Document:-
A/CN.4/SR.2280

Summary record of the 2280th meeting

Topic:
State responsibility

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

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

2280th MEETING

Thursday, 2 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, 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. MIKULKA said that, in view of the rudimentary nature of the centralized machinery for the enforcement of international law, the individual means of constraint or coercion represented by countermeasures were a basic element of that law. The question was undoubtedly highly complex and delicate, but the Commission owed it to itself to discharge its responsibilities in the matter. In formulating draft articles on countermeasures, it had to avoid petrifying the present and largely unsatisfactory state of the law relating to the use of countermeasures in international relations, but should, rather, identify all the progressive elements which emerged from recent practice in order to supplement them so as to arrive at clear and precise rules that would strengthen the safeguards against abuses. If it adopted that approach, the Commission would be doing the international community a great service.

2. Draft article 11 stated the main rule in that regard, namely, that an injured State had the right to resort to countermeasures, while making it quite clear that resort to countermeasures was not a direct and automatic consequence of the commission of an internationally wrongful act, but was allowed only after the demands addressed to the wrongdoing State by the injured State to obtain cessation of, or reparation for, the internationally wrongful act had failed to meet with an adequate response. The purpose of that article was thus to limit possibilities of premature and therefore abusive resort to countermeasures and he could not but support that approach.

3. During the debate, several members had proposed that greater emphasis should be placed on the temporary or reversible nature of countermeasures by replacing the words "not to comply with" in article 11 by the words "suspend the performance of". There was no doubt that countermeasures should be temporary in nature and end as soon as the State which had committed the internationally wrongful act had indicated that it accepted the obligations arising from its responsibility for that act; there was no divergence of views on that point within the Commission. He nevertheless thought that the introduction of the idea of "suspension" would limit unduly the latitude left to the injured State by suggesting that only obligations of means of a continuing nature, as opposed to obligations of result, would come within the scope of countermeasures. He could not support that conclusion and thought that the problem should be considered more thoroughly.

4. Moreover, the order in which the provisions relating to conditions of resort to countermeasures (art. 12), proportionality (art. 13) and prohibited countermeasures (art. 14) followed one another should perhaps be changed. Article 11, which stated the general rule that an injured State was entitled, by way of countermeasure, not to comply with one or more of its obligations towards the wrongdoing State, should immediately be followed by an indication that the non-performance, by way of countermeasure, of certain categories of international obligations was strictly prohibited. The exceptions to the general rule or, in other words, the categories of obligations which could not be the subject of countermeasures as listed in article 14, should be listed immediately after article 11, possibly in a new paragraph 2 to that article. Such an approach would, *inter alia*, take account of the concerns of the members of the Commission who wanted it first to formulate rules establishing guarantees against possible abuses of resort to countermeasures. If the Commission wanted to move in that direction, it could also adopt an even more radical solution, which would be to list the categories of prohibited countermeasures in a new paragraph 2 to article 30 of part 1 of the draft articles,[4] which precluded wrongfulness in the case of countermeasures. In order to do so, it would, of course, have to wait until the second reading of part 1 of the draft articles. That was the approach that had been adopted in drafting the other articles of chapter V of part 1 relating to the other circumstances precluding wrongfulness, namely, consent (art. 29)[5] and state of necessity (art. 33)[6]: in those articles, the main rule was always followed by its exceptions.

---

[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] For text, see *Yearbook... 1980*, vol. II (Part Two), p. 33.

[5] Ibid.

[6] Ibid.

5. With regard to article 14 and substance, he agreed with the idea expressed in paragraph 1 (*b*) (iii) of that article, namely, that an injured State must not resort, by way of countermeasure, to any conduct which was contrary to a peremptory norm of general international law. There was no doubt that *jus cogens* rules included the prohibition of the threat or use of force in contravention of Article 2, paragraph 4, of the Charter of the United Nations, as mentioned in paragraph 1 (*a*), as well as at least part of the rules of international law on the protection of fundamental human rights mentioned in paragraph 1 (*b*) (i). However, the way in which the prohibition of the use of force and the violation of rules on human rights and the peremptory norms of general international law was expressed in article 14 could give rise to inadmissible *a contrario* interpretations. From that point of view, article 14, paragraph 1, had to be redrafted.

6. Paragraph 1 (*b*) (ii), which prohibited any conduct which was not in conformity with the rules of diplomatic law, related to a category of rules which could not be placed on the same footing as peremptory norms or the rules on the protection of fundamental human rights: it would be hard to agree that, in that case, the prohibition of countermeasures was equally absolute. In that connection, he shared the view of the members of the Commission who considered that it would not be justified to prohibit resort to reciprocal countermeasures in the framework of diplomatic law. In that area, resort to countermeasures was not forbidden, even if it was considerably limited.

7. Paragraph 1 (*b*) (iv) offered a useful safeguard against the extensive use of countermeasures.

8. He agreed with the tenor of article 14, paragraph 2, but doubted whether it added anything to the provisions of paragraph 1 (*a*) and whether it was therefore necessary.

9. Turning to draft article 12, he shared the fear with regard to paragraph 1 (*a*) expressed by several members of the Commission that an obligation couched in such general terms might place the injured State at a disadvantage. Mr. Bowett's comments (2277th meeting) on that point had been very convincing.

10. Article 12, paragraph 3, gave rise to some problems which had already been mentioned by Mr. Calero Rodrigues (2278th meeting). That provision, whose purpose was to preclude resort to countermeasures which were not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered, should have a more general function than that assigned to it in the framework of article 12, which limited its scope to the exceptions stated in paragraph 2.

