Document:-

A/CN.4/SR.2705

Summary record of the 2705th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2001, vol. I

ally wrongful act but of the obligation to compensate that flowed from the act.

82. Mr. ROSENSTOCK said that, logically, the last sentence should become the second sentence of the paragraph, as it was not normal to have to read such a long paragraph in order to find out what ICJ had done, or rather what it had not done, in the case mentioned in the first sentence, with regard to guarantees of non-repetition.

83. Mr. CRAWFORD (Special Rapporteur) said that the recasting of the paragraph proposed by Mr. Rosenstock would without doubt be better for the logic of the paragraph and he would produce a text to submit to the Commission.

84. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

Paragraph (10) was adopted on that understanding.

Paragraph (11)

85. Mr. PELLET said that, in his opinion, the paragraph was not complete in that a reference to article 48 was essential, as the Commission had adopted very clear positions on that point that should be reflected in the commentary. He therefore proposed that a sentence should be added, reading: "In addition, assurances and guarantees of non-repetition may be sought by a State other than an injured State in accordance with article 48."

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

86. Mr. ECONOMIDES, supported by Mr. SIMMA, said that it was not logical to say in the penultimate sentence that the exceptional character of the measures was indicated by the words "if the circumstances so require", as by definition one did not know what the circumstances would be. He therefore proposed that the words "more or less" should be inserted before "exceptional".

87. Mr. LUKASHUK said that the sixth sentence was repetitive and added nothing to the analysis of the question. It should therefore be deleted.

Paragraph (13), as amended, was adopted.

The commentary to article 30, as amended, was adopted.

Commentary to article 31 (Reparation)

Paragraph (1)

88. Mr. PELLET pointed out that paragraph 48 of the judgment of ICJ in the *LaGrand* case mentioned in a footnote had nothing to do with assurances and guarantees of non-repetition.

89. Mr. CRAWFORD (Special Rapporteur) said that the footnote in question could be kept and the words "in the context of assurances and guarantees against repetition" could be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

90. Mr. PELLET, supported by Mr. KAMTO and Mr. LUKASHUK, said that the definition of moral damage, in the sixth sentence, was not satisfactory in that it omitted the moral damage that could potentially be caused to the State in the form of an affront to its honour, dignity or prestige, as in the decision in the *"Rainbow Warrior"* case. In addition, the seventh and eighth sentences should be deleted, for that was not how he understood article 31. The whole of the end of paragraph (5) should therefore be reviewed.

91. Mr. CRAWFORD (Special Rapporteur) proposed that he should revise paragraph (5) in the light of the comments made on the question of the definition of moral damage and submit a new text at the next meeting.

92. The CHAIRMAN said that, if he heard no objection, he would take it that members agreed to that proposal.

It was so agreed.

The meeting rose at 1.05 p.m.

2705th MEETING

Tuesday, 7 August 2001, at 3 p.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-third session (*continued*)

Chapter V. *State responsibility* (continued) (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

E. Text of the draft articles on responsibility of States for internationally wrongful acts (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

2. Text of the draft articles with commentaries thereto (*continued*)

Part Two. Content of the international responsibility of a State (*continued*)

Chapter I. General principles (*concluded*)

Commentary to article 31 (Reparation) (*concluded*) (A/CN.4/L.608/Add.3)

Paragraph (5) (*concluded*)

1. The CHAIRMAN recalled that the Special Rapporteur had offered to provide a new text of paragraph (5), taking into account the concerns expressed by Mr. Goco, Mr. Pellet and Mr. Rosenstock. The text read:

> "(5) The responsible State's obligation to make full reparation relates to the 'injury caused by the internationally wrongful act'. The notion of 'injury', defined in paragraph 2, is to be understood as including any damage caused by that act. In particular, in accordance with paragraph 2, 'injury' includes any material or moral damage caused thereby. This formulation is intended both as inclusive, covering both material and moral damage broadly understood, and as limitative, excluding merely abstract concerns or general interests of a State which is individually unaffected by the breach.[1] 'Material' damage here refers to damage to property or other interests of the State and its nationals which is assessable in financial terms. 'Moral' damage includes such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life. Questions of reparation for such forms of damage are dealt with in more detail in chapter II of this Part.[2]

> "[1] Although not individually injured, such States may be entitled to invoke responsibility in respect of breaches of certain classes of obligation in the general interest, pursuant to article 48. [Text of the first footnote to paragraph (5) to be added.]

> "[2] See especially article 36 and commentary."

