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**Summary record of the 2649th meeting**

Topic:
**State responsibility**

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# 2649th MEETING

*Tuesday, 1 August 2000, at 10 a.m.*

*Chairman*: Mr. Chusei YAMADA

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

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## 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. TOMKA said that countermeasures were recognized by international law as a legal institution, as was shown by the decision of ICJ in the *GabŹ kovo-Nagymaros Project* case, which had treated countermeasures as a circumstance which might preclude the wrongfulness of an act that would otherwise be characterized as wrongful. Lawful countermeasures should therefore be included among the circumstances precluding wrongfulness, in chapter V of Part One, in article 30. The new version of article 30 proposed by the Special Rapporteur in paragraph 362 of his third report (A/CN.4/507 and Add.1–4) provided a useful basis for further work, and he fully supported its transmission to the Drafting Committee.

2. Accordingly, he also welcomed the inclusion of articles 47 to 50 bis, on lawful countermeasures, and commended the Special Rapporteur's willingness not to press his proposed article 30 bis, under which the exception of non-performance (*exceptio inadimplenti non est adimplendum*) was to have been included among the circumstances precluding wrongfulness. The best way of addressing the concerns voiced by several members regarding unlawful recourse by States to countermeasures was to lay down clear conditions for their lawfulness, thereby limiting the possibility of abuses by States. It was an additional reason for clearly defining in the draft the conditions in which countermeasures could be taken, a position that had not been advocated by some major States that, in their written comments following the adoption of the articles on first reading,[3] favoured leaving that matter out of the draft.

3. Article 47 rightly specified that the purpose of countermeasures was to induce a State that had committed an internationally wrongful act to comply with its obligations arising in the context of its responsibility, for example, in the form of cessation, reparation, or both, and also excluded punitive countermeasures. Nonetheless, article 47 raised a few problems. First, it was not quite clear, from the use of the word "may", in paragraph 1, whether an injured State had a subjective right to take countermeasures, one balanced by a correlative obligation at least to tolerate the conduct on the part of the allegedly wrongdoing State, or whether the article provided only the possibility for the injured State to take such countermeasures. In paragraph 322 of his report the Special Rapporteur specifically stated that article 47 would be better expressed as a statement of the entitlement of an injured State to take countermeasures against a responsible State for the purpose and under the conditions specified in the relevant articles. Yet that entitlement was not set forth in the text of the article itself. Thus, although in paragraph 294 of the report he did not fully endorse the approach that had been taken by the Commission when adopting article 47 on first reading, the Special Rapporteur effectively adopted more or less the same approach. The term "lawful" did not appear in chapter II of Part Two bis, but in article 30, and the wrongfulness of countermeasures was precluded, not by articles 47 et seq., but by article 30.

4. The issue might at first sight seem purely theoretical. It appeared, however, that some Governments might be reluctant to recognize a "right" of the State to take countermeasures. For instance, Argentina proposed that countermeasures should be regarded as an act merely tolerated by international law, while Denmark, on behalf of the Nordic countries, favoured first stating that resort to countermeasures was unlawful unless certain conditions were fulfilled.[4]

5. In paragraph (1) of the commentary to article 30,[5] the Commission had qualified a countermeasure as "a measure *permissible** in international law as a reaction to an international offence", and had stated in paragraph (4) that "Only in specific cases does international law grant to a State injured by an internationally wrongful act committed to its detriment … the *possibility** of adopting against the State guilty of that act a measure which … infringes an international subjective right of that State". Nowhere in the commentary to article 30 had the Commission used the word "entitlement" with reference to countermeasures. Nor was the word "entitlement" used in the general commentary to chapter III (Countermeasures) of Part Two as adopted on first reading.[6] Instead, paragraph (2) stated that "there is sufficient evidence that the practice of countermeasures is *admitted** under customary international

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

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

[3] *Yearbook . . . 1998*, vol. II (Part One), document A/CN.4/488 and Add.1–3 and *Yearbook . . . 1999*, vol. II (Part One), document A/CN.4/492.

[4] Ibid.

[5] See 2647th meeting, footnote 3.

[6] See footnote 1 above.

law as a means of responding to unlawful conduct". Thus, the concept of "entitlement" to take countermeasures appeared only in paragraph (1) of the commentary to article 47, which stated that "The basic notion of countermeasures is the entitlement of the injured State not to comply with one or more of its obligations towards the wrongdoing State". But if, in certain conditions, countermeasures could be taken in exercise of a subjective right, then there would have been no need to include countermeasures in Part One among the circumstances precluding wrongfulness, since, by definition, the exercise of a right could not at the same time be unlawful.

6. He would thus support the formulation of article 47, paragraph 1, proposed by the Special Rapporteur, provided it was made clear in the commentary that paragraph 1 allowed for the possibility (*faculté*) of taking countermeasures, but not for the entitlement to do so.

7. As to the issue of the relationship between suspension of the obligation and countermeasures, the former was referred to in paragraph 2 of article 47, which stated that "Countermeasures are limited to the suspension of performance of one or more international obligations …", and in the *chapeau* of article 47 bis, referring to obligations not subject to countermeasures. In that regard, he fully agreed with the views expressed in paragraph 325 of the report, but had some doubts about paragraph 324 and about the wisdom of including in the draft a concept that the Commission previously had deliberately refrained from introducing. In paragraph 324 the Special Rapporteur referred to the findings of ICJ in the *GabŽ kovo-Nagymaros Project* case, but the situation in that instance had been quite different. The Court had accepted the argument of one of the parties that a decision by the other party to halt the work provided for under the treaty amounted to an attempt to suspend the operation of the treaty, but had found that a determination of whether a convention had or had not been properly suspended was to be made pursuant to the law of treaties. Accordingly, care should be taken, in drafting articles 47 and 47 bis, to avoid any reference to suspension of performance. It might be sufficient to say in paragraph 2 that countermeasures were limited to the non-performance of one or more international obligations of the State, in order to avoid giving the impression that the law of State responsibility provided additional grounds for suspension of the performance of obligations.

8. It was not clear what criteria justified distinguishing between articles 47 bis and 50 and he shared the view of those who favoured combining them, as had been the case in the articles adopted on first reading. While the enumeration in article 47 bis was basically acceptable, he wondered how an obligation concerning third party settlement of disputes (subpara. (*c*)) could, in practice, be suspended by way of countermeasures. If there was compulsory jurisdiction and the State availed itself of the right to seize the third party, the failure of the other party to appear would not of itself halt the proceedings. In fact, specific provision should be made for a situation in which the treaty explicitly prohibited the taking of countermeasures. The Special Rapporteur had dealt with the issue in paragraph 343 of the report, but his conclusion had been that it could be achieved by the *lex specialis* provision (article 37 adopted on first reading), and it was sufficient to note the possibility in the commentary to article 50. However, in dealing with state of necessity, the Commission had adopted a text for article 33 on first reading that prohibited invoking a state of necessity if such a possibility was specifically excluded by the treaty.

