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Summary record of the 2600th meeting

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2600th MEETING

Friday, 9 July 1999, at 10.10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Yamada.

State responsibility¹ (continued) (A/CN.4/492,² A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,³ A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of chapter I, section D (Countermeasures as provided for in part one, chapter V and part two, chapter III), of the second report of the Special Rapporteur on State responsibility (A/CN.4/498 and Add.1-4), which had been provisionally issued as document ILC(LI)/CRD.1.

2. Mr. ROSENSTOCK said that he was grateful to the Special Rapporteur for drafting such a remarkably clear survey of the very complex issue of countermeasures and that he endorsed many of the conclusions in chapter I, section D. For example, he agreed with the Special Rapporteur and Mr. Tomka that part three (Settlement of disputes) of the draft articles and its linkage to countermeasures were untenable in various respects. Part three had been included as a token of goodwill and because it had been thought that countermeasures constituted a response to the imperfect nature of the international legal order, as demonstrated in particular by the lack of settlement machinery, and that it was therefore necessary to tie countermeasures to their *raison d'être*.

3. He also agreed with the Special Rapporteur that the institution of countermeasures existed in international law, as had been reflected in the Commission's decision to retain article 30 (Countermeasures in respect of an internationally wrongful act)⁴ and in some pronouncements of

ICJ. In that respect, he basically agreed with the Special Rapporteur's analysis and summary of the views expressed by the Court in the case concerning the *Gabčíkovo-Nagymaros Project*. There were nevertheless some limits to the conclusions which might be drawn from the lack of any reference to specific articles in a given area.

4. Moreover, like the Special Rapporteur, he thought that articles 47 to 50, as they stood, were fatally flawed. In that respect, it was debatable whether the heroic efforts to save them after the careful results of the Drafting Committee had been wrecked had been well advised or whether it would not have been better to let them founder, instead of trying to salvage what was beyond the point of rescue.

5. He did not wholly agree with the Special Rapporteur's conclusion that the case concerning the *Air Service Agreement of 27 March 1946* and the dictum contained therein did not reflect international law.

6. It was premature to think about the amendment of article 30, as it was first necessary to gain a better understanding of what was possible as far as part two of the draft articles was concerned. In that connection, the Special Rapporteur correctly set out the options available to the Commission. He himself had no substantive objections to option 4 contained in the general conclusions to chapter I, section D, preferred by the Special Rapporteur,⁵ and he was ready to give it a try in all good faith, but he hoped that, in exchange, others would be prudent enough not to denigrate options 1 and 2, if the Special Rapporteur's optimism about option 4 were to prove ill-founded.

7. It had been stated on several occasions during the debate that countermeasures were of greater use to the Governments of the most powerful States than to others. In truth, all measures were more effective in the hands of the strong, but they had many other means of exerting pressure, such as measures of retortion or the denial of technical assistance, before turning to countermeasures. In reality, countermeasures were most useful to medium-sized Powers in particular circumstances.

8. Other material in chapter I, section D, could and would be criticized at the appropriate moment; silence did not signify approval. The important point at the current stage was that the Special Rapporteur had fulfilled his responsibilities superbly and had provided the Commission with a sound basis for seeking a generally acceptable solution to the issue of countermeasures. The earlier the Commission started an informal examination of articles 47 to 50, the earlier it would perceive realistically what options were feasible and how they could be achieved. If option 4 could be made to work, so much the better, if not, the others would still be open.

9. Mr. LUKASHUK said that he generally endorsed chapter I, section D, which was plainly the excellent result of very painstaking work. The answer to the question whether a regime of countermeasures should be included in the draft articles depended on the Commission's reply to another question: did it want to make international law

¹ For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

² Reproduced in *Yearbook ... 1999*, vol. II (Part One).

³ *Ibid.*

⁴ See 2590th meeting, para. 39.

⁵ See 2599th meeting, para. 90.

more effective and countermeasures less arbitrary? He thought that, since countermeasures were a very powerful means of action, they should be regulated precisely and their use strictly limited. In the comments and observations received from Governments (A/CN.4/492),⁶ Governments had expressed anxieties on that score, as they thought that the establishment of rules would open the door to abuses of countermeasures. It was, however, the very absence of rules and regulations which made the abuse of countermeasures possible. Moreover, it was not by chance that the fiercest opponents of such a regime were the Governments which frequently used countermeasures.

10. The work on the topic had led to new terminology that he found inappropriate. One now spoke of primary rules and secondary rules in referring to what were normally called substantive rules and procedural rules. For him, the definition of a regime of countermeasures was part of the elaboration of international procedural law. Some fields, such as space law and the law of the sea, had their own procedural rules, but international procedural law generally comprised four categories of norms: norms which regulated the implementation, operation and extinction of substantive rules, i.e. primarily the 1969 and 1986 Vienna Conventions; norms governing international responsibility; norms relating to countermeasures; and norms relating to the settlement of disputes. According to the articles which had been adopted by the Commission on first reading, countermeasures were used when a State did not abide by the substantive rules and could be used only after negotiations had taken place. That being so, there was inevitably a connection, both legal and logical, between the rules relating to State responsibility and countermeasures. The draft must regulate the latter, for, if it did not, they were likely to continue to be arbitrary for a long time. That was well understood by those States that, as the Special Rapporteur indicated, regarded countermeasures as an essential issue in the context of the draft articles. Admittedly, some States saw things differently. For example, the Government of the United States of America believed that the intention was to restrict the use of countermeasures unjustifiably and that the Commission should radically review the proposed restrictions.