2. Mr. PELLET said that, in its new formulation, paragraph (5) admirably addressed all the concerns raised.

3. Mr. LUKASHUK said that moral damage should be defined as non-material damage. In accordance with the *"Rainbow Warrior"* arbitration, reference should be made to "non-material damage of a moral, political and legal nature resulting from the affront to the dignity and prestige of the State".

4. Mr. CRAWFORD (Special Rapporteur) said that Mr. Rosenstock's concern regarding exemplary or other non-compensatory damages was properly dealt with under article 34, and, to a lesser extent, in article 41. The problem was that the injury was compensated for only to the extent of the damage. As to Mr. Lukashuk's point, while he agreed that something was missing from paragraph (5), the point was discussed in paragraphs (6) to (9).

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

5. Mr. PELLET drew attention to an error in the French text of the third sentence. He also proposed that the last sentence, which did not deal with preconditions to reparation, should be deleted or, if retained, relegated to the introductory commentaries dealing with preconditions to responsibility.

6. Mr. CRAWFORD (Special Rapporteur) said he could accept the deletion of the last sentence.

Paragraph (7), as amended, was adopted.

Paragraph (8)

Paragraph (8) was adopted.

Paragraph (9)

7. Mr. LUKASHUK said that the second sentence referred to "material, moral and legal injury". In his view, however, there were only two types of injury. He thus proposed amending the phrase so as to read "material and moral legal injury".

8. Mr. CRAWFORD (Special Rapporteur) said it was quite clear from chapter II that the forms of reparation included satisfaction for non-financially-assessable loss—"immaterial loss" being the term he had himself favoured. Perhaps a more flexible formulation could be found for the second sentence. As a last resort, he could accept the deletion of paragraph (9) *in toto*. What he could not accept was a statement that reparation did not extend to non-patrimonial or non-material interests of the State.

9. Mr. PELLET said it was clear that article 31, paragraph 2, referred only to "material" and "moral" damage; there was no third category. It was also clear that some members, himself among them, were allergic to the term "legal injury", whereas others did not wish to limit injury to moral and material injury. Since, in a commentary, the Commission was not obliged to reproduce the exact wording of the article, the solution seemed to be to use different terms, such as "material" and "immaterial" or "patrimonial" and "non-patrimonial".

10. Mr. SIMMA said that a lack of consensus on that issue seemed to have been "papered over" at some stage. A formulation must be found that satisfied both camps. He himself advocated including some reference to the

concept currently described as "legal injury". A good solution would be to use the terms "material" and "non-material".

11. Mr. ECONOMIDES said there was clearly a problem, since three adjectives were used to denote only two categories of injury. In his view, the concept of legal injury should nonetheless be retained. A compromise solution might be to use the wording "injury extends to material injury, on the one hand, and, on the other, to moral and legal injury". Legal injury had far more in common with moral injury than with material injury.

12. Mr. MELESCANU supported Mr. Simma's comments. Reference might also be made to "quantifiable" and "non-quantifiable" injury, a term used elsewhere by the Commission.

13. Mr. BROWNLIE said that Mr. Simma seemed to advocate setting the stage for a doctrinal dispute that would then have to be resolved—a course that he personally found utterly pointless. In his view, unless the Special Rapporteur believed that paragraph (9) added something of fundamental importance to the other paragraphs, the paragraph should simply be deleted.

14. Mr. GALICKI said that the second and third sentences classified injury according to two different sets of criteria, which needed to be kept separate. Accordingly, a word such as "Furthermore" should be inserted at the start of the third sentence. The terms "material" and "moral" should nonetheless be retained, since they were the ones used in the adopted text of the article.

15. Mr. CRAWFORD (Special Rapporteur), responding to Mr. Brownlie's and Mr. Galicki's comments, said that the only essential sentence in paragraph (9) was the first sentence. Accordingly, he proposed that it be retained as the last sentence of paragraph (8), and that the remainder of paragraph (9) be deleted.

It was so agreed.

Paragraph (9), as amended by the Special Rapporteur, was adopted.

Paragraphs (10) and (11)

Paragraphs (10) and (11) were adopted.

Paragraph (12)

16. Mr. PELLET said that, in the French version, the words *comportement fautif* should read *comportement illicite*.

Paragraph (12), as amended in the French text, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

Paragraph (15)

Paragraph (15) was adopted with a minor editing change to the French text.

The commentary to article 31, as amended, was adopted.

Commentary to article 32 (Irrelevance of internal law)

Paragraph (1)

17. Mr. GAJA said that the State was not itself bound by its internal law. Accordingly, in the last sentence, the words "State confronted" should be amended to read "State organ confronted".

