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Summary record of the 2590th meeting

Topic:
State responsibility

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with countermeasures proper, and not with sanctions. He conceded that article 30 was not very clearly formulated in that regard, a matter the Drafting Committee would need to address. Sanctions imposed under the Charter of the United Nations were expressly saved by article 39 (Relationship to the Charter of the United Nations) in part two, which would in due course apply to the articles as a whole. Sanctions imposed lawfully under other specific treaties would be covered by the *lex specialis* principle, but in any event they were not countermeasures. It should be made clear in the text and commentary that article 30 was not concerned with sanctions.

76. As to Mr. Goco's point, he supported the retention of an article 30, but the formulation would depend on the extent to which countermeasures were dealt with in detail in part two. If the treatment of countermeasures was retained in part two, article 30 could be very brief. Once the Commission had concluded its consideration of the remaining articles in chapter V, he would be happy to formulate a brief paper addressing the arguments for and against retaining a treatment of countermeasures in part two. Thereafter the Commission could return to article 30.

77. Mr. ROSENSTOCK said that chapter V would be woefully insufficient if it did not include an article 30. He personally found article 30 substantially acceptable as currently worded. That wording might or might not have to be radically recast in the light of the fate of chapter III (Countermeasures) of part two.

78. The CHAIRMAN said that a majority of members appeared to favour discussing the desirability of retaining article 30, but not its substance.

79. Mr. SIMMA said he fully agreed with the Special Rapporteur and Mr. Rosenstock with regard to the procedure to be adopted, the need to retain article 30, and the need to regulate countermeasures in part two. As to the drafting, he had two concrete proposals to make. First, it seemed not to be entirely clear to some States that article 30 excluded organized sanctions. That point should be clarified, since sanctions decreed by the Security Council to counter a threat to the peace might be directed against a State whose threat to the peace did not necessarily involve a breach of international law. Secondly, he strongly advocated replacing the word "legitimate", which carried a heavy ideological charge, by a word such as "legal" or "justified", as many activities that were "legitimate" were not entirely legal.

80. Mr. PAMBOU-TCHIVOUNDA asked whether it might be useful for the Commission to work on the basis of the redrafting of article 30 that the Special Rapporteur had just offered to prepare, rather than considering a text that had apparently now been superseded.

81. Mr. CRAWFORD (Special Rapporteur) said that, like the hapless Coleridge in Byron's *Don Juan*, he felt called upon to "explain his explanation". If he were to propose a new article 30 at the current juncture, he would have to propose two different texts, one based on the assumption that the treatment of countermeasures would be retained in part two, the other based on the opposite hypothesis.

82. Mr. ROSENSTOCK asked whether it could be placed on record that the Commission now accepted in principle that countermeasures had a place in chapter V; that the provision relating to countermeasures would broadly resemble article 30 as adopted on first reading; and that that provision might nonetheless require further consideration, depending on the ultimate fate of chapter III of part two.

The meeting rose at 1.05 p.m.

2590th MEETING

Friday, 18 June 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Elaraby, Mr. Gaja, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Lukashuk, Mr. Melescanu, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Tomka, Mr. Yamada.

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

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 30 (*concluded*)

1. Mr. KATEKA drew attention to the linkage between article 30 (Countermeasures in respect of an internationally wrongful act) of part one and chapter III (Countermeasures) of part two of the draft.

2. Countermeasures had a place in the draft only subject to certain conditions, which were set out in chapter III of part two, concerning the obligation to negotiate, the principle of proportionality and the settlement of disputes, and were designed to prevent abuses. Yet paragraph (17) of the commentary to article 30[4] implied the possibility, by way of reprisals, of bombarding a town or a port of an

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

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

[3] Ibid.

[4] See 2587th meeting, footnote 8.

aggressor State, something that was clearly unlawful. It was to be hoped that the Special Rapporteur would make the necessary corrections in the final text of the commentary. That being said, he accepted article 30 as adopted on first reading.

