

Document:-
A/CN.4/SR.2648

Summary record of the 2648th meeting

Topic:
<multiple topics>

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

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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 *Gabčikovo-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. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Tomka.

State responsibility¹ (*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).

Africa, in 1984, during apartheid, six leaders of the anti-apartheid movement had taken refuge in the British consulate in Durban. The South African Government had argued that the granting of asylum to political refugees in the consulate violated the Vienna Convention on Consular Relations. In retaliation, it had reneged on an undertaking to return four South Africans to the United Kingdom to stand trial on charges of violating the arms embargo ordered by the British Government. That illustrated the practical difficulty of making countermeasures fit the alleged violation.

4. He endorsed Mr. Sreenivasa Rao's views on the reversibility of countermeasures. Although the Special Rapporteur approved of it in principle, he declined to mention it expressly in article 47, paragraph 2. In his own opinion, it would be wise to refer to it specifically in article 47 and it was therefore an issue for the Drafting Committee.

5. Turning to articles 47 bis and 50, he said that he understood the reasons, spelled out by the Special Rapporteur in paragraph 334 of the report, for separating the two provisions. Article 47 bis dealt with the subject of countermeasures, whereas article 50 discussed their effect. Nevertheless, like most of the members who had commented on the draft articles, he considered the two provisions to be so closely related that they should be amalgamated, but, if that was not possible, they should be situated side by side. Furthermore, the title of article 50 did not tally with its contents and the heading proposed by Mr. Simma, "Prohibited effects of countermeasures" seemed more appropriate. The Drafting Committee could settle that question and, similarly, in article 47 bis it could try to eliminate the repetition of the word "obligations".

6. Article 50 gave rise to more difficulties. First of all, there was a need to separate human rights from third-party rights in two distinct subsections. Most countermeasures inevitably had some adverse impact on some human rights, particularly in the social and economic field, but he was not sure whether the word "basic" was helpful in that respect. As Mr. Simma had suggested, moreover, a clause prohibiting countermeasures that endangered the environment should be included.

7. Article 50, subparagraph (a), proposed by the Special Rapporteur was hardly satisfactory. It would be preferable to return to article 50, subparagraph (b), adopted on first reading. Notwithstanding the difficulty of defining "extreme", the expression "territorial integrity or political independence" should be retained, since it was important and frequently occurred in General Assembly resolutions. The principle of respecting territorial integrity and political independence was valued by developing nations and, in any case, the former wording was clearer. The word "intervention" was notoriously difficult to define and the expression "domestic jurisdiction" was unfortunate, because in English it was reminiscent of a bygone era in which Article 2, paragraph 7, of the Charter of the United Nations was used to trump international law in all circumstances. It had no place in a modern text and so it would be preferable to return to the wording adopted on first reading.

8. As far as the other articles were concerned, he had no objection to articles 49, 50 bis and 30 and he approved of

article 48, subject to the substitution of the word "offer" for the word "agree" in paragraph 1 (c). All those draft articles could be referred to the Drafting Committee.

9. Mr. ELARABY said that the notion of "counter-measure" was highly controversial and, as a matter of principle, he was personally allergic to it, since countermeasures underlined the imbalance and even widened the gap between rich and powerful States and the rest. Having represented his country on the Security Council for two years, he had first-hand knowledge of how easy it was for the most powerful States to impose their will on the international community. It was nevertheless necessary to face up to reality. In the modern-day world, countermeasures were used and abused and were to some extent recognized by customary international law. The Commission therefore had to draft a watertight regime for them.

10. An incident in 1964 offered a fine example of a reciprocal, proportionate and reversible countermeasure. During the troubles in the Congo, the Congolese Government had decided to place the Egyptian Ambassador to the Congo under house arrest. When Mr. Tschombe had been passing through Egypt a short time later, he had been put under house arrest by the Egyptian Government. He had been released when the Egyptian Ambassador had been released.

11. As for the draft articles proposed by the Special Rapporteur, like Mr. Pellet and for the reasons given by him, he would personally prefer article 47 to be drafted in the negative: "Countermeasures may not be taken unless ...". Furthermore, it would be desirable for paragraph 1, to end after the words "those obligations" because the wording that followed was imprecise and added nothing.