18. In response to a doubt expressed by Mr. ROSENSTOCK, Mr. CRAWFORD (Special Rapporteur) said that Mr. Gaja's proposal seemed to be constructive, in that it contrasted the situation of the State in terms of responsibility with that of an individual organ.

19. Mr. ECONOMIDES drew attention to a drafting problem in the French text of the last sentence.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

The commentary to article 32, as amended, was adopted.

Commentary to article 33 (Scope of international obligations set out in this Part)

Paragraph (1)

20. Mr. GAJA said he found the fourth sentence obscure. In particular, he was not sure what was meant by the phrase "distinct legal wrongs in themselves".

21. Mr. CRAWFORD (Special Rapporteur) said that the sentence created more problems than it solved. The simplest course would be to delete it. The word "secondary", in the last sentence, should also be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

22. Mr. GALICKI said that the sixth sentence referred to the exercise of specific rights to invoke responsibility "under some specific rule", with a cross-reference to article 55. That article, however, spoke of "special" rules. The language of the commentary should be harmonized with that of article 55. Likewise, in the seventh and eighth

sentences, the word "entities" should be changed to "persons or entities", to bring it into line with the text of article 33.

Paragraph (4), as amended, was adopted.

The commentary to article 33, as amended, was adopted.

CHAPTER II. REPARATION FOR INJURY

Commentary to chapter II (A/CN.4/L.608/Add.4)

The commentary to chapter II was adopted.

Commentary to article 34 (Forms of reparation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

23. Mr. PELLET said that an example should be inserted in the second sentence. The *Corfu Channel* case sprang to mind, but better examples could no doubt be found.

24. Mr. CRAWFORD (Special Rapporteur) said that an example would be inserted.

Paragraph (2) was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

25. Mr. ECONOMIDES said the third sentence gave the impression that States always had a choice in the matter, which was not the case. He wondered if *affecté*, in the French text, was the correct word to use in that context.

26. Mr. CRAWFORD (Special Rapporteur) said that Mr. Economides's concern was addressed in the fourth sentence, which made it clear that the injured State could choose between different forms of reparation "in most circumstances". He therefore believed that "affected" was the right word, at least in English, as it was not too dogmatic.

Paragraph (4) was adopted.

Paragraph (5)

27. Mr. PELLET said that in the antepenultimate sentence it was not clear what the word "consequential" meant in the phrase "damage which is indirect, consequential or remote", and it should be deleted.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

The commentary to article 34, as amended, was adopted.

Commentary to article 35 (Restitution)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

28. Mr. PELLET said that, if possible, the two contrasting definitions should be supported by some references. More importantly, for the sake of completeness, a sentence should be added at the end of the paragraph to read: "It does not exclude that restitution may be supplemented by compensation in order to ensure full reparation for the injury actually suffered."

29. Mr. CRAWFORD (Special Rapporteur) said that he would endeavour to find up-to-date references in support of the definitions.

Paragraph (3)

30. Mr. PELLET suggested that, in addition to the *Chorzów Factory* case, the *Texaco* case should be cited as an example, as the sole arbitrator in the latter case had made some definitive remarks on the subject.

31. Mr. CRAWFORD (Special Rapporteur) said that as the *Texaco* case was not a State-to-State case and the part of the draft articles they were discussing concerned only restitution in the interests of States, he would prefer to cite the *Texaco* case in a footnote.

Paragraph (3) was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

32. Mr. GAJA said that the second sentence was virtually identical to the second sentence of paragraph (3) of the commentary to article 34. It could therefore be deleted and the remaining sentence "What may be required . . . " moved to the beginning of paragraph (6).

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

Paragraph (12)

33. Mr. PELLET said that, while the reference in the footnote was correct (except for the page number, which was p. 149 of the English text), the original reference (Institut für Internationalen Recht an der Universität Kiel, *Zeitschrift für Völkerrecht* (Breslau, 1930), vol. XV, pp. 359–364) should also be cited.

Paragraph (12) was adopted.

The commentary to article 35, as amended, was adopted.

Commentary to article 36 (Compensation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

34. Mr. PELLET said he disagreed with the contention in the first sentence that compensation had a distinct function compared with satisfaction and restitution. The overall function of compensation, satisfaction and restitution was the same, namely, reparation.

35. Mr. CRAWFORD (Special Rapporteur) said that the sentence could be deleted; the following sentence would then begin: "The relationship with restitution is clarified . . . ".

Paragraph (3), as amended, was adopted.