3. Mr. SIMMA said that it was necessary to achieve clarity with regard to the difference between "countermeasures" and "reprisals", terms that were used more or less synonymously. He was guided by General Assembly resolution 2625 (XXV) of 24 October 1970 containing in an annex the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, where it was stated in the principle dealing with the non-use of force that "States have a duty to refrain from acts of reprisal involving the use of force". It was true that the term "reprisals" had lately fallen out of grace, but the term "countermeasures" designated a more aggressive attitude and had less pacific connotations because it derived from American political theory as applied to nuclear deterrence.

4. Mr. CRAWFORD (Special Rapporteur) said he agreed that it was necessary to settle the question of terminology. He nevertheless believed that the more recent term "countermeasures" meant only pacific measures. "Reprisals" was a wider term which did not wholly coincide with the subject of article 30. Moreover, a distinction would also have to be drawn between those terms and "retortion" and, especially, "sanctions", the last-named being imposed by an international institution, in particular, by the Security Council under Chapter VII of the Charter of the United Nations.

5. Mr. ROSENSTOCK said he did not think that the word "sanctions", which often had a punitive connotation, was the most appropriate to designate measures taken under Chapter VII of the Charter of the United Nations.

6. Mr. LUKASHUK said that to claim that sanctions were not a prerogative of international organizations was contrary to practice and inconsistent with a recognized principle of international law. The Special Rapporteur himself had rightly said that States could not be given the right to impose sanctions, as that would be contrary to international law, and that only international institutions, and especially the United Nations, had that right when it involved the use of force.

7. Mr. ROSENSTOCK, clarifying his earlier comments, pointed out that the Charter of the United Nations never spoke of "sanctions", but only of "measures". Thus, even an international institution did not, perhaps, have the right to impose sanctions.

8. Mr. KAMTO said that the Commission was considering a very sensitive issue which gave rise to enormous problems. The history of the concept of "countermeasures" showed that the term had first come into use at a time when the international community had been forced to acknowledge the weakness of the Security Council and of the United Nations system in general; that weakness had led to the establishment of a kind of private justice.

9. At present, it could be asked whether such a concept was really consistent with the letter and spirit of the Charter of the United Nations. In other words, were there situations where a State was authorized to take measures on its own—whether or not those measures involved military force—in order to put an end to a violation of international law? In more narrowly legal terms, what was the primary rule relating to countermeasures? In the case of self-defence it was, clearly, natural law. However, in the case of countermeasures, even if the term was now accepted, the fundamental principle was not evident and it was hard to tell whether the practice being codified was not, perhaps, contrary to international law. A side issue that also arose was the question of the Commission's normative policy: should the practice of ICJ, whose decisions did not necessarily become accepted rules suitable for codification, be automatically endorsed?

10. Chapter VI of the Charter of the United Nations offered the possibility of settling a situation involving a breach of an international obligation by means other than countermeasures. The Charter did not provide only for military action, but also proposed other mechanisms. It was, in any case, indispensable to circumscribe countermeasures, as far as possible, by all sorts of conditions, such as the principle of proportionality, machinery for the settlement of disputes and the obligation to negotiate.

11. It was not possible to use the term "sanctions" for measures taken by an international organization and a different term for those taken by States. The law, as classically construed, provided that sanctions could be imposed only by a judicial body empowered to do so. However, in the international legal order, it did not matter who imposed the sanctions, it was the punitive intent that would indicate whether or not those measures constituted sanctions. They were actually sanctions only if the State against which they were taken perceived them as such.

12. In any event, countermeasures had become part of international practice. They were included in the Special Rapporteur's draft and it would not be wise to ignore that fact. Indeed, since countermeasures were a reality, it was important to establish a legal regime to govern them and that regime should be as restrictive as possible. The machinery already in place (principle of proportionality, etc.) could be expanded on the basis of the idea that countermeasures were essentially provisional and were authorized only pending an appeal to an international court or institution capable of settling the dispute that was the origin of the countermeasures. Thus, it might be possible, on the one hand, to add the obligation to discontinue the wrongful act and, on the other hand, to specify that the damage caused had to be real. A mere breach of an international obligation should not, in itself, give rise to countermeasures.

13. Mr. CRAWFORD (Special Rapporteur) reminded the members that the question under consideration was whether article 30 should be maintained in chapter V. More generally, the Commission would have to decide whether the question of countermeasures should be dealt with in greater depth in connection with chapter III of part two.

