Document:-

A/CN.4/SR.2645

Summary record of the 2645th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

2000, vol. I

subparagraph (*b*) was assessed on a case-by-case basis and in the light of the particular circumstances. Articles 46 quinquies and sexies were also acceptable. He therefore considered that chapter I of Part Two bis, as proposed by the Special Rapporteur, should be referred to the Drafting Committee.

64. Mr. LUKASHUK, referring to article 46 ter, paragraph 1, said that the word "should" ought to be retained and not, as some members had suggested, replaced by the word "shall", which implied obligation. If an injured State were obliged to specify in its claim what form reparation should take, that might be interpreted as meaning that an injured State which did not request compensation, for example, was subsequently not entitled to make such a claim.

The meeting rose at 12.40 p.m.

2645th MEETING

Tuesday, 25 July 2000, at 10.05 a.m.

Chairman: Mr. Chusei YAMADA

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

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. HE said the Special Rapporteur was to be congratulated on his initiative in putting together the new Part Two bis on implementation of State responsibility, which was marked by its comprehensive nature and well reasoned and balanced argumentation. It would undoubtedly occupy an irreplaceable position in the draft articles.

2. Article 46 ter, paragraph 1, contained a crucial element in the invocation of responsibility: the need for the injured State to give notice to the responsible State of its claim. Paragraphs 234 and 236 of the third report (A/CN.4/507 and Add.1–4) stressed the need for the injured or interested State to respond to the breach, the first step being for it to call the attention of the responsible State to the situation so that it would cease the breach and provide redress. According to paragraphs 236 and 237, care should be taken not to over-formalize the notification procedure, as ICJ did not attach much significance to formalities. The various forms of notification, from an unofficial or confidential reminder to a public statement or formal protest, could be taken as suitable means of notification, as circumstances required, but failure to make such notification to the responsible State could entail serious legal consequences, including loss of the right to invoke responsibility.

3. With all those requirements specified for notification of a claim of responsibility, one thing might appear to be missing: the time factor. Was there any time limit for notification? The answer lay in article 46 quater, subparagraph (*b*), which indicated that the claim had to be made known to the responsible State "within a reasonable time" after the injured State had notice of the injury. Accordingly, the time factor should be mentioned in the commentary.

4. He agreed with the Special Rapporteur that paragraph 2, subparagraphs (*a*) and (*b*), of article 46 ter, referring to nationality of claims and exhaustion of local remedies, set out general legal principles whose coverage was not confined to cases of diplomatic protection, i.e. those concerning treatment of foreign nationals and corporations, and that the principles should be treated as general conditions for the invocation of State responsibility. Like other members, however, he thought that paragraph 2 should be incorporated in a separate article, since it dealt with the conditions under which a State's responsibility could not be invoked, whereas paragraph 1 concerned the need to give notice.

5. He welcomed the adoption of the traditional distinction between waiver and delay in article 46 quater and especially liked the wording of subparagraph (*b*), which struck a fair balance between the interests of the injured State and those of the responsible State. Some difficulties arose, however, with regard to settlement. Admittedly, under subparagraph (*a*), unqualified acceptance by the injured State of reparation tendered by the responsible State could be regarded as a type of waiver. Nevertheless, in most circumstances unilateral action by one State was not enough: settlement had to be reached through the actions of both States with a view to achieving a solution that benefited both. In general terms, settlement could not therefore be categorized as a kind of waiver and must be treated separately.

6. In the absence of a specific solution with regard to a plurality of injured States (art. 46 quinquies) and a plurality of States responsible for the same internationally wrongful act (art. 46 sexies), it was desirable to follow the

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

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

proposed general principle that each State was responsible for its own conduct in respect of its own international obligations and that each injured State was entitled to claim reparations from any responsible State for losses flowing from and attributable to an act of that State, subject to the proviso in article 46 sexies, paragraph 2. As pointed out in the report, situations in which there were several injured States or responsible States in regard to one and the same wrongful act did not seem to have caused any difficulties in practice that required specific regulation in the draft over and above what was set out in article 46 quinquies.

7. Mr. TOMKA said the Special Rapporteur was to be congratulated on his suggestion to draft a new Part Two bis, since it was a big improvement over the text adopted on first reading, especially as far as countermeasures were concerned.

8. The first issue that called for attention was the so-called "right" of the injured State to choose the form of reparation. Although article 46 ter did not speak expressly of such a right, paragraph 1 (*b*) appeared to imply it. During the discussion, the Special Rapporteur seemed to have confirmed that interpretation. In paragraph 232 of the report, the Special Rapporteur stated much more clearly that it was desirable to spell out the right of election expressly. In paragraph 233, he suggested that it was sufficient to refer to a "valid" election of one of the forms of reparation leaving the conditions of validity to be determined by general international law. Was the right of election to be construed as a subjective right of an injured State, to which corresponded an obligation on the part of the responsible State to provide the form of reparation that had been "validly" elected by the injured State? Apparently yes, according to the statement in paragraph 233 that under the draft articles, such an election should be given effect. But was that conclusion in harmony with the Special Rapporteur's criticism, in paragraph 227 of the report, that Part Two as adopted on first reading allowed for no element of choice or response on the part of other States, or indeed on the part of the responsible State itself?

9. Two cases had been cited with reference to the "right" of election: the *Chorzów Factory* and the *Great Belt* cases. In the first, Germany had preferred compensation to the possibility of restitution. In the second, Finland had eventually chosen compensation, although the settlement had been reached before an internationally wrongful act had actually been committed, for in 1992 the bridge had not yet been built and the right of free passage of oil rigs and drill ships had not been impeded. It was a situation analogous to that of the *Gab Ź kovo-Nagymaros Project* case, when one of the parties had started construction in its territory in 1991 that had had no impact at that time on the other State, although the possibility of modifying the works or reaching an agreement on them had then existed. In the *Great Belt* case, it had still been possible to modify the project to build a bridge or reach an agreement on it. With no internationally wrongful act committed at the time, the issue of Denmark's responsibility would not have arisen, nor would the duty of restitution or compensation within the meaning of articles 43 and 44. Finland, in exchange for a sum of money to be paid to its shipyards, had agreed to the continuation of construction of the bridge, which had in fact been put into operation in 2000.