12. The prohibition of the use of force or threat of the use of force, a cardinal principle of contemporary international law, should be expressly mentioned in article 47 bis, subparagraph (a). The phrase "within a reasonable time" should be deleted from article 48, paragraph 3. He agreed with Mr. Dugard's comments on the countermeasures referred to in article 50 and hoped that the previous formulation "territorial integrity and political independence" would be reinstated. Lastly, he endorsed the point of view on article 30 expressed by the Special Rapporteur in paragraph 366 of his report.

13. Mr. ADDO said that there could be no denying that the regime of countermeasures was more favourable to powerful nations. The Special Rapporteur himself had noted in paragraph 290 of his report that Governments, in their comments on whether to retain the provisions on countermeasures, i.e. articles 47 to 50, had referred to the unbalanced nature of countermeasures, which favour only the most powerful States. It was therefore not surprising that former Special Rapporteur Riphagen had observed that, when devising the conditions of lawful resort to such actions, the Commission should take care to ensure that the factual inequalities among States did not unduly operate to the advantage of the rich and strong over the weak and needy. It was therefore essential to craft a balanced regime of countermeasures which would be of greater utility in curbing the excesses that some people feared than keeping quiet and pretending that the problem did not exist. As the Special Rapporteur had said, to do noth-

ing about countermeasures would be courting disaster. In view of the current position with regard to international law and international relations, States had to retain the right to take countermeasures in response to acts committed in violation of their legal rights. The complaint invariably levelled against international law was its lack of effective enforcement because of an absence of compulsory judicial process and the limited power of international institutions to impose sanctions on those who violated the law. That was inevitable in a divided world.

14. General international law allowed countermeasures under certain conditions and within the limits of necessity and proportionality. Nonetheless, judicial and arbitral decisions on countermeasures had been rare and scholarly analysis had been relatively sparse. State practice, although abundant, had not shed much light on the circumstances in which retaliation might be authorized or on the precise limits of countermeasures. Admittedly a preference for peaceful settlement rather than countermeasures had been expressed, but little had been said about the relationship between the two. Non-violent self-help and non-forcible countermeasures would certainly remain an important feature of international law and might grow as the network of international law and obligations expanded. The more laws there were, the greater the likelihood of violations and counteraction by those who believed that they were injured, but lacking in any other means of redress. Measures such as trade embargoes, the freezing of assets, the suspension of treaty obligations and the expulsion of foreign nationals confirmed that observation. The *Air Service Agreement* case offered an illustration of one way of enforcing international law, namely, by self-help. The term “countermeasure”, which had been used for the first time in that case, had more recently replaced the word “reprisal”, most probably because of the latter’s pejorative connotation, because it covered armed reprisals, which had become illegal.

15. A countermeasure was therefore an illegal act rendered lawful by the fact that it was a response to a prior illegal act. That was how he construed article 30 of Part One of the draft .

16. According to the *Naulilaa* case, which seemed to be the *locus classicus* of the law on reprisals, the object of a reprisal must be to elicit reparation from the offending State for the offence or a return to legality by the avoidance of further offences. It was lawful only when preceded by an “unsatisfied demand” for reparation or compliance. Countermeasures involving the use of armed force were certainly prohibited by virtue of Article 2, paragraph 4, of the Charter of the United Nations.

17. Turning to the draft articles proposed by the Special Rapporteur, he said that he approved of the incorporation of countermeasures in chapter II of Part Two bis, but those provisions called for some comment. He recommended the deletion of article 47, paragraph 2. Nothing would be lost if it disappeared and, on the contrary, if it were retained, it might create confusion and cause interpretational problems. It might also prove unduly restrictive, owing to the limitations inherent in it.

18. Since no departure was ever allowed from the rules of *jus cogens*, was there any reason to keep article 47 bis,

subparagraph (e)? On the other hand, the Commission might wish to retain it *ex abundante cautela*. As for subparagraph (c) referring to obligations concerning the third-party settlement of disputes, he considered that, when States had undertaken to settle their disputes peacefully, the responsible State must, as a general rule, be allowed sufficient opportunity to make redress. No hasty decisions should therefore be taken after the submission of a demand. Accordingly, if the two States in question had given a formal undertaking to settle their dispute peacefully, recourse to countermeasures by either must be regarded as unlawful. In some situations, however, settlement machinery might prove to be inadequate. In that event, an aggrieved State might justifiably resort to countermeasures under customary international law. Such a course of action was possible because the principle of countermeasures retained, from the point of view of applicability, a separate existence from the rule concerning the settlement of disputes in treaty law.

