Document:-

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Summary record of the 2647th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2000, vol. I

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).

doubtful situation. For example, article 19 would be mired in the "serious breaches" category. The Special Rapporteur had expressed his preference for a non-binding instrument on State responsibility, and had also delinked countermeasures from binding dispute settlement, stating in paragraph 287 that such a linkage gave a one-way right to the target State. Personally, he would be happy to give the same right to the injured State because dispute settlement was a universally accepted peaceful means of resolving conflicts.

5. The ILA study group on the law of State responsibility had observed in its first report that countermeasures were a dangerous opening of the legal order to power, something which would indicate that a link between countermeasures and compulsory dispute settlement was necessary in order to really guarantee the rule of law in public international law. Disappointingly, the report had gone on to argue that the approach in favour of a compulsory jurisdiction at least with regard to countermeasures seemed hardly realistic. Time and the reaction of States would tell who was being realistic. Just as Part V of the 1969 Vienna Convention had been linked to compulsory dispute settlement, the same might have to be the case with countermeasures.

6. The Special Rapporteur had recast the articles on countermeasures adopted on first reading, stating that the purpose of countermeasures was instrumental, in other words, to induce compliance. That was not necessarily the case, for countermeasures could be punitive in order to satisfy the political or economic purposes of the injured State. However countermeasures were dressed up, they were clearly not palatable. As the commentary to article 30[3] had stated, they were measures whose object was, by definition, to inflict punishment or to secure performance, and which under different conditions would infringe a valid and subjective right of the subject against which the measures were applied. The commentary said that that general feature served to distinguish the application of countermeasures, sometimes referred to as "sanctions", from the mere exercise of the right to obtain reparation for damage. The commentary left no doubt as to the purpose of countermeasures. The Commission was thus being called upon to legitimize what would otherwise amount to the rule of the jungle whereby the strong bullied the weak. He was opposed to the inclusion of countermeasures in the draft articles.

7. If the Commission nonetheless decided to include them, he had a number of comments to make. The reconfiguration of the articles had not simplified matters. The creation of a proposed new article 47 bis, extracted from article 50 adopted on first reading, had not improved the text, and in his view it would be better to restore the omnibus article 50, on prohibited countermeasures. The Special Rapporteur had described article 47 adopted on first reading as a "hybrid" yet in his proposed new article he had retained the gist of paragraph 1 of that article. His own view was that there was more to countermeasures than the question of inducement. It was not helpful to tell a country when its assets abroad were frozen that the action was instrumental; the State in question might not be able to buy medicines, and instrumentality could therefore lead to punitive results. As Mr. Lukashuk had said, countermeasures were difficult to define in a specific manner. Article 47 might need to be recast.

8. The Special Rapporteur had identified five basic issues in recasting the provisions on countermeasures. He had been right to reject reciprocal countermeasures, for in reality there was no reciprocity; it was one-way traffic. While some developing countries kept their assets abroad in developed countries, and were therefore easy victims when it came to the taking of countermeasures, most of the developed countries had no similar assets in the developing countries that could be seized as a countermeasure.

9. In article 47 bis, the Special Rapporteur had identified for recasting the question of obligations not subject to the regime of countermeasures. Paragraph 334 of the report stated that it seemed better and clearer to distinguish between obligations which could not be suspended by way of countermeasures and obligations which must be respected in the course of taking countermeasures—in other words, between the subject of countermeasures and their effect. Personally, he did not find that distinction helpful when compared with article 50 adopted on first reading. Mr. Lukashuk had proposed that article 47 bis should be placed next to article 50 because of the close link between them, while another member had argued that they should be merged. The language of the *chapeau* to article 47 bis was not as clear as the mandatory language of article 50 adopted on first reading. Indeed, the discretionary "may" could imply that there might be situations in which the obligations mentioned could be suspended. The text of subparagraph (*a*) would be improved if "embodied" was replaced by "enshrined".

10. He was concerned about the deletion of article 50, subparagraph (*b*), as adopted on first reading. The Special Rapporteur had argued, in paragraph 312, that countermeasures were coercive, and that confirmed his worst fears about them. The Special Rapporteur had further argued, in paragraph 352, that a measure could not lawfully be "designed" to endanger the territorial integrity of a State because the use of force was excluded as a countermeasure. It was a difficult argument to sustain because the sovereignty and existence of a State were not threatened solely by the use of force; economic and political coercion had done irreparable harm to the sovereignty of many developing countries. Some members had voiced concern about collateral damage when discussing the human rights provisions and he hoped that they would feel the same concern regarding economic coercion.