10. In practice, election was most frequently between restitution and compensation. In paragraph 143 of his report, the Special Rapporteur rightly concluded that the principle of the priority of restitution should be retained. Article 44 expressed that priority by providing that a State which had committed an internationally wrongful act had an obligation to compensate for damage "to the extent that such damage is not made good by restitution". Accordingly, article 46 ter could not be construed as confirmation of a subjective right of an injured State to elect the form of reparation. Such election should be an option for the injured State. If the injured State was seeking restitution and the restitution was not materially impossible or would not involve a burden out of all proportion to the benefit gained from obtaining restitution instead of compensation, then the responsible State had the obligation to provide such restitution. If the injured State was seeking compensation, instead of restitution, although restitution was not materially impossible or would not involve a disproportionate burden, then two basic scenarios were possible. Either the responsible State agreed to compensation instead of restitution and, by such agreement, the priority of restitution was set aside *ad casum*; or the responsible State did not agree to paying compensation and expressed its willingness to provide restitution. In such a case the injured State should not have the right to refuse to accept restitution and insist on compensation, yet if article 46 ter was construed as providing for a right of the injured State to elect the form of reparation, that would be the result. Since the so-called "right" of election was not expressly spelled out in that provision, his criticisms were directed against the relevant paragraphs of the report, which would apparently serve as the basis for the preparation of the commentary to article 46 ter.

11. For article 46 ter, paragraph 1 (*b*), he would prefer the wording "what form of reparation it seeks" to "what form reparation should take". He had doubts about the conclusion in paragraph 247 that the *non ultra petita* rule was the procedural complement of the more basic principle that an injured State was entitled to elect from among the remedies available to it in the context of full reparation. He himself viewed the *non ultra petita* principle as a principle of the law of judicial proceedings, or a general principle of law, applicable not only to issues of State responsibility but in a much broader context—for instance, to claims in matters relating to maritime or territorial delimitations. Since the Commission was not concerned with codification of the law of judicial proceedings, there was no need for it to enunciate that principle.

12. The phrase "nationality of claims" in paragraph 2 (*a*) of article 46 ter, was imprecise, even though it was sometimes used in the doctrine and in the practice of the United Kingdom and other States. "Nationality" described a special relationship between a person and a State, not between a claim and a State. What was really meant was the nationality of a person on whose behalf a claim was put forward by a State. In its future work, the Commission should seek to improve on the phrase "nationality of claims". The rule on exhaustion of local remedies also fell under the separate topic of diplomatic protection. There was no room for applying the two rules in the area of State responsibility for an internationally wrongful act that injured a State directly, and not through

its nationals. Paragraph 2 was therefore unnecessary. Such matters would better be left for the Commission's further work on the topic of diplomatic protection, and it might be sufficient to include in Part Four a saving clause with respect to the rules on diplomatic protection.

13. As for article 46 quater, he agreed that when a State waived a claim it could no longer invoke responsibility, but it was doubtful whether unqualified acceptance of an offer of reparation could be subsumed under the category of waiver. Either a State proposed a form of reparation and it was accepted, in which case agreement, not waiver, was involved, or, if a form of reparation was actually provided, there was no justification for the invocation of responsibility, since the obligation of reparation had been fulfilled.

14. The word "reparation" would be preferable to "compensation" in article 46 sexies, paragraph 2 (*a*). He also wondered whether the phrase "admissibility of proceedings", in paragraph 2 (*b*) (i), was correct. Should it not be replaced by "admissibility of a claim" or "admissibility of an application"?

15. Mr. KABATSI said he had no reason to disagree with the recommendation, generally endorsed by members, that draft articles 46 ter, quater, quinquies and sexies should be referred to the Drafting Committee. They followed from the well-researched reasoning set out in chapters II and III of the third report. The Special Rapporteur deserved the praise he had already received for his outstanding work, in which praise he himself wished to join.

16. He accepted in principle the provisions in article 46 ter, which would undoubtedly be further refined by the Drafting Committee. Paragraph 1 dealt with the way notice of a claim should be given. The Special Rapporteur had pointed out that it should be in writing, which was the normal mode of inter-State communication, but recognized that care should be taken not to over-formalize the procedure. Judicial attitudes suggested that no formality was required for transmission of notice. On the other hand, the Special Rapporteur underlined the importance of giving effective notice to the respondent State if the claim was to be successfully entertained. In order to maintain the requisite flexibility, the word "notice" in paragraph 1 should not be modified by words such as "officially" or "in writing", as some members had suggested. He would prefer the wording proposed by the Special Rapporteur. In addition, paragraph 2 was sufficiently clear about the limitations on the invocation of responsibility and no further detail was required. Further treatment of the issue was, in any event, the subject of another topic, diplomatic protection.

17. In the main, he could accept article 46 quater, although he could not see the need for subparagraph (*b*), on delay. The subparagraph could be deleted and delay could be mentioned in subparagraph (*a*), as could termination or suspension of the obligation breached.

18. Mr. GOCO commended chapter III, which was not only comprehensive and cogent but had also brought out contemporary legal principles and rules. The Special Rapporteur's work was undoubtedly what the Sixth Committee had envisaged when, after the first reading of the draft articles, it had approved the approach of updating and streamlining it.

19. Chapter I of Part Two bis, entitled "Invocation of the responsibility of a State", combined substantive rights and procedural rules. The former pointed to the right of the injured State to invoke the responsibility of another State, while the procedural rules related to the modalities of that invocation. There was no question about the right of the injured State to elect the form of reparation, although there was nothing to prevent the States parties, injured and responsible, from entering into an agreement vis-à-vis reparation payments. Such agreements had been common as an aftermath of the Second World War. The Special Rapporteur had got the balance right and he therefore registered no objection to the formulation of article 46 ter, paragraph 1.

