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Summary record of the 2456th meeting

Topic:
State responsibility

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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.

State admitted the existence of a breach and assured the injured State that it was ready to meet its responsibilities, there should be no reason for countermeasures. He would therefore like the phrase in question to be deleted.

8. Mr. BOWETT said that he did not read paragraph 1 of the new text proposed for article 47 [11] in the same way as Mr. Arangio-Ruiz, since, in his view, the two criteria to which countermeasures were subject under the last part of paragraph 1 were cumulative, as was indicated by the conjunction "and" before the words "as necessary". If there was "no reason" for countermeasures, as in the situation to which Mr. Arangio-Ruiz had referred, they would not be "necessary" and hence would fall foul of the second criterion. In actual fact, it was the provision on compulsory arbitration that would provide the most effective safeguard against abuses of countermeasures. Any State which took measures that were unreasonable or unnecessary would be penalized in the arbitration process. Any sensible interpretation of article 47 [11], paragraph 1, made in good faith must take that provision into consideration.

9. Furthermore, he trusted that no attempt would be made, during the consideration of article 47 [11] or of other articles, to introduce new conditions about prior attempts at negotiation or settlement, which had already been rejected by the Drafting Committee and were, in addition, unnecessary because of the provision on compulsory arbitration.

10. Mr. JACOVIDES said that, owing to lack of time, he had been unable, at the preceding meeting, to make the comments he was hoping to on countermeasures in the context of State responsibility, in the light of chapter III as adopted by the Drafting Committee. If countermeasures were to be included in the draft—and, in the circumstances, their omission would leave a serious gap in the present state of international law—they must (*a*) be circumscribed as clearly and narrowly as possible; (*b*) be accompanied by the strictest possible system of effective and binding third party dispute settlement procedures; (*c*) be proportional to the wrongful act responded to; and (*d*) be prohibited in certain categories of case and, certainly, when they were in contravention of peremptory norms of international law, a concept which, incidentally, should be clarified and defined. Draft articles 47 [11] to 50 [14] as adopted by the Drafting Committee were acceptable in that they achieved a certain balance among the various elements involved. Like several members of the Commission, including Mr. Sreenivasa Rao, Mr. Al-Baharna and the small group of members who had submitted a proposal (2455th meeting), he considered that countermeasures should be the exception rather than the rule. At the same time, he was prepared to go along with the text read out by Mr. Crawford.

11. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he could accept the new text proposed for article 47 [11], but felt bound to express strong reservations about its drafting. New paragraph 1 of article 47 [11] defined countermeasures and then laid down two conditions to which they were subject. Those conditions should have been set out in the articles which dealt with the conditions for and restrictions on the use of countermeasures.

12. Mr. SZEKELY said that, like Mr. Bowett, he considered that the two conditions to which countermeasures were subject under new paragraph 1 of article 47 [11] were cumulative. He too still preferred the text originally proposed by the Drafting Committee and he had some concern about the reasons for recasting article 47 [11]. He also found it difficult to accept the new text proposed for article 47 [11] before knowing the final content of article 48 [12] on the conditions relating to resort to countermeasures. Accordingly, he could join in the consensus on article 47 [11] provided that the outcome of the discussion on article 48 [12] did not jeopardize the balance achieved in article 47 [11].

13. Mr. VILLAGRÁN KRAMER said that the Drafting Committee had made considerable efforts to arrive at the compromise wording Mr. Bowett had just read out. He himself was prepared to vote on the text as initially proposed so that the General Assembly could be aware of who among the members of the Commission took the view that there was a rule of *lex lata* with regard to reprisals or countermeasures and that the rule must be codified and who believed that the draft should not deal with that question and preferred to let the law of the jungle prevail in that regard. Because it was necessarily linked to article 48 [12], he could accept article 47 [11] and join in the consensus only if article 48 [12] remained as it stood.