19. The Special Rapporteur’s analysis demonstrated that countermeasures would be legal if: (a) a breach of an international obligation had occurred; (b) the demand of the injured State had been vain; and (c) the countermeasures of the injured State complied with the principle of proportionality.

20. Article 48 established in principle that countermeasures must always be preceded by a demand which had been made by the injured State, but which the responsible State had disregarded. Although there was no hard and fast rule regarding the content of the demand, it had to be expressed in such clear terms that the responsible State could not fail to understand it or the serious implications involved. Contrary to what was stated in paragraph 1 (b), the injured State should not be obliged to announce the nature of the countermeasures it intended to take. In paragraph 1 (c), it would be better to say that the injured State must “offer to negotiate”, for it was up to the responsible State to accept the offer or to reject it and thereby lay itself open to countermeasures.

21. As for paragraph 4 on the injured State’s obligations in relation to dispute settlement, the principle of good faith required that a State which had undertaken to submit a dispute to arbitration or judicial settlement should not break its word by engaging in unlawful acts. Once the arbitration or judicial proceedings were under way, recourse to countermeasures should no longer be automatic for, in those circumstances, such measures could frustrate the judicial process. That was probably why the Special Rapporteur had drawn up paragraph 4. But he had not solved all the problems. When States belonged to an institutionalized framework like ECOWAS or OAU, which prescribed peaceful settlement procedures, the State concerned certainly had to exhaust those procedures before it took countermeasures. Throughout that period of time, its right to resort to countermeasures was simply in abeyance and could be revived if the institutional framework proved ineffective. For example, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, ICJ, in its order of provisional measures, had required the Islamic Republic of Iran to terminate the detention of the hostages and certain other unlawful acts, but the Islamic Republic of Iran had ignored the order for the remainder of the proceedings. Clearly, the Court had

not afforded an adequate remedy in that instance. For that reason, a situation might well arise in which it was necessary to maintain countermeasures during litigation, when the tribunal was unable to bring about a cessation of the injury stemming from the violation at issue in the case.

22. He unreservedly approved the principle embodied in article 49 and the formulation of that provision. Determining the criterion for judging proportionality was, however, likely to present some difficulties. He was also in agreement with article 50, subparagraph (a), but, as far as subparagraph (b) was concerned, he thought that countermeasures consisting of the imprisonment or torture of nationals of the offending State, for example, had to be viewed as unlawful because they contravened established human rights standards. When examining the lawfulness of countermeasures, should a distinction be drawn between various categories of human rights? There was consensus that a State engaging in countermeasures could not violate the physical integrity of nationals of the responsible State. But, for example, if the free movement of the nationals of one State had been restricted by another, was it lawful for the first State itself to impose similar constraints on the nationals of the second? Did the Special Rapporteur perhaps have an answer to that question?

23. Moreover, article 50, subparagraph (b), referred to the rights of third parties. The growing economic and political interdependence of States signified that countermeasures taken against a State might have unintended repercussions on innocent third parties. Did injury to third parties or their property affect the legality of countermeasures? Should the Commission elaborate rules to settle that matter? Were injured third parties entitled to resort to countermeasures in their own right and, if so, against whom? The original injured State or the original offending State? Those were very difficult dilemmas the Drafting Committee might like to ponder.

24. Lastly, he endorsed the principles embodied in draft articles 47 to 50 bis. In his opinion, those provisions should be sent to the Drafting Committee.

25. Mr. GOCO said that he was not sure what was meant by "basic human rights" in article 50, subparagraph (b). Two covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, guaranteed civil, political, economic, social and cultural human rights. Which of those rights had to remain intact for a countermeasure to be lawful?

26. Mr. ADDO said that that was the very question he had raised. While torture was plainly an unlawful countermeasure, it should be permissible to impose restrictions on the free movement of nationals of the responsible State. He quoted the example of the expulsion of Nigerians by Ghana in 1969, followed by the expulsion of Ghanaians by Nigeria in 1983.