Paragraph (4)

36. Mr. ROSENSTOCK asked whether it would be appropriate to speak about exemplary damages in paragraph (4).

37. Mr. CRAWFORD (Special Rapporteur) said that there was a discussion of excessive demands made under the guise of satisfaction in paragraph (8) of the commentary to article 37. In paragraph (5) of the commentary to Part Two, chapter III, of the draft articles (A/CN.4/L.608/Add.8), it was stated that the function of damages was essentially compensatory, and the jurisprudence on the concept of punitive or exemplary damages was referred to in a footnote thereto. The concept was implicit in paragraph (4) but he would draft a new sentence to make it clearer.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

38. Mr. PELLET, referring to the footnote, said that the most useful reference in French was the work by Personnaz.

39. The CHAIRMAN said the reference would be included in the footnote.

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (18)

Paragraphs (8) to (18) were adopted.

Paragraph (19)

40. Mr. KAMTO asked what the distinction was between "pain and suffering" (*pretium doloris* in the French text) and the list that followed those words (mental anguish, humiliation, etc.).

41. Mr. CRAWFORD (Special Rapporteur) said there was no real distinction; the list simply gave examples of actual pain and suffering.

Paragraph (19) was adopted.

Paragraphs (20) to (23)

Paragraphs (20) to (23) were adopted.

Paragraph (24)

42. Mr. PELLET said that, in the French text, it was unclear what was meant by *livres récents*, in the second sentence.

43. The CHAIRMAN said the translation would be checked against the English original.

Paragraph (24) was adopted.

Paragraph (25)

Paragraph (25) was adopted.

Paragraph (26)

44. Mr. PELLET said that the French translation of "wasting assets" (*actifs défectibles*) should also be checked.

Paragraph (26) was adopted.

Paragraphs (27) to (34)

Paragraphs (27) to (34) were adopted.

The commentary to article 36, as amended, was adopted.

Commentary to article 37 (Satisfaction)

Paragraph (1)

45. Mr. KAMTO said that, for the sake of logic and to match the original English text, the word *souvent* should be deleted from the second sentence of the French text.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

46. Mr. PELLET said that the paragraph should begin "In accordance with article 31, paragraph 2" as that was where the quoted material was taken from, not article 37, paragraph 1, as implied by the current wording.

Paragraph (3) was adopted.

Paragraphs (4) to (6)

Paragraphs (4) to (6) were adopted.

Paragraph (7)

47. Mr. KAMTO said that the second sentence was confusing. The sentence construction made it appear, wrongly, that the apologies in the *Consular Relations* and *LaGrand* cases had been offered to third parties. Perhaps the sentence could be divided into two sentences, one on cases where the apologies were requested by third parties and one on cases where they were requested, and received, by the injured State.

48. Mr. CRAWFORD (Special Rapporteur) agreed that the sentence could give rise to confusion if a reader was not acquainted with the details of the cases cited, and said he would try to find clearer language.

Paragraph (7) was adopted on that understanding.

Paragraph (8)

Paragraph (8) was adopted.

The commentary to article 37, as amended, was adopted.

Commentary to article 38 (Interest)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were adopted.

Paragraph (8)

49. Mr. PELLET said that "the preponderance of authority", in the penultimate sentence, could best be translated into French as *la majorité des auteurs et des tribunaux.*

Paragraph (8), as amended in the French text, was adopted.

Paragraph (9)

50. Mr. PELLET said that "given the present state of authorities", in the third sentence, was too vague and should be replaced by "given the present state of international law".

Paragraph (9), as amended, was adopted.

Paragraph (10)

51. Mr. PELLET said that "the present unsettled state of practice makes a general provision on the calculation of interest useful", in the antepenultimate sentence, should be translated by *le caractère anarchique de la pratique actuelle incite à penser qu'une disposition générale sur le calcul des intérêts est utile*; the wording *penser qu'il serait utile* suggested that the commentary was a draft at the first-reading stage.

Paragraph (10), as amended in the French text, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

52. Mr. PELLET said he saw no reason to include "as such" in the first sentence; either the article dealt with post-judgment or moratory interest or it did not. Similarly, in the last sentence, "is better regarded as a matter" should be replaced by, simply, "is a matter".

Paragraph (12), as amended, was adopted.

The commentary to article 38, as amended, was adopted.

Commentary to article 39 (Contribution to the injury)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

The commentary to article 39 was adopted.

CHAPTER III. SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Commentary to chapter III (A/CN.4/L.608/Add.8)

Paragraph (1)

53. Mr. GAJA proposed that the words "peremptory norms" in the second sentence should be replaced by the phrase "obligations under peremptory norms".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

54. Mr. ECONOMIDES proposed deleting in the first sentence the phrase "although it has been cautious in applying it", which referred to the approach taken by ICJ to the notion of obligations to the international community as a whole. An alternative formulation for the French text of "became bound" (*sont devenues liées*) should also be found.

