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Summary record of the 2455th meeting

Topic:
State responsibility

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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 Rodrigues, 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.

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

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE[2] PROPOSED BY THE DRAFTING COMMITTEE[3] (*continued*)

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

CHAPTER III (Countermeasures) (*continued*)

ARTICLE 47 (Countermeasures by an injured State) and

ARTICLE 48 (Conditions relating to resort to countermeasures) (*continued*)

1. Mr. Sreenivasa RAO reminded members that he had submitted a number of proposals (2454th meeting) concerning articles 47 [11] and 48 [12] to encourage further dialogue on the important subject of the enforcement of international law. A number of valuable comments had been made on those proposals, in particular by Mr. Tomuschat, who had rightly pointed out that the wording of article 47 [11], paragraph 1, created the wrong impression in that it lowered the threshold at which countermeasures could be taken. In point of fact, his intention had been to ensure that countermeasures were taken only as a last resort and to compel observance of, rather than run counter to, the law. In view of Mr. Tomuschat's comments, therefore, his original proposal should be amended to read:

> "1. The State which considers that it has suffered a significant injury on account of an internationally wrongful act allegedly committed by another State is entitled to take countermeasures, that is, not to comply with one or more of its obligations towards that State, subject to the conditions and restrictions set out in this chapter."

2. While he also agreed with Mr. Tomuschat that the wrongdoer must not be favoured, it was important to think in terms of a law that not only distinguished between a right and a wrong but also met the needs of justice and equity and commanded universal approval, in other words, a law that was wholly in keeping with the Charter of the United Nations and was based on the interests of all nations rather than those of a select few. Such interests should form the basis of a genuine give-and-take policy on the part of all concerned and should not be imposed under duress or on the basis of unequal strength.

3. But there was a further point: could international law—or indeed any law—ever be enforced by the use of force and punishment? Surely it was not sanctions but genuine reciprocity that lay at the root of peaceful interaction. In today's international society, dogged by poverty and overpopulation, the articulation of the universal principles and processes of law-making that would ensure participation on an equal footing for all citizens throughout the world merited the Commission's consideration as a matter of some priority. Ultimately, only those principles that were voluntarily accepted as being in the common interest had a guarantee of enforcement. It was in that context that doubt was cast on the role of countermeasures. In its further work on the draft articles, on second reading, the Commission would, however, no doubt take due account of the comments received from States and of those made in the Commission.

4. Mr. EIRIKSSON said that he joined Mr. Tomuschat in supporting the Drafting Committee's original proposal.

5. Mr. BARBOZA said that he too was in favour of the provisions in chapter III submitted by the Drafting Committee, since they were well-balanced and reflected a good compromise between opposing trends. It would be a pity if the opportunity to agree on an acceptable text was lost in the search for a utopian one. Compulsory arbitration afforded an allegedly delinquent State the best guarantee that the countermeasure adopted was legal.

6. Much had rightly been said about the past abuses strong States had inflicted on weaker States. One of the main reasons for those abuses was the lack of any check on the legality of abusive countermeasures, in other words, to establish that the breach of the obligation giving rise to the countermeasure was a real, not an invented, one. If the breach was real and the other conditions of legality, for instance, those laid down in articles 49 [13] and 50 [14], were complied with, there would be no further abuses in the field of countermeasures.

7. It had also been said that the acceptance by weaker States of article 47 [11] was a trap, since stronger States would never accept article 58 [5] (Arbitration). That was tantamount to insulting the intelligence of States, weak and strong alike. Articles 47 [11] and 58 [5] were interlinked: if the latter was rejected, the former would no longer exist.

8. Many members had stressed the iniquity of countermeasures and there was no denying that stronger States had in the past used reprisals in an abusive way, particularly when armed reprisals had not been forbidden under international law as they now were. But decentralized sanctions were the very stuff of a legal order: in the absence of a central body to take such sanctions in the place of individual States, there would be countermeasures, as there was no other mechanism for enforcing international law.

