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Summary record of the 2706th meeting

Topic:
State responsibility

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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.

Paragraph (5)

10. Mr. SIMMA, referring to the second sentence, said that, in addition to primary rules, reference should also be made to *lex specialis* rules, which could be of a secondary nature.

11. Mr. CRAWFORD (Special Rapporteur) proposed that the words “The primary rules” should be deleted and the words “special rules” inserted before “may also determine”.

Paragraph (5), as amended, was adopted.

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

Commentary to article 42 (Invocation of responsibility by an injured State)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

12. Mr. PELLET said that the first sentence, which was awkward and not very clear, should be amended to read: “This chapter is expressed in terms of the invocation by a State of the responsibility of another State.” At the end of the fifth sentence the word “specific” should be added before the word “title”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

13. Mr. PAMBOU-TCHIVOUNDA said that the beginning of the fourth sentence, up to the comma, was not at all clear. He proposed that it should be amended to read *La situation d'un État lésé doit être distinguée de celle qui confère à tout État le droit d'invoquer la responsabilité d'un autre État.*

14. Mr. CRAWFORD (Special Rapporteur) proposed that the fourth sentence should be placed in square brackets until the English text of Mr. Pambou-Tchivounda's proposal had been prepared.

It was so agreed.

Paragraph (4)

Paragraph (4) was adopted.

Paragraph (5)

15. Mr. GALICKI said that the word “three” in the first sentence should be deleted because more than three cases were envisaged in article 60.

Paragraph (5), as amended, was adopted.

Paragraphs (6) to (10)

Paragraphs (6) to (10) were adopted.

Paragraph (11)

16. Mr. PELLET said that, in order to avoid any ambiguity, the words “of a functional character” should be added at the end of the paragraph.

Paragraph (11), as amended, was adopted.

Paragraph (12)

17. Mr. GAJA said that, as in other paragraphs of the commentaries, the words “States parties to the obligation” at the end of the paragraph should be replaced by the words “States to which the obligation is owed”.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

18. Mr. PAMBOU-TCHIVOUNDA proposed that, in the French text of the fourth sentence, the word *vif* should be replaced by the word *réel*.

Paragraph (14), as amended in the French text, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Commentary to article 43 (Notice of claim by an injured State)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

19. Mr. ECONOMIDES said that the words “extinctive prescription” towards the end of the paragraph were awkward because they implied that there was a time limit for prescription.

20. Mr. CRAWFORD (Special Rapporteur) proposed that those words should be replaced by the word “acquiescence”, which was used in article 45.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

21. Mr. PELLET said that he absolutely did not understand the last sentence.

22. Mr. CRAWFORD (Special Rapporteur) said that that sentence was indeed quite obscure and that it could be deleted without any harm.

Paragraph (4), as amended, was adopted.

Paragraph (5)

23. Mr. PELLET said that, in the fourth sentence of the French text, it would be better, for the sake of accuracy, to replace the words *il n'appartient pas à l'État lésé* by the words *l'État lésé n'est pas tenu*.

Paragraph (5), as amended in the French text, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

24. Mr. PELLET said that, in the second sentence, the word “should” should be replaced by the word “may”.

Paragraph (7), as amended, was adopted.

The commentary to article 43, as amended, was adopted.

Commentary to article 44 (Admissibility of claims)

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

The commentary to article 44 was adopted.

Commentary to article 45 (Loss of the right to invoke responsibility)

Paragraph (1)

25. Mr. GALICKI said that the Commission did not usually quote the text of articles of the 1969 and 1986 Vienna Conventions *in extenso*. He therefore proposed that the footnote should be deleted.

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

26. Mr. ECONOMIDES proposed that the following sentence should be added at the end of paragraph (4): “In any case, in the event of a serious breach of a peremptory norm, a State cannot unilaterally waive the right to invoke responsibility until the matter has been settled in accordance with international law.”

27. Mr. CRAWFORD (Special Rapporteur), supported by Mr. TOMKA (Chairman of the Drafting Committee), said that he had no objection, provided that that wording did not impose an obligation on the State. He would draft an addition to the paragraph to meet the concern expressed by Mr. Economides.

It was so agreed.

Paragraphs (5) to (10)

Paragraphs (5) to (10) were adopted.

Paragraph (11)

28. Mr. ECONOMIDES said that the first sentence should be simplified.

29. Mr. PELLET proposed that in the French text the word *réputée* should be deleted and that a term other than *défavorisé* should be used.

