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Summary record of the 2454th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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82. The CHAIRMAN said it was his understanding that Mr. Villagrán Kramer agreed to his proposal being taken up at some future date.

83. Mr. VILLAGRÁN KRAMER said, that if his proposal was not opened up for discussion, he would vote against the draft Code.

84. Mr. Sreenivasa RAO said that he was very much alive to the need to include crimes such as terrorism, use of mercenaries, apartheid and colonialism in the draft Code but, unfortunately, it was too late to do so. The whole question of the Code had been thrashed out over many long years of arduous work when members had all had a chance to make their positions known. It was not, however, the end of the matter but only the beginning. He therefore appealed to Mr. Villagrán Kramer not to insist on a vote.

85. Mr. VILLAGRÁN KRAMER said that there were some subjects of vital importance to him and intervention was one. He could not see how intervention and drug trafficking could just be omitted from the Code, like that. He would nonetheless like to find a way out of the difficulty so as to avoid a vote. Possibly the Commission could agree on a statement reflecting an understanding that the five crimes which had been accepted were merely a beginning to the Code and not the Code in itself.

86. Mr. BENNOUNA, speaking on a point of order, said it simply was not possible to decide such a crucial matter at such a late hour. He suggested that a decision on the adoption of the draft Code should be deferred until later and that, in the meantime, further discussion should be held with Mr. Villagrán Kramer.

87. Mr. CRAWFORD said that Mr. Villagrán Kramer's concern could perhaps be met either in the commentary to the article or even by an appropriate statement made by the Chairman at the time of the adoption of the draft Code.

88. The CHAIRMAN suggested that a decision on the matter should be taken at the next meeting.

It was so agreed.

The meeting rose at 1.40 p.m.

2454th MEETING

Friday, 5 July 1996, at 10.15 a.m.

Chairman: Mr. Robert ROSENSTOCK

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr.

Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

Draft Code of Crimes against the Peace and Security of Mankind¹ (*continued*) (A/CN.4/472, sect. A, A/CN.4/L.522 and Corr.1, A/CN.4/L.532 and Corr.1 and 3, ILC(XLVIII)/DC/CRD.3²)

[Agenda item 3]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING³ (*concluded*)

PART TWO (Crimes against the peace and security of mankind) (*concluded*)

1. The CHAIRMAN said that, if he heard no objections, he would take it that the Commission wished to adopt part two of the draft Code of Crimes against the Peace and Security of Mankind.

*Part two, as amended, was adopted.**

ADOPTION OF THE DRAFT ARTICLES ON SECOND READING

2. The CHAIRMAN said that the Commission had completed its second reading of the draft Code of Crimes against the Peace and Security of Mankind and could now adopt it, with the following statement:

“In order to arrive at an agreement, the Commission has considerably reduced the scope of the draft Code, which, during the first reading in 1991, contained a list of 12 categories of crimes. Certain members have expressed regret that the Code has been restricted in that manner. The Commission took such action so that the text could be adopted and receive the support of Governments. It is understood that the inclusion of certain crimes in the Code does not change the status of other crimes under international law and that the adoption of the Code does not in any way prejudice the future development of the law in this important area.”

3. He said that, with that statement, if he heard no objections, he would take it that the Commission wished to adopt on second reading the draft Code of Crimes

* See 2464th meeting, para. 71.

¹ For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 94 et seq.

² Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

³ For the text of draft articles 1 to 18 as adopted by the Drafting Committee on second reading, see 2437th meeting, para. 7.

against the Peace and Security of Mankind as a whole, as amended.

It was so decided.

*The draft Code of Crimes against the Peace and Security of Mankind, as a whole, as amended, was adopted on second reading.***

TRIBUTE TO THE SPECIAL RAPPORTEUR

4. The CHAIRMAN said that, in accordance with the practice of the Commission and in order to give official recognition to the special contribution which the Special Rapporteur, Mr. Doudou Thiam, had made to the work done by the Commission on the draft Code, he proposed that it should adopt a draft resolution, which read:

“The International Law Commission,

“Having adopted the draft Code of Crimes against the Peace and Security of Mankind,

“Expresses to the Special Rapporteur, Mr. Doudou Thiam, its deep gratitude for and its warmest congratulations on the exceptional contribution he has made to the preparation of the draft Code through his devotion and tireless efforts and for the results he has achieved in his work on the articles of the draft Code of Crimes against the Peace and Security of Mankind.”

5. The CHAIRMAN said that he took it that the Commission wished to adopt the draft resolution by consensus.

It was so decided.

6. Mr. THIAM (Special Rapporteur) said that he was very moved by the tribute just paid to him by the Commission. He in turn wished to thank the Chairmen of the successive Drafting Committees and all his collaborators, without whose devotion the work on the draft Code could not have been successfully completed.

7. The CHAIRMAN said that the Commission still had to recommend to the General Assembly the form that the Code should take and the modalities of its adoption. Consultations in that regard would take place among the members of the Commission.