11. The question of the settlement of disputes was closely linked to that of responsibility. The difficulty arose from the fact that the drafting of rules on the subject gave rise to problems that were at once political and legal. Thus, in order for provisions on the settlement of disputes to have any real meaning, they had to appear in a convention. The drafting of a convention would take years and, even if the Commission managed to adopt one, there was no knowing if and when the convention in question would enter into force. The international community urgently needed rules on State responsibility, as demonstrated by the fact that ICJ had referred on several occasions to the draft articles now in preparation. The work had to be completed as rapidly as possible.

12. His feeling was that article 30 should be retained in its own place, for reasons that were both logical and legal. Finally, like the Special Rapporteur, he preferred option 4.

13. Mr. Sreenivasa RAO thanked the Special Rapporteur for his excellent second report, which was all the more remarkable for the complexity of its subject and, in particular, for the clear options he had proposed to the Commission for the continuation of its work. Noting that, in paragraph 363 of the second report, the Special Rapporteur had stated that there was no specific exclusion for conduct implying a breach of the norms of international humanitarian law, he said that it would be wrong to draw the conclusion that countermeasures were not subject to the norms of international humanitarian law. They applied in all cases. The draft articles adopted by the Commission on first reading had not stated that categorically, perhaps because it seemed obvious or because the subject was dealt with elsewhere, but it might be advisable to clarify the point.

14. In paragraph 364 of the second report, the Special Rapporteur gave the impression, in explaining the word "extreme" used in article 50 (Prohibited countermeasures), subparagraph (b), that it was the most important word in that provision. In his opinion, whether the measures were extreme or not, they were prohibited once they purported "to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". Clarifications would be necessary in that regard. Clarifications were also called for in respect of the "obligations of total restraint" mentioned in paragraph 365, particularly in the light of Article 2, paragraph 4, of the Charter of the United Nations.

15. With regard to the settlement of disputes, he did not share the opinion that the articles on that subject adopted on first reading were "fatally flawed". In examining those provisions, it should be borne in mind that countermeasures had been linked to the settlement of disputes in order to take account of the fact that the international community was disorganized. Thus, a powerful State which felt it had been injured could take countermeasures without the need to negotiate or resort to a settlement procedure. To say that the State to which the countermeasures applied had been granted a right in respect of the settlement of disputes which had been denied to the injured State was not exactly correct. The fact that the right had not been conferred on the injured State expressly was not an injustice, but acceptance of the fact that a powerful State which considered itself injured had no recourse to a procedure for settling disputes; nevertheless, if it wished to do so, the draft articles did not prohibit that. In that regard, several members of the Commission had felt that measures such as representations, a request for clarification, negotiations or the use of a dispute settlement procedure should precede countermeasures.

16. The reservations he had always had about the mechanism of countermeasures derived from the fact that its existence constituted an admission that the rule of law had failed and was proof of the absence of higher international institutions, which were the circumstances that obliged a State to take the law into its own justice. It was certainly fully justifiable in theory to establish a regime of countermeasures and to define the circumstances in which it could be used. One could philosophize ad infinitum on that point. However, the system could function only on the assumption that there were no institutions higher than the State itself, which decided unilaterally that

⁶ See 2567th meeting, footnote 5.

it had been wronged—perhaps in the case of a controversial situation on which opinions in the international community were divided. Moreover, it was the relatively powerful States which were particularly able to make use of countermeasures.

17. Under the topic on State responsibility, the Commission was trying to set up a legal system for the international community to regulate inter-State relations, but the main problem was that it could not base a particular regime such as the one it envisaged for countermeasures on the fact that, although the law of responsibility existed, there was no regime to implement it. States themselves had the power to enforce the law, even outside the framework of the international community.

18. International law was constantly evolving in many areas and was as clear as it could get; there was a sufficient amount of exceptions and qualifications for each principle, especially with regard to the use of force. It would be illusory to project the impression that a State could do whatever it wanted to enforce what it called its rights.

19. In conclusion, he said that he would join in the consensus and go along with whatever the Commission chose to do. He was also prepared to accept option 4, contained in the general conclusions to chapter I, section D, but stressed that, if the Commission wanted to fulfil its task of the progressive development of the law, it would have to devote a part of the draft to dispute settlement. Which part would be up to the Special Rapporteur. The new formulation of article 30 was welcome and it could be referred to the Drafting Committee.

20. Mr. KATEKA said that countermeasures were a reality in international practice. Recent and ample jurisprudence quoted by the Special Rapporteur supported his analysis of various distinct elements. In paragraph 383 of the second report, the Special Rapporteur counselled against obscuring the value of the draft articles as a first attempt to formulate the international law rules governing the practice of countermeasures. The Special Rapporteur seemed to prefer that the fate of countermeasures should be resolved in part two, but the Commission had already agreed that countermeasures had their place in chapter V of part one (Circumstances precluding wrongfulness).

21. Article 30 as proposed by the Special Rapporteur seemed generally acceptable and could be referred to the Drafting Committee.