14. Mr. BARBOZA said that the Commission should avoid reopening the debate on chapter III. It was extremely difficult to carry out drafting work in plenary meetings. With regard to paragraph 1 of the new article 47 [11], the phrase "as long as it has not complied" was redundant, since countermeasures were defined precisely as those measures which were taken when the wrongdoing State had not complied with its obligations. He joined in the consensus on article 47 [11], but reserved his position on article 48 [12] for the time being.

15. Mr. PELLET said he agreed with the Chairman of the Drafting Committee that the last part of paragraph 1 of the new article ("as long as it . . .") should be placed in paragraph 3. With regard to substance, Mr. Arangio-Ruiz was right to express reservations about the condition laid down by that phrase, which, referred not to the obligation of arbitration, but to the obligations which the wrongdoing State had to fulfil under articles 41 to 46. If article 47 [11] was taken literally, as proposed, it could be said that the injured State was justified in taking countermeasures even during the period of arbitration. Such a procedure could last three or four years. That being said, he was prepared to accept the new text, which seemed better than the previous version, since it no longer asserted that recourse to countermeasures was a right. In that regard, he agreed with Mr. Villagrán Kramer that, in order to limit the use of countermeasures to a minimum, such measures must not, for a start, be considered as a right. He also took exception to what he regarded as blackmail in article 48 [12]. In his opinion, whatever version of article 47 [11] was retained, the basis for that decision must be taken into account during the consideration of the following article.

16. Mr. ROSENSTOCK said that the text of article 47 [11] as provisionally adopted by the Commission at its

forty-sixth session,[4] had been drafted in a satisfactory manner and had been discussed thoroughly enough. In his opinion, it was a mistake to engage in drafting work in the plenary meeting. He was nevertheless prepared to join in the consensus, but he agreed with other speakers that article 48 [12] must not be changed.

17. The words "as long as it . . ." would have to be applied in real circumstances. If they referred to the amount of time the wrongdoing State would have for making reparation, it was hardly likely that the injured State would agree not to use countermeasures in return for a simple promise. If those words referred to the time prior to arbitration, that was hardly more realistic because they would keep the injured State from acting during the entire time it would take to establish a conciliation commission or arbitral tribunal, and that, as everyone knew, might be very long.

18. The new text under consideration seemed to be the least common denóminator on which the members of the Commission could agree. He would therefore accept it in that sense, subject to the smoothing of its stylistic rough edges later.

19. Mr. HE said that he would have preferred article 47 [11] to be retained as already adopted. The wording had been the result of lengthy debate, made even more difficult by the many aspects that had had to be covered. If a consensus was reached on the new text, however, he would agree to join in it.

20. Mr. FOMBA said that the new text of article 47 [11] was an improvement over the previous one because it no longer said that the injured State was entitled to take countermeasures. The system of State responsibility was based on respect for primary obligations. However, the functioning of the system was based on four considerations: the period during which the primary rules were not respected; the evaluation of the gravity of the breach of the primary rules; the evaluation of the good faith, goodwill and ability to make reparation of the wrongdoing State; and, lastly, the assessment of the need for countermeasures. In the proposed text, there was a balance between two criteria of the continued existence of the internationally wrongful act and the need to counter it with a reaction. He therefore endorsed the new text of article 47 [11].

21. Mr. LUKASHUK said that he, too, was prepared to join in the consensus on the new text of article 47 [11], which seemed to be more precise and to give more consideration to the entire range of views expressed by the members of the Commission. Nevertheless, he associated himself with the reservations expressed by the Chairman of the Drafting Committee about the end of paragraph 1. The words "as long as it has not complied" should be part of the conditions under which countermeasures could be taken and which were dealt with in the following articles.

22. Mr. VARGAS CARREÑO said he welcomed the consensus that seemed to be taking shape on the new text of article 47 [11]. In his opinion, the fate of that provision had to be linked to that of article 48 [12] and also that of articles 49 [13] and 50 [14]. He proposed that the new text of article 47 [11] should be adopted provisionally; the Commission could return to it for final adoption once action had been taken on the other articles on countermeasures.