11. The Special Rapporteur had then proposed a watered-down text in a truncated article 50 to take care of the concerns of the proponents of subparagraph (*b*) as adopted on first reading. However, the new text of article 50, subparagraph (*a*) was insufficient in that it broadened the provision and lost the reality of economic and/or political coercion being used in order to justify destabilizing countermeasures. In his view, the language of article 50, subparagraph (*b*), as adopted on first reading should be followed.

[3] *Yearbook . . . 1979*, vol. II (Part Two), pp. 115 et seq.

12. Article 48 was said to have been by far the most controversial of the four articles adopted on first reading. It would be better if paragraph 1 (*c*) of the proposed new version was to become paragraph 1 (*a*) in order to emphasize the importance of negotiation before the taking of countermeasures; for him, the significance of the provision counted for more than the question of logic. While it was helpful for the Special Rapporteur to replace the unfortunate term "interim measures of protection" by the idea of "provisional" measures, the basic problem remained in the sense that, whatever name they were given, countermeasures were wrong because of their unilateral nature. Whether provisional or full, their impact might be difficult to reverse, and the duration or time factor was not the issue. It was the taking of any countermeasures at all that was the problem. In that regard, he would prefer, as stated in paragraph 358 (*d*), that all countermeasures be postponed until negotiations were concluded or had definitively broken down. Alternatively, the distinction between "provisional" and other countermeasures could be eliminated. Paragraph 4 of article 48 was somewhat vague, and it would be better to use the form of language of article 48, paragraph 3, as adopted on first reading.

13. The new formulation of article 49 was couched positively as opposed to negatively in the article adopted on first reading, and there was merit in deleting the double negative formulation. However, it was not useful to introduce the notion of purpose mentioned in paragraph 346, for the reasons he had already stated.

14. The proposed new article 50, subparagraph (*b*), provided that countermeasures must not impair the rights of third parties, in particular basic human rights. The Special Rapporteur contended in paragraph 347 that there was no need to refer to the position of third States which might be affected by countermeasures. While countermeasures might not operate objectively, they could cause suffering. For example, a trade embargo imposed by State A against State B could cause grave harm to State C, which might be an innocent victim of countermeasures; landlocked developing countries could be denied essential transit facilities as a result of countermeasures. The citing of "basic human rights" as a specific case raised the question of whether human rights for individuals in the target State could by implication be excluded because it was not a third State. The use of the word "basic" also raised the old argument as to what constituted fundamental human rights and how they related to other derogable human rights. It introduced an element of subjective judgement, which was best left out.

15. In proposed new article 50 bis, the Special Rapporteur had introduced a French proposal to the effect that countermeasures must be terminated as soon as the conditions which justified taking them had ceased. He had clarified that he was talking of suspension of the performance of the obligation and not of the obligation itself, but why did the article refer to suspension if the internationally wrongful act had ceased? The article borrowed the language of article 48 adopted on first reading. It should use the word "terminated" and not "suspended". Again, paragraph 3 was a qualified termination because of the reference to obligations under Part Two. It was an unnecessary linkage that widened the scope of the paragraph.

16. Lastly, he wished to restate his opposition to the inclusion of countermeasures in the draft articles. If the Commission decided to retain them, it would be better to have general but brief provisions, based on the draft articles adopted on first reading. In all fairness, the Special Rapporteur had done his best in dealing with a difficult subject.

17. Mr. GAJA said that the articles seemed to be better formulated than did the draft adopted on first reading, although in some respects further improvements were possible. For one thing, the text relating to countermeasures might usefully be reduced in size.