22. The Special Rapporteur was of the view that the connection between the taking of countermeasures and compulsory arbitration should not be retained. That was why, as he explained in paragraph 387, he preferred option 4. He himself supported option 3, which included such linkage. In that regard, he endorsed the views expressed by Argentina, in the comments and observations received from Governments, that countermeasures and compulsory arbitration should be regarded as two sides of the same coin. The linkage would strike a balance between the interests of the injured State and those of States finding themselves at the receiving end of countermeasures, such States usually being small and vulnerable countries. Hence, the fear that article 58 (Arbitration), paragraph 2, could incite a powerful State to take counter-

measures to force another State to accept recourse to arbitration seemed to be misplaced. Countermeasures could be acceptable when coupled with compulsory dispute settlement. But to link countermeasures and compulsory arbitration, the draft articles would logically have to take the form of a convention.

23. The Commission must try to overcome the obstacles rather than proposing delinkage. It must take up issues such as equality of treatment of the injured State and the wrongdoing State. The same applied to problems arising from collective countermeasures in situations where there were many injured States.

24. Mr. ADDO said he preferred option 4 proposed in paragraph 389 of the second report. Dispute settlement mechanisms were too time-consuming to be linked to a system of countermeasures. They might be subject to abuse through delaying tactics by the target State. Dispute settlement was complex enough. There was surely a need to maintain article 30 within chapter V of part one of the draft and he accepted the new formulation of the article.

25. Mr. KABATSI said he thought that countermeasures could not be wished away. They had become a fact of international life. But it was important that they should be regulated and strictly curtailed by appropriate rules so that the danger of excess was minimized. He endorsed the new formulation of article 30 and considered that it could be referred to the Drafting Committee.

26. As to the options proposed in paragraph 389, he thought the Special Rapporteur was only partly correct in emphasizing that linking countermeasures to dispute settlement was impossible because it would favour one party and not the other. The Special Rapporteur should above all try to remove that imbalance. In his own view, the two mechanisms could go hand in hand. Resort to a compulsory dispute settlement mechanism did not necessarily exclude resort to countermeasures. That was why option 3 was preferable, for it preserved the linkage between countermeasures and compulsory arbitration.

27. Mr. GOCO said that, if the two mechanisms were working together, as Mr. Kabatsi suggested, he wondered what place would be held by conservative measures. Could they not be adopted prior to the settlement of the dispute?

28. Mr. KABATSI said that conservative countermeasures could very well be taken by resort to an arbitration institution. As the Special Rapporteur had recalled, all countermeasures were essentially provisional.

29. Mr. CRAWFORD (Special Rapporteur) said he recognized that there was an imbalance in the fact that the wrongdoing State could require recourse to a dispute settlement mechanism, but not the injured State. Obviously, the latter State could not be required to bring the case to court only if it simultaneously took countermeasures: that would be contrary to the Commission's goal of discouraging the adoption of countermeasures. As pointed out by Mr. Kabatsi, it was necessary to seek equality of treatment between the parties.

30. That argued in favour of setting up a general system of dispute settlement in the framework of the draft on

State responsibility. It implied that the draft articles should probably take the form of a convention. He would be perfectly happy to proceed in that manner and would be delighted if a system of universal jurisdiction was introduced in respect of the wrongful acts of States. That would be a big step forward in the rule of law; whether it was realistic would have to be discussed at the fifty-second session of the Commission.

31. Formally associating the adoption of countermeasures, which was a very difficult technical problem to sort out in an actual case, with the right which would be given to wrongdoing States alone to refer the dispute to a court was a system which could not function: one need only take the example of the *M/V "Saiga"* case.⁷

32. Mr. PELLET said that it was difficult to disagree with the Special Rapporteur when he said that he would review the commentary to the draft articles, delete the link between countermeasures and compulsory dispute settlement, restore the balance between the wrongdoing State and the injured State and ensure that the system of countermeasures was strictly incorporated into a legal framework.

33. The main point was that the example of countermeasures must be raised in the draft articles because it was one aspect of the very notion of State responsibility according to the definition given by a former Special Rapporteur on the topic, Mr. Roberto Ago, in his second report,⁸ i.e. all the consequences of a breach of the law. In fact, the regime being contemplated should be set out in detail because it was part of the topic, just like, for example, the obligation to pay compensation. That requirement was unique to international law, which did not have a higher order and differed in that way from internal law.

34. As pointed out, countermeasures were a fact of modern international life, although they worked to the advantage of the most powerful countries. The Commission could not bury its head in the sand precisely because of that circumstance, which called for a particularly strict regime. In that connection, he did not understand the position of Mexico, in the comments and observations received from Governments, which thought that it must oppose countermeasures, but refused to provide a legal framework for them. The former Special Rapporteur, Mr. Gaetano Arangio-Ruiz, had taken the same position in his fifth report:⁹ countermeasures had to be opposed at all costs. For him the solution had been to introduce complex dispute settlement mechanisms so that States were free to adopt countermeasures, but on the other hand risked finding themselves in court. Mr. Arangio-Ruiz had thought that that should be sufficient, but his reasoning was faulty because a court must have something to rule on, which in the present case was the original wrongful act.

