples in the commentary and not in the text of the article in order to avoid any impression that the draft articles on State responsibility dealt with primary obligations. There was good reason to retain the notion of serious breaches in article 41, with appropriate examples in the commentary, as suggested by the Netherlands in the comments and observations received from Governments, to which reference was made in paragraph 51 of the fourth report. However, it was necessary to clarify the various thresholds mentioned in article 41 and to identify the relationship between that article and the Charter of the United Nations. As China had pointed out in its comments on the article, the text, in its current form continued to raise fundamental questions both with regard to the definition of the concept and to its consequences, questions which must be examined and clarified.

35. With regard to chapter II of Part Two *bis* on countermeasures, the main question was whether the Commission should retain and, if necessary, improve the draft articles on countermeasures, or delete them, leaving article 23 in chapter I to cover the subject. Like many other members, he believed that the Commission must first delete article 54; and he noted what appeared to be a growing consensus within the Commission in favour of deleting that article, a course of action that would improve the balance and clarity of the draft articles. While he had an open mind on the question of retaining chapter II of Part Two *bis*, he wished to see all the conditions referred to in article 53 retained, so as to preserve the balance of the draft articles. He would even favour a more direct reference to the offer of a means of peaceful settlement of disputes as one of the conditions set forth in article 53. He suggested, however, that article 53, paragraph 3, which provided that the injured State could take "provisional and urgent countermeasures", should be deleted, since in his view that provision removed the very *raison d'être* of the article. No real distinction could be suggested between urgent and definitive countermeasures.

36. Mr. Sreenivasa RAO said that the remaining issues relating to State responsibility had elicited almost diametrically opposing views, on the one hand, and reactions with significant nuances, on the other, even when the speakers were on the same side. Many of the views expressed, both by members of the Commission and by Governments in their comments, were based on an underlying philosophy or policy that could not be discussed in a direct and transparent manner. That had inevitably created misunderstandings that could have been removed if there had been a debate on the basic issues. At the present stage of the work, it was very difficult to deal in just a few minutes with the outstanding issues, which had been the subject of much controversy both in doctrine and in terms of policy. It was a pity that the Commission had not been able to consider them in greater depth, because they were not merely semantic questions, but were bound up with the background and experience of members of the Commission and would have warranted study in a broader context.

37. Turning to the question of the relationship between injury and damage and the need to identify the injured State having the right to invoke the responsibility of the wrongdoing State, he said that that was not merely a conceptual or abstract problem. The Commission's stand on it must be careful and pragmatic, since it had to do with the *locus standi* of the State to raise the question of responsibility of another State. Injury should be conservatively defined and must mean moral or material damage arising as a consequence of the internationally wrongful act. Accordingly, there was little reason to change the existing wording of article 31, paragraph 2.

38. Once the injured State had been identified, the right of other States not directly injured to invoke the responsibility of a State should be limited. In particular, they should not be given the right to take countermeasures, as proposed in article 54. However, that did not mean that, when a violation was serious or had implications for an obligation essential to the international community as a whole, such States had no role to play; they could still make diplomatic representations. As correctly noted in paragraph 35 of the fourth report, such *démarches* did not amount to invocation of responsibility and no special legal interest was required. Representations of that kind had a value in the real world and they could be further coordinated in a variety of ways: for example, they could take the form of a resolution by the United Nations or another of the organizations involved or be used to deprive the wrongdoing State of special incentives or to assist the victim State. All those responses would have as good an effect as countermeasures themselves. Moreover, sanctions in the formal sense did not necessarily produce as good and as swift results as desired and they could do harm to innocent civilians and third States. It would therefore be a sound policy to limit the scope of "injury" and the field in which countermeasures could be taken and, for that purpose, to delete article 54.

39. He also believed that it would be useful to delete the reference to integral obligations in article 43, subparagraph (*b*) (ii). The consequences of violating such obligations were spelled out in article 60, paragraph 2 (*c*), of the 1969 Vienna Convention. In any case, that type of obligation was covered in only a few treaties and violations of such obligations were extremely rare. As several members of the Commission had pointed out, deleting article 43, subparagraph (*b*) (ii), would lessen the confusion and help promote consensus.