55. Mr. ROSENSTOCK said that the phrase proposed for deletion provided historical background and described the actual situation surrounding the work of the Commission. In his opinion it should be retained.

56. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Rosenstock. Many States were reticent about the notion of obligations to the international community as a whole, and drawing attention to the caution exercised by the Court in that regard was helpful.

Paragraph (3) was adopted.

Paragraph (4)

57. Mr. LUKASHUK said that the second sentence misrepresented the terms of the 1969 Vienna Convention, which contained nothing about "a small number of" substantive norms. He proposed that that phrase should be deleted.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

58. Mr. PELLET said the phrase "has recognized the principle", in the fourth sentence, was unclear. To which principle was reference being made?

59. Mr. CRAWFORD (Special Rapporteur) suggested that the sentence should be deleted.

It was so agreed.

Paragraph (6), as amended, was adopted.

Paragraph (7)

60. Mr. PELLET suggested that some clarification should be added to the statement in the first sentence that the articles did not recognize any distinction between State "crimes" and "delicts".

61. Mr. ROSENSTOCK said that the sentence referred to a contentious issue that had been resolved and that perhaps the sentence could be deleted.

62. Mr. PELLET said that some reference to the issue was necessary.

63. Mr. CRAWFORD (Special Rapporteur) said it was true that it was a part of international legal discourse on State responsibility and had to be mentioned. He would prefer not to add anything to the first sentence, however.

64. Mr. LUKASHUK proposed that the word "small" should be replaced by "certain" in the seventh sentence.

It was so agreed.

65. Mr. PELLET said that the French texts of the seventh and eighth sentences should be corrected: *à les respecter* should be replaced by *à leur respect*, and *il serait bon* by *il est bon*.

Paragraph (7), as amended, was adopted.

The commentary to chapter III, as amended, was adopted.

Commentary to article 40 (Application of this Chapter)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

66. Mr. LUKASHUK pointed out that one might gain the impression from the second sentence that *pacta sunt servanda* did not constitute a peremptory norm. In the third sentence, peremptory norms were described as being concerned with "substantive prohibitions of conduct", but that was true of all norms. All basic principles of international law had the status of peremptory norms.

67. Mr. CRAWFORD (Special Rapporteur) said that the *pacta sunt servanda* rule was a logical necessity, a framework rule. As long as international law had existed, it had always been the case that *pacta sunt servanda*, irrespective of the existence of article 53 of the 1969 Vienna Convention. The key point of article 53, however, was that it stipulated that there were certain substantive things that could not be done or allowed under treaties: for example, to invade or annex other countries or commit genocide. The points made in paragraph (3) were correct and were substantiated by the citation in the footnote.

68. Mr. PELLET pointed out the ambiguity of the term "norms" in the second sentence, which could refer either to article 53 of the 1969 Vienna Convention or to article 40 of the articles on State responsibility.

69. Mr. ECONOMIDES suggested deleting the sentence and revising the beginning of the third sentence accordingly. The existence of norms of *pacta sunt servanda* that did not constitute solely prohibitions of conduct could not be ruled out.

70. Mr. TOMKA said he was opposed to deleting the second sentence, because it might give the impression

that the Commission was characterizing *pacta sunt servanda* as a peremptory norm. The breach of each and every treaty was a breach of *pacta sunt servanda*, but the intention of the Commission had not been to have chapter III apply in the event of ordinary breaches of treaties.

71. Mr. MELESCANU said he agreed with Mr. Tomka. The commentary must help the reader to understand what the Commission viewed as the difference between breaches of the peremptory norms mentioned in article 40 and other breaches of equally valid international obligations. With some drafting changes, perhaps the second sentence might be improved and retained.

72. Mr. PELLET said he was in favour of keeping the second sentence with some drafting changes, so as to avoid conveying the impression that the Commission was giving a lesson in general international law. For the purposes of State responsibility, it was absolutely immaterial whether or not the rule of *pacta sunt servanda* was a peremptory norm.

73. Mr. CRAWFORD (Special Rapporteur), responding to a query by Mr. HAFNER, proposed that the second sentence should be deleted and that the beginning of the third, "Their concern is with substantive prohibitions of conduct which", should be replaced by "The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what".

It was so agreed.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

74. Mr. Sreenivasa RAO said the right of self-determination must not, he strongly believed, be listed among the examples of peremptory norms. The right of self-determination could be described as a peremptory norm solely in the context of colonial domination: to go any further would be to create a problem by raising a contentious issue.