9. Lastly, he supported the Special Rapporteur's proposed formulation for article 49, but noted in passing that the word "commensurate" had been used, not only by ICJ in the *GabŹ kovo-Nagymaros Project* case, but also by the Commission some 20 years previously, in the commentary to article 30.

10. Mr. KABATSI said the proponents of countermeasures argued that, in a world lacking a centralized legal authority capable of dispensing and enforcing justice among and between States, States must be allowed or entitled to protect and fend for themselves if their international rights were breached. It was further argued that such practice was in any case authorized by existing international custom having the force of law. It was also *Gab Ź kovo-Nagymaros Project* case. It was argued, too, that, in the light of that scenario, an elaboration of a balanced regime of countermeasures was more likely to be of use in controlling excesses than would silence. Moreover, it was further contended that stringent restrictions and prohibitions on the use of countermeasures were provided in the draft, so as to ensure that the allegedly injured State took countermeasures against the allegedly wrongdoing State only when no other alternative existed, and so as to avoid collateral injury to third States and impairment of basic human rights.

11. Thus, the draft sought to provide, first, that countermeasures could be taken only in response to conduct that was actually unlawful; secondly, that the purpose of countermeasures was to induce the responsible State to comply with its obligations of cessation and reparation, and to refrain from punitive sanctions; thirdly, that countermeasures were to be used only as a last resort, where other means had failed or would clearly be ineffective in inducing the wrongdoing State to comply with its international obligations; fourthly, that countermeasures could be applied only to the extent they were necessary for that purpose; fifthly, that pursuant to the findings of ICJ in the *Gab Ź kovo-Nagymaros Project* case, countermeasures must be reversible; and lastly, that a dialogue would take place between the supposedly injured State and the supposedly wrongdoing State before and during the taking of countermeasures.

12. All those arguments seemed, prima facie, to bestow a human face on the proposed regime of countermeasures. In fact, however, the regime had little or nothing to offer by way of a human face. While countermeasures were theoretically a facility available to all States, in practice the unbalanced nature of the regime favoured the more powerful States at the expense of the weaker. It was no coincidence that countermeasures were most strongly supported by the stronger States, and opposed by the weaker, who constituted a substantial majority. States occupying the middle ground were predictably more ambivalent in their attitude, since their fear of being the victims of countermeasures applied by powerful States was offset by the prospect of resorting to countermeasures against States weaker than themselves.

13. Furthermore, the decision as to the existence of a wrongful act or unlawful conduct, as well as to the extent and gravity thereof, was left to the unilateral wisdom of the State taking the countermeasures. Likewise, the question of proportionality, especially having regard to determination of the gravity of the injury, was one left to the State taking countermeasures to decide. Furthermore, as the Special Rapporteur conceded, the countermeasures might not be reversible as to their effects. Moreover, although the draft articles sought to prohibit countermeasures adversely affecting third parties or impairing basic human rights, serious injury to those parties and impairment of those rights was often inevitable, even though they did not constitute direct targets. That, again, the Special Rapporteur did not dispute.

14. Mr. Simma had rightly likened countermeasures to an elusive dragon, but had not suggested that any attempt should be made to tame it. Maybe that was because dragons were, by their very nature, impossible to tame. In any case, less mythical beasts such as lions and leopards were notoriously safer when encountered in the wild than when let loose in the community. Accordingly, he could not support a set of draft articles which, as currently formulated, could only exacerbate existing inequalities between States, the majority of which were already the victims of underdevelopment, adverse trading conditions, technology lags and a crushing debt burden.

15. As to the question whether the provisions proposed by the Special Rapporteur in his third report constituted an improvement on those adopted on first reading, he would side with those who saw the current proposals as a step in the wrong direction, as Mr. Kamto had eloquently argued. The provisions adopted on first reading had been linked to dispute settlement mechanisms applicable prior to the taking of countermeasures, mechanisms which, as well as offering safeguards against abuses, had also envisaged the real possibility that the draft articles might ultimately take the form of a binding international instrument. No such prospect was envisaged under the current proposals. Article 50, subparagraph (*b*), prohibiting resort by way of countermeasures to extreme economic or political coercion designed to endanger the territorial or political independence of a State which had committed the internationally wrongful act, was to be deleted from the draft proposed for adoption on second reading. Virtually no safeguards against possible errors and abuses now remained. If forced to choose between the draft articles proposed for adoption on first and on second readings, he would favour the former, as at least providing some solace for weaker States, in the form of the linkage with a prior dispute settlement procedure. The procedural limitations relating to resort to countermeasures imposed under article 48, paragraph 1, were almost entirely vitiated by the provisions of paragraph 2 of that article.

16. In conclusion, while joining those members of the Commission who opposed the inclusion of lawful countermeasures in the draft articles, particularly for the detailed reasons given by Mr. Kateka, he nonetheless wished to acknowledge and applaud the skills of the Special Rapporteur, who had ably handled that most complicated area of the extremely difficult and complex topic of State responsibility.

17. Mr. AL-BAHARNA said that, on the basis of his evaluation of the comments submitted by Governments and the generally supportive statements made in the Commission, the Special Rapporteur had introduced a set of revised draft articles on countermeasures which had no special linkage with the dispute settlement procedures envisaged in Part Three of the draft articles. In paragraph 289 of the third report, the Special Rapporteur referred to the *Gabŕ kovo-Nagymaros Project* case judgment of ICJ, which appeared to have inspired his revision of the articles on countermeasures. Summing up his conclusions on the Court's judgment, the Special Rapporteur noted that the Court had accepted the conception of countermeasures and had also endorsed the requirement of proportionality, while adopting a stricter approach than the language of article 49 might imply. The result was a much improved set of draft articles on countermeasures, one that was far more likely to gain acceptance than the articles on the subject adopted on first reading. The Special Rapporteur was to be commended for his groundbreaking work on the topic.

18. Since new article 47 spelled out the injured State's right to take countermeasures and referred to their lawfulness if the responsible State did not comply with the request or its notification, it was preferable to the version adopted on first reading, which merely defined those measures. The words "may take countermeasures" were more appropriate, as they allowed action to be taken in defence of what the injured State regarded as its right. On the other hand, it might be possible to find a more felicitous phrase than "in response to the call" in paragraph 1. Similarly, it might be wise to use less strong wording than "to the demands", in article 47. The phrase "its response to the notification of the injured State that it do so" might be more apposite. Again, the words "are limited to" in new paragraph 2 were better, since that phraseology reflected the essential scope of countermeasures, as discussed in paragraph 323 of the report. Article 47 bis formulated more elegantly all the five categories of conduct set out in article 50 adopted on first reading, but subparagraphs (*a*) to (*e*) should be numbered 1 to 5.