9. It was better to have a regulation that provided all States with adequate guarantees rather than pretending that, by ignoring countermeasures, they could somehow be made to disappear. Regulation of countermeasures was essential if international law was to be a real legal

[1] Reproduced in *Yearbook... 1996*, vol. II (Part One).

[2] 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.

[3] 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.

order. While he would not oppose the idea of requiring prior negotiation, the arbitration clause would, in his view, suffice.

10. Mr. VILLAGRÁN KRAMER said that he wished, in order to clarify matters, to raise a question that was prompted by a statement by Mr. Koroma, a judge at ICJ, made in 1992 when he had still been a member of the Commission, that, before the Commission gave its imprimatur to the chapter on reprisals, it should clarify the *lex lata* rules it wished to codify and also the rules *de lege ferenda* it was endeavouring to draft—a view he had expressed because the chapter on reprisals was extremely sensitive. Also, as Kelsen had once said, international law was characterized by the act of reprisals.[4]

11. His own question, therefore, was whether the Commission, before proceeding any further, should establish that it was codifying existing rules—part *lex lata*—or whether it would move on to rules *de lege ferenda*.

12. Mr. AL-BAHARNA said it was pointless to argue that the principle of countermeasures, as a final remedy for the injured State, should be deleted from the draft articles because it was unnecessary. That principle lay at the very heart of the doctrine of State responsibility and was unreservedly accepted in customary international law. Indeed, the fact that it had undergone a number of restrictions, as reflected in draft articles 47 [11] and 48 [12], was itself an expression of the progressive development of international law.

13. The mitigations for which the draft articles provided were self-explanatory. Under article 47 [11], for instance, an injured State could resort to countermeasures, but that right was not absolute inasmuch as it was subject to the conditions laid down in articles 48 [12], 49 [13] and 50 [14], the effect of which was to mitigate drastically the effect of countermeasures. A further mitigating element was to be found in the reference in article 47 [11], paragraph 1, to articles 41 to 46, which provided for a series of remedies that the State which had committed the allegedly wrongful act must seek in good faith.

14. There had been an earlier suggestion that, before the injured State took any countermeasures, negotiations should be held between that State and the State which committed the wrongful act. The answer to that suggestion was that negotiations were always implied in the process. It was not possible to conceive of an injured State resorting to countermeasures immediately after the commission of the wrongful act, save perhaps in the case of aggression as a result of which a state of war ensued, and the injured State would naturally resort to self-defence.

15. In normal cases, some time for diplomatic negotiations would be allowed before the mechanism under articles 47 [11] and 48 [12] came into operation. He was certain that those members who had commented on the draft articles did not object to the actual principle of countermeasures, as set forth in draft article 47 [11]. Rather, they were inclined, with the best of intentions, to make the right to take countermeasures subject to further mitigation and restrictions. In his view, however, draft article 47 [11] provided the best compromise available and should command consensus in the Commission. To make the drafting more acceptable, he would nonetheless propose that it should be reworded to read:

> "As long as the State alleged to have committed an internationally wrongful act has not complied with its obligations under articles 41 to 46, the injured State is entitled to take, subject to the conditions and restrictions set out in articles 48 to 50, countermeasures that allow it not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response by the State which has committed the internationally wrongful act to the requirements of complying with its obligations under articles 41 to 46."

In addition the word "alleged" or "allegedly" should be incorporated at the appropriate point throughout the draft articles and, in particular, in article 42 [6 *bis*], paragraphs 1 and 4, and article 48 [12], paragraph 2.

16. Article 48 [12] was satisfactory. As the Chairman of the Drafting Committee had rightly noted, it was an attempt to strike a fair balance between the interests of the injured State and the wrongdoing State.