27. Mr. KAMTO said that it was hard to regard the expulsion of the Ghanaians by Nigeria as a countermeasure because it had occurred more than 10 years after the first event.

28. Mr. CRAWFORD (Special Rapporteur) said that the rules relating to human rights which were contained in

multilateral treaties had to be coordinated with the law relating to countermeasures. The distinction drawn by Mr. Addo was pertinent, but human rights did have to be protected against the effects of countermeasures. He personally advised the Commission to reserve its position on whether there were fundamental rights from which countermeasures could derogate in certain circumstances and other rights which were non-derogable.

29. Mr. MOMTAZ said that, on the whole, the Special Rapporteur had succeeded in establishing a sound balance between the interests of the injured State and those of the State committing the unlawful act. It was fairly clear from his report that, although countermeasures might be deemed lawful in international law, subject to certain limitations, they should only ever be adopted as a last resort. The purpose of the new articles was to preclude the abuse of countermeasures by introducing substantive and procedural restrictions on the freedom of the injured State to have recourse to them.

30. The enumeration of substantive limitations began in article 47 with the actual definition of the purpose of countermeasures. Paragraph 1 of that article posed hardly any difficulties because it stated that the aim of countermeasures was to induce a State which was responsible for an internationally wrongful act to comply with its obligations, in other words, they should not be of a punitive nature. The question might, however, arise if a violation of international law constituted a crime. The Commission would have the opportunity to return to that issue at a later stage in its work.

31. Article 47 bis itemized the circumstances in which the injured State could not resort to countermeasures. The non-exhaustive list in that article could be shortened, as some of the situations it covered partly overlapped. Subparagraphs (a) and (e) were a case in point; it would be sufficient to speak of "peremptory norms of general international law". The obligations as to the threat or use of force, referred to in subparagraph (a), were embodied in the Charter of the United Nations and were therefore indubitably a peremptory norm of international law. The same was true of the diplomatic immunities mentioned in subparagraph (b), which were certainly of a peremptory and inviolable nature. ICJ had been quite definite about that.

32. Perhaps it should be made clear that the obligations of a humanitarian character mentioned in subparagraph (d) encompassed provisions of both international humanitarian law and human rights law. In both cases, reprisals against persons protected by those bodies of rules were banned. Plainly, subparagraph (d) was based on article 60, paragraph 5, of the 1969 Vienna Convention, which prohibited the termination of provisions "relating to the protection of the human person contained in treaties of a humanitarian character". That clause unquestionably reflected a well-established international custom. It was interesting to note that in 1970, long before the entry into force of the Convention, ICJ had referred to it in its advisory opinion in the *Namibia* case.

33. Having noted that there was a logical link between article 47 bis and article 50, which both related to prohibited countermeasures, he regretted that article 50,

subparagraph (b), no longer referred to countermeasures which endangered the political independence of the State responsible for the wrongful act. In paragraph 352 of his report, the Special Rapporteur justified that deletion by asking how countermeasures could endanger the political independence of the offending State. The question could well arise if the injured State was the main trading partner of the responsible State and refused, as a countermeasure, to buy that State's output, that of a monoculture, for example. The ensuing loss of revenue might certainly endanger the political independence of the responsible State.

34. The reference in article 50, subparagraph (b), to "basic human rights" was likely to give rise to some problems. What did "basic rights" really mean? They might be human rights from which no derogation was ever possible, but that was not always the case. For example, article 11 of the International Covenant on Economic, Social and Cultural Rights qualified the right of everyone to be free from hunger as "fundamental". There was therefore a temptation to say that, pursuant to article 50, subparagraph (b), countermeasures which would cause famine among the civilian population of the State which had committed the wrongful act should be prohibited because they infringed a fundamental right.

35. In that connection, it was pertinent to note that article 23 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, required each High Contracting Party to allow the free passage of all consignments of medical and hospital stores intended for civilians of another High Contracting Party, even if the latter was its adversary. That article unquestionably reflected a well-established custom. Measures designed to interrupt the dispatch of such products in wartime and, *a fortiori*, in peacetime would therefore be prohibited.

