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Summary record of the 2457th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1996, **vol. I**

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.

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

1. Mr. CRAWFORD said that, at the previous meeting, the Commission had voted to adopt a proposal by Mr. Bennouna for a new paragraph 1 of article 48 [12] containing a provision to the effect that, before resorting to countermeasures, an injured State was required to negotiate in accordance with article 54 [1] of part three. A number of members had voted against the proposal on the grounds that, by depriving the injured State of the possibility of protecting itself for what might well prove in some circumstances to be a considerable length of time, the proposed provision threw the whole chapter out of balance. In an endeavour to retrieve that balance yet preserve the principle of prior negotiation before countermeasures were definitively applied, he now wished to propose the addition of the following paragraph 1 *bis* to follow the new paragraph 1:

> "1 *bis*. Paragraph 1 is without prejudice to the taking by the injured State of interim measures of protection which otherwise comply with the requirements of this chapter and which are necessary to preserve its legal position pending the outcome of the negotiations provided for in article 54."

The proposal reintroduced the concept of interim measures of protection initially proposed by the Special Rapporteur, and drew on the form of language used by the Special Rapporteur in his fourth report.[4] The French version of the proposed new paragraph 1 *bis* had been improved by Mr. Bennouna.

2. Mr. BOWETT said that, while acknowledging the reasons for Mr. Bennouna's proposal and the support expressed by a number of members for the best of motives, he continued to think that the result of the previous day's vote represented a very serious error. It meant the Commission was back where it had been three years before, with all the intervening effort dismissed as so much waste of time. Chapter III as it now stood would be unacceptable to Governments because it was largely unworkable in practice. For example, an injured State might decide on a temporary freeze of assets. If prior negotiations were to be a condition for taking countermeasures, the wrongdoing State would be able to make sure that by the time the negotiations ended there were no assets left to freeze. Although the proposal for a new paragraph 1 *bis* provided some remedy in the form of "interim measures of protection", it merely made the best of a bad job. The ideal solution was to adopt the right principle, not to adopt a bad principle and then minimize its harmful effects. However, he was prepared, albeit with misgivings, to support the proposal and join a consensus on article 48 [12]—which he continued to regard as a very bad article—on condition that new paragraph 1 *bis* was included. If it was not included, he would vote against the article as a whole.

3. Mr. BENNOUNA said it appeared that either the Commission worked so as to please certain Governments—those that were in a position to freeze other States' assets—or it was made up of bad jurists who made mistakes. That was a totally unacceptable assertion, the Commission was now simply engaged in correcting something that had been badly done. At the previous meeting, the majority of members had wisely decided to restore a minimum measure of balance to an unsatisfactory provision by making countermeasures contingent upon prior negotiation. The amendment he had proposed was in keeping with customary international law and its adoption had therefore been a straightforward act of codification.

4. As to the proposal by Mr. Crawford, the fact that he had refined the French version should not be taken to mean that he was in agreement with the substance of the proposed new paragraph 1 *bis*, which, he feared, might have the effect of neutralizing paragraph 1 as adopted by the Commission (2456th meeting). In any case, he was not sure that article 48 [12], which was on the conditions relating to resort to countermeasures was the right place for the proposed new provision. It might be more appropriately inserted as a separate new article on interim measures between articles 47 and 48 [12].

5. Mr. ARANGIO-RUIZ said that he could only abstain in a vote on article 48 [12] as well as on article 47. After years in which improvements would have been made on the highly unfortunate article 12 of part two, which had been adopted by the Drafting Committee at the forty-fifth session, in 1993[5] without any real reflection of the true position in the Commission, paragraphs and bits and pieces of articles were being proposed that simply did not square with each other. He did not consider Mr. Bennouna's solution adequate, for he had originally had much more than negotiation in mind, and Mr. Crawford wished to suggest a remedy by reverting to interim measures that had been rejected after very superficial discussion in the Drafting Committee in 1993 and 1994, with a promise that they would be scrutinized later. The matter never had been looked into. The current

[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.

[4] See 2456th meeting, footnote 5.

[5] See 2454th meeting, footnote 13.

situation was a mess and article 47 was in an unacceptable state. The whole issue of the relationship between the Commission and the Drafting Committee should be given special consideration when the Commission came to review its methods of work in connection with the report of the Planning Group.

6. Mr. ROSENSTOCK said that he entirely agreed with Mr. Bowett on the substance of the matter. It was intolerable to hear comments that the work was being done hastily and that the Drafting Committee's view had been unbalanced. It was utterly deplorable that, without prior notice or consultation, an amendment should be tossed in at the last minute and undo years of painstaking work by the Drafting Committee. The Commission was engaged in an *ex post* mitigation exercise. Chapter III would not be perfect and, if the Commission tried to make it so, it would decide in effect not to submit to the Sixth Committee a text which most members could accept. Mr. Crawford's proposal was not one he liked and he had rejected the idea in the Drafting Committee on several occasions. Interim measures were a concept borrowed from elsewhere. At no time when suggested in the past had it been explained in any detail. It had been regarded as a cumbersome and dubious idea and rejected at Drafting Committee meetings open to all concerned. However, it made the chapter less bad. Mr. Crawford's proposal represented the lesser of two evils and was a basis on which it was conceivable the Commission could adopt a text without a vote.