17. Mr. ARANGIO-RUIZ said that, with the use of the phrase "as long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 41 to 46", article 47 [11] ignored a number of possibilities of positive response on the part of the wrongdoing State to an allegation by an injured or allegedly injured State that an internationally wrongful act had been committed. He was referring to such positive responses as admission of wrongdoing, admission of responsibility, apology, and assurances or even commencement of implementation of one or more forms of reparation. In any such cases there should be either renunciation by the allegedly injured State of resort to countermeasures or an attenuation or suspension of countermeasures. He had raised that point in the Drafting Committee without success. In his view, article 47 [11] could not be accepted unless that serious defect was eliminated. Before countermeasures were taken or continued, the wrongdoing State must be given the opportunity to recognize its responsibility and act accordingly. The present formulation would simply grant an excessive degree of severity for the action by the injured State.

18. Mr. YAMADA said that he agreed with Messrs. Tomuschat, Eiriksson and Barboza that the draft articles on countermeasures were well balanced. Whether the Commission liked it or not, countermeasures were used in actual practice and, as such, they were not prohibited under positive international law.

19. The Commission had to find a proper balance between the legal constraints it placed on countermeasures on the one hand, and on the other, the protection of the

[4] H. Kelsen, "Unrecht und Unrechtsfolge im Völkerrecht", *Zeitschrift für öffentliches Recht* (Vienna), vol. XII, No. 4 (October 1932), pp. 571 et seq.

rights of the injured State in the event of intentional delay or refusal by the wrongdoing State to redress its illegal act. The draft articles did provide a reasonable balance in that regard. Furthermore, the legal constraints on countermeasures in the draft articles went beyond existing customary law by providing, under article 58 [5] of part three, for compulsory arbitration, to be initiated by the State against which the countermeasures had been taken. Deletion of the articles on countermeasures, as suggested by some members would lead to hardship for the State against which countermeasures had been taken. He endorsed the adoption of the countermeasures articles as a whole, in their present formulation. An amendment to any element of those articles could well bring about the collapse of a well-balanced system.

20. Mr. CRAWFORD said that the question of countermeasures was difficult and controversial. In the course of lengthy debate and an arduously negotiated package of proposals on the subject, a number of compromises had obviously had to be made, but that was in the nature of the way the Commission worked. Members had preferences which could and, indeed, ought to be reflected in the commentaries to the articles, especially on a first reading.

21. The function of draft articles adopted on first reading was not to present the Commission's final view, but to present the issues in a defensible form, for discussion and response by States. The draft articles as currently formulated did, by and large, meet that criterion. Actually, the provision on prohibited countermeasures and the provision associating arbitration with the taking of countermeasures in certain circumstances were important steps forward. The Commission would have a chance to continue its debate once States had been given the opportunity to comment on the articles.

22. Some members of the Commission were in favour of eliminating the chapter on countermeasures, which would be a regressive move, for failure to provide adequate regulation of countermeasures would only lead to greater use of such measures. The amendments to article 47 [11] proposed by Mr. Sreenivasa Rao were certainly of merit, but did not resolve the certain basic problem which arose from the fact that the determination of whether a State had committed a wrongful act could not always be made categorically at the point at which the injured State was entitled to act. For example, in cases where it had not actually been determined whether a State was in breach of its obligations, insisting on cessation as a condition for arbitration might not be justified. Again, Mr. Sreenivasa Rao's amendments to paragraph 1 of article 47 [11] reintroduced elements of subjectivity which contradicted the Commission's basic position that countermeasures could only lawfully be taken in response to an act which was unlawful. It was the use of the word "considers" or "allegedly" that was incompatible with that position. A State taking countermeasures did so at its own risk and if it was confronted with lawful conduct then its own conduct would, by definition, be unlawful.

23. The draft articles as they stood were reasonably balanced and, in conjunction with appropriate commentaries, could usefully serve as the basis for further debate.

