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Summary record of the 2265th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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had found that there were two main trends: that of those who proposed out-and-out rejection and that of the optimists who hoped that a solution might one day be found. However, he believed that there was also an intermediate position, namely, that, if the Commission was not too ambitious, it would be able to draft a text that could answer the questions the General Assembly and the Sixth Committee had asked in connection with an international criminal court in the general sense of the term. Some speakers had made very useful proposals that should be reflected in the Commission's work. However, it might be for the Working Group or the Drafting Committee to identify the trends that would make it possible to find such an intermediate solution and consider the question more realistically.

32. The CHAIRMAN said that the Special Rapporteur had done his best at the current meeting to provide answers to specific questions on part two of his report. He agreed, however, that, generally speaking, a summary of opinions and trends would be helpful once the consideration of the topic had been completed at the current session. The question should be brought to the Planning Group's attention.

33. Mr. THIAM (Special Rapporteur) said he was sure that the Working Group, which had taken note of all the views expressed, would have useful ideas on how to draft the report to the General Assembly, which should reflect the two main trends in the Commission.

34. The CHAIRMAN said that those comments concluded the discussion on the Special Rapporteur's tenth report and that the consideration of the topic would be resumed in the Working Group chaired by Mr. Koroma. The Commission would come back to it after it had received the Working Group's report.

The meeting rose at 11.20 a.m.

2265th MEETING

Tuesday, 26 May 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

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

State responsibility (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

ARTICLE 5 *bis and*
ARTICLES 11 TO 14[3]

1. The CHAIRMAN invited the Special Rapporteur to give a brief summary of the contents of his third report on State responsibility (A/CN.4/440 and Add.1) for the benefit of the new members of the Commission. He recalled that that report had been introduced at the previous session.[4] Consideration of the fourth report (A/CN.4/444) would begin later.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had decided to conform to fashion and speak of countermeasures instead of reprisals, but if he should refer to measures or to reprisals at any time, they should be understood as being synonymous with countermeasures. He happened to prefer the term reprisal because it was clear when a distinction was drawn with self-defence and retortion.

3. With regard to the beginning of the "operative" part of the third report, the first point in connection with the regime of countermeasures was the basic condition for lawful reprisals: the existence of an internationally wrongful act, or—to use a term proposed by one of the new members—a breach, whether of short duration or ongoing. Bona fide belief that a breach had occurred was not in itself sufficient justification to resort to a countermeasure. Such a belief on the part of State A, allegedly injured by a breach allegedly committed by State B, could, once it had been found that there was in fact no breach or that State B was not the wrongdoer, only diminish the degree of unlawfulness, and therefore liability, of State A for having resorted to an unjustified reaction. The existence of a breach and its author need not, however, be the object of a prior determination by a judge, arbitrator or political body, except to the extent that a settlement procedure was envisaged.

4. A second point was the function of countermeasures, which some considered to be strictly compensatory, whereas others believed that measures of that kind were also, or even mainly, punitive. He was inclined to take the view that both elements were present, although in varying degrees, depending on the case. Undoubtedly, in resorting to a countermeasure an injured State would feel that it was securing not just compensation but also the satisfaction that fell to an injured party as a result of meting out some kind of punishment. In his opinion, the Commission should not state explicitly either that the

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

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

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

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

function of countermeasures was partly compensatory or was partly punitive or that it was both. The draft article should not state either that countermeasures should pursue reparation only. The matter should simply be left untouched: the more so as a punitive function could hardly be denied in the case of crimes, and it would be awkward if that had to be made explicit in any provision dealing with crimes. It should also be kept in mind that the qualitative difference between the breaches labelled as "delicts" and those labelled as "crimes" might well prove to be, in a last analysis that had yet to be made, only one of degree, probably of degree of fault. The most serious among the "delicts" would thus appear to be so close to the supposedly distinct category of crimes that a distinction from the viewpoint of the presence or absence of punitive consequences would be difficult to justify in practice as well as in theory.

5. A third point was whether and to what extent resort to countermeasures was subject to conditions to be met by the injured State. Conditions fell under two headings: a prior demand for cessation and/or reparation, protest or the like, and prior resort to and exhaustion of dispute settlement procedures. The problems that arose under those two headings, particularly the prior resort to dispute settlement procedures, were crucial in devising a regime for countermeasures. He would revert to the question later, but would simply note for the time being that he had placed the question of conditions in part 2 of the draft, thereby departing from the practice of his predecessor, who had placed most of it in part 3.

6. The next point concerned those further conditions for lawful reprisals that derived from the prohibition on the use of force, respect for human rights, the law of diplomatic relations, respect for the rights of third parties and the peremptory norms of international law. After such solemn proclamations as those made in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States[5] and in other United Nations and non-United Nations instruments, there could be no doubt that armed countermeasures were prohibited by the terms of Article 2, paragraph 4, of the Charter of the United Nations. The universal view of scholars, one with which he disagreed, was that Article 2, paragraph 4, of the Charter had become a rule of customary international law. The prohibition and condemnation of armed reprisals should be expressly included in one of the articles on State responsibility. One must, of course, not overlook that part of the doctrine which raised the question whether the failure to implement Articles 42 to 47 of the Charter, the core of the United Nations collective security system, did not justify an "evolutive" interpretation of Article 2, paragraph 4, to allow exceptions to the prohibition contained therein. He was referring to the doctrine according to which the prohibition laid down in Article 2, paragraph 4, should be subject not only to the exceptions envisaged in Article 51 of the Charter but also to other exceptions not expressly provided for in Article 51. However, such a doctrine could only cover if, and in the measure in which it might be acceptable, those hypotheses in which resort to force might be justified by the grave emergency situations for which Articles 42 to 51 had been devised. Even though some of those hypotheses might call for a broadening of the concept of self-defence, that would not justify an exception to the prohibition of armed countermeasures against an internationally wrongful act. States invariably invoked self-defence, and not situations calling for reprisals or countermeasures, when they resorted to force in response to what they regarded as grave emergency situations. That did not prove that armed reprisals were admissible; and, indeed, the actions in question had been condemned by the Security Council on more than one occasion.

7. With regard to the meaning of the term "force", in his third report he had given a brief outline of the different doctrinal positions on the unlawfulness of certain economic and political countermeasures. Force could be taken to mean more than armed force, and he referred in that connection to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty,[6] the Declaration on Friendly Relations already cited, the Final Act of the Conference on Security and Cooperation in Europe[7] and various regional instruments, in particular the Charter of the Organization of American States. In a number of those texts, the prohibition of certain forms of political and economic coercion had been dealt with under the principle of non-intervention. Although State practice was not abundant in that respect, political and economic measures had been frequently resorted to and were regarded as admissible as countermeasures. Yet their admissibility was not exempt from a number of restrictions. In practice, there seemed to be a trend towards prohibiting political and economic measures that jeopardized the territorial integrity or political independence of the State against which they were taken.

8. As to compatibility with respect for