Document:-
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Summary record of the 2424th meeting

Topic:
Other topics

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prohibition of force and the outlawing of armed reprisals, but the latter had often been confused with self-defence, as indicated in paragraphs (4) and (5) and in the relevant footnotes. He was nevertheless prepared to take account of all the specific proposals that might be submitted to him in writing in order to draft a text that would be more acceptable.

67. The CHAIRMAN said that, before a decision was taken on paragraph (2), the members of the Commission should consider the other paragraphs relating to article 14, subparagraph (*a*). He therefore invited them to comment on paragraphs (3) to (6).

Paragraphs (3) to (6)

68. Mr. LUKASHUK said he took the last sentence of paragraph (3) to mean that, although aggression was prohibited for one reason or another, the same could only be true of armed reprisals. However, reprisals could be legitimate and justified by various circumstances, whereas aggression was a crime that could not be justified in any way. He therefore wished to have some clarifications about the real meaning of the last sentence.

69. Mr. BENNOUNA pointed out that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations had been adopted not unanimously, but by consensus, and that the words "unanimously" in the third sentence of paragraph (3) should therefore be deleted.

70. Mr. TOMUSCHAT said that the Declaration had actually been adopted without a vote. He also thought that it would be difficult to base a prohibition on armed countermeasures on the prohibition of aggression and he therefore fully agreed with Mr. Lukashuk on that point.

71. Mr. BOWETT said that the problem was the result of the fact that paragraph (3) did not express the basic idea that the prohibition of the use of force provided for in Article 2, paragraph 4, of the Charter was a peremptory norm and that a State could therefore not adopt countermeasures which would lead to the violation of a peremptory norm. That was why armed reprisals were not admissible countermeasures. That general idea would have to be added in one of the paragraphs under consideration.

72. Mr. ARANGIO-RUIZ (Special Rapporteur), taking paragraph (3) sentence by sentence, said that the first sentence should be retained, subject to the replacement of the words "the express prohibition of the use of force" by the words "the express prohibition of force". The second sentence should also be kept as it stood. It could be immediately followed by a sentence expressing Mr. Bowett's idea. In the third sentence, the word "unanimously" could be deleted, as proposed. With regard to the fourth and fifth sentences, which referred to aggression, something that had given rise to objections on the part of some members, he pointed out that, in footnote 7, he quoted article 3 of the Definition of Aggression,[3] which defined a set of possible cases relating to the use of force that undoubtedly included armed reprisals and it was therefore not wrong to say that the prohibition of armed reprisals was implicitly confirmed by the Definition. However, the Commission was free, if it so wished, to delete the fifth sentence and footnote 7 relating to it.

73. As to paragraph (4), he proposed that the first sentence should be retained and that, in the second sentence, the phrase beginning with the words "such pleas of self-defence" and ending with the words "article 19 of the present draft)" should be deleted. He would also try to amend paragraph (2), to which there had been so many objections, but he did not think that he was expressing ideas in that paragraph which were not consistent with the trend towards the prohibition of the threat or use of force that had taken shape between the two wars.

74. Mr. ROSENSTOCK said that it would be better to delete the end of paragraph (4). The idea, also expressed in paragraph (6), that self-defence could only be a reaction to crimes was, in his view, completely wrong and unacceptable. The paragraphs under consideration were, in fact, all too long and it would be better to delete them and replace them by a single text that could be drafted along the lines of what Mr. Bowett had proposed, with a few appropriate footnotes. All the rest was unnecessary and misleading.

75. Mr. PELLET said that he partly agreed with Mr. Rosenstock and also shared Mr. Bowett's opinion. What the Special Rapporteur said was on the whole accurate, but the problem was whether it should be made into a commentary to article 14. Paragraphs (2) to (5) should be completely revised. Paragraph (6) could be retained if it was amended. Starting with the first sentence, emphasis should be placed on the restrictive nature of the cases in which resort to armed force was lawful under the Charter, as well as on the peremptory nature of the prohibition of the use of armed force in all the other cases not provided for by the Charter, and it should be indicated that the consequence of that dual nature was the prohibition of countermeasures. The Commission might also explain that such a prohibition was in keeping with the intentions of the framers of the Charter, as stated, moreover, in paragraph (3), and, if the Special Rapporteur considered it necessary, conclude with a sentence such as that at the end of paragraph (4). He would submit a written proposal to the Special Rapporteur.

The meeting rose at 6.15 p.m.

2424th MEETING

Friday, 21 July 1995, at 10.20 a.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. He, Mr. Idris, Mr. Kabatsi,

[3] Assembly resolution 3314 (XXIX), annex.

Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yankov.