14. Mr. HE said he thought that article 30 should be maintained in chapter V, but should be kept in square brackets pending the outcome of the debate on chapter III of part two.

15. Mr. TOMKA said that the point was whether, as a matter of principle, countermeasures could be a circumstance precluding wrongfulness. The discussion on the substance of the question should be deferred until later.

16. Mr. GOCO said that the question of the regime that should govern countermeasures was irrelevant at the current time. For the moment, the Commission was concerned with the issue of wrongfulness.

17. Mr. LUKASHUK said that article 30 had to be included in chapter V because countermeasures were among the most important circumstances precluding wrongfulness, quite independently from the outcome of the debate on the regime for countermeasures and from the question of the location of the article. International law was unimaginable without implementation machinery or, in other words, without countermeasures. Positive law recognized that to be so: for example, the 1969 Vienna Convention provided that, if State A violated a treaty, State B had the right, by way of countermeasures, to demand the implementation of the treaty or not to implement the treaty for as long as the violation continued.

18. Mr. ADDO said he did not think that article 30 could be referred to the Drafting Committee until a decision had been taken on the status of countermeasures in international law.

19. Mr. GOCO said that, once the Commission had decided whether countermeasures were a circumstance precluding wrongfulness, it would be able to amend the wording of article 30.

20. Messrs ELARABY, KABATSI, KAMTO and KATEKA said they were of the view that the Commission could not take a decision on the future fate of article 30 before completing its consideration of chapter III of part two.

21. Mr. ROSENSTOCK noted that everyone agreed on the need to mention countermeasures in chapter V; however, a decision on the wording of article 30 could not be taken before the regime for countermeasures had been considered in the context of part two of the draft articles.

22. The CHAIRMAN confirmed that the Commission was being asked to decide whether article 30 should be maintained in the draft articles, not on the article's contents.

23. Mr. PELLET said that article 30 should be kept in chapter V, for the reasons outlined by the Special Rapporteur. Countermeasures were a fact and a reality of international life. He had two comments to make on paragraph 245 of the second report on State responsibility (A/CN.4/498 and Add.1-4); at the end of the third sentence, the words "be collectively sanctioned" (*sanction collective*) should be replaced by the words "give rise to a collective response" (*réaction collective*), since the reference to sanctions had a punitive connotation. In the French text of the last sentence, the words *l'État fautif* should be replaced by the words *l'État responsable*, which was, in his opinion, a better translation of the English words "wrongdoing State".

24. Mr. CRAWFORD (Special Rapporteur) said that paragraph 245 was merely a condensed version of the commentary to article 30. It was quite possible that it needed some improvements.

25. Mr. LUKASHUK said that, like Mr. Pellet, he did not agree with the idea of fault. He also thought it was incorrect to speak of countermeasures in respect of a wrongful act because they were obviously taken in respect of a State and not of an act.

26. Mr. KAMTO said that it was not because an act existed that it must be accepted as a reason for exoneration. Acts were one thing, while the rules of law were another.

27. Mr. SIMMA said that the Commission was supposed to be dealing not with acts but with legal rules and principles. The problem was whether countermeasures existed as an institution. The answer could be said to be yes and it was not because countermeasures were not mentioned in the draft articles that they would disappear as an established principle.

28. A certain logic had to be preserved in the draft articles. If article 30 was deleted from chapter V of part one, there would no longer be any reason to cover conditions relating to resort to countermeasures and proportionality in part two; and chapter III (arts. 48-50) should then be deleted from part two.

29. The approach advocated by the Special Rapporteur not only of retaining article 30, but possibly expanding on it by adding elements from articles 47 to 50 of part two would therefore be preferable. The Commission should indicate to readers that, among the circumstances precluding wrongfulness, it had not overlooked countermeasures, whatever wording was finally adopted for that article. Obviously, that solution would not satisfy members of the Commission who thought that countermeasures were wrongful.