19. The contents of new article 48 were a great improvement on those of the article adopted on first reading, in that they did not mention Part Three and paragraph 1, subparagraphs (*a*), (*b*) and (*c*), listed the gradual steps to be taken by the injured State in a logical order. Such civilized procedural practice was commendable. Nevertheless, subparagraph (*a*) should read "Notify the responsible State, requesting it that it should fulfil its obligations" for, in his view, the words "a reasoned request" were superfluous. Any notification would have to state the reasons that prompted it. In subparagraph (*b*) use of the term "notify" was correct. The procedural process outlined in subparagraphs (*a*) to (*c*) should be retained and subparagraph (*b*) should not be deleted, since the steps referred to must be taken before embarking on any countermeasures. In subparagraph (*c*) "offer" would be more apt than "agree".

20. The Special Rapporteur seemed to justify provisional measures as a first reaction to the wrongful act committed by the responsible State, but personally, he was not in favour of paragraph 2 because, in the absence of a legal framework for "provisional measures", the latter encompassed in fact and in practice all the elements of counter-

measures, but no legal safeguards. Hence an injured State which knew that it was bound to follow the gradual procedure laid down in paragraph 1 would be more likely to resort to countermeasures under paragraph 2, thus rendering the procedure under paragraph 1 meaningless and devoid of substance.

21. While paragraph 2, on provisional countermeasures could be deleted, he disagreed with the deletion of paragraphs 3 and 4 suggested by the Special Rapporteur, since they were related to paragraph 1. The words "within a reasonable time" should offer an injured State a satisfactory safeguard against protracted and fruitless negotiations.

22. New article 49 was simpler and clearer than the article adopted on first reading and rightly embodied the rule of limitations on the right to take countermeasures, as it had been established in the judgment of ICJ in the *Gabčíkovo-Nagymaros Project* case. New article 50 was likewise a great improvement, because subparagraph (*a*) was much more elegantly worded than subparagraph (*b*) of the previous version and the idea contained in existing subparagraph (*d*) was to be found in (*b*) of the proposed text. He was inclined to accept the formulation of subparagraph (*a*), for the reasons outlined in paragraphs 352 to 354 of the report and concurred with the Special Rapporteur that there would be no need to add "or political independence of the State", for that notion was implicit in "territorial integrity".

23. The question of what was meant by "basic" or fundamental human rights in article 50, subparagraph (*b*), had been correctly answered by the Special Rapporteur in paragraph 351 of the report, which seemed to indicate that a wider interpretation of subparagraph (*b*) could include the prohibition of reprisals against individuals, which were banned in international humanitarian law. The emphasis in subparagraph (*b*) on third parties, rather than third States, was elucidated in paragraph 349 of the report. On the other hand, that explanation, when seen in conjunction with the express provision of subparagraph (*b*), confirmed that that paragraph dealt with the rights of third parties in general and basic human rights in particular and that its scope was therefore much wider than basic human rights. For that reason, States would probably reject that subparagraph as it stood, but might be more inclined to accept it if "human" were added before "rights" so that the phrase read "impair the human rights of third parties".

24. Noting that proposed article 50 bis contained most of the elements embodied in article 48 adopted on first reading, he proposed that the introductory phrase in paragraph 1 should be redrafted to read: "Countermeasures must be suspended as soon as". Paragraphs 2 and 3 should be inverted.

25. Lastly, as far as the formulation of new article 30 was concerned, in view of what appeared to be general agreement within the Commission that the principle of countermeasures would be incorporated in Part Two bis, that article would necessarily have to be included in Part One of the draft, as suggested in paragraph 362 of the report. Article 30 reformulated by the Special Rapporteur was preferable to the article adopted on first reading, but for the sake of greater clarity, the words "towards another State" should be inserted after "international obligation", so that the phrase read "obligation of that State towards another State".

26. Mr. HE drew attention to the fact that the institution of countermeasures figured prominently in the regime of State responsibility. Its existence in international law had been confirmed by the *Gabčíkovo-Nagymaros Project* case and the Commission's decision to include it in Part Two bis on implementation. It was a sensitive topic, because it involved the interests of both the injured and the wrongdoing State. Small, weak States feared that countermeasures might be abused as a tool to exert coercion and enforce the demands of strong States. For that reason, countermeasures could be used only as a last resort in exceptional circumstances and they had to be carefully, precisely regulated to reflect customary international law and not reformulated to the detriment of weak and small States.

27. It had therefore been suggested that countermeasures be narrowly delimited, that their application be strictly defined so as to prevent abuse and that a third-party dispute settlement procedure be established. Another proposal was that it be clearly stated that countermeasures must be adopted in good faith, applied objectively and not affect the rights of third parties. Furthermore, it had been emphasized that a link between countermeasures and a compulsory dispute settlement procedure was vital in order to preserve the rule of law.

28. On the other hand, the view that too many unwarranted restrictions were being placed on countermeasures had led to a call to sever the link between the adoption of countermeasures and recourse to dispute settlement procedures, as the international machinery for the latter was too time-consuming and the wrongdoing State might institute proceedings as a delaying tactic. Moreover, recourse to such procedures could not prevent a State taking what it regarded as appropriate countermeasures.

29. The crux of the issue, therefore, was whether the adoption of countermeasures should be linked to dispute settlement. While that link would guarantee the rule of law, it hardly seemed realistic as long as compulsory third-party jurisdiction was not generally accepted by States. It might be possible to strike a proper balance by including a general regime for third-party dispute settlement in the draft while finding a practical method of separating countermeasures and dispute settlement. To that end, it would be necessary to adjust, amplify and strengthen article 48, the key provision on countermeasures. In paragraph 1 (*c*) "agree" should be replaced with "offer". Paragraph 3 should state "If negotiations do not lead to a resolution of the dispute:" and then two subparagraphs should be added to read: "(*a*) The injured State or the wrongdoing State may submit the dispute to the dispute settlement procedure in force between them; (*b*) In the absence of any dispute settlement procedure in force between them, the dispute may be submitted to any dispute settlement procedure by agreement between the injured State and the wrongdoing State". The whole of paragraph 4 should be deleted and replaced by "The injured State may take the countermeasures in question after exhausting the above procedures."