18. He agreed with the description of the purpose of lawful countermeasures as coercive. Article 47 indicated that the purpose was to induce compliance with obligations under Part Two. However, all the implications of that purpose were not fully reflected in the articles. Article 50 bis, paragraph 3, rightly stated that, once there had been compliance with obligations under Part Two, countermeasures should cease. However, article 49 stated that countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effects on the injured party. That wording evoked the idea that countermeasures were sanctions for an unlawful act, and that the more serious the breach, the greater the countermeasures. In his view, proportionality should instead be assessed in relation to the coercive purpose of countermeasures. If, for example, State A expressed willingness to pay compensation for all the damage caused but insisted that, in order to do so, legislation had to be enacted, countermeasures should be taken only to promote prompt passage of that legislation; in that example, the gravity of the injury did not matter. There might be other cases in which the gravity of the injury did affect the likelihood of the State complying, and in such cases there was some merit in a reference to gravity. The wording of article 49 was borrowed from formulations in the decisions on such cases as *Naulilaa* and the *Air Service Agreement* and, in his opinion, it should be recast. ICJ in the *Gabčíkovo-Nagymaros Project* case considered that the purpose of countermeasures was to induce the responsible State to comply with its obligation under international law, but somehow demoted the relevance of the purpose by saying that it was one of the conditions for the lawfulness of countermeasures. Also, the Court did not relate proportionality to the purpose. Following to some extent the Commission's half-hearted approach regarding purpose in its first draft articles, the Court had said that proportionality was related to the "injury suffered taking account of the rights in question" [p. 56, para. 85]. The Commission should take a step forward and state the possible implications of the purpose of countermeasures on proportionality.

19. He agreed with much of what had been said by Mr. Galicki, Mr. Kateka and Mr. Pellet regarding the relationship between articles 47 bis and 50. The distinction between a direct breach of an obligation and a breach through consequential effects was very fine indeed. If a State was under an obligation to protect the right to life of individuals, it mattered little whether it directly impaired that right or whether it starved people to death through economic and other measures. While it could be said that the breach of obligations under norms that were not

peremptory could be justified only in the relations between the injured State and the responsible State, such a breach was not generally of interest to the international community. He did not, however, think that the same could be said about breaches of all the obligations that were not imposed by peremptory norms. It would be strange if countermeasures were considered lawful under international law when they implied a breach by the State taking countermeasures of obligations that affected several other States, and particularly the international community as a whole. There should be a general rule stating that when the obligation breached affected the international community as a whole, countermeasures were prohibited. That would cover many of the cases in proposed new articles 47 bis and 50, certainly those in article 47 bis, subparagraphs (*a*), (*d*) and (*e*) and in article 50. While it would be difficult to delete all the examples in article 50 adopted on first reading, one or two could be kept and a more general statement could be included. Unlike Mr. Pellet, he had no problems with the separate references to inviolability of diplomatic agents and to obligations concerning dispute settlement.

20. Paragraph 84 of the judgment of ICJ in the *Gab Ź kovo-Nagymaros Project* case stated the requirement of *sommation*, formal notice, before countermeasures were taken, which implied that a period of time had first to elapse. It would be useful to indicate in article 48, paragraph 1, that an offer to negotiate formed part of the process of giving notice. He was not convinced of the need for subparagraph (*b*), as it might be counterproductive to inform the responsible State of the exact countermeasures that were to be taken.

21. The wording on notification in article 48, paragraph 2, denied the need for *sommation* and was also imprecise. He favoured the alternative version proposed in the footnote to article 48 to which some elements could be added.

22. Mr. CRAWFORD (Special Rapporteur), referring to what Mr. Gaja had said about obligations affecting the international community, said he wondered whether the draft articles could be interpreted as saying that countermeasures could be taken only in respect of the bilateral obligations in force between the responsible State and the injured State. If that was the case, the only exclusions required were those in articles 47 bis and 50, inviolability of diplomatic or consular agents and settlement of disputes and, possibly, domestic jurisdiction.

23. Mr. ROSENSTOCK said he had been surprised to hear, in an otherwise convincing presentation, that in addition to giving notice, States had to let a period of time elapse before taking countermeasures. That idea did not seem to be in any way reflected in customary law and merely created more problems than it solved. As long as a demand was made, the law clearly supported the right of the injured State to take countermeasures, not some fancy permutation of the judicial requirements for temporary measures.

24. Mr. GAJA said that, if the Commission wished to engage partly in progressive development of the law, it could stipulate that only bilateral obligations, in the sense of obligations solely towards the responsible State, could be breached by countermeasures. That would also be the case with obligations under multilateral treaties when multilateral treaties gave rise in practice to a series of bilateral relations. That would arguably restrict countermeasures further than what was now customary international law. Responding to Mr. Rosenstock, he noted that there was no reason why the draft should not say that a period of time was necessary before countermeasures could be taken. The responsible State should not be allowed to play for time to avoid the consequences of its acts, but neither should actions be taken against that State suddenly, before it had even been notified of the invocation of responsibility.

