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Summary record of the 2266th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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the draft during the current quinquennium would also depend on what the Drafting Committee was able to achieve.

The meeting rose at 1 p.m.

2266th MEETING

Wednesday, 27 May 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/440 and Add.1,[1] A/CN.4/444 and Add.1-3,[2] A/CN.4/L.469, sect. F, A/CN.4/L.472, A/CN.4/L.478 and Corr.1 and Add.1-3, ILC(XLIV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 5 *bis* AND ARTICLES 11 TO 14[3] (*continued*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur), continuing the recapitulation of his introduction to his third report on State responsibility (A/CN.4/440 and Add.1)[4] for the sake of new members, referred to the question of so-called self-contained regimes. He said that they were characterized by the fact that the substantive obligations they set forth were accompanied by special rules concerning the consequences of the violation of those regimes. The analysis of international practice showed that multilateral treaties, particularly the constituent instruments of international organizations, often contained such rules, the main feature of which was that their implementation frequently involved the role of an international body, either in monitoring compliance or in discussing, implementing or authorizing measures to be taken in the event of violations. The question was whether the rules constituting the so-called self-contained regime affected—and, possibly, in what way—the rights of States parties to resort to the countermeasures provided for under general international law.

2. With regard to the so-called "legal order" of the European Economic Community, the Court of Justice of the European Communities had repeatedly confirmed the principle that member States did not have the right to resort to unilateral measures under general law (see consolidated cases 90-91/63[5] and case 232/78).[6] Some scholars shared that point of view, but others maintained that the *faculté* to resort to the remedies afforded by general international law could not be excluded when the recourse mechanisms provided for within the framework of the Community had been exhausted. Generally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties: in their view, the element of reciprocity was not set aside and even the choice of the contracting States to be members of a "community" could not be regarded as irreversible, at least as long as those States remained sovereign entities and legal integration had not been achieved.

3. It would appear to follow that the Community's system did not really constitute a self-contained regime, at least not for the purposes of countermeasures. The claim that it would be legally impossible, as a last resort, for member States to fall back on the measures afforded by general international law did not seem to be justified, at any rate not from the point of view of general international law. As pointed out by White,[7] that type of claim appeared to be based more on political considerations than on legal reasoning.

4. The other two examples of so-called self-contained regimes, namely the rules on the protection of human rights and the rules on diplomatic relations and the status of diplomatic envoys, were even less convincing.

5. With regard to human rights, the literature was divided, but the prevailing view clearly ruled out the possibility that universal or regional conventional systems in that area could constitute self-contained regimes.

6. As to the International Covenant on Civil and Political Rights, he was inclined to agree with Tomuschat,

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[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1992*, vol. II (Part One).

[3] For texts of proposed draft articles 11 and 12, see 2273rd meeting, para. 18; for 5 *bis*, 13 and 14, see 2275th meeting, para. 1.

[4] See *Yearbook... 1991*, vol. I, 2238th meeting, paras. 2-24.

[5] *European Economic Community* v. *the Grand Duchy of Luxembourg and the Kingdom of Belgium*, judgement of 13 November 1964 (*Cour de justice des Communautés européennes, Recueil de la jurisprudence de la Cour, 1964*, Luxembourg, pp. 1217 *et seq.*) Judgement published in French only. For account of the cases in English, see *Common Market Law Reports [1965]*, vol. 4, (London), Consolidated cases 90-91/63 (Import of milk products), *EEC Commission* v. *Luxembourg and Belgium*, pp. 58 *et seq.*

[6] See *Commission of the European Communities* v. *French Republic*, "Mutton and lamb", judgement of 25 September 1979 (Court of Justice of the European Communities, *Reports of Cases before the Court 1979-8* (Luxembourg), pp. 2729 *et seq.*)

[7] For sources, see the relevant footnote to document A/CN.4/444/Add.2.

Meron, Simma and others[8] that, given the content of article 44 of that instrument, it did not constitute a self-contained regime.

7. Although the literature was more cautious about the system established by the 1950 European Convention on Human Rights, the prevailing view was that that system did not prevent the member States of the Community from resorting to the remedies afforded by general international law. Article 62 of the Convention affirmed the right to resort to dispute-settlement procedures other than those set up by that instrument.

8. In referring to those two human rights systems, he himself had had the occasion to affirm that the obligations they embodied were subject to the general rules of international law, regardless of any particular procedures made available to individuals, groups or States. Similarly, Henkin[9] had stated that the procedures envisaged in the Covenant and the European Convention were intended to supplement, and not to supplant, the general remedies available to parties in the event of a violation by another party. A number of recent cases, which he discussed in his fourth report, appeared to support the view that there was no such thing as a self-contained regime for human rights, the only difficulty in those cases being that it was not always easy to distinguish between countermeasures *stricto sensu* and cases of mere retortion.