30. Mr. PELLET said that, while the word "countermeasure" was relatively recent, the practice itself, whatever the name given to it in the past, had always been the normal means by which States had reacted to wrongfulness. As Mr. Lukashuk had rightly pointed out, the concept was absolutely essential in modern-day society. In asking whether countermeasures constituted a circumstance precluding wrongfulness, perhaps the Special Rapporteur had asked the wrong question. The members of the Commission had to decide whether or not the article should be kept in chapter V and the text could, if necessary, be placed in square brackets to indicate that it was provisional.

31. Mr. ADDO said that, if countermeasures were in fact considered to constitute circumstances precluding wrongfulness, something about which members such as Mr. Kamto seemed to have doubts, it was obvious that article 30 should be retained in chapter V.

32. Mr. DUGARD said that the question asked by the Special Rapporteur was simply whether countermeasures really precluded wrongfulness and therefore had a place in chapter V. One of the difficulties was that, for obvious reasons, there were no examples of resort to countermeasures in systems of internal law characterized by a vertical law enforcement mechanism. In the international context, however, that idea corresponded to a need and it should be acknowledged and taken into account.

33. Mr. GOCO said that the concept of countermeasures in international law could be compared with that of self-defence in internal law.

34. Mr. MELESCANU said that he agreed with Mr. Tomka. The Commission had to consider not the principle of countermeasures in international law per se, but whether acting within the framework of a countermeasure could be a circumstance precluding wrongfulness. In his opinion, the answer was yes.

35. Some members of the Commission had pointed out that the principle embodied in article 30 would be elucidated, or, rather, that its contents would be delineated, in part two of the draft articles, and had suggested that, pending the consideration of that part, the text of article 30 should be left in square brackets. He himself was not very much in favour of placing the statement of a fundamental principle of international law in square brackets. What was important was to explain why article 30 had been retained in chapter V, with or without square brackets.

36. Mr. PAMBOU-TCHIVOUNDA said that the conditions for resort to countermeasures provided for in articles 48 to 50 of part two of the draft were so strict that it was hard to imagine that a State that took them could be committing a wrongful act. It was therefore fairly paradoxical to say that something that was entirely in accordance with the law would be part of the circumstances precluding wrongfulness (the circumstances that made it possible not to act in conformity with the law).

37. Nevertheless, the solution proposed in paragraph 249 of the second report seemed acceptable. Article 30 could be retained in square brackets and its final wording could be decided on later, during the consideration of the regime for countermeasures in part two.

38. Mr. CRAWFORD (Special Rapporteur) said that, from the comments and observations received from Governments (A/CN.4/492),[5] it could be seen that none of them had suggested the deletion of article 30. Whatever concerns they had expressed, most of the members of the Commission seemed to be of the same view. The Commission must send a coherent draft to the Sixth Committee and no one would understand why countermeasures had not been mentioned in chapter V among the circumstances precluding wrongfulness. The solution of placing the text, but not the title, of article 30 in square brackets seemed to provide an acceptable compromise.

39. The CHAIRMAN said it appeared that the members of the Commission thought that article 30 should not be referred to the Drafting Committee, but agreed that countermeasures had their place in chapter V among the circumstances precluding wrongfulness. The Commission would come back to the wording of article 30 in the light of what would be decided later on in articles 47 to 50 of part two.

It was so agreed.

ARTICLE 30 bis

40. The CHAIRMAN said that article 30 bis (Non-compliance caused by prior non-compliance by another State) was a new article that was not related to any of the articles adopted on first reading. The commentary by the Special Rapporteur on the article was contained in paragraphs 314 to 329 of the second report.

41. Mr. SIMMA said he found the article to be slightly disturbing because it brought together several concepts that were only partially interrelated. First, there was the principle expressed in the maxim *exceptio inadimplenti non est adimplendum*, which the Special Rapporteur said had been enunciated by PCIJ in the case concerning the *Factory at Chorzów* [see page 31]. In his own view, the principle laid down by the Court in that case had very little to do with what was called, in international law, *exceptio inadimpleti contractus*; it related rather to the principle of *nullus commodum capere potest de sua propria injuria* (no one can obtain an advantage by his own wrong). The principle could in some instances refer to a breach of an obligation and might well have its place in the draft, but not in the chapter on circumstances precluding wrongfulness.

