Document:-
A/CN.4/SR.2277

Summary record of the 2277th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1992, vol. I

ceremony of the twenty-eighth session of the International Law Seminar.

42. Mr. BLANCA (Director-General of the United Nations Office at Geneva) recalled that, when he had welcomed the participants to the twenty-eight session of the International Law Seminar, he had expressed the hope that the session would take place in a constructive and open spirit and would prove to be an enriching experience for all. That wish had been realized and the various lectures given by the eminent members of the Commission and by different officials from the United Nations Secretariat had no doubt provided them with a source of inspiration and reflection.

43. For the first time that year, the participants had been able to compare and apply their ideas in four working groups set up to study one particular problem dealt with by the Commission, namely, the establishment of an international criminal court. That innovative step had been made possible with the cooperation of the Chairman and the support of the members of the Commission. It had been a true practical exercise in which practice had been complemented by theory. The four members of the Commission who had supervised the working groups had listened with great interest to the submission of the ensuing reports. After all, was not practical work the ultimate purpose of university studies? It was that practical knowledge which had in particular enabled the Commission to draft major international legal instruments and to seek viable agreements on all issues that had met with opposition.

44. On behalf of the United Nations, he thanked the Governments which had made voluntary contributions and had offered fellowships for the Seminar, thereby promoting wider teaching, study, dissemination and understanding of international law. With their assistance, young jurists, mainly from developing countries, had been able to attend meetings of the Commission and to acquire practical experience in the drafting of international legal texts. Thanks to such generosity, 16 fellowships had been awarded for a total of 22 participants, not to mention the 4 UNITAR fellows who traditionally attended the Seminar. He also thanked in particular the Director of the Seminar, Mrs. Noll-Wagenfeld, who had done everything possible to ensure the success of the Seminar's activities.

45. He had no doubt that the lessons learned from the Seminar would help the participants to become the builders and shapers of the world of the future and to promote dialogue, understanding, tolerance and open-mindedness. He wished them every success in their future endeavours.

46. The CHAIRMAN said that the Commission attached great importance to the International Law Seminar, which was designed to familiarize young jurists with the work of the Commission and to increase their understanding of the difficulties it had to face. During the session, the participants would have gained awareness of the importance of individual work, but also of the benefits of dialogue and cooperation. A jurist must know how to listen and to take seriously arguments he did not particularly like.

47. The participants had for the first time been asked to play an active role by contributing to the work of the Commission. The results of their reflections on the statute of an international criminal court had been particularly encouraging and their papers would be made available to all members of the Commission, who could then take them into account in their deliberations.

48. Participation in the International Law Seminar was a kind of initiation rite, since it was precisely as participants in the Seminar that a not inconsiderable number of the present members of the Commission had had their first contacts with it. He therefore trusted that some of the participants would one day return to the Commission as members.

49. Mr. NHERERE, speaking on behalf of the participants in the International Law Seminar, thanked the members of the Commission and in particular Mr. Crawford, Mr. Pellet, Mr. Tomuschat, and Mr. Villagran Kramer, the tutors of the four working groups, for their assistance and understanding and for making themselves readily available. He also thanked Mrs. Noll-Wagenfeld, the Director of the Seminar. The feeling of being present at the actual creation of the law during the discussions in which creativity had vied with originality had been a fascinating and rewarding experience for all participants, who would in future look at the Commission's reports with fresh eyes and renewed interest. Their stay in Geneva had also provided many of them with an opportunity to make international contacts for the first time, and that was entirely in keeping with the spirit of the United Nations. He trusted that the Chairman and other members of the Commission would still be present when some of the participants at the Seminar had the chance one day to return to the International Law Commission as members.

The Director-General presented participants with certificates attesting to their participation in the twenty-eighth session of the International Law Seminar.

The meeting rose at 12.15 p.m.

2277th MEETING

Tuesday, 23 June 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. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Prince Ajibola, a Judge of the International Court of Justice and a former member of the Commission, and was sure that he spoke on behalf of all members of the Commission in expressing the conviction that Prince Ajibola would make as fruitful a contribution to the work of ICJ as he had done to the work of the Commission.

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*)

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to make a point of clarification concerning the last paragraph of chapter VII of his fourth report (A/CN.4/444/Add.2) in which he had indicated that draft article 4[4] of part 2 might require further reflection and would, if necessary, be the subject of a further addendum. The fact that no such addendum had been produced was due not to any change of view on his part about the relevance of the issue but rather because it was of such importance as to require in-depth treatment. He would very much welcome members' views on the matter, which he had already touched upon on earlier occasions, for example, at the 2267th and 2275th meetings.