Visit by a member of the International Court of Justice

8. The CHAIRMAN welcomed Mr. Ferrari Bravo, a Judge of the International Court of Justice.

** Subsequently, the wording of article 7 (renumbered as article 8) was amended (see 2465th meeting, paras. 1-4) and a new subparagraph was added to article 17 (renumbered as article 18) (see 2464th meeting, paras. 49 et seq.).

State responsibility (continued)* (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,⁴ A/CN.4/L.524 and Corr.2)**

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE⁵ PROPOSED BY THE DRAFTING COMMITTEE⁶ (continued)

PART TWO (Content, forms and degrees of international responsibility) (continued)***

CHAPTER I (General principles)

ARTICLE 36 (Consequences of an internationally wrongful act),

ARTICLE 37 (*Lex specialis*),

ARTICLE 38 (Customary international law),

ARTICLE 39 (Relationship to the Charter of the United Nations) and

ARTICLE 40 (Meaning of injured State) (concluded)***

9. The CHAIRMAN invited the Commission to conclude its consideration of chapter I of part two.

10. Mr. ARANGIO-RUIZ said that he still had reservations about article 39, whose deletion he had proposed unsuccessfully (2452nd meeting). At that time, he had abstained in the vote on the amendment to that article proposed by Mr. Bennouna because it had seemed dangerous to him to include an express reference to the Charter of the United Nations just in the context of State responsibility. Adding a special rule on responsibility would pave the way for a new interpretation of the Charter, whereas Article 103 of the Charter would suffice. He also stated that he was unable to join the Chairman in his welcome to the visitor.

11. Mr. BARBOZA said that the reasons that had made him express his opposition to article 36 [1], paragraph 2, still existed. That paragraph provided that, despite the legal consequences referred to in paragraph 1, the State which had committed an internationally wrongful act still had to perform the obligation it had breached. That provision was not convincing because, once it had been breached, an obligation could no longer be performed. The breach itself gave rise to new obligations in accordance with what were known as secondary rules. That distinction between primary and secondary rules was a conceptual framework which the Commission had been using profitably for a long time.

12. An obligation was a legal link between two subjects of law. Its content was variable, but its principle was clearly the relationship established between the two

*** Resumed from the 2452nd meeting.

⁴ Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

⁵ For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

⁶ For the text of the articles of parts two and three, and annexes I and II thereto, proposed by the Drafting Committee at the forty-eighth session, see 2452nd meeting, para. 5.

subjects for a certain service. If that primary obligation was breached, the obligation of reparation came into play and it was entirely different, if only because it represented a penalty, not a service voluntarily provided. The content of that obligation was also different from that of the primary obligation. According to the rule arising out of the 1928 decision by PCIJ in the *Chorzów Factory* case,⁷ the breach of a primary obligation had effects which had to be wiped out entirely. To that end, the fulfilment of the primary obligation was not enough because the breach had given rise to new obligations. Thus, if the primary obligation had been to pay a certain amount on a particular date, in the event of failure, interest would also have to be paid by virtue of a new obligation.

13. In conclusion, he maintained that article 36 [1], paragraph 2, made the Commission's conclusions less clear because it stated that, following a breach of the obligation, there was still a legal link which had, however, by definition, already been broken. Primary rules were thus creeping into the realm of secondary rules. The distinction between the two was not a mere artifice, but a fact.

14. Mr. de SARAM, referring to the footnote to article 40 [5], which corresponded to the word "crime" in paragraph 3, and according to which "alternative phrases" could be "substituted" for that term, said that, whatever phrase was chosen, it must correspond exactly to what was stated in article 19, paragraph 2, which referred to the breach of an "international obligation . . . essential for the protection of fundamental interests of the international community".

15. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt chapter I (articles 36 to 40) of part two.

Chapter I (articles 36 to 40) of part two was adopted.

CHAPTER II (Rights of the injured State and obligations of the State which has committed an internationally wrongful act)

ARTICLE 41 (Cessation of wrongful conduct),

ARTICLE 42 (Reparation),

ARTICLE 43 (Restitution in kind),

ARTICLE 44 (Compensation),

ARTICLE 45 (Satisfaction), and

ARTICLE 46 (Assurances and guarantees of non-repetition)

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), in introducing part two, chapter II, said it contained articles 41 to 46, adopted by the Commission at its forty-fifth session.⁸

17. He said that the title of article 41 [6] (Cessation of wrongful conduct) described its content accurately. The Drafting Committee had not made any changes in that article.

18. Article 42 [6 bis] (Reparation) provided that the injured State was entitled to obtain reparation, four forms of which were defined and detailed in the four articles that followed. The Drafting Committee had simply made a minor change in paragraph 1. He was, however, proposing the addition of a new paragraph 3. During the debate on the consequences of crimes, the question had been raised whether a general limit, which would be applicable to both delicts and crimes, should be placed on full reparation. Opinion in the Drafting Committee had been divided on that point.