20. The admissibility rule in article 46 ter, paragraph 2, ran the risk of raising a plethora of other issues. A simple provision on the nationality of claims might suffice. The premise behind the nationality of claims was the existence of the legal interest of a State when nationals and entities with a sufficient connection with that State suffered injury in another State. Moreover, there were many refinements to the concept, including such instances as continuity of nationality, change of nationality, international agreement or internal legislation. All that tended to suggest, that, as stated in paragraph 242, the topic of diplomatic protection would deal with the matter more appropriately. He was similarly persuaded by the argument in paragraph 241 that a saving clause should be inserted, in lieu of article 22, reserving cases covered by the exhaustion of local remedies rule. Some local laws, after all, were intrinsically defective or there might be laxity or arbitrariness in their enforcement. In that context he looked forward to further discussion of the Calvo clause,[3] whereby an alien waived the right of appeal to his own State in contracts entered into in another State.

21. The *non ultra petita* principle was sensible when applied to international litigation. It was not novel: domestic courts invariably applied it. Even if the evidence tended to support a larger claim, the court was generally constrained to limit the award to the one asserted. He therefore agreed with the Special Rapporteur's conclusion, in paragraph 247, that there was no need for the principle to be spelled out in further detail, lest it limit the flexibility of international tribunals in deciding on the appropriate combination of remedies. Similarly, the rule against double recovery could indeed be subsumed in the general principle of full, equitable reparation, although as pointed out in paragraph 248 there was a possibility of different persons being entitled to bring the same claim before different forums. That raised the issue of identity of parties, claims or relief that might lead to a bar to the claim. There was also the danger of "forum shopping", whereby the parties presented claims in different forums. That, however, was basically a procedural point that should be taken into consideration by tribunals or by an alert respondent.

22. In article 46 quater, the use of the word "validly" to describe waiver ruled out any vitiated consent to the waiver. Equivocation might exist when the relationship was between individuals, but perhaps not between States

[3] See 2625th meeting, footnote 2.

parties when decisions were formulated by office bearers. He suggested, however, that "renounce" might be a useful improvement on "waiver", despite the Special Rapporteur's cogent explanation of his choice of the latter. To renounce implied a formal declaration that a right was being relinquished. In that context the application of "laches" might be appropriate, perhaps under subparagraph (*b*), in cases where a claim was not brought to the attention of the responsible State within a reasonable time. Estoppel was another possibility.

23. As stated in paragraph 259, there were no clear-cut limits in measuring the lapse of time, in the practice of international courts. It was hard to measure a reasonable expectation that a claim could not be pursued. Sometimes circumstances prevented a State from bringing its claim seasonably. Such a problem had faced the Philippines at a time when the Sultan of Sulu had enjoyed proprietary rights over Sabah, Borneo, which he had then ceded to the Philippine Government, even when it was part of a commonwealth. Only when independence had been gained in 1946 had the Government asserted its claim over the territory, by which time a British company—and later Malaysia—had consolidated their hold over that territory. The issue of delay had been ventilated during the diplomatic negotiations between the Philippines and Malaysia. Malaysia had, however, refused to be a party before ICJ.

24. He had no quarrel with the question of settlement: to be reached, it must have the concurrence of both parties and unilateral action was not enough. The reference to the 1969 Vienna Convention was appropriate, given the proviso in the Convention that the termination of a treaty did not impair or affect any obligation or right to reparation. Articles 46 quinquies and sexies were well served by the commentary, particularly paragraph 282, which provided a summary. It was his understanding that the summary set out the responsibility of each State for its conduct and the entitlement of any injured State; the latter could not recover more compensation than its loss and where more than one State was responsible, questions of contribution might arise between them. Such situations had often occurred. OAU had identified several States and entities responsible for the 1994 genocide in Rwanda. The same might apply in the case of mutual defence pacts, where an attack against one State constituted an attack against its partners. Moreover, any State involved in the pact could be responsible for the implementation of the mutual defence. The States comprising NATO could become liable severally and the cases before ICJ on *Legality of Use of Force*, relating to the bombing of Belgrade, could have triggered the issue of plurality. In that context, the peculiarity of joint and solidary obligations was the concurrence of several parties; the plaintiff could seek relief from any one of the parties, which in turn had a right of recourse for contribution from the others. The principle was well laid out in article 46 sexies and in paragraph 282 of the report.

25. Rosalyn Higgins, a judge at ICJ had written that there seemed to be no topic that was not embraced by State responsibility.[4] In his view, however, the tendency to make State responsibility the "law of everything" had led to considerable problems in concluding the Commission's work on the topic. The wide coverage of State responsibility was clear from the variety of articles debated and scrutinized, which showed clearly that, far from being unrealistic, international law was relevant, timely and vibrant. The topic of reparation was a shining example of that.The draft articles should be referred to the Drafting Committee.

26. Mr. KUSUMA-ATMADJA congratulated the Special Rapporteur on his third report. In view of the illuminating comments by other members and, in particular, by Mr. Goco, there was little he could add to the discussion.

27. Mr. AL-BAHARNA said that the Special Rapporteur had been right to insert article 40 bis in chapter I of Part Two bis, since it contained the definition of an "injured State". He questioned, however, the wisdom of numbering the new draft articles as 46 ter to 46 sexies, which could give rise to confusion and even misunderstandings. The effect was to overload article 46, which would in any case eventually have to be split up into several articles. A simpler method of numbering could surely have been found.

28. He drew particular attention to paragraphs 227 and 228 of the report, which showed up the distinction between the secondary consequences of an internationally wrongful act and the ways in which those consequences could be dealt with. In paragraph 232, the Special Rapporteur discussed election between forms of reparation, which could include compensation, restitution or cessation. That approach to the problems posed in the text of Part Two as adopted on first reading provided certain necessary improvements by reflecting the element of choice or response on the part of both the injured and the responsible State.

29. The wording of the proposed draft articles could, however, have been tightened up in some instances. The word "seeks", in article 46 ter, paragraph 1, tended to weaken the provision. Moreover, the word "notice" should be replaced by the words "a written notification" and the words "shall" and "should" required coordination. Lastly, the phrase "under these articles" should be replaced by the phrase "under this Part". The paragraph would thus read:

> "1. An injured State which invokes the responsibility of another State should give written notification of its claim to that State, in which it should specify:
>
> "(*a*) What conduct on the part of the responsible State is required to ensure cessation of any continuing wrongful act, in accordance with the provisions of article 36 bis;
>
> "(*b*) What form reparation should take."