30. Mr. BROWNLIE said that the principle was composed of two elements: implied consent on grounds of delay and the fact that the respondent State had been disadvantaged.

31. Mr. CRAWFORD (Special Rapporteur) said that he would redraft the sentence.

It was so agreed.

Commentary to article 46 (Plurality of injured States)

Paragraphs (1) and (2)

32. Mr. SIMMA, supported by Mr. PELLET, said that the commentary was a bit sketchy. It would be better to add just one sentence relating to a plurality of injured States.

33. Mr. CRAWFORD (Special Rapporteur) said that there were not many examples of that case, but he would try to add a new paragraph to the commentary to article 46.

It was so agreed.

34. Mr. GAJA proposed that, in the second sentence of paragraph (2), the words “all the States parties to an interdependent obligation” should be replaced by the words

“all the States to which an interdependent obligation is owed”.

Paragraphs (1) and (2), as amended, were adopted.

Commentary to article 47 (Plurality of responsible States)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

35. Mr. LUKASHUK said he was not sure what was meant by the words “attributable to it” in the third sentence. Did they mean that a State was responsible to the extent to which its conduct was unlawful?

36. Mr. CRAWFORD (Special Rapporteur) said that article 2 was the reference. He therefore proposed that the words “in the sense of article 2” should be added at the end of the sentence.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (10)

Paragraphs (4) to (10) were adopted.

The commentary to article 47, as amended, was adopted.

Commentary to article 48 (Invocation of responsibility by a State other than an injured State)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

37. Mr. Sreenivasa RAO said that the first sentence should be redrafted because the words “international law accepts” seemed to indicate that the case in question was exceptional.

38. Mr. PELLET proposed that “international law accepts the invocation of responsibility of States” should be amended to read: “responsibility may be invoked by States”.

39. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Pellet’s proposal.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

40. Mr. PAMBOU-TCHIVOUNDA proposed that, at the beginning of the French text of the first sentence, the words *parole de* should be replaced by the word *visé*.

Paragraph (4), as amended in the French text, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Paragraph (6)

41. Mr. GALICKI proposed that the wording of paragraph (6) should be brought into line with that of article 48 and that, at the end of the first sentence, the words “of the group” should be added after the words “collective interest”.

42. Mr. KAMTO said that the second part of the penultimate sentence should be simplified and amended to read: “may derive from multilateral treaties or general or regional customary international law”.

43. Mr. Sreenivasa RAO said that the distinction drawn by the Special Rapporteur was relevant and that it might be better to leave the text as it stood.

44. Mr. LUKASHUK proposed that the problem might be solved by simply saying: “general customary international law”.

45. Mr. SIMMA said that the problem was caused by the word “hence” in the penultimate sentence, which seemed to introduce a list of sources of international law, something that regional customary regimes obviously were not.

46. Mr. CRAWFORD (Special Rapporteur) said that he agreed to the deletion of the word “hence” and proposed that the rest of the sentence should be amended to read: “obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law”.

Paragraph (6), as amended, was adopted.

Paragraph (7)

47. Mr. SIMMA said that human rights should be explicitly referred to in paragraph (7).

48. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Simma’s comment and proposed that the words “or a regional system for the protection of human rights” should be added to the phrase in parentheses at the end of the second sentence.

49. Mr. Sreenivasa RAO said that he would like to know the difference between “a collective interest” and “a group interest”.

50. Mr. PELLET, supported by Mr. BROWNLIE, said that the words “from which article 48 is a deliberate departure” in the last footnote should be deleted.

51. Mr. SIMMA said that he objected to that deletion because it would have the effect of highlighting the questionable decision taken by ICJ in that case. If those words were deleted, it would be better simply to delete the second sentence of the footnote as a whole.

52. Mr. TOMKA (Chairman of the Drafting Committee), supported by Mr. DUGARD, said that the text of the footnote should be retained as it stood.

53. Mr. PELLET said that he would not press for the deletion of the words in question, but requested that his objections should be reflected in the summary record.

54. Mr. Sreenivasa RAO proposed that the third sentence should end after the words “some wider interest” and that the words “and even in matters of universal concern” should be deleted. That would prevent confusion between the concept of “collective interest” and the broader concept of interests of the international community.

55. Mr. SIMMA said that matters of universal concern, such as human rights, could be protected in the context of a group of States. That was the meaning of the phrase in question.

56. Mr. PELLET said that he shared Mr. Sreenivasa Rao’s point of view. Paragraph 1 (a) did not refer to “universal concern”, but paragraph 1 (b) did.