30. It was generally recognized that proportionality, the issue addressed in article 49, set a limit to countermeasures in international law. The proposed text followed the reasoning of the judgment in the *Gab Ź kovo-Nagymaros Project* case, which took into account the gravity of the internationally wrongful act and its harmful effects on the injured party. It thus offered a highly effective limitation which would help to curb unilateral arbitrariness in a system without obligatory jurisdiction.

31. Mr. ECONOMIDES pointed out that countermeasures were an archaic practice which inevitably worked to the advantage of powerful States and undermined the prestige and authority of international law. Domestic legislation had long prohibited taking the law into one's own hands, so it was shocking to see that the same rule did not apply in international law. Countermeasures were certainly evil, but were they really a necessary evil? In any event, since the majority of the Commission was in favour of accepting countermeasures, he could do no more than stress the need to subject them to as severe and restrictive a regime as possible.

32. His country had, in its comments, rightly noted that countermeasures were more appropriate for breaches characterized as delicts than for breaches that constituted international crimes and that that distinction should be reflected in chapter III. He was convinced that it would be naive of States to try to respond individually to the international crimes mentioned in article 19 with, possibly serious, countermeasures.

33. International crimes violated international public order and so any reaction had to take the form of a collective response from the international community via its competent organs, first and foremost the Security Council. Such measures naturally had to be not only instrumental but also punitive and purposive. He hoped that the Special Rapporteur would deal with that topic in chapter IV of the third report.

34. For the time being, article 47 or another article ought to state explicitly that countermeasures did not apply in the event of breaches of international obligations essential to the protection of the fundamental interests of the international community as a whole. Article 47 in the formulation proposed by the Special Rapporteur could be interpreted in that way, but only in respect of irreversible crimes like genocide. Similarly, the draft should contain a provision to the effect that countermeasures did not apply to international crimes.

35. Before any countermeasures could be countenanced it was necessary to be absolutely certain that an internationally wrongful act had occurred. In view of the opinion of two leading authorities, Politis[7] and Fitzmaurice,[8] who had considered the matter many years earlier, it would be advisable at least to add the word "established" before "internationally wrongful act" in article 47.

36. He fully endorsed the opinions of Mr. Kamto, Mr. Kateka and Mr. Sreenivasa Rao on the necessity of a link between countermeasures and the settlement of disputes. Dispute settlement by negotiation or recourse to a third party must take priority over any kind of countermeasures. Otherwise, unilateral action on possibly dubious bases would be favoured at the expense of international justice. Naturally, every care had to be taken to ensure that procedure was prompt and that both parties were acting in good faith. Only if reciprocal countermeasures were manifestly impossible should countermeasures be taken that were equivalent to or commensurate with the internationally wrongful act of the responsible State. Furthermore, the adoption of the criterion of the reversibility of countermeasures might help to temper them.

37. The words "an injured State may take …", in article 47, could be replaced by "an injured State may have to take …". Paragraph 2 could be worded "Countermeasures consist of the suspension of one or more of the international obligations of the State taking those measures towards the responsible State, without the validity of these obligations being affected in any way." Paragraph 3 of article 47 adopted on first reading could be usefully retained in that article or somewhere else in chapter II.

38. Articles 47 bis and 50 should be merged under the heading "Obligations not subject to countermeasures" for the reasons given by Mr. Pambou-Tchivounda (2648th meeting). Article 48, the most important provision in that chapter, was the most problematic since it was biased in favour of the injured State, which was in control of the situation from start to finish. The article rightly attached great importance to the good faith of the responsible State, but was unconcerned about the good faith of the injured State—which might be non-existent. How could the article be more evenly balanced? Paragraph 1, subparagraph (*b*), should be placed before subparagraph (*a*) and very short deadlines should be stipulated between the action required in the three subparagraphs. If the responsible State accepted the offer of negotiations, which then failed, and agreed to the dispute being settled by a judicial or arbitral tribunal, the injured State must not be allowed to resort unilaterally to countermeasures. Similarly, the injured State must not have the right to resort to countermeasures if it refused to submit the matter to an impartial third party. Moreover, no clear distinction was drawn between the countermeasures referred to in paragraph 2 and those mentioned in paragraph 3. On the other hand, countermeasures could be taken against the responsible State if it refused negotiations or settlement of the dispute by an impartial third party, or did not apply the tribunal's ruling.

39. Article 49 should be worded "Countermeasures must be equal to the injury suffered, or if that is impossible, they must be commensurate with the injury." The word "equal" was not to be construed as "reciprocal". The last sentence of article 49, as it stood, added nothing of legal pertinence. The title of article 50 bis needed to be revised. In paragraph 1 (*b*), "or make" should be replaced by "and make" and the last part of the sentence in paragraph 2, beginning "or otherwise fails", should be deleted. Paragraph 1 (*b*) was in line with his proposal concerning article 48, since he saw no reason why the submission of a dispute to a tribunal should automatically suspend

[7] N. Politis, "Le régime des représailles en temps de paix", *Annuaire de l'Institut de droit international, 1934* (Brussels), p. 31.

[8] Fourth report on the law of treaties (*Yearbook . . . 1959*, vol. II, p. 37, document A/CN.4/120), at p. 46.

countermeasures, when the submission of the same dispute to a tribunal at an earlier stage did not automatically prevent their adoption in the first place.

40. Mr. ROSENSTOCK said it was 20 years since he had engaged in a debate like the current one, revolving around the fact that it was better to be powerful than weak. Was there something so exceptional, so particular, about countermeasures as to make it unacceptable to recognize them as a means of dealing with an imperfect world? Everyone agreed with Mr. Economides that it was unfortunate that the society of nations had not developed to the point reached by domestic societies, and that legal obligations must consequently be brought into effect by countermeasures from time to time. The role of countermeasures or reprisals in customary international law was widely and currently recognized. The most recent example of that recognition was the position taken by ICJ in the *Gab Ź kovo-Nagymaros Project* case. The Court and others who had addressed the issue of countermeasures had made it clear that there were limits to what they facilitated, that the relevant rules must be consistent with their effectiveness and abuses must be avoided. Countermeasures were a response to the breach of an international obligation, and the Commission was benefiting no one by seeking to obscure that fact and also that the goal of countermeasures was the restoration of the status quo ante, the relations that ought to exist under the law.

41. The new draft proposed by the Special Rapporteur was an improvement over that which had emerged on first reading, a draft hastily cobbled together by the Commission that had vitiated the careful and extremely ambitious work done by the Drafting Committee.

42. He agreed with those who wished to delete the last phrase in article 47, paragraph 1. Paragraph 2 of that article seemed acceptable, since "suspension of performance" covered both the removal of a prohibition as well as the suspension of an affirmative obligation. The Drafting Committee might nonetheless wish to craft a less obscure formulation. Article 47 bis, subparagraph (*c*), seemed awfully broad. Did it refer to obligations that had nothing to do with the wrongful act or the specific countermeasures involved? If so, why?