19. For some members of the Drafting Committee, no form or quantum of reparation should deprive the population of the author State of its means of subsistence. In fact, wrongful acts were often committed by the elite or by the leaders of a State without the population participating or being in a position to prevent those acts. Other members had referred to State practice and cited article 42 [6 bis], paragraph 1, which mentioned "full reparation". They had noted that the articles on restitution in kind (art. 43 [7]) and satisfaction (art. 45 [10]) already set limits on reparation. In addition, they did not see how, in principle, full reparation could deprive a population of its means of subsistence. If the amount of the compensation were extremely high, payment methods could be agreed on which would avoid that harm. Moreover, the point of view on which the new paragraph 3 was based took account only of the harmful effects which full reparation might have on the population of the wrongdoing State and neglected any harm to the population of the injured State that might result from less than full reparation.

20. The majority opinion had prevailed and the Drafting Committee had added a new paragraph to article 42 [6 bis], which he read out. The Commission should bear in mind that some members of the Drafting Committee had expressed reservations about the text.

21. The other articles in chapter II, articles 43 (restitution in kind), 44 (compensation), 45 (satisfaction) and 46 (assurances and guarantees of non-repetition) had not been changed by the Drafting Committee.

22. Mr. ARANGIO-RUIZ said that he had some reservations about article 42 [6 bis] and, consequently, about the articles following it, as a result of the problem of fault on the part of the wrongdoing State.

23. Although fault was not necessarily a *sine qua non* condition of wrongfulness, it played an important role with regard to both the substantive and the instrumental consequences of an internationally wrongful act. It followed that neither the introductory provision before the Commission in article 42 [6 bis], nor those covering the various forms of reparation nor even the articles on countermeasures could properly ignore such a fundamental element, one that characterized most internationally wrongful acts. The notion of fault was surely relevant when moving from the merely preliminary stage of determining wrongfulness to the stage at which the

⁷ *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

⁸ See 2436th meeting, footnote 3.

degree of responsibility must be identified. The degree of responsibility could not depend exclusively on the physical, material or objective aspects or elements of the infringement of an international obligation. It depended largely on that element of fault which was called the "subjective" or "psychological" element.

24. From the total absence of fault to such a diversity of variables as those represented by minor fault (*culpa levissima*), negligence and *dolus* (wilful intent), there were as many degrees as in the gravity of the internationally wrongful act. To leave that element out of any consideration of the articles under discussion was not only more serious than to leave a gap for States parties or a conciliation commission, arbitrator or judge to fill but would also mean incorporating a gross ambiguity, particularly as part one did not make any mention at all of fault. To ignore that element in part two could be understood as a negative indication, preventing any consideration of the subjective element either by States or by international bodies involved in dispute settlement.

25. That gap was made even more manifest, if possible, by the fact that article 42 [6 *bis*], paragraph 2, indicated that the negligence or the wilful intent or omission of the injured State was an element that should condition the quality and the quantity of reparation. That provision seemed to take the Commission back to the time when the whole draft had been intended to cover exclusively the responsibility of States for injuries to alien nationals. Moreover, it made article 42 [6 *bis*] appear extremely unbalanced: was it intended to codify the responsibility of the wrongdoing State or that of the injured State? It was not appropriate to refer to the fault, the negligence or the wilful intent of the injured State without referring to those of the wrongdoing State.

26. The problem was aggravated by the fact that there was no mention in article 19 of part one (International crimes and international delicts) of wilful intent, despite the fact that it was difficult to conceive of any one of the crimes referred to in that article as not being characterized by wilful intent. Considering that delicts and crimes were obviously placed along a continuum proceeding from faultless wrongful acts to wrongful acts with a greater or lesser degree of fault, it was strange to move from total non-consideration of fault to the inevitably implied relevance of the gravest degree of fault, namely, *dolus*, in the case of crimes. The law, any more than nature, did not jump over things (*Natura non facit saltus*).

27. It would be even more awkward if the footnote to the term "international crime" in article 40 [5], paragraph 3, was adopted. How could account be taken of an especially serious internationally wrongful act unless account was taken of its subjective aspect, namely, wilful intent, which would no longer be covered without the use of the word "crime", in which it was implicit?

28. He had drawn the Commission's attention more than once to the importance of the role of fault in the determination of the degree of responsibility for, and thus of the consequences of, an internationally wrongful act.

29. By way of evidence, he would confine himself to citing his eighth report (A/CN.4/476 and Add.1), particularly the paragraphs on the role of fault in general

and in connection with satisfaction and on proportionality in chapter II.