36. Again with reference to article 50, he had very serious misgivings about the example mentioned in the last footnote to paragraph 347 of the report. The right of the navies of belligerent States to inspect, on the high seas, merchant vessels flying the flag of a neutral State to make sure that they were not smuggling war contraband to enemy territory had absolutely nothing to do with the topic under consideration. In the French text, moreover, the term *droit de poursuite* was inappropriate, for it had a very different meaning in the law of the sea. If that footnote was to be retained, it should be reworded.

37. Turning to "procedural" restrictions on countermeasures, he considered that Mr. Simma's question whether provisions on the settlement of disputes should be included in the draft articles had been apposite. Disputes could nevertheless arise between States concerned by the countermeasures about the nature of the act attributed to the State against which those measures had been taken. Such measures could be justified only when they were a response to unlawful behaviour. A dispute might therefore turn on the issue whether the act in question was unlawful. For example, in 1969, when Iraq had denounced the border treaty with Iran, by which it had been bound since 1937, it had prided itself on acting as an "allegedly responsible" State, to quote Mr. Kamto. Its initiative did not therefore come under the heading of a lawful countermeasure, but under that of retortion or reprisals.

38. That being so, it would be wise to make provision in the text for recourse to third party dispute settlement. There were numerous cases in which States had adopted countermeasures, although the State against which they were targeted hotly denied the wrongful nature of the original act. When doubts existed about the unlawfulness of the original act and when international law provided no explicit guidance on the subject or was undergoing a sea change, he wondered whether recourse to a compulsory settlement procedure was not essential. Article 50 bis was welcome because it met a vital concern.

39. In conclusion, he drew attention to paragraph 364 of the report, which quoted the example of agreements concerning the exchange of prisoners of war. The term was incorrect and not consonant with international humanitarian law. Under article 118 of the Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949, belligerent States were obliged not to exchange, but unconditionally to release, the prisoners of war they were holding, without delay after the cessation of active hostilities. In other words, States which concluded an agreement to exchange prisoners of war would be acting in breach of that Convention, which reflected what was certainly an established custom. It would be wiser not to quote such an example.

40. Mr. PAMBOU-TCHIVOUNDA said that, judging by the wide range of reactions by States to the draft articles adopted by the Commission on first reading, the question of countermeasures was a politically sensitive one. A body of rules of law to contain and limit the consequences of countermeasures was being elaborated precisely because of the need to give some semblance of normality to a decision which, by definition, was left to the sole appreciation of its author, but whose consequences were cause for concern. In that regard, articles 47 to 50 set out in paragraph 367 of the third report were a brave initiative that should be retained, at least as a working paper for the Commission.

41. Chapter III, section D, called for three sets of general comments. In the first place, it could prompt at least two reactions. The first was a tendency to dramatize the idea of countermeasures and see it as a system for opting out—an arrangement for taking the law into one's own hands as a result of the level of institutionalization of the international community—and it called for the standardization and codification of countermeasures. That could be contrasted with an attitude of indifference or a tendency to downplay countermeasures on the grounds that the basis for resorting to them depended entirely on the State's assessment of the importance of its own interests—countermeasures being self-serving in a way—as could be seen in the words of the arbitrator, Mr. Reuter, in the *Air Service Agreement* case. From that standpoint, the codification of the law on countermeasures was necessary because it could help restrict the hold of the law of the jungle on international relations. No matter what the reaction was, the exercise the Commission was involved in must therefore be carried through.

42. In order to do that, the Commission must know what it was talking about. In that respect, chapter III, section D, lagged behind the text which the Commission had adopted on first reading on the concept of counter-

measures and which had both the advantage and the disadvantage of saying that countermeasures must be seen as a means justified by an end, although its material content was never fully explicated. Section D was totally silent on that point and that was one of the conceptual weaknesses of article 47 as redrafted by the Special Rapporteur. Section D also did not solve the problem of the status of countermeasures, particularly when there was a plurality of responsible States, because a State, even a powerful one, was much less powerful when facing a number of adversaries against which it could never be certain of winning out. That meant that the effectiveness of countermeasures was relative. The unity of the regime being elaborated might also be undermined by the division of the concept of countermeasures into two branches, i.e. countermeasures that were applied by the injured State as some sort of interim measure of protection and countermeasures ordered by an impartial third party. Section D did not specifically define a regime for either of those branches, although it could usefully be clarified by appropriate built-in dispute settlement machinery.