40. With regard to the treatment in articles 41 and 42 of serious breaches of essential obligations towards the international community, it was no secret that article 41 was a replacement of article 19, adopted on first reading. The examples given had been adopted on the understanding that they were based on the law in force. Since that time, the concept of an international crime had gained ground. The International Criminal Court had taken the matter further by providing for the prosecution of individuals, but that was without prejudice to State responsibility for

the serious breach involved. Accordingly, he believed the Commission must maintain articles 41 and 42 and bring back the various examples that had been used to illustrate article 19, either within article 41 or in the commentary. In that respect, he agreed with the comment by the Netherlands referred to in paragraph 51 of the fourth report.

41. The fact that the relevant articles did not provide for any special or different consequences in case of "serious breaches" should not lead to the conclusion that there was no difference between ordinary and serious breaches. On the contrary, such a distinction would help to reduce the involvement of States not so directly injured by a wrongful act and to confine their responses to cases of serious breaches. Those responses could be organized without having to go as far as article 54 provided.

42. He felt that the question of countermeasures was a subject that the Commission could usefully have done without. Efforts made in that direction had not yet been able to satisfy either those who opposed the institution or those who supported it. But since the regime of countermeasures was already included in the draft articles, the Commission should not shrink from spelling out the conditions for resorting to them, as defined in article 53. It should also be expressly stated that the offer of a means of peaceful settlement should be a precondition for resort to countermeasures. Furthermore, article 53, paragraph 3, should be deleted because it provided for measures which were not regarded as part of current international law and, as Mr. Idris had said, it could be said to negate the very *raison d'être* of the article.

43. The draft articles on countermeasures successfully captured the dictum of ICJ and the relevant decisions of arbitral tribunals. The message of chapter II of Part Two *bis* was that, if States took the law into their own hands, they must act within its bounds.

44. The CHAIRMAN, speaking as a member of the Commission, said that, in his opinion, the draft articles on State responsibility ought to take the form of a convention. It would be a pity if the long and careful work of the Commission were to become simply an annex to a General Assembly resolution rather than a binding legal instrument. As for the question of the settlement of disputes, he could accept the proposal by China that Part Four should contain a general provision on the peaceful settlement of disputes arising out of State responsibility, which could be based on Article 33 of the Charter of the United Nations.

45. With regard to serious breaches of essential obligations towards the international community as a whole, he favoured retaining the distinction between serious and other breaches, as long as it was made clear that the purpose of consequential damages was not to stigmatize and punish the State which had committed the wrongful act, but to reflect the gravity of the breach in a compensatory way.

46. As to countermeasures, he believed there was a real danger of legitimizing them, irrespective of the situation, and that the draft articles in chapter II of Part Two *bis* could be deleted. At the same time, the presence of that chapter in the draft articles helped to balance the text as a whole. The solution might therefore be not to delete it, but to limit the scope of its provisions to reduce the risk that was inseparable from the very possibility of resorting to countermeasures. Article 54 could not be watered down and he thought it should be deleted, along with article 53, paragraph 3, as Mr. Idris and Mr. Sreenivasa Rao had suggested.

47. Speaking as Chairman, he declared the debate on State responsibility closed. The Commission seemed to agree that the remaining draft articles should be referred to the Drafting Committee, but without prejudice to any decision which might be taken on the basis of the consultations to be held on the outstanding issues and to be organized by the open-ended working group set up for the purpose under the chairmanship of the Special Rapporteur, Mr. Crawford.

It was so agreed.

The meeting rose at 12.35 p.m.

2675th MEETING

Friday, 11 May 2001, at 10.05 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. He, Mr. Herdocia Sacasa, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Momtaz, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka, Mr. Yamada.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/513, sect. E, A/CN.4/516,[1] A/CN.4/L.601 and Corr.1 and 2)

[Agenda item 6]

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