30. Sooner or later, when the work had reached the stage of second reading or of a diplomatic conference to adopt a convention on State responsibility, everyone would realize that provisions on so-called "liability" for injurious consequences arising out of acts not prohibited by international law would have to be part of, and flow into, the draft on State responsibility and the convention to be adopted on that subject. He had made that point on only one occasion⁹ in order not to give the impression that he wanted to steal the topic for which Mr. Barboza, Special Rapporteur on the topic of international liability for the injurious consequences of acts not prohibited by international law, was responsible. At that future stage, in any event, it would have to be acknowledged that fault was an essential element in determining the various degrees of responsibility. It was therefore essential to refer to fault in the draft, at least within the framework of parts two and three.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he was aware that Mr. Arangio-Ruiz had always attached great importance to the concept of fault. He had no doubt that many jurists would agree with him that that aspect should have been developed more fully in the draft articles. He recalled, however, that article 42 [6 *bis*] had been adopted, not at the current session, but at the forty-fifth session in 1993. At that time, Mr. Arangio-Ruiz, as Special Rapporteur on the subject, had been involved in the work of the Drafting Committee that had prepared the article. He had thus had ample time to set out his arguments and formulate reservations. At the current stage of work, comments made in plenary for inclusion in the summary record should be as concise as possible. Proposals aimed at amending a text that had already been adopted should be formulated in extremely clear language and not in general terms.

32. Mr. BARBOZA said that, without wishing to enter into polemics with Mr. Arangio-Ruiz, he was extremely surprised to hear him drawing a link with the topic of international liability for the injurious consequences of acts not prohibited by international law. On the occasion of the United Nations Decade of International Law,¹⁰ he had written an article¹¹ intended specifically to demonstrate the many differences between State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. He invited the members of the Commission to consult that article.

33. Mr. PELLET said that, having been personally involved in the preparations for the United Nations Decade of International Law, he had had the privilege of reading the excellent article by Mr. Barboza and would suggest

⁹ *Yearbook . . . 1991*, vol. I, 2227th meeting, pp. 128 to 130, paras. 12 to 31.

¹⁰ See 2433rd meeting, footnote 2.

¹¹ "Sine delicto (causal) liability and responsibility for wrongful acts in international law", *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission* (United Nations publication, Sales No. E/F.97.V.4).

that copies should be distributed to the members of the Commission.

34. He had two comments to make on the articles of chapter II now under consideration. Unlike Mr. Arangio-Ruiz, he thought that the concept of fault must in fact be excluded from everything relating to delicts, for it had nothing to do with the international responsibility of a State. It could come into play only in respect of crimes. In more general terms, articles 42 [6 *bis*] and 45 [10] suffered from being too concise and did not correspond to what had been expected of the Commission. A genuine code on reparation should have been developed and more specific indications given to States on the consequences of responsibility.

35. Mr. VILLAGRÁN KRAMER said he shared the reservations which the Chairman of the Drafting Committee had expressed about article 42 [6 *bis*], paragraph 3. Although he had no formal objection to that paragraph, he questioned the Commission's decision to place general limitations on the concept of full and complete reparation as applied both to delicts and to crimes.

36. Jurists were, of course, all influenced by the legal regime of the country in which they had been born. However, the Latin American countries were trying to free themselves from the system of Roman law and he did not think that it was necessarily appropriate for the Commission to let itself be guided by that system in its work on the codification of the rules of international law.

37. Mr. ARANGIO-RUIZ said that, at the risk of contradicting the Chairman of the Drafting Committee, the issue of fault had never actually been dealt with as it should have been in part two of the draft. Each time he had raised the issue, the Commission had tried to find ways of evading or ignoring it by using arguments already put forward in connection with part one, which was totally different.

38. He had therefore had to explain his position again and to recall that, in chapter II of his eighth report, he had given serious consideration to the problem in two separate contexts. He regarded the fact that that dimension had not been taken into consideration in part two as a regrettable failing and a source of ambiguity and he was fully entitled to express that view so that it would be reflected in the summary record.

39. The current discussion of the articles on State responsibility was, moreover, the last opportunity he would have to express himself on the subject in the Commission. As everyone knew, he would be deprived of the possibility of participating in the future work on the topic owing to a so-called age limit, which existed neither in Italian law nor in the United Nations and was being arbitrarily applied to him. Without going into personal considerations, he wished to say that that measure, which was unprecedented in the history of the Special Rapporteurs of the Commission, appeared to be based on tactical reasons which he preferred not to go into at length. It had prompted a protest resolution from the faculty of law of the University of Rome, La Sapienza, to which he had the honour to belong. In any event, the situation forced him to seize his last opportunity as a member of the Commission to express the viewpoints

that he considered important for the future of the codification and progressive development of the international law of State responsibility.

40. Mr. BENNOUNA said that he agreed with Mr. Pellet's analysis of the articles under consideration. While it was useful to speak of negligence or of a deliberate act or omission, the idea of fault had no place in the chapter under consideration.

41. The CHAIRMAN, speaking as a member of the Commission, said he had serious reservations about article 42 [6 *bis*], paragraph 3.

42. Mr. Sreenivasa RAO said that he shared Mr. Pellet's view and, in a way, that of Mr. Arangio-Ruiz as well: the articles under consideration were inadequate. The various consequences referred to in chapter II were presented in a manner that was both too logical and too semantic and did not reflect the true situation. As they stood, the articles would be difficult to implement in practice.

43. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt chapter II (articles 41 to 46) of part two.

Chapter II (articles 41 to 46) of part two was adopted.

CHAPTER III (Countermeasures)

44. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) introduced chapter III of part two, comprising articles 47 [11] to 50 [14].

45. He said that article 47 (Countermeasures by an injured State) corresponded to the former article 11 adopted by the Commission without a commentary at its forty-sixth session.¹² The Drafting Committee had made no changes in the article, which provided for the right of an injured State to take countermeasures subject to certain conditions specified in the three following articles.

46. Article 48 (Conditions relating to resort to countermeasures) corresponded to the famous article 12, which had shuttled between the Commission and the Drafting Committee since the forty-fifth session in 1993, when it had first been referred to the Commission by the Drafting Committee.¹³ At the forty-sixth session, the article had been referred back to the Drafting Committee, on the understanding that, if reformulation of the article proved impossible, the text adopted by the Drafting Committee at the forty-fifth session would form the basis for action by the Commission. The Commission had taken no action on the article at the forty-sixth or forty-seventh sessions.

47. At the present session, however, the Drafting Committee had been directed to consider all articles in parts two and three for the purposes of their adoption on first

¹² For the text of articles 11, 13 and 14 of part two provisionally adopted by the Commission at its forty-sixth session, see *Yearbook . . . 1994*, vol. II (Part Two), pp. 151-152, footnote 454.

¹³ For the text of article 12 of part two, as adopted by the Drafting Committee, see *Yearbook . . . 1993*, vol. I, 2318th meeting, para. 3.

reading. It had therefore reviewed article 48 [12]. In the light of the decision taken by the Commission at its forty-sixth session,¹⁴ it had taken the view that it should not attempt a substantive revision of the article, but should confine itself to bringing the text up to date because of the adoption, at the forty-seventh session, of part three on the settlement of disputes.¹⁵ Consequently, paragraphs 1 and 2 of the article had been revised.

48. As already indicated by the two previous Chairmen of the Drafting Committee, the text of article 48 [12] was the result of a compromise. It represented an attempt to strike a fair balance between the interests of the injured State and the wrongdoing State. Thus, paragraph 1 said that the injured State which had taken countermeasures continued to be bound by its obligations in relation to dispute settlement procedures.

49. Paragraph 2 stipulated that, provided that the wrongful act had ceased, the right of the injured State to take countermeasures was suspended when and to the extent that the dispute was submitted to a tribunal which had the authority to issue orders binding on the parties.

50. Lastly, paragraph 3 provided that the suspension of the right to take countermeasures would terminate if the wrongdoing State failed to honour a request or order from the tribunal to which the dispute had been submitted.

51. Before going on to introduce articles 49 [13] and 50 [14], he asked whether there were any comments on articles 47 [11] and 48 [12].

ARTICLE 47 (Countermeasures by an injured State) and

ARTICLE 48 (Conditions relating to resort to countermeasures)

52. Mr. PELLET said that chapter III as a whole was very questionable and that he would vote against it if it was put to the vote, as he hoped it would be. Article 47 [11] in particular was disastrous because it was based on the principle that the injured State had a right to take countermeasures. In practice, it was obviously the most powerful States that would have that option and the provision thus amounted to proclaiming a real "law of the jungle". Article 48 [12] was supposed to mitigate that right, but a close look showed that the conditions it set were not basic conditions. The only limit on the right to resort to countermeasures lay in article 49 [13] on proportionality.

53. Mr. BENNOUNA said that he basically agreed with Mr. Pellet's reservations and would willingly dispense with all of chapter III, the effect of which was, in a sense, to "legalize" countermeasures. In reply to those who said that account must be taken of realities, he would say that he preferred to reject the reality of the balance of power. He, too, would like the adoption of chapter III to be put to the vote.

54. If the Commission finally decided to maintain the chapter, he would like to make two proposals. The first related to article 47 [11], in which the words "As long as the State which has committed an internationally wrongful act" were far too affirmative. It would be better to use the words: "As long as the State which is presumed to have committed" or "accused of having committed".

55. His second proposal related to article 48 [12], paragraph 1, in which it would be necessary to introduce the idea, that, prior to taking countermeasures, the injured State should first try to negotiate. The beginning of the paragraph might read: "Prior to taking countermeasures, an injured State shall fulfil the obligation to negotiate provided for in article 54 . . .".

56. Mr. KABATSI said that he shared the reservations expressed by Mr. Pellet and Mr. Bennouna. He was totally opposed to legalizing unilateral self-help at the international level by one State against another, as that would only serve the interests of the strong against the weak and the rich against the poor, whereas, the so-called safeguards contained in articles 48 [12], 49 [13] and 50 [14] did not really deserve to be described as such. The only genuine safeguards would be prior ones, for example, of the kind proposed by Mr. Bennouna.