3. As he saw it, the effect of article 4 in its present form would be to subordinate the provisions of the draft on State responsibility both to the provisions of, and to the procedures in, the Charter of the United Nations on the maintenance of international peace and security. In particular, that would mean the subordination of the draft articles on State responsibility to any recommendations or decisions adopted by the Security Council in the context of its functions regarding dispute settlement and collective security. As stipulated unambiguously in the Charter, the Security Council's powers consisted of making non-binding recommendations, under Chapter VI, which dealt with dispute settlement, and also binding decisions under Chapter VII, which dealt with measures of collective security. The main point was that, according to the doctrinal view—which did not appear to be seriously challenged either in the legal literature or in practice—the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under Chapter VI into binding settlements of disputes or situations.

4. But what if the Security Council did try to impose binding settlements? Would article 4 as adopted by the Commission, and eventually embodied in a treaty, subordinate the validity, the interpretation and the application of any provisions of a convention of codification of the law of State responsibility to any decision of the Security Council imposing the settlement of a dispute or situation? Although he had not been able to reach a considered opinion on the subject, he could, for the moment, think of two examples. First, if a Security Council decision under Chapter VI of the Charter of the United Nations did affect a dispute or situation between one or more injured States and one or more wrongdoing States in a manner not in conformity with the rules laid down in a convention of State responsibility, of which article 4 formed part, what would be the implications for the relationship in terms of responsibility, whether substantive or instrumental, as between the States concerned? Second, in the event of such a situation, what would be the relationship between the competence of ICJ, on the one hand, and that of the Security Council, on the other, for instance in a case where, on the basis of a valid jurisdictional link, State B unilaterally brought a case against a wrongdoing State A before ICJ and the Court was confronted with a contradiction between one of the provisions of the convention on State responsibility and a decision taken by the Security Council in violation of the limitation of its competence under Chapter VI of the Charter?

5. Although he would be unable, for the time being, to answer such delicate and difficult questions, he thought that they could not be ignored by the Commission. In any case, as regarded the inclusion of article 4 in the draft, he was of the view that for such a provision to be maintained, it would be indispensable for the Commission to study the matter in adequate breadth and depth. He also realized that, for the time being, the Commission's mandate did not appear to be sufficiently broad to enable it either to interpret the Charter of the United Nations, in particular, Chapters VI and VII, or to determine the relationship between the Security Council and ICJ, or to determine the consequence that Article 103 of the Charter would have on any specific provisions of the law of State responsibility as codified by the Commission and accepted by States in a convention. He felt, therefore, that the best course for the Commission would be to leave article 4 out of the draft. Any question concerning the relationship between an eventual convention on State responsibility and the Charter of the United Nations should be governed by Article 103 of the latter.

6. Mr. BARBOZA, congratulating the Special Rapporteur on his third (A/CN.4/440 and Add.1) and fourth (A/CN.4/444 and Add.1-3) reports, which contained a wealth of information, said that he would underline in particular the importance of the analysis of self-contained regimes and of the question of a plurality of injured States. As to the need to codify, and possibly progressively develop, the law on countermeasures, while he appreciated that reprisals had a bad reputation in the history of international law and international relations, he could not share Mr. Shi's position (2267th and 2273rd meet-

[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 2266th meeting, footnote 11.

ings) for reprisals had always been, and would continue to be, a fact of international life. Since he was sceptical about the likelihood of abolishing countermeasures, he considered that the Commission should place before the General Assembly a draft that provided for detailed regulation of the conditions under which reprisals could be taken. That was the only safeguard international law could offer to the smaller and weaker States.

7. He agreed with other members that countermeasures should be limited basically to securing cessation and reparation. Even if the object of a countermeasure was to obtain satisfaction, it should not be regarded as punitive in nature. Satisfaction might be the only way in which the injured State could be compensated for the damage suffered as a result of violation of its subjective right. Reprisals, therefore, should not be recognized under modern international law as having a punitive function, irrespective of the subjective motive that prompted the injured State to take them. An article spelling out that fact would provide smaller States with an added safeguard. In that connection, he noted that the Special Rapporteur was not in favour of including such a provision and would prefer to rely on proportionality to temper any excesses so far as the punitive nature of the countermeasure was concerned. The precise meaning of proportionality was not always clear, however, which was why an article on the function of reprisals was necessary. He also agreed that there should be no reference in the draft to sanctions as such. Since retortion had been omitted from the draft and reciprocity, as in former article 8,[5] had been equated with reprisals, as in former article 9[6]—something he agreed with entirely—countermeasures now signified reprisals alone. The Special Rapporteur had, however, expressed the view that the term "countermeasures" was not a useful and clear concept. Why not, then, use the term "reprisals", notwithstanding its unfortunate connotation?