43. Lastly, the report gave the impression that the normative structure of countermeasures must be built on two basic pillars designed to ensure that they functioned rationally. The first was the requirement of proportionality, whose essence as a rule or a general principle of law no longer had to be proven, although a more appropriate formulation in the draft articles could help remove any ambiguity about the motives for countermeasures and thereby facilitate an evaluation of whether the author had been acting in good faith at the time they were taken. The second pillar which was lacking in the draft and should be the subject of a proposal by the Special Rapporteur and the Commission was the all too necessary creation of dispute settlement machinery that would be as flexible as possible in order to give countermeasures a more rational basis, or legitimacy, in contemporary international law, thereby reducing the ambiguity created by their duality, on the one hand, as interim measures of protection and, on the other, as mandated by an impartial third party. That would help introduce a rational approach that would narrow the scope of the presumption of responsibility of which an allegedly injured State could avail itself as grounds for conduct taking the form of countermeasures against the allegedly responsible State. There might then be a whole set of overlapping or competing responsibilities precisely because no one knew who was responsible and who was injured, and chapter III, section D, did not propose any solution for that problem. The effectiveness or usefulness of countermeasures and, by extension, the reliability of the relevant draft articles were accordingly to some extent thrown into doubt.

44. He had a number of drafting proposals to make before the draft articles were referred to the Drafting Committee. First of all, article 47 should be entitled "Object and purpose of countermeasures" instead of "Purpose and content of countermeasures" because what mattered was the purpose for which a State decided to adopt countermeasures. As for the definition of countermeasures, the need for which was obvious, even though it was something new in the system of State responsibility, he proposed the following wording based on the beginning of article 47, paragraph 1, as adopted on first reading:

"For the purposes of the present articles, the term 'countermeasures' means the unilateral adoption by the injured State of any measures it deems appropriate in order to induce a responsible State to comply with its obligations under the said articles, as long as it has not complied with those obligations and has not responded to the demands of the injured State that it do so."

The last part of the sentence avoided the use of the idea of necessity, which carried too heavy a burden of subjectivity and might therefore lead to disagreement. Paragraph 2 could be redrafted to read:

"Subject to the conditions and restrictions provided for in articles 48 to 50, an injured State can take countermeasures in respect of the performance of one or more of its international obligations towards the responsible State."

Paragraph 3 of the text adopted on first reading should be reinstated, with the replacement of the words "State which has committed an internationally wrongful act" by the words "responsible State".

45. Article 47 bis was the result of a division of article 50 adopted on first reading for which there was no justification. In contrast, the Commission should be thinking along the lines of combining article 47 bis as proposed by the Special Rapporteur with article 50 adopted on first reading to form a whole, but a more condensed whole, as proposed by Mr. Momtaz and Mr. Pellet. The title "Obligations not subject to countermeasures" was, however, preferable to "Prohibited countermeasures", the title adopted by the Commission on first reading, which contained a contradiction because, once a countermeasure had been authorized, it could not be prohibited.

46. The structure proposed by the Special Rapporteur for article 48 was the result of a methodological exercise which, if carried out on a strictly formal or structural, and not on a functional basis, would obscure the fact that countermeasures must be useful and be at least to some extent rooted in the international legal order, which existed to benefit not only States, but beyond States, international law and the international community as well. That was why he thought article 48 should consist of three paragraphs. Paragraph 1 should make the exercise of the right to take countermeasures subject to the prior mobilization of a dispute settlement system for which provision must be made in the draft articles. The Commission might thus draw on the wording of article 48, paragraph 2, as adopted on first reading, and paragraph 1 would read:

"An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under the present articles or any other dispute settlement procedure in force or to be agreed between the injured State and the responsible State."

That would be followed by a paragraph 2 on interim measures of protection, which must not be ruled out, but viewed in the light of paragraph 1. Then would come paragraph 3, which would correspond to what Mr. Pellet had called "putting the factors in order" and would read:

"An injured State taking countermeasures shall comply with the following procedure:

- “(a) Request for cessation or reparation;
- “(b) Offer to negotiate;
- “(c) Notification of countermeasures.”