24. Mr. ROSENSTOCK said that he shared the views of Mr. Crawford and Mr. Yamada. With regard to Mr. Sreenivasa Rao's proposed reformulation of article 47 [11], the addition of the word "significant" in paragraph 1 was not helpful. If "significant" meant not *de minimis*, it did not add anything. If it meant more than that, the word simply led to confusion and indicated a failure to appreciate the importance of article 49 [13]. The use of the word "alleged" in paragraph 1 was also a matter of concern: it could well diminish or eliminate the responsibility of a State which took countermeasures in the erroneous belief that a wrongful act had been committed against it. As to paragraph 3, he was again opposed to the use of "alleged" and to the last phrase, namely "remedies as are approved or ordered by the particular procedure of settlement of dispute involved", which seemed to be a misperception of the role of a third party dispute settlement procedure in regard to the issue at hand. It would be an odd arbitration procedure which spelt out what could be done to punish a wrongdoing State if it failed to comply with an order for cessation. The reimposition of countermeasures, subject to proportionality, prohibited countermeasures and failure to honour orders, was enough to regulate the situation in the context in which it was likely to arise.

25. Mr. PELLET said that he had formally requested (2454th meeting) the deletion of chapter III of part two and hoped that the chapter could be put to a vote. It was not only unbalanced but was actually based on a false equilibrium: it began by setting forth a State's entitlement to take countermeasures, which could, in his view, only be applied in practice by the most powerful States, and counterbalanced that with an unrealistic dispute settlement mechanism, provided for under part three. A State might decide to accept chapter III of part two without accepting the constraints of part three, something which would automatically destroy that false equilibrium. The Commission would be better off eliminating chapter III and stating expressly that the draft was adopted notwithstanding the possibility of adopting countermeasures. A proposal could be made to the General Assembly to include in the Commission's agenda an item on the codification of the law on countermeasures, though he was not sure the Commission would receive such a mandate. That was his basic position.

26. A number of changes to the articles on countermeasures had been proposed by Messrs. Kabatsi, Bennouna and Sreenivasa Rao and they were all in the right direction. All the amendments were preferable to the texts as they currently stood. However, a decision still had to be taken on the Commission's procedure: a vote, referral to the drafting Committee, rediscussion of the amendments one by one.

27. It might just be possible for him to join in a consensus and agree to chapter III, but only if paragraph 1 of article 47 [11] was couched in negative terms rather than in terms of a positive entitlement to take countermeasures. It should be reformulated to the effect that the injured State did not have the right to take countermeasures except under the conditions and subject to the

restrictions set out in articles 48 [12] to 50 [14]. Thus revised, the draft would be in conformity with the rules of law, for countermeasures must not be a priori, legitimized. They were an unfortunate fact of international life and the Commission would do a great disservice to international law if it started out by saying that they were permitted.

28. Mr. Sreenivasa RAO said that he wished to endorse the statement made by Mr. Pellet, in the light of comments made by Mr. Crawford. The revision proposed by Mr. Pellet would definitely improve the draft text and help achieve the goal of regulating the use of countermeasures and restricting their abuse.

29. Several members had pointed out that a progressive element had been introduced into the draft article by giving to the State against which countermeasures had been taken the right to seek compulsory arbitration. For his part, he failed to see the logic in that procedure. In a civilized system, it was the aggrieved party which took its complaint to court, not the party against which reprisals had been taken. It had been suggested that both parties should be entitled to submit the dispute to arbitration, a solution he found more equitable.

30. If the Commission attempted to restrict the use of countermeasures solely through compulsory settlement of disputes, the draft articles would not gain broad acceptance: no State was prepared to accept compulsory settlement of disputes under circumstances in which the law itself was not clearly articulated in the best interest of all States.