35. The Special Rapporteur was right to want to shift the focus of the topic to the codification of the law and away from the idea of institutions, which had no chance of seeing the light of day, especially since, as indicated by

a number of States quoted in paragraph 376 of the second report, that would cause a real upheaval: forcing States to refer their disputes to a court would be tantamount to making international law a matter for the courts—and that would be both absurd and revolutionary. International law was not based on recourse to a judge and the regime of countermeasures would not change that. As pointed out by the Special Rapporteur, there was a danger of arriving at the paradoxical result of encouraging the adoption of countermeasures: a State would adopt countermeasures against another for the sole purpose of forcing it to appear in court.

36. But if the link between countermeasures and the compulsory settlement of disputes was removed, it would then be necessary to be all the more rigorous in delimiting countermeasures and strengthening the doctrinal foundation on which they were based. The idea of consolidating the applicable rules was not so harmless, as could be seen in the fact that the United States, in the comments and observations received from Governments, considered those rules to be unsupported restrictions. He thought precisely the opposite.

37. On that point, the Commission should not confine itself to codifying international law, but should try to develop it progressively within realistic and reasonable limits. Countermeasures were a fact, but one which must be flanked by very strict rules of law. In that connection, of the possible changes that he suggested to the Special Rapporteur, the most desirable related to the replacement in article 49 (Proportionality), as adopted on first reading, of the negative wording "shall not be out of proportion" by the positive formulation "shall be proportional". It also seemed that the Commission should reconsider, and carefully this time, the balance between the obligation to negotiate and the idea of urgent measures: it was not until the very last minute that the Commission had subordinated the adoption of countermeasures to the idea of negotiations and that, in exchange, for the sake of realism, the possibility of urgent measures had been considered because, in some cases, there was not enough time to negotiate and the damage might well be irreparable. Although he recognized that that was a rough-and-ready result, it was necessary to continue in that direction and he trusted that the Special Rapporteur would consider the outline adopted on first reading in greater depth so as to define urgent measures and their limits.

38. On the whole, he agreed with the Special Rapporteur. Of the options which the Special Rapporteur proposed, he preferred option 4 by far, option 3 being the worst. However, he disagreed with the Special Rapporteur on a number of points which were not all questions of detail, but which he would merely draw attention to at the current time.

39. First, on a rather theoretical point, he did not share the Special Rapporteur's view when he said in paragraph 383 that countermeasures were not limited to reciprocal measures in relation to the same or a related obligation, and that enabled a clearer distinction to be drawn between countermeasures and the application of the *exceptio inadimpleti contractus*. He was convinced that the opposite was the case. All that could be said was that reciprocal measures were a particular category of counter-

⁷ See 2599th meeting, footnote 12.

⁸ See *Yearbook ... 1970*, vol. II, document A/CN.4/233, p. 185, para. 25.

⁹ See *Yearbook ... 1993*, vol. II (Part One), p. 1, document A/CN.4/453 and Add.1-3.

measures. On that point, he thought that there was a disagreement on legal thinking between himself and the Special Rapporteur; the fact remained that he did not understand the Special Rapporteur's position on *exceptio inadimpleti contractus*. Secondly, the problem of urgent measures had by no means been resolved by the assertion at the end of paragraph 386 that the injured State must at least have called on the wrongdoing State to comply with the relevant primary rule or to offer a reparation. Lastly, and above all, he thought that it would be impossible for the Commission to settle the problem of countermeasures without dealing with that of crimes because, if there was an area in which the consequences of simple offences were different from the consequences of crimes, it was that of countermeasures. Reactions to an obvious crime, such as genocide, were unlikely to be the same as to the violation of a trade agreement and the problem was whether countermeasures should not be classified as a function of the seriousness of the act. There was a similar problem with regard to the violation of obligations *erga omnes* and norms of *jus cogens*. As long as the Commission was not clear on those problems, it would be impossible and unrealistic to want to adopt a complete system on countermeasures and he would firmly oppose doing so.

40. In conclusion and subject to the inclusion in paragraph 381 of the change suggested by Mr. Tomka, namely, that it was the implementation of Variant C that constituted an internationally wrongful act, he paid tribute to the Special Rapporteur's objectivity in reporting on the case concerning the *Gabčíkovo-Nagymaros Project*.

41. Mr. YAMADA said that the provisions on countermeasures were needed in part two of the draft. Reserving the right to take the floor in the debate at the fifty-second session of the Commission, he simply said that the existence of countermeasures was a fact and that spelling out the limits and procedural conditions applicable to the adoption of countermeasures would contribute to the stability of international relations. However, in his opinion the linkage established in article 58, paragraph 2, as adopted on first reading, between the taking of countermeasures and compulsory arbitration created an imbalance between the wrongdoing State and the injured State and he supported removing the link between the two. But if the Commission decided to retain part three on dispute settlement, the latter should not cover disputes arising out of countermeasures.

42. Accordingly, he endorsed option 4 proposed in paragraph 389 and hoped that the Special Rapporteur would prepare his third report on the basis of that option. As it had been decided in the Commission that countermeasures constituted a circumstance precluding wrongfulness, he supported referring article 30 set out in paragraph 392 to the Drafting Committee.