9. In the view of some, GATT and diplomatic law also constituted self-contained regimes, but, there again, the implementation of the provisions of those instruments would not seem to mean the abandonment of the regime of countermeasures provided for by general international law. The self-contained nature of diplomatic law, in particular, was contested. The most convincing theory on that subject was that any restrictions on "diplomatic" countermeasures derived not from any specificity of diplomatic law, but from the normal application, in the area of diplomatic law, of the general rules and principles constituting the regime of countermeasures. That was the position taken by Simma and, to a certain extent, by Dominicé.[10]

10. None of the systems envisaged would appear to constitute *in concreto* a self-contained regime. Furthermore, the analysis of those systems raised most serious doubts as to the admissibility, even *in abstracto*, of the very concept of self-contained regimes as subsystems of the law of State responsibility or, to use the expression employed by the previous Special Rapporteur, Mr. Willem Riphagen, "closed legal circuits". To be sure, substantive rules or any more or less articulate and organized set of such rules might well introduce provisions to ensure that the consequences of their violation were better regulated. In certain cases, the aim pursued might be either to monitor violations more effectively through ad hoc machinery or to prevent a reaction to a violation from compromising the general purpose of the breached rule. But, in so doing, the rules in question did not exclude the validity or application of the rules of general international law with regard to the substantive or instrumental consequences of internationally wrongful acts. Those ad hoc rules merely represented derogations from the general rules, such derogations being admissible only to the extent that they were not incompatible with the general rules. No derogation from the essential rules and principles which governed the consequences of internationally wrongful acts and which were inherent to international relations and international law was conceivable. For example, no conventional provision would be admissible that led to a derogation from the principle of the prohibition of the use of force, the rule of respect for fundamental rights, the basic imperatives of diplomatic relations, the obligation to respect the rights of third States, the principle of proportionality or the rule under which the lawfulness of any unilateral measure must be assessed in the light of that measure's ultimate legal function.

11. It therefore seemed reasonable to assume that a State joining a so-called self-contained regime did not, in so doing, abstain from exercising a part of the rights or *facultés* of unilateral reaction it possessed under general international law to such an extent as to exclude any possibility of a derogation from the accepted regime. Of course, any State that accepted a regime of that nature would be bound, when confronted with a breach of an obligation under that regime, to react first, assuming it wished to do so, in conformity with the regime's provisions. But that did not exclude the possibility of resorting to the remedies afforded by general international law, a possibility whose latitude varied according to the effectiveness of the remedies envisaged by the conventional regime.

12. The use of the remedies provided for and allowed under general international law was and must remain possible at least in two cases. The first was that in which the State injured by a violation of the system resorted to the conventional institutions and secured from them a favourable decision but was not able to obtain reparation through the system's procedures: clearly, the injured State might then lawfully resort to measures which, although not covered by the system, were available to it under general international law. The second case occurred when the internationally wrongful act was a continuing violation of the regime. There again, the injured State was under an obligation, except of course where it was entitled to act in self-defence, to resort first to agreed conventional procedures. If, however, the offending State persisted in its unlawful conduct while those procedures were in progress, the injured State might resort simultaneously to any "external" measures to protect its primary or secondary rights without jeopardizing a "just" settlement of the dispute through the procedures provided for under the system.

13. He had reservations about draft article 2 of part 2 as adopted on first reading[11] for reasons analogous to those concerning the concept of self-contained regimes or "closed legal circuits". In view of the link between the subject of that draft article and the problem of so-

[8] Ibid

[9] Ibid.

[10] Ibid.

[11] For text, see *Yearbook... 1989*, vol. II (Part Two), p. 81.

called self-contained or other special regimes, the Commission should revert to that draft article and not wait until it had been considered on second reading. For reasons partly connected with the same problem, he also had doubts about draft article 4.[12]

14. Turning to the question of the so-called "non-directly injured", "non-directly affected" or "non-specially affected" States, he recalled that the concept had emerged in the Commission and in the Sixth Committee for the first time in 1984 in connection with the definition of an injured State. Certain scholars had begun using it in preference to the term "third State", which had been employed in the same sense. He had ruled out the expression "third State" from the start because it designated States extraneous to a legal relationship. But the terms "non-directly injured State" or "non-directly affected State" were no better and were very ambiguous, particularly in the light of the definition of injured State that the Commission appeared to have retained.

15. An essential element of the definition of injured State, more or less satisfactorily reflected in the text of article 5,[13] was that an internationally wrongful act consisted not only or not necessarily in the inflicting of unjust material, namely physical, damage: more broadly, it was or resulted in the infringement of a right, such infringement constituting the injury, whether or not damage had been caused. A State could thus be injured by the breach of an international obligation even if it did not suffer any damage other than the infringement of its right. Hence, in each particular case the essential starting point in identifying the injured States for the purposes of the legal consequences of an internationally wrongful act was to determine which States had suffered in the absence of, or in addition to, any material, physical damage, an infringement of their rights.