31. Mr. ARANGIO-RUIZ said that Mr. Crawford seemed to wish to reduce the first reading text to a very preliminary draft intended merely to open the debate, as if the Commission was only starting the exercise on parts two and three. Of course, the text had to be submitted, in view of the second reading stage, for the comments of Governments, but it was odd to leave gaps or to include very unsatisfactory formulations. The Commission had been working on parts two and three of the topic since before 1980 and should endeavour to present the best possible articles. As to Mr. Pellet's suggestion to remove chapter III, he would point out that the Special Rapporteur's allegedly "revolutionary" draft article 12 of part two proposed in 1992[5] was indeed couched in negative terms, that is to say an injured State could not take countermeasures unless means of amicable settlement had first been used. With regard to the question of whether the articles on countermeasures should be maintained, he believed that the Commission must be consistent. It would be absurd to present a draft with the immense gap that would result from omitting the provisions on countermeasures. The Commission should try to include articles 47 [11] and 48 [12] to the best of its ability. If a working group or the Drafting Committee considered them, there was a good chance of improving the text.

32. Mr. VILLAGRÁN KRAMER said that there were many countries powerful enough to take countermeasures against weaker countries, which found them much more difficult to apply. Yet the smaller, weaker countries were obliged to find special ways to apply their own form of "countermeasures"—not necessarily armed reprisals—between themselves. For example, one Central American country had successfully carried out reprisals during a commercial transaction by a most ingenious interpretation of the convention which applied in the particular case. The sole purpose had been to obstruct the transaction to secure settlement of an entirely different matter.

33. The Commission had been given a mandate to codify the rules of international law. That implied, of course, that members would at times have to codify certain rules which they themselves did not endorse. The chapter on countermeasures was a case in point. Nevertheless, it was important to include in the draft measures which, within what was currently considered permissible, would safeguard the rights of the smaller countries. His own region had suffered repeated tragedies as the result of the use of countermeasures. He therefore endorsed the articles on countermeasures because they provided means whereby such harmful effects could be mitigated.

34. Those who wished to see chapter III deleted should be aware that countermeasures would continue to exist, but would not be balanced by any restrictions. The Commission would appear to be promoting the law of the jungle rather than international law. Instead, it was necessary to find a formula to frame the use of countermeasures. Were countermeasures to be considered as penalties, or as a means of inducing the wrongdoing State to compensate the damage caused? He favoured the latter view, though he would have been willing to discuss the former, which had seemed to prevail in the Drafting Committee. Yet the Commission had preempted such discussion by deciding that the measures must be aimed at inducing a wrongdoing State to cease the act and compensate the damage.

35. There was a counterpart responsibility to the taking of countermeasures: if a State could not demonstrate before ICJ that it was the injured State, it immediately became a wrongdoing State. It was therefore essential to link the underlying purpose of the countermeasures, namely to induce the wrongdoing State to rectify illegal conduct, with the need to demonstrate that the countermeasures themselves were not illegal—on pain of incurring penalties.

36. The discussion had been useful to some degree for it had enabled the Commission not only to define countermeasures but also to see clearly their limitations. As Mr. Crawford had pointed out, there were certain conditions that applied to the application of countermeasures: they could not be carried out through the use of force or in such a way as to affect the political independence of States. There were also certain circumstances in which States must suspend countermeasures. In short, chapter III provided for minimum safeguards for States that might be affected by countermeasures. It must be viewed as a whole and decided on as such, leaving minor amendments to a later stage. If the Commission failed to adopt chapter III, it would be leaving the

[5] See 2454th meeting, footnote 16.

door open to all manner of abuse. If it adopted that text, on the other hand, it would place the countermeasures regime within a legally manageable context.