23. Mr. YANKOV said that neither the earlier version nor the new text of article 47 [11] was fully satisfactory, although the latter did dispel certain doubts about the nature of countermeasures. He was fully prepared, in principle, to put aside his reservations and join in the consensus which seemed to be taking shape. It should nevertheless be understood that article 48 [12] would define precisely the conditions under which countermeasures could be taken.

24. Mr. MIKULKA said that, while he was willing to accept the new text of article 47 [11], he endorsed the comments by Mr. Pellet and the Chairman of the Drafting Committee on the end of paragraph 1, which in his view, belonged in paragraph 2. In fact, the words "as long as it has not complied" could just as well be deleted, since its meaning was already implicit in the text, which clearly stated that the purpose of countermeasures was to induce the wrongdoing State to comply with its obligations. It should also be understood that the interpretation of that phrase would always be made in the light of article 49 [13] on proportionality.

25. Mr. AL-BAHARNA said that, although it had been drafted hastily, the new text of article 47 [11] was somewhat better than the previous version. He was therefore willing to join in the consensus, it being understood that article 48 [12] would also be adopted. The commentary should also be revised to take the new wording into account. If the new text of article 47 [11] and article 48 [12] could not be adopted by consensus, he would like the Commission to go back to the earlier version of article 47 [11] and put it to a vote.

26. Mr. ROBINSON said he welcomed the fact that the entitlement to take countermeasures had been left out of the new text, which, in his view, differed from the previous text only in the way in which the issues were presented. He was willing to join in the consensus which seemed to be taking shape on articles 47 [11] and 48 [12].

27. The CHAIRMAN, speaking as a member of the Commission, said that he, too, welcomed the deletion of the reference to an "entitlement to countermeasures", which would appear to authorize the types of conduct that article 30 condemned. It was now much clearer that countermeasures should come into play only in exceptional cases.

28. He recalled that the Commission was merely at the stage of the first reading of the draft and that it could, if necessary, go back over any wording that needed to be reworked.

29. Mr. ARANGIO-RUIZ said that he would like his very serious reservations on the words "as long as it has not complied" to be reflected in the summary record.

[4] See 2454th meeting, footnote 12.

30. Mr. EIRIKSSON said that he joined in the consensus because he considered that article 30 of part one had already dealt with the problem at hand.

31. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt the new text of article 47 [11] by consensus.

Article 47, as amended, was adopted.

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

32. Mr. PELLET said that it would be logical to bring article 48 [12] into line with the new article 47 that had just been adopted. He therefore suggested the following amendment to the last two paragraphs of that article:

> "2. Provided that the internationally wrongful act has ceased, the injured State shall suspend countermeasures when and to the extent that the dispute settlement procedure referred to in paragraph 1 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.
>
> "3. The obligation to suspend countermeasures ends in case of failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure."

Even with that amendment, he believed that the conditions set out in article 48 [12] were somewhat utopian, for they presupposed that part three of the draft articles, dealing with the settlement of disputes, would be adopted—something that was by no means certain.

33. Mr. BENNOUNA said he supported the proposal made by Mr. Pellet and recalled that he himself had likewise proposed (2454th meeting) an amendment to article 48 [12] designed to introduce, in a new paragraph 1, the idea that, before resorting to countermeasures, the injured State was under the obligation to negotiate. The amendment read:

> "1. Prior to taking countermeasures, an injured State shall fulfil its obligation to negotiate provided for in article 54 . . . ."

Such a provision might be useful for a number of reasons: first, it was directly in line with Article 33 of the Charter of the United Nations; secondly, it enabled the parties, regardless of the outcome of the negotiations, to exchange views and clearly state their respective positions; thirdly, it would discourage powerful countries from being tempted to take advantage of their dominant position; and, fourthly, it offered the parties a practical and realistic solution, for, as Mr. Pellet had pointed out, arbitration could go on for years.