7. Mr. LUKASHUK said that he was not happy with the procedure of adopting an important amendment by only a small majority after a snap vote. Article 48 [12] in its current form was no longer on the side of the injured party but, rather, on the side of the wrongdoing State. As such, it ran counter to many existing standards of international law and to the Charter of the United Nations itself, which did not insist on prior negotiations as a preliminary condition for self-defence. That being so, the article was unacceptable. He had no objection to the compromise solution proposed by Mr. Crawford, but seriously doubted whether his country would be able to agree to chapter III even with that amendment. The decision taken by the Commission (2456th meeting) jeopardized the chances of acceptance of the draft articles on State responsibility as a whole.

8. Mr. VILLAGRÁN KRAMER said that the Commission's decision regarding article 48 [12] placed the international community in a very curious situation from the legal point of view. There existed at the current time no rule whatsoever in international law which obliged the wrongdoing State and the injured State to hold negotiations. Until such time as a sufficient number of States ratified an international instrument incorporating the provision which Mr. Bennouna had proposed and the Commission had accepted, the situation remained and would remain where it was, namely, the situation in which the Drafting Committee had adopted draft article 12 of part two at the forty-fifth session of the Commission. When Governments came to analyse the draft adopted by the Commission on first reading at the current session, they would realize that it had, in effect, sought to codify a non-existent rule. They would not accept article 48 [12] and matters would be worse than before. It would be seen that the Commission could not formulate a text that might be acceptable to the majority of States that resorted to reprisals with some frequency, and the record would show that political considerations had prevailed over legal ones in the Commission's deliberations. Mr. Crawford's contribution was worthy of praise and he would support it, although it provided only a partial solution to the problem arising from the fact that negotiations could be drawn out indefinitely. While aware of the highly unusual nature of such a procedure, he intended to request a roll-call vote on article 48 [12] unless a satisfactory formula were found that would redress the current lamentable situation.

9. Mr. EIRIKSSON said that the mood which had prevailed at the previous meeting had left him with a bad taste in his mouth. He feared that a similar situation might be arising at the current meeting and appealed to all members to make an effort to overcome their personal differences. So far as Mr. Crawford's proposal was concerned, he suggested that, after taking a decision on it, the Commission should set up a small working group to look at the text with a view to making possible improvements before adopting article 48 [12] as a whole.

10. Mr. YAMADA said that he had voted against Mr. Bennouna's proposal for reasons which coincided with those put forward by Mr. Bowett and Mr. Lukashuk. The provision adopted as new paragraph 1 diminished the value of article 54 [1] and other articles of part three. While appreciating Mr. Crawford's efforts to reduce the harm done, he did not think that adoption of the proposed new paragraph 1 *bis* would restore the balance of article 48 [12] as proposed by the Drafting Committee. Therefore, he could not endorse that article in its new form.

11. Mr. SZEKELY said that he, too, had been totally opposed to Mr. Bennouna's proposal and had voted against it. The adoption of the proposal had to be viewed as something that was most regrettable and would do the Commission little good from the point of view of the repute or the quality of its products. He wished to associate himself with the comments made by Mr. Rosenstock and also the statement by Mr. Bowett in regard to substance. Mr. Crawford's proposal was an attempt to mitigate the effects of the lamentable accident of the adoption of Mr. Bennouna's amendment. It was inconceivable that the Commission should not be equal to the task of doing the work properly.

12. Mr. YANKOV said that he did not share some of the extreme views voiced in support of the idea of negotiations prior to taking countermeasures, nor the view that negotiations could go on forever: should one of the parties to a dispute so decide, it could cease negotiations at any time. The negotiations requirement, far from improving the text, would simply create more problems. In the circumstances, serious thought should be given to Mr. Crawford's proposal, which could also be referred to a small working group with a view to making the wording consistent with the other paragraphs in the article.

13. Members of the Commission did not speak on behalf of any particular Government but sat as experts and in their personal capacity. While they should take account of the possible reactions of States, such reactions

were in no way binding either as to the interpretation of principles of international law or as to any other issues relating to dispute settlement and State responsibility.

14. Mr. THIAM, noting that the Commission had broken with its long tradition of not voting on first reading, said that Mr. Crawford's proposal could perhaps be accepted pending any comments received from Governments or made by delegations in the Sixth Committee. For his own part, he could provisionally accept the proposal.

15. Mr. de SARAM said that he supported Mr. Crawford's proposal, which sought to remove a flaw in Mr. Bennouna's proposal, and agreed that it should be considered further in a working group.

16. So far as the decision taken at the previous meeting was concerned, his own difficulties had arisen because he had always regarded article 47, paragraph 1, and article 48 [12], paragraph 1, in the original formulations, as interlinked. In particular, it seemed to him that the right to exercise the privilege accorded under article 30 of part one, whereby an injured State could in certain circumstances resort to a countermeasure, was clearly subject to certain conditions laid down in article 47, paragraph 1. Those conditions were included in the new condensed version of article 47, paragraph 1, but there was a difference when it came to clarity. Mr. Bennouna's proposal, for which he had voted, went some way to remedying the situation. Under article 47, paragraph 1, as originally drafted, it was clear that the injured State would make demands on the wrongdoing State, for instance, would call upon it for cessation or reparation. As that was less clear in the condensed version, he had been concerned at the effect on article 48 [12], paragraph 1, but had decided that the conciliation requirement proposed by Mr. Bennouna would meet the point. The problem was that in an extreme situation where an injured State needed to take a countermeasure in order to preserve its position, it would be self-defeating for it to inform the other State that it proposed to do so. That difficulty would now be resolved by Mr. Crawford's very worthwhile proposal. Consequently, notwithstanding certain practical and other difficulties, he supported that proposal as a way out of the difficult situation facing the Commission.