37. Mr. BENNOUNA said he could not agree with members who considered the text well balanced, despite Mr. Crawford's eloquent argument. The draft should deal with the consequences of countermeasures, rather than the countermeasures themselves, and there lay the conceptual problem. A countermeasure was a unilateral act, a priori of an illegal nature, carried out by a State; it was a breach of the law that was condoned because it took place in response to another illegal act. But such acts should neither be condoned nor criminalized: the State should be exonerated from responsibility for them, as for actions taken in self-defence. And such exoneration should be gained through a dispute settlement procedure rather than arrogated to themselves by States, as would be the effect under the draft articles. It was argued that to require the exhaustion of all dispute settlement procedures before countermeasures could be started would be unrealistic. Perhaps that was true; but the Drafting Committee had turned the whole sequence back to front, making all dispute settlement efforts subsequent to the adoption of countermeasures. The most judicious approach would have been to require some attempts at dispute settlement—for example, negotiation—to precede the launching of countermeasures.

38. Mr. Pellet's proposal seemed to be a compromise formula that was wholly acceptable. It had the advantage of being fully in line with existing international law and actually adapted the self-defence regime to countermeasures. If that proposal was adopted, he could go along with a consensus on the draft articles. Otherwise, he would call for a vote on chapter III as a whole, and would vote for it to be deleted.

39. The CHAIRMAN read out the following proposal, submitted by a small group of members of the Commission:

> "*Article 47. Countermeasures by an injured State*
>
> "1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations to the State which has committed the internationally wrongful act.
>
> "2. The injured State is not entitled to take countermeasures, except under the conditions and subject to the restrictions set out in articles 48 to 50, as necessary in the light of the response of the State which has committed the internationally wrongful act to its demands in order to induce it to comply with its obligations under articles 41 to 46.
>
> "3. (Previous paragraph 2)."

40. Mr. ROSENSTOCK said that tinkering with the articles now might only undo the whole package. He believed the Commission should proceed directly to a vote, recording differing views in the commentary, as appropriate, and in the summary records. If it was accepted that the only issue to be considered with regard to chapter III was whether or not article 47 [11] could be reformulated in slightly stronger terms—a public relations exercise—then it might be worth a brief effort, perhaps through a small working group, to see whether that change alone, and no other, could be accepted. Otherwise, the result would be to destroy chapter III.

41. Mr. EIRIKSSON said that he endorsed the proposal, which was entirely in line with the considerations outlined by Mr. Rosenstock: to effect a slight change in the tone of article 47 [11] without affecting the substance. He would likewise support, and contribute to, an attempt to revise the proposal with a view to reaching consensus.

42. Mr. CRAWFORD said that the exact wording of the proposal was not the crucial matter at stake: if it was determined that such a proposal had broad support, and that that was the only significant change to be made to chapter III, then a small working group could take charge of the final formulation. The Commission should also establish a small working group to ensure that the views of all of its members were adequately reflected in the commentaries. For the moment, a time-limited exercise, as suggested by Mr. Rosenstock, was the right course to follow, to achieve consensus on chapter III as a whole.

43. Mr. BENNOUNA said he had no objection to the idea of refining the proposal further, even by establishing a small working group. But he could not accept Mr. Rosenstock's contention that the proposal must be the sole change to be made to chapter III. He himself had already made a suggestion, one that seemed to have been accepted, that a reference to prior negotiation should be incorporated in article 48 [12]. That, too, should be debated thoroughly. The overriding objective was to achieve consistency in chapter III, which covered a delicate subject that had already raised controversy in the General Assembly. If necessary, a vote should be taken on both proposed changes—to article 47 [11] and to article 48 [12].

44. Mr. SZEKELY said he agreed with Mr. Rosenstock that the only type of change that should be contemplated at the present stage was one of very limited scope. If the approach advocated by Mr. Bennouna was adopted, however, the entire package represented by chapter III would be reopened for discussion and that would be extremely unfortunate. It might indeed be better to proceed to a vote.

45. Mr. ROSENSTOCK said he was in complete agreement with Mr. Szekely. The issue of whether efforts should first be made at dispute settlement had been twice debated in the Commission and twice in the Drafting Committee. Bringing up the issue yet again would serve no purpose and might only undermine what had been achieved so far. Redrafting article 47 [11], moreover, as part of a public relations exercise, would not necessarily ensure that consensus would be reached: the exercise did not therefore seem to be a very promising or constructive one.