25. Mr. CRAWFORD (Special Rapporteur) said he entirely accepted the criticisms of article 48, paragraph 1 (*b*), and had no objection to deleting it. He had included it simply because it was part of a coherent proposal made by France that seemed to represent a useful compromise in that area.

26. Mr. KAMTO said that, like some other members of the Commission, he had reservations about countermeasures, primarily because he viewed them as a step backwards at a time when the trend was in the opposite direction, towards the regulation of international relations through dispute settlement machinery, including judicial machinery. It seemed curious that, precisely when international legal institutions that could settle disputes among States at all levels were springing up everywhere, the Commission should be giving States the right to step in and, in some way, take their place. Further, he was not convinced that there was a sufficient basis in general customary law for countermeasures. Recent practice had emerged on the basis of the actions of some States, but it was far from what was traditionally understood as customary law.

27. There was perhaps no point in re-opening the debate on the principle of whether countermeasures should be included in the draft. The question had already been discussed at length and resolved. The subject was politically sensitive, however, and it was therefore important for countermeasures to be clearly delineated before the relevant legal regime was established. Could countermeasures be assimilated to known institutions like reprisals, retortion, reciprocal measures and sanctions? Within that range of measures, countermeasures occupied a very narrow space. It was totally artificial, for example, to try to entirely dissociate countermeasures from sanctions. Paragraphs 290 and 296 of the report detailed some of the concerns expressed by Governments in that regard, and yet the Special Rapporteur himself adopted the opposite viewpoint in paragraph 287. A measure was punitive on the basis, not of its origin—an individual act of a State or a collective act—but of its effects, and of the way it was perceived by the addressee. How could a decision by the United Nations or the European Union to impose an embargo for failure to respect obligations under a human rights treaty be in the nature of a sanction, while a decision taken by a State on the same grounds was not? If Governments were asked how they viewed countermeasures, he was sure they would say they saw them as nothing more nor less than sanctions.

28. As for reciprocity, suspension and above all termination of a treaty as a consequence of a material breach, within the meaning of article 60 of the 1969 Vienna

Convention, had the effect of wiping out the norm, either temporarily or permanently. Countermeasures, on the other hand, were a reaction to a breach that had no such effect: the treaty obligations were undermined but could still be invoked, and the treaty remained in force.

29. Compared to retortion, which was lawful *ab initio*, countermeasures were unlawful *ab initio* and were made lawful only by the wrongful act to which they were a response. Unlike reprisals, countermeasures could never be military in nature. Armed reprisals had been admitted only at a time when the ban on the use of force had not yet been enunciated as a fundamental principle of international law. The non-use of force was now unequivocally laid down in the Charter of the United Nations. Countermeasures were thus non-military reprisals that could, or could not, have a sanctioning or punitive character. The term "countermeasures" was generic, neutral and thus acceptable to States as covering, at least partially, the two notions of reprisals and sanctions. States had been able to adopt reprisals and sanctions in the anarchy that had prevailed until the early part of the twentieth century, but that was no longer the case today. Countermeasures had emerged in the late 1970s and early 1980s, a time of a considerable weakening of the Security Council's authority and of a parallel expansion of what had been called "private justice". That must not be forgotten in seeking to develop the relevant regime.

30. The main issue was how to ensure that, when exercising countermeasures, a State that considered itself injured did not act as if it was an impartial third party, and that countermeasures did not impede or complicate the peaceful settlement of disputes? Chapter III, section D, of the report did not offer an entirely satisfactory answer to those questions, although it did represent an improvement over previous reports on the subject.

