Document:-
A/CN.4/SR.2646

Summary record of the 2646th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
2000, vol. I

serve the injured State's rights. Paragraph 3 included the further requirement that, if the negotiations did not lead to a resolution of the dispute within a reasonable time, the injured State might take full-scale countermeasures. One example might be that, if those countermeasures took the form of the sequestration of assets, there could be a prohibition on the removal of those assets from the jurisdiction straight away in order to preserve the rights of the injured State eventually to sequestrate them. The sequestration itself would be the more substantial form of countermeasure. Of course, the confiscation of the assets would be excluded entirely as a countermeasure because it would be irreversible. The new article 48 therefore embodied in a slightly different form the compromise which had inspired the Commission on first reading. There were strong views on the issue, and if the Commission decided not to adopt the intermediate position, he had proposed a simpler provision in the footnote to new article 48.

The meeting rose at 1.15 p.m.

2646th MEETING

Wednesday, 26 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Tomka.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of chapter III, section D, of his third report (A/CN.4/507 and Add.1–4).

2. Mr. CRAWFORD (Special Rapporteur) said that he had first discussed (2645th meeting) the definition of countermeasures and, secondly, the conditions attached to the taking of countermeasures, the procedural conditions.

3. There were, however, also some essential conditions which had to be observed by the State resorting to countermeasures, the first being, of course, the principle of proportionality embodied in article 49. No State had cast any doubts on that principle in the comments which had been received, although some had expressed concern about its crucial role in determining the legality of countermeasures. Others had been worried about the rather lax way in which the situation was viewed in article 49 adopted on first reading, as it employed a sort of double negative: "Countermeasures … shall not be out of proportion to …". ICJ in the *Gabčíkovo-Nagymaros Project* case had expressed the same idea in a positive manner by stating that countermeasures had to be commensurate with the injury suffered. Article 49 had to be more clearly worded to bring out the fact that proportionality was a key requirement of lawfulness; it should not be a vague definition of principle like the previous article.

4. The third and last aspect of the issue of countermeasures was the suspension and termination of the measures adopted. The articles adopted on first reading were silent on the matter, but a number of Governments, including the French Government,[3] had urged that it be dealt with in the draft text. ICJ had referred to it indirectly in the *Gabčíkovo-Nagymaros Project* case, but from the angle of reversibility. If a countermeasure could not be suspended or terminated, it was not reversible and, if it was not reversible, the Court held that it was unlawful.

5. The draft articles adopted on first reading had provided for the suspension of countermeasures if the wrongful act had ceased and the dispute had been submitted to third-party adjudication by a body whose decisions were binding on both States. That seemed satisfactory because the countermeasures pertained to a situation where, in the absence of an authoritative third party, the injured State had no choice but to act on its own account. Article 48 adopted on first reading had therefore assumed that the necessity for countermeasures would disappear once a compulsory settlement procedure had been instituted. That provision had been generally welcomed by States, subject to some drafting improvements. In fact, it was partly based on the arbitrament in the case concerning the *Air Service Agreement* . That aspect of article 48 had been embodied in new article 50 bis. A third paragraph had been added to that article stating: "Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two in relation to the internationally wrongful act". That paragraph operated irrespective of whether countermeasures had been suspended.

6. The eventuality of there being a plurality of injured States still had to be dealt with. In the light of the proposal made in chapter I of Part Two bis, each injured State should have the right to take countermeasures proportionate to the injury it had suffered, independently of the

[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, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).

[3] See 2613th meeting, footnote 3.

position with respect to collective countermeasures. That would form the subject matter of another chapter.

7. Mr. LUKASHUK said that the right to take countermeasures was the consequence not of a breach of international law, but of the refusal of the State which had committed it to comply with the obligations incumbent on it as a result of its relations with the injured State. Countermeasures were not therefore an intrinsic part of the subject of responsibility; they were simply a means of getting a State to fulfil its obligations. In other words, the mere existence of a breach did not create the right to resort to countermeasures. The Special Rapporteur had understood that very well and had spelled out the specific circumstances in which countermeasures were lawful, i.e. in which they might induce the wrongdoing State to fulfil its secondary obligations of cessation, suspension and reparation. Some States, such as the Czech Republic,[4] had also emphasized in their comments that countermeasures were not a direct, automatic means of responding to the breach of an obligation. All that pointed towards making countermeasures an independent international law institution, that would come into play only when a State refused to fulfil its obligations.

8. In point of fact, the Special Rapporteur did not give a definition of countermeasures. In his own opinion, it was such an important institution that it was absolutely essential to work out a very clear legal definition. The Special Rapporteur had stated in paragraph 322 of his report that he preferred to formulate article 47 as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles. New article 47 did not solve the problem and defined nothing, yet the Special Rapporteur's analyses contained enough elements to build a definition which might read: " Countermeasures are measures which are not in conformity with the obligations of the injured State taking them in respect of the responsible State, but which the injured State is entitled to apply to the responsible State to induce it to fulfil its obligations under international law".

9. Article 47, paragraph 2, also gave rise to problems. Limiting countermeasures to the suspension of compliance with one or more international obligations was a departure from current legal standards. Article 60 of the 1969 Vienna Convention stated that a material breach of a bilateral treaty by one of the parties entitled the other to invoke the breach as a ground for terminating the treaty or suspending its operation. In the event of such a breach of a multilateral treaty, the other parties were entitled by unanimous agreement to suspend the operation of the treaty in whole or in part. Article 47 should be brought into line with that provision. The Special Rapporteur was quite right to make it plain in paragraph 331 that the feature distinguishing countermeasures from sanctions was that they were not coercive.

10. A clear distinction had to be drawn between countermeasures and sanctions, for they were two quite different things. As the previous Special Rapporteur had noted, the idea that a State was entitled to resort solely to countermeasures was based on practice and *opinio juris*. In contrast, sanctions were the monopoly of the United Nations and no State or group of States had the right to impose them outside the framework of that institution. Perhaps it might be wise to add a clause to article 47 which might read: "This article does not affect the right of the United Nations to apply sanctions in accordance with the Charter".