16. In the traditional view, all international obligations were such that, even when they were established by a multilateral treaty or a customary rule, their violation infringed the right of only one or a few given States. It seemed, however, that that was not always true. Although most international rules, like most provisions of internal law, continued to set forth obligations of the traditional kind, namely, obligations the violation of which affected only the rights of one or more given States, other rules apparently escaped such a bilateral pattern: the rules protecting a general or collective interest that must be complied with in the interest of all the States to which they applied. According to Spinedi:

> . . . mention had been made in that connection of rules designed to safeguard interests common to all States or to all the States of which a given body was composed, and not to each one separately.[14]

Rules concerning disarmament and arms control, promotion of and respect for human rights and environmental protection—in general and in areas not falling within the jurisdiction of any State—fell into that category. The same scholar, cited in the fourth report, also stressed that:

> . . . [those] rules impos[ed] upon each State obligations towards all other States, each one of which ha[d] a corresponding subjective right. The breach of those obligations simultaneously injured the subjective rights of all the States bound by the rule, whether or not they were specifically affected, with the exception, of course, of the subjective right of the State that had committed the breach. The term "*erga omnes* obligations" was generally used to denote those obligations.[15]

The provisions of draft article 5, paragraphs 2 (*e*) (ii) and (iii), 2 (*f*) and 3, as adopted on first reading, referred specifically to the legal relationships or situations determined by the violation of such rules.

17. Today, the debate did not so much concern the existence of *erga omnes* obligations: the main issue in the area of State responsibility was to establish the consequences of the fact that *erga omnes* obligations corresponded to *omnium* rights. It was therefore important to determine, in the perspective of a possible violation, the exact situation of the various States for whose benefit such obligations existed. Were those States in the same situation as States qualifying as injured under rules other than *erga omnes* rules? Were all States considered as injured under an *erga omnes* rule in the same situation? If not, how did their situations differ and what were the consequences of those differences? All those questions raised doubts about the concepts of "non-directly injured" State, "non-specially affected" State and "third State".

18. Having rejected the concept of "third State", he intended to show why the other two concepts were also unacceptable.

19. To show that the concept of a "non-directly injured" State was inappropriate, it might be useful to take the example of a violation of *erga omnes* rules on the protection of human rights. As was generally acknowledged, rules of that type created among the States to which they applied a legal relationship characterized by the obligation to ensure the enjoyment of human rights for everyone, irrespective of nationality. A violation of its obligation by State A would therefore constitute a simultaneous infringement of the corresponding right of States B, C, D, E . . . and, as the right in question was the same for all, namely, the right to have State A respect the human rights of all those under its jurisdiction, the violation did not affect any one of those States more or less directly than the others. Of course, differences might manifest themselves in certain cases. For instance, if the violation by State A of its obligation constituted a violation of the human rights of individuals more closely related to an injured State B, ethnically or otherwise, State B might feel particularly affected. Even in such a case, however, one could not say that State B's injury was legally more direct than that suffered by States C, D, E . . .

20. Another example would be the breach of an *erga omnes* obligation relating to the protection of the environment in outer space or in any area whose contamination or pollution would have an adverse effect for the whole planet. For example, an internationally wrongful act causing depletion of the ozone layer would have a concrete impact on all States and constitute a legal injury for all States parties to the multilateral treaty setting

[12] Ibid.

[13] Ibid.

[14] See footnote 7 above.

[15] Ibid.

forth the breached obligation. There again, there would be an infringement that was the same for all rights that were the same for all. At most there could be qualitatively or quantitatively different injuries. Even if all States were not exposed in the same way to the adverse impact of the depletion of the ozone layer, in no case could those differences be defined by distinguishing between "direct" and "less direct" or "indirect" injury. Once again, the concept of a non-directly injured State appeared to be logically untenable.

21. A further example would be the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas. Such an act would affect many interests, namely (*a*) those of any State whose ships had been on the point of entering the canal when the restriction had been put into effect; (*b*) those of any State whose ships had been sailing towards the canal in order to traverse it; and (*c*) those of all other States because, according to the law of the sea, all States were entitled to the free use of the canal. In that case, too, there were no "indirectly" injured or affected States. All States having the right to the free use of the canal were legally injured by the decision of State A. There would, of course, be differences between the three groups of States he had mentioned, but only in respect of the extent of the material, physical damage sustained or feared.

22. The conclusion thus seemed to be that the distinction between directly and indirectly injured States did not hold water. The examples cited indicated that the application of such a distinction would lead, in some cases, such as those of human rights, and, possibly, the global environment, to all States whose right had been infringed by a violation being considered as indirectly injured States and, in other cases, such as the violation of freedom of navigation or commission of aggression, to the improper presentation in terms of "directness" or "indirectness" of differences relating only to the nature or extent of the injury.

23. The only reasonable starting point for the substantive and instrumental consequences of a violation of *erga omnes* obligations, as well as the consequences of a violation of any other kind of international bilateral or multilateral obligation, thus appeared to be the characterization of each injured State's position according to the quality and degree of the injury sustained.