11. Concerning article 13 (Proportionality), he supported the proposal that the criterion of the gravity of the internationally wrongful act and of its effects should be replaced by a different one which would take account of the purpose served by countermeasures, namely, the cessation of the wrongful act and reparation. However, there was much to be said for the arguments put forward by Mr. Al-Khasawneh (2278th meeting) on the highly subjective nature of any assessment of proportionality, regardless of the criterion chosen.

12. Lastly, with regard to draft article 5 *bis*, he noted that the accompanying commentary constantly referred to the concept of *erga omnes* obligations, thereby creating the impression that the question of a plurality of injured States could be equated with that of *erga omnes* obligations, and that was not the case. As Mr. Bennouna had pointed out, *erga omnes* obligations were part of *jus cogens* and consequently related to international crimes, which the Commission had still not yet begun to consider. In fact, the problem of a plurality of injured States did not arise only for *erga omnes* obligations; it arose for any regime of multilateral obligations. It was in that sense that the question also arose in the context of international delicts.

13. Mr. MAHIOU said that, before discussing the substantive aspects of the proposed draft articles, he wished to make a few comments on the concepts and ideas on which the Special Rapporteur had tried to provide some clarifications and explanations in his third report (A/CN.4/440 and Add.1) before proposing draft article 11.

14. As a general rule, the Commission had to refrain from using certain concepts and refuse to make room for them because they were not in conformity with international law and could even pervert its spirit. He was thinking in particular of the concept of "preventive self-defence" which had been invoked to try to justify more or less perniciously the use of force and which was no more than a perversion of the concept of self-defence. It was worth remembering Clemenceau's remark that a nation which wanted to make war was always in a state of self-defence. The Commission should therefore be careful, as urged by the Special Rapporteur, not to endorse any broad or abusive interpretation of certain concepts deriving from the Charter of the United Nations or other rules that might undermine the foundations of international law.

15. It had also been stated that measures of retortion were not part of countermeasures because, by definition, they were not contrary to international law. That was true, but it might also be asked whether a distinction should not be made according to whether those measures were taken in response to mere unfriendly acts or in response to a wrongful act. In the latter case, being a consequence of the wrongful act, they belonged to the topic under consideration and it might be useful to recall, if not in the draft article on the principle of proportionality, at least in the commentary thereto, that measures of retortion taken under those conditions were subject to that principle, like all other countermeasures.

16. It was understandable that there should be some hesitation about the choice between "reprisals" and "countermeasures", particularly in the light of the views expressed in the Commission which indicated that, behind the terminology question, there was a substantive problem, and even a conceptual problem of international law. There were two basic reasons for not using the term "reprisals". The first was the risk of confusion by contagion between armed reprisals and unarmed reprisals and, in that connection, he referred to the historical ex-

amples quoted by the Special Rapporteur. A clear-cut distinction had to be made between unarmed reactions and the use of force and reference should be made to countermeasures only when force was not used in order to show that the two areas were quite different. The second reason for rejecting the term "reprisals" was that behind it lay the idea of the punishment of one State by another or of a hierarchy as between guilty States and States empowered to punish them for the blameworthy acts that they might have committed. In fact, that idea was not only baseless in international law, but was also dangerous in that it could be invoked by a State wishing to play the role of international policeman. Besides, it might well be asked whether referring to "countermeasures" did not amount to presenting in a reassuring light something that was far from reassuring, thereby ignoring the fact that, in the final analysis, countermeasures threatened international law and international order just as much as reprisals. Would it not be better in that case to speak of reprisals because of the risks and threats inherent in all countermeasures, so that the latter would continue to have the suspect nature that was their basic feature? After some hesitation, he had finally opted for the term "countermeasures", which was, moreover, already used in the title of article 30 of part 1 and in draft article 11 proposed by the Special Rapporteur; he had done so out of optimism and perhaps in the hope that dressing the wolf up in sheep's clothing would make it more docile and easier to control.

17. With regard to article 12, he agreed with paragraph 1, which prohibited an injured State from taking countermeasures before it had exhausted all the amicable settlement procedures available and had communicated its intention of doing so. Those were two minimal conditions, and the first in particular, which was absolutely fundamental, deserved the Commission's attention. It provided the opportunity to place the emphasis on recourse to machinery for the peaceful settlement of disputes and to achieve progress in that area, in which connection he fully endorsed the arguments put forward by the Special Rapporteur in chapter V of his third report. If countermeasures were not to be the starting point for an escalation and for chain reactions between injured States and wrongdoing States, the subjective nature of the assessment of the existence and gravity of a wrongful act should be eliminated or reduced to the minimum and the credibility of procedures for the settlement of disputes, particularly those of a judicial kind, should be strengthened.

18. The relationship between countermeasures and procedures for the peaceful settlement of disputes was, however, complex and it was a matter not only of asking whether countermeasures were possible while a settlement procedure was actually under way, but also of considering the question in terms of complementarity and subsidiarity. Recourse to countermeasures could be justified if it helped to improve the operation of peaceful settlement procedures, for instance, by bringing pressure to bear on the wrongdoing State to make it accept or to facilitate such a procedure; in such a case, countermeasures were perceived to be complementary to the settlement procedure. Countermeasures could also be justified to alleviate the effects of the lack or failure of a recourse to peaceful settlement procedures, in which case reference could be made to subsidiarity. Article 12, paragraph 2, took account of that relationship in seeking to regulate the countermeasures and to make the injured States respect certain conditions, but without favouring or encouraging the wrongdoing States. As some members had pointed out, the time factor should not be disregarded in such a situation and the passage of time should not be allowed to penalize the injured State, thus operating to the benefit of the wrongdoing State.