11. A further flaw of paragraph 1, was that it stated that the aim of countermeasures was to "induce [the State] to comply with its obligations". It so happened that the same thing could be said of retortion which was not mentioned anywhere in the draft. Measures of retortion were nevertheless important and also called for a legally clear definition.

12. Article 47 raised the question of the evaluation of the conduct of one State by another, an evaluation which always comprised an element of subjectivity. Moreover, a State could make a genuine error. For that reason, provision had to be made for means whereby the State against which countermeasures were taken could exonerate itself. That clause would be very important, above all, for small countries which had genuine arguments against the countermeasures imposed on them by some stronger States.

13. Turning to new article 47 bis, he simply noted that it was very similar in content to article 50 and should therefore immediately precede that provision.

14. New article 50, subparagraph (*b*), spoke of "the rights of third parties, in particular basic human rights". If those "third parties" were States or institutions, what was meant by their "basic human rights"? The wisest course of action would be to devote a separate clause to human rights.

15. New article 50 bis stated quite categorically that countermeasures must be suspended if the internationally wrongful act had ceased. It was, however, possible to imagine a situation in which countermeasures had been suspended, but where the responsible State subsequently refused to comply with its secondary obligations of restitution or compensation, for example. What would then be the position of the injured party? Paragraph 3 of the same article would be much more precise if it read: "Countermeasures shall be terminated as soon as the responsible State has complied with the obligations set forth in Part Two relating to its responsibility for the internationally wrongful act".

16. In his opinion, the draft articles under consideration by the Commission could be referred to the Drafting Committee.

17. Mr. CRAWFORD (Special Rapporteur) said that he wished to clarify his position on the question of the relationship between countermeasures and the law of treaties. Under article 60 of the 1969 Vienna Convention, a State injured by the breach of a treaty could terminate the treaty or suspend its operation, subject to certain conditions: the breach must be "material" (the definition set a rather high threshold) and, depending on the nature of the treaty, it might be possible to suspend only part of it. When a treaty was terminated, no one was under any obligation any

[4] Ibid.

more. When a treaty was suspended, it was in limbo and neither party had to comply with it until it came back into force, assuming that the parties affected by that suspension consented thereto.

18. The legal situation of countermeasures was radically different. The denunciation of a treaty in accordance with article 60 of the 1969 Vienna Convention was a lawful act. Hence it was of no interest to the Commission, which was dealing with the question of a State's non-compliance with a treaty in order to induce another to honour its obligations under Part Two of the draft. The conditions were different as well; countermeasures could be taken even if the breach was not "material", although they had to be proportionate. Similarly, there was no requirement of severance; the underlying obligation was always incumbent on the State subject to the entitlement and it was relevant in the assessment of the right to take countermeasures.

19. While he found the notion of suspension of performance quite attractive because of its relation to reversibility, he could well understand that the Commission might take the view that, when used in article 47, paragraph 2, that term might lead to confusion with the suspension of a treaty. It was probably right, but it had to discriminate between the situation referred to in the 1969 Vienna Convention and the situation in the sphere of State responsibility.

20. He wished to add two comments to his presentation of the chapter under consideration (Circumstances precluding wrongfulness). First, he proposed a simple formulation of article 30, in the event the other articles were adopted. That article had been left open pending a decision on countermeasures.[5] For the slightly complex reasons explained in paragraphs 363 to 366 of his report, he believed that the broader conception of the exception of non-performance was sufficiently covered by countermeasures and his narrower conception based on the dictum of PCIJ in the *Chorzów Factory* case was sufficiently dealt with in article 38 of Part Two, the retention of which had been proposed. He therefore did not press the proposal for a separate circumstance precluding wrongfulness in the form of the exception of non-performance.

21. Mr. SIMMA said that he agreed with the distinction drawn by the Special Rapporteur between the suspension of a treaty and the suspension of the performance of an obligation in the context of countermeasures. He was, however, unable to agree with the distinction he had made between the situation dealt with in the 1969 Vienna Convention and that which arose in the context of State responsibility. The Special Rapporteur had said that article 60 of the Convention allowed termination or suspension only in the event of a material breach, thereby implying that neither of those acts was authorized if the breach was not sufficiently serious, whereas countermeasures could be adopted on relatively minor grounds. The conclusion was not cogent, for the view could be taken, as he himself had done in a number of publications, that the idea underlying article 60 of the Convention would allow proportionate, reciprocal suspension not as a countermeasure, but owing to the breach. The last paragraph of the preamble of the Convention indeed stated "the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". There had been instances where that sort of proportionate, reciprocal suspension based on the idea of *exceptio non adimpleti contractus* embodied in article 60 had taken place. That was the only point on which he differed with the Special Rapporteur.

22. Mr. CRAWFORD (Special Rapporteur) said that, according to the 1969 Vienna Convention, a treaty could be suspended or terminated on the grounds of a material breach. In other words, the treaty could not be touched if the breach was non-material. Mr. Simma was correct in saying that the exception of non-performance in its broader sense could well lead to what amounted to a suspension in the context of synallagmatic obligations, but that was a matter which was covered by the Convention. It was necessary to resist the idea that there were ways of terminating a treaty or suspending its operation other than those enumerated in the Convention, which specified that it exhaustively stated the grounds for doing so.