75. Mr. KAMTO said he endorsed those remarks. To affirm in general terms that self-determination was a right would be completely at variance with other rules and with international practice. He proposed that, in the penultimate sentence, the words "within the framework of decolonization" should be inserted between "self-determination" and "deserves".

76. Mr. ROSENSTOCK, supported by Mr. SIMMA, said he would not be able to go along with that sort of limitation on the right of self-determination.

77. Mr. CRAWFORD (Special Rapporteur) said that the last two sentences in paragraph (5) were very carefully phrased to be as neutral as possible, and they merely paraphrased what ICJ had said in the *East Timor* case. Mr. Sreenivasa Rao had expressed his position but had not pressed for any amendment. He himself was strongly disinclined to make any change other than to incorporate in the footnote a reference to certain relevant provisions of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[1] provisions which had stood the test of time.

It was so agreed.

Paragraph (5), as amended, was adopted.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

78. Mr. PELLET, referring to the footnote, said that, for the sake of historical accuracy, the words "as cases of serious breaches of fundamental obligations" should be replaced by "of what article 19 as adopted on first reading denominated as 'international crimes'".

79. Mr. CRAWFORD (Special Rapporteur) suggested that the phrase should read "as cases denominated as 'international crimes'".

It was so agreed.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to article 40, as amended, was adopted.

Commentary to article 41 (Particular consequences of a serious breach of an obligation under this Chapter)

Paragraph (1)

80. Mr. PELLET said that the word "scale" should be rendered in French, not as *échelle*, but as *gravité*.

Paragraph (1), as amended in the French text, was adopted.

Paragraph (2)

81. Mr. Sreenivasa RAO proposed that the words "could be envisaged" should be replaced by "could possibly be involved".

Paragraph (2), as amended, was adopted.

[1] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

Paragraph (3)

82. Mr. KAMTO said, in relation to the fifth sentence, that it would be useful to add the phrase "of general scope" after "positive duty of cooperation", in view of the fact that specific duties of cooperation existed in some areas of international law, such as environmental protection, in which a State was required to take either emergency measures or preventive action. Indeed, a specific reference to environmental protection could be made in the next sentence.

83. Mr. PELLET said that a more economical way of dealing with Mr. Kamto's concern would be to insert the word "general" before "international law". Another objection to the sentence was that it bordered on the repetitious. The word "already", in particular, was redundant and should be deleted. He also asked why, in the last sentence of the paragraph, the restrictive expression "at least" was necessary. States should be required to react. The words "at least some response" should be replaced by a phrase such as "a response appropriate to the measures envisaged".

84. Mr. ECONOMIDES supported the suggestion. Article 41 established that States must cooperate, but it was for them, not for the Commission, to determine the extent of such cooperation.

85. Mr. LUKASHUK regretted that, while the paragraph referred to the duty to cooperate, it made no mention of the basic principle of the general duty of cooperation.

86. Mr. HAFNER supported Mr. Pellet's suggestion. He was concerned, however, about the footnote, with its reference to article 54, which gave the impression that measures under article 41 were identical with those under article 54. If that was the case, it should be stated in the commentary itself, and the commentary to article 54 should refer back to article 41.

87. Mr. Sreenivasa RAO said he wished to raise a practical concern. Not all the 189 Member States of the United Nations needed to be involved in a given situation at the same time, all the time or at the same level; much depended on which State had the duty to cooperate. There was no point in protecting countries which could make no possible contribution. It might be that, so long as they were not interfering, that was cooperation enough. As for the suggestions by Mr. Kamto and Mr. Pellet, one solution would be to replace the words "some response" by the words "a suitable response". Otherwise there was a risk of reducing cooperation to a minimal level.

88. Mr. CRAWFORD (Special Rapporteur) said that paragraph (3) was an exercise in tightrope walking by a person loudly denying that there was a tightrope. From that point of view, the proposals for change were relatively minor, as opposed to the changes demanded by the law of gravity. The difficulty raised by Mr. Hafner could be solved by deleting the footnote. Mr. Kamto's point was best dealt with by adopting the solution suggested by Mr. Pellet: to insert the word "general" before "international law" in the fifth sentence. As for the word "already", that too should be deleted, for the reasons given by Mr. Pellet. On Mr. Lukashuk's point, he considered that the commentary should not broach general questions about the duty of cooperation in international law; the question at issue was a specific one. As to the issues raised by Mr. Sreenivasa Rao, the element of doubt was expressed in the phrase which opened the fifth sentence. Moreover, in the next sentence mention was made of cooperation in the framework of international organizations, which itself provided a measure of input and control. Lastly, the last sentence spoke of strengthening existing mechanisms of cooperation; and, if a State wanted to do so, existing measures gave ample opportunities for backsliding. He suggested that the last sentence should be reworded in the following terms: "Paragraph 1 seeks to strengthen existing mechanisms of cooperation, on the basis that all States are called upon to make an appropriate response to the serious breaches referred to in article 40."