19. Article 12, paragraph 3, was drafted in somewhat obscure terms, although he believed that he understood the Special Rapporteur's intention, which was to set forth an exception to the exception; however, the use, at least in the French version, of three negatives in four lines made the article difficult to understand. The Drafting Committee should nevertheless be able to overcome the problem. The principle of proportionality, which was the subject of article 13, was probably the least controversial; all that remained was to decide how to express it and, above all, how to characterize proportionality. So far as the actual text was concerned, the Special Rapporteur had considered various possible forms of wording, negative and positive, and had referred in particular to the *Air Service* award[7] and to the proposal of the Institute of International Law.[8] For his own part, he tended to favour the positive form of wording, since, in his view, it limited the area of subjective assessment more than the negative form of wording.

20. Proportionality should characterize all the reactions of the injured State, including reciprocal measures and measures of retortion. It was in that regard that, behind the abstract equality and superficial symmetry, the de facto inequality between the powerful States and the less powerful manifested itself most patently. The interpretation of the principle of proportionality should be the same whatever the reaction; on that point, he did not share the view of the Special Rapporteur, who had referred, in his third report, albeit with great prudence, to "a more articulate application" in the case of reciprocal measures. Proportionality should operate in the strictest possible way so as to avoid any imbalance between the countermeasures and the wrongful act that had motivated them. A reciprocal measure taken by a coastal State against a land-locked State, for instance, could have frankly disastrous consequences for the latter. In such situations, proportionality was of fundamental importance in preventing powerful States from abusing their position to the detriment of weaker States by making them endure extreme consequences for a wrongful act, regardless of the gravity of that act.

21. With regard to the parameters that governed the definition of proportionality, article 13 stipulated for the gravity of the wrongful act and of the effects thereof. The problem in that connection was to prevent the application of *lex talionis*. That was no easy matter, particularly if the assessment of the gravity of the wrongful act and of its effects was left to the discretion of the injured State. It was perhaps on that point that the Commission should endeavour to promote recourse to procedures for

[7] See 2267th meeting, footnote 8.

[8] Ibid., footnote 10.

the peaceful settlement of disputes, for there was no other way of limiting the discretion of the injured State and the possibilities of abuse than to involve a third party in the assessment of the gravity of the wrongful act, though the problem was how to involve such third party.

22. The Special Rapporteur apparently considered that the criterion of object had no place among the parameters of proportionality. His doubts were, of course, partially justified in the case of objects in general, but the question arose whether some objects, for instance, securing the cessation of the wrongful act or recourse to a peaceful settlement procedure, should not play a part in assessing the proportionality of countermeasures. If those specific objects were taken into consideration, it would help to avoid the application of the *lex talionis* that might result from the assessment of the gravity of the wrongful act or of its effects.

23. In article 14 (Prohibited countermeasures), paragraph 1 (*a*) merited special attention owing to its importance. In his view, Article 2, paragraph 4, of the Charter of the United Nations prohibited any use of force other than in the case of self-defence, that term being understood in the narrowest sense—and he repeated that because it was vital—excluding from it in particular the concept of preventive self-defence and other concepts invoked to justify the acts prohibited by the Charter and general international law. He felt bound to express his opposition to a certain line of reasoning which had also been referred to by the Special Rapporteur, which, in the name of logic and realism, invoked the conduct of a small number of States that had used force in order to contend that Article 4, paragraph 2, of the Charter would allow the use of force and which held that it should therefore not be condemned in absolute terms. If that line of reasoning was applied to other areas, it could lead to the conclusion that because certain States, even more numerous than those which had used armed force, engaged in practices condemned by many conventions, such as torture, those practices were lawful. As he saw it, if there was one area where the Commission should absolutely refuse to sanction certain pernicious interpretations of the law, it was certainly that of the use of force, which should be prohibited outright.

24. Article 14, paragraph 2, raised the wide-ranging problem of measures of political or economic coercion and of their prohibition if they jeopardized the territorial integrity or political independence of a State. Such measures could, of course, have consequences that were as serious as, and even more serious than, the use of armed force, but they still had to be defined more carefully to restrict the scope of the prohibition. In the wording proposed by the Special Rapporteur, that scope was made conditional on the "extreme" nature of the measures of coercion, but, in addition to the fact that that word lacked precision, it was not so much the intrinsic nature of the measures that should command attention as their object, which was to jeopardize the territorial integrity or political independence of a State. While it was comparatively easy to recognize or to establish that territorial integrity had been jeopardized, the same did not apply when political independence was jeopardized, something that could, in extreme cases, be regarded as inherent in any countermeasure. The concept of political independence therefore called for further reflection with a view to defining the threshold of gravity beyond which there would be prohibition by identifying the characteristics and dimensions to be protected, particularly with regard to the main aspects of State sovereignty.

25. In chapter VII of his fourth report (A/CN.4/444/Add.2), the Special Rapporteur reverted at length to the question of so-called self-contained regimes and their relationship to draft article 2 of part 2.[9] In his view, the discussion on the article should not be reopened at the present stage. In the first place, the strict interpretation given to it in the fourth report was not the only possible one, since the rules which the Commission was drawing up could also be of a residual nature in the case of so-called self-contained regimes. Furthermore, the Commission should perhaps re-examine draft article 2 of part 2 when it considered the relationship between the convention that was being codified and the other international agreements that governed responsibility in a particular area. As treaty regimes could fall within the scope of the Commission's draft in the case of a wrongful act, it was also necessary to determine whether there should be a provision to define the relationship between the convention that was being prepared and existing conventions or whether reference should be had to the rules of the 1969 Vienna Convention on the Law of Treaties. The Special Rapporteur had pinpointed and clarified the problem, but it was perhaps too soon to find a solution.