47. Lastly, articles 49 and 50 would be devoted to proportionality and suspension of countermeasures in line with what the Special Rapporteur proposed in chapter III, section D.

Cooperation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

48. The CHAIRMAN welcomed Mr. Brynmor T. I. Pollard, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

49. Mr. POLLARD (Observer for the Inter-American Juridical Committee) said that the Committee had a membership of 11 jurists, who were nationals of OAS member States, elected in their personal capacity for four-year terms of office by the General Assembly of that organization and eligible for re-election.

50. The principal purposes of the Committee were to serve as an advisory body to OAS on juridical matters of an international character, to promote the progressive development and the codification of international law, and to study juridical problems relating to the integration of the developing countries of the hemisphere and the possibility of attaining uniformity in their legislation. During its most recent regular sessions, it had devoted particular attention to five major topics, namely, the right of access to information, including personal information (and limitations to that right); improving the administration of justice in the Americas; the application of the United Nations Convention on the Law of the Sea by the States of the hemisphere; the preparation of a report on human rights and biomedicine or on the protection of the human body; and the juridical aspects of security in the hemisphere.

51. At the request of the General Assembly of OAS, the Committee had sought to ascertain the extent to which national legislation had addressed access to information and the protection of personal data as a prerequisite to determining whether it was desirable to prepare a preliminary draft Inter-American convention on the model of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The Committee was of the view that electronic mail and computerized electronic transmission systems, whether controlled by Governments or private entities, must have adequate legal protection. However, as only six member States had replied to its requests for information, the Committee had decided to continue its consideration of the topic with a view to determining how best to proceed with the matter and, in particular, whether there was a need to develop basic principles, guidelines, a model law or a draft international instrument covering that sphere of activity.

52. The topic “Improving the administration of justice in the Americas”, which had been on the Committee’s agenda since 1995, had been the subject of a preliminary report submitted to the Permanent Council of OAS. The report provided an in-depth study of principles, procedures and mechanisms intended to safeguard the independence of the judiciary and lawyers in performing their functions. The Committee was very supportive of the initiatives that had resulted from the meetings of Ministers of Justice or of Attorneys-General of the Americas. It welcomed in particular the decision of the ministers to establish the Justice Studies Centre of the Americas and their declared commitment to providing greater access to justice by the disadvantaged members of society and to strengthening cooperation among OAS member States in the struggle against transnational and cyber-crime.

53. In March 2000, the Committee had approved a document reviewing the rights and duties of States under the United Nations Convention on the Law of the Sea and had agreed to its being circulated to those organs of member States with responsibility for implementing the Convention or concerned with the law of the sea. The document was a very useful guide to member States seeking to give effect to the Convention, because of its complexity and the difficulties experienced by developing countries in its implementation. The Committee had also decided to keep the matter under review in the light of comments it might receive from member States and the Committee on Juridical and Political Affairs of the Permanent Council of OAS.

54. On the initiative of one of its members, the Committee had commenced discussions on the preparation of a report on human rights and biomedicine or on the protection of the human body. The issues identified had included the right to life from the moment of conception and the issue of excess embryos in artificial insemination or fertilization procedures. It had been agreed that the ultimate goal must be to protect the embryo and to avoid certain practices such as surrogate maternity and post-mortem paternity. However, it had been considered that the time was not yet ripe to develop a model law or a draft convention on the subject. The Committee had decided to inform the Pan-American Health Organization of that conclusion, requesting it to provide information and views on the scientific, medical and technical factors which had to be considered, as well as any other relevant information.

55. At the fifty-sixth regular period of sessions of the Committee, held in Washington, D.C., from 20 to 31 March 2000, there had been an exchange of views during a meeting with the legal advisors of the ministries of foreign affairs of OAS member States on the topic of a new concept of security in the hemisphere. Documents had been presented by the representatives of Chile, Mexico and Peru and by members of the Committee. One member had tabled, on behalf of Canada, a paper entitled “Human Security: Safety for People in a Changing World”. The Canadian thesis was that State security and human security were mutually supportive. A safe world could not be attained unless the people were themselves secure. The other submissions raised the question of the future of security in the hemisphere in the context of wider global

responsibility. All those issues would be the subject of further discussion at the Committee's next regular period of sessions.