Draft report of the Commission on the work of its forty-seventh session (*continued*)

CHAPTER III. *State responsibility* (continued) (A/CN.4/L.512 and Add.1 and A/CN.4/L.521)

1. The CHAIRMAN invited the members of the Commission to resume its consideration of chapter III of the draft report.

B. Consideration of the topic at the present session (*continued*)*

CONSIDERATION BY THE COMMISSION OF THE TEXTS ADOPTED BY THE DRAFTING COMMITTEE FOR INCLUSION IN PART THREE OF THE DRAFT ON STATE RESPONSIBILITY (A/CN.4/L.512/Add.1)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

2. Mr. MAHIOU proposed that the words "Several members", in the first sentence, should be replaced by "Most members".

3. Mr. de SARAM said that, when reference was made in the Commission's report to the Model Rules on Arbitral Procedure, the status of those rules should be specified in a footnote.

Paragraph 4, as amended, was adopted.

Paragraph 5

4. Mr. PELLET proposed that, in the third sentence, the words "for many members" should be deleted.

5. Mr. THIAM said he wondered whether the first part of the second sentence, which stated that the approach recommended by the Drafting Committee might seem "too bold" to Governments, was necessary.

6. Mr. PELLET said that that had been the view of the large majority of members.

7. The CHAIRMAN said that he agreed with Mr. Thiam. A word other than "bold" would be preferable.

8. Mr. ROSENSTOCK proposed that the word "bold" should be replaced by "far-reaching".

Paragraph 5, as amended, was adopted.

Paragraph 6

9. Mr. IDRIS said that, in his view, the idea contained in the last sentence of the paragraph had already been expressed in paragraph 5 and need not be repeated.

10. Mr. PELLET said he did not agree. Paragraph 5 dealt with the approach recommended by the Drafting Committee. The last sentence of paragraph 6 reflected a decision taken by the Commission.

11. Mr. ROSENSTOCK said that, at the present stage, the last sentence of paragraph 6 was clearly a hope rather than a reality.

Paragraph 6 was adopted.

Paragraph 7

Paragraph 7 was adopted.

Section B, as amended, was adopted.

C. Text of articles 13 and 14 of part two and of articles 1 to 7 of part three and the annex thereto, with commentaries, provisionally adopted by the Commission at its forty-seventh session (*continued*)

Draft commentaries to articles 13 and 14 of part two (*continued*) (A/CN.4/L.521)

Commentary to article 14 (continued)

12. The CHAIRMAN invited the Commission to consider the text which had been circulated to members and which contained paragraphs (2) to (4) of the commentary to article 14 revised in response to comments made at the previous meeting. The text read:

"(2) *Subparagraph (a)* prohibits resort, by way of countermeasures, to the threat or use of force. The trend towards the restriction of resort to force which started with the Covenant of the League of Nations and the Kellogg-Briand Pact has culminated in the expressed prohibition of force contained in Article 2, paragraph 4, of the Charter of the United Nations. The obvious relevance of this prohibition to the use of force by an injured State in the pursuit of its rights is consistent with the intention of the framers of the Charter.[1] The consequent prohibition of armed reprisals or countermeasures is spelled out in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, by which the General Assembly proclaimed that 'States have a duty to refrain from acts of reprisals involving the use of force'.[2] That armed reprisals are recognized as prohibited is further evidenced by the fact that States resorting to force attempt to demonstrate the lawfulness of their conduct by characterizing it as an act of self-defence rather than as a reprisal.

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* Resumed from the 2421st meeting.

"[1] The framers of the Charter intended to condemn the use of force even if resorted to in the pursuit of one's rights, as reflected in the proceedings of the San Francisco Conference. See P. Lamberti Zanardi, *La legittima difesa nell diritto internazionale* (Milan, Giuffrè, 1972), pp. 143 *et seq.*, and R. Taoka, *The Right of Self-defence in International Law* (Osaka, Osaka University of Economics and Law, 1978), pp. 105 *et seq.*

"[2] General Assembly resolution 2625 (XXV), subparagraph 6 of the first principle. R. Rosenstock, 'The Declaration of Principles of Interna-

"(3) The prohibition of armed reprisals or countermeasures as a consequence of Article 2, paragraph 4 of the Charter is also consistent with the decidedly prevailing doctrinal view;[3] as well as a number of authoritative pronouncements of international judicial[4] and political bodies.[5] The contrary trend, aimed at justifying the noted practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission.[6] Indeed, armed reprisals do not present those requirements of immediacy and necessity which would only justify a plea of self-defence.[7] According to a prevailing view in the literature which is consistent with international jurisprudence, the prohibition of armed reprisals or countermeasures has acquired the status of a customary rule of international law.