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

89. Mr. Sreenivasa RAO questioned whether the example given in the second sentence—which, along with the third, did not appear in the French text—was worth retaining. A specific example, however, would be of interest.

90. Mr. CRAWFORD (Special Rapporteur) said that the problem had arisen because the original reference had been to non-recognition of the acquisition of territory by the unlawful use of force. Mr. Rosenstock had rightly pointed out that the reference should be to any use of force, since such non-recognition was the basis on which a number of situations were resolved without any agreement on underlying questions of responsibility. He had therefore changed the example but perhaps weakened the point being made.

Paragraph (5) was adopted.

Paragraph (6)

91. Mr. PELLET said that the phrase "US Secretary of State" should read "Secretary of State".

Paragraph (6), as amended, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

Paragraph (9)

92. Mr. PELLET said the paragraph was perplexing. Obviously the responsible State had the obligation of non-recognition; that was hardly worth stating. It was far more significant that the injured State was unable to

recognize a situation that resulted from a breach of *jus cogens*. He therefore suggested that the paragraph should be entirely recast along the following lines:

> "The obligation of non-recognition applies to all States, including the injured State. There have been cases where the State responsible for a serious breach has sought to consolidate the situation by having it recognized by the injured State. This is conceivable in relation to breaches of obligations arising out of non-peremptory norms, but not when the obligations breached arise out of peremptory norms, which, by definition, concern the international community of States as a whole. [At that point, reference to a footnote referring to article 53 of the 1969 Vienna Convention.] Accordingly, the injured State itself is under an obligation not to accept the continuation of the unlawful situation, an obligation consistent with article 30 on cessation and reinforced by the peremptory character of the norm in question."

93. Mr. CRAWFORD (Special Rapporteur) said that the Commission was faced with two separate questions: first, whether to retain existing paragraph (9) and, second, whether to adopt Mr. Pellet's suggestion, which might be temporarily termed paragraph 9 (*a*). The two dealt with different situations. He would prefer, on balance, to retain paragraph (9), for there had been attempts to institutionalize a situation by the recognition of it by the responsible State; it was not a purely abstract or academic situation, although admittedly it could be a matter of some delicacy. As for paragraph 9 (*a*), he had no difficulty in accepting the substance. It dealt with an issue raised by article 45, which it had been possible to avoid in the earlier context raised by Mr. Economides, in that, whereas chapter II was not at all concerned with *ex post facto* conduct, chapter III was. His only doubt about paragraph 9 (*a*) was whether it would be acceptable to States. Such issues might well be better dealt with in the framework of article 45. It was, in fact, a question of expediency. If the Commission decided to accept paragraph 9 (*a*), he would, of course, reword both paragraphs to ensure that there was no repetition.

94. Mr. ECONOMIDES said he was in favour of keeping paragraph (9), which dealt appropriately with the question of the responsible State: the obligation of non-recognition applied to all States, including the responsible State, for reasons that had been explained.

95. He was also in favour of adopting paragraph 9 (*a*), which dealt with the injured State. The proposal was, indeed, similar to the proposal he had made (2704th meeting), although he did not know whether it should rightly be considered in the framework of article 41 or article 45.

96. Mr. PELLET said he was not in sympathy with Mr. Economides's position. To take a concrete example, Iraq had invaded Kuwait, yet, according to paragraph (9), Kuwait could not recognize the situation arising from its invasion. That was true, but it led nowhere and intellectually was most unsatisfactory. Moreover, it detracted from the specificity of serious obligations. He would therefore prefer to delete existing paragraph (9) altogether and replace it with paragraph 9 (*a*).

97. Mr. KAMTO said he was for both paragraphs. Paragraph (9) described a situation that was not merely hypothetical, whether the breaches involved were serious or not. It was, indeed, possible for an invasion to be carried out under the control of another State; and the latter would also be covered by article 40. Paragraph 9 (*a*) was also useful, since article 41, paragraph 2, stated that "No State shall recognize as lawful a situation created by a serious breach . . . ". Hence there was no need to refer to article 45. He considered, however, that to make a distinction, as in paragraph 9 (*a*), between serious and non-serious breaches would be misleading.