34. Mr. ARANGIO-RUIZ said he continued to be of the opinion that article 48 [12] should have been much stricter in requiring prior compliance with dispute settlement obligations before a State resorted to countermeasures. The obligation to negotiate as proposed by Mr. Bennouna was welcome, but it was not sufficient. Reference should also have been made in paragraph 1 to all the other dispute settlement procedures available, above and beyond those provided for in part three. In that connection, he referred the members of the Commission to the draft article he himself had proposed, in his fourth report.[5] In general terms, the conditions for countermeasures laid down in the article were too dependent on the ultimate fate of part three and particularly article 58 [5], paragraph 2, to which strong objections had been expressed by several members of the Commission.

35. Another defect of article 48 [12] was that it contained no provision imposing prior communication among the parties. Except, of course, for urgent protective measures, for which no prior communication should be required, a wrongdoing State should be granted the possibility of avoiding countermeasures by admitting to the breach it had been accused of committing and by offering reparation. That was possible only in the context of prior communication with the injured State.

36. Article 48 [12] also entirely failed to take account of the distinction that must be made between countermeasures and urgent protective measures. He had drawn attention to that matter yet again in his eighth report (A/CN.4/476 and Add.1).

37. For everything he had said about dispute settlement, he referred the members of the Commission to his fourth and fifth[6] reports, chapter II of his eighth report and the article that he had published in 1994.[7]

38. Mr. MIKULKA said that the drafting amendment proposed by Mr. Pellet seemed logical, but he wondered whether it would solve the problem completely. By indicating, in paragraph 2, that "the injured State shall suspend countermeasures", the Commission was assuming that countermeasures had already been adopted. Yet article 47 had been amended precisely to do away with the idea that the injured State had the right to adopt countermeasures. Accordingly, must not article 48 [12] likewise cover the case where the injured State had not adopted countermeasures? He said he would like Mr. Pellet to redraft paragraphs 2 and 3 along those lines.

39. Mr. ROSENSTOCK said that he endorsed the comments made by Mr. Mikulka. By wishing at all costs to make article 47 "politically correct" without really changing anything as to substance, the Commission had complicated matters in article 48 [12]. As to whether paragraph 1 should include a reference to the obligation to resort to dispute settlement machinery other than that provided for in part three, he recalled that all proposals made along those lines by the Special Rapporteur had been rejected.

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[5] *Yearbook . . . 1992*, vol. II (Part One), p. 22, document A/CN.4/444 and Add.1-3, para. 52.

[6] *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3.

[7] G. Arangio-Ruiz, "Counter-measures and amicable dispute settlement means in the implementation of State responsibility: A crucial issue before the ILC", in *Journal européen de droit international*, vol. 5 (1994), No. 1, pp. 20-53.

40. Mr. LUKASHUK said that he had no objection in principle to draft article 48 [12] or the drafting amendments proposed by Mr. Pellet and Mr. Bennouna. He wondered, however, whether the Commission was not making things unnecessarily complicated. After all, the right to resort to countermeasures was generally recognized and countermeasures themselves were an important part of the mechanism by which international law operated. That fact could be repudiated on paper, but what would happen in practice? If the Commission wanted to be honest, it had to stop contesting the right to countermeasures and merely limit it. Obstinately doing otherwise would only lead to contradictions.

41. Mr. PELLET acknowledged that article 48 [12] represented an attempt to find a middle term. The version he had proposed had the advantage of being in line with article 30 of part one of the draft, which was careful not to say anything about a right to resort to countermeasures. In order to meet the concerns expressed by Mr. Mikulka, he could either replace the words "the injured State shall suspend countermeasures" in paragraph 2, by the words "the injured State shall not adopt countermeasures and shall suspend the countermeasures it has adopted" or incorporate wording to that effect in the commentary.

42. Mr. de SARAM drew Mr. Pellet's attention to the fact that, in article 30 of part one, to which he had referred, countermeasures were described as constituting a legitimate measure. He did not particularly want the word "right" to be retained in article 48 [12], but he wondered whether, in proposing that it should be deleted, Mr. Pellet was motivated only by drafting considerations.