57. Having said that, he knew that chapter III existed and all members who were opposed to it had had several occasions to state their point of view. He would personally address himself particularly to the last part of paragraph 2 of article 48 [12], which read: "and the dispute is submitted to a tribunal which has the authority to issue orders on the parties". That part of the sentence was unnecessary and would further aggravate the situation of the State against which the countermeasures were directed. Paragraph 2 already made the suspension of the right of the injured State to take countermeasures subject to two preconditions: that the internationally wrongful act had ceased and that the dispute settlement procedure referred to in paragraph 1 was being implemented in good faith by the State which had committed the internationally wrongful act. Accordingly, he doubted the appropriateness of setting a third condition the effect of which would be to give more time to the State taking countermeasures, since establishing a tribunal, particularly a special one was bound to take time. He therefore proposed that the last part of paragraph 2 of article 48 [12] should simply be dropped.

58. Mr. ARANGIO-RUIZ said that he was flabbergasted by the statements of Mr. Pellet and Mr. Bennouna. Recalling the history of the provisions relating to countermeasures, he said that, when the time had come for him, as Special Rapporteur, to deal with the instrumental consequences of an internationally wrongful act, he had been confronted with rules of customary international law which admitted the right to resort to countermeasures, subject, of course, to certain rules and conditions. At that time, there had been opposition from two sides to having countermeasures dealt with in the draft. One had come from Mr. Shi, now a judge at ICJ, who had said that, since countermeasures were to the advantage of strong States, they should simply not be mentioned in the draft. The other objection, seemingly with

¹⁴ See *Yearbook . . . 1994*, vol. II (Part Two), p. 151, para. 352.

¹⁵ See 2436th meeting, footnote 13.

different motivations, had been put forward in the Sixth Committee by the representative of France, who had suggested that countermeasures should not be dealt with by the Commission, but should be left to the unwritten rules of international customary law.

59. In any event, a very large majority of the members of the Commission had unquestionably wanted him to submit articles on countermeasures. Contrary to what Mr. Bennouna had said, it was not the Special Rapporteur alone who had had the idea of putting countermeasures in the draft.

60. Referring to Mr. Pellet's comments, he said that, on finding himself, as Special Rapporteur, in the position of having to prepare articles on countermeasures, he had decided to surround countermeasures with as many guarantees as possible against abuse. In that, he had been instructed directly by the Sixth Committee, where a veritable hue and cry had been raised during the forty-seventh session of the General Assembly on the subject of possible abuses of countermeasures by States. That was why, in addition to an article 11 which was a good deal shorter and better than what had eventually become article 47 [11], he had proposed an article 12 entitled "Conditions relating to resort to countermeasures", paragraph 1 of which had read:

"1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

"(a) The exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it is a party;"¹⁶

61. Mr. Pellet's reaction to that proposal had been to call it revolutionary. At the current time, things had changed and Mr. Pellet had appointed himself the champion of the weak against the strong, whereas he himself was supposed to be the champion of the strong against the weak. Incredible as it might seem, the member of the Commission who had accused the former Special Rapporteur of being a revolutionary was now calling him a reactionary.

62. Mr. Bennouna seemed to be inventing an obligation to negotiate, having discovered at the last moment that negotiation was a means of settlement to which the parties to a dispute had to resort. Yet that obligation was set forth in Article 33 of the Charter of the United Nations and was quite clearly referred to in paragraph 1 of draft article 12 as proposed by the Special Rapporteur.

63. Mr. LUKASHUK said that he understood the doubts expressed by Mr. Pellet, Mr. Bennouna and others on the subject of countermeasures. However, it was obviously too late to change what had already been accomplished. The existence of countermeasures was a reality and Governments were manifestly not about to renounce it. The Commission had been accused of lack of realism, but it had to show both realism and idealism

in the decisions it was called on to take. That being so, it could not overlook the fact that countermeasures were an essential element of a realistic mechanism of international law. The Commission could not, even if it wanted to, change the existing situation at the drop of a hat. Moreover, and he agreed with Mr. Arangio-Ruiz on that score, the draft did place a certain limit on countermeasures and that limit would disappear if all provisions on the subject of countermeasures were removed from it. As the proverb had it, the road to hell was paved with good intentions. The best course would, in his opinion, be to await the reaction of States to the draft.

64. The discussion in the Commission and the differences of opinion expressed testified to the fact that the Commission had for many years found itself unable to find a solution to a problem of great importance. That was the only conclusion that could be drawn in practice.

65. Mr. FOMBA said that, whatever they were called, countermeasures were a reality. Nonetheless, the purpose of article 47 [11], in particular, was to recognize the right of States to take countermeasures, and that was tantamount to excluding the weak countries from the possible and highly desirable benefit they could or should derive from the regime of responsibility being proposed by the Commission and so in a sense to recognize the law of the strongest. If the Commission really had to recognize the right to take countermeasures, it would have to ring that right round with draconian substantive conditions in order to mitigate very significantly, if not avoid, the prejudice that such a right would cause to the weak countries. That did not apply, in general, to the proposed provisions. Bearing in mind that all of the Commission's work ranged between what was possible and what was desirable, the Commission had in the present case perhaps arrived at the threshold of what was possible.