43. Article 48 entailed a complicated and risk-laden approach and should be replaced by the version in the footnote to that article. It was a trap for the unwary and, a source of confusion and argument. It reflected no customary law and no statement by ICJ. As to article 49, on proportionality, the term "gravity" tended to speak to issues other than the return of the status quo ante. Article 50 appeared to tell a State that, although its territorial integrity had been jeopardized and its domestic jurisdiction violated, it could not respond proportionately. That was preposterous. Subparagraph (*b*) was somewhat infelicitously drafted. While injury to a third State could not be justified under any notion of countermeasures, it did not affect the legal relationship *inter se* between the injured and the injuring States.

44. Article 50 bis appeared to require automatic suspension of countermeasures, even where a tribunal authorized to issue a suspension order did not do so. Was that not rather hyperactive? If agreement could not be reached, the basic need might be met by including article 30 in an objective formulation in Part One and making no attempt to spell out the specific actions that triggered suspension.

45. Lastly, it was in nobody's interests for the Commission to respond to the world at the current time as if it was the one which had existed 50 years ago.

46. Mr. OPERTTI BADAN said there was a head-on collision between those who did not wish to include countermeasures in the draft as an institution to be regulated by international law and those who, in contrast, thought that could be done. It was an area in which the borderline between international law per se and foreign relations was fairly indistinct. The Commission, as a body of legal specialists, had the obligation to help to dispel that uncertainty. Its first task was to decide whether, with respect to countermeasures, it should confine itself simply to reflecting reality or engage in progressive development, in line with article 15 of its statute.

47. The question also arose whether there was a set of generally accepted customary rules that legitimized the use of force. Both qualitative and quantitative changes in the international community could be observed. There were now 189 States Members of the United Nations which had differing expectations of it. Some sought the opportunity to respond to crucial domestic problems like economic development. Others wanted the Organization to legitimize certain international acts or conduct. To speak of customary law, immutable and frozen in time, was very difficult. The Commission should accordingly approach the topic of countermeasures with an open mind, yet should not abandon its focus on the law in favour of nothing but realism.

48. The Commission would be adopting rules as recommendations to States on the use of countermeasures to settle disputes by what was, after all, a type of use of force—in Part Three of the draft adopted on first reading, the allegedly responsible State was given the option of obstructing the use of countermeasures by unilaterally bringing into play the mechanism of arbitration. That had acknowledged the link between countermeasures and peaceful settlement of disputes. Paragraph 4 of new article 48 would oblige an injured State that adopted countermeasures to fulfil its obligations for the peaceful settlement of disputes "under any dispute settlement procedure in force". Yet where no such procedures were in force, there would be no such obligation. Was that more restricted formulation really a contribution to the progressive development of international law?

49. Again, article 50 as adopted on first reading listed extreme economic or political coercion as one of the prohibited countermeasures, but no such reference was included in the current proposal. That was unrealistic, because such measures had a strong impact, not only on Governments but also on peoples. A number of precedents should be taken into account. At San Francisco, at the time of the adoption of the Charter of the United Nations, the Latin American nations had submitted proposals to prohibit economic sanctions. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in

accordance with the Charter of the United Nations[9] prohibited them, and recent regional pronouncements like the opinion adopted by the Inter-American Juridical Committee on the Helms-Burton Act[10] should also be borne in mind.

50. Article 50, subparagraph (*b*), did not define basic human rights: the Special Rapporteur had said it was not the Commission's place to do so. Did they include economic rights? For a State that had recently gained political independence, economic rights, including the right to market access, for example, were indeed fundamental. Economic stability brought with it political stability.

51. The reference in article 50, subparagraph (*b*), to "third parties", not "a third State" as in article 47 adopted on first reading, represented major progress. The expression was broader, encompassing persons and economic agents as well as States.

52. If countermeasures were ultimately included in the draft articles, they should be envisaged, not as a right, but as an exception under international law. Moreover, he had serious doubts about whether lawfulness would really be guaranteed by the fact that the injured State itself was authorized to gauge the lawfulness of its own countermeasures. Proportionality as covered in article 49 was therefore a problematic notion. If provisions on that subject were included, they should be as simple and austere as possible.

53. The CHAIRMAN, speaking as a member of the Commission, said he supported the main lines of the Special Rapporteur's proposals on countermeasures.

54. New article 48, paragraph 4, and article 50 bis, paragraph 1 (*b*), dealt with the same subject, namely the situation after countermeasures had been taken, and must be read together. He had a particular question to raise. Article XXIV, paragraph 2, of the Treaty of Friendship, Commerce and Navigation, between Japan and the United States,[11] read: "Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means." If Japan violated the Treaty, for example by discriminating against Americans within its territory in breach of its commitment to providing most-favoured-nation status, the United States must first try to solve the matter by diplomacy. If that failed to produce a settlement, it could resort to countermeasures. Afterwards, it had the obligation, in accordance with article XXIV, paragraph 2, to submit the dispute to ICJ or to agree on other pacific means of dispute settlement. When the dispute was submitted to the Court, the United States must suspend its countermeasures. Was that a correct interpretation of articles 48, paragraph 4, and 50 bis, paragraph 1 (*b*), of the draft?

55. Another point came to mind. The Treaty of Friendship, Commerce and Navigation was *lex specialis*, while the draft articles were rules of general as well as residual international law. Accordingly, article XXIV, paragraph 2, of the Treaty had priority of application to problems arising out of the Treaty: its self-contained dispute settlement regime excluded any resort to countermeasures.

56. He accepted the idea that the principle of proportionality set out in article 49 was part of customary international law. If, however, the principle was construed in terms of balance with the injury suffered or the gravity of the wrongful act, he experienced some difficulties. In that connection, he shared the view put forward by Mr. Gaja and agreed with the comment made by the Government of the United States. Countermeasures were authorized to induce the wrongdoers to comply with their obligations. Thus, the proportionality must be relevant to that purpose, in other words, it should be proportional to the minimum degree of measures necessary to induce compliance.