46. Mr. PELLET said Mr. Rosenstock's comment that the proposed rewording of article 47 [11] was a public relations exercise could not be allowed to go unchallenged. The proposed reformulation of article 47 [11]

was intended to make it absolutely clear that countermeasures could be envisaged only under the conditions outlined in articles 48 [12] to 50 [14]. A statement that States had a right to do something was diametrically opposed to a statement that they did not have such a right. In its previous endeavours in elaborating international instruments, the Commission had very carefully considered whether the wording should be couched in positive or negative terms. For example, the commentary to article 46 of the Vienna Convention on the Law of Treaties explained why the wording had been deliberately cast in the negative.[6] The same was true of article 33 (State of necessity), in part one of the draft. The proposed negative formulation of article 47 [11] was intended to place the maximum limitation on resort to countermeasures.

47. Mr. Rosenstock's position was that article 47 [11] could be slightly amended as long as no change was made to article 48 [12]. Article 47 [11] had been adopted subject to the adoption of article 48 [12], which had never been adopted. Personally, though he endorsed Mr. Bennouna's proposed amendment to article 48 [12], he would not insist on that amendment, as long as article 47 [11] was reformulated in such a way as to make it clear that countermeasures could not be taken, except in certain cases. He would insist, however, on the Commission's right to contemplate any changes to article 48 [12] that it deemed appropriate: that text was not sacrosanct, contrary to the viewpoint advanced by Mr. Rosenstock.

48. Mr. THIAM said that he was prepared to vote in favour of the text proposed by a small group of members, but would have no objection to referring the text to a small working group provided a decision could be reached soon. The Commission had already spent a great deal of time on the subject of countermeasures.

49. The CHAIRMAN said that, if necessary, the Commission could hold an extra meeting the next day.

50. Mr. LUKASHUK said that, by turning the plenary meeting into a meeting of the Drafting Committee, the Commission was seriously jeopardizing the chances of completing its work on the draft. The only way to achieve success at the present stage was to stop discussing amendments and, instead, to decide whether chapter III should be maintained or deleted. His own position on that issue was a dual one. As a responsible jurist, he thought that the chapter was useful and should be maintained, but from the point of view of his country's national interests he thought that it could be dispensed with.

51. Mr. ARANGIO-RUIZ said that he welcomed the proposal submitted by a small group of members, which went some way towards meeting the criticisms he had formulated earlier in the meeting. Perhaps the order of the first two paragraphs should be reversed. The fact that the right of the injured State to take countermeasures was expressed in a negative rather than a positive form was perhaps an improvement, although the difference was not very great as the provisions of articles 49 [13] and 50 [14] were also expressed in negative terms. As for article 48 [12], which had also been couched in the negative originally, there was no need to prejudge the issue until a decision had been reached on article 47 [11]. Mr. Bennouna's proposal was useful but would not really suffice. For his own part, he would want much more than negotiation prior to countermeasures.

52. Mr. KABATSI said that the text proposed by a small group of members represented a useful compromise and he was prepared to accept it. It should be understood that those who had spoken out against countermeasures had not done so out of any misplaced sympathy for the wrongdoing State but only because they felt the underlying approach to be too heavily weighted in favour of the injured State, real or imagined. The new formulation went some way towards redressing the situation. He was not against countermeasures. They should simply be the exception rather than the rule and subject to certain conditions.

53. Mr. ROSENSTOCK suggested that, under the circumstances, the simplest way to proceed would be to treat the proposal by a small group of members as an amendment to article 47 [11] as it stood. A decision could then be taken without further delay. Otherwise, the Commission would be going round in circles.

54. Mr. BENNOUNA said that he had no objection to the procedure just proposed by Mr. Rosenstock. The Commission could adopt the proposed new text of article 47 [11] and then go on to consider article 48 [12]. Perhaps the small group should be allowed to meet for a few minutes in order to put some finishing touches to the text.