66. He supported in large measure the reservations expressed by Mr. Pellet and Mr. Bennouna and was inclined to favour the idea of a vote on some articles. Mr. Bennouna's proposal seemed to be on the right lines, even allowing for Mr. Arangio-Ruiz's explanation in that connection. He was grateful to Mr. Arangio-Ruiz for having refrained from supporting the strong against the weak and for having emphasized the impartial, neutral and intermediary nature of his position, which he himself had never doubted.

67. Mr. Sreenivasa RAO said that part two, which dealt with the consequences of a wrongful act and incorporated chapter III on countermeasures, was one of the most difficult with which the Commission had had to grapple, not only because it had been necessary to reconcile the divergent positions, of the Special Rapporteur and other members on the one hand, and of a group of members including Mr. Rosenstock, on the other, but also because it was virtually impossible to reflect the basic realities of international society in a text of that kind.

68. In his excellent eighth report, the Special Rapporteur had identified the various abuses to which countermeasures could give rise, had warned against such abuses and had endeavoured to fashion a regime to control those abuses. On the other hand, Mr. Rosenstock and other members had argued that, given the state of international society and the lack of institutions to respond

¹⁶ *Yearbook* . . . 1992, vol. II (Part Two), p. 27, footnote 61.

without delay, in the event of a wrongful act, it had been necessary, in the regime of State responsibility, to preserve a measure of freedom and to build in a certain element of deterrence through countermeasures. Both perspectives were reasonable and respectable and were based on the logic and preferences of those who espoused them and on their understanding of what was just for international society in a given situation.

69. Other members of the Commission, including Mr. Shi and himself, had made a number of observations over the years which were not reflected in the draft articles under consideration and which had not in fact really been heard because the two opinions he had referred to had clashed sometimes violently and it had not been possible for other opinions to be expressed and for certain members of the Commission to make their contribution to the debate. For that reason, he felt duty-bound at the current stage to express his complete disagreement with chapter III for the various reasons he had mentioned whenever he had had an opportunity to do so during the consideration of the topic.

70. Like Mr. Shi, he had initially simply wondered whether it was possible to try to elaborate, in the case of a concept as controversial in practice as countermeasures, a regime that was acceptable to the majority of States. Secondly, on several aspects, the general principles, namely, the so-called primary rules, had not been developed or, if they had been, they remained controversial both as to their scope and as to their elements and the specific nature of their application in international law. That was particularly true in the case of the non-use of force and the maintenance of international peace and security in general, international trade law, human rights and environmental law. There was a tendency to project the choices of a State or a group of States as community decisions without basing those choices on the common interest which could be developed only through the democratic participation of all States in the debate and after genuine attempts to arrive at a consensus. Some sometimes had a tendency to try to crystallize their position as norms before others understood all the implications and had had the possibility to propose alternative solutions. That was why they had ended up with an unsupportable, contradictory and unjustified regime for countermeasures. No State should be encouraged to decide unilaterally to take the law into its own hands, no matter how real the provocation to which it reacted.

71. Turning to the draft articles under consideration, he expressed his full support for the comments made by Mr. Bennouna and Mr. Pellet. Like them, he would ask for chapter III to be put to the vote if the specific proposals he was about to make were not deemed acceptable.

72. He proposed that paragraph 1 of article 47 [11] should be replaced by the following:

“1. The State which has a reason to believe that an internationally wrongful act has been committed involving significant injury to its rights is entitled to take countermeasures subject to the conditions and restrictions set out in this chapter.”

73. Paragraph 2 of article 47 [11] would remain unchanged. Paragraph 1 of article 48 [12] should be replaced by the following:

“1. Before taking countermeasures, the State which has suffered, in its opinion, significant injury to its rights shall fulfil the obligations in relation to peaceful settlement of disputes inscribed in the Charter of the United Nations, and in particular Article 2, paragraph 4, and Article 33, and obligations of dispute settlement arising under part three in respect of any other binding dispute settlement procedure in force between itself and the State which is alleged to have committed the internationally wrongful act.”

74. In his view, it seemed advisable to refer expressly to the provisions of the Charter which dealt with the non-use of force and the different methods for the peaceful settlement of disputes.

75. Paragraph 2 of article 48 [12] should be deleted and paragraph 3 replaced by the following:

“3. A failure by the State which is alleged to have committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall entitle the State alleging injury to its rights to take recourse to such remedies as are approved or ordered by the particular procedure of settlement of dispute involved.”

76. The trouble with the existing wording was that, if the State accused of the internationally wrongful act defaulted, the injured State would be free to act as it saw fit, and that was tantamount to making the law of the strongest prevail. It would be preferable if the dispute settlement procedure that had been initiated continued to apply.