17. Mr. BARBOZA said that he had voted against Mr. Bennouna's proposal at the previous meeting, as it introduced a very definite imbalance into the draft. Mr. Crawford's proposal, however, restored that balance to some extent and he could therefore support it. It might also be useful for a small working group to attend to any drafting details and to consider how the proposed form of wording might affect the rest of the article.

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee), speaking as a member of the Commission, said that one of the main points to be solved, of course, concerned the interplay between countermeasures and dispute settlement procedures. From the very outset, he, like the former Special Rapporteur, Mr. Arangio-Ruiz, had always believed that dispute settlement procedures should come before countermeasures. He continued to feel that countermeasures, though unfair, were unavoidable and must be accepted as a reality in the disorganized international society of the modern-day world. At the same time, an attempt must be made to limit them in so far as was possible.

19. Article 12 (currently art. 48), as adopted by the Drafting Committee at the forty-fifth session, when Mr. Mikulka had been Chairman of the Drafting Committee, had not been to his liking at all. At the time, the Commission had decided that, unless a better text could be approved, it would have to stand. He had finally concluded that it should be accepted as a compromise, particularly in view of the approval of article 58 [5] of part three, paragraph 2, under which a State against which countermeasures had been taken would be immediately entitled to seek arbitration, when the countermeasures would be suspended and a solution found.

20. Even though he was in favour of having dispute settlement procedures before the application of countermeasures, he had had to vote against Mr. Bennouna's proposal at the previous meeting, first, because that proposal had not been studied in the Commission at all and, secondly, because it was very one-sided. For instance, although it was designed to protect a State wrongly accused of having committed a wrongful act, it would also protect a State that had actually committed a wrongful act and would therefore be detrimental to the interests of the injured State.

21. Mr. Crawford's proposal restored to some extent the balance the former Special Rapporteur had earlier sought to achieve in that it would allow the injured State a certain leeway to react immediately with measures of protection, if not with full countermeasures. He therefore supported that proposal. Unless it were adopted, and if the provision for which the Commission had voted at the previous meeting were maintained, he would be unable to vote in favour of the article.

22. Mr. FOMBA said that the idea of requiring negotiations to be held before countermeasures were taken, with which he agreed, had been accepted by a majority in the Commission at the previous meeting. Yet it was now being said that it could lead to problems and in particular to the use of delaying tactics by States. The answer lay in the principle of the presumption of good faith, which should apply unless it was felt that that principle no longer carried weight, something he personally would deplore. The proposed solution was to introduce a system of interim measures of protection, but the question was to what extent such measures should be taken *ex ante* or *ex post*. His own feeling was that it was necessary to talk before interim measures were taken. Only when a measure of ill-will was discernible should it be necessary to think in terms of applying such measures. He had nothing against such measures in principle, although they could cause certain difficulties as to form and substance as far as the chapter on countermeasures was concerned. For the rest, he shared to a large extent the position of Mr. Bennouna and Mr. Arangio-Ruiz. Should a general consensus emerge in favour of Mr. Crawford's proposal, however, he was prepared to join in it, subject to any necessary improvements.

23. Mr. ROBINSON said that, while he had some sympathy with Mr. Crawford's proposal, it gave rise to certain concerns, one of which was that the regime of interim measures was nowhere defined in the Commis-

sion's work. The acceptability of the proposal would therefore be considerably enhanced by a carefully elaborated commentary explaining that interim measures operated in a very narrow and circumscribed ambit.

24. Another point concerned the wording of the proposal. He was not altogether sure that it was correct to refer to the preservation of the legal position of the injured State—as distinct from its essential interests—pending the outcome of the negotiations. He would none the less consider Mr. Crawford's proposal in the context of those considerations.

25. Mr. ARANGIO-RUIZ said that, in 1993 and 1994, when he had been the Special Rapporteur and had taken part in the work of the Drafting Committee, if article 12 had been made worse than it was—and he was not implying that it had been perfect originally—it had certainly not been through the fault of the Chairmen of the Committee at the time. It had been the fault of the Drafting Committee and the fact that the Committee's composition had not reflected—as it had not reflected at the current session—the views, and the support for those views, in the Commission. That was why article 12 had been messed about. He was sorry that the Drafting Committee, under the chairmanship of Mr. Calero Rodrigues, had not managed at the current session to do anything, simply because of something he could only define as a kind of obstinate veto on reviewing article 12 and on moving away from the bad drafting of the article in 1993. That obstinacy on the part of some members of the Drafting Committee had prevailed and indeed had been reflected in the report on the work of the Drafting Committee at the forty-fifth session of the Commission in 1993[6]. At that time, as repeatedly stressed by the Special Rapporteur, and as reported by the then Chairman of the Drafting Committee in plenary, there had been a majority in the Drafting Committee in favour of prior recourse to means of settlement. The reason why it had not worked was because at one point its supporters had started to disappear; why, he did not know. At one point, the Drafting Committee had been reduced to just a few members opposed to the idea of prior recourse. That explained what was to be found in the summary records of the Commission.