24. However, the fact that the breach of *erga omnes* obligations resulted in the existence of a plurality of injured States, combined with the fact that those States might not be injured in the same way or to the same degree, complicated the responsibility relationship. With regard to the substantive consequences of the breach, the question was whether, to what extent and under what conditions the States thus equally or unequally injured were all entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition. With regard to the instrumental consequences, the question was whether, to what extent and under what conditions the various equally or unequally injured States could lawfully resort to sanctions or countermeasures. Until the present, those problems had been considered in connection with wrongful acts frequently labelled as "crimes". They might well arise, however, also with regard to the consequences of more common wrongful acts usually referred to as "delicts".

25. The problems could arise in two possible ways. One was that the relevant rules—*erga omnes* or more or less general rules—would envisage procedures for the monitoring and sanctioning of violations. However, the other was that such procedures might not exist or might not be exhaustive.

26. He believed that the particular problems raised by the violation of *erga omnes* obligations—wrongly presented in terms of a plurality of "indirectly" or "directly" injured States—called neither for amendments to the draft articles adopted or proposed so far nor for the adoption of ad hoc draft articles. Those problems, which were more correctly to be identified in terms of a plurality of equally or unequally injured States, called simply for a proper understanding and application of the general rules so far adopted or proposed. The only useful, and probably indispensable, ad hoc provision would be the addition of a new draft article *5 bis* to article 5 as adopted on first reading and defining the "injured State". The additional draft article would simply provide that, whenever an internationally wrongful act affected more than one injured State, each of those States was entitled to the rights and *facultés* laid down in the relevant articles.

27. In reply to a question by Mr. Crawford (2265th meeting), he recalled that he had submitted two reports on State responsibility to the Commission, in 1988[16] and 1989,[17] each containing a set of articles which had been referred to the Drafting Committee. So far, the Committee had done nothing about them, despite his plea in 1991 (2238th meeting) that it should give the topic some consideration. The time that had elapsed since 1988 and 1989 could not but have an adverse effect on the preparation of draft articles in the sense that anything written or said on the subject then was now liable to be out of date or forgotten. He also wished to make it absolutely clear that, early in the year, he had been asked by the secretariat to be present in the Commission throughout the month of May, as Mr. Barboza would not be free before June and the Commission intended to devote most of the current session to the consideration of their two items. He therefore did not see why the Commission had chosen to deal with the item on the draft Code first. In his view, the consideration of his third report on State responsibility during the first three weeks of the session —even if that report did not contain any draft articles— would have enabled the Commission and the Drafting Committee to familiarize themselves with the topic and gain time by facilitating the discussion of the fourth report, especially for the Commission's new members. The Special Rapporteurs and the members of the Drafting Committee would thus have been aware of the views of the members of the Commission on the question of countermeasures and a draft could have been prepared

[16] Reproduced in *Yearbook... 1988*, vol. II (Part One), p. 6, document A/CN.4/416 and Add.1.

[17] Reproduced in *Yearbook... 1989*, vol. II (Part One), p. 1, document A/CN.4/425 and Add.1.

by the Drafting Committee by the end of the session. He therefore deeply regretted that the Commission had not deemed it appropriate to consider his third report earlier and that the draft articles referred to the Drafting Committee in 1988 and 1989 had not yet been dealt with by that Committee.

28. The CHAIRMAN said that he did not want to prolong the debate on organizational matters. He recalled that the Commission had decided to set up a working group on the question of the establishment of an international criminal court and that, in order to enable the Working Group to begin its work, it had been necessary to give priority to the consideration of that topic in plenary.

29. Mr. BENNOUNA said that the Special Rapporteur's third report on State responsibility was extremely detailed and full, but it could be criticized as not being sufficiently action-oriented. It was important not to lose sight of the objectives of the Commission, whose basic function was to consider draft articles with a view to the preparation of a draft convention. However, some parts of the report did not serve any purpose and did not lead to any specific conclusions.

30. With regard to countermeasures, his general view was that the Commission had to proceed very cautiously, with every possible guarantee, because that question related to the question of the limits of internal law and to the problem of the inequality of States. Above all, the Commission must be careful not to appear to be saying that might was right. It should also be borne in mind that the literature referred to by the Special Rapporteur was essentially Western, and more particularly European, and that the practice, which was that of the most powerful States, had been designed to suit their purposes and was therefore not necessarily to be taken into account. In order to codify that part of State responsibility and since there was little *lex lata*, it was necessary to rely on the major indisputable principles of international law, such as the prohibition of the use of force and the obligation to settle disputes by peaceful means. It was undeniable that no State could unilaterally apply sanctions that affected the entire world. A State could take measures only to defend itself and to defend its rights. That principle would have to be borne in mind when each draft article was considered in detail.