57. Mr. GALICKI congratulated the Special Rapporteur on his inventiveness and tenacity on the problematic question of countermeasures. The question had been the subject of extensive debate in the Commission from its forty-sixth to forty-eighth session, as a result of which the Commission had inherited the set of provisions contained in articles 47 to 50. At its fifty-first session, the Commission had adopted a two-pronged approach to countermeasures. It had decided to retain article 30 on countermeasures as a circumstance precluding wrongfulness, in chapter V of Part One; at the same time, it had deferred finalizing article 30 until it had considered the regime of countermeasures in chapter III of Part Two. In his second report,[12] the Special Rapporteur had identified four options, varying from full retention to total deletion of the treatment of countermeasures in Part Two. The prevailing opinion among members of the Commission had been to deal substantially with countermeasures outside of article 30, but to avoid any special linkage with dispute settlement. That legacy must be kept in mind as the Commission approached its final decision about the place and size of provisions on countermeasures within the draft on responsibility.

58. In his third report, the Special Rapporteur made some refreshing and courageous proposals for the reconstruction of the provisions on countermeasures. Despite some criticism, the prevailing opinion seemed to be that it would be useful to have a separate chapter on countermeasures within the part on implementation of State responsibility. The version of that chapter proposed was over-large, however, and should be condensed by the merging of certain articles. Although he agreed with Mr. Opertti Badan that the use of countermeasures should be seen as exceptional in nature, it should not be forgotten that their application in the everyday practice of States was by no means rare. What seemed to be missing in the proposed provisions was a more precise definition or legal description of countermeasures within the meaning of the draft on State responsibility. An attempt should be made to differentiate between such closely related

[9] See 2617th meeting, footnote 19.

[10] See 2629th meeting, footnote 9.

[11] Signed at Tokyo on 2 April 1953 (United Nations, *Treaty Series*, vol. 206, No. 2788, p. 143).

[12] See 2614th meeting, footnote 5.

concepts as countermeasures, reprisals, retortion and sanctions.

59. In paragraph 289 of his report, the Special Rapporteur rightly recalled the full list of elements within the concept of countermeasures given by ICJ in the *Gabčíkovo-Nagymaros Project* case. Those elements had not, however, been fully reflected in the very brief and functional quasi-definition of countermeasures contained in article 47. Such important factors as the bilateral and reversible character of countermeasures, for example, had not been sufficiently underlined.

60. He had already expressed doubts about the "divorce" suggested by the Special Rapporteur within the provisions of article 50 adopted on first reading on prohibited countermeasures, which would result in the formulation of a new article 47 bis, on obligations not subject to countermeasures. In practice, it was not always possible to distinguish clearly between obligations not subject to countermeasures and prohibited countermeasures. It could also be questioned why certain situations deriving directly from Article 2 of the Charter of the United Nations appeared in article 47 bis, subparagraph (*a*), while others were included in article 50, subparagraph (*a*). Article 50, as adopted on first reading, had dealt with those matters together and had also used terminology that was more consistent with the language of the Charter.

61. The differentiation in articles 47 bis and 50 between "obligations of a humanitarian character" and "basic human rights" might create difficulties in practical application. The very concept of "basic human rights" could cause serious problems with respect to the specific rights that should be included. Were the right to freedom of movement and the right to freedom from hunger covered? What about the right to protection of property, which was violated so often in practice as a result of the application of countermeasures?

62. Again, the juxtaposition in article 50, subparagraph (*b*), of the "rights of third parties" and "basic human rights" was not a very good idea, since the first concept was connected with States, while the second applied to individuals. In order to avoid any problems that might result from the rather artificial inclusion of "rights of third parties" in article 50, it might be advisable to reinstate article 47, paragraph 3, adopted on first reading which dealt with the same problem in the context of the purpose and content of countermeasures, a much more appropriate setting.

63. Many voices had been raised against that proposed separation of article 47 bis and article 50. If it was effected, then the two articles must be placed in direct proximity or in sequence; a clear distinction must be clearly made in their relative scope and language compatible with other international instruments, in particular with the Charter of the United Nations, must be used.

64. Formal conditions relating to resort to countermeasures were listed in article 48 but they seemed too detailed and should be compressed. For example, paragraphs 1 (*a*) and 1 (*b*) could be combined. The order in which the conditions were listed was somewhat problematic: article 48 adopted on first reading set out a much more logical sequence in which the obligation to negotiate in good faith was at the start of the list of the conditions.

65. Article 49 followed the formulas applied by ICJ in the *Gabčíkovo-Nagymaros Project* case and seemed generally acceptable. It should stay as a separate article, thereby stressing the importance of the principle of proportionality for the application of countermeasures. Article 50 bis required some editorial correction but provided the logical conclusion of the set of articles on countermeasures with the necessary provisions on suspension and termination.

66. He joined with other members of the Commission who were in favour of referring articles 47 to 50 bis to the Drafting Committee for final elaboration.

67. Mr. CRAWFORD (Special Rapporteur), summing up the debate, said that his remarks would be without prejudice to any views expressed later, as they would be taken fully into account by himself and by the Drafting Committee.

68. At its fifty-first session, the Commission had decided to embark on improving the draft articles relating to countermeasures, without any specific link to dispute settlement in the unilateral form which had been proposed on first reading, and then to consider comments received on the revised version. The Sixth Committee would then comment on the provisions proposed and the Commission would resume the discussion on a general level at the fifty-third session in the context of the final text as a whole.

69. Many comments had been made, by States and by members of the Commission, relating both to the general, as in the case of Mr. Kabatsi and Mr. Kateka, and to the particular. States had, by and large, either reluctantly accepted or positively supported the elaboration of the provisions on countermeasures, although they might change their minds when they came to see the end result. The Commission none the less owed it to States to produce the best possible text, on which it would then make a decision in the light of comments by States.

70. The general reluctance to contemplate countermeasures was understandable, but the adoption of countermeasures was a fact of life. As one who had experience of situations in which countermeasures had been taken, he believed that it was preferable to have some regulation than none, in which regard he strongly concurred with the views of Mr. Addo, Mr. He, Mr. Simma, Mr. Tomka, and others. In its quest for the best text, the Commission should draw a clear distinction between the general question of the position taken by the draft on dispute settlement and the specific connection between dispute settlement and countermeasures. The general question depended on the form that the draft would ultimately take and that had not yet been decided. If, following feedback from the Sixth Committee, the majority view in the Commission was that it should take the form of a convention, that would be acceptable to him. Meanwhile, article 48 contained as close a connection between countermeasures and dispute settlement as was possible without introducing new forms of dispute settlement in the text. The Commission had proceeded as far as it could in the direction of the compromise suggested by Mr. Bowett, a former

member of the Commission, while remaining consistent with the underlying decision made at the fifty-first session about the principle of the equality of States. That principle had been seriously impaired by the text considered by the Commission at that session, a text which would have constituted a significant inducement for States to take countermeasures.