"(4) The prohibition of the threat or use of force by way of countermeasures is set forth in terms of a general reference to the Charter rather than the specific provisions of Article 2, paragraph 4. Furthermore, the Commission opted for a general reference to the Charter as one source, but not the exclusive source, of the prohibition in question which is also part of general international law and has been characterized as such by the International Court of Justice."

tional Law concerning Friendly Relations: A survey', *American Journal of International Law* (Washington, D.C.), vol. 65, No. 5 (October 1971), pp. 713 *et seq.*, in particular p. 726. ICJ indirectly condemned armed reprisals in asserting the customary nature of the Declaration's provisions condemning the use of force in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*I.C.J. Reports 1986*, pp. 89-91, paras. 188, 190, 191). The Final Act of the Conference on Security and Cooperation in Europe also contains an explicit condemnation of forcible measures. Part of Principle II embodied in the first 'Basket' of that Final Act reads: 'Likewise they [the participating States] will also refrain in their mutual relations from any act of reprisal by force' (*Final Act of the Conference on Security and Cooperation in Europe*, signed at Helsinki on 1 August 1975 (Lausanne, Imprimeries Réunies, [n.d.]).

"[3] The contemporary doctrine is almost unanimous in characterizing the prohibition of armed reprisals as having acquired the status of a general or customary rule of international law. See I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1963), pp. 110 *et seq.*, and in particular pp. 281-282; P. Reuter, *Droit international public*, 6th ed. (Paris, Presses universitaires de France, 1983), pp. 510 *et seq.* and in particular pp. 517-518; A. Cassese, *Il diritto internazionale nel mondo contemporaneo* (Bologna, Mulino, 1984), p. 160; H. Thierry *et al.*, *Droit international public* (Paris, Montchrestien, 1986), p. 192 and pp. 493 *et seq.*, particularly p. 508; B. Conforti, *Diritto internazionale*, 3rd ed. (Napoli, Editoriale Scientifica, 1987), p. 356; C. Dominicé, 'Observations sur les droits de l'État victime d'un fait internationalement illicite', in *Droit international 2* (Paris, Pedone, 1982), p. 62; F. Lattanzi, *Garanzie dei diritti dell'uomo nel diritto internazionale generale* (Milan, Giuffrè, 1983), pp. 273-279; J.-C. Venezia, 'La notion de représailles en droit international public', *Revue générale de droit international public* (Paris, July-September 1960), pp. 465 *et seq.*, in particular p. 494; J. Salmon, 'Les circonstances excluant l'illicéité', *Responsabilité internationale* (Paris, Pedone, 1987-1988), p. 186; and the fourth report of the Special Rapporteur on State Responsibility, Mr. Riphagen, *Yearbook . . . 1983*, vol. II, (Part One), p. 15, document A/CN.4/366 and Add.1, para. 81. The minority who doubt the customary nature of the prohibition are equally firm in recognizing the presence of a unanimous condemnation of armed reprisals in Article 2, paragraph 4, of the Charter as reaffirmed in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. See, for example, J. Kunz, 'Sanctions in international law', *American Journal of International Law* (Washington, D.C.), vol. 54, No. 2, April 1960, p. 325; G. Morelli, *Nozioni di diritto internazionale*, 7th ed. (Padova, CEDAM, 1967), p. 352 and pp. 361 *et seq.*; G. Arangio-Ruiz, 'The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', *Collected Courses of The Hague Academy of International Law, 1972-III* (Leiden, Sijthoff, 1974), vol. 137, p. 536. It is also significant that the majority of the recent monographic studies on reprisals are expressly confined to measures not involving the use of force. See, in particular, A. De Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Milan, Giuffrè, 1985); E. Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures*, (Dobbs Ferry, New York, Transnational Publishers, 1984); and O. Y. Elagab, *The Legality of Non-Forcible Countermeasures in International Law* (Oxford, Clarendon Press, 1988). These authors obviously assume that 'the prohibition to resort to reprisals involving armed force had acquired the rank status of a rule of general international law' (De Guttry, op. cit., p. 11). See also the Restatement of the Law Third, section 905 of which states that '[t]he threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to subsection (1)'. The subsection in question specifies that 'a State victim of a violation of an international obligation by another State may resort to countermeasures that might otherwise be unlawful, if such measures (*a*) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (*b*) are not out of proportion to the violation and the injury suffered' (*Restatement of the Law Third: The Foreign Relations Law of the United States* (American Law Institute Publishers, St. Paul, Minn.), vol. 2, 1987, p. 380).