31. In the first part of the report, the Special Rapporteur reviewed a wide range of concepts and measures which were, in his own opinion, confusing. It would be preferable to use only the term "countermeasures", which was more neutral, for example, than the form "reprisals", which contained the idea of a breach of international law and a balance of power. Self-defence could be taken into account only in the context of the rules of the Charter of the United Nations or, in other words, as an exception to the general prohibition of the use of force in the event of armed attack—once again, so as not to appear to be saying that might was right. As to the concept of self-help, which was also mentioned in the report, he did not think it had any legal foundation whatever and served only to broaden the scope of the concept of self-defence. The term "sanctions" should, as the Special Rapporteur himself stated, be reserved for measures of a punitive nature adopted by an international body. With regard to retortion, he agreed with the Special Rapporteur that the concept should not find a place within the framework of a codification of State responsibility. The concept of reprisals should be rejected outright because reprisals were often associated in practice with the cold-blooded use of force; it would be better to use the term "countermeasures" which was more general in nature. The question of reciprocity should be considered together with the problem of proportionality. On the question of the suspension and termination of treaties, he said he was not convinced that the law of State responsibility went further than the law of treaties and he did not think it necessary to go beyond the framework of the Vienna Convention on the Law of Treaties, which codified international law in that regard.

32. As to that portion of the report dealing with the internationally wrongful act, he said that the existence of an internationally wrongful act, the precondition for the application of countermeasures, had to be established in an objective manner by an impartial third party. The belief of the injured State was not enough; several signs must point to the fact that a wrongful act had been committed.

33. The Special Rapporteur had been too subtle in his treatment of the question of the functions of measures and the aims pursued, which were dealt with later in the report. His own view was that the purpose of such measures was restitutive and compensatory and he was therefore not in favour of assigning them a punitive or afflictive function, for, in such a case, their use would be restricted to the handful of States which had the means to inflict punishment, and that once again gave rise to the problem of the inequality of States. However, the distinction was far from clear-cut because, once the measure had been taken, it was very difficult to tell the difference between compensation and punishment.

34. With regard to the issue of a prior claim for reparation, it was indisputable that the use of a countermeasure presupposed a prior claim of reparation. There had to be a protest or a claim for cessation or reparation on the part of the injured State, since that was the only way for it to safeguard its rights. *Lex lata* in that regard was clearly not satisfactory and improvements would therefore have to be made, more especially to ensure better protection of prospective weaker parties, as the Special Rapporteur had stated in the report.

35. As to the impact of dispute-settlement obligations, he agreed with the idea of working out adequate and appropriate settlement procedures based on the provisions of Article 33 of the Charter of the United Nations. Time-limits would have to be set in order to prevent the offending State from using delaying tactics to avoid such procedures and hold up countermeasures. The possibility could also be envisaged of the injured State adopting provisional measures with a view to protecting its rights.

36. Proportionality was clearly necessary, given the inequalities in the balance of power between States. The aim of the State which took the countermeasure should be to protect its rights and secure cessation and compensation for the damage suffered; and it was from that

standpoint that the requirement of proportionality should be viewed.

37. With respect to the suspension and termination of treaties, he had the impression that there was some confusion between the regime of suspension and termination, which, in his view, formed part of the law of treaties, and the consequences of a breach of a treaty, which came more within the scope of the law of responsibility. The Special Rapporteur might wish to examine the matter further. As to the issue of so-called self-contained regimes, it seemed obvious that priority should be given to those regimes before turning to general international law.

38. On the problem of differently injured States, he said that he agreed with the conclusion reached by the Special Rapporteur, namely that the position of "non-directly" affected States should be left to depend simply on the normal application of the general rules governing the consequences of internationally wrongful acts, in view of the fact that the peculiar features of the position of "non-directly" affected States might well be just a matter of degree. That was in fact self-evident, so that there was virtually no need for the preceding line of argument. Also, the concept of "injured State" could perhaps be brought closer to the concept of "interest in taking action".

39. With regard to substantive limitations issues, he wondered whether it would not have been better to start by setting forth the peremptory norms, not only because it was always necessary to proceed from the general to the particular, but also because those rules already contained the principles of the prohibition of force and respect for human rights and other humanitarian values; it was therefore unnecessary to develop those principles, other than by way of example, since it was believed, and in that he supported the Special Rapporteur, that established law should actually limit recourse to countermeasures. Care should also be taken not to give too broad a meaning to the concept of basic rights, since a State could not take countermeasures against individuals. As for the inviolability of specially protected persons, he agreed with the Special Rapporteur that there was a need to draw a distinction between their physical inviolability and the privileges and immunities they enjoyed.

40. The work carried out by successive Special Rapporteurs on State responsibility should make it possible for the Commission to forge ahead on that topic and start drafting some draft provisions. If the Commission really wanted to do a good job, that must be the focus of its efforts, since State responsibility was a basic element of international law that had yet to be codified. The time had come for the Commission to be more efficient in that area.

41. Mr. BOWETT said that, like the Special Rapporteur, he believed that the generic term "self-help" should be avoided. He also agreed that the concept of retortion had no place in a draft on State responsibility, since, in that case, the conduct complained of and the reaction to that conduct were lawful acts. Furthermore, he was very doubtful about the utility of the concept of reciprocity, for reciprocal measures were merely a form of countermeasures which, by their very nature, were proportionate and therefore did not constitute a separate category. Apart from those reservations, he endorsed the classification of the kinds of measures to be considered. With regard to the conditions for the legality of countermeasures—using that term in the broad sense—he considered that the prior existence of a wrongful act, was, of course, essential, but that, at the stage when the injured State was contemplating countermeasures, there was no objective determination that a wrongful act had been committed: there was only a bona fide belief on the part of the State resorting to the countermeasures. As for the second suggested precondition of a prior claim for reparation, he would agree to it in the sense that there must be a prior notification of the breach complained of by the injured State to the wrongdoing State, since the latter had the right to know what unlawful act it was alleged to have committed. The complaining State therefore had to identify the unlawful act and call for the cessation of the breach. It would, however, be unreasonable to expect the injured State at that stage, prior to any countermeasure, to specify the reparation it would demand. That kind of claim would come much later.