26. In proposing a draft article 5 *bis*, the Special Rapporteur questioned the approach which had been adopted by his predecessor and had resulted in article 5[10] adopted on first reading. After a line of reasoning that was rigorous, sound and fairly persuasive, he concluded that the distinction between directly injured States and non-directly injured States was unacceptable because it was inappropriate and, above all, had no basis in law. In drafting and adopting article 5, however, the Commission had apparently not endorsed that distinction, which was basically still one made by the former Special Rapporteur. To that problem of a plurality of equally or unequally injured States, the Special Rapporteur proposed a solution which he, for his part, tended to find more coherent and more satisfactory in many respects, based as it was not on the direct or indirect character of the injury, but on the nature and degree of the damage suffered. That solution had the advantage, first, of again placing the problem on the firmer and more familiar ground of damage, which concept underpinned the whole of part 2. It was also free of the risks and uncertainties that affected the concepts of directly or indirectly injured States. Finally, it avoided any possible confusion between directly or indirectly injured States and direct or indirect damage. There remained, of course, the question whether it would allow for a clear definition of the position of the various States towards which there were obligations that had been violated, what substantive or instrumental consequences would arise for each State and what countermeasures could be taken according to the nature and degree of the damage suffered. The Special

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

[10] Ibid.

Rapporteur had already clarified some of those questions, but others remained in the dark. In any event, his approach allowed for a more coherent interpretation of article 5, the structure and content of which were not at issue. Should that approach definitely be reflected in an additional article 5 *bis* as the Special Rapporteur proposed? All things considered, if a question deserved to be raised and clarified, a provision along those lines was justifiable. In any event, the proposed draft articles as a whole could be referred to the Drafting Committee.

27. Mr. RAZAFINDRALAMBO said that he agreed for the most part with the broad options set forth in the third and fourth reports, which did not depart significantly from those laid down by the former Special Rapporteur and already considered by the Commission at its thirty-seventh session. His comments and remarks would therefore relate solely to some problems raised by the Special Rapporteur and to specific points in his proposed draft articles.

28. The question whether it was desirable to deal with measures taken by the injured State in response to an internationally wrongful act was not a gratuitous one, having regard to the fact that the actual occurrence of the injury could be called into question and bearing in mind that, in the not so distant past, powerful States, claiming to have been injured by an act attributable to weak States, had taken reprisals against the latter in the form of punitive military expeditions, the object being to secure massive advantages for themselves. The reports under consideration seemed to cast a veil of modesty, as though not to revive old antagonisms, over those practices, which were contrary to justice, if not to international law, and which had marked the recent history of the former colonial nations. But had those practices really disappeared, or had they just taken new forms? The Commission could not conceal the phenomenon, particularly as it had devoted a special provision—article 30—to the legitimate exercise of countermeasures in reaction to an internationally wrongful act. It would also be strange if the Commission, having examined the forms of reaction of the injured State which the Special Rapporteur termed substantive consequences, did not then consider the other forms, namely, those involving the suspension of the performance of the obligations of the injured State, in other words, the instrumental consequences. Given the sinister connotations of the word "reprisals", the Special Rapporteur had preferred—and, in that, he had been supported by virtually all the preceding speakers—to retain the term "countermeasures", which had already been used by the Commission and was to be found both in arbitration case law (the 1978 *Air Service* award) and in the jurisprudence of ICJ itself (the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*)).[11]

29. The regime of countermeasures outlined in the third and fourth reports hinged on three main ideas: there must be an internationally wrongful act, which would be the condition, as it were, for the existence of countermeasures; a prior demand for reparation and the exhaustion of amicable settlement procedures; and, lastly, substantive limitations on the use of countermeasures. While he agreed fully with that general approach, the discussion to which it had given rise prompted certain remarks. The first concerned the possible temptation of a State to take countermeasures without itself having suffered damage; that was the "policeman syndrome" found over all, or part, of the world. In fact, the system devised by the Special Rapporteur established a necessary link between the countermeasure and the claim for restitution in kind (art. 7)[12] and for reparation by equivalent (art. 8),[13] a claim which was a preliminary step and whose object was compensation for the damage suffered. Another, allied, problem concerned the need to give countermeasures a function that was strictly confined to compensation and reparation, having regard to the consequences of punitive reprisals to which reference had already been made.

30. The Special Rapporteur questioned the validity of the concept of "self-contained" regimes and, at the same time, raised a question as to the scope of article 2 which the Commission had already provisionally adopted in 1986. In his own view, the retention of the article as worded, for the time being, would have no effect on the study of the provisions on legal consequences dealt with in part 2 of the draft, so that the best solution might be to come back to the problem when States had formulated their observations on the draft as a whole, once it had been adopted on first reading. As to the question of a plurality of equally or unequally injured States, the conclusion reached by the Special Rapporteur seemed well-founded, but, since it did not introduce any fundamental change into the general rule, there seemed no point in giving form to it in an additional article 5 *bis*.

31. Commenting specifically on the proposed draft articles, he noted that article 11, which was simply an extension of article 30 of part 1 and was made conditional on the failure of claims pursuant to articles 6 to 10, was designed to cover all kinds of countermeasures and, especially, reprisals and reciprocity, and that explained why the requirement that the obligations breached by the wrongdoing State must correspond to the obligations not performed by the injured State had been dropped. The words "not to comply", however, seemed to indicate that the injured State had no other choice than to put an end definitively to its own obligations. The concept of "suspension of the performance" seemed more compatible with the provisional nature of the measures as provided for in article 12, paragraph 2, particularly when an international body was required to take a decision in the context of a settlement procedure by a third party. Naturally, there were cases in which the obligations could not be effectively suspended, but the Drafting Committee could no doubt find a form of wording which combined suspension and revocation.

32. With regard to article 12, the condition requiring the exhaustion of all the available settlement procedures

[11] See 2267th meeting, footnote 6.

[12] For text proposed by the Special Rapporteur, see *Yearbook... 1989*, vol. II (Part Two), para. 230, pp. 72-73.