30. Such a reformulation had a number of advantages. First, the omission of the word "seeks" would strengthen the thrust of the paragraph. Secondly, the substitution of "a written notification" for the word "notice" was in line with articles 23 and 67 of the 1969 Vienna Convention, both of which referred to notification in writing. It was also in accord with the Special Rapporteur's own thinking, as reflected in paragraph 238 of the report and in the

[4] R. Higgins, *Problems and Process: International Law and How We Use It* (New York, Oxford University Press, 1994).

footnote thereto. The word "notification" was preferable to the word "notice" because it was less formal and would thus correspond with the judgment of ICJ in the case concerning *Certain Phosphate Lands in Nauru*, referred to in paragraph 237. The draft article should be made more flexible, in order not to give the responsible State an excuse for not complying with its obligations by claiming that no formal notice had been given. A written notification could take any form. As for the replacement of "shall" by "should", it too could be justified on the implied basis of the judgment of the Court in that case, since the word "should" would leave room for the flexibility required in the form of communication addressed by the injured State to the responsible State. The Special Rapporteur himself had said, in paragraph 238, that there must be at least some minimum requirement of notification by one State against another of a claim of responsibility.

31. The necessity for a written notification or communication was confirmed by the analogy with the 1969 Vienna Convention, and also by the Special Rapporteur when he said in paragraph 238 of the report that it seemed appropriate to require that the notice of claim be in writing. That being said, there was no excuse for the Special Rapporteur's failure explicitly to reflect that requirement in the text of paragraph 1 of the proposed article.

32. The words "in its view", in paragraph 1 (*a*), should be omitted as having no place in the language of legal drafting. With regard to paragraph 1 (*b*), it should be noted, first, that restitution should have priority over any other form of reparation; and secondly, that the right of the injured State to elect or choose the form of reparation was not absolute, but was subject to certain limitations. Those limitations were discussed by the Special Rapporteur in paragraph 134 of his report, which stated that no option might exist for an injured State to renounce restitution if the continued performance of the obligation breached was incumbent upon the responsible State and the former State was not (or not alone) competent to release it from such performance. It thus seemed necessary to reflect those views in paragraph 1 (*b*).

33. Moreover, the wording of paragraph 1 (*b*) should be qualified so as to reflect the fact that, in practice, the form of reparation to be provided by the responsible State was usually negotiated, through diplomatic channels, by the injured and the responsible States. Consequently, the States concerned might reach a resolution of the claim by means of a settlement agreement achieved through bilateral negotiations. In so doing, they might settle for compensation instead of restitution. Furthermore, following bilateral negotiations, the injured State might agree to waive its claim altogether, or to accept satisfaction as a form of reparation. Therefore, it was not for the injured State alone to elect the form of reparation. All those possibilities could allow for a resolution of the claim of responsibility on the basis of the joint conduct of both the injured and the responsible States, which, acting together, might choose any form of reparation, or give preference to one specific form of reparation over another. Paragraph 1 (*b*) should, consequently, reflect those possibilities.

34. Paragraph 2 of article 46 ter should be reformulated so as to comprise a new, separate article entitled "Conditions for the invocation of responsibility". The new article should be formulated in positive rather than negative terms, and should read:

"*Article X*

"The invocation of the claim of responsibility by an injured State under article 46 ter shall conform to:

"(*a*) Any applicable rule relating to the nationality of claims;

"(*b*) Any rule of the exhaustion of local remedies, where the claim of responsibility is one to which such a rule effectively applies."

35. The advantage of formulating the provision as a separate article was to present it as a purely procedural article required in the context of article 46 ter alone in order to render that article comprehensive, for article 46 ter would be incomplete if no reference was made to nationality of claims and the exhaustion of the local remedies rule. At the same time, he had avoided reference to the second phrase of paragraph 2 (*b*), so as not to avoid substantive issues relating to the rule of exhaustion of local remedies, which properly belonged under another topic, that of diplomatic protection.

36. Moreover, any simplification of that rule or principle in the context of Part Two bis of the draft would seem to be in line with the objective mentioned in paragraph 241 of the report, which said that the saving clause should be in quite general terms: it should cover any case to which the exhaustion of local remedies rule applies. Of course, the commentary would need to mention the exceptional cases to which the exhaustion of local remedies rule might not apply in the context of claims of responsibility. Paragraph 241 of the report cited examples of human rights violations to which the rule should not apply. Needless to say, there would now be no need for the detailed substantive article 22 on exhaustion of local remedies, contained in Part One. That article should accordingly be deleted. In any case the Special Rapporteur on the topic of diplomatic protection, Mr. Dugard, could rest assured that, in adopting a harmless procedural article to complement article 46 ter, the Special Rapporteur on State responsibility would not be trespassing on his preserve.

37. In general terms, he had no problem with article 46 quater. Subparagraphs (*a*) and (*b*) should, however, be renumbered paragraphs 1 and 2. In subparagraph (*a*), the words "validly waived" should reflect all cases or modes of waiver to which the Special Rapporteur referred in paragraphs 253 to 256 of the report, in which he rightly described waiver as a manifestation of the general principle of consent. It was also interesting to note from paragraph 256 that a waiver might exceptionally be inferred from the conduct of the State concerned, although Australia's argument to that effect in the case concerning *Certain Phosphate Lands in Nauru* had been rejected by ICJ.

38. The other problem in subparagraph (*a*) concerned the phrase "or in some other unequivocal manner". It was ambiguous and should be reformulated so as to reflect the intended meaning more clearly. The other circumstances that might lead to loss of the right to invoke responsibility, such as delay, settlement and termination or suspension of

the obligation breached should be specifically mentioned in the paragraph itself, or at least in the commentary thereto.