43. Mr. GAJA said that, by comparison with the text of article 30 adopted on first reading, the text proposed by the Special Rapporteur in paragraph 392 involved only a number of drafting changes. Both texts clearly presupposed that the substantive and procedural conditions to which the lawfulness of countermeasures was subordinated were spelled out in another part of the draft articles. That was made explicit in the proposed text, which referred expressly to draft articles that had not yet been

written or numbered. Although he had no objection to the text or the changes proposed, there was little point in referring the text to the Drafting Committee because the question was not so much whether article 30 in square brackets should be replaced by another article 30 in square brackets, but, rather, whether the question of countermeasures could be separated from that of the settlement of disputes. The Special Rapporteur had made a convincing case in criticizing the way in which a linkage had been established between countermeasures and dispute settlement in the draft articles adopted on first reading. Part three seemed to be problematic in a number of respects and it was obvious that it would be necessary to go back to it. Hence, the sole point that the Commission should perhaps settle at the current time, to put the Special Rapporteur's mind at rest, was to say that that linkage was not necessary, but that it was important to consider the general problem of dispute settlement in the area of international responsibility.

44. He shared the view that countermeasures were an essential part of the law of State responsibility, but had doubts about the desirability of regulating them in part two of the draft. Countermeasures were not necessarily to be regarded as one aspect of the "content, forms and degrees of international responsibility", to cite the heading of part two of the draft adopted on first reading. It also emerged from article 47 (Countermeasures by an injured State) adopted on first reading, as well as paragraph 87 of the judgment of ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*, that countermeasures were an instrument which the injured State could employ to obtain cessation of the wrongful act or reparation. Thus, the possibility of taking countermeasures should not be regarded as a consequence of a wrongful act in the same category as reparation or cessation. Rather, they were an instrument which, as pointed out by Mr. Lukashuk, States could use to ensure compliance with an international obligation on the part of another State. In other words, countermeasures were related to the implementation of international responsibility, although they could also incidentally affect compliance with primary obligations if cessation was viewed as only one aspect of compliance with primary obligations. Countermeasures had been given a prominent place in part two of the draft articles adopted on first reading in part because some members of the Commission and some of the Special Rapporteurs had thought that countermeasures were a sort of sanction, i.e. when a wrongful act was committed, on the one hand, there was the possibility of claiming reparation and, on the other, the possibility of inflicting sanctions which, in a society as unorganized as international society, would be imposed individually by States. All those considerations led him to doubt whether countermeasures should be dealt with in part two of the draft; it would be better to deal with them in part two bis, which could include admissibility of claims, countermeasures and collective measures.

45. Mr. HAFNER said that, in order to avoid an endless debate on matters affecting the essence and efficiency of international law, he would focus his statement on the questions raised by the Special Rapporteur, as they related to fundamental issues of international law such as the equality of States and the peaceful settlement of disputes.

46. Taking as his starting point the purpose of countermeasures, which was to induce the wrongdoing State to comply with international law, he entirely shared Mr. Gaja's viewpoint in that respect and therefore supported his proposal that countermeasures should be included in a part two bis as a separate subject. At all events, countermeasures were certainly not a sanction, as had very definitely been confirmed by ICJ in the case concerning the *Gabčíkovo-Nagymaros Project*. Hence there were both substantive and procedural limits to countermeasures. He did not think it advisable to study substantive limits at the current stage and wondered why the Special Rapporteur was tackling them. On the other hand, as far as procedural limitations were concerned, he acknowledged that, despite the best intentions of the Commission, interim measures of protection did not solve the problem because they were not defined and could therefore only be a source of confusion. With regard to the linkage of countermeasures and dispute settlement, he was unable to subscribe to the Special Rapporteur's point of view, as expressed in paragraph 387 of his second report, because, in his opinion, both the State taking countermeasures and the wrongdoing State could always avail themselves of the procedure for the peaceful settlement of disputes. That possibility was not precluded by the draft articles. It would, however, be unacceptable for the taking of countermeasures to be made subject to the exhaustion of dispute settlement procedures, for that would deter States from accepting the compulsory jurisdiction of ICJ, for example, owing to the slowness of the procedure. In his opinion, that was why the Commission had authorized the wrongdoing State to have recourse to the procedure for the peaceful settlement of disputes. Consequently, the real issue in that context was not the right to resort to a procedure for the peaceful settlement of disputes, but the effect of resorting to such a procedure on countermeasures. And in that respect only, there was a loophole or an imbalance in chapter I, section D. On the other hand, if, in pursuance of option 4 proposed by the Special Rapporteur, the Commission avoided the specific linkage between countermeasures and dispute settlement, it should be understood that discussion of that matter was not ruled out.

47. Lastly, the reply to the question whether it was necessary to provide rules on countermeasures in the context of State responsibility might be in the negative, by analogy with the draft articles on self-defence, which merely referred to lawful measures of self-defence, without defining them. There was, however, a basic difference between measures of self-defence and countermeasures in that, on account of their very purpose, countermeasures were closely connected with the issue of State responsibility. It was therefore necessary to include provisions on countermeasures in the draft articles on State responsibility. In conclusion, he thought that option 4 proposed by the Special Rapporteur should be adopted and, despite Mr. Gaja's doubts about article 30, he supported the idea of referring it to the Drafting Committee.

48. Mr. ECONOMIDES pointed out that countermeasures were an archaic institution which reflected the archaic nature of international society in general and international law in particular. Furthermore, it was a rather undemocratic institution which was primarily the prerogative of the great Powers or the strongest States.

Nevertheless, since it was impossible to ignore the existence of that institution, it had to be regulated as rigorously and meticulously as possible.