43. Mr. VILLAGRÁN KRAMER said that the right of reprisals was fully recognized by the doctrine and that, if the obligations of the injured State were listed, the least that could be done was to recognize its rights as well. The difference between *faculté* and "right" was not of such fundamental importance in that connection. If his memory served him correctly, Mr. Pellet himself had dealt masterfully with the problem of countermeasures in a work in which he included them among the circumstances precluding unlawfulness. The Spanish version of that work stated that the wrongfulness of such measures in question was precluded if they were legitimate measures taken in response to an internationally wrongful act.

44. As to the obligation of prior exhaustion of all possibilities of peaceful settlement which Mr. Arangio-Ruiz wanted to introduce, he had not found one single example among the cases cited by the former Special Rapporteur showing that such an obligation existed. No precedent to that effect was to be found either in the *Portuguese Colonies* case (Naulilaa incident)[8] or in the case concerning *the Air Service Agreement of 27 March 1946 between the United States of America and France*.[9] What did exist, however, was the obligation of the State which intended to take countermeasures to give prior notice. The following wording, which he had recently found in a treaty on international law, seemed highly pertinent: "Before taking countermeasures, notice is given not out of courtesy, but because it is an obligation".

45. The injured State would therefore request the wrongdoing State, first, to cease the wrongful act and, secondly, to provide satisfaction or reparation. If the response to that request was negative, there would be a controversy between the two States, but, if it was positive, the dispute settlement mechanism could enter into play. That did not, however, imply the existence of an obligation to resort to such a mechanism unless the obligation to submit a given question to arbitration or to a compulsory dispute settlement system was provided for by a treaty. In that case, that obligation would cancel out the right of the injured State to resort to countermeasures. As it happened, part three of the draft did contain such an obligation.

46. Referring specifically to the wording of article 48 [12], he recalled that some members had agreed to amend the text of article 47 only on condition that no change was made in article 48 [12]. He was, however, prepared to consider the proposal by Mr. Pellet, but would ask for a vote on any proposal that went beyond that of Mr. Pellet and, in particular, on any proposal for the addition of a new paragraph 1 to article 48 [12].

47. Mr. PELLET explained that the wording of article 48 [12] which he was proposing did not entirely correspond to what he would have wished, namely, that the Commission should start from the idea that, save in exceptional circumstances, States had no right to resort to countermeasures.

48. In reply to the question raised by Mr. de Saram, he said that, by adopting the proposed wording, the Commission would avoid stating the principle of the existence of a subjective right to take countermeasures. Furthermore, article 48 [12], like article 30 of part one, would make the right and the obligations indissociable, since the legitimacy of the countermeasure would be made contingent on compliance with a number of conditions.

49. Referring to Mr. Villagrán Kramer's rejection of the proposal that a new paragraph 1 should be added to article 48 [12], he said that he could not understand such a position on the part of a member who was apparently one of those who wanted to limit resort to countermeasures to the maximum possible extent. The proposal to make resort to countermeasures subject to prior negotiations amounted to adding an a priori obligation to the a posteriori obligations contained in part three, thereby limiting still further the possibility of resorting to countermeasures that was available to the great Powers or the super-Powers. The proposal was a happy medium between the thesis of a subjective right to resort to countermeasures and the somewhat unrealistic idea defended by Mr. Arangio Ruiz that the injured State should be able to resort to countermeasures only after the exhaustion of all dispute settlement procedures.

50. Lastly, like Mr. Arangio Ruiz, he regretted the fact that the Commission had set aside the possibility of

[8] United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1011.

[9] Ibid., vol. XVIII (Sales No. E/F.80.V.7), pp. 415 et seq.

recourse to urgent protective measures in exceptional cases. That was a question to which the Commission should come back on second reading.