39. The word "notice" in subparagraph (*b*) should be replaced by "knowledge". The words "within a reasonable time" served a useful purpose, as they would leave it to the court to decide, on the merits of each claim, whether the delay in notification constituted grounds for loss of the right to invoke responsibility. It was doubtful whether what was referred to in the third report as "extinctive prescription" would operate, in the strict sense, in such claims of responsibility. ICJ was inclined to adopt a flexible position on the question of the time limit for each claim, on a case-by-case basis.

40. The principle set forth in article 46 quinquies, reflected the prevailing practice whereby each injured State was permitted to make a separate claim. In order to emphasize that principle, it might be advisable to replace the phrase "on its own account" by "in its own right". The article should also reflect the various problems arising where there was disagreement between the injured States concerning the forms of reparation claimed.

41. Article 46 sexies, paragraph 1, posed a problem, for the words "to be determined" seemed inappropriate, as Mr. Economides had already pointed out. Paragraph 1 should be redrafted to read: "Where two or more States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to the internationally wrongful act committed by that State." That reformulation would bring the terminology into line with that of article 46 quinquies, and with the title of chapter I of Part Two bis. His preference for the verb "may", and his omission of the words "in accordance with the present draft articles", were also motivated by a desire for consistency.

42. Paragraph 2 of article 46 sexies had drawn criticism from other members. It appeared to be out of place in the article. First, it bore no direct relation to paragraph 1 and secondly, it should properly refer, not to compensation, but to reparation. Furthermore, it should apply to States only, omitting the reference to persons or entities. However, he could not agree with Mr. Pellet that an analogy with internal law was dangerous or irrelevant in the context of paragraph 2 of the article. Judgments of ICJ provided a number of instances of recourse to such an analogy. However, if the Special Rapporteur envisaged codifying the principles referred to in paragraphs 243 to 249 of his report relating to the limits on the recovery of reparation, and the problems arising therefrom, paragraph 2 of article 46 sexies**,** with its reference to compensation alone, did not appear to exhaust those principles. In short, paragraph 2 should be redrafted, and placed elsewhere in the draft articles, perhaps in chapter II, on the forms of reparation, in the section on compensation.

43. Mr. KAMTO, referring first to article 46 ter, paragraph 1 (*b*), said that in paragraph 232 of his third report, the Special Rapporteur stated that an injured State was entitled to elect as between the available forms of reparation. Given that the form reparation would take was a matter negotiated between the States or, failing that, decided by an impartial third party, it seemed to him that that choice was not so much an entitlement (*un droit*) as a claim (*une prétention*)—a reading that paragraph 1 (*b*) seemed to confirm by its use of the word "should".

44. His second remark concerned the concept of acquisitive prescription. In article 46 quater, subparagraph (*b*), loss of the right to invoke responsibility was made conditional upon failure by the injured State to notify the responsible State within a reasonable time after it had notice of the injury. That condition, while faithfully reflecting current jurisprudence, might have to be tempered in the light of the realities of inter-State relations, for the concept of acquisitive prescription needed also to be considered in the context of States that had undergone a process of decolonization. In many cases, the evidence that would enable such States to invoke the responsibility of another State had not been made available to them on independence. One example was that of the events in the newly independent former Belgian Congo in 1960. Furthermore, it sometimes happened that newly independent States were prevented by civil war or protracted domestic strife from invoking the responsibility of another State. Somalia was an example, Sierra Leone a likely candidate. Consequently, a phrase to the effect that the injured State must "be in a position to establish the responsibility of the respondent State" should be inserted in article 46 quater, subparagraph (*b*), or at least in the commentary.

45. Mr. GALICKI said he fully understood Mr. Kamto's fears concerning the plight of States emerging from colonization, but believed that the expression "within a reasonable time after the injured State had notice of the injury" could be interpreted in such a way as to obviate those concerns. That point could be brought out in the commentary.

46. On another question, he noted that article 46 quater should logically address, first claims, then waivers thereto. Consequently, there was a case for reversing the order of subparagraphs (*a*) and (*b*).

47. Mr. CRAWFORD (Special Rapporteur), summing up the debate, said there appeared to be universal agreement that the draft articles discussed should be referred to the Drafting Committee. Many of the comments had related to, or raised points that could be accommodated in, the drafting of the articles. However, a few points of substance needed to be dealt with. He had taken careful note of all such points raised, and wished to apologize in advance to any members whose points he was unable to respond to individually in the very brief time currently available.

48. There had been general agreement that the draft articles should include a chapter on invocation, as distinct from the chapters dealing with the immediate consequences of an internationally wrongful act. It was of course implicit, if not explicit, in chapter III of the report that the rights of the injured State and of other States to invoke responsibility would find a place in Part Two bis. In that connection, he noted that the rather odd numbering of draft articles 46 ter to 46 sexies was explained by the need to locate them between articles 46 and 47. It was to be hoped that, at the end of its work on the topic at the current session, the Drafting Committee would renumber all

the articles, from article 1 through to the end, thereby obviating the need for recourse to Latin.

49. The first point of substance in relation to article 46 ter related to "notice"—a term Mr. Al-Baharna felt was more formal than "notification", but one he himself had intended to be less formal. There had been a divergence of views as to how formal the notification should be, and as to whether it should be in writing—a divergence reflected in the report, which said that the notification should be in writing, whereas the article itself did not. He tentatively favoured the latter view, one apparently shared by the majority within the Commission. That would be a matter for the Drafting Committee to consider.

50. A more substantial question was that of the election as between the forms of reparation. The first point to make was that the situation was clearly different where the question of reparation, including restitution, was implicated with the question of the continued performance of the obligation. It might well be that the injured State was not alone competent to release the responsible State from the continued performance of the obligation. No doctrine of election could override that situation. Thus, in the framework of election, the Commission was concerned only with a situation where restitution as to the past was at stake, and where no requirement of continued compliance arose. The question was whether, in those circumstances, the injured State could freely elect the form of reparation, or whether—where restitution was possible and compensation would be unduly burdensome—the responsible State could insist on restitution rather than compensation. Obviously, if the injured State had already suffered financially assessable loss, that must be compensated for in addition to restitution. He was not aware that that situation had ever arisen, and the problem was not an easy one to resolve in the abstract. That was why, in what was undoubtedly a defectively drafted article, he had chosen to use the word "validly", at least in relation to waiver; but the same applied, at least by implication, in relation to article 46 ter.