42. The maxim *inadimplenti non est adimplendum* (not being required to respect an obligation if the other party to the contract did not respect its own) and the *exceptio* that derived from it were always related to contractual obligations, in other words, treaty obligations in the context of international law. The principle was firmly entrenched in primary rules and had been codified as such in article 60 of the 1969 Vienna Convention. It was not a principle that applied to international law in general and was apparently not applicable in the context of customary law.

43. At its forty-fourth session, in 1992, the Commission had been right to reject a proposal by a former Special Rapporteur, Mr. Willem Riphagen, who had suggested that, in addition to countermeasures, the principle of "reciprocal measures", should be acknowledged.[6] The Commission had rightly stated that such measures constituted symmetrical reprisals. The only option available to a State for reacting to non-performance of a non-treaty obligation was to adopt a countermeasure. The purpose of countermeasures was to induce the wrongdoer to return to legality and, possibly, pay reparation. An exception to prior non-performance did not come within the framework of countermeasures. In such a situation, a State that had been injured by a breach by another party was not prevented from performing its own obligations. It had the

[5] See 2567th meeting, footnote 5.

[6] See *Yearbook ... 1992*, vol. II (Part Two), p. 23, para. 151; see also the third report on State responsibility of the Special Rapporteur, Mr. Arangio-Ruiz (*Yearbook ... 1991*, vol. II (Part One), pp. 12-13, document A/CN.4/440 and Add.1), chap. I, sect. F.

option of performing them, but was not inclined to do so, since such performance was not reciprocated. It was possible, when reading article 30 bis in conjunction with article 31 (Force majeure) as proposed in the second report, to see in article 30 bis a special case of force majeure. But, in such a situation, force majeure would actually be the act of the other party and that was why the idea of linking force majeure to the situation covered in article 30 bis seemed strange. The article should accordingly be given a separate place, but the measures for which it provided must not be construed as constituting a subcategory of force majeure. He had no objection to the adoption of article 30 bis with a small editorial correction: the phrase "by another State", which might be interpreted as meaning "by a third State", should be replaced by the phrase "by the State towards which the obligation is owed" or some similar wording.

44. Mr. CRAWFORD (Special Rapporteur) said he agreed with Mr. Simma that the *exceptio* could not be seen as a particular example of force majeure, although, in certain factual situations, the distinction between them might be difficult to draw. The idea underlying the *exceptio* was that, when two parties were bound to perform an obligation and one party did not perform, the other party was not bound to perform, without prejudice to its right to call on the other side to perform. The question involved was a performance issue, not a question of termination or suspension of a treaty within the meaning of article 60 of the 1969 Vienna Convention. The real problem was whether the *exceptio* was sufficiently reflected in the rules relating to countermeasures. He did not believe the Commission had ever considered the *exceptio* in the framework of chapter V. It had been considered exclusively in the context of countermeasures under part two, which was why the issue was still open in the context of chapter V. He was not certain that the rules and restrictions contained in part two in relation to countermeasures were appropriate for situations of non-performance of synallagmatic obligations. The *exceptio* should be adopted, but as narrowly as possible, as specifically articulated in article 80 of the United Nations Convention on Contracts for the International Sale of Goods. It was important to clarify that there had to be a clear and direct causal link between the performance of an obligation by one party and the performance of the parallel obligation by the other party. The matter was not covered by the law of treaties, which excluded all issues of performance.

45. Mr. SIMMA said that it would be dangerous to codify a rule covering both obligations under customary law and general principles under international treaties. Codifying a rule such as the one contained in article 30 bis would give States the opportunity not to perform a synallagmatic obligation without having to go through the carefully drafted limitations on countermeasures, by reacting "tit for tat" without any formalities. Furthermore, article 30 bis was drafted in a form strongly suggestive of force majeure, in which the principle *exceptio inadimplenti non est adimplendum* was hardly recognizable.

46. Mr. GOCO said that, in the framework of a reciprocal obligation, when one party committed a breach and the other party also did so, they were *in pari delicto*. There was an analogy between that concept and the concept of non-performance due to prior non-performance: both parties were guilty.