8. Like Mr. Calero Rodrigues (2274th meeting), he approved of the last phrase, "not to comply with one or more of its obligations towards the said State" in draft article 11, but he wondered why the word "suspend", used in former articles 8 and 9 drafted by the previous Special Rapporteur, Mr. Riphagen, had been omitted. The phrase in question denoted some degree of permanence, whereas reprisals should cease once their purpose had been achieved. There again, he agreed with Mr. Calero Rodrigues that that fact should be spelt out in the draft. Article 11 further provided that, only when the injured State had not received an adequate response to its demand for compliance with articles 6 to 10, could it set in motion the procedure for the settlement of disputes, under article 12. Having regard to paragraph 1 (*a*) of article 12, and to the fact that the object of a reprisal might well be to bring about the establishment of a settlement procedure, a countermeasure might be acceptable provided that its lawfulness was examined in the context of such a procedure.

9. With regard to article 12, notwithstanding the exception laid down in paragraph 2 (*a*), he had doubts about the precise meaning of the expression "all the amicable settlement procedures available . . .", in paragraph 1 (*a*), and would have preferred the words "all the" to be replaced by "any", for the sake of clarity. Paragraph 2 (*b*) and (*c*) as well as paragraph 3 apparently reflected the reasoning behind the paragraphs of the conclusion to chapter II of the fourth report dealing with the nature and objective function of the measure envisaged. Yet, the differences alluded to in the report with respect to the impact of settlement procedures and countermeasures were not reflected in the article.

10. Article 13, on proportionality, was a key provision and, like the *Naulilaa*[7] and *Air Service*[8] awards, was couched in negative terms. It was an improvement on former article 9 as drafted by Mr. Riphagen, which mentioned only the effects of the reprisal, in that it introduced a qualitative as well as a quantitative element and it also omitted the word "manifestly", which went too far. The Special Rapporteur's comparison, in the report, between two evils, as represented by the breach and the reaction to the breach, called to mind *lex talionis*, the purpose of which, in primitive law, had been to set a limit on private revenge and to impose a rudimentary civil rather than a penal sanction. There was, however, much to be said in favour of Mr. Bowett's suggestion (2274th meeting) to the effect that the countermeasure must be necessary to bring about, first, cessation of the wrongful act, and second, recourse to peaceful settlement. To apply more compulsion than was necessary was a sure indication of the disproportionate nature of the reprisal.

11. As far as paragraph 1 (*a*) of draft article 14 was concerned, whether it be the version originally submitted[9] or the reformulation, it would perhaps be preferable to use the expression "in contravention of the Charter of the United Nations and not only of Article 2, paragraph 4, thereof". Subparagraph (*b*) of the first version was perhaps preferable to paragraph 2 of the second, though it might not be acceptable. The Special Rapporteur's aim with paragraph 2 was to impose some limitation on the effects of reprisals by providing that they should not be allowed if they jeopardized the "territorial integrity or

[5] See 2273rd meeting, footnote 10.

[6] Ibid.

[7] See 2267th meeting, footnote 7.

[8] Ibid., footnote 8.

[9] The version originally submitted by the Special Rapporteur, read:

"*Article 14. Prohibited countermeasures*

"An injured State shall not resort, by way of countermeasure to:

"(*a*) the threat or use of armed force in breach of the Charter of the United Nations;

"(*b*) any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken;

"(*c*) any conduct which:

"(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

"(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

"(iii) is contrary to a peremptory norm of general international law;

"(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act."

He later reformulated it. See 2275th meeting, para. 1.

political independence of the State against which they were taken". While that idea deserved some reflection, it might first be asked whether proportionality was not in itself sufficient to make a reprisal illegal when it produced such catastrophic results. A second question then arose: if the reaction which produced those catastrophic results was in effect proportional to the breach, did that not indicate that the breach itself might have jeopardized the territorial integrity or political independence of the injured State? Yet application of article 14, paragraph 2, and the proportionality factor signified that the injured State could not go as far in taking reprisals as the offending State had done in committing the wrongful act. Paradoxically, proportionality between the coercion used and the objective aim of the reprisal meant that the reprisal had to end as soon as cessation of the wrongful act or reparation was achieved.