51. An example had been given, in a related context in which several injured States disagreed on the form of reparation, of two downstream co-riparian States, one of which was prepared to accept compensation in lieu of a proper flow of water, whereas the other was not. In that situation, the first downstream State would of course have an obligation to the second downstream State to ensure an appropriate supply of water. Consequently, an agreement between two upper riparian States might involve a breach of the rights of the lower riparian State to continued performance, not just of its rights in relation to past events. In any case, the question had been raised whether the articles should enter into detail, both on the matter of the validity of an election and on that of the problem arising where there was more than one injured State and disagreement between them. He had—instinctively rather than as a result of a conscious decision—not gone into detail on those points, partly because of the absence of guidance from State practice, and also because so much would depend on the particular circumstances. The inference to be drawn from chapter II of Part Two was probably that, in circumstances where restitution was available, each injured State had a right to restitution. It could be that that right prevailed over an election by another injured State—at least if that election had the effect of denying the right. If that was the correct answer, it should perhaps be spelled out in the article; or perhaps it could be adequately dealt with in the commentary. In any event, it was a point that went beyond the existing state of doctrine and practice, as Mr. Tomka had made clear in his thoughtful analysis. Mr. Tomka had rightly pointed out that the *Great Belt* case had not been one involving responsibility, because there had been no breach up to the moment of settlement, but merely a possible apprehended future breach. The *Chorzów Factory* case had, of course, involved a claim on behalf of a national in respect of compensation for property, where no one would deny that there was obviously a right to elect. Whether that right existed in all cases, even apart from questions relating to future performance, was a difficult question.

52. He agreed with the majority view that paragraph 2 of article 46 ter should be retained, but as a separate article. It raised the more general question of the relationship between the draft on State responsibility and the draft on diplomatic protection. For him diplomatic protection was not separate from State responsibility; it was a compartment of State responsibility. He agreed in essence with Mr. Al-Baharna and others who had argued that paragraph 2 should not go into much detail, but he did feel that it had its place and he would not be happy with a general saving clause with regard to diplomatic protection which would simply fail to say things that were of concern to States. If the exhaustion of local remedies rule were omitted there would be very significant concern among Governments, especially in view of its place in the articles adopted on first reading. He therefore favoured a separate article incorporating the substance of paragraph 2, taking the various drafting points into account, but not going into detail. The article, which should be placed in Part Two bis, should be drafted in such a way as not to prejudice the debate between the substantive and procedural theories of the exhaustion of local remedies. Another, and in his opinion decisive, consideration in retaining the exhaustion of local remedies rule was that it was applicable not only to diplomatic protection but also in the context of individual breaches of human rights, which did not form part of the law of diplomatic protection but did form part of the law of State responsibility.

53. As to loss of the right to invoke responsibility, there had on balance been general support for article 46 quater, subparagraph (*a*), although there had been suggestions that the notion of settlement should be treated as distinct from the notion of waiver. That might be right. With regard to subparagraph (*b*), the point had been made that there was a distinction between a case of unconscionable delay amounting to laches or *mora* and a case where a State's delay caused actual prejudice to the responsible State. The Drafting Committee should perhaps consider a bifurcation of subparagraph (*b*), although that was an open question in view of the opinions expressed.

54. With regard to a plurality of injured States and of responsible States, the rather modest approach adopted in the articles had attracted general support. Certainly there had been no strong support for a more categorical approach in favour of doctrines of joint and several responsibility. The point had been made that one interpretation of the facts of the *Corfu Channel* case was that it had been two separate wrongful acts involving the same

damage. Another interpretation, of course, had been that two States had colluded in a single wrongful act. In any event, the Drafting Committee might wish to consider whether article 46 sexies should apply in situations where there were several wrongful acts each causing the same damage.

55. As for article 46 sexies, paragraph 2 (*a*), he would strongly resist the idea of deleting the reference to "person or entity". The situation clearly arose where the individual entity injured recovered even in domestic proceedings let alone in others. The principle of double recovery certainly needed to be taken into account, and he agreed with Mr. Al-Baharna that the principle was not exhausted by the subparagraph, though it raised a special case which in his view and that of the majority should be included.

56. As for paragraph 2 (*b*), he agreed with Mr. Pellet and others that subparagraph (i) was a rule of judicial admissibility and should not be included in the article. It should be the subject of a general saving clause in Part Four. He had not made provision for that, and it was for the Drafting Committee to consider. It was a valuable distinction to be made between the admissibility of a claim in the context of State-to-State relations and the admissibility of a case before an international court. It was clear that the matter referred to in subparagraph (i) related to the latter and not the former.

57. There had been no disagreement regarding the substance of paragraph 2 (*b*) (ii), but he had been asked whether there was any authority for application of the *ex turpi causa* principle as between co-responsible States. He was not aware of any, and had merely raised it as a possibility. The subparagraph left the issue to be decided on merit, and he would be happy for the Drafting Committee to consider a suitable form of words.

58. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to refer the draft articles to the Drafting Committee.

It was so agreed.

59. The CHAIRMAN invited the Special Rapporteur to introduce chapter III, section D, of his third report .

60. Mr. CRAWFORD (Special Rapporteur) said that chapter III, section D, dealt with part of the general topic of countermeasures, and was the second of three instalments on the subject. Members would recall that, at its fifty-first session, the Commission had discussed, in chapter I, section D, of his second report,[5] some general issues about countermeasures, and in particular the linkage which the articles adopted on first reading made between the taking of countermeasures and dispute settlement. The outcome of that debate was summarized in paragraph 286. The majority view had been that the unilateral right of the responsible State to invoke dispute settlement was indefensible. It had certainly been and remained his own view, and it had been broadly endorsed in debates in the Sixth Committee. In any event, the Commission's provisional agreement had been that the Commission would proceed to draft the substantive articles on countermeasures irrespective of questions of dispute settlement, and that it would continue to questions of dispute settlement at the next session in light of the text as a whole. Chapter III, section D, proceeded on that assumption.