23. Mr. PELLET said that Mr. Lukashuk had introduced a useful distinction between countermeasures, formerly known as reprisals, and retortion, but he had been wrong to reproach the Special Rapporteur for not having included retortion in the draft articles. Retortion was a reaction to an act that could just as well be unlawful as lawful. It was by definition a lawful measure —and thus not a "circumstance precluding wrongfulness"—which a State could adopt if it disliked another State's attitude and thus answered a hostile attitude with a hostile attitude. Retortion was not one of the consequences of an internationally wrongful act and was not covered by the topic. If retortion was added to countermeasures, moreover, the Commission would be moving still farther away from the very concept of responsibility, which presupposed at the outset that an internationally wrongful act had been committed. Perhaps it could be stated in the commentary that it was better to resort to retortion first instead of immediately taking countermeasures because retortion was not a threat to the international legal system. It would be a mistake, however, to do so in the draft articles, even if that would be tempting from the standpoint of what could be called legal policy.

24. Mr. LUKASHUK, explaining his idea, said that retortion could be used against a State "in order to induce it to comply with its obligations". That was why it would be appropriate to have a paragraph or an article stating that the draft articles did not cover the question of resort to retortion.

25. Mr. TOMKA said that he thought retortion could be used as a response to a wrongful act. The fundamental difference between retortion and countermeasures was that retortion did not affect the legal situation in any way: it was a response to an act, not a legal instrument. The Commission was codifying the regime for legal institutions and was not to be concerned with non-legal issues.

26. Mr. ROSENSTOCK, supported by Mr. SIMMA, said that he, too, believed that the Commission would be wrong to get involved in the subject of retortion, which was not part of the topic under consideration.

[5] *Yearbook . . . 1999*, vol. II (Part Two), p. 88, para. 448.

27. Mr. SIMMA, recalling that he found the term "countermeasures" very strange, said that the decision to take up the question and to draft provisions thereon was to be welcomed, because countermeasures were a fact of life and would not go away simply because the Commission tried to ignore them.

28. In essence, he thought the Special Rapporteur was proposing an adequate regime and he agreed in principle with his proposals.

29. With regard to procedure, he had been surprised to see how quickly, during the Commission's fifty-first session, the procedural link between countermeasures and dispute settlement by arbitration, which had been present in the draft adopted on first reading, had been abandoned. He could live with the decoupling of countermeasures and dispute settlement procedures, however, first, because he had the impression that the Commission's final product was going to be a soft law instrument, in other words some kind of a declaration to be adopted by the General Assembly, and, secondly, because there was a growing number of special regimes—*lex specialis*—regulating how to induce States to return to legality and thereby equalizing the balance of power between powerful and less powerful States.

30. Several aspects of the issues addressed in chapter III, section D, of the report were good. First, the Special Rapporteur's definition of countermeasures in new article 47 was a distinct improvement over the old version. Secondly, a valuable distinction was made between the suspension of obligations on the basis of the law of treaties and suspension on the basis of performance, leaving the obligation intact. Thirdly, he endorsed the rejection of Riphagen's ideas of measures of reciprocity, or reciprocal countermeasures,[6] not because such measures did not exist, but because in general they were subject to precisely the same regime as other countermeasures. Fourthly, he found that the Special Rapporteur made a very valuable distinction between obligations that must not be legitimate targets of countermeasures, which were covered in article 47 bis, and what could be called collateral infringements of rights, the subject of article 50. He welcomed the rejection of the idea of introducing the exception of non-performance (*exceptio non adimpleti contractus*) among the circumstances precluding wrongfulness. Lastly, he endorsed the proposal that a new text should be drafted for article 30, replacing the word "sanction" by the word "countermeasures".

31. He was more critical on the Special Rapporteur's positioning of human rights. First of all, he found it strange to speak of human rights in connection with the rights of third parties, as in new article 50, subparagraph (*b*), because the expression "third parties" in international law was related to States or other subjects of law, but not to human beings; secondly, because, if a human being had a human right, he was a party, purely and simply, and not a third party; and, lastly, because the word "third" always implied that the person was not involved, and that was not the case if the person had human rights. Furthermore, he could not agree with the rationale put forward by the Special Rapporteur to explain why human rights were excluded from the operation of countermeasures. The idea was that, with regard to human rights obligations, the primary beneficiaries were not other States, but human beings. That idea was fine, but it was dangerous to relieve States of the responsibility to secure performance of human rights obligations on the part of other States, thereby de-emphasizing the inter-State aspect of human rights obligations. His own rationale was that, while it was true that human rights must not be an object of countermeasures, human rights obligations, whether derived from a treaty or grounded in customary international law, were by definition "integral obligations" within the meaning of new article 40 bis. Performance of those obligations could accordingly not be bilateralized because that would impair the right of other States parties to the obligation to see the human right respected.

32. He liked the first part of new article 47, paragraph 1, but had problems with the phrase "as long as it has not complied with those obligations and as necessary in the light of its response to the call that it do so". It made the sentence too long and attempted to embody a temporal element that was taken care of in article 50 bis, as well as the idea of proportionality, which was the subject of article 49. He proposed a version of the article in which the final part of paragraph 1 would be removed and the remainder combined with paragraph 2. It would read: "… Part Two, by suspending performance of one or more international obligations of the State taking those measures towards the responsible State". He also thought that the phrase "one or more obligations" was not very satisfactory and that the Drafting Committee should be asked to review it.

33. Turning to article 47 bis, he said that subparagraphs (*a*) to (*c*) should be made a bit more forceful by describing the obligations in the following manner:

> "(*a*) The obligation to refrain from the threat or use of force in accordance with the Charter of the United Nations;
>
> "(*b*) The obligation to respect and ensure the inviolability of diplomatic or consular agents, premises, archives or documents;
>
> "(*c*) The obligation to submit the dispute to third party settlement;".

A more fundamental problem arose with regard to subparagraph (*d*), which was highly reminiscent of article 60, paragraph 5, of the 1969 Vienna Convention and dealt with the "reprisals" precluded by humanitarian law. Since, at the time of the United Nations Conference on the Law of Treaties, human rights had been a relatively new idea and since the protection of human rights could not be overemphasized today in a context such as that of reprisals he thought that either a separate paragraph on basic human rights should be inserted, or subparagraph (*d*) should be reworded, using the draft adopted on first reading as a guide in order to exclude basic human rights from the operation of reprisals. Lastly, he thought that the word "precluding" should be replaced by the word "excluding".