12. The second version of article 14 brought two elements into play: the nature of countermeasures which might jeopardize a State's territorial integrity or political independence, and the equation of certain countermeasures with the use of force. The article seemed to imply that the prohibitions referred to in paragraph 1 (*a*) derived from the language of the Charter of the United Nations. He wondered, however, if article 14 might not be introducing new and alien elements into the interpretation of the Charter. He was willing to accept the content of the four subparagraphs contained in paragraph 1 (*b*). However, as it stood, paragraph 1 (*b*) (ii) might give rise to abuses in the utilization of countermeasures. He would, therefore, replace the words "is of serious prejudice to" by "may hinder the normal operation of bilateral or multilateral diplomacy".

13. The report also contained valuable material on non-directly injured States. In particular, the logic expounded in the seventh paragraph of chapter VIII C of the fourth report could be usefully applied to help clarify responsibility in the case of pollution of the "global commons", if the obligation not to pollute them was considered to be an *erga omnes* obligation. The Commission should give further consideration to the material on non-directly injured States and to the tentative draft of a possible article 5 *bis*, proposed by the Special Rapporteur.

14. Mr. BENNOUNA said that he appreciated the comprehensive review of theory provided by the Special Rapporteur in his fourth report; at the same time, he was concerned that such an approach would lead the Commission to engage in interminable controversy, thus hindering it from reaching its goal of producing a set of draft articles.

15. He was, by and large, in agreement with the Special Rapporteur's observations on proportionality and with the content of draft article 13. However, the criteria by which proportionality was evaluated remained an unresolved issue. Equity, for example, was too vague a criterion and generally depended on the way it was defined in a dispute settlement procedure.

16. Countermeasures could be used as a pretext for a State, or a group of States, to impose its own view of the international order on another State. Hence, the question arose of whether it was acceptable that a regional group, such as the European Community, having determined unilaterally that a State had violated human rights or the right to self-determination, should suspend or terminate its association with that State, thereby jeopardizing its economic and social equilibrium. Or more generally, could the Community use a claim of violation of human rights as a means of no longer honouring certain specific obligations towards another State, when the actual objective was to impose on that State an economic and social system that was more favourable to the Community? Clearly, one of the key elements in considering proportionality and the related question of countermeasures was the real objective of such measures. The matter called for further reflection. The relationship between countermeasures and the prohibition of the use of force was a highly sensitive issue. He feared that the way in which it had been treated by the Special Rapporteur in his fourth report might lead to a widening of the scope of the use of force. In his view, the Commission should take the opposite approach: in dealing with the question of the use of force, it should confine itself to referring to the generally accepted rule of international law, as established under Article 2, paragraph 4, of the Charter of the United Nations. All the justifications for the use of force cited by the Special Rapporteur in the report were, in reality, simply various means of broadening the scope of the only legitimate exception to the prohibition of the use of force, namely self-defence. A number of examples were given in chapter V A, which failed to mention, however, that the claims of self-defence had very often been rationalizations for other, unacknowledged objectives that had prevailed during the epoch of spheres of influence: during that period, the actual aim had been to ensure ideological unity in a particular region.

17. It should be borne in mind that countermeasures were prohibited by international law, even when taken by a group of States, unless they fell within the scope of Chapter VIII of the Charter of the United Nations and had been authorized by the Security Council for the purposes of maintenance of peace. In that connection, he considered unacceptable the statement in chapter V A of the report that:

> The lawfulness of armed intervention to protect nationals in danger abroad generally appears to be accepted not so much under Article 51 ... as on the basis of a plea of self-defence as understood in the practice of common law countries, namely, of self-defence in a broad sense.