71. The debate had been extremely rich and he could not address all the points raised. It was, however, clear that his attempt to make a distinction between articles 47 bis and 50 had been a complete failure. The two should be combined. He hoped that it would nonetheless be possible to distinguish between obligations which were the subject of countermeasures and obligations which could not be breached while countermeasures were being taken. A single article, however, would be sufficient for that purpose, as Mr. Gaja had said.

72. As for the relationship between article 30, which was also being referred to the Drafting Committee, and the provisions of Part Two bis, the general view was that article 30 should be kept in a simple form. He was attracted by Mr. Al-Baharna's suggestion that the words "towards the responsible State" should be inserted. The article set out the legal effect of countermeasures, namely that—if justified in accordance with the provisions of the articles—they precluded wrongfulness vis-à-vis the target State. As ICJ had ruled in the *Gab Ź kovo-Nagymaros Project* case, and as was made clear in chapter II, countermeasures were instrumental. That being so, some clarification along the lines suggested by Mr. Tomka concerning article 47 might be possible: the text could be inverted to stipulate that countermeasures might not be taken unless certain conditions were met. That would leave any illegal effect to be regulated by article 30. It would not involve any of the hypocrisy of the text adopted on first reading, on which Mr. Rosenstock had commented so trenchantly. There was general support for a clearer approach in article 47, although care should be taken over the point raised by Mr. Opertti Badan and Mr. Tomka. He hoped that the Drafting Committee would be able to resolve the problem.

73. Many of the comments on articles 47 and 47 bis had been points of drafting, but two had been fundamental. Indeed, they suggested that chapter III, section D, of his third report might not go far enough. The first was the question of reversibility and the second the question of the bilaterality of obligations suspended. Possibly the Commission should bite the bullet and say plainly that countermeasures must be reversible and must relate to obligations only as between the injured State and the target State. The issue of reversibility raised a particular problem: there was no question that action pursued in the course of taking countermeasures should subsequently be undone. Action of which the wrongfulness would be precluded under article 30 would undoubtedly be taken. Reversibility meant a return to the status quo, as Mr. Tomka had emphasized. That notion must not be prejudiced. He had tried to express it through the concept of suspension of the performance of obligations, and there had been general support for a distinction between the suspension of obligations and the suspension of their performance. Article 50 bis, paragraph 3, had also been generally endorsed as a step in the right direction. Whether it went far enough or whether the Drafting Committee could make any improvements remained to be seen, but certainly the question needed further consideration. He suspected, however, that the problem was too subtle for any easy solution.

74. Difficulties also arose over the bilateral character of the obligation that was the subject of countermeasures. It was, as Mr. Rosenstock had said, clear that the position of the injured State vis-à-vis third States was wholly unaffected by the draft articles. If a third State was the subject of a breach, independent rights were available to it. In that sense, countermeasures were bilateral. The Drafting Committee would, again, have to consider whether more could be done.

75. Many drafting comments had been made on article 48, varying from the preference expressed by some members for the simple provision contained in the footnote to the article to the suggestion that no countermeasures of any sort should be taken until negotiations had been exhausted. The fact that a similar and endless debate had taken place on first reading reflected the underlying tension in the topic. The provisions of article 48, although they could clearly be improved, were an attempt to provide a reasonable compromise between the two positions, bearing in mind that the type of reversible or suspendable interim countermeasures in question were precisely those that, if not taken straightaway, could not be taken at all. He therefore continued to favour a compromise along the lines of the proposal in article 48, which was, after all, substantially the same as the compromise achieved on first reading. Many deficiencies might remain, but the Drafting Committee should be allowed to attempt to improve the draft article.

76. He agreed with the view that article 48, paragraph 1 (*b*), should be deleted. It had originally been included in the draft because it was an endorsement, in slightly different terms, of the moderate proposal by the Government of France aimed at resolving a difficult problem.

77. There had been general agreement on the need to include proportionality: whether it should be treated in a separate article or as part of a broader synthesis was a question for the Drafting Committee. The same applied to commensurability, although he acknowledged that the last phrase in article 49 raised a difficulty that had been acutely analysed. The Drafting Committee would clearly have to consider that matter, too. It might be that ICJ had been right about the second part of the formula as well as about the first.

78. Article 50 would, as he had said, need to be synthesized with article 47 bis. Article 50 bis, meanwhile, had been generally endorsed during the discussion. Whatever decision was reached on article 48, some provision along the lines of article 50 bis should be retained, although there was considerable room for improvement.

79. Despite the doubts expressed by some members, the Commission was in a position to refer the articles in question and article 30 to the Drafting Committee to see whether an improved synthesis of the various ideas put forward could be produced for discussion by the Sixth Committee and by the Commission at its fifty-third session.

80. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the draft articles in paragraph 367 of the third report and article 30 to the Drafting Committee.

*It was so agreed.*

81. Mr. OPERTTI BADAN said he trusted that the referral to the Drafting Committee would not prejudge the outcome of the Commission's consideration of the topic. The Drafting Committee might resolve many of the problems that had been raised, but that should not be taken to imply that a decision to accept the mechanism of countermeasures under the draft articles had been taken.

82. The CHAIRMAN gave an assurance that the Commission would have another opportunity to examine the report of the Drafting Committee and to make any further comments.

83. Mr. CRAWFORD (Special Rapporteur) said that there would be little opportunity for further debate at the current session. Rather, it would be a matter of registering improvements made by the Drafting Committee. In his fourth report, which, God willing, would be the last, he would revert to the issue in the light of reactions by States in the Sixth Committee. At the fifty-third session the Commission would consider the draft articles as a whole, including the treatment of the issues in chapter III, section D, and chapter IV of his third report. The ultimate choice between the various options would also be made at that time.

84. Mr. HAFNER said that he concurred with almost everything that appeared in chapter III, section D, of the third report and with much of what the Special Rapporteur had just said. Paragraph 338 of the report, however, appeared to refer to a right of the receiving State to "terminate the mission". He doubted that diplomatic law contained such a rule, as recent experience had proved. Indeed, discussions on the issue had already taken place in the Council of Europe. In paragraph 343 the reference to European Union treaties should in fact be to the Treaties establishing the European Communities, on which the exclusive nature of enforcement was based, as confirmed by article 292 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. Even within the field of European Community law, however, it could be argued that the system of enforcement was not a self-contained regime for the purposes of State responsibility. On the other hand, it was true that the Treaty on European Union, outside the European Communities, seemingly did not constitute a closed system, since measures by 1, 3 or 14 States against another State that was alleged to be breaching principles embodied in the Treaty on European Union were considered legal. Certainly no arguments had been raised against that conclusion so far. Paragraph 343 also contained a statement which could be interpreted as implying that, where a treaty prohibited reservations, the obligations under that treaty precluded the use of the purpose of countermeasures. He could not accept that proposition. Rights under the United Nations Convention on the Law of the Sea, after all, could be used for that purpose.