42. It seemed to him that the third precondition suggested, namely, prior fulfilment of any obligations relating to the peaceful settlement of disputes, could not be a precondition to the right to take legitimate measures of self-defence or even reprisals or countermeasures, since that would be to ignore the time factor. The obligations in that connection could embrace negotiation, conciliation, mediation, arbitration and judicial settlement—in a word, the whole range of methods of peaceful settlement to which the two States were committed. But the implementation of that kind of measure took time and it would be quite unreasonable to expect the injured State to refrain from taking countermeasures until all those obligations had been fulfilled. It seemed to him that any provision on the matter should rest on the concept that any right to take countermeasures must be suspended, first, when the breach had ceased, and, secondly, when the wrongdoing State had accepted and implemented bona fide a method for the peaceful settlement of disputes. That would, first of all, determine whether a wrongful act had been committed and, secondly, if so, what the appropriate reparation would be. Those two determinations would not necessarily result in a binding award, but they might well come out of conciliation or mediation or even direct negotiations between the parties.

43. With regard to the functions or aims of the various countermeasures and, in particular, of reprisals, he would like the Commission to remove a certain awkwardness. Reprisals, which should be designed to bring about the cessation of the unlawful conduct and a return to legality, had traditionally been conceived as a form of punishment or as a sanction for the wrong committed. It was his view that that concept of punitive reprisals should have no place in contemporary international law and that the Commission should rather place the emphasis, first, on the aim of bringing about the cessation of the unlawful act and, secondly, on recourse to an agreed mode for the settlement of the dispute. Any question of sanctions should emerge only as a consequence of the process of peaceful settlement, preferably in the form of a third party procedure, which would give it an impartial character.

44. The fourth precondition, proportionality, was essential provided that it was known to exactly what the measures were supposed to be proportionate. To make the countermeasures proportionate to the injury would be tantamount to making them punitive and they would then have to fit the offence. It followed from what he had said previously that the true measure of proportionality was that the countermeasures must be such as to bring about, first of all, the cessation of the wrongful act and, secondly, recourse to peaceful settlement.

45. As to the difficult question of differently injured States, an injured State could not be denied the right to take countermeasures simply because a State which was more directly or more seriously affected did not do likewise. In that connection, he proposed that two principles should be adopted: first, any State which took countermeasures should do so at its own risk, particularly if those measures were unreasonable, disproportionate and, ultimately, unlawful. Secondly, if the emphasis was placed on the cessation of the wrongful act and recourse to peaceful settlement, the wrongful act and the legitimacy of the countermeasures would be reviewed as part of the peaceful settlement procedure, preferably under a third-party procedure, and the legitimacy of the countermeasures would be judged by reference to the question whether the State which took those measures had been directly or indirectly affected and whether it had chosen to take those countermeasures even though States affected more directly or equally had refrained from so doing. The fact that a State had been the only State to take countermeasures might not be conclusive as to the illegality of those measures, but it would be strong evidence that they were unreasonable or disproportionate.

46. He saw no particular virtue in the concept of so-called self-contained regimes. There clearly were various regimes under which States undertook specific treaty obligations with regard to the mechanisms for the settlement of disputes arising under those treaties. Such mechanisms might, however, prove to be ineffective in affording the injured State an appropriate remedy or reparation. If so, the question whether those States could fall back on the general regime of countermeasures raised a question of treaty interpretation. In short, it would be necessary to determine whether the particular treaty involved a renunciation on the part of the parties to that treaty of the right to take countermeasures under general international law, assuming that the measures provided for under the treaty were inadequate. Since the answer would be different in each case, he saw no purpose in generalizing that into some concept of "self-contained regimes".

47. Mr. ROBINSON said it was regrettable that, after so many years spent on the topic of State responsibility, the Commission still did not have before it a set of draft articles which could form the basis for an international convention. He wished, however, to make a few general comments on the content of the third report.

48. The primary flaw of the report was its overly doctrinal approach; too much attention was paid to the views of authors and to legal literature in general, compared to the amount of consideration given to State practice, although there were more references to State practice in the fourth report. It was important, however, to acknowledge the fact that the Special Rapporteur had recognized explicitly that the Commission's approach should be based on an examination of State practice.

49. Two basic questions thus arose. First, why was it necessary for the Commission to examine and define State practice in that area? Secondly, in what manner was that practice to be determined?

50. On a preliminary basis and subject to more in-depth study, he noted that there did not seem to be an abundance of State practice or at least that it did not exist in a form that would make it easy to extract customary rules from it.