34. New article 48 conveyed a very important idea and he was in favour of keeping it in the comprehensive format, rather than reducing it to the form proposed in the

[6] See 2645th meeting, footnote 7.

footnote to the article. In paragraph 1 (*c*), the word "agree" should perhaps be replaced by the word "offer" because the current wording might create the impression that a *pactum de negociando* was involved. Paragraph 2 reprised the old idea of interim measures of protection, which might be a necessary evil in order to make article 48 as a whole digestible to certain States, but the new wording was not as different from the version adopted on first reading as the commentary tried to suggest. In paragraph 3, he wondered whether the choice of the term "dispute" was appropriate, since certain conditions had to apply to a legal dispute and it might be asked whether it was a dispute in the technical sense of the word that was meant.

35. Turning to new article 49, on proportionality, he said that he was in favour of replacing the negative formulation by the positive formula used by ICJ in its judgment in the *GabŽ kovo-Nagymaros Project* case. Since the phrase after the comma in article 49 as worded added nothing, he thought the Court's judgment in that case should be followed even more closely. After the comma, the text should read: "taking account of the rights subject to the internationally wrongful act".

36. With regard to new article 50, he wondered whether mentioning "intervention" would not mean opening Pandora's box. As to subparagraph (*b*), he recalled the problems he had already mentioned concerning the link between the rights of third parties and basic human rights, but he welcomed the reference to general comment No. 8 of the Committee on Economic, Social and Cultural Rights, which was cited in paragraph 350.

37. In conclusion, he said he was in favour of sending all the draft articles to the Drafting Committee.

38. Mr. ROSENSTOCK said that, with regard to the question of proportionality, what the Special Rapporteur was seeking to do, and did reasonably successfully, was to encompass what Riphagen saw as the two measures of proportionality in the *Air Service Agreement* case, namely, not merely the magnitude of the illegality and loss flowing from the French conduct, but also the harmful effects if that conduct was repeated with regard to numerous other identical agreements held by the United States.[7]

39. Mr. CRAWFORD (Special Rapporteur) said it was true that article 50, subparagraph (*b*), posed a problem, but the same had been true of the text adopted on first reading. The real problem was that countermeasures taken by a State which might, in their inception, have been lawful—for example, a trade embargo—might, over time, produce a result that violated human rights. That was why he wished to include human rights in article 50—not because of any refusal to take them seriously, but because analysing human rights in the context of countermeasures was a delicate task. Obviously, a State could not take countermeasures which involved the suspension of human rights as such. There might, however, be situations when the human being was not the subject of the right, but, in some sense, the object. That had been true of the old prohibition of reprisals in humanitarian law, a prohibition which, unlike the situation in modern human rights, had been a pure inter-State obligation of which individuals were beneficiaries. That was why he had placed the prohibition of reprisals in article 47 bis, although the language of that article could be discussed in due course.

40. On analysis, the problem of compliance with human rights fell within the scope of article 50 and not that of article 47 bis as soon as one accepted the distinction between obligations not subject to countermeasures and prohibited countermeasures.

41. He accepted the point that bringing the rights of third parties and basic human rights together in article 50, subparagraph (*b*), might be thought to be an excess of "human rights-ism" in that it amounted to regarding the beneficiaries of human rights as being third parties vis-à-vis the State. The problem was that it would be odd to devote a separate third paragraph to human rights because in reality they were rights of third parties, when compared with State-to-State obligations, which were the subject of countermeasures. The solution would be to break subparagraph (*b*) into two parts, one concerned with the rights of third States and the other, with human rights. That would leave out the possibility of an adverse impact on the rights of entities other than third States, but that could be covered in the commentary.

42. Mr. SIMMA said that he welcomed the idea of dividing article 50, subparagraph (*b*), into two parts, one on the rights of third parties and the other on basic human rights, but he wished to underline the view that it was dangerous to "privatize" human rights obligations by saying that they were obligations not owed to other States. He thought human rights obligations, especially those laid down in treaties, had a double nature: they were obligations between States parties which, like other obligations, justified the exercise of countermeasures in the event that they were breached. That aspect was important and should not be overshadowed by the other aspect of human rights brought out by the European Court of Human Rights in the sense that the obligations arising from treaties were not just obligations among States, but were also, and perhaps in the first instance, obligations vis-à-vis individuals.

43. It would not be illogical to include a subparagraph in article 47 bis exempting basic human rights obligations from the scope of countermeasures, as had been done in the draft adopted on first reading.

44. Mr. Sreenivasa RAO said that the distinction drawn between human rights protection in the context of reprisals and human rights protection in general was valid, up to a point. If human rights protection was considered in the context of armed conflicts, it would be recognized as really being the protection of innocent civilians. When a State was the target of countermeasures—and thus of an attack against which it had to protect itself—it might suspend the exercise of a large number of human rights under a state of emergency. The suspension of some of those rights might not be of great consequence for the purposes of the draft articles. What, however, should be done in situations where, as had occurred during the Second World War, large groups of persons were isolated and put into camps? It was difficult to separate the question of human rights from that of armed conflict situations. Moreover,

[7] Ibid.

times had changed and an ever-increasing number of rights were considered basic human rights. Provision should be made that both the affected State and the State taking the countermeasures should be bound to protect basic rights. In that perspective, the distinction between articles 47 bis and 50 would lose much of its importance.

45. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Sreenivasa Rao, said that human rights were, of course, to be protected unconditionally. The derogation provisions under public emergencies were part of the human rights regime and, indeed, they provided the test for the acceptability of interning people in times of armed conflict. They were not part of the law of countermeasures.