57. Mr. CRAWFORD (Special Rapporteur) said that the only purpose of the sentence was to make it clear that what was involved was not narrow self-interest such as that which might, for example, be invoked in connection with free trade agreements.

58. Mr. SIMMA proposed that account might be taken of Mr. Sreenivasa Rao’s concerns by replacing the words “and even in matters of universal concern” by the words “and even in the general interest”.

59. Mr. CRAWFORD (Special Rapporteur) suggested that that proposal might be adapted to read: “and even in some wider common interest”.

Paragraph (7), as amended by the Special Rapporteur, was adopted.

Paragraphs (8) to (11)

Paragraphs (8) to (11) were adopted.

Paragraph (12)

60. Mr. SIMMA asked the Special Rapporteur what was meant by the word “general” in the sixth sentence and by the words “if it is in being” in the ninth sentence.

61. Mr. CRAWFORD (Special Rapporteur) said that the word “general” should be deleted. The words “if it is in being” referred to Somalia-type situations, in which there was no State government.

62. Mr. PELLET, pointing out that the definition of the term “State” assumed that there was a government, said that the situation referred to by the words in question was covered by the tenth sentence. He therefore proposed that the words “if it is in being”, as well as the word “themselves”, in the tenth sentence, should be deleted.

63. Mr. DUGARD said that he was in favour of retaining the words “if it is in being” and adding a footnote referring to the situation in Somalia.

64. Mr. BROWNLIE, supporting Mr. Pellet’s proposal that the words “if it is in being” should be deleted, stressed that the Commission had to be cautious in referring to examples of current situations.

65. Mr. ROSENSTOCK said that the words in question were useful, provided that the Commission refrained from referring to specific situations.

66. Mr. Sreenivasa RAO said he agreed with Mr. Brownlie that the Commission must be very careful and not say too much, since it knew what it was talking about.

67. Mr. HE said that he was in favour of the deletion of the words “if it is in being”.

68. The CHAIRMAN proposed that the word “general” in the sixth sentence, the words “if it is in being” in the ninth sentence and the word “themselves” in the tenth sentence should be deleted.

It was so agreed.

69. Mr. ECONOMIDES proposed that, in order to use the exact wording of article 30, the words “when necessary” in the first sentence should be replaced by the words “if circumstances so require”.

Paragraph (12), as amended, was adopted.

Paragraphs (13) and (14)

Paragraphs (13) and (14) were adopted.

The commentary to article 48, as amended, was adopted.

CHAPTER II. COUNTERMEASURES

Commentary to chapter II (A/CN.4/L.608/Add.5)

Paragraph (1)

70. Mr. PELLET proposed that, for the sake of clarity, the beginning of the second sentence should be amended to read *En d’autres termes, il traite de mesures qui seraient contraires aux obligations internationales de l’État lésé vis-à-vis de l’État responsable si elles n’étaient prises par le premier en réaction. . . .*

71. Mr. CRAWFORD (Special Rapporteur) said that, in English, that proposal would read: “In other words, it deals with measures which would otherwise be contrary

to the international obligations of an injured State *vis-à-vis* the responsible State. They were not taken . . . ”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

72. Mr. ROSENSTOCK proposed that the third sentence should be deleted because, although it was obvious that countermeasures were liable to abuse, it was not certain that they were more liable to abuse by powerful States and the sentence was therefore inappropriate.

73. Mr. SIMMA, supported by Mr. BROWNLIE, said that he could agree to the deletion of the words “Like other forms of self-help”, but he would like the rest of the sentence to be retained because inequalities between States were a fact of life, particularly in the economic sphere.

74. Mr. GOCO, Mr. KATEKA, Mr. LUKASHUK, Mr. PAMBOU-TCHIVOUNDA and Mr. Sreenivasa RAO said that, in view of the importance of the third sentence, they were not in favour of its deletion.

Paragraph (2) was adopted.

Paragraph (3)

75. Mr. SIMMA, said that the ninth sentence, beginning with the words “Questions concerning the use of force” gave the impression that there were rules governing the use of force outside of the Charter of the United Nations. The tenth sentence referred to countermeasures as defined in article 23, but it was in fact article 49 which defined countermeasures.

76. Mr. PELLET proposed that, in the tenth sentence, the word “properly” should be deleted because it implied that the other articles dealing with countermeasures did not do so properly.

77. Mr. CRAWFORD (Special Rapporteur) proposed that the words “contrary to the Charter” in the ninth sentence and the word “properly” in the tenth sentence should be deleted and that the word “defined” in the tenth sentence should be replaced by the words “referred to”.