31. The principle of recourse to countermeasures and the notions of interim countermeasures and proportionality were all sources of possible disagreement between the State that considered itself injured and the allegedly responsible State—responsibility being something that still remained to be determined. The reputedly injured State could not resolve the disagreement unilaterally, by taking full-scale countermeasures, for example. Resolution could be achieved only through the machinery for peaceful settlement of disputes, ranging from negotiation to judicial proceedings. That was why, in his view, the adoption of countermeasures was inextricably tied in with the peaceful settlement of disputes, but according to the Special Rapporteur that was not so. In paragraph 287, the Special Rapporteur said that there should be no special linkage between countermeasures and dispute settlement, as such linkage gave the allegedly responsible State a one-way right to invoke third party settlement, yet such a right must also be given to the injured State in lieu of taking countermeasures. Why should the injured State consider that it was deprived of the right to resort to third party settlement? If there was a possibility, as outlined in paragraph 299, that the allegedly responsible State would prolong negotiations and engage in dilatory procedures, then he could understand the need to provide in certain instances for countermeasures. But he could in no sense go along with the delinkage of countermeasures and peaceful settlement of disputes.

32. In fact, he was in favour of establishing in Part Two a fully-fledged, comprehensive legal regime for countermeasures. The basic idea must be that countermeasures could be adopted solely to contribute to the proper functioning of the dispute settlement process or to the enforcement of the decisions emerging from that process, and never to obstruct the application of the resulting decisions. In fact, it would be more in keeping with contemporary international law for decisions—and not orders—to impose "interim" measures to be taken on an emergency basis by a third party capable of issuing binding injunctions. That was the role now being played with success by the International Tribunal for the Law of the Sea. The fact that ICJ did not have such powers was regrettable and might be cause for proposing a revision of its Statute and Rules of the Court. But any international arbitral tribunal could make an emergency ruling if the parties so requested. Further, nothing prevented two States that had agreed on the basis of a special agreement to bring a case before the Court from stipulating that any "interim" measures imposed by the Court would be binding upon them. Hence there was a whole range of emergency procedures obviating the need for countermeasures which, in the hands of certain States, could represent a clear threat. Again, countermeasures could be disproportionate, but what if the allegedly responsible State proved not to have been responsible after all? Provision had to be made for reparation—reparation that had to be decided by an impartial third party.

33. Countermeasures could be adopted either before the dispute settlement machinery was initiated, and with the proviso that their validity was subsequently reviewed by an impartial third party, or after the dispute was settled, in order to ensure that the decision adopted by the third party was put into effect. On that understanding, he wished to offer the following comments on the draft articles themselves.

34. In article 47, paragraph 1, he proposed the insertion of the words "or flowing from a binding decision by an impartial third party" after "under Part Two". For the French version of article 47 bis , subparagraph (*a*), he endorsed the proposed change from *prévues dans* to *conformément à*. In subparagraph (*c*), the words "third party" should be deleted, to give the provision broader coverage.

35. It would indeed be useful to transpose subparagraphs (*a*) and (*b*) of article 48, paragraph 1, and he thought the words "responsible State" should be replaced by "State considered responsible" for the reasons he had given earlier.

36. He had particular difficulty with article 48, paragraph 2, because it laid down no actual conditions relating to recourse to countermeasures. If retained, it should be reformulated to include a phrase such as "in an emergency" or "if the situation so requires" and to omit the word "provisionally". He would also favour adding the phrase "in accordance with article 47, paragraph 2" and omitting the phrase "as from the date of the notification": there was no justification for taking countermeasures hard on the heels of a notification, even if they were interim. Indeed, he doubted the validity of "interim" countermeasures: either they were countermeasures or they were not. If his proposal was accepted, paragraph 3 should naturally

be deleted and paragraph 4 would become paragraph 3. He would then advocate a new paragraph 4, consisting of a reformulation of article 50 bis, paragraph 2, which belonged rather in article 48. He suggested wording along the following lines:

> "A State may implement such countermeasures as may be necessary to ensure the execution of decisions made by a third party under a dispute settlement procedure, if the responsible State does not conform with that decision."

37. As for article 49, it served to reinforce the need for a dispute settlement mechanism, because proportionality could not exist in a vacuum: some body would be needed to assess and monitor it.

38. There was no reason to retain article 50, at least not as a separate article: its title represented a logical impossibility. It could be entitled "Prohibited conduct" or "Countermeasures"; but, by definition, countermeasures could not be prohibited. The solution was to include the provisions of article 50 in article 48. Moreover, with regard to subparagraph (*a*), the rendering of "domestic jurisdiction" in the French version was not felicitous. The term *domaine réservé* could cause controversy, since its meaning was highly debatable. He would prefer *juridiction interne*. The sole change he envisaged to article 50 bis was to transfer paragraph 2 to article 48 and renumber paragraph 3.