49. The substantive articles already embodied in part two of the draft were a beginning, but they required careful reconsideration so as to clarify them and, possibly, increase the number of limitations.

50. Dispute settlement was essential in the context of countermeasures, for the latter brought into play difficult concepts and raised essential issues which should not be left to the discretion of the most powerful.

51. With regard to the options set forth in paragraph 389 of the second report, he concurred with other members that there was a lack of balance between options 3 and 4. He was personally in favour of option 3, although he recognized that it was necessary to expand and improve the dispute settlement for which it provided in order to establish a procedure which also covered the injured State and would be satisfactory for all parties concerned. He might be able to accept option 4, on condition that in a separate chapter at the end of the draft articles, provision was made for general dispute settlement machinery.

52. Referring to what Mr. Pellet had said about crimes, he was of the opinion that countermeasures might be an appropriate response to delicts, but that collective rather than individual responses were required for crimes in order to achieve international justice and maintain international order. If the Commission's work on codification and, above all, on progressive development were to remain on course, strict limits had to be set for countermeasures and judicial remedies had to be promoted and sought whenever possible. Lastly, article 30 seemed perfectly acceptable and even ready for inclusion in the set of articles which the Drafting Committee had already studied.

53. Mr. SEPÚLVEDA said that some issues were a matter of concern even, though a great effort had obviously been made to identify problems and propose solutions in chapter I, section D.

54. One matter of concern was that the draft articles could have the effect of turning an act which had been recognized as being wrongful and which was not in conformity with one State's obligation towards another, into a lawful measure. That preclusion of wrongfulness appeared to put a seal of approval on a system of self-help and retortion that conflicted with the modern-day legal system, which was not supposed to leave any legal opportunities open for a scenario of reprisals.

55. Similarly, since the purpose of the Charter of the United Nations was to give the Organization a monopoly on the use of force, including the application of measures of constraint of any kind, especially economic sanctions, the spirit of the Charter would be violated if the adoption of unilateral countermeasures were to be permitted.

56. It was also impossible not to be concerned, as the Special Rapporteur had pointed out, by the de facto inequality implied by countermeasures, since, by definition, it was the most powerful States which were really able to adopt such measures.

57. Nevertheless, the new wording of article 30, as proposed by the Special Rapporteur in paragraph 392, defined countermeasures more restrictively and made the preclusion of the wrongfulness of an act subject to more stringent conditions. The replacement of the word “legitimate” by the word “lawful” was therefore to be welcomed.

58. Bearing in mind the need to strengthen the system for dispute settlement, to which Mr. Economides had also drawn attention, he personally preferred option 3 proposed by the Special Rapporteur, including the idea of curbing or eliminating any abuses resulting from the application of countermeasures by establishing a mechanism to prevent or settle disputes between States. The absence of such a mechanism obviously entailed risks because, without it, there were no means of working towards solutions. That was the conclusion reached by the Special Rapporteur, who emphasized, in paragraph 386 that countermeasures envisaged the normalization of relations through the resolution of the underlying dispute. However, that conclusion did not necessarily hold good, for it was quite possible that such normalization might fail to materialize.

59. In conclusion, very strict conditions had to be laid down for the use of countermeasures in truly critical circumstances and, at the same time, provision had to be made for a dispute settlement regime aimed at guarding against the likelihood of their use or, if such critical circumstances arose, at achieving a satisfactory solution to the application of those desperate measures.

60. Mr. AL-KHASAWNEH said that the question of countermeasures was one of the most important ones that the Commission had had before it at the current session. The decision it would adopt would have lasting effects, not only on the shape of the draft articles but also on the efficacy and the very essence of international law in the coming millennium.

61. Despite the fact that countermeasures were capable of innate discrimination against weaker States, they were a fact of life and had to be taken into account and regulated. Unfortunately, the Commission had still not elaborated substantive rules for their effective regulation. True, it had been decided to create a sophisticated regime for the settlement of disputes, but that could not be done at the expense of the development of substantive rules. One of the areas in which there was a need for such rules was proportionality. Proportionality had rightly been described as a false friend in that it gave the impression that there was an objective yardstick against which to measure the actions and counteractions of States. That was not in fact the case, especially since the Commission had abandoned the suggestion made by a former Special Rapporteur, Mr. Willem Riphagen, to distinguish between two types of reactions: on the one hand and in a limited sense, reciprocities, and, on the other, in a more general sense, countermeasures.¹⁰ There was no lack of references to proportionality in writings on countermeasures, of course, and there were precedents going as far back as the eighteenth century. But in those days, international relations had been much more limited and the proportion-

ality of the action and the reaction could be objectively assessed. In the contemporary world, there were so many reactions totally unrelated to the original act that proportionality had become a highly elastic and confusing concept.

62. He would disagree with Mr. Pellet on the fact that a system for regulating the substantive aspects of countermeasures, on the one hand, and a dispute settlement procedure, on the other, were not mutually exclusive, but mutually supportive. The linkage with an effective dispute settlement procedure was essential for the acceptance of countermeasures. The elasticity of the substantive rules was an additional reason for acceptance of such a procedure, on the understanding, of course, that States accepting to be bound by a treaty should, as a matter of good faith, accept that their conduct with regard to that treaty must be open to compulsory third-party dispute settlement. One might disagree on the details of such a system or on how politically feasible it was, but it was indisputable that there had to be a link between the two subjects. Some writers had argued for doing away altogether with proportionality and for increasing the areas in which the taking of countermeasures was absolutely prohibited. That solution, although drastic, was worth exploring. There was room for improvement of the test of proportionality.