"[4] The condemnation of armed reprisals and the consolidation of the prohibition into a general rule are supported by the statement of ICJ in the *Corfu Channel (Merits)* case with respect to the recovering of the mines from the Corfu Channel by the British navy ('Operation Retail') (*I.C.J. Reports 1949*, p. 35, see also *Yearbook . . . 1979*, vol. II (Part One), p. 42, document A/CN.4/318 and Add.1-4, para. 89) and, more recently, by the decision of ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case (*I.C.J. Reports 1986*, p. 127, paras. 248-249).

"[5] See, for example, Security Council resolutions 111 (1956) of 19 January 1956, 171 (1962) of 9 April 1962 and 188 (1964) of 9 April 1964.

"[6] The anchors (writers) representing this minority trend have maintained that some forms of unilateral resort to force either have survived the sweeping prohibition of Article 2, paragraph 4, of the Charter, to the extent that they are not used against the territorial integrity or political independence of any State or contrary to the purposes of the United Nations but rather to restore an injured State's rights or have become a justifiable reaction under the concepts of armed reprisals or self-defence based on the realities of persistent State practice and the failure of the collective security system established by the Charter to function as envisaged in practice. E. S. Colbert, *Retaliation in International Law* (New York, King's Crown Press, 1948); J. Stone, *Aggression and World Order. A Critique of United Nations Theories of Aggression* (London, Stevens, 1958), especially pp. 92 *et seq.*; R. A. Falk, 'The Beirut raid and the international law of retaliation', *American Journal of International Law* (Washington, D.C.), vol. 63, No. 3, July 1969, pp. 415-443; D. W. Bowett, 'Reprisals involving recourse to armed force', ibid., vol. 66, No. 1, January 1972, pp. 1-36; R. W. Tucker, 'Reprisals and self-defence: The customary law', ibid., No. 3, July 1972, pp. 586-596; R. B. Lillich, 'Forcible self-help under international law', *United States Naval War College—International Studies* (vol. 62): *Readings in International Law from the Naval War College Review 1947-1977* (vol. II): *The Use of Force, Human Rights and General International Legal Issues*, texts compiled by R. B. Lillich and J. N. Moore (Newport (R.I.), Naval War College Press, 1980), p. 129; D. Levenfeld, 'Israeli counter-Fedayeen tactics in Lebanon: Self- defense and reprisal under modern international law', *Columbia Journal of Transnational Law* (New York), vol. 21, No. 1, 1982, p. 148; and Y. Dinstein, *War Aggression and Self-Defence* (Cambridge, Grotius, 1988), pp. 202 *et seq.* For a critical review of the literature, see R. Barsotti, 'Armed reprisals', *The Current Legal Regulation of the Use of Force* (Dordrecht, Nijhoff, 1986), pp. 81 *et seq.*

"[7] As recalled in the fifth report of the Special Rapporteur (*Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3), the Commission had expressed itself clearly on the concept of self-defence."

13. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the secretariat had assured him previously that the commentaries to articles 13 and 14 had been informally distributed to a number of the members. Although he had received a few comments from Mr. Bowett, he had not received any from other members, which meant that some of the complaints expressed at the previous meeting had not been justified. If members had provided their comments earlier, the Commission would have saved a great deal of time at the previous meeting.

14. As to the changes in the commentary to article 14 , he had removed from paragraph (2) the historical notes relating to the Covenant of the League of Nations and the Kellogg-Briand Pact and had done so *pro bono pacis* and simply to save time. Nevertheless, he firmly believed that those inter-war period instruments were of importance for a better understanding of the clear prohibition of armed reprisals emerging from the Charter of the United Nations. Paragraph (2) was therefore consid-

erably simplified, moving from a very brief reference to the Covenant and the Kellogg-Briand Pact to the culmination in the Charter of the trend towards the restriction of resort to force.

15. In response to observations made by Mr. Lukashuk, he had, with regret, deleted from the original version of paragraph (3) the reference to the Definition of Aggression. He wished to point out that a number of the coercive acts listed as instances of aggression in article 3 of the Definition were perfect examples of armed reprisals. The fact that the coercive acts had been listed as examples of aggression clearly implied a fortiori that such acts were prohibited. In addition, and most important in view of the frequent abuse of the concept of self-defence as a pretext for unlawful resort to armed reprisals, a few of the instances set forth in article 3 of the Definition corresponded to some of the very instances in which an attempt had been made to present armed reprisals as acts of self-defence.