39. Mr. GOCO said he endorsed Mr. Kamto's realistic approach. The question was indeed in what circumstances a State could be deemed an injured State. The world was full of situations in which there was an incursion by one country into another's territory, airspace or exclusive economic zone, giving rise to allegations and counter-allegations. There was often no question of referring the matter to a third party. Article 48, paragraph 2, however, required the injured State to notify the responsible State of countermeasures it intended to take. That was to ignore the harsh realities of life: a countermeasure was a measure of self-help. There was a stark difference between the thrust of article 48 and the original proposition in article 30: the former envisaged temporary measures, while the latter was applicable if a State adopted countermeasures in response to another State's breach of its international obligations. He therefore wondered whether article 30 should still be retained.

40. Mr. PAMBOU-TCHIVOUNDA said that he had been struck by one implication of Mr. Kamto's comments: the need to ensure that the State deemed responsible really was so. Responsibility must be established before countermeasures could be valid. If it was subsequently found not to be justified, a difficult situation would arise: countermeasures could not be founded on presumed responsibility. If responsibility was not established, the very system of regulating interim countermeasures might, by residing on presumption, be harmed. A situation might even arise in which the State claiming to be the injured party turned out to be the one responsible for the breach. That possibility should be covered by the draft articles.

41. Mr. ROSENSTOCK, while partly endorsing Mr. Pambou-Tchivounda's point, said he would go further. Mr. Kamto could not accept article 47 because it presupposed wrongfulness, yet was equally unable to accept draft article 50 because it did not presuppose wrongfulness. That displayed an uncharacteristic lack of logic, which suggested the Commission was adopting a biased approach to a difficult problem that was perhaps simply a realistic reflection of the current state of the world. Not everybody accepted the compulsory jurisdiction of ICJ and there existed no dispute settlement mechanism covering all regions. Countermeasures or reprisals of some kind were bound to be adopted. The question was, therefore, whether it was possible to find a basis for agreement that would keep such action under some sort of control in an organized fashion that did not favour some groups over others. Unless such agreement was reached, the whole attempt to develop a dispute settlement mechanism would collapse.

42. Mr. GOCO questioned whether the right approach had been adopted. Settlement of a dispute was clearly the best solution, if possible, but, in a case such as the border war between Ethiopia and Eritrea, the process of observing the provision in article 48, paragraph 2, could result in further action by the responsible State. The alternative, however, seemed to be to recognize unilateral action by the allegedly injured State.

43. Mr. KAMTO said he did not deny he had expressed strong views on the principle of countermeasures, but they took account of the realities of the international scene. It was incorrect to say that he had dismissed the possibility of interim countermeasures. The question, however, was under what conditions and in what situations they should be adopted. Nor did he believe that ICJ was the only recourse for an injured State: States had been known to have recourse to arbitration. Lastly, he was not opposed to article 50 as a whole; he merely objected to its illogical title. That problem could be solved by incorporating its provisions in article 48.

44. Mr. CRAWFORD (Special Rapporteur) said that realism appeared differently to different people. Mr. Kateka had accused him of being too realistic in assuming that the draft articles could not become a treaty with a system of compulsory jurisdiction. Although, however, he would obviously favour such an outcome, because it would be satisfying to have his work consolidated, it was difficult to envisage realistically. The task before the Commission, if the Commission decided to provide for countermeasures more fully than under the general provision in article 30, was to establish a relationship between them and dispute settlement that would fit in with the slow but general and discernible development in the direction of the availability of third party settlement. It would not, for various reasons, be possible to establish a new and automatic link between the taking of countermeasures and dispute settlement, but articles could be drafted that would fit into existing and developing systems of dispute settlement, so that a State which was credibly alleged to have committed a breach of international law would be in a position to prevent any countermeasures by stopping or suspending the action and submitting the case to a court. That was the effect that the provisions in the draft articles should achieve.

45. Mr. LUKASHUK said he fully shared Mr. Kamto's concern regarding the peaceful settlement of disputes, but

feared that his approach would require the reconstruction of whole branches of international law. It was quite unrealistic. At the same time, he could not accept the Special Rapporteur's characterization of himself as realistic: even the slightest of the limitations that he proposed was markedly idealistic in comparison with contemporary practice. If Governments approved even a minimum of the proposed provisions, that would constitute a signal success for the Commission and an important step in the progressive development of international law.