47. Mr. CRAWFORD (Special Rapporteur) said he was not convinced that the broad formulation of the *exceptio*, as found for example in the UNIDROIT Principles of International Commercial Contracts,[7] was necessary or desirable, having regard to the scope of countermeasures. In the narrower version as expressed in article 80 of the United Nations Convention on Contracts for the International Sale of Goods, the limitations on countermeasures contained in part two ought not to apply. The principle involved would be an automatic principle applying in the context of performance. Concerns about the breadth of the principle of the *exceptio* had led him to adopt a narrow formulation.

48. Mr. GAJA said that, in its current usage, the maxim *exceptio inadimplenti non est adimplendum* had a much broader meaning than that used by the Special Rapporteur. It was understandable that, if one of the parties to a treaty did not fulfil its obligation, then the other did not intend to fulfil its own obligation under that treaty. It concerned countermeasures that did not need to be treated separately in the draft. Article 30 bis seemed more likely to refer to a different hypothesis, that of the impossibility for a State to act in conformity with its obligation because of a breach of the obligation by another State. But there might be other circumstances preventing a State from performing its obligation, even without a breach of an obligation by the other State. The first State would not be reacting to a wrongful act. For example, if State A concluded an agreement with State B to finance a marble statue, but did not promise to furnish the marble and then placed an embargo on its marble exports, it was not committing a wrongful act, but was nevertheless preventing State B from fulfilling its own obligation. That example did not correspond to either force majeure or countermeasures and could be taken into consideration in the draft articles.

49. Mr. PAMBOU-TCHIVOUNDA said that the terms used in article 30 bis were too imprecise. In the French version, it would be preferable to speak of *l'impossibilité* for a State to comply with its obligation rather than its *incapacité* to do so. The expression *par un autre État* at the end of the article gave the impression that a third State was involved, whereas the context was a bilateral one. Moreover, impossibility in that situation was much more in keeping with force majeure (unforeseen external event) than with the concept of countermeasures. For those reasons, article 30 bis might be eliminated and the issue it covered might be taken up, if necessary, in the commentary, which should be reserved for article 31.

50. Mr. CRAWFORD (Special Rapporteur) said he did not believe that the situation was exactly one of impossibility. In prisoner-of-war exchanges, for example, it was perfectly clear that, if one party did not release its prisoners, the other party did not have to do so either, and that was not a matter of countermeasures. Neither would it be a case of impossibility, as the State concerned could perfectly well release its prisoners, but it was not in its interest to do so unilaterally. Similarly, in the case of the dual

[7] See 2587th meeting, footnote 19.

funding of an institution by two States, the fact that one State ceased to contribute did not prevent the other from continuing to finance the institution unilaterally. Those cases had nothing to do with countermeasures, and the conditions as now stated in part two did not apply.

51. Mr. BROWNLIE said that he regarded article 30 bis, as drafted, as reflecting a special department of impossibility, apart from force majeure. The Special Rapporteur might find his way more easily if he did not attempt to include the *exceptio inadimplenti non est adimplendum* and various related problems in article 30 bis or perhaps considered another category for them. The difficulty lay in the fact that the other category, explained at length in chapter I, section C, of the second report, led to the difficult area of contract law and contractual fault, about which common lawyers had written a great deal, although the concept was not confined to common law systems.

52. Mr. ROSENSTOCK said that he endorsed Mr. Brownlie's views, but noted that the example in question was a case of frustration of the purpose of a contract rather than impossibility, whereas article 30 bis spoke of impossibility. On the other hand, he did understand concern about frustration being given as a reason, in addition to other reasons, for termination or non-fulfilment of an obligation. Once it was acknowledged that frustration of the purpose rather than impossibility was involved, he wondered whether that could be formulated in a way that was not excessively open ended.

53. Mr. HAFNER said he shared the Special Rapporteur's view that article 30 bis was completely unrelated to article 60 of the 1969 Vienna Convention and found the reasons given by the Special Rapporteur in the second report rather convincing. In that respect, countermeasures, as understood by the Special Rapporteur in article 30 bis, were very different from the purpose of the rule contained in article 47 (Countermeasures by an injured State) of part two. He did not share Mr. Simma's view that a rule was a primary rule simply because it was contained in an article of the Vienna Convention on Diplomatic Relations, as treaties contained a fairly large number of secondary rules. If article 47 of the Vienna Convention on Diplomatic Relations was in conformity with customary law, it was part of customary law and, insofar as it reflected the idea of the *exceptio*, that idea might also be regarded as part of customary law. Unlike Mr. Simma, therefore, he did not believe that the *exceptio inadimplenti non est adimplendum* was restricted to contractual obligations.