It was essential to recognize that the lawfulness of self-defence based on necessity was not generally accepted, either as doctrine or by the States themselves. It had been strongly contested by scholars, including Jiménez de Aréchaga and Tanzi. Much of the doctrine espousing a broad interpretation of the concept of self-defence was based on cases which had been adjudicated before the entry into force of the Charter of the United Nations in 1945. Such cases were of purely historical interest and were no longer relevant to modern thinking on the subject of self-defence. One of the key cases in the matter was the *Corfu Channel* case, which dated from 1949, and in which ICJ, in its Judgment, had rejected the United Kingdom's defence of "Operation Retail" as a method of self-protection or self-help, and said that:

"between independent States, the respect for territorial sovereignty is an essential foundation of international relations".[10] It was also a fact that many States had refused to accept the claims of those which had invoked self-defence based on necessity. Widespread protest had thus prevented a broad interpretation from becoming part of the generally accepted rules of international law. Members should not be put in the position of subscribing to the highly controversial doctrine of urgent necessity. The Commission was not mandated to deal in detail with the issues of the prohibition of the use of force or the nature of self-defence.

18. Generally speaking, he concurred with the Special Rapporteur's remarks on the use of economic and political measures as forms of coercion. The Commission probably did not need to go into lengthy debate in that regard. The Special Rapporteur had adequately defined the restrictions on such measures in article 13 (Proportionality), and in paragraph 2 of the new version of article 14 (Prohibited countermeasures).

19. He agreed, too, with the sections of the fourth report concerning the relations between countermeasures and human rights and the Special Rapporteur's observations concerning the rules on the inviolability of diplomatic envoys and other protected persons. He objected, however, to the wording of the penultimate sentence of the last paragraph of chapter V D, which indicated that those rules had come into existence long before the rules on the protection of human rights and the rules of *jus cogens*. *Jus cogens* did not represent specific rules. The concept related rather to the hierarchy of rules in the juridical system, the place of the rule in that hierarchy determining its character. There appeared to be some confusion between *erga omnes* obligations and obligations deriving from multilateral treaties, for they were two different concepts and should be distinguished from one another. *Erga omnes* obligations were applicable to all States.

20. In short, he had no quarrel with the substance of the draft articles, but was concerned about the fact that the articles themselves did not fully reflect the discussion in the fourth report.

21. Mr. BOWETT said he understood the reluctance of some members to see the Commission's draft endorse countermeasures—they looked back, with distaste, at the coercion of weaker States by the major Powers during the nineteenth century. However, one must be realistic: States were not prepared to surrender their right to take countermeasures, and indeed the draft articles afforded an opportunity to use countermeasures as a positive, constructive means of promoting respect for the law. The draft should thus have three aims in view: first, eliminating the punitive aspect of countermeasures; second, utilizing countermeasures as a means of compelling States to return to compliance with the law; and third, subjecting the underlying dispute to impartial, third-party settlement procedures, which would also encompass the legality of any countermeasures undertaken.

22. As to the earlier version of article 14, he had no difficulty with the proposition, in paragraph (*a*), that countermeasures should not involve the threat or use of force, or with the provision in paragraph (*c*), with the exception of subparagraph (ii) thereof, which was too broad and too subjective. If countermeasures should not be taken against the staff or premises of diplomatic missions, the draft should say so. Paragraph 2 of the reformulation of draft article 14 raised serious difficulties and he would prefer to see it deleted, because it implied that the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations extended to political and economic coercion, a view which had been decisively rejected in the resolutions adopted by the General Assembly on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty[11] and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[12] Again, although a separate provision could be included to forbid countermeasures as incompatible with the duty of non-intervention, without reference to Article 2, paragraph 4, of the Charter, that would be equally unacceptable. The Special Rapporteur had clearly shown in his report that the duty of non-intervention was extremely broad; it covered, in the words of paragraph 1 of General Assembly resolution 2131 (XX) of 21 December 1965

> ... all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.

With a ban on countermeasures set out in such broad terms as that, virtually all countermeasures would be prohibited. Clearly, the Special Rapporteur had not intended to go as far as that; his intention was that the prohibition should extend only to

> ... those measures of an economic/political nature the consequences of which are likely to cause very serious or even catastrophic disruption to the State against which they are taken.

But if the only prohibited measures were extreme measures of that kind, surely they would be prohibited in any case, since they would be disproportionate. There was no need to provide separately for them, except by emphasizing the need for proportionality.

23. In his initial statement, the Special Rapporteur had referred to draft article 4 of part 2, provisionally adopted by the Commission, saying that the Commission might need to look at it again. That article read:

> The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

24. Presumably, what worried the Special Rapporteur was the possibility that countermeasures might be prohibited, not by any express provision of the Charter of the United Nations, but by a decision of the Security Council binding on Member States by virtue of Article 25 of the Charter. The place to address that problem

[10] *I.C.J. Reports 1949*, p. 35.