85. With regard to article 47, paragraph 1, an injured State should be given the right to take countermeasures not only as long as the responsible State had not complied with the original obligations but also to the extent that it had not complied with them. With reference to paragraph 2, he wondered whether, as some other members had suggested, the expression "towards the responsible State" reflected the bilateral nature of countermeasures clearly enough. Article 47 bis was hardly distinguishable from article 50, except insofar as the former addressed certain rights that must not be suspended, whereas the latter merely stated that, if certain rights were suspended, the suspension must not amount to a threat to territorial integrity. His preference would be to keep the two provisions separate, but in close proximity. He understood from article 47 bis, subparagraph (*b*), that violations of the rights of other persons who enjoyed diplomatic immunity could lead to countermeasures. That did not apply to the rights of "bilateral" diplomats, such as a minister visiting another State. The word "third", in subparagraph (*c*), should be deleted, as many treaties provided for a settlement dispute mechanism without involving a third party, or else they required such a procedure as a prerequisite for a third party settlement. The current formulation would lead to a situation where the negotiations or the duty of consultation but not the adjudication procedure could be suspended, even though the former had necessarily to precede the latter. As for article 48, he would prefer the shorter version proposed by the Special Rapporteur in the footnote to the article, and he shared the view of the Chairman and Mr. Gaja regarding article 49.

86. Article 50, subparagraph (*a*), could be misused to exclude any countermeasures. A refusal to deliver military goods, for example, could also be considered to endanger a State's territorial integrity, since the State would have a limited capacity to defend its territory. In any case, the objective of the wording used differed from that of article 47 bis, subparagraph (*a*), in that it did not require the use of force to achieve the desired result. It should therefore either be absorbed into article 47 bis, subparagraph (*a*), or be restricted by some such phrase as "constitutes a direct threat to the territorial integrity". Pollutants also threatened a State's integrity, however. It would therefore be wise to retain the general reference to territorial integrity, but to restrict the manner in which that integrity could be endangered. He questioned whether the reference to intervention should be retained, given the fuzzy definition of the principle of non-intervention. Subparagraph (*b*) contained two different ideas that should be kept separate. The first could remain in article 50, but it might be preferable to transfer the second to article 47 bis, inasmuch as basic human rights should not be made the object of countermeasures. They were in any case different from the rights of a humanitarian character referred to in article 47 bis, subparagraph (*d*). In article 50 bis, paragraph 2, the unqualified reference to an "order" from an international tribunal could give rise to the interpretation that even procedural orders, such as the delivery of a written document before a certain date, were included. He doubted whether that was the intention. Therefore, the reference should be made more specific, with the addition of a phrase such as "on the substance" or "on the merits of the case".

87. Lastly, with reference to the order of the articles, he suggested that the provisions limiting the right to resort to countermeasures should appear together, separately from those dealing with questions of procedure. The two kinds were mixed up in the articles as they stood.

88. Mr. GOCO noted that, according to paragraph (4) of the commentary to article 48, the term "interim measures of protection" was inspired by procedures of international courts or tribunals that might have the power to issue interim orders or otherwise indicate steps that should be taken to preserve the respective rights of the parties in dispute. Under the version proposed by the Special Rapporteu, however, the injured State might provisionally implement such countermeasures unilaterally. Moreover, interim measures were not intended to be full-scale countermeasures, yet article 48, paragraph 2, appeared to cover countermeasures that went beyond interim measures of protection. The question thus arose as to whether there was a real distinction between such measures and provisionally implemented countermeasures. With regard to the former, there was, of course, an analogy with domestic law or even international tribunals: a petition for an injunction to stop a particular act was a recognized procedure. Moreover, within that procedure was the equally recognized ancillary remedy for injunctive relief for the respondent to desist from continuing the act. That injunctive relief was analogous to the interim measures of protection. Interim measures could be retained in a reformulation of article 48, paragraph 2, but some further refinement might be needed to clarify the point of including them.

89. Mr. BROWNLIE said he did not have a well formed set of opinions on countermeasures, which were a very intractable subject. He saw some value, however, even at such a late stage, in examining the nature of the task facing the Commission. It was worth considering what the existing position was in international law. The Commission was not a mere codifying body; it could make or propose new law. It was nonetheless useful to test the depth of the water it was trying to navigate. He discerned, from the report and from the debate, an easy assumption that non-forcible countermeasures were recognized in general international law. That proposition was both true and untrue. Non-forcible countermeasures were indeed recognized as one of the circumstances precluding wrongfulness, which was how article 30 had, unsurprisingly, come into being. There was, however, a qualitative difference between the two-dimensional, low-profile status of an institution that figured as one of a list of circumstances precluding wrongfulness—other examples being consent, compliance with peremptory norms and self-defence—and the construction of a three-dimensional institution, namely, countermeasures legitimized by provisions that might involve giving legitimacy to elements that had not previously been recognized as part of general international law.

90. Countermeasures had a multitude of purposes, not in the legal sense but in terms of the political behaviour of States. They were used as an inducement to another State to resort to a dispute settlement procedure; as a reprisal; as a deterrent; as an inducement to abandon a policy; as a form of self-defence (in which case interim measures would apply); or as self-help in order to achieve a settlement. Despite the high calibre of his current work, the fact remained that neither the Special Rapporteur nor his predecessor had produced a clear decision as to which of those purposes was to be legitimated under the draft articles, although the implication of articles 47 and 48 was that it was self-help. In that context, the purpose appeared to be to bring about cessation and reparation, but doing so without any procedure of peaceful settlement.

91. He was not raising the question of linkage but simply analysing the apparent effect of those articles. After all, without any actual procedure of peaceful settlement intervening, the draft articles would legitimate what was, in the final analysis, self-help, even if it was non-forcible. The Special Rapporteur's approach was empirical, as though the topic was a wild animal that had to be tamed. There was, however, a direct link between the choice of purposes to be legitimated and the technical questions of proportionality and "reversibility": the latter issues could not be adequately tackled unless their context was clear. For that reason, he believed that even at the current stage in the examination of the topic, more thought should be given to the legitimate purposes of such a form of self-help. It was not simply a question of the long-standing debate about linkage. Rather, it was a question of whether pressure applied in order to achieve a peaceful settlement should be legitimated. Perhaps that was what the Commission aimed to achieve, but, if so, it should be clear about its aim; and that clarity seemed to him to be lacking.

*The meeting rose at 1 p.m.*

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## 2650th MEETING

*Wednesday, 2 August 2000, at 10 a.m.*

*Chairman*: Mr. Chusei YAMADA

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

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