[13] For text proposed by the Special Rapporteur, see *Yearbook... 1990*, vol. II (Part Two), para. 344, footnote 271.

might perhaps be considered a latent defect, but why rush? Under Article 33 of the Charter of the United Nations, the parties to any dispute were obliged to seek its solution by using a number of settlement procedures. In terms of the wording of article 12, he believed that those settlement procedures provided for in an instrument to which the injured State was party should be given priority over the other procedures mentioned in paragraph 1 (*a*). Paragraph 2 did not give rise to any problems, but paragraph 3 was not clear enough and might need to be looked at again by the Special Rapporteur. In respect of article 13, the negative form of wording seemed logical for a rule which constituted a prohibition. That rule was also designed to temper the effects of the right provided for in article 11 and it should therefore be placed, as had been done by the former Special Rapporteur, after the enunciation of that right.

33. He endorsed the principle of the prohibition of certain types of countermeasures stated in article 14. He fully supported the Special Rapporteur's proposal to define the scope of the prohibition on the threat or use of force by making it applicable not only to armed force, but also to any extreme measures of political or economic coercion. Nevertheless, understood in that way, the threat or use of force was a violation of the provisions of Article 2, paragraph 4, of the Charter of the United Nations. Consequently, by relegating part of the definition to a separate paragraph 2, the new version of article 14 limited the scope of the prohibition and was thus not as good as the first version.[14] The Drafting Committee might be able to find the ideal solution. Paragraph 1 (*b*) (i) referred to the concept of fundamental human rights, which was mentioned only in the Preamble to the Charter, Article 1 referring to human rights and fundamental freedoms. Article 4, paragraph 2, of the International Covenant on Civil and Political Rights provided that there could be no derogation from the human rights listed in subsequent articles; that was a more precise formulation and one which corresponded to that used in the Vienna Convention on the Law of Treaties to define a peremptory norm of international law (art. 53). It might thus be asked whether fundamental human rights did not simply come under *jus cogens* and whether paragraph 1 (*b*) (i) did not serve the same purpose as paragraph 1 (*b*) (iii). He would nevertheless maintain the prohibition in respect of the protection of fundamental human rights, since that concept might change and might one day encompass certain economic and social rights and even rights such as the right to the environment.

34. The wording of paragraph 1 (*b*) (ii) was preferable to that of article 12 (*a*), as proposed by the former Special Rapporteur,[15] since the prohibition related to all forms of bilateral or multilateral diplomacy, although it was less specific in other respects. It made no distinction between diplomatic privileges and immunities and said nothing about the effects of the prohibition on the principle of reciprocity. Paragraph 1 (*b*) (iii) did not seem indispensable, since *jus cogens* was by definition peremptory.

35. Paragraph 1 (*b*) (iv) did, however, give rise to more problems because, behind its innocuous exterior, it dealt with violations of *erga omnes* obligations. In the view of the Special Rapporteur, the solution proposed by his predecessor in draft article 11, paragraph 1 (*a*) and (*b*) and paragraph 2,[16] took into consideration only those *erga omnes* obligations stipulated in multilateral treaties and made no mention of those arising from rules of general customary or unwritten law. That issue had already been raised in connection with article 5 of part 2,[17] which, in defining the injured State, referred to customary international law (para. 2 (*e*) and para. 2 (*e*) (ii)). To fill the gap to which the Special Rapporteur had rightly drawn attention, it would be enough to add the words "or a rule of customary international law by which they are bound" to article 11, paragraph 1, as proposed by the former Special Rapporteur. The Special Rapporteur might help the Drafting Committee find more comprehensive and acceptable wording which would "clean up" article 11. In any event, he agreed that draft articles 11 to 14 should be referred to the Drafting Committee.

36. Mr. FOMBA recalled that he had already commented on chapters IV, V and VI of the fourth report (A/CN.4/444/Add.1) (2278th meeting); he would therefore limit himself to brief remarks on chapters VII and VIII (A/CN.4/444/Add.2).

37. With regard to self-contained regimes, the Special Rapporteur raised the central question whether the rules constituting such regimes affected the rights of States parties to resort to the countermeasures provided for under general international law. He tried to answer that question pragmatically by examining the main cases of so-called self-contained regimes (legal order of the European Community, rules on the protection of human rights, rules on diplomatic relations and the system under the General Agreement on Tariffs and Trade) and concluded that the examples were not convincing. He stated that

> ... it would be inappropriate, in codifying the law on State responsibility, to contemplate provisions placing "special" restrictions upon measures consisting in the suspension or termination of obligations arising from treaties creating special regimes or international organizations. A correct interpretation and application of the general rules governing any unilateral measure ... should, in our view, be sufficient to cover the problems which may arise from treaties establishing international organizations or any allegedly "self-contained" regimes.

Personally, he agreed with that conclusion, for, in legal matters, he was in favour of as much "integration" as possible, meaning complementarity between an overall legal system and any special subsystems. In fact, behind the theoretical concept of self-contained regimes, what seemed to be taking shape was the outline of the old debate on the dialectic between legal macrocosm and legal microcosm in which the Commission did not have to get involved, except perhaps to point out the consistencies and interdependence between the two.

38. The Special Rapporteur's comments in his fourth report on draft article 2 of part 2, adopted on first reading, and his proposal to return to that article without

[14] See 2277th meeting, footnote 9.

[15] See 2273rd meeting, footnote 10.

[16] Ibid.

[17] See 2266th meeting, footnote 11.

waiting for its consideration on second reading because of the link between its content and the self-contained regimes was rather puzzling, but, whatever final position the Commission adopted on the question of "self-contained regimes", it would have to be in harmony with the spirit and the letter of draft article 2. He had no comments to make on draft article 4, which would, according to the Special Rapporteur, also require further consideration.