46. With regard to the point raised by Mr. Simma, the problem was that, if the general protection of human rights was inserted in article 47 bis, the much more important problem of article 50 was avoided because human rights were breached in the context of countermeasures not because reprisals were taken against individuals, but because collateral human suffering occurred and could be extremely severe. It was therefore most important that States should be on notice that, even if they imposed economic blockades or froze bank accounts, there were still individual rights that should be maintained, subject of course to any relevant derogation. It followed that, if there was a choice between a more confined treatment in article 47 bis in relation to the classic problems of reprisals and a broader protection in article 50, human rights were actually better served than they would be by adopting the approach suggested by Mr. Simma.

47. Mr. GALICKI noted that article 50 adopted on first reading had included all the elements that were currently divided between articles 47 bis and 50. It might therefore be a good idea to revisit some of the results of that divorce in order to avoid any repetitions or omissions. As had been said, article 47 bis, subparagraph (*d*), dealt with obligations of a humanitarian character. That differentiation in terminology ought to be taken into account. Some participants in the debate had considered that the concept included human rights. He would favour harmonizing the terminology and deciding whether the reference should be to humanitarian or to human rights law, as in article 50. The Drafting Committee should consider the matter. The same applied to subparagraph (*a*) of both articles, which had suffered from the divorce procedure imposed on article 50 adopted on first reading. The procedural separation of various items in the two articles should be carefully reconsidered.

48. Mr. SIMMA said that he wished to put in a plea for keeping the distinction that had been drawn between articles 47 bis and 50. In a case where a State engaged in economic countermeasures against another State, obligations that could not be suspended under article 47 bis would be those arising out of a trade agreement or some economic assistance agreement. The collateral damage would, of course, fall on the innocent population; that was well taken care of in article 50, the provision made perfect sense and there was no confusion. On the other hand, was it impossible to envisage countermeasures that pinpointed human rights obligations?

49. The example given by Mr. Sreenivasa Rao of people rounded up and put in camps called for reflection. Such people were in all probability nationals of the target State. However, that pertained more to diplomatic protection, to the minimum standards governing the treatment of aliens and therefore to individual human rights.

50. Other situations were possible, however. There might, say, exist an association of friends of Austria in Germany. If a problem arose between the two countries, Germany might, by way of countermeasures, detain the friends of Austria, who would be its own, German nationals. Such measures were not unthinkable; indeed, examples could currently be found in the press.

51. For that reason, many difficulties would not be resolved by the insertion of human rights considerations in article 50; nor would his own apprehensions be relieved. It would be useful for the Drafting Committee to reconsider the issue.

52. Mr. PELLET said that his position on countermeasures was well known. First, he had little liking for measures, such as intervention, which could, inevitably, be used only by the most powerful States. Secondly, countermeasures might be an evil, but they were a necessary evil and in any case they were a fact of life. It was therefore necessary to accept them with a good grace, as long as international society remained essentially decentralized; in the absence of an organized system of justice, such a primitive form of "private justice" was unavoidable. Thirdly, the world being what it was, it was better to regulate countermeasures than to leave them in the limbo of lawlessness to which some people wished to confine them. For the weak, nothing was more dangerous than the absence of law.

53. That said, the articles proposed by the Special Rapporteur seemed, overall, to constitute an advance over the draft articles adopted on first reading, even if they were not perfect and in some areas could actually be retrograde.

54. That certainly applied to the wording of the beginning of article 47, which repeated the formulation originally proposed by the previous Special Rapporteur, Mr. Arangio-Ruiz,[8] which a majority of the then members of the Commission had successfully opposed, despite the determined resistance of a minority, of whom the current Special Rapporteur had been one. Article 47 as adopted on first reading had been neutral: it had presented countermeasures as a fact. The Special Rapporteur was inviting the Commission to return to that solid neutrality, without any clear justification for such a step back into the past, and to accept the idea that countermeasures were lawful under certain conditions: "an injured State may take countermeasures …". He would prefer a negative formulation, as some States had suggested: "… an injured State may not take countermeasures, unless …". If such wording was not acceptable to a majority of the Commission, at least there should not be an assumption that States would resort to countermeasures; the Commission should at least return to the neutral, compromise formula that it had

[8] See fourth report (*Yearbook . . . 1992*, vol. II (Part One), document A/CN.4/444 and Add.1–3), p. 22, art. 11.

laboriously reached at its forty-eighth session, in 1996. In his view, the most negative aspect of the report, on the theoretical level at any rate, was that, at the stroke of a pen, without any explanation, the Special Rapporteur had gone back on a balanced formulation that had been laboriously achieved.

55. Otherwise, the Special Rapporteur had been right to seek to simplify the structure of article 47, although the rationalization could be carried still further. Like Mr. Simma, he had doubts about the validity of the last phrase in paragraph 1: "… in the light of its response to the call that it do so". Apart from the fact that it was hard to understand on its initial reading, he thought that, while such calls and responses should be taken into consideration, they were only two of the relevant factors; the truth was that countermeasures should be taken only when "strictly necessary in view of the circumstances", a wording that he would prefer because he considered it simpler, more restrictive and more precise.

56. With regard to article 47, paragraph 2, he concurred with the Special Rapporteur in believing that restricting countermeasures to what Special Rapporteur Riphagen had called "reciprocal countermeasures" would not be realistic. On the other hand, despite the explanations contained in paragraph 347, he keenly regretted that the Special Rapporteur had eliminated from the article the protection of the rights of third parties, which had been covered by paragraph 3 of the article adopted on first reading. That was particularly surprising, given that paragraph 348 gave the impression that ultimately the Special Rapporteur had been convinced by the Irish Government's suggestion,[9] which would, on the contrary, have the effect of strengthening the position of third parties, under both article 47 and article 30.