63. Interim measures could still be confused with countermeasures and further improvements could be made in that part of the draft.

64. It had been stated that an analogy between internal law and international law might be false. There was no hierarchy of institutions in international law as there was in internal law. International law was not a static system. It was up to the Commission to make it progress towards the establishment of the rule of law at the international level. Acceptance of countermeasures as a fact of life must be tempered by a certain dose of idealism. As Toynbee had written:

It is a rule—and this rule is inherent in the declines and falls of civilizations—that the demand for codification is greatest at the penultimate stage before some social catastrophe and long after the zenith of the achievements in jurisprudence has past and when the legislators of the day are irretrievably on the run before the forces of destruction.¹¹

It was to be hoped that the Commission could prove that that statement was unduly pessimistic and that it would be able to legislate effectively in that area.

65. Mr. MELESCANU said he favoured option 4 proposed by the Special Rapporteur, which was by far the most acceptable. Countermeasures were a fact of international life and could not be passed over in silence. The Commission must not set itself the goal of solving all the questions relating to the permissible use of force in international relations: it should, rather, confine itself to examining countermeasures from the standpoint of State

¹⁰ See 2590th meeting, footnote 6.

¹¹ A. Toynbee, *A Study of History*, 12 vols. (London, Oxford University Press, 1935-1961).

responsibility or, more precisely, of factors precluding wrongful acts of States.

66. It was not appropriate, however, to link countermeasures with the peaceful settlement of disputes. First, that would complicate the Commission's task, which was to elaborate a set of rules on responsibility. Secondly, if such a hybrid system were created, it might have a deterrent effect and discourage States from becoming parties to the future instrument. Thirdly, such a proposition was of no practical utility. States that did not intend to submit to such a procedure would simply refuse to do so and the matter was accordingly purely theoretical. Like Mr. Pellet, he thought that countermeasures must be very strictly circumscribed in the hopes that a system for the peaceful settlement of disputes would enable States to apply the rules to be formulated by the Commission. The Special Rapporteur should be given guidance on that matter for his future work.

67. Mr. CRAWFORD (Special Rapporteur), summing up the debate, said that even those members—the minority—who had expressed a preference for option 3 had not defended the establishment of a connection between the taking of countermeasures and compulsory dispute settlement. Those who nevertheless favoured close linkage between countermeasures and dispute settlement did so essentially because of the danger of abuse inherent in countermeasures and the need to control it as much as possible.

68. As to the way to proceed, he thought that, first of all, article 30, as proposed in paragraph 392 of his second report, should be referred to the Drafting Committee, which, as Mr. Gaja had proposed, could consider it at the fifty-second session in the context of its discussion of other articles. It would be useful to inform the General Assembly that that draft article had been referred to the Drafting Committee, but that, owing to lack of time, the latter had been unable to discuss it, a situation that now seemed inevitable.

69. At the fifty-second session, the Commission should concentrate on formulating an acceptable version of articles 47 to 50, devoting particular attention to the major problem of collective countermeasures. On that subject, he had been very interested in the argument put forward that countermeasures did not apply in a case of the breach of *erga omnes* obligations and could apply only in the context of bilateral relations between States.

70. He could not, in all conscience, defend the linkage between the taking of countermeasures and dispute settlement, for all the reasons which had been given, and neither did he think that the majority of members would be inclined to do so. At the fifty-second session, the Commission would have to consider the question of the form of the draft articles and that of the dispute settlement mechanism. In that context, he was not suggesting that issues of resort to countermeasures could never be the subject of dispute settlement. Of course they could, and had done so indirectly in the case concerning the *Gabčíkovo-Nagymaros Project*. The existing dispute settlement mechanisms would apply, under their terms of reference, to disputes which had involved resort to countermeasures. To the extent that those mechanisms did

apply, it might be appropriate to qualify the capacity of States to resort to countermeasures, directly or indirectly. It seemed to him that the members who supported those mechanisms, Mr. Kabatsi and Mr. Kateka in particular, were in fact arguing for an extended form of dispute settlement which he himself could support if it was realistic.

71. He was extremely interested in Mr. Gaja's proposal to transfer the articles on countermeasures from part one to part two bis. It was clear that the Commission was in the process of planning, or rather replanning, part three. The question whether there would be a separate provision in the form of a separate part or a protocol dealing with dispute settlement depended above all on the question of the form of the draft articles. On another question, the draft articles lacked a part which it had always been intended that it should contain, relating to the implementation of responsibility. Accordingly, he would give very serious consideration to Mr. Gaja's view that countermeasures should be seen as part of the implementation of responsibility rather than as consequences in the field of reparation in the broad sense.

72. The only way forward was to submit, as Mr. Riphagen had done, a complete text of parts two, two bis and three—if there was to be one—in order to provide the Commission with an overview of the issues. At the next session, he would try to do that, perhaps in the form of an annex rather than in the exploratory form which characterized the greater part of his second report.