39. As to the problem of a plurality of equally or unequally injured States, dealt with in chapter VIII of the report, he had taken due note of the reasons why the Special Rapporteur could not accept the concept of non-directly injured States. He was grateful to the Special Rapporteur for recalling the origins of that concept and the debates which had taken place in the Commission and in the Sixth Committee in 1984.

40. In respect of the definition of an injured State in draft article 5, it was important to stress that an internationally wrongful act usually consisted of an infringement of a right, that infringement—with or without harm—constituting the injury. That was another aspect of the principle "no interest, no action".

41. He had read with great interest the Special Rapporteur's theoretical analysis of the possible positions of States with regard to the consequences of *erga omnes* obligations.

42. The footnote to the penultimate paragraph of chapter VIII B had attracted his attention. It stated that ". . . the concept of 'indirectly' injured States was the fruit of a misunderstanding which derived from an inadequate absorption of the definition of an internationally wrongful act, as laid down in article 3 of part 1 of the draft." It might be asked who was responsible—the members of the Commission or the members of the Sixth Committee?

43. He endorsed the Special Rapporteur's conclusion that "The only reasonable starting point, for the substantive as well as the instrumental consequences of a violation of *erga omnes* obligations . . . appears to be the characterization of each injured State's position according to the nature and the degree of the injury sustained."

44. In chapter VIII C dealing with the case of a plurality of injured States, the Special Rapporteur noted that: "The fact that the breach of *erga omnes* obligations results in a plurality of injured States, combined with the fact that such States are not injured in the same way or to the same degree, complicates the responsibility relationship." He then provided a judicious analysis of the way in which the substantive and instrumental consequences of the breach were affected. He pointed out in particular that those problems had been considered solely in connection with wrongful acts labelled "crimes" under article 19 of part 1, but they could also arise with regard to the consequences of more ordinary wrongful acts, commonly referred to as "delicts".

45. He generally agreed with the Special Rapporteur's conclusions at the end of that chapter of the report, and, in particular, his conclusion that the particular problems raised by the violation of *erga omnes* obligations ". . . call simply for a proper understanding and application of the general rules adopted or proposed so far".

46. Lastly, draft article 5 *bis* was justified for the following reasons: the concept of the "injured State" did not, *ipso facto*, imply equal treatment for the injured States; the use in the determination of the injured State or States of a definition *stricto sensu* of the internationally wrongful act; and the establishment, on the basis of that strict definition alone, of the rights or *facultés* of each State. While the scope of article 5 *bis* could easily be deduced from an intelligent reading of draft article 5, it might be necessary to formulate it expressly to eliminate any ambiguity. The rest was a matter of drafting.

47. Mr. VARGAS CARREÑO said that the Commission had a historic opportunity to make rapid progress on the topic under consideration. The fact that ideological confrontation had disappeared with the cold war, that international relations were more propitious for consensus, and that the international community had been strengthened by the many States joining its ranks were all favourable circumstances of which the Commission should take advantage. In his view, priority should be given to the topic of State responsibility in the next five years so that a final draft convention could be adopted during the present United Nations Decade of International Law.

48. The problem the Commission was dealing with at the current session—the instrumental consequences of an internationally wrongful act, or countermeasures—was not an easy one. As pointed out by the Special Rapporteur, it was an issue which had hardly any similarities with the regime of State responsibility recognized in national legal systems. International law also did not provide an appropriate institutional framework and that made it difficult to identify the components of a system governing the conduct of States. While inter-State practice was abundant, elements of *lex lata* were not enough in themselves to provide a basis for codification. They thus had to be supplemented by progressive development, taking account of contemporary international realities, the different legal systems and the need for wording on which consensus solutions could be based.

49. For a countermeasure to be legitimate, there had to have been an internationally wrongful act which actually infringed the right of the State adopting the countermeasure. It was not enough for the State to believe in good faith that a wrongful act had been committed to its detriment. If it resorted to countermeasures on the basis of a presumption of the wrongfulness of the conduct of the other State, it must assume responsibility for its reaction and, ultimately, it might itself be responsible at the international level if it turned out that none of its rights had, in fact, been violated.

50. The main function of countermeasures was to obtain cessation of the wrongful act, reparation for the harm, a guarantee that the act would not recur or all three. The punitive function of countermeasures was more questionable and, like the Special Rapporteur, he believed that it would not be appropriate to incorporate that function into the draft articles. It should also be emphasized that countermeasures could not be adopted automatically and that, in principle, they should be pre-

ceded by some type of protest, claim, *sommation* or intimation.

51. With regard to draft article 12 (Conditions of resort to countermeasures), he was entirely in favour of paragraph 1 (*a*), according to which the injured State must, before resorting to countermeasures, exhaust all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it was a party. He also considered that, as stated in paragraph 2 (*a*), that condition did not apply where the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and implementation of amicable settlement procedures.

52. However, he seriously doubted whether it was necessary or desirable to include a provision on interim measures of protection, especially if the draft articles were expressly to authorize resort to them before the peaceful settlement procedure had begun or even, as had been proposed, while it was in progress. Paragraph 2 (*b*) might give rise to problems or even lead to abuses by States on the basis of that authorization, which weakened the scope of Article 33 of the Charter of the United Nations. Admittedly, in certain circumstances, it might be lawful to take interim measures of protection immediately, without waiting for a peaceful settlement procedure to begin. However, the same caution which had prompted the Special Rapporteur not to take account of the punitive aspect of countermeasures should dissuade him from including a provision on interim measures of protection which would have more drawbacks than advantages.

53. He was in favour of draft articles 11 and 12, but would prefer it if article 12, paragraph 2 (*b*) and (*c*), were deleted or redrafted so that those provisions would not undermine the basic rule embodied in Article 33 of the Charter of the United Nations.

54. With regard to draft article 13 (Proportionality), he agreed with the Special Rapporteur's explanations, especially about the need to assess it by taking account not only of the purely quantitative elements of the damage caused, but also of qualitative factors, such as the importance of the interest protected by the rule infringed and the seriousness of the breach.