57. As matters stood, it was inevitable that, in certain cases, the interests of third parties would be harmed by countermeasures. Rights and interests, however, should not be confused and, if third parties had rights, there was no reason why, if they were not at fault, the violation of their rights should be legitimized by the breach committed by the author of the internationally wrongful act. Article 47, paragraph 3, adopted on first reading expressly dealt with the consequences of such a situation. It was essential that the notion should be restored to the draft article and that the extremely ambiguous wording proposed by the Special Rapporteur, whereby the same result was seemingly to be attained by the cryptic expression "measures towards the responsible State", should not be retained. On the other hand, he utterly rejected the idea that individuals could be "third parties" in the context of inter-State responsibility. He could therefore not accept the wording proposed by the Special Rapporteur for article 50, subparagraph (*b*). He concurred with Mr. Lukashuk and Mr. Simma on that point: individual persons were not the objects of human rights law, they were parties to an obligation and not in any way third parties. He was not sure that separating article 50, subparagraph (*b*), into two sections would suffice to meet his concerns.

[9] See footnote 3 above.

58. Article 48 had undergone the clearest and most spectacular development as a result of the Special Rapporteur's proposed changes to the text adopted on first reading. That text had been based on the naïve belief that the excesses that too often accompanied countermeasures would be restrained by the fact that States would, in theory, submit to the compulsory arbitration provided for in Part Three. To rely entirely on such an unrealistic mechanism, which was obviously unacceptable to the vast majority of States, would mean neglecting the basic restrictions that must be imposed on the "private justice" of countermeasures. The Special Rapporteur was right to suggest abandoning such a ludicrous notion, which had lulled the members of the Commission into believing that international society was the same as national society or that it should be forced into the same mould.

59. On the other hand, it was important to preserve the benefits of the text adopted on first reading, which had consisted in making the taking of countermeasures dependent on undertaking negotiations in good faith within a reasonable time. He recognized that article 48, paragraph 3, as proposed by the Special Rapporteur, was an expression of that idea. He regretted, however, that the logical sequence between paragraph 3 and paragraph 1 (*c*), which dealt with the obligation to agree to negotiate in good faith had been broken by paragraph 2, which he would prefer to see transferred to the end of the article. The provisional measures for which it provided should be seen for what they were: exceptions to the prohibition against taking countermeasures before the path of negotiation had been tried. More emphasis should be placed on their exceptional nature and, rather than the expression "as may be necessary", he would prefer a stronger form of words, such as "as prove [or as are] essential". On the other hand, the Special Rapporteur had been right to remove the ambiguity created by the reference to "measures of protection", despite the fact that the concept was the same. Measures of protection under international procedural law might appear the same, but in fact were not.

60. Referring to the sequence of paragraphs 1 and 2, he also thought that paragraph 1 (*b*) appeared too soon and that the requirement for the injured State to give notification of the countermeasures that it intended to take before the start of negotiations was too inflexible. The logical and practical order should be, first, a reasoned call for reparation, followed by negotiation in good faith. It was perhaps unnecessary to provide for a separate obligation to agree to negotiate, since a State which envisaged taking countermeasures should not simply "agree to negotiate". It should propose negotiations. Notification could then be given of the intended countermeasures which could legitimately be deployed in terms of the negotiation. That would also fit in with the logic of the fleeting reference, at the end of article 47, paragraph 1, to the insistence on the necessity for countermeasures in the light of the response by the responsible State to the call from the injured State.

61. Paragraph 4—which could become paragraph 3 or, indeed, precede paragraph 2—posed no problem, in principle in any case, and seemed to have been flexibly worded to achieve an acceptable result.

62. On the other hand, he was firmly opposed to the alternative suggested in the footnote to new article 48 which eliminated the main achievement of the draft adopted on first reading, namely, the obligation to negotiate, theoretically beforehand.

63. The proportionality dealt with in article 49 was a crucial concept and he welcomed the fact that the Special Rapporteur had substituted the word "and" after the phrase "gravity of the internationally wrongful act" for the word "or", which had appeared in the article adopted on first reading. Like Mr. Simma, he also considered that the simple word "proportionality", to which the Special Rapporteur proposed to return, was infinitely preferable to the negative expression "out of proportion" which appeared in the text adopted on first reading.

64. Proposing to discuss articles 47 bis and 50 together, he noted that, in paragraph 334 of his report, the Special Rapporteur stated that the distinction he drew between obligations which may not be suspended by way of countermeasures, and obligations which must be respected in the course of taking countermeasures clarified matters. There, the Special Rapporteur was unduly Cartesian in his approach. While, in the abstract, he understood the distinction the Special Rapporteur had in mind, between the subject of countermeasures and their effect, he was at a loss to understand its application in articles 47 bis and 50. If article 50, subparagraph (*a*), were to be drafted slightly differently, but without in any way affecting its substance, so as to state, for example, that the obligation not to endanger the territorial integrity of the other States could not be limited by way of countermeasures, the result would be an "obligation not subject to countermeasures", in other words, an obligation under article 47 bis. The same was true of the duty of non-intervention. As for subparagraph (*b*), on which he had already spoken, he wished to add that, despite the explanations provided in paragraphs 340 and 341, he failed to understand in what way respect for fundamental human rights differed in essence from the humanitarian obligations under article 47 bis.

65. In any case, it would seem wise to revert to a single article 50 concerning prohibited countermeasures. In that regard, he shared the views expressed by Mr. Galicki, notwithstanding Mr. Simma's very strong plea.