51. In reply to the first question, he believed that it was only in basing itself on State practice, as distinguished from the views of scholars, that the Commission could discharge its mandate of promoting the progressive development and codification of international law.

52. The reply to the second, and more important, question was that the determination of State practice from which customary rules could be derived called for a study not only of the conduct of States which had led to decisions of international courts or arbitral tribunals, but also of conduct which had not given rise to decisions of that kind. The determination of State practice should also include an analysis of the conduct of States at the multilateral level, within the United Nations, the General Assembly and the Security Council, within regional bodies and even at the bilateral level.

53. In view of the scarcity of State practice and the difficulty of deriving from it rules of customary international law, the Commission's task in that field would be limited essentially to the progressive development of the law in the form of draft articles which States would not necessarily be ready to accept. Consequently, the Commission had to take great pains to define the theoretical underpinnings of its work and try to reconcile the interests of all States, bearing in mind their differences in size, wealth, development, military strength, economic system and capital flow situation.

54. With regard to State practice as analysed by several writers referred to in the third report, he noted that the large majority of newly independent developing countries had not contributed to that practice or, more precisely, that sufficient account had not been taken of their conduct in determining the rules of customary international law. For example, in their positions on State responsibility for the protection of aliens, a number of scholars did not take account of the conduct reflected in the objections of many small States.

55. Referring to the limitations on reprisals derived from the prohibition on the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations, he acknowledged that the international community had not yet achieved the degree of cohesion which a total ban on armed reprisals presupposed. However, the Commission must start from the premise that customary international law was reflected by that Article of the Charter, the sole general exception being self-defence, as

envisaged under Article 51. If it was the Commission's intention to develop the law beyond the scope of those Articles so as to allow armed reprisals under special circumstances, it must, given the lack of clarity in State practice, try to ensure the best possible balance between militarily strong and militarily weak States, by a careful circumscription of all the relevant parameters.

56. In connection with the paragraph of the report in which the Special Rapporteur seemed to be hinting at a dichotomy between State practice and the norms prohibiting armed reprisals, as established by Article 2, paragraph 4, and Article 51 of the Charter, he had the following technical question: had the conduct of States which, in the past 30 or 40 years, had frequently resorted to armed reprisals under conditions apparently not envisaged by those Articles, not reached the stage where it might be qualified, in terms of article 31, paragraph 3 (*b*), of the Vienna Convention on the Law of Treaties, as "subsequent practice in the application" of those Articles which ought to be taken into account in interpreting those provisions? If so, the Commission would then have to react in an appropriate manner to that disharmony between practice and norms.

57. Mr. BARBOZA said that, before commenting at the appropriate time on the fourth report (A/CN.4/444 and Add.1-3), as viewed in the light of the third report (A/CN.4/440 and Add.1), he wished to point out that the Commission had already considered some excellent reports that did not propose draft articles and would probably not do so again. It was certainly not wasting its time in considering such reports; quite the contrary, as demonstrated by the current debate on the third report.

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the purpose of the third report was not so much to cite practice as to draw attention to the questions which had been raised and to which he had replied in his fourth report by making an analysis of practice, which was, in fact, relatively extensive. Moreover, a special rapporteur who had to submit a report at each session did not always have time to polish or shorten it. The members of the Commission should bear that in mind and, if they found the third report too theoretical, they should concentrate precisely on the merits of the concepts it dealt with. He did not see why he should not have submitted the third report: it was his responsibility to draw the attention of his colleagues to the questions that he had had to answer. Anyway, the richness of the debate was ample proof that his purpose of provoking comments had been and was still being achieved.

59. According to Mr. Bennouna, he had not taken sufficient account of the doctrine of the third world countries. It was true that he had based his study of the topic principally on Italian doctrine. However, Italy offered ample opportunity for the study of international law, especially since Italian scholars, more than others, generally based their works on the literature published in all the easily accessible languages. Thus, in referring to an Italian author, especially a contemporary Italian author, he was certain that that author had studied the doctrine in a very thorough way. None the less, he would in future try to take more direct account of the doctrine of the developing countries. Also, the fact that the doctrine of the Western countries was referred to more frequently than that of the former communist countries was the result of language considerations. In his fourth report, he had given examples which had been taken from cases involving Pakistan and India, the Libyan Arab Jamahiriya and the United Kingdom of Great Britain and Northern Ireland, Ghana and France, Ghana and Guinea, Côte d'Ivoire and Guinea, and Mexico and Spain; that clearly showed that he had not limited himself to the practice of Western countries. Italian doctrine was, moreover, characterized by a very high degree of objectivity. In his reports, as well as in his statements, he had referred on more than one occasion to internationally wrongful acts committed by his country, rather than to those committed by other States. In any event, he had never sought to give greater weight to the doctrine of the powerful or wealthy countries. In fact, he believed that the law of State responsibility should be progressively developed in such a way as to serve the interests of the weaker and less privileged countries. It was precisely with a view to protecting the interests of such countries that he had stressed the need to develop procedures for the peaceful settlement of disputes, although that had certainly not been the Commission's idea when he had initially joined it, and he still expected to meet with resistance in that respect, within the Commission and elsewhere, in the name of the deleterious idol of the sovereignty of States.