16. Paragraph (3) of the revised commentary showed that the prohibition of armed reprisals or countermeasures as a consequence of Article 2, paragraph 4, of the Charter was also consistent with the prevailing doctrinal view as well as a number of authoritative pronouncements of international judicial and political bodies. It was better explained, in that paragraph, that the opposing trend aimed at justifying the practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence had no plausible legal justification and was considered unacceptable by the Commission. The fourth footnote to paragraph (3) contained a reference to the minority doctrine. Clearly armed reprisals did not present the requirements of immediacy and necessity that would alone warrant a plea of self-defence. The last sentence of paragraph (3) was a simplified version of what had been paragraph (5) in the original version of the commentary. Paragraph (4) of the revised commentary was a considerably shortened version of what had previously been paragraph (6).

17. Mr. YANKOV said he wished to thank the Special Rapporteur for his understanding and efforts. In his view, it was unfortunate that the historical background to the prohibition of armed force had been removed from the commentary. Although it had not made express reference to countermeasures, the Kellogg-Briand Pact was the first treaty to explicitly prohibit the use of force as a means of settling disputes and to recommend that disputes should be settled peacefully.

18. With regard to revised paragraph (3), he proposed that, at the very end of the paragraph, after "customary rules of international law", words should be added to the effect that the prohibition of armed reprisals or countermeasures had acquired the status of *jus cogens* in contemporary international law.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the words "of a peremptory character" should be added after "international law," at the end of paragraph (3). He would none the less point out that the prohibition of armed reprisals or countermeasures was, in his personal view, a treaty obligation. It was neither a customary rule nor a peremptory rule. Personally, he failed to fully understand, in particular, what a peremptory rule was. But that, of course, was only his own view. The commentary was the work of the Commission as a whole, not the Special Rapporteur.

20. Mr. de SARAM said he wished to thank the Special Rapporteur for the revised version of the commentary to article 14. The question of the limits of self-defence, dealt with in paragraph (3), was a very thorny one. It was essential to make the commentary precise so that it would not give rise to any debate on the matter in the Sixth Committee.

21. The Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was one of the major achievements of the General Assembly, adopted as part of the twenty-fifth anniversary celebrations. In general, the Declaration should not be mentioned in any way that might diminish its importance.

22. While he appreciated the references in the footnotes to articles written by members of the Commission, he would also recommend mention of the article by Oscar Schachter[1] which dealt with all of the matters under consideration in article 14.

23. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the last footnote to paragraph (3) of the revised commentary referred to the specific portions of his fifth report,[2] which dealt with the evolution of the Commission's views on the matter of self-defence.

24. Mr. LUKASHUK said that he wished to thank the Special Rapporteur for his efforts. Paragraph (2) of the revised commentary was acceptable. Nevertheless, he would suggest that, in the fourth sentence, the word "countermeasures" should be deleted: the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations referred to "reprisals", but not to "countermeasures". "Prohibited countermeasures" was not a satisfactory title for article 14. Countermeasures, by definition, were lawful. Other measures taken in reaction to a crime might be unlawful, but they were not considered to be countermeasures.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Lukashuk's comment was logical, but the title of the article had already been adopted. An explanation had been given by the Chairman of the Drafting Committee when the articles had been presented at the forty-fifth session in 1993. In his view, the title was self-explanatory and should not cause doubt in the mind of the reader.

26. Mr. VILLAGRÁN KRAMER cited the Charter of OAS,[3] which prohibited reprisals, whether armed or unarmed, and the Protocol of Amendment to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), which incorporated the Definition of Aggression. Accordingly, there was legal testimony to the Definition be-

[1] O. Schachter, "The right of States to use armed force", *Michigan Law Review*, vol. 82, Nos. 5 and 6 (April/May 1984), pp. 1620-1646.

[2] See 2391st meeting, footnote 13.

[3] See 2407th meeting, footnote 6.

yond its being contained in the General Assembly resolution.

27. Mr. EIRIKSSON proposed that in paragraph (2) the words "as prohibited by the Charter of the United Nations" should be added at the end of the first sentence.

28. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraphs (2) to (4), formerly paragraphs (2) to (6).

Paragraphs (2) to (4), as amended, were adopted.

Paragraph (7)

29. Mr. de SARAM said that, although he did not feel any changes were required, he would like to point out that the phrase "economic or political coercion" was not entirely satisfactory. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations and the authoritative texts to which the Special Rapporteur referred used different formulations.

Paragraph (7) was adopted.

Paragraphs (8) and (9)

Paragraphs (8) and (9) were adopted.

Paragraph (10)

30. Mr. LUKASHUK, referring to the quotation at the end of the paragraph from the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, said that measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind were criminal acts prohibited by international law and were an entirely different matter from countermeasures. The reference should therefore be deleted from the paragraph.

31. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the action in question was prohibited. So, if a countermeasure met such a definition, it was unlawful.