54. He appreciated the Special Rapporteur taking up the question of the *exceptio*, which surfaced from time to time in legal textbooks and, in practice, was cited by States more often than might be thought, in particular in the field of international economic law.

55. The first question which arose was the scope of the *exceptio* rule; in his view, the Special Rapporteur had refrained from taking up the Riphagen definition,[8] mentioned in paragraph 322 of the second report, for the reasons given in paragraph 329. The problem of the escalation of the conflict (action-reaction) raised by too broad a definition could be overcome by reference to the principle of proportionality, as had been the case with the United Nations monitoring of ceasefire agreements, referred to in paragraph 328. Nevertheless, the risk remained that a State party to a dispute might misuse a broad definition of the *exceptio,* hence the Commission's only choice, if it wished to include such a principle, would be to subject it to very strict limitations. The Special Rapporteur had endeavoured to do so by restricting the possibility of using the *exceptio* rule to cases where the original act of a State prevented another State from acting in a lawful manner. That formulation came very close to the *exceptio* of impossibility dealt with in article 31, but he shared the Special Rapporteur's view that there were differences between the two, that not all the conditions spelled out in article 31 were applicable to article 30 bis and that article 30 bis should therefore be included in the draft. He also believed that the "clean hands" doctrine was not yet part of general international law and should not be included in the draft, regardless of the result of the Commission's discussion when it took up the question of diplomatic protection.

56. Secondly, the question arose as to where the provision on the *exceptio* should be inserted in the draft articles and, more particularly, how it related to the provisions on countermeasures. The point had been discussed at length and Mr. Pellet was right that the expression "countermeasures" was in a sense new and that it was up to the Commission to define it if it wanted to use it. In its ordinary meaning, the expression covered the hypothesis envisaged in the original (broad) version of article 30 bis, but then it would be necessary once again to make provision for quite a few of the restrictions in chapter III of part two of the draft articles on countermeasures. There would still be a risk of misuse. On the other hand, if the Commission confined itself to the current restrictive wording of article 30 bis as proposed by the Special Rapporteur, there would be no need to make its application subject to the restrictions set out in part two; that would simplify the situation and he therefore proposed that the current text of article 30 bis be used as a starting point for discussion in the Drafting Committee, which should take account of the various problems of formulation referred to by a number of speakers.

57. Mr. SIMMA pointed out to Mr. Hafner that his argument had been that the Commission had considered that the fact that the receiving State applied any of the provisions of the Convention restrictively because of a restrictive application of that provision to its mission in the sending State did not constitute discrimination, provided that it did not go beyond the framework set for the said rule because, otherwise, that would come within the scope of reprisals, i.e. countermeasures, which had nothing to do with the *exceptio inadimplenti*. Hence, the Commission had not thought that the article in question reflected the notion of exception.

58. Mr. Sreenivasa RAO said that he was surprised to hear Mr. Hafner and, before him, Mr. Crawford maintain that the "clean hands" rule was not a real principle of international law. The Commission's purpose was to pro-

[8] See the fifth report of the Special Rapporteur, *Yearbook ... 1984*, vol. II (Part One), p. 3, document A/CN.4/380, art. 8.

mote the progressive development of international law and its codification and it must be consistent and logical in the performance of that task. The clean hands rule was a basic principle of equity and justice; it might seem abstract to some and went well beyond the hypothesis under consideration, but that was no reason to discard it.

59. Mr. HAFNER said that, as he understood it, Mr. Simma himself had regarded article 47 of the Vienna Convention on Diplomatic Relations as a sort of exception, which could therefore be considered to be part of customary law. In any case, the clean hands rule had nothing to do with the *exceptio inadimplenti* applied to the law of State responsibility; it would be possible to revert to that idea in the discussion on diplomatic protection, but, even in that area, the principle was not generally recognized.