26. Mr. BENNOUNA said that he was not opposed to the idea of interim measures of protection, which had in fact existed in the Commission since the time of draft article 12 as proposed by the former Special Rapporteur, Mr. Arangio-Ruiz. As Mr. Thiam had said, the proposed paragraph 1 *bis* could be adopted pending the second reading of the draft articles, but it seemed to him that a second paragraph introducing an exception to the first in an article on conditions relating to resort to countermeasures would be a little bizarre from the legal standpoint. The Commission could, of course, proceed to adopt paragraph 1 *bis* with the legal inconsistencies to which reference had been made and he would not oppose its adoption. The best thing, however, would be to have a separate article at the end of the chapter on countermeasures and to ask Mr. Crawford to draft it.

[6] Ibid.

27. Mr. CRAWFORD said that the notion of interim measures of protection had appeared in the fourth report of the former Special Rapporteur, Mr. Arangio-Ruiz, within the framework of countermeasures but without any definition. The proposal before the Commission attempted to spell out the same basic idea in a little more detail. True, it did not occur anywhere else but it was needed only at that particular point because of the problem raised by the insertion of the new paragraph 1 and notwithstanding the fact that, in the view of the majority, paragraph 1 had other merits. Nor was it the case that paragraph 1 *bis* neutralized paragraph 1; it merely qualified it in a particular respect, namely, in respect of interim measures. He agreed entirely that that should be explained in the commentary.

28. With regard to Mr. Fomba's point about bad faith, unfortunately, in some circumstances States incontestably committed an unlawful act—for instance, where the hostage-taking of diplomatic personnel was involved—and in such cases the principle of presumption of good faith could wear a little thin.

29. In his view, adoption of the principle set forth in his proposed paragraph 1 *bis* was essential if the article was to be satisfactory and he would vote against the article unless something along the lines of that proposal was adopted. It seemed that the Commission was in a position to adopt it if not by consensus at least without a vote. He would be opposed to a separate article as he did not think it was necessary, but questions of placement and further drafting refinements in the narrow sense could be examined once the principle had been accepted.

30. Mr. ROSENSTOCK said that virtually everything he had wanted to say had been said by Mr. Crawford. The fact that the Commission had adopted an amendment (2456th meeting) in connection with certain points requiring fine-tuning did not mean that the amendment would be exempt from further refinement. If the best way of arriving at a text without a vote—a text about which most members were less than overjoyed—was by a change in wording in order to overcome the concerns expressed regarding the interaction between Mr. Crawford's proposal and the rest of the article, there should be no reason why that was not possible. Personally, he agreed with Mr. Crawford's proposal, but it should be examined further in the light of the text as a whole. In particular, artificial barriers should not be erected. Should such barriers persist, however, the Commission might wish to reconsider the decision it had taken at its previous meeting. He trusted that matters would not come to that.

31. Mr. KABATSI said that he found it extremely difficult to accept any argument which questioned the need for and usefulness of negotiations in disputes between States. In fact, the ideal solution in such cases was to enter into negotiations before any drastic steps or actions were taken. He could appreciate, however, that circumstances might arise in which an injured State might have to use interim measures of protection, which were in fact countermeasures, in order to preserve its legal rights or position pending the outcome of negotiations. There was, of course, the risk that once such interim measures were authorized, they might be abused, especially if they

were not implemented in good faith. Under such circumstances, interim measures could be quite drastic.

32. He was prepared to accept paragraph 1 *bis* proposed by Mr. Crawford, provided that the interim measures to which it referred were implemented in good faith. The commentary to article 47 should emphasize the need to avoid situations where such measures might be taken in bad faith and where countermeasures might be resorted to in the guise of interim measures.

33. Mr. AL-BAHARNA said that he considered the principle of interim measures of protection to be legitimate, but it might not be prudent to grant the injured State the right to take interim measures because the definition and scope of such measures had still not been clarified. Some members had suggested placing such clarifications in the commentary. That would not be sufficient: once the injured State was given the unilateral right to take interim measures, it might act in bad faith or exceed the limits of interim measures, thus causing injury.

34. The right to authorize the use of interim measures should be restricted to the courts. In that connection, the contents of paragraph 1 *bis*, as proposed by Mr. Crawford, would be more appropriately incorporated in paragraph 2 of article 48 [12]. In particular, the right to order interim measures of protection should lie with the tribunal referred to in paragraph 2. That would lessen the danger of exceeding the limits of interim measures.

35. Mr. ARANGIO-RUIZ said it was true that "interim measures of protection" had been used without definition in the original proposal. The expression had been used as a term of art whose meaning was understandable to lawyers, especially in relation to the concrete situation in which the concept was being used by an injured State, which had in any case to interpret and apply it at its own risk.