[11] See 2265th meeting, footnote 6.

[12] Ibid., footnote 5.

would be in the commentary and he would suggest including a number of points in it.

25. First, given the purposes and principles of the Charter, it was not to be expected that the Security Council would use its powers to deny any State its legal rights or remedies, including the right to take lawful countermeasures. Second, it was recognized that the Security Council had the primary responsibility for maintaining international peace and security. Third, it was accepted that the Security Council had the power to oversee the use of countermeasures, and to indicate whether, in any given case, it believed them to be disproportionate. Fourth, it might request a State to delay the taking of countermeasures when, in its view, they would tend to aggravate the situation and lead to a threat to international peace and security, and when there was a reasonable prospect of peaceful settlement. Lastly, when the wrongdoing State was recalcitrant, and refused to cease its unlawful conduct, or to accept pacific settlement, beyond asking for a reasonable delay, the Security Council would have no right to demand that a State should not take lawful countermeasures.

26. Mr. CRAWFORD said that he agreed with the Special Rapporteur on many matters: on retortion; the terminology applying to countermeasures; the rejection of a special category of reciprocal measures—although with one reservation; the requirement of a genuinely unlawful act, as distinct from mere belief that the act was unlawful—which meant that the State acted at its own peril; and the legal irrelevance of a subjective punitive intent on the part of the State taking the countermeasures. He also agreed that countermeasures should not be of a punitive character. But a distinction should be drawn between interim and final countermeasures, that was to say, between reversible and non-reversible acts. Even where the countermeasures were in response to an unlawful act of an irreversible kind, their purpose should be to obtain cessation and reparation, and they must therefore, as far as possible, be reversible in nature. Hence he agreed with Mr. Barboza that article 11 should permit the injured State to suspend its obligations towards the State which had committed the internationally wrongful act; it should not speak simply of non-compliance.

27. Article 12 raised the problem of negotiation as a procedure for dispute settlement. Negotiations could afford a ground for delay: a State which had committed an internationally wrongful act could pursue negotiations indefinitely. Some limitation would therefore be required in paragraphs 1 (*a*) and 2 (*a*). One option might be to limit the dispute settlement procedure to third-party settlement; another would be to place a qualification on paragraphs 1 (*a*) and 2 (*a*) in cases where the injured State had reason to believe that the procedure would not lead to a resolution of the dispute within a reasonable time. A third option, suggested by Mr. Bowett, and the one he preferred, would be to make a satisfactory agreement on dispute resolution a suspensive condition for countermeasures.

28. Article 12, paragraph 2 (*b*), differed from the provision adumbrated in subparagraph (*b*) of the first paragraph of chapter II E of the report. The difference related to the period before interim measures of protection could be ordered by a court or a tribunal. The wording of the article was preferable to that of the report. An intermediate solution would be to confer a qualified right to take interim measures, pending the decision of the court or tribunal. Sometimes, for instance where assets were to be seized, the measures were likely to be ineffectual unless they were taken immediately. In that light, the proposal in chapter II E of the report did not seem to be workable.

29. Paragraph 3 of article 12 was unsatisfactory. It was extremely vague, and in any event its apparent object was already covered by the essential obligation of proportionality. He wondered how "justice" was to be defined; justice was in the eye of the beholder. In any case, the maintenance of international peace and security was a matter for the Security Council. States should not be subjected to vague and imprecise restrictions on their right to take countermeasures, provided the measures did not go beyond the requisite limits. Moreover, the duty of States not to aggravate their disputes should not be imposed unilaterally on injured States in the present context.

30. Article 13 dealt with the concept of proportionality by relating the countermeasures to the gravity of the internationally wrongful act and its effects, a principle which he endorsed. Mr. Barboza's idea that the conduct of the injured State should be proportionate to the two legitimate aims of the countermeasures, namely cessation and reparation, was interesting. As to the problem of differently affected States, the option was either to make special provision for them, a course to which the Special Rapporteur was opposed; or to specify that the gravity and the effects of the internationally wrongful act should relate to the State in question. In other words, it would only be possible to take countermeasures where they were warranted by the gravity of the breach *vis-à-vis* the State taking the countermeasure, and by the damage suffered by it. Otherwise, the ability to take countermeasures would be too broad and would be dissociated from the effects of the wrongful act. There was also the question of collective countermeasures, in cases where the worst affected State(s) sought assistance from others. If such State or States refrained from countermeasures, it might be that third States should not be allowed to take them. The right to take countermeasures should accordingly be made relative to the wrong suffered by the State in question, so that in practice only the most affected State(s) would take them. But the question of countermeasures by other States, taken at the instigation of the most injured State, was unresolved, and called for further reflection.