Paragraph (3), as amended, was adopted.

Paragraph (4)

78. Mr. PELLET said that the footnote should also refer to the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case, in which the Court clearly distinguished between the law of treaties and the law of responsibility. In the last sentence of the French text, the word *provisoires* should be replaced by the word *temporaires* and that substitution should be made systematically in the other articles.

Paragraph (4) was adopted with the correction to the French text.

Paragraph (5)

79. Mr. PELLET proposed that the fifth sentence should be amended to read: “First, for some obligations, e.g. those relating to the protection of human rights, reciprocal reactions are hardly conceivable, since the obligations in question are themselves of a non-reciprocal nature and are owed not to another State, but to individuals.” The sixth sentence should be deleted.

80. Mr. SIMMA proposed that the sixth sentence should be retained and amended to read: “These obligations are owed not only to States, but also to individuals.”

81. Mr. CRAWFORD (Special Rapporteur) suggested that those two proposals should be placed in square brackets and that the Commission should come back to them later.

82. Mr. ECONOMIDES proposed that the tenth sentence should be deleted because he did not see why an injured State would be “descending” by taking reciprocal countermeasures and not “descending” by taking countermeasures other than reciprocal ones. He also proposed that the penultimate sentence should be deleted and that the beginning of the last sentence should be amended to read: “However, reciprocal countermeasures are more likely . . . ”.

83. Mr. CRAWFORD (Special Rapporteur) said that, in his view, the tenth sentence was correct and useful because, if reciprocal countermeasures were the only kind of countermeasures that could be taken, the more serious outrages there were, the more countermeasures there would be. He would, however, not object to the deletion of that sentence. In general, he did not want to rewrite the commentary on countermeasures, on which a great deal of work had been done.

84. Mr. Sreenivasa RAO said that a great deal of effort had indeed gone into the preparation of that commentary and that it would better simply to make minor changes to it.

85. Mr. SIMMA said that it was not fair simply to brush off the problems raised by the members who had not taken part, or who had not been allowed to take part, in the work of the Working Group on the commentaries to the draft articles on State responsibility chaired by Mr. Mellescanu, as was his case. If the tenth sentence was deleted, however, the word “reciprocal” should be added before the word “measures” in the ninth sentence.

86. Mr. PELLET said that, in his view, that sentence should be retained. The word *valoriser* should be replaced by the word *encourager* and the words *à s'abaisser* should be deleted.

87. Mr. CRAWFORD (Special Rapporteur) said that, in the commentary on countermeasures, he had tried to establish a reasonable balance between a wide variety of opinions and he urged the members to be tolerant. He himself was prepared to consider any proposed change. For example, he could agree that the sentence in question should be deleted and that the word “reciprocal” should be added before the word “measures” in the ninth sentence. However, he did not see the need to amend the last

sentence. He stressed that paragraph (5) was intended to indicate that countermeasures must not be limited to reciprocal countermeasures, but that the latter were more likely to satisfy the requirements of necessity and proportionality.

88. The CHAIRMAN proposed that the adoption of paragraph (5) should be postponed until the Special Rapporteur had taken a decision on the two proposals placed in square brackets.

It was so agreed.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

89. Mr. PAMBOU-TCHIVOUNDA proposed that the first sentence should be amended to read: “This chapter also deals to some extent with the conditions of the implementation of countermeasures.” He also proposed that the second, third and fourth sentences should be deleted because they had nothing to do with countermeasures and should be moved to the beginning of the commentary in the general introduction to the draft articles.

90. Mr. SIMMA said that, in the second sentence, the words “the articles cannot themselves establish” should at least be replaced by the words “it is not opportune for the articles to establish”, but he would also not object to the deletion of the second and third sentences.

91. Mr. CRAWFORD (Special Rapporteur) said he agreed that the second sentence was badly drafted and might be confusing. The idea had been to reflect, in a balanced manner, the various opinions on the question of the link between countermeasures and the settlement of disputes. In the context of draft articles which would not take the form of a treaty, such a link could apparently not be established. It would be up to States to decide what provisions were to be drafted on the settlement of disputes. He nevertheless accepted the deletion of the second, third and fourth sentences and the amendment of the first sentence.

Paragraph (7), as amended, was adopted.

Paragraph (8)

92. Mr. GALICKI proposed that the words “in the interests of the victims” at the end of the paragraph should be replaced by the words “in the interest of the injured State or the beneficiaries of the obligation breached”, in accordance with the wording of article 54.