61. Chapter III, section D, did not deal with the third instalment of countermeasures—collective countermeasures and countermeasures by individual States in the context of the invocation of responsibility to the international community as a whole—which was dealt with in chapter IV of the report. Chapter III, section D, was concerned only with the narrower question of the taking of countermeasures by an injured State, as provisionally defined in paragraph 2 of article 40 bis. It dealt with the comparatively straightforward situation where State A injured State B and State B, having failed to obtain reparation, sought to take countermeasures against State A.

62. Articles 47 to 50 adopted on first reading dealt with that situation, and a substantial account of those articles and of the very detailed comments of Governments on them was to be found in paragraphs 292 to 319.[6] The comments had been carefully made and had been fully taken into account. He wished to express particular gratitude to the Government of France, several of whose comments he had adopted almost verbatim.

63. The articles he was proposing had the intended effect of articles 47 to 50, on countermeasures, adopted on first reading, but were a reconfiguration of them to solve a number of conceptual and other difficulties. Article 47 had been a hybrid in that it purported to define countermeasures at the same time as trying to limit them, thereby creating problems. Article 48 had created the great problem of the relationship between the procedure of seeking reparation and the taking of countermeasures, which was the most controversial issue of the entire text; he had tried to solve it by making a verbally, and perhaps substantively, rather unsatisfactory distinction between interim and other measures. Article 49 had been drafted rather loosely, and he was proposing a tighter formulation in the light of the guidance given by ICJ in the *Gab Ź kovo-Nagymaros Project* case. Article 50 had confused two different matters: the question as to which obligations could be suspended by way of the taking of countermeasures, and the question as to what effects countermeasures could not have in terms of, for example, a breach of human rights and a breach of the rights of third States. Analytical clarity depended on making that distinction.

64. The result was that a larger number of articles were being proposed so as to respond to the quite widespread concerns on countermeasures, while maintaining much of the substance of what the Commission had tried to do on first reading.

65. Proposed new article 47 defined the purpose and content of countermeasures, adopting the instrumental view of them, and dealing with obligations the performance of which might not be suspended by way of countermeasures. Article 48 dealt with the procedural conditions of resort to countermeasures, article 49 with proportional-

[5] See 2614th meeting, footnote 5.

[6] See 2615th meeting, footnotes 5 and 6.

ity, and article 50 with prohibited countermeasures. Article 50 bis, responding to suggestions made especially by the Government of France, dealt with the suspension and termination of countermeasures.

66. There was a fundamental distinction between suspension of the performance of an obligation and suspension of an obligation, one that was not made clear in much of the discussion on countermeasures. The 1969 Vienna Convention dealt with the suspension of treaty obligations, basically saying that where a State was entitled to terminate a bilateral treaty it could also suspend it. It did not say anything at all about how treaty obligations were to be reinstituted, in other words, how or when the suspension was to be terminated. The point was that quite high thresholds were set on suspension: the breach had to be material, for example. The effect of suspension was to release both parties from the obligation to perform and the effect of suspension was to put the obligation suspended into cold storage. It was true that the suspending State must not do anything to prevent the suspended treaty from being able to come back into force later on, but presumably if the suspending State could have terminated the treaty it could also at a later stage exercise that right unless it had waived it.

67. The question was to determine what were to be considered as countermeasures. Partly to avoid the confusion with the suspension of treaties, the draft articles adopted on first reading had not used the word "suspension". Instead, article 47 had simply said that countermeasures occurred when a State did not comply with its obligations, but that seemed to raise a very serious problem, because a State "not complying with its obligations" covered all sorts of things, including some which could in effect be irreparable and permanent.

68. ICJ in the *Gab Ź kovo-Nagymaros Project* case had said that countermeasures should be reversible, but there was nothing in the draft articles adopted on first reading that responded to that important element of the concept of countermeasures. By definition, countermeasures were taken in order to encourage, induce or possibly coerce the responsible State to comply with its obligations of cessation and reparation. They were proportionate to the breach, and it followed that once the responsible State had complied with its obligations the countermeasures had to be terminated. It further followed that countermeasures should not be taken that would imply a continuing breach by the injured State of its obligations even after the occasion for countermeasures had passed. It was in that sense that the Court had identified a very substantial element of the notion of countermeasures. Reversibility really meant that it must be possible to revert to a situation of legality on both sides. There were certain actions that could be taken by way of not complying with international obligations as defined in article 47 which would be inconsistent with reversibility. On the other hand, there were some obstacles to saying that countermeasures should be reversible because, after all, the countermeasures had been taken and produced effects while they were being taken.

69. Sometimes the consequences of countermeasures were irreversible, something that was difficult to formulate. He had therefore chosen to revert to the term "suspension" of the performance of obligations, used previously by former Special Rapporteur Riphagen.[7] It might be that article 47 bis should also use that form of language. The right of the responsible State to the performance of obligations if the responsible State complied with its obligations of cessation and reparation was one of the rights to be taken into account in determining the proportionality of countermeasures. It was for the Drafting Committee to consider how to formulate it, but an important element missing from the draft articles adopted on first reading had been the complete failure to cover the question of reversion to a situation of legality if the countermeasures had their proper effect. He had endeavoured to deal with it through the notion of suspension of the performance of an obligation, and not suspension of the obligation itself. The obligation remained in force, and there was no situation of abeyance. The obligation was there as something by reference to which the countermeasures could be assessed.

70. A further question needed to be considered in regard to article 47. The countermeasures that could be taken were not reciprocal countermeasures, in the sense of that concept as used by Special Rapporteur Riphagen. Reciprocal countermeasures were taken in relation to the same or a related obligation. The question was whether the notion of reciprocal countermeasures should be introduced either exclusively or at least in part as the basis for a distinction in the field of countermeasures. On first reading, the Commission had rejected that distinction, because limiting countermeasures to the taking of reciprocal countermeasures would create a situation in which the more heinous the conduct of the responsible State, the less likely countermeasures were to be available, because the more heinous the conduct the more likely it was to infringe, for example, human rights. In the context of breaches of human rights, or breaches of an egregious character, it was perfectly obvious that considerations of humanity told against the taking of countermeasures.