77. Mr. PELLET said that Mr. Arangio-Ruiz should not take criticisms of the draft articles as personal attacks. Nonetheless, it was true that, insofar as article 47 [11] endorsed countermeasures, which were available only to powerful States, he was conservative and that part three seemed excessively innovative having regard to the state of international law. The sole limitation on countermeasures was the dispute settlement procedures set forth in part three, in other words, provisions that were totally unacceptable in the existing state of international society.

78. With regard to Mr. Lukashuk's comment, the fact that the Commission was well advanced in the consideration of the topic should not prevent its members from trying to improve the provisions when they considered them unacceptable—and Mr. Sreenivasa Rao's proposals in that connection were judicious albeit insufficient—or from rejecting them. In fact, chapter III could be dropped without difficulty since countermeasures were not indispensable for a regime of responsibility, which could be applied without prejudice to such measures.

79. Mr. TOMUSCHAT said that he supported the text of chapter III, which was an excellent and balanced compromise. It would be a complete mistake to assume that the small States were the “good guys” and the big States the “bad guys”: any State could commit an inter-

nationally wrongful act, as attested to, for instance, by the case of the diplomatic and consular staff held in a certain capital, which showed that it was sometimes necessary to take countermeasures quickly. The small State/big State configuration was therefore absolutely irrelevant and a dispute which gave rise to countermeasures could very well arise between States of equal power.

80. He would also draw attention to paragraph 2 of article 58 [5] of part three, the existence of which those members who had spoken seemed to have forgotten and which, in his view, constituted a big step forward in that it protected weak States from arbitrary action by strong States. That was why the Commission would be ill-advised to drop chapter III, thereby leaving strong States free to take such countermeasures as they deemed appropriate, under general international law. Paragraph 2 did give rise to a problem, however: if the injured State instituted proceedings for the settlement of disputes pursuant to article 48 [12], paragraph 1, and if, at the same time, the State which was the victim of countermeasures had instituted proceedings pursuant to article 58 [5], paragraph 2, two parallel procedures for settlement would have been instituted. That risk could perhaps be mentioned in the commentary.

81. With regard to Mr. Sreenivasa Rao's proposal concerning article 47 [11], paragraph 1, any State could claim that it had "reason to believe" that an internationally wrongful act had been committed by which it was affected. The existing wording therefore seemed preferable.

82. Mr. AL-KHASAWNEH said he had always felt that acceptance of the provisions on countermeasures should be conditional on the existence of effective dispute settlement procedures. The provisions in part three were, however, a little disappointing from that standpoint, bearing in mind that countermeasures were a fact of political life, and an extremely dangerous one, and that, although they could be taken by a small State, the possibilities of abuse were more frequent in the case of disputes between a powerful State and a weaker State or between a rich country and a poor country. The substantive rules, including the rule of proportionality, were very elastic and could give rise to so many different interpretations and the dispute settlement provisions were not as clear and as binding as they should be.

83. With regard to Mr. Sreenivasa Rao's proposal concerning article 48 [12], it was the Special Rapporteur who had been the first to adopt protection of poor or weak States as one of his uppermost considerations in preparing the draft articles. He was to be commended on the work he had accomplished in that regard and a tribute should be paid to him for his commitment to an ideal of justice in what was a politically sensitive area.

84. Mr. ARANGIO-RUIZ said that Mr. Tomuschat was not perhaps altogether wrong in thinking that, basically, the Commission had arrived at a balanced text. Despite the persistent faults he had repeatedly indicated, that text struck him as less unbalanced than it had been earlier. So far as Mr. Sreenivasa Rao's proposal concerning paragraph 1 of article 47 [11] was concerned, both

the Drafting Committee and he himself had assumed that, because an allegedly injured State acted at its own risk, it would make very sure that there had indeed been an internationally wrongful act, that that act was attributable to a given State and that certain consequences derived from it. The words "has reason to believe" were therefore pointless, if not dangerous, for the reasons Mr. Tomuschat had explained.

85. Article 48 [12] departed a little less from his initial proposal for article 12.

86. The deletion of chapter III, as advocated by the representative of France in the Sixth Committee, would be tantamount to allowing powerful States complete freedom in the matter of countermeasures.

87. In addition to settlement procedures, the State wishing to take countermeasures should be required to notify, in one form or another, the State against which it intended to take such measures. A provision to that effect had appeared in his initial proposal and perhaps it was an oversight that could easily be corrected by providing, for example, that the State which intended to take countermeasures was required to inform the State concerned, in an appropriate and timely manner, of its intention.

88. The CHAIRMAN said that the Commission would resume its consideration of articles 47 [11] and 48 [12] at its next meeting to allow it to hold the ceremony for the award of certificates to the participants in the thirty-second session of the International Law Seminar.

The meeting rose at 1.05 p.m.

2455th MEETING

Tuesday, 9 July 1996, at 10.05 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Roldrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Lukashuk, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.