98. Mr. MELESCANU said that the important element of a peremptory norm was that no State could recognize the situation as lawful; paragraph (9) was therefore necessary. Nevertheless, he was also in favour of paragraph 9 (*a*): as Mr. Economides had said in relation to the chapter on circumstances precluding wrongfulness, it was possible for the injured State to accept the breach, whereas in the case of peremptory norms it must be clearly stated that such acceptance was not possible. A cross-reference to article 45 should be included.

99. Mr. PELLET said he was willing to retain paragraph (9), but there should be an indication, at least in a footnote, that the provision also applied to ordinary breaches. Otherwise, a surreal situation would be created in which a responsible State could never recognize a situation arising from its own breach.

100. Mr. CRAWFORD (Special Rapporteur) said that, if the Commission decided to introduce paragraph 9 (*a*), it would further need to decide whether it should appear in the framework of article 41 or whether there should be a cross-reference to article 45, which dealt with the loss of the right to invoke responsibility and the corollaries thereto. Obviously, if the injured State, in situations covered by chapter III, validly rectified a situation, for example by entering into a comprehensive peace agreement, the rest of the world was no longer under an obligation of non-recognition. The matter could therefore be dealt with under article 45.

101. Mr. ROSENSTOCK suggested that, from a drafting standpoint, the matter was best dealt with by having a *chapeau* for article 9, followed by two subparagraphs.

102. The CHAIRMAN said that it should be left to the Special Rapporteur to redraft the text of paragraph (9).

It was so agreed.

Paragraph (10)

103. Mr. PELLET said, in relation to the first sentence, that it would be more accurate to say that the consequences of the obligation of non-recognition were not unqualified.

104. Mr. ROSENSTOCK said the thrust of the paragraph was the fact that it was possible to recognize a State's activities, even if an occupation was illegal. The quotation in the paragraph established that the recognition was not of a lawful but of a factual nature, giving rise to certain consequences such as the legitimacy of

children, of marriage or of private property transactions. The paragraph must be retained; otherwise, great injustice could be done.

105. Mr. CRAWFORD (Special Rapporteur) concurred. He suggested that the words "as lawful" should be inserted after the word "recognized" in the second sentence.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (14)

Paragraphs (11) to (14) were adopted.

106. Mr. CRAWFORD (Special Rapporteur) expressed his gratitude for the patience that members of the Commission had shown in dealing with extremely difficult material.

The meeting rose at 5.50 p.m.

2706th MEETING

Wednesday, 8 August 2001, at 10 a.m.

Chairman: Mr. Peter KABATSI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-third session (*continued*)

CHAPTER V. *State responsibility* (continued) (A/CN.4/L.608 and Corr.1 and Add.1 and Corr.1 and Add.2–10)

E. Text of the draft articles on responsibility of States for internationally wrongful acts (*continued*) (A/CN.4/L.608/Add.1 and Corr.1 and Add.2–10)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)

PART THREE. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

Commentary to Part Three (A/CN.4/L.608/Add.6)

1. Mr. KAMTO said that the word "secondary" in the first sentence should be deleted, as had been done in other paragraphs of the commentaries. If the word "another" in the second sentence was to have any meaning, the word "State" should be added before the word "responsibility".

The commentary to Part Three, as amended, was adopted.

CHAPTER I. INVOCATION OF THE RESPONSIBILITY OF A STATE

Commentary to chapter I

Paragraph (1)

2. Mr. SIMMA said that, as had been done in other paragraphs of the commentaries, the words "State or entity" should be replaced by the words "State, person or entity".

3. Mr. CANDIOTI said that, at the end of the last sentence, the words "article 34" should be replaced by the words "article 33".

Paragraph (1), as amended, was adopted.

Paragraph (2)

4. Mr. KAMTO proposed that the words "and which should be considered as injured thereby" at the end of the second sentence should be deleted.

5. Mr. ECONOMIDES said that the beginning of the fourth sentence was wrong because the draft articles covered all international obligations which were not governed by special provisions.

6. Mr. CRAWFORD (Special Rapporteur) said that the comment by Mr. Economides applied only to the French text and that the secretariat would make the necessary correction.

Paragraph (2), as amended, was adopted.

Paragraph (3)

7. Mr. GAJA said he wondered whether the word "injured" should not be added before the word "State" in the last sentence.

8. Mr. ROSENSTOCK said that, if that were done, the impression would be given that there could be cases where an injured State was not entitled to invoke responsibility.

9. Mr. CRAWFORD (Special Rapporteur) said that it was better to delete the last sentence.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.