66. There was no need to embark on a point-by-point discussion of the seven prohibited countermeasures appearing in articles 47 bis and 50. In his view, it would be sufficient to mention the prohibition on resort to force pursuant to the Charter of the United Nations and obligations under peremptory norms of general international law, provided it was mentioned in the commentary that the peremptory character of certain obligations (including those relating to the inviolability of diplomatic agents) had been disputed. That being said, ICJ had itself referred to "imperative obligations" in its order in the case concerning *United States Diplomatic and Consular Staff in Tehran* [p. 20, para. 41]. Similarly, it had described the humanitarian obligations referred to in article 47 bis, subparagraph (*d*), as "intransgressible" in its advisory opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons* [p. 257, para. 79]. On that point, he agreed with Mr. Simma's view that there was no reason to distinguish humanitarian obligations from respect for human rights and he also endorsed Mr. Simma's remarks concerning fundamental rights of individuals and the need to confine articles 47 bis and 50 to those fundamental rights. The same could no doubt be said of the principle of territorial integrity and perhaps also of the principle of non-intervention. There remained only the obligation concerning settlement of disputes by a third party, but article 48, paragraph 4, appeared to cover the main hypothesis. Admittedly, that paragraph was not exactly coextensive with article 47 bis, subparagraph (*c*), but he was not sure that there was any need for that addition, which dealt with marginal hypotheses.

67. In any case, while he had nothing against the content of the long enumeration contained in articles 47 bis and 50, he was critical, as he had already been in the debate on first reading, of the very procedure of enumeration, which was probably not exhaustive. One could never be sure of not having omitted something, and, as reference was made to *jus cogens* in article 47 bis, subparagraph (*e*), that reference could suffice.

68. Turning to article 50 bis, he was in favour of its inclusion in the draft and it was entirely right to specify that the countermeasures must cease when the circumstances justifying them had themselves ceased.

69. Article 50 bis, paragraph 3, thus posed no problem. On the other hand, paragraph 2 was not necessary. To begin with, it raised a number of drafting problems. For example, he was not keen on the expression "may be resumed", which was a sort of attenuated echo of the opening of article 47, of which he had already spoken harshly. Moreover, neither the word "request" nor the word "order" seemed satisfactory. Lastly, the expression "in good faith" was also unsatisfactory. The Drafting Committee might rectify those matters, but the qualifications were in any case superfluous and could easily be relegated to the commentary, if possible with a few concrete illustrations. Those were thus concrete, but implicit consequences of paragraph 1. The provision was in any case so unnecessary that he did not favour referring it to the Drafting Committee.

70. Matters were different with paragraph 1, which could be referred to the Drafting Committee. He wondered, however, whether the word "orders", which appeared in its subparagraph (*b*), was appropriate and thought that the Commission might confine itself to referring to the tribunals or bodies authorized to make decisions binding on the parties.

71. Subparagraph (*b*) raised two further questions. The first was whether it also referred to decisions taken by the Security Council under Article 25 of the Charter of the United Nations. He supposed that was the case, but, if so, that should be spelled out and explained in the commentary. That also raised interesting legal problems with regard to the *Lockerbie* case.

72. Secondly, it was not clear whether subparagraph (*b*) referred to orders of ICJ or of another court indicating preliminary measures. That should certainly be the case, but it was not what the proposed text said. In his view, orders of the Court did not constitute binding decisions, still less injunctions. Perhaps the reference was to the

"requests" under paragraph 2, but, if that was the case, paragraphs 1 and 2 did not correspond.

73. As for article 30, he had no problem with the text proposed by the Special Rapporteur in paragraph 362 of his report, which indeed constituted an improvement on the previous wording, thanks to the addition of the expression "and to the extent that". Nonetheless, he wondered whether that provision was necessary. Its inclusion in Part One created an ambiguity about which some members of the Commission had expressed concern at the previous session, as countermeasures appeared to be simultaneously a circumstance precluding wrongfulness and consequences of responsibility. Such a duality of one and the same legal concept was not helpful. Of course, in the abstract, countermeasures could be seen as a circumstance precluding wrongfulness, but that was also true of other legal institutions, for example, of a decision of the Security Council requiring States to take measures contrary to some of their obligations, something the Council could do within certain limits; and it was also true, or could be true, of consent to wrongfulness or *exceptio inadimpleti contractus*, an exception that, wisely, the Special Rapporteur had decided not to mention in the draft articles. He thought that the Special Rapporteur had been right to take that course, for the same reasons that led him to believe that it was neither useful nor desirable to mention countermeasures in Part One, particularly as, strictly speaking, it was not the countermeasure that precluded wrongfulness, but the wrongfulness of the initial act attributable to the responsible State. It was in fact the first wrongful act that excused the second, not the countermeasure as such. There was something illogical in that. Article 30 was not necessary and articles 47 bis to 50 bis were all that was needed.

74. Summing up, he said that he favoured referring all the draft articles under consideration to the Drafting Committee, except for article 50 bis, paragraph 2, and article 30. He also strongly favoured: first, redrafting article 47 so as to avoid the impression that countermeasures were a right; secondly, reincorporating article 50 into article 47 bis and considerably reducing the list of eventualities referred to in the two provisions; and, thirdly, retaining a clear separation between the general regime of countermeasures and the settlement of disputes. Everything else was a matter of drafting amendments.

75. Mr. LUKASHUK said he broadly endorsed Mr. Pellet's remarks, except for those relating to article 47 bis, subparagraph (*d*), and article 50, subparagraph (*b*). It was also his view that the distinction between humanitarian obligations, namely, those stemming from international humanitarian law, and human rights must be maintained.

76. Mr. CRAWFORD (Special Rapporteur) said that he emphatically did not share Mr. Pellet's view that the whole of the prohibitions on the taking of countermeasures was covered by the notion of *jus cogens* and that he could not subscribe to his proposal on that point. As States were almost never in agreement that any one norm had the character of *jus cogens*, such a formulation would radically widen the scope of the countermeasures, which was certainly not the outcome desired by Mr. Pellet. In particular, he was very strongly opposed to the idea that the inviolability of diplomatic and consular premises, archives and documents, referred to in article 47 bis, subparagraph (*b*), was a norm of *jus cogens*. That provision had in any case been endorsed by States and he would be opposed to its deletion.