31. The issue of prohibited countermeasures was dealt with in the reformulated version of article 14.[13] He agreed with the prohibition of the threat or use of force in paragraph 1 (*a*), since the article was not dealing with self-defence. Paragraph 1 (*b*) (i) was not sufficiently precise—did it refer to all human rights or only some of them, and which ones? No doubt the Drafting Committee would decide. Paragraph 1 (*b*) (ii), on diplomatic immunities, was far too vague; in particular, it lacked a

[13] See footnote 9 above.

definition of "serious prejudice". Moreover, it seemed to defeat the purpose of the provisions on countermeasures, which should be to resolve, not to aggravate, disputes. Since the normal channels of diplomacy should be left open, he suggested specifying that countermeasures which breached diplomatic and consular immunity should be subject to a strict regime of reciprocity, that was to say that they could only be in response to a breach of similar or related obligations in the field of diplomatic and consular immunity.

32. Paragraph 1 (*c*) (iii) raised the question of countermeasures in breach of *jus cogens*. He did not agree with Mr. Pellet (2276th meeting) that the provisions on human rights, and the prohibition on the threat or use of force, could be left to be covered by the general reference to *jus cogens*. Nor would the effect of countermeasures on diplomatic relations be covered by paragraph 1 (*b*) (iii). A sentence could be included in the commentary to explain that the prohibition on conduct contrary to a peremptory norm of general international law was of a general character, and did not reflect a view that other prohibitions set out in paragraph 1 (*b*) (i) and (ii) were not rules of *jus cogens*. He could not accept the prohibition in paragraph 2 of "extreme measures of political or economic coercion". The article on proportionality should be drafted to confine extreme measures to cases where the injured State was itself the victim of extreme measures which jeopardized its territorial integrity or political independence. As for self-contained regimes, the draft articles should not attempt to resolve that question, which invariably called for an interpretation of the other treaty concerned. Article 2 of part 2 should not be deleted; instead, it could be redrafted along the lines of article 5 (Absence of effect upon other rules of international law) of the draft on international liability for injurious consequences arising out of acts not prohibited by international law.[14]

33. To revert to the question of differently affected States, he would suggest placing two limitations on the capacity of less-affected States to take countermeasures or to rule *restitutio in integrum*. First, it should be proportional to the degree of injury suffered by the State taking the measures; second, if the most affected State(s) disclaimed *restitutio in integrum*, no other State should be able to claim it. The Drafting Committee could incorporate those points, either in the articles or in the commentary.

34. Lastly, with regard to draft article 4 of part 2, the Commission should not be attempting, in its draft on State responsibility, or indeed in the commentary, to resolve problems arising under the Charter of the United Nations, which were a matter for the Security Council: in that sense, he agreed with Mr. Bowett. The words "as appropriate" should be deleted, since the draft articles should not be inconsistent with the provisions of the Charter.

The meeting rose at 11.30 a.m.

[14] For text as referred to the Drafting Committee, see *Yearbook... 1988*, vol. II (Part Two), p. 9.

2278th MEETING

Friday, 26 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, 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. PAMBOU-TCHIVOUNDA said that the fourth report on State responsibility (A/CN.4/444 and Add.1-3) developed and gave substance to the broad lines of the third report (A/CN.4/440 and Add.1), which had already been discussed by the Commission. During that discussion, he had observed, like the Special Rapporteur, that recourse to countermeasures was permitted under international law as a right inherent in the sovereignty of States—to borrow an expression used by ICJ—and that it was therefore a prerogative of pre-eminence, the exercise of which was left to the discretion of States. He had also pointed out that the object in drafting a legal framework for the exercise of that prerogative was to convert it into a right of subrogation with a view to preventing slip-ups and ensure that abuses of the right to have recourse individually to countermeasures had their natural limits within a system that was freely accepted by the community of States. In that connection, he had raised three questions in particular: first, was it the internationally wrongful act or the harm that was the condition for the proper exercise of countermeasures? Secondly, should joint countermeasures be left out? Thirdly, could the regime of countermeasures be compatible with the recognized right of States to enter reservations to the provisions of a treaty?

[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.