55. In draft article 14 (Prohibited countermeasures) as reformulated, the Special Rapporteur was proposing that the injured State should be prohibited from resorting, by way of countermeasure, to the threat or use of armed force and to various other forms of conduct listed in paragraph 1 (*b*) (i) to (iv). He intended to consider those provisions in detail.

56. First, as to the prohibition of the threat or use of armed force, which was more fully defined in the reformulated version of article 14, it seemed that the prohibition embodied in Article 2 of the Charter of the United Nations ranked as a rule of general international law and as part of *jus cogens*. That was borne out by all the jurisprudence of ICJ and by several of its judgments, as well as by the resolutions of the General Assembly. On the basis of the origins of that Article of the Charter and the interpretation to which it had subsequently given rise, it was clear that what was meant by "force" was only physical or military force, not other kinds of coercion, which, although they were unlawful and contrary to international law, were not covered by Article 2, paragraph 4, of the Charter. Since he was in favour of a restrictive interpretation of that paragraph, he would be just as strict with regard to the wholly exceptional situations in which the use of force might be justified in international relations. He could think of only two: individual or collective self-defence; and intervention by competent United Nations bodies to restore peace.

57. The first exception, self-defence, applied only in the event of an armed attack, namely, when an act of violence had actually been committed. Any other interpretation justifying armed reprisals—apart from humanitarian reasons or the need to protect nationals in foreign territory—could not be regarded as being in conformity with international law.

58. The second exceptional situation, intervention by United Nations bodies, raised various legal problems. The Commission was not the place to discuss them, but the Special Rapporteur had invited the members to think about draft article 4 of part 2[18] which had been provisionally adopted by the Commission and according to which the legal consequences of a wrongful act were subject to the Charter of the United Nations. As the Special Rapporteur himself said, that article also had more drawbacks than advantages and it gave rise to problems that went beyond the international responsibility of States because they related to the question of dispute settlement, the distinction to be made between legal and political disputes and the powers of the Security Council and its relationship with the other organs of the United Nations, especially ICJ. Did article 4 mean that the Security Council could not use the power conferred on it by Chapter VI of the Charter? What effects did it have on the jurisdiction of ICJ? Was the Court competent to remedy the legal consequences of an internationally wrongful act?

59. Coming back to draft article 14, he said that he preferred the earlier wording to the reformulation. It was important to distinguish between threat or use of force *stricto sensu* and other situations which would not be covered by a strict application of Article 2, paragraph 4, of the Charter of the United Nations. Thus, if the original wording was retained, the element of political and economic coercion to be included should perhaps be expressed in terms similar to those of articles 18 and 19 of the Charter of OAS, which were reflected in a number of General Assembly resolutions, including resolution 2625 (XXV) of 24 October 1970, which prohibited the use or the encouragement of the use of economic, political or any other type of measures to coerce another State.

60. Referring to the limitations which draft article 14 would place on the right of the injured State to take unilateral countermeasures, he said that the first, as contained in paragraph (*c*) (i), consisted of countermeasures not in conformity with the rules of international law on the protection of fundamental human rights. Human

[18] Ibid.

rights law had recently been developing at breakneck speed and the prohibition proposed by the Special Rapporteur appeared to be readily acceptable. The distinction he drew between "fundamental" or "essential" human rights and others was the same as that found in the main human rights instruments, all of which distinguished between rights from which no derogation was possible (for instance, the right to life) and freedoms which could be suspended. By using the expression "fundamental human rights", the draft article therefore left out, for instance, the property rights of foreign nationals present in the injured State. In recent State practice, moreover, there were cases not only of the expropriation of foreign property by way of countermeasure, but also of the freezing of the assets of foreigners as a reaction to the wrongful conduct of the State to which they belonged.

61. Paragraph (*c*) (ii) also excluded countermeasures which seriously prejudiced the normal operation of bilateral or multilateral diplomacy. However, the proposed wording seemed too vague and general. If there was one area in which countermeasures were regarded as perfectly lawful, it was precisely in the field of diplomatic law. Many examples came to mind: breaking off or suspending diplomatic relations; refusing to recognize Governments; recalling the Ambassador or the entire diplomatic mission; declaration of *persona non grata*, and so forth. Such conduct could indeed prejudice the normal operation of bilateral diplomacy. In the field of multilateral diplomacy, especially where regional international organizations were concerned, there were also examples of lawful acts which none the less jeopardized the operation of normal relations. That had been the case in 1976, when the General Assembly of OAS should have been held in Santiago, Chile, but the Mexican Government had refused to take part because a military Government was in power in the host country. It had also been the case in 1978, when the Government of Uruguay had offered to host the General Assembly in Montevideo and the offer had been accepted in principle, but, because the Government had not invited the Inter-American Commission on Human Rights, a number of States had intervened to request that the General Assembly should be held elsewhere. The proposed text would be acceptable if additions were made referring to the immunities of diplomatic and consular agents and to the situation with regard to premises. He therefore proposed that the prohibition should be extended to countermeasures which threatened the inviolability of persons and premises protected by diplomatic law: that would be a more precise and more appropriate provision.

62. Paragraph (*c*) (iii) prohibited countermeasures which were contrary to a peremptory norm of general international law. The prohibition was apt, since those which preceded it did not cover the whole of *jus cogens*, which was also of a historical nature and could therefore be extended, restricted or changed at different times, without such changes necessarily being reflected in a convention.

63. Another proposed restriction derived from the application of the *erga omnes* effect of certain international legal obligations. An *erga omnes* obligation was characterized not by the importance of the interest to which it related, but by the juridical indivisibility of its content. That was a complex subject, covered to some extent in the Vienna Convention on the Law of Treaties. The Special Rapporteur had rightly treated it cautiously in his report.