The meeting was suspended at 12.45 p.m. and was resumed at 12.55 p.m.

55. Mr. BENNOUNA said that the proposed new version of article 47 [11] would read:

> "1. The injured State is not entitled to take countermeasures, except under the conditions and subject to the restrictions set out in articles 48 to 50, as necessary in the light of the response of the State which has committed the internationally wrongful act to its demands in order to induce it to comply with its obligations under articles 41 to 46.
>
> "2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.
>
> "3. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations to the State which has committed the internationally wrongful act, in response to that act."

He hoped that the text, thus amended, would be accepted by consensus.

56. Mr. EIRIKSSON and Mr. LUKASHUK said that they were unable to accept or vote on a text which had not been circulated in writing.

57. Mr. ROSENSTOCK said that he continued to regard the proposed text as seriously deficient. The omis-

[6] The article was originally adopted as article 43; for the commentary, see *Yearbook... 1966*, vol. II, pp. 240 et seq., in particular, para. (12) at p. 242.

sion of the phrase "As long as the State . . . has not complied" represented a substantive change which he, for one, was not prepared to accept. The possibility of reaching a decision by consensus was therefore very slight.

58. The CHAIRMAN said that the proposed new text of article 47 [11] would be circulated in writing for the next meeting.

The meeting rose at 1.10 p.m

2456th MEETING

Wednesday, 10 July 1996, at 10.15 a.m.

Chairman: Mr. Ahmed MAHIOU

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

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

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE[2] PROPOSED BY THE DRAFTING COMMITTEE[3] (*continued*)

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

CHAPTER III (Countermeasures) (*continued*)

ARTICLE 47 (Countermeasures by an injured State) (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of chapter III of part two starting with article 47 [11].

2. Mr. CRAWFORD said that the compromise text which had been prepared by a group of members read:

> "1. For the purposes of the present articles, the taking of countermeasures means that an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46, as long as it has not complied with those obligations and as necessary in the light of its response to the demands of the injured State that it do so.
>
> "2. The taking of countermeasures is subject to the conditions and restrictions set out in articles 48 to 50.
>
> "3. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified under this chapter as against the third State."

3. Paragraph 1 of that text no longer stated that countermeasures were lawful, but simply defined them, which was more consistent with article 30 (Countermeasures in respect of an internationally wrongful act) of part one of the draft. The wording was therefore more neutral. The words "as long as it has not complied" imposed a temporal limitation on countermeasures, while the end of the article, from the words "as necessary" indicated that, if countermeasures were not "necessary", they could not be taken, and that met the concern expressed by the former Special Rapporteur (2455th meeting).

4. Paragraph 2 made countermeasures subject to the conditions and restrictions set out in articles 48 [12] to 50 [14] and should be uncontroversial, while paragraph 3 was the same as former paragraph 2, except that the words "of paragraph 1" had been replaced by the words "under this chapter" to take account of the amendment to paragraph 1.

5. Mr. de SARAM said that it was difficult for him to comment on a text he had only just seen. Nonetheless, he would like to know how paragraph 1 of the text as just read out by Mr. Crawford differed from the original paragraph 1 and, in particular, whether it weakened the safeguards the latter paragraph provided against possible abuses with respect to countermeasures. If there was no substantial difference, he could go along with the new text, which was in fact clearer and did not take a position on the legitimacy or otherwise of countermeasures.

6. The CHAIRMAN said that the new text was not substantially different from the text it replaced; it was merely more neutral.

7. Mr. ARANGIO-RUIZ said that he was on the whole in favour of the new text proposed for article 47 [11], although he had the strongest reservations about the phrase "as long as it has not complied with those obligations and", which suggested that a State could take countermeasures without waiting for any response on the part of the State which had allegedly committed the wrongful act or before assessing such response. If the accused

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[1] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[2] 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.

[3] 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.