73. Mr. ROSENSTOCK said that it would be advisable to refer to the Drafting Committee both article 30 as adopted on first reading and the new formulation proposed by the Special Rapporteur in paragraph 392 of his second report. The problem raised by the Special Rapporteur's proposal was that it prejudged the reply to the question of deciding which of the four options should be discussed by the Commission. Article 30 as adopted on first reading worked whichever of the four options was used, whereas the Special Rapporteur's proposal worked with only some of them.

74. Mr. CRAWFORD (Special Rapporteur) said that he saw no objection, as that had been done with many other articles. The appropriate course would be to refer article 30 as adopted on first reading and his proposal as contained in paragraph 392 to the Drafting Committee, for consideration at the next session in the light of the other provisions on countermeasures elicited from the third report and the debate on the issue.

75. The CHAIRMAN said he took it that the Commission wished to refer article 30, as adopted on first reading, together with the new formulation proposed by the Special Rapporteur, to the Drafting Committee, on the understanding that the two texts would be considered by the Drafting Committee at the next session in the light of the debate.

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)¹² (A/CN.4/496, sect. A, A/CN.4/501)¹³

[Agenda item 4]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

76. Mr. Sreenivasa RAO (Special Rapporteur), introducing his second report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) (A/CN.4/501), said that the aim of the report was to suggest possible courses of action the Commission could take having adopted the draft articles on first reading and after examining the comments and observations received from Governments, prior to their adoption on second reading. Three options were proposed at the end of the report: (a) to proceed with the topic of liability and finalize some recommendations; (b) to suspend work on the topic of international liability until the regime of prevention had been finalized on second reading; and (c) to terminate the work on international liability. He recommended adopting the second option, namely, to consolidate the work already accomplished and to combine it with proposals made by other bodies in an attempt to finalize a regime in a realm in which many Governments expected the Commission to provide them with guidance. Purely and simply to abandon the draft would amount to a betrayal of the Commission's mandate.

77. The various views on the topic were presented objectively in the second report. Chapter II contained a summary of the views expressed by Governments on the three questions raised in the report of the Commission on the work of its fiftieth session.¹⁴ The question of the kind or form of dispute settlement procedure which might be considered at the next session was not discussed. By contrast, the question of deciding whether the obligation of prevention should always be regarded as an obligation of conduct had been the subject of extensive research, the results of which were described. He had placed particular emphasis on studying the constituent elements of obligations of conduct and of due diligence, as well as on the various possible types of compliance with the obligation of due diligence. In chapter III, section A, the notion of due diligence was discussed in the context of the Commission's work on the topic of State responsibility; in the context of article 7¹⁵ of the draft articles on the law of the non-navigational uses of international watercourses; and in the context of the schematic outline submitted by the Special Rapporteur, Mr. Robert Q. Quentin-Baxter.¹⁶ He

also mentioned the commentary to article 4 (Prevention)¹⁷ of the draft articles as recommended by the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-eighth session of the Commission, with reference to comments made by Governments on the subject. The notion of due diligence was also discussed in the context of far more extensive spheres, such as the environment. The views of UNEP were also presented.

78. The problems of implementing and encouraging a spirit of compliance with treaties were also examined closely, particularly in chapter III, section B. In that regard, a distinction could be drawn between two categories of State: those which wished to fulfil their obligation of compliance, but did not have the capacity to do so, and those which were capable of complying, but had no intention of doing so. Three strategies of compliance in respect of international environmental agreements were mentioned: the sunshine approach, incentives to comply and sanctions. According to the experts' recommendations, a combination of the sunshine approach and incentives seemed to be the most effective means of obtaining compliance with obligations of due diligence. The work carried out by the Commission until the forty-eighth session and the discussions held in the Sixth Committee of the General Assembly, together with the various opinions of Governments and the views of the Working Group on international liability for injurious consequences arising out of acts not prohibited by international law at the forty-ninth session,¹⁸ were discussed in chapter IV, section A. Lastly, the history of the work done in the context of the Antarctic Treaty, the Convention on Biological Diversity and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal was discussed in chapter IV, section B. For each of those instruments, a specific liability regime adapted for implementation of the corresponding obligations was being developed.

79. Mr. KATEKA asked whether the fact that the second report had been submitted meant that it would be discussed at the current session. If the main debate was not due to take place until the next session, he could not see why the report had been submitted.

80. The CHAIRMAN said it had already happened that, even if there remained insufficient time for a thorough discussion, reports had been submitted in order to facilitate preparation by the members of the Commission for the main discussion at the following session. Members would have the possibility of asking additional questions concerning the report at a later meeting.

The meeting rose at 1.15 p.m.

¹² For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook ... 1998*, vol. II (Part Two), p. 21, para. 55.

¹³ See footnote 2 above.

¹⁴ See *Yearbook ... 1998*, vol. II (Part Two), p. 17, paras. 31-34.

¹⁵ See *Yearbook ... 1994*, vol. II (Part Two), p. 102.

¹⁶ The text of the schematic outline is reproduced in *Yearbook ... 1982*, vol. II (Part Two), p. 83, para. 109. The changes made to the outline by the Special Rapporteur are indicated in *Yearbook ... 1983*, vol. II (Part Two), pp. 84-85, para. 294.

¹⁷ See *Yearbook ... 1996*, vol. II (Part Two), document A/51/10, annex I, pp. 110-111.

¹⁸ See *Yearbook ... 1997*, vol. II (Part Two), p. 59, paras. 165 and 167.