32. Mr. TOMUSCHAT said he did not agree that any type of measure to coerce another State would be unlawful. However, paragraph (11) of the commentary made it clear the Commission had in mind only extreme economic or political coercion.

33. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations was clearly referring to extreme coercion.

34. The CHAIRMAN said that most of the points mentioned had been discussed at the time of adoption of the articles. He urged the members not to reopen matters that could not be resolved.

Paragraph (10) was adopted.

Paragraph (11)

35. Following a brief discussion in which Mr. LUKASHUK, Mr. ROSENSTOCK and Mr. PELLET took part, Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the phrase "although non-binding" should be deleted from the last sentence of the paragraph.

Paragraph (11), as amended, was adopted.

Paragraph (12)

Paragraph (12) was adopted.

Paragraph (13)

36. Mr. TOMUSCHAT proposed that the fourth sentence should be deleted. The reference to the Falklands/Malvinas crisis was out of context and implied that the Commission agreed that the trade sanctions in question were a form of economic aggression.

37. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in his view, the sentence should be retained. The word "alleged" indicated that the Commission was not taking a stand on the issue.

38. Mr. PELLET endorsed the Special Rapporteur's remarks. Indeed, the Falklands/Malvinas example was apposite.

39. Mr. MAHIOU said that Mr. Tomuschat's proposal called the entire paragraph into question. The Falklands/Malvinas example could not be deleted without deleting the other examples in the paragraph. All of the examples were simply allegations. The Commission was not responsible for them and they should be maintained.

40. Mr. ROSENSTOCK said he endorsed Mr. Tomuschat's views. In fact, the rest of the paragraph following the words "involve countermeasures in a strict sense." should be deleted, since it implied that the Commission believed there was some validity to those arguments.

41. The CHAIRMAN suggested that the paragraph should end after the footnote which followed those words, and that all the examples should be included in that footnote.

42. Mr. PELLET said that he was opposed to that suggestion. The Commission would be retaining two irrelevant examples, those of Bolivia and Cuba, and eliminating the relevant examples.

43. Mr. YANKOV proposed that all the examples should be relegated to the footnote, for which the reference should be placed after the phrase "or other catastrophic effects", in the second sentence.

44. Mr. de SARAM proposed that the word "alleged" should be added before the expression "economic strangulation", in the second sentence.

45. The CHAIRMAN noted that, in keeping with accepted practice throughout the United Nations, examples should not be given in a way that would reopen discussion. Placing the examples in a footnote would make them less sensitive issues, without undermining their value.

46. Mr. IDRIS said he endorsed Mr. Yankov's proposal and also suggested that the footnote should include the sentence "This list is not intended to be exhaustive". On quite another matter, all references to the Soviet Union should contain the word "former".

47. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Yankov's proposal.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

48. Mr. ROSENSTOCK proposed a new formulation for the paragraph. The first sentence would remain unchanged. The rest of the paragraph would read:

"Not all forms of countermeasures relating to diplomatic law or affecting diplomatic relations are considered unlawful. An injured State may resort to countermeasures affecting its diplomatic relations with the wrongdoing State, including declarations of *persona non grata*, the termination or suspension of diplomatic relations and the recalling of ambassadors."

49. Mr. TOMUSCHAT said that the examples given were not countermeasures but political decisions.

50. Mr. PELLET proposed that the phrase "the recalling of ambassadors" should be placed between "declarations of *persona non grata*" and "the termination or suspension of diplomatic relations". On a more general level, he had doubts about the advisability of article 14, subparagraph (*c*), which was, moreover, contradicted by the examples given in the first footnote to paragraph (17) of the commentary. He would develop those ideas further when that paragraph came to be discussed.

51. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Tomuschat's objection might be met if the word "countermeasures", in the fourth line, was replaced by "measures". As for Mr. Pellet's doubts, the subparagraph as he had originally drafted it had been quite different. Since the paragraph had already been adopted, however, Mr. Pellet's point would have to be considered when the article was discussed on second reading.

52. The CHAIRMAN asked whether the Special Rapporteur and Mr. Tomuschat might draft a new text for paragraph 15 in the light of the comments made.

It was so agreed.

Paragraph (16)

53. Mr. TOMUSCHAT proposed that the opening phrase should be replaced by "The area of prohibited countermeasures is delineated by those rules of diplomatic law" or by some wording along those lines.

Paragraph (16), as amended, was adopted.

Paragraph (17)

54. Mr. PELLET, said that the first footnote to paragraph (17) gave two different examples of the proposition stated at the beginning of the paragraph. Indeed, the first example directly contradicted the provision contained in article 14, subparagraph (*c*). He would therefore like the record to show that he had serious doubts about the wording of that subparagraph. In particular, he was not certain whether, so far as the infringement of the diplomatic privileges and immunities of a State's own representatives was concerned, the prohibition on reprisals or countermeasures was as well established as all that.