64. To sum up, he considered that draft articles 11 to 14 as submitted by the Special Rapporteur were generally to be welcomed. The Drafting Committee would make the necessary changes in them and the Commission could continue to make progress in its work.

65. Mr. KUSUMA-ATMADJA expressed admiration for the enormous amount of work the Special Rapporteur had done. He agreed with him that it was best for the Commission not to be in too much of a hurry to produce draft articles. It could take time for further thought without giving up the idea of achieving concrete results within the next five years.

66. There was an obvious link between the Commission's work on State responsibility and other topics on its agenda, namely, the establishment of an international criminal court and international liability for injurious consequences arising out of acts not prohibited by international law. Once countermeasures permitted by international law gave rise, in the State to which they were directed, to damage out of proportion to what had been necessary to obtain satisfaction, the State which had taken the countermeasures incurred "strict" liability. In any case of strict liability, compensation was due for the damage caused. That was a particularly interesting aspect because the Commission's task was not only to draft laws and conventions, but also to concern itself with their effects on human beings. In that connection, Mr. Shi (2267th and 2273rd meetings) had quite rightly drawn attention to the danger involved in codifying countermeasures, which could be a statement that might was right. His own conclusion, however, was different: the danger involved was a further reason why the Commission should deal with the problem, for it was best to face up to the realities of the world, which was characterized by a wide variety of situations. The use of force, which was hardly imaginable in some rich developed countries, was still quite common in other parts of the world and nationalism, which might seem an old-fashioned idea, was far from dead, as shown by the present situation in Eastern Europe and in the former Soviet Union.

67. With regard to the draft articles 11 to 14 on the question of countermeasures, he agreed with the Special Rapporteur's general approach, even though a few minor drafting changes would be necessary. He particularly welcomed the fact that countermeasures had been treated as a very exceptional solution to be used only in extreme situations. He nevertheless agreed with Mr. Razafindralambo that, in draft article 13 on proportionality, the negative form of wording should perhaps have been used to give the prohibition greater weight.

68. He had the same problems as the Special Rapporteur with self-contained regimes, but he thought that article 5 *bis* was unnecessary and that what it stated could be included in a commentary. In that area, as in the area of countermeasures, the Commission had to use balanced wording. It must not dwell too much on excep-

tional situations so as not to produce some kind of "monster". The conservatism of the earlier draft articles proposed by the former Special Rapporteur had had some good points and, if those earlier versions were combined with the bolder proposals by the present Special Rapporteur, the Commission could probably achieve some very sound results. As to the relationship between self-contained regimes and *erga omnes* obligations resulting from treaties or conventions, the Commission should be guided by the general rules derived from the Vienna Convention on the Law of Treaties. After all, self-contained regimes were treaties, too.

69. In that connection, the Commission should also not be in too much of a hurry to produce draft articles. There were specific examples to show, for instance, that the member countries of the European Community, both individually and as a community of States, had taken years to adjust to the new regime established by the United Nations Convention on the Law of the Sea. In that field as in the field of countermeasures, the Commission must consider that it was dealing with some very particular aspects of international law and act accordingly. For example, could the articles which the Commission was trying to draft be allowed to diminish or weaken the *erga omnes* obligations arising out of the 1949 Geneva Conventions? That brought him to the question of the rules of international law relating to the protection of human rights, which the Special Rapporteur quite rightly mentioned in draft article 14. That aspect, which warranted reflection and could be further developed later in the commentary to that article, was of great importance for the topic under consideration. For instance, the sovereign rights of States over their natural resources, which were essential for developing countries, were often violated by transnational corporations whose only concern was to make profits and whose operations were contrary to local regulations. In such a case, if the host country took countermeasures, they would, in his view, be fully justified. Of course, the violations of human rights which gave rise to countermeasures must have been persistent and violent. In that connection, he wondered whether the words "use of force" in article 14, paragraph 1 (*a*), referred only to physical force or to any kind of force. He could not answer that question himself, but he did want to warn the members of the Commission that there might be a risk of opening Pandora's box. The Commission must continue to be cautious in its approach and aware of just how far it could go.

The meeting rose at 1.05 p.m.

2281st MEETING

Friday, 3 July 1992, at 10.10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, 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. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (*continued*)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN extended a warm welcome to Mrs. Margaret Killerby, Observer for the European Committee on Legal Cooperation, and invited her to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) said that since July 1991 two more States, Poland and Bulgaria, had joined the Council of Europe and that other Central and Eastern European countries were expected to become members in the near future. The Council now had 27 European Member States. It was continuing its extensive programme of cooperation in the legal field for the Central and Eastern European countries. The "Demo-Droit" programme, which was designed to facilitate the establishment of institutions and legislative frameworks based on the principle of pluralist democracy, human rights and the rule of law, contained multilateral and country-specific programmes that took account of the priorities of the States concerned. CDCJ had been kept regularly informed of the Commission's activities and, at its 56th meeting, in November 1991, had had the pleasure of hearing a statement in that regard by Mr. Eiriksson.

3. At its meeting in June 1992, CDCJ had adopted a draft second Protocol to amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality. The draft Protocol permitted dual nationality in certain instances and would enable contracting States to allow second-generation migrants to acquire the nationality of the host country while retaining their nationality of origin. It would also allow a spouse to acquire the nationality of the other spouse without losing the nationality of origin, and the children of such spouses to have both nationalities. The draft Protocol would be examined in the autumn by the Committee of Ministers of the Council of Europe. At the same meeting, CDCJ had invited the Committee of Ministers to adopt two draft recommendations: one on the protection of personal data in the area of telecommunications services, with particular reference to telephone services; and the other on teaching, research and training in the field of law and information technology.

---

* Resumed from the 2275th meeting.