77. On the other hand, if the provisions under consideration were to appear in an appropriate form in the draft articles, article 30 was perhaps not necessary, but, if they were couched in the neutral and totally unsatisfactory form in which they had been adopted on first reading, that article was indeed necessary.

78. Mr. ECONOMIDES said that he wondered whether, in the hypothetical situation in which, after the notification by the injured State referred to in article 48, the responsible State replied that it disputed the existence of the breach and proposed the immediate referral of the dispute to ICJ or an arbitration tribunal, the injured State could nonetheless take countermeasures, including those referred to in article 48, paragraph 2.

79. Mr. DUGARD said he endorsed Mr. Lukashuk's comment that a clear distinction must be drawn between international humanitarian law and human rights.

80. Mr. ROSENSTOCK, referring to Mr. Pellet's suggestion that the reference to countermeasures in article 30 should be deleted on the grounds that the real point at issue was the initial wrongful act of the responsible State, said that, according to such reasoning, one could *a fortiori* delete the reference to self-defence. One could thus effectively deprive article 30 of all substance and reshape the entire text so as to attempt to solve the problem it contemplated in a totally different manner. By doing so, however, the Commission risked forgoing any chance of completing its work on the topic at its fifty-third session, in 2001.

81. Mr. SIMMA said he too thought that article 30 should be retained. However, the title of article 50 seemed to him far too broad, and he would prefer a different title, for instance, "Prohibited effects of countermeasures". Moreover, in the English text of its order in the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ had used a very strong wording, but had avoided saying whether diplomatic law fell within the category of *jus cogens*. The question of non-performance of an obligation following decisions taken by the Security Council was covered by a saving clause.

82. Mr. PAMBOU-TCHIVOUNDA endorsed Mr. Pellet's comments on the order of the provisions in article 48. He considered, however, that there was no reason to confine the modes of dispute settlement to negotiations, in paragraph 3 of that article.

83. Mr. TOMKA, referring to article 30, said that in the *Gabčíkovo-Nagymaros Project* case, ICJ had considered countermeasures as circumstances precluding wrongfulness. That had, furthermore, been well established in doctrine since the 1930s and the famous Kelsen article.[10] It was thus important to include countermeasures among circumstances precluding wrongfulness.

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

84. Furthermore, States could, by bilateral agreement, derogate from obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents; consequently, those obligations did not fall within the category of *jus cogens*.

85. Mr. MOMTAZ said that countermeasures could be taken only in response to conduct actually unlawful and noted in that connection that, in paragraph 294 of his report, the Special Rapporteur stated that a good faith belief in its unlawfulness was not enough.

86. Mr. PELLET said he still believed it would be preferable, in article 47 bis, to replace the enumeration of the various obligations with a more general formulation covering them all. The existing enumeration was in any case incomplete: one might also refer, for example, to obligations under environmental law and to many others. In that connection, he was surprised that the Special Rapporteur, who had in the past criticized article 19, paragraph 3, should use the same procedure in article 47 bis.

87. With regard to the question raised by Mr. Economides, the reply was to be found in article 50 bis, paragraph 1 (*b*). As for who was to decide on the need for countermeasures, in international law States were the first judges of lawfulness, regrettable as that might be. Hence the importance of limiting resort to countermeasures as much as possible.

88. Replying to Mr. Rosenstock, he said that the mention of self-defence in article 30 might also be deleted, if only because that was a question of *lex specialis*.

89. In reply to Mr. Simma's comment, he said that decisions taken by the Security Council under Chapter VII of the Charter of the United Nations enabling States not to perform an obligation were admittedly covered by a special provision in the draft articles, but operated in the same way as countermeasures. As for the case cited by Mr. Tomka, ICJ had perhaps accorded much more weight to the Commission's draft articles than was justified by texts adopted only on first reading.

90. Mr. KAMTO said that article 30 must be retained, inter alia, for the reason given by Mr. Rosenstock. He also stressed the almost indissoluble link between countermeasures and settlement of disputes, to which he would return in his statement at the next meeting.

91. Mr. CRAWFORD (Special Rapporteur), replying to Mr. Economides, said that in the situation envisaged, the injured State could not take countermeasures if the wrongful act had ceased. Replying to a question by Mr. Pellet, he said that the Security Council was not covered by article 50 bis, paragraph 1 (*b*), and that its decisions were covered by article 39.

The meeting rose at 1 p.m.

2647th MEETING

Thursday, 27 July 2000, at 10 a.m.

Chairman: Mr. Chusei YAMADA

Present: Mr. Addo, Mr. Al-Baharna, Mr. Baena Soares, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Gaja, Mr. Galicki, Mr. Goco, Mr. He, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Momtaz, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka.

State responsibility[1] (*continued*) (A/CN.4/504, sect. A, A/CN.4/507 and Add.1–4,[2] A/CN.4/L.600)

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN invited the Commission to resume its discussion of chapter III, section D, of the third report (A/CN.4/507 and Add. 1–4).

2. Mr. KATEKA said that, in the general commentary to chapter III of Part Two adopted on first reading, countermeasures were described as the most difficult and controversial aspect of the whole regime of State responsibility. The commentary said that States resorted to unilateral measures of self-help when they took countermeasures. In his opinion, therefore, great caution was called for in dealing with the articles being proposed.

3. It was clear from the views expressed by some Powers that they did not rule out forcible countermeasures and that was a clear danger signal that countermeasures might be subject to abuse, especially by the strong Powers against the weak, whose ability to take countermeasures might be confined to diplomatic protest notes. The inclusion of countermeasures in the draft would limit the articles' acceptability to certain States. He had indicated his opposition to including countermeasures during the debate on article 30.

4. The Special Rapporteur planned to complete the second reading of the draft articles at the fifty-third session of the Commission, with the Drafting Committee producing a complete text, but with the question of dispute settlement set aside until the end. That process of disaggregation had left a number of issues in a somewhat

[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, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 2000*, vol. II (Part One).