36. A definition had been needed, perhaps in the commentary, and it was what the Drafting Committee should have done, but had failed to do. Some members had contended that the very idea was too vague. Actually, the inclusion of a special provision in the old article 12 exempting urgent protective measures from prior dispute settlement requirements would have meant a very considerable reduction in the weight of the prior recourse to amicable settlement requirement, by admitting that interim measures would be subject neither to prior communication nor to prior resort to amicable means of settlement. Members who had supported that view had again disappeared, so no definition had been elaborated. That was the story of what had happened.

37. Mr. VILLAGRÁN KRAMER said that the obligation to negotiate was independent of the good faith of States. A State which had committed an unlawful act would clearly not propose negotiations prior to committing the act. Yet the injured State was bound under article 48 [12] to enter into negotiations.

38. Was the obligation to negotiate appropriate in the case of an international crime such as aggression or genocide? Under such circumstances reprisals were taken in order to obtain the immediate cessation of the crime or, as the case might be, immediate reparation. Negotiations which continued for an unlimited period would only prolong the agony of the victim State.

39. After a brief exchange of views in which the CHAIRMAN, Mr. BENNOUNA and Mr. ROSENSTOCK took part, the CHAIRMAN suggested that the Commission should adopt paragraph 1 *bis* in principle and establish a working group, to be headed by Mr. Crawford, and comprising a limited membership representing the five regional groups: Messrs. Bennouna, de Saram, Robinson, Rosenstock, and Yankov. It would revise draft article 48 [12] and submit the new draft to the Commission.

It was so agreed.

ARTICLE 49 (Proportionality)

40. Mr. ARANGIO-RUIZ said that, with regard to article 49 [13], he was strongly opposed to the phrase "the effect thereof on the injured State", which must be deleted from that article, for two reasons. First, it was misleading to emphasize the effects of an internationally wrongful act on an injured State in any case of infringement of an *erga omnes* obligation. He was referring to both *erga omnes* delicts and, of course, to crimes, which were always *erga omnes*. In either case, there might well be no damage at all to any one of the injured States concerned. That would be true, for example in the case of infringement by a State of its obligations with regard to the treatment of its own people, including human rights, self-determination and non-discrimination. Again, in the case of differently injured States, as in the case of aggression or damage to the environment, there might be some States, or a great majority of the States involved, which did not suffer any damage at all. In both instances, the reference to "effects . . . on the injured State" would be clearly inappropriate as a criterion or factor for the assessment of proportionality.

41. The second and equally important reason was that in any case—even apart from the hypothesis of the infringement of an *erga omnes* obligation, the emphasis on the effects upon the injured State stressed only one of the factors that went to make up the gravity of the wrongful act. The gravity of such an act depended, in addition to the importance of the infringed rule and even prior to the "effects" on anybody, on the absence or presence of fault and, where fault was present, on the degree of that fault, which might, as in the case of crimes, reach the degree of wilful intent. It followed that, by emphasizing the effects on the injured State, article 49 [13] quite seriously altered the balance between the various factors which had to be considered in order to assess the gravity of the breach.

42. He would suggest deletion of the phrase in question. As he had been unsuccessful in drawing the Commission's attention to that matter in his seventh report[7] he had taken up the issue again in his eighth report (A/CN.4/476). In its current form, article 49 [13] was unacceptable.

[7] See 2434th meeting, footnote 5.

43. Mr. ROSENSTOCK said that members who were dissatisfied with the language of article 49 [13] failed to take due account of what had been fully in the minds of all concerned when the article had been provisionally adopted, namely, it was not the fact that a fundamental violation of human rights was involved that meant that the act had no effect on the injured State. The notion of "effect on the injured State" in article 49 [13] had the same sense as the notion had been discussed in the case *concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*.[8] The subject of examination had been not only whether the breach of the treaty was of itself serious but also the fact that the treaty provision in question was one found in very many agreements. Accordingly, the breach would affect not only that agreement but other agreements as well, so that the effect of the wrongful act went in fact beyond the gravity of the act. The Commission had accepted article 49 [13] expressly on the understanding that there were no implications whatsoever in the case of breaches of *erga omnes* obligations involving fundamental human rights. The criticisms raised with respect to article 49 [13] were directed at a problem that did not really exist; that problem had been resolved by the commentary.

44. Mr. de SARAM said that he endorsed draft article 49 [13] as it stood, including the last clause reading "the effects thereof of the injured State" which provided a perfectly valid criterion for evaluating proportionality. A countermeasure was in fact a unilateral act of coercion which was taken by a State which believed itself to be injured. While that belief might prove to be well founded, there was always the possibility of a genuine misunderstanding between States with regard to whether a breach had actually occurred and as to what adequate reparations should be.

45. Mr. VILLAGRÁN KRAMER said that he agreed with Mr. de Saram that article 49 [13] should be maintained as it stood. In the literature on the subject of international crimes much attention had been paid to the question of whether the concept of proportionality should apply both in the case of reprisals and in the case of international crimes. It was his understanding that, as it appeared in article 49 [13], proportionality had a general application and would apply to all wrongful acts.

46. Mr. ARANGIO-RUIZ said that he objected to Mr. Rosenstock's point with reference to the commentaries, the value of which should not be overestimated. They were useful, but what mattered was the text of the article itself.

47. The CHAIRMAN said that if he heard no objections, he would take it that the Commission wished to adopt article 49 [13].