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Commentary to article 49 (Object and limits of countermeasures)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

93. Mr. PELLET said that there was no need in paragraph (4) to refer to the continuity of the wrongful act and proposed that the first sentence should be amended. The words “obligations of reparation” should read “obligations of cessation and reparation”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

94. Mr. KAMTO proposed that the first sentence should be amended to read: “In some cases, however, countermeasures may . . .”. The words between dashes in the third sentence and the last sentence should also be deleted.

95. Mr. PELLET said he was also of the opinion that the words between dashes should be deleted because the right of transit was an obligation *erga omnes* that was independent of any special agreement. It was thus not a relevant example.

96. Mr. CRAWFORD (Special Rapporteur) said that the double negative in the first sentence should be retained and that the last sentence should be retained as well so that the paragraph would be balanced. He did, however, accept the deletion of the words between dashes.

97. Mr. Sreenivasa RAO said that, although the indirect or secondary effects of countermeasures on the position of third States could not be avoided altogether, it would be interesting to know what the rights of those States were because they were just as important as the rights of other States.

98. Mr. CRAWFORD (Special Rapporteur) said that the Commission could not provide that a State which had taken countermeasures had an obligation to compensate a third State which had indirectly suffered the effects thereof because that would be contrary to the content of the draft articles. The question was not one of rights, but of the consequences of countermeasures. All the Commission could do was to indicate that countermeasures had to be taken in such a way as to affect third parties as little as possible.

99. Mr. SIMMA proposed that the footnote should be deleted because it might imply that Article 50 of the Charter of the United Nations allowed for the possibility referred to in the sentence to which the footnote referred.

100. Mr. ECONOMIDES pointed out that the indirect or secondary effects in question were in fact collateral effects and he therefore proposed that the word “secondary” be replaced by “collateral” because it was more appropriate.

Paragraph (5), as amended by Mr. Simma and Mr. Economides, was adopted subject to the deletion of the words between dashes.

The meeting rose at 1.05 p.m.

2707th MEETING

Wednesday, 8 August 2001, at 3.20 p.m.

Chairman: Mr. Peter KABATSI

later: Mr. Gerhard HAFNER

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kamto, Mr. Kateka, 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 THREE. THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE (*continued*)

CHAPTER II. COUNTERMEASURES (*continued*)

Commentary to article 49 (Object and limits of countermeasures) (concluded) (A/CN.4/L.608/Add.5)

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

1. Mr. LUKASHUK said that it was quite possible for a State to apply for satisfaction, even after obtaining compensation, in cases where its honour, for example, was affected. He therefore suggested that the last sentence should be deleted.

2. Mr. CRAWFORD (Special Rapporteur) said that the commentary addressed the issue discussed in the Drafting Committee, which was whether countermeasures would be available in order to insist on satisfaction in situations in which there was no continuing wrongful act and compensation had been obtained or, at least, tendered. The view had been taken that, although satisfaction had certain special features, it should not be excluded as a matter in relation to which countermeasures might in theory be demanded. He was not opposed to a deletion, but, in that case, the last three sentences should be deleted. The last sentence could not be deleted on its own, since it provided the necessary balance with the penultimate sentence by specifying that countermeasures could be taken only in specific cases where the demand was proportionate.

3. Mr. BROWNLIE said that he was among those who thought the sentence should be retained, since it had been an issue during the discussion. It would be wrong for the Commission to proceed on the principle that material should be deleted because one member felt strongly and the rest stayed silent.

4. Mr. GAJA said that reference should be made to assurances and guarantees of non-repetition. It was not that countermeasures should be allowed in those circumstances, but the commentary should not pass over the matter in silence. He therefore suggested that the following sentence should be inserted, possibly after the second sentence: “However, countermeasures are unlikely to be appropriate in order to obtain assurances and guarantees of non-repetition.”

5. Mr. CRAWFORD (Special Rapporteur) said that such assurances and guarantees had features in common with satisfaction. In both cases, they were supplementary and not always applicable, and in ordinary circumstances it was difficult to conceive that countermeasures would be taken, but the issue was adequately dealt with by the notion of proportionality. He therefore suggested adding a footnote, saying that the same considerations applied to assurances and guarantees of non-repetition.

6. Mr. KAMTO said that, inasmuch as satisfaction was always symbolic, being psychological rather than material, he saw no point in retaining the word “symbolic” in the penultimate sentence. As for the difficulty over the last sentence, a solution might be to replace the phrase “is adequately addressed” by “may be adequately addressed”.

Mr. Hafner, Vice-Chairman, took the Chair.