71. The kinds of action that had characteristically been the subject of countermeasures had been the freezing of assets, the suspension of permits or licences or operations. They were actions that could, relatively readily, be reversed. The draft articles should encourage the taking of countermeasures in respect of reversible conduct, and for those reasons, as well as the practical non-availability of reciprocal countermeasures in many cases, the Commission had decided on first reading not to adopt a regime of such countermeasures. He agreed with that decision and with the reasons for it.

72. The formulation of article 47 had seemed to be a hybrid because it had introduced questions about the effects of countermeasures on third States, which were really separate from the definition of countermeasures. The basic concept of a countermeasure was that it should be the suspension by the injured State of the performance of an obligation towards the responsible State with the intention of inducing the latter to comply with its obligations of cessation and reparation. That basic concept was incorporated in the new article 47, subject of course to the limitations specified in chapter II.

[7] See the sixth report (*Yearbook . . . 1985*, vol. II (Part One), p. 3, document A/CN.4/389), pp. 10–11.

73. The draft articles also drew a distinction between obligations the suspension of which was not subject to the regime of countermeasures and obligations that may not be infringed in the course of taking countermeasures. The first was dealt with in article 47 bis, the second in article 50. The content of article 50 as adopted on first reading was split into those two provisions. It was important because a State, even in the course of taking countermeasures which were legitimate under chapter II, must not do the things referred to in article 50. Article 47 bis covered obligations the performance of which must not be suspended as countermeasures in the first place. It was an important distinction if one considered the impact of countermeasures on human rights. No one was suggesting that a human rights obligation could be suspended as a countermeasure. A countermeasure was taken against a State and not a human being. Problems nevertheless arose with regard to the impact of countermeasures on human rights, a matter dealt with in article 50.

74. Subject to that, he had broadly followed the content of article 50. The obligations the suspension of which were not subject to the taking of countermeasures in article 50 included, first and foremost, the obligation relating to the threat or use of force embodied in the Charter of the United Nations. On first reading, the Commission had been very clear the article was not dealing with forcible reprisals, belligerent reprisals or the use of force, something which was reflected in subparagraph (*a*) of article 47 bis.

75. There had been little criticism on first reading of the provision now in subparagraph (*b*) of article 47 bis and it was generally endorsed by Governments in their comments. As obligations the performance of which could not be suspended by way of countermeasures, he had included obligations concerning the inviolability of diplomatic or consular agents, premises, archives or documents.

76. Subparagraph (*c*) of article 47 bis pertaining to obligations concerning the third party settlement of disputes, had clearly been implied in article 48, but it was quite obvious that a State could not suspend an obligation as a peaceful settlement of a dispute. In the context of countermeasures, the peaceful settlement of disputes was about containing and dealing with the situation created by countermeasures.

77. Article 50 had then gone on to deal with human rights, saying that they could not be subject to the taking of countermeasures. Two separate problems arose in that regard. It was perfectly obvious from the definition of countermeasures in article 47 that human rights obligations themselves could not be suspended, and subparagraph (*d*) of article 47 bis was concerned with the separate and narrower point about humanitarian reprisals which constituted part of general international law in the aftermath of the discussion of those issues in the context both of the 1969 Vienna Convention and of the 1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

78. He had retained the provision now in subparagraph (*e*) of article 47 bis because it was plain that performance of obligations under peremptory norms of general international law could not be suspended under any circumstances other than as provided for in those obligations.

79. Again even though lawful under the draft articles, countermeasures must not impair the rights of third parties, and there too, the performance of third party rights could not be suspended. If third parties had a right as against the injured State, then the injured State was responsible to them for any breach of that right. Third parties included human beings, the addressees of basic human rights, so human rights were also covered by new article 50, subparagraph (*b*).

80. Article 50, subparagraph (*b*), as adopted on first reading, had referred to extreme economic or political coercion designed to endanger the territorial integrity or political independence of the responsible State, and had been the subject of much comment. States had obviously been concerned that extreme measures of coercion might be taken by way of countermeasures. However, at one level, countermeasures were coercive by their very nature, since they were calculated to induce a State to comply with its international obligations. There was some contradiction in saying that countermeasures, provided they were proportionate, induced a State to comply with its international obligations and, on the other hand, to complain about their being coercive. There were further concerns which he had tried to formulate in new article 50. It stated in subparagraph (*a*) that countermeasures must not endanger the territorial integrity or amount to intervention in the domestic jurisdiction of the responsible State. It had of course to be borne in mind that calling on a State to comply with its obligations and the taking of countermeasures per se were by definition not matters within the domestic jurisdiction of that State but there were other things that could be done by way of countermeasures that would infringe that. The article was intended to be a more acceptable formulation of the article 50, subparagraph (*b*), adopted on first reading, which had attracted so much criticism.

81. As to the question of the conditions for resorting to countermeasures, he had adopted the substance of the proposal by the French Government dealing with that matter. It was generally agreed that, before a State took countermeasures, it must invoke the responsibility of the responsible State by calling on it to comply. The problem was what happened if the responsible State did not comply. The draft articles drew a distinction between interim measures of protection and other measures. His proposal avoided the "interim measures of protection" formula, which was the language of judicial procedures, and dealt with the notion of provisional implementation of countermeasures in paragraph 2 of article 48. Adopting the notion of countermeasures as involving the suspension of entitlements—for instance, the freezing of assets—the countermeasures had to be taken straight away or they would not be able to be taken at all and there would be an inducement to take more extreme measures. Hence the injured State needed to take provisional measures to protect itself while negotiations were going on. That had been the underlying idea of article 48 adopted on first reading, although it was badly implemented.

82. His new article 48 set out in paragraph 1 the basic obligation to make the demand on the responsible State, and then said in paragraph 2 that in the meantime provisional measures might be taken where necessary to pre-

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

The meeting rose at 1.15 p.m.

2646th MEETING

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

Chairman: Mr. Chusei YAMADA

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

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

[Agenda item 3]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

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

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

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

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

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

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

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

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

[3] See 2613th meeting, footnote 3.