46. Mr. Sreenivasa RAO commended the way in which the Special Rapporteur had charted a path through the myriad complexities of the topic, which was replete with nuances and permutations that might never be fully captured. As an added complication, it was deeply enmeshed with policy. The situation of colonial days was not relevant, since times had changed, but it did colour the whole international approach to countermeasures. The previous Special Rapporteur, Mr. Arangio-Ruiz, had believed that the potential for abuse was such that the more sensible approach was to subsume it in the broader topic of State responsibility. If it was fully covered, a whole residuary system of international law would be involved. *Lex specialis* might even be applicable. Moreover, provision for the consequences of an improper application of previous provisions would be needed. He questioned whether a second level of safeguards was required.

47. On the other hand, the view that countermeasures were bound to be taken and that provision must therefore be made to ensure a certain level of reasonableness seemed to have gained ground. He would not say categorically that countermeasures were unfit for legal consideration. States were sometimes compelled to resort to minimum measures of protection. Such measures should, however, be restricted to sanctions, and only in accordance with the Charter of the United Nations, involving such action as freezing bank accounts, denying economic aid or suspending treaty rights and obligations. In the case of human rights violations, action might include resolutions by the Commission on Human Rights or the identification of abuses by a special rapporteur. The examples he had given tended to illustrate that the passionate advocacy of one approach or another was out of proportion to reality, although he acknowledged that the Commission's debates had enabled ICJ, in its consideration of the *Gabčíkovo-Nagymaros Project* case, to enunciate four propositions that would, in turn, provide the Commission with further guidance. Whether the Commission could proceed to actual codification, however, was another matter.

48. Statements made by States in the Sixth Committee were much more reasonable and pragmatic than some of those made within the Commission, where the temptation was to match one impassioned statement with another. The pragmatism of States, however, was the example to follow: they might make claims but ultimately they compromised. He therefore questioned the usefulness of cut-and-dried propositions on countermeasures. Indeed, no harm would be done if the topic of countermeasures were eliminated altogether from the topic of State responsibility.

49. No one would dispute that countermeasures should be a measure of last resort—"a necessary evil", in Mr. Pellet's words. Thus, if countermeasures were seen as an exception to the general rule whereby the claimant could not be the judge and enforcer of his own cause, the draft articles must place as many reasonable hurdles as possible in the way of States that might otherwise be tempted to have overhasty recourse to such measures. Hence the emphasis placed, in the draft articles adopted on first reading, on the linkage between countermeasures and dispute settlement. That emphasis needed to be brought out even more strongly in new article 48 proposed for the second reading, and dispute settlement must not be presented merely as an option. In that connection, he noted that article 48, paragraph 4, seemed redundant, as it merely stated the obvious truth that, where a dispute settlement procedure was in force, States must avail themselves of it before resorting to countermeasures. However, if retained, article 48, paragraph 4, should logically be placed before paragraph 3, as advocated by Mr. Pellet and others, so as better to reflect the natural sequence of events. Likewise, article 48, paragraph 1 (*b*), with its requirement of notification, should not, as the Special Rapporteur had suggested, be deleted, as it set forth a logical sequence of events, and might also enable the responsible State to focus on the most significant of the injured State's grievances. As to subparagraph (*c*), he endorsed the proposal to replace the word "agree" with the word "offer". In subparagraph (*a*), the words "reasoned request" should be replaced by "written claim".

50. The problem was that the corpus of international law to which an injured State could have recourse was a highly sophisticated body of law, comprehensible to its creators and practitioners, but rarely to the 180 or so States governed by its provisions. Hence, States did not heed their legal advisers, but instead adopted their own approach, availing themselves of internal institutions by which they were usually better served. In short, the process of codification of international law had not yet been successful: when it came to application and interpretation, doubt had even been cast on the Charter of the United Nations, a text drafted with the utmost clarity. *Jus cogens* was a sealed box, and no one was really sure of its precise contents. Thus, except where rights and obligations had been directly negotiated in the form of a bilateral or multilateral treaty, a corpus of international law from whose development and enforcement the majority of States felt excluded had only very limited application.