55. Mr. THIAM said that he shared Mr. Pellet's concern. The examples given were not very appropriate.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the difficulty with article 14, subparagraph (*c*) could be dealt with on second reading. The two examples cited in the footnote had been given simply to throw light on the problem.

57. The CHAIRMAN suggested that the Commission should take note of the fact that some members felt strongly that the examples given were not accurate examples of countermeasures and that it should agree to revert to the matter on second reading.

It was so agreed.

Paragraph (17) was adopted on that understanding.

Paragraph (18)

58. Mr. TOMUSCHAT said that paragraph (18) simply repeated the content of paragraph (16). It should be deleted.

It was so agreed.

Paragraphs (19) to (23)

Paragraphs (19) to (23) were adopted.

Paragraph (24)

59. Mr. TOMUSCHAT said that the paragraph was misleading and should be couched in more cautious terms. In its present form, it seemed to suggest that to suspend a treaty which provided for assistance in the field of, say, education would be unlawful. That would

be going too far and would place too much of a restriction on the political discretion of States.

60. Mr. de SARAM, agreeing with Mr. Tomuschat, said that it was not just a matter of drafting. A difficult issue was involved and it would have to be considered later.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) suggested that the problem might be overcome by adding, at an appropriate point, some non-committal phrase such as "Mention may be made of the following incidents which might be of some interest in considering the problem".

62. Mr. ROSENSTOCK said that a phrase along the lines suggested by the Special Rapporteur would help. It would also be helpful if the example of the measures taken by France was deleted.

63. Mr. KABATSI said that he would have preferred the commentary to refer to State A, State B and so on, rather than to incidents involving specific States, something which could only open old wounds. Moreover, to cite incidents involving just two or three States in a region could paint a particular picture of that region.

64. Mr. MAHIOU said that the Special Rapporteur had been faced with the problem of how to refer to State practice, as required by the statute of the Commission, in terms that were not unduly abstract. Admittedly, the first example cited was not relevant in terms of countermeasures and it could perhaps be deleted. Also, the phrase suggested by the Special Rapporteur might be amplified by a sentence to the effect that: "The examples which do not necessarily correspond to a situation involving countermeasures may serve as an illustration." But, given the lack of time, the most practical course might be to adopt Mr. Rosenstock's suggestion.

65. Mr. IDRIS said that he sympathized with Mr. Kabatsi. In particular, he was not at all sure about the relevance of the two examples cited in the first footnote to paragraph (17), which should perhaps be deleted.

66. Mr. AL-KHASAWNEH said he was at a loss to understand such extreme sensitivity about referring to specific countries by name. The examples given were readily available in literature published all over the world. Was the Commission's report to be pure theory, without reference to anything that had happened in the past? He for one did not favour such a timid approach.

67. Mr. THIAM said that, while he understood Mr. Al-Khasawneh's view, the point he had made earlier was that the examples referred to in the footnote were not, strictly speaking, countermeasures. It would therefore be better not to refer to them at all and he would propose that the footnote should be deleted.

68. Mr. de SARAM said he could not disagree more with Mr. Al-Khasawneh. The Commission had before it commentaries to draft articles, not summaries of the views expressed on those articles. Moreover, neither of the examples given had been discussed either in plenary or in the Drafting Committee. Hence he, too, would prefer to speak of State A, State B and so on, rather than specific cases.

69. Mr. ARANGIO-RUIZ (Special Rapporteur) said he could not agree that it would be better to refer to State A, State B and so on, which was altogether too academic, rather than to specific cases that were of relevance. The idea behind the paragraph was to convey the notion that States which applied any kind of measures, whether countermeasures or retortion, were sensitive to humanitarian considerations. In view of the objections raised, however, the first example cited concerning the personal security forces of Bokassa, could be deleted.

70. Mr. PELLET said he objected very strongly to the suggestion that States should not be named but only referred to by letters. The Commission had to illustrate what it was saying. The question of condemnation did not arise. Such an excess of diplomatic caution was, in his view, entirely out of place in a body that was composed not of diplomats but of legal experts. In his opinion, the example concerning Bokassa was a good one, for it showed that fundamental human rights had been taken into account. If he considered some examples inappropriate, it was certainly not because they might cause offence in certain quarters but because their relevance was questionable.