60. Mr. SIMMA, speaking on a point of order, said that the "clean hands" doctrine must be discussed under chapter V, whereas the current debate was on the *exceptio inadimplenti non est adimplendum*, and, in that connection, he would like to know whether the various issues which had been raised by the Special Rapporteur in chapter I, section C.4, but which could not be directly included in a draft article, such as the "clean hands" doctrine, might nevertheless be considered.

61. Mr. CRAWFORD (Special Rapporteur) said that at the end of the discussion on article 35, the Commission should be able to consider any other issues associated with the second report, of which the clean hands rule was one. In that connection, he pointed out to Mr. Sreenivasa Rao that he had merely said that the clean hands rule did not belong in chapter V.

62. Mr. LUKASHUK noted that article 30 bis raised a number of issues. First, it addressed the question of supervening impossibility of performance, which was the subject of article 61 of the 1969 Vienna Convention, although the interpretation given was different. Secondly, it referred to another special case of impossibility, namely, impossibility due to a wrongful act committed by another State—and that was a reference to article 60 of the Convention on termination of a treaty as a consequence of its breach; that idea was contained in the very title of article 30 bis: "Non-compliance caused by prior non-compliance by another State". It was clear that such cases occurred and the Special Rapporteur had described them, but they were not so common in practice as to require a separate article. Consequently, it was not wise to include the very special case of impossibility of performance in the draft; instead, the point should be discussed in the commentary on that part of the draft.

63. Mr. PELLET said that he wondered whether article 30 bis did not duplicate article 60 of the 1969 Vienna Convention. Mr. Simma had rightly pointed out that the *exceptio inadimpleti contractus* had been applied only to treaty relations and, as a general principle of law, he thought that, technically, it was in fact confined thereto. But, treaty obligations and their violation had their place in the draft articles on State responsibility, on the same basis as the violation of non-treaty obligations, such as the customary rule and the unilateral commitments of States. That made him think that article 60 of the Convention and the problem with which the Special Rapporteur was dealing were on two different levels. However, he had the feeling that article 30 bis only appeared to fill a gap because the law of State responsibility already covered every hypothesis which might occur.

64. For example, taking the example of marble cited by Mr. Gaja and notwithstanding Mr. Hafner's opinion, it seemed to him that a hypothesis of force majeure was involved, as defined in article 31: all the conditions were met and it did in fact involve impossibility of performance owing to a situation which had nothing to do with the State that reacted; if that was not an example of force majeure, then it was an example of a countermeasure. The Special Rapporteur had argued that, in the case covered by article 30 bis, it was assumed that the response was linked to the obligation breached, but, in his view, that was a variation on a simple countermeasure, unless the Commission had a very special and restricted understanding of countermeasures. Since it had been decided earlier, following a suggestion by the Special Rapporteur, that article 30 should be left in square brackets and reverted to in the context of the consideration of the articles of part two on the scope and consequences of countermeasures, he found it very difficult to refer article 30 bis to the Drafting Committee, thereby separating it from the study of countermeasures. He thus proposed that article 30 bis should also be placed in square brackets, without approval or rejection, and that it should be determined during the consideration of countermeasures whether or not it was a separate case.

65. Coming back to the function of countermeasures and referring to a comment by Mr. Pambou-Tchivounda, according to whom it could not be both a circumstance precluding wrongfulness and a way of determining responsibility, he drew attention to a difficult terminological problem. Strictly speaking, the circumstance precluding wrongfulness was not the countermeasure, but the internationally wrongful act, and the countermeasure thus in fact served as a means of determining responsibility. Hence, the circumstance was the existence of the internationally wrongful act and the Special Rapporteur might explore that avenue and report his findings during the discussion on countermeasures.

66. Unlike Mr. Hafner, he had no doubt about the fact that the "clean hands" doctrine was a principle of positive international law. However, that principle came under the determination of responsibility because it had an impact on the scope of compensation and could even lead to the elimination of compensation; the wrongfulness nevertheless persisted and it thus was not a circumstance precluding wrongfulness. The Special Rapporteur had been right not to deal with the subject, which should, however, be taken up during the consideration of part two of the draft articles, given its importance for the scope of compensation and the existence of the obligation to compensate.

The meeting rose at 1.05 p.m.