51. It was hard to see how a structure that had established *erga omnes* and *jus cogens* obligations, thus positing the existence of a higher order of law, could also permit unilateral actions whereby a State could take the law into its own hands. In such a scheme, an international community seemed sometimes to exist, sometimes not to exist. The real choice, though, was between a global, albeit idealistic, regime and an international free-for-all. No middle course was possible. A balance must be struck, in the treatment of countermeasures, between the interests of the injured State, those of the responsible State and those of the international community.

52. Articles 48 and 50 played a useful role in limiting States' freedom to take countermeasures, as did article 47. In his view, however, articles 47 and 50 should be merged. As worded, the *chapeau* to article 47 bis seemed to suggest that suspension of the obligations enumerated thereafter was a matter for the State's discretion. If that was not

the intention, the *chapeau* should be more strongly worded so as to dispel that impression. Likewise, in subparagraph (*a*), a stronger term than "embodied" should be found. There seemed also to be an overlap between article 47 bis, subparagraph (*a*), and article 50, subparagraph (*a*): a better overview of the conditionalities applicable to countermeasures might perhaps be obtained by combining those two articles.

53. Despite the disadvantages to which the Special Rapporteur had drawn attention, reciprocal countermeasures were to be encouraged wherever feasible. Greater prominence should be given to that idea in the text of the draft articles, not merely in the commentary.

54. A further issue addressed by the Special Rapporteur was the question of the reversibility of the countermeasures as a criterion for their lawfulness or reasonableness. Reversibility was a criterion that had been endorsed by ICJ, as the Special Rapporteur noted in paragraph 289 of his report; and the Commission should echo the work of that organ, just as the Court echoed that of the Commission. Further consideration should be devoted to the question, at least in the Drafting Committee. Moreover, in his submission, reversibility was not to be equated with suspension, but should be seen as a very important criterion in its own right.

55. His third proposition was that the draft articles on countermeasures should be brought into play only where *jus cogens* obligations were involved or a gap needed to be filled. They should never serve as a substitute for other self-contained regimes created by States, which, imperfect as some of them might be, must be honoured and allowed to evolve within the overall structure of international law.

56. Special prominence must also be given to the idea that countermeasures must not violate basic human rights. Protection of human rights must be a fundamental condition where countermeasures were resorted to, not just an issue tacked on to the quite separate issue of third party rights.

57. Lastly, on proportionality, ICJ had noted, in the *GabŹ kovo-Nagymaros Project* case, that countermeasures must be commensurate with the injury suffered, taking account of the rights in question. The Special Rapporteur, however, now proposed that countermeasures must be "commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and its harmful effect on the injured party" (art. 49). He had not had time to reflect carefully on the question, but his first impression was that those two approaches were quite different. The matter undoubtedly merited further consideration. Finally, while countermeasures could legitimately be resorted to as a means of inducing the other party to comply with its obligations, they must, of course, be kept entirely separate from the quite different issue of punitive sanctions.

58. Mr. KUSUMA-ATMADJA said he wished simply to refer to the point made about the reversibility of countermeasures as a criterion for their lawfulness. Events moved so fast on the world scene that countermeasures might well, in some instances, prove irreversible.

The meeting rose at 1.05 p.m.

2648th MEETING

Friday, 28 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. Mr. DUGARD said that international lawyers disliked countermeasures and reprisals because they reminded them that the system in which they worked was primitive and lacked the means for law enforcement which existed in domestic legal systems. That probably explained why textbooks on international law often failed to mention reprisals or countermeasures. Yet they constituted a fact of international life or, as Mr. Sreenivasa Rao had said, a necessary evil and it was therefore up to progressive international lawyers to curb their excesses. The Commission seemed to agree on that. It must therefore adopt provisions which sought to restrict the scope of countermeasures, while recognizing their existence as an unfortunate fact of the international legal order. The draft articles proposed by the Special Rapporteur in his third report (A/CN.4/507 and Add.1–4) would achieve that goal, subject to some changes.

2. The text of article 47 adopted on first reading was a model of inelegance and he was delighted that the Special Rapporteur had substantially redrafted it. Personally, his only regret was that the final sentence had been retained, but the Drafting Committee should be able to recast it to make it clearer and more polished.

3. The Special Rapporteur had rightly rejected the notion of reciprocal countermeasures. In practice, it was virtually impossible for countermeasures to match the obligation that had been breached. For example, in South

[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).