56. Joint meetings with the legal advisors of the ministries of foreign affairs of the member States of OAS, which had been held annually, would henceforth be held triennially. In August 1998, the preliminary reports of the co-sponsors of the 1999 Centennial Commemoration of the First International Peace Conference had been considered in a joint session with the co-sponsors, who had given a commitment to take account of the views expressed and the conclusions reached at the joint session when finalizing their reports.

57. Every year since 1974, the Committee had sponsored a course on international law for officials of OAS member States, in which well-known specialists participated. Two members of the International Law Commission, Mr. Baena Soares and Mr. Candioti, had delivered lectures at the course held in August 1999.

58. In concluding, he thanked members of the Commission for the opportunity they had provided to maintain and strengthen the association between the Commission and the Committee and assured them of the great importance the Committee attached to that ongoing collaborative exercise.

59. Mr. OPERTTI BADAN said that the presence of the Observer for the Inter-American Juridical Committee at the meeting was symbolic of the need to harmonize regional codification and universal codification, which must be seen as complementary tasks.

60. Security in the hemisphere was of real importance at a time when new patterns of regional security were emerging, patterns which should be subordinated to the Charter of the United Nations. In the light of certain recent measures, one could not but be concerned at the fact that the mechanisms provided for in the Charter had not been consulted. Human security had been the subject of an in-depth dialogue at the most recent OAS General Assembly and that too was a question of critical importance. Lastly, the Americas region was making genuine efforts to achieve economic and social integration and the Committee's work in that area would always be welcome.

61. The principle of non-interference had always placed limits on international organizations' activities to promote the protection of democracy. A few weeks previously, however, OAS had taken measures to assist the Government of Peru in re-establishing a democratic dialogue, improving relations between the various authorities and relaunching the Peruvian Constitutional Court and the judicial system. That was a very clear demonstration that OAS was not turning a blind eye to problems—indeed, quite the reverse—and that its approach was not punitive, but cooperative.

62. He thanked the Observer for the Inter-American Juridical Committee for his statement and urged the Committee to continue its work on regional codification, in order to meet needs of which insufficient account was taken in the context of universal codification.

63. Mr. MONTAZ said that, given the crucial role that Latin America had played in the progressive development of the law of the sea, he would like the Observer for the Inter-American Juridical Committee to provide additional information on the difficulties encountered by Latin American member States of the Committee in application of the provisions of the United Nations Convention on the Law of the Sea, which he had himself acknowledged were complex.

64. Mr. GOCO asked what steps had been taken to follow up the Inter-American Convention against Corruption. In Asia, his own region, corruption was a matter for serious concern. Indeed, the phenomenon was no longer endemic, and affected all countries. It would thus be interesting to know what measures had been taken by OAS to combat that scourge.

65. Mr. TOMKA asked the Observer for the Inter-American Juridical Committee what the Committee's plans for its future activities were and whether there was any exchange of information between its member States and the Committee concerning the work of the Commission. He had in any case ascertained that a number of those States submitted written comments to the Commission concerning its work.

66. Mr. POLLARD (Observer for the Inter-American Juridical Committee) said that difficulties arose with regard to the United Nations Convention on the Law of the Sea, for instance, with regard to the delimitation of territorial waters, the contiguous zone and the continental shelf between contiguous States. But the real problem was that the legal services of the ministries of foreign affairs lacked the staff to prepare a catalogue of the tasks to be accomplished and to undertake those tasks, so that, in consequence, much remained to be done.

67. With regard to corruption, the Committee had devoted a good deal of time to preparing draft laws intended to give effect to the Inter-American Convention against Corruption to which Mr. Goco had referred. It was now for member States to take the necessary measures on the basis of that work.

68. As for the question raised by Mr. Tomka, who had asked whether the Committee took account of the work of the Commission, it was true that the Committee chiefly dealt with questions brought before it by the organs of which it was a subsidiary, namely, the General Assembly and Permanent Council of OAS. That did not, however, prevent it from taking account of the work of the Commission, or from taking a great interest in the possibility of contacts with the Commission's members.

The meeting rose at 12.50 p.m.