71. Mr. AL-KHASAWNEH said that he was, at best, only half convinced by Mr. de Saram's arguments. A proper sense of the Commission's importance ought not to lead members to belittle the importance of other United Nations bodies. As a Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities, he had had to deal with a highly sensitive subject, but that had not prevented him from naming names or prevented the Commission on Human Rights from adopting the report of the Subcommission on the subject.

72. Mr. MAHIOU said that the passages appearing in English in the French version of paragraph (24) should be deleted. They were unnecessary and confusing.

73. Mr. THIAM said he agreed that the members were not there to defend the susceptibilities of States. However, the examples in the footnote were inappropriate and should be deleted.

74. The CHAIRMAN suggested that the Commission should adopt paragraph (24) on the understanding that the examples would, as far as possible, be relegated to footnotes. A disclaimer would be added, indicating that the examples were merely illustrative and, in some cases, did not represent countermeasures, and making it clear that the Commission was not taking a position on the cases referred to or prejudging the positions of the parties involved.

75. Mr. TOMUSCHAT said that he was prepared to agree to the adoption of paragraph (24) subject to the addition of an explanatory sentence along the lines just indicated by the Chairman. However, the words in the third sentence, "by way of countermeasures", relating to the United States blockade of trade relations with the Libyan Arab Jamahiriya , should be deleted.

Paragraph (24) was adopted on the understanding outlined by the Chairman.

Paragraph (25)

76. Mr. LUKASHUK questioned the correctness of the statement appearing in the first sentence of the paragraph, which seemed to be at variance with the quotation in the footnote which followed.

Paragraph (25) was adopted.

Paragraph (26)

Paragraph (26) was adopted.

Paragraph (27)

77. Mr. TOMUSCHAT proposed that the first sentence should be deleted.

Paragraph (27), as amended, was adopted.

Paragraphs (28) and (29)

Paragraphs (28) and (29) were adopted.

Organization of the work of the session (*concluded*)**

[Agenda item 2]

78. The CHAIRMAN, noting that the Commission still had before it the commentary to article 11 of part two and commentaries to part three of the draft articles on State responsibility and commentaries to articles A, B, C and D on international liability for injurious consequences arising out of acts not prohibited by international law, invited members to decide whether a meeting was to be held in the afternoon and, if so, what items were to be discussed and in what order.

79. Mr. AL-KHASAWNEH proposed that the Commission should meet in the afternoon, if only out of courtesy to Mr. Barboza, the Special Rapporteur on the topic of international liability for injurious consequences arising out of acts not prohibited by international law.

80. Mr. PELLET said that he wished to place on record his strong objection to having to engage in the essential exercise of adopting commentaries to draft articles under conditions of extreme pressure of time. If the Commission decided to meet in the afternoon, he was willing to cooperate, but only under protest.

81. Following a discussion in which Mr. ROSENSTOCK, Mr. AL-BAHARNA and Mr. EIRIKSSON took part, Mr. YANKOV formally moved under rule 71 of the rules of procedure of the General Assembly that the Chairman should rule that a meeting of the Commission should be held in the afternoon and that the remainder of the present meeting should be used for substantive, rather than procedural, matters.

82. The CHAIRMAN, having ensured the presence of a quorum, made a ruling in accordance with that suggestion.

83. Mr. PELLET appealed against the Chairman's ruling.

The Chairman's ruling was upheld by 9 votes to 5, with 3 abstentions.

84. The CHAIRMAN, noting that there was no time left for further substantive discussion at the current meeting, said that at the afternoon meeting the Commission would revert to the consideration of paragraph (15) of the draft commentary to article 14 of part two of the draft on State responsibility, which had been left in abeyance. It would then proceed to consider the commentary to article 11 of part two and the commentaries to part three of the draft on State responsibility, as well as the commentaries to articles A, B, C and D of the draft on international liability for injurious consequences arising out of acts not prohibited by international law.

85. Mr. PELLET said that he was entirely opposed to the consideration of the commentary to article 11.

86. Mr. ROSENSTOCK said that the question whether the commentary to article 11 should or should not be considered would have to be decided by a vote. As for the method of dealing with part three (A/CN.4/L.520), he would recommend leaving the introduction aside and proceeding immediately to the consideration of the substantive part, beginning with the commentary to article 1.

The meeting rose at 1 p.m.

2425th MEETING

Friday, 21 July 1995, at 3.15 p.m.

Chairman: Mr. Pemmaraju Sreenivasa RAO

later: Mr. Alexander Yankov

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. de Saram, Mr. Eiriksson, Mr. Idris, Mr. Lukashuk, Mr. Mahiou, Mr. Mikulka, Mr. Pellet, Mr. Rosenstock, Mr. Tomuschat, Mr. Villagrán Kramer.

** Resumed from the 2422nd meeting.