60. In his third report and in his introduction at the preceding session, he had indicated that the new international order was a rather vague, and even debatable, concept, especially in view of the lack of adequate guarantees of objectivity and impartiality. He had noted, for example, that the Western powers that had been involved in the Gulf war should not have referred to it as a war and should not have celebrated a victory at the end of the operation, as they had done: they ought rather to have referred to "measures" and to have expressed their satisfaction at having served the interests of the international community by taking the necessary measures against an aggressor. The only conceivable way to reduce the danger of distortions in the otherwise indispensable enforcement of the rule of law in inter-State relations was precisely an adequate development of judicial control of international action.

61. In respect of Mr. Bennouna's comments, he noted that, as indicated in his introductory statements at the preceding and current sessions, the glossary at the beginning of the third report was intended simply to clarify his position with regard to terminology and, in particular, with regard to countermeasures. He did not share Mr. Bennouna's view that "countermeasures" was a useful and clear concept. Even self-defence was a countermeasure, whence the confusion between countermeasures, reprisals and self-defence which was discussed in the fourth report. The extension of the idea of self-defence, to which Mr. Robinson had alluded was one thing; the issue of determining to what extent such an extension was lawful was another. He was not sure whether the gaps in the Charter of the United Nations with respect to the system of collective security (Art. 42 *et seq.*) were adequate justification for broadening the concept of self-defence, as it was defined in Article 51. He would not readily answer that question in the af-

firmative. In any event, if the concept of countermeasures against an internationally wrongful act was retained, in which case the concept would be closer to reprisals, it might then be possible to make a distinction between the issue of self-defence and the condemnation of armed reprisals.

62. With regard to Mr. Robinson's question whether the prohibition of the use of force had been influenced in a restrictive sense by State practice, he recalled that, in his oral introduction at the 2265th meeting and in his fourth report, he had stated that, in his view, such was not the case, at least with regard to the prohibition of force by way of reprisal and countermeasure against an internationally wrongful act. He had referred to several cases in which the Security Council had not agreed to consider particular military actions as self-defence.

63. As regarded the other remarks by Mr. Robinson, which he feared he had perhaps not understood completely, he could only refer Mr. Robinson to the announcement made in his third report that the practice of States would be dealt with in the fourth report. Mr. Robinson could perhaps express his views on the impact of practice as soon as the debate began on the fourth report. He would then be able to note that he (the Special Rapporteur) had already fully agreed with the view that the Commission's task with regard to the regime of countermeasures would be mainly a matter of progressive development; and that, precisely with a view to reducing the disadvantage of the weak and less developed States.

64. He was not sure what had led Mr. Bennouna to express regret that the issues raised in the third report had not given rise to any specific conclusions, especially since he had emphasized that, on every issue under consideration, further thought was necessary.

65. He agreed that the principle of proportionality served as a counterbalance to the use of force, and acknowledged, of course, that certain obligations, such as the non-use of force and respect for human rights, were included in the category of *jus cogens*. He nevertheless considered that those obligations should be spelled out, for, while States often invoked *jus cogens*, they were far from agreeing on the exact scope of that category of rules.

66. Mr. KOROMA said that one of the problems with the third report was that it seemed to raise questions that had already been settled, such as that of armed reprisals, which was not open to further discussion: under the provisions of the Charter of the United Nations, reprisals were quite simply prohibited.

The meeting rose at 12.40 p.m.

2267th MEETING

Friday, 29 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/440 and Add.1,[1] A/CN.4/444 and Add.1-3,[2] A/CN.4/L.469, sect. F, A/CN.4/L.472, A/CN.4/L.478 and Corr.1 and Add.1-3, ILC(XLIV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 5 *bis and*

ARTICLES 11 TO 14[3] (*continued*)

1. The CHAIRMAN, speaking as a member of the Commission, said that any countermeasure constituted a measure of self-help designed to safeguard the rights of the injured State. While it would, of course, be much better if the international community had a centralized system of law enforcement at its disposal, no such system existed as yet and any draft provisions on State responsibility must take account of the dangers inherent in authorizing States to take countermeasures at their own discretion. Some kind of preventive control by an authoritative body would thus be welcome. In that respect the Security Council was competent only with regard to issues affecting international peace and security, and many disputes between States Members of the United Nations did not fall within that category. Indeed, even in matters pertaining to international peace and security, the Charter of the United Nations recognized that States would not always be subject to the authority vested in the Security Council, since the Council might take no action even in the event of open and undisputed aggression on the part of a particular State. The international community was a loose grouping which had succeeded in establishing common rules, but had not so far produced a common entity with sole authority to apply sanctions against wrongdoing States. He doubted

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[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1992*, vol. II (Part One).

[3] For texts of proposed draft articles 11 and 12, see 2273rd meeting, para. 18; for 5 *bis*, 13 and 14, see 2275th meeting, para. 1.