Article 49 was adopted.

ARTICLE 50 (Prohibited countermeasures)

48. Mr. ROSENSTOCK said that subparagraph (*b*) of article 50 [14] was extremely vague and unhelpful and, in the light of the existence of article 49, unnecessary as well as unwise.

49. Mr. VILLAGRÁN KRAMER said that subparagraph (*b*) was very important because it reflected an aspiration and a reality and was grounded in the Charter of the United Nations. He could agree with Mr. Rosenstock that the subparagraph had lost some of its force, in view of the restrictions on countermeasures which had been incorporated into article 48 [12]. However, the matter could be brought up again during the Commission's subsequent review of article 48 [12]. For the time being, he was in favour of maintaining subparagraph (*b*).

50. Mr. SZEKELY said that he endorsed the comments of Mr. Villagrán Kramer. Subparagraph (*b*) was of the greatest importance for article 50 [14].

51. Mr. LUKASHUK said that article 50 [14] was quite satisfactory. It set forth sound criteria and contained important limitations on the conditions under which a State could resort to countermeasures.

52. Mr. ROSENSTOCK said that whereas the prohibition on countermeasures set forth in subparagraph (*d*) would necessarily hold in all cases, it was a matter of concern that, by virtue of subparagraph (*b*), a situation might arise in which an injured State that was suffering from extreme economic or political coercion as a result of a wrongful act could not respond proportionately to the situation if it needed to take the measures described in that subparagraph. It was an unwise idea, and further complicated by the lack of precision in the wording.

53. He did not object in general to article 50 [14] but wished simply to record his hesitation and doubts about subparagraph (*b*).

54. Mr. FOMBA said that he was in favour of subparagraph (*b*), a provision that was founded on a philosophy which was beneficial to the smaller countries. It would help prevent the situation in which a small country which had committed an internationally wrongful act was brought to its knees through economic or political coercion.

55. Mr. ARANGIO-RUIZ said it should be made very clear in the commentary that the Commission was fully aware of the fact that the prohibitions contained in subparagraphs (*a*) and (*b*), threat or use of force, and extreme economic or political coercion, were circumvented by qualifying the countermeasures concerned as self-defence. He would refrain from citing examples, some of them, unfortunately, all too recent.

56. Mr. SZEKELY said that he was glad that Mr. Rosenstock had simply wished to place on record his reservations with regard to subparagraph (*b*) because the argument according to which the injured State might be suffering from extreme political or economic coercion and should thus be entitled to proportional action could be applied equally to some of the other prohibited countermeasures. He himself wished to place on record his endorsement of subparagraph (*b*).

57. Mr. AL-BAHARNA said that he endorsed article 50 [14] as it stood. The five subparagraphs of the article formed a whole and helped link article 50 [14] to arti-

[8] See 2456th meeting, footnote 9.

cle 47. Article 50 [14] minimized the effect of countermeasures and described which countermeasures were prohibited. By using the words "designed to endanger", subparagraph (*b*) was making express reference to the idea of intent. Any intent on the part of the injured State to resort to countermeasures of the type described in the subparagraph should, of course, be prohibited.

58. Mr. EIRIKSSON said he took the view that if the conditions and restrictions set out in articles 48 [12] to 50 [14] were not complied with, the particular measure could not be deemed to fall within the realm of countermeasures. The title of article 50 [14], "Prohibited countermeasures", was therefore a contradiction in terms. The actions enumerated under subparagraphs (*a*) to (*e*) were simply prohibited measures.

59. Mr. ELARABY said he supported article 50 [14] as a whole and was particularly in favour of subparagraph (*e*), which ensured that any countermeasure that ran counter to a peremptory norm of general international law would be prohibited. Since the norms of *jus cogens* were in constant development, the system was thus open-ended, ensuring that countermeasures would always be subject to certain restrictions.

60. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt article 50 [14].

Article 50 was adopted.

CHAPTER IV (International crimes)

61. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that no article within the draft on State responsibility had attracted so much attention as had article 19 of part one: heated discussion had taken place in the Commission and in the Sixth Committee on the merits, wisdom and practicality of that article. In view of the Commission's decision not to reopen article 19 for examination until the second reading of parts one, two and three, it should now be dealing solely with the consequences of article 19. In other words, it should determine what the consequences were of a category of wrongful acts—whether they were called crimes or exceptionally serious wrongful acts—that might differ from those of delicts. It was necessary to examine the extent of the differences from those already described in part two and whether the procedures for the settlement of disputes arising in relation to crimes should be different from those already proposed in part three.

62. The Drafting Committee had examined the articles in part two on cessation, reparation and countermeasures to see whether they were applicable to crimes, with or without modifications. It had concluded that article 41 (Cessation of wrongful conduct), applied without qualification to international crimes. All four forms of reparation had likewise been found to be applicable to crimes. A State that committed a wrongful act of exceptional gravity was certainly obligated to make full reparation. Some of the limitations on restitution in kind and satisfaction should be lifted for an act of such gravity, a point he would explain in connection with article 52. The limitation on reparation set forth in article 42, paragraph 3, remained applicable.

63. Regarding countermeasures, the Drafting Committee had concluded that articles 47 to 50 applied without exception or modification to international crimes. The grounds for the Committee's conclusions were, first, the relationship between countermeasures and the dispute settlement procedure referred to in article 48 [12]; secondly, the requirement under article 49 that there should be proportionality between countermeasures and the wrongful act; and thirdly, the fact that the list in article 50 of prohibited countermeasures should also apply to crimes.

64. In relation to the procedures for dispute settlement, the Commission had heatedly debated the issue of who would make the initial determination that an international crime had been committed. The Drafting Committee had taken the view that that determination was made in the first instance by the injured State or States, in the form of their reaction. That reaction would either involve protest or a demand for reparation; in the case of crimes, there would be no limitations on restitution in kind or on satisfaction. If the State alleged to have committed the crime did not agree with the characterization of its conduct as a wrongful act or did not accept responsibility for the commission of the act, the resulting dispute between the parties would be subject to the dispute settlement procedure in part three. In addition, the Drafting Committee believed that a State accused of committing a crime had the option, if it wished to challenge that accusation, of invoking Article 35 of Chapter VI of the Charter of the United Nations, thereby bringing the dispute to the attention of the General Assembly or the Security Council, which would exercise their functions in accordance with the Charter. A dispute about an alleged crime would presumably also meet the criterion of Article 33 of the Charter, its continuance being likely to endanger international peace and security.

65. The Drafting Committee thus believed that the procedures under part three and those provided for by the Charter of the United Nations were sufficient to deal adequately with the characterization of a wrongful act as a crime in the sense of article 19 of part one, and that it was unnecessary to design any new procedures for that purpose. Some members of the Drafting Committee, while agreeing with that general approach, had felt that the draft should provide the State accused of committing a crime with the immediate right to binding dispute settlement under part three, but that view had not been accepted by the majority. Some of the members had indicated at that point that they intended to raise the matter in the Commission.

66. As to article 51 (Consequences of an international crime), it was in fact an introductory clause to the whole of chapter IV. It made the point that an international crime entailed all the consequences of any other internationally wrongful act, but that it also entailed further specific consequences that were set out in articles 52 and 53. The words "any other internationally wrongful act" were intended to refer to acts called "delicts" in article 19, paragraph 4, of part one.

67. Mr. ARANGIO-RUIZ said he opposed chapter IV in its entirety much more on account of what was omitted than what was included. He was referring to both the

substantive and the instrumental consequences of the international crimes of States. As to the substantive consequences, he had in mind draft articles 16,[9] 17,[10] and 18[11] of part two as proposed in his seventh report. For the instrumental consequences, he would refer members to draft article 19,[12] proposed in the same report. In regard to the latter consequences he voiced in particular strong opposition to the deliberate omission of any involvement of ICJ in the determination of the existence/attribution of a crime. That omission created an unacceptable gap in a draft devoted to the progressive development and codification of the law on State responsibility. As he had explained in his eighth report, that gap would inevitably be seen as acceptance by the Commission of an untenable theory advanced, especially by one member, at the forty-sixth and forty-seventh sessions, namely the theory that, since all or most international crimes of States represented threats to the peace, the determination of the existence/attribution and consequences of such a crime naturally fell within the powers of the Security Council in the exercise of its functions in the maintenance of international peace and security. By deliberately setting aside the proposed involvement of ICJ in the determination of the existence/attribution of a crime the Commission would place the authority of all its members behind such a theory. It would thus approve not only unlimited extension of the notion of threat to the peace on the part of the Security Council, something viewed with great concern by some Governments and numerous scholars, but also implicit extension of the Commission's support for the even more dangerous theory—also evoked by at least one member of the Commission—that the Security Council would be endowed under the Charter of the United Nations or its interpretation, with judicial and even legislative powers. He was unable to endorse such a theory and wished to record his firm belief that it had no foundation *de lege lata* and was dangerous *de lege ferenda*.

68. By implicitly espousing such a theory, the Commission would be failing doubly in its duty as a body of legal experts. First, it would fail to stress the manifest legal incorrectness of the theory, and secondly, it would encourage the otherwise meritorious political body in question to pursue a policy of expanding its functions and powers, something that was incompatible with the Charter of the United Nations. In so doing, the Commission would also ignore the important, long-standing debate among international legal scholars about the legality of action of United Nations political bodies, and particularly of the Security Council. He had in mind the debate, to which he had contributed in his capacity as Special Rapporteur, between the "legalists"—a very bad term to describe real lawyers—and the "realists"—a term for those who dealt not with international legal problems as lawyers but with international facts, especially the facts of the strong. Ultimately, to minimize the involvement of ICJ in favour of a broadened role for the Council entailed the subjection of the law of State responsibility to the law of collective security or, more precisely, to interpretations of the law of collective security made by a political body of restricted composition and even more restricted voting power. Moreover, the Commission's total rejection of draft article 19 proposed by the Special Rapporteur at the forty-seventh session inevitably implied serious neglect of the role that the General Assembly should play, together with ICJ and the Council, in the reaction to a crime.