51. Mr. CRAWFORD said that he was prepared to join in the consensus that seemed likely to emerge in favour of the amendments to article 48 [12] which had been proposed in order to bring it into line with article 47. On the other hand, he thought that the problem raised by Mr. Mikulka was already resolved by the existing text of paragraph 1 of article 48 [12], referred to in paragraph 2 of the same article, which was concerned only with an injured State that had actually taken countermeasures. That left open the possibility, which he supposed was not merely hypothetical, that a State entitled to take countermeasures might exercise that right only after it had already referred the matter to a dispute settlement mechanism which it had accepted previously, for example, by a treaty. In such a case, the coexistence of two parallel dispute settlement procedures, one relating to the underlying dispute and the other relating to the subsequent taking of countermeasures, would undoubtedly give rise to problems. However, that possibility did not fall textually within the scope of article 48 [12].

52. Mr. VILLAGRÁN KRAMER, replying to Mr. Pellet's remarks, said that his reasoning was not in the least contradictory. Like the other members of the Commission, he had received a very clear mandate from the General Assembly to codify in good faith the existing rules of general international law, *lex lata*, and, if no rules existed, to undertake the progressive development of international law. But the Assembly had not given him the right to negotiate a solution politically. He could, of course, reach a compromise on defining a rule or on precluding the application of a rule, but, unlike some of his colleagues, he considered himself bound by the statute of the Commission. Besides, the question of the right of reprisals was relatively clear-cut.

53. It was also worth pointing out that, when the Security Council authorized a State to take reprisals by reason of a violation of the Charter of the United Nations or a wrongful act committed by a State, prior negotiations were not required.

54. Mr. EIRIKSSON said that he supported Mr. Pellet's proposal. For the same reasons as Mr. Crawford, he did not think that it needed to be amended in order to meet the concerns of Mr. Mikulka and Mr. Rosenstock.

55. Mr. MIKULKA, unreservedly supported by Mr. ROSENSTOCK, said that he could accept Mr. Pellet's proposal that the problem he had raised should be solved in the commentary. That did not, however, mean that he was convinced by the arguments put forward by Mr. Crawford and supported by Mr. Eiriksson. It was not entirely true to say that paragraph 1 was concerned a priori with cases in which countermeasures had already been taken; according to article 47, countermeasures as such were authorized only subject to the conditions set out in articles 48 [12] to 50 [14]; in other words, those conditions had to be interpreted as being applicable to the actual taking of countermeasures. Moreover, while paragraph 1 defined the limits placed on a State already engaged in taking countermeasures, paragraph 2 had a far wider scope in that it applied to a situation where a State which had the intention of taking countermeasures, but which hesitated to apply them, submitted in advance to procedures set out in part three. Meanwhile, a development took place in that the wrongful act ceased and the perpetrator of the act himself submitted to a procedure provided for in part three. He therefore objected to it being stated in the commentary that the problem was solved because paragraph 2 of article 48 [12] derived purely and simply from paragraph 1.

56. The CHAIRMAN invited the members of the Commission to decide on Mr. Pellet's proposal. If he heard no objection, he would take it that the Commission wished to adopt the proposal.

It was so decided.

57. The CHAIRMAN invited the members of the Commission to vote on Mr. Bennouna's proposal that a new paragraph 1 should be added to article 48 [12].

The proposal was adopted by 13 votes to 9, with 1 abstention.

58. Mr. CRAWFORD, speaking in explanation of vote, said that the addition of the paragraph in the absence of any provision relating to urgent measures of protection contributed towards seriously unbalancing article 48 [12].

59. Mr. ROSENSTOCK said that he associated himself with the explanation of vote given by Mr. Crawford. Article 48 [12] as it had just been amended was totally unacceptable. He therefore requested the Chairman to put the whole of article 48 [12] as amended to the vote.

60. The CHAIRMAN, replying to comments by Messrs. Arangio-Ruiz, Bennouna, Eiriksson, Mikulka, Thiam, Güney and Szekely, said that the beginning of the following meeting would be set aside for the vote on article 48 [12], as a whole, and for possible explanations of vote by members of the Commission.

The meeting rose at 1.15 p.m.

2457th MEETING

Thursday, 11 July 1996, at 10.10 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. Elaraby, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.