69. In conclusion, he felt compelled to quote the Phaedrus: *peperit mons ridiculum murem*—the mountain gave birth to a ridiculous mouse—regarding the entire part of the exercise on State responsibility which related to international crimes of States. It had been precisely in the sad expectation that such would be the outcome—clearly heralded by the response to the seventh and eighth reports—that he had decided, with regret, not to be present at the birth in the Drafting Committee. The idea of referring to crimes in the terms suggested in the footnote to article 40, paragraph 3, was simply a most infelicitous fig leaf to cover acts which anyone with common sense, and the media and States themselves characterized as crimes, namely as very serious, wilful breaches of fundamental international obligations.

70. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said he wished to explain the reasons why the Drafting Committee had not retained the four articles dealing with crimes as proposed by the former Special Rapporteur, Mr. Arangio-Ruiz: draft articles 17, 19, 20[13] of part two and draft article 7 of part three.[14]

71. Draft article 17 would make the application of countermeasures dependent on a decision by ICJ that a crime had been committed—a decision to be taken after the General Assembly or the Security Council had determined that the conduct alleged to constitute an international crime was of concern to the international community. Such a procedure had earlier been proposed in draft article 19 but had received little support in plenary, being generally considered too complicated to apply. The Drafting Committee had decided not to retain draft article 19 and, consequently, not to retain draft article 17, paragraphs 1 and 2, which were dependent on draft article 19. Draft article 17, paragraph 3, provided that the requirement established in article 49 (former art. 13) of proportionality for countermeasures should apply in relation to crimes. The Committee had felt that the regime of countermeasures as set forth in chapter III of part two necessarily applied to all wrongful acts, except as otherwise indicated, and that therefore the paragraph was unnecessary.

72. Draft article 20, had stipulated that the provisions of the articles on State responsibility were without prejudice to measures decided upon by the Security Council and to the right of self-defence under the Charter of the United Nations. The Drafting Committee had taken the view that article 39 (former art. 4) dealt adequately with the relationship between the articles and the provisions

[9] For the text, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 105.

[10] Ibid., footnote 109.

[11] Ibid., footnote 114.

[12] See 2436th meeting, footnote 9.

[13] Ibid., footnote 4.

[14] For the text, see *Yearbook . . . 1995*, vol. II (Part Two), footnote 149.

of the Charter, and that a new article on the matter was unnecessary.

73. Finally, draft article 7 of part three had provided for a particular system for the settlement of disputes related to international crimes, a system the Drafting Committee found unnecessary, since the provisions of part three could aptly cover disputes concerning both delicts and crimes.

74. Mr. BOWETT said the Chairman of the Drafting Committee had just described four of the draft articles as too complicated, but he would say, rather, that they were misconceived. The entire scheme had hinged on the acceptance of the compulsory jurisdiction of ICJ over crimes. The view generally taken had been that there was no way States would accept such compulsory jurisdiction, and that in that case, they would either reject chapter IV as a whole, thereby excluding crimes *in toto*, or refuse to sign the convention itself. The consequences of the scheme were very serious, and it was right and proper to avoid them.

PART THREE (Settlement of disputes)

75. Mr. EIRIKSSON introduced the memorandum in support of the proposals by Mr. Pellet and himself which related to part three of the draft (ILC(XLVIII)/CRD.4/Add.1).[15] In addition to the supporters listed in that memorandum (Messrs. Bennouna, de Saram, Idris, Kabatsi, Robinson, Szekely, Villagrán Kramer, Yamada and Yankov), other members had decided to endorse it, namely, Messrs. Barboza, Crawford, Fomba, Jacovides, Lukashuk, Thiam and Vargas Carreño. He referred the Commission to the memorandum, which contained detailed explanations for the reasons behind the proposal, and drew attention to some editorial corrections.

76. In essence, the proposal envisaged two stages. In the first, either party could require the Conciliation Commission to state in its final report whether there was prima facie evidence that a crime had been committed. An affirmative view by the Conciliation Commission would trigger the second stage, allowing either party unilaterally to initiate arbitration. The first stage acted like a filter, preventing abuse, and the second stage, involving compulsory arbitration, had been thought to be analogous to the requirement of compulsory jurisdiction for ICJ over disputes arising from pleas of *jus cogens* under articles 53 or 64 of the Vienna Convention on the Law of Treaties. The basis of the analogy had been seen in the relative uncertainty surrounding both the concept of crime and the concept of *jus cogens*.

The meeting rose at 1 p.m.

2458th MEETING

Thursday, 11 July 1996, at 3.15 p.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. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, 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) (*concluded*)

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

1. The CHAIRMAN invited the Commission to continue its consideration of part two, chapter III, of the draft articles and recalled that a working group on article 48 [12] had been set up (2457th meeting). He requested

[15] It was proposed that a paragraph 6 should be added to article 57 [4] (Task of the Conciliation Commission) to read as follows:

"6. At the request of either party, the Commission shall indicate in its final report whether there is prima facie evidence that an international crime may have been committed."

It was also suggested that the text of article 58 [5] (Arbitration), paragraph 2, should be amended as follows:

"2. A dispute may, however, at any time be submitted unilaterally to an arbitral tribunal to be constituted in conformity with the Annex to the present articles in the following cases:

"(*a*) Where one of the parties to the dispute has taken countermeasures, by the State against which they are taken;

"(*b*) By either party to the dispute, in cases where the Conciliation Commission has indicated in accordance with paragraph 6 of article 4 that there is prima facie evidence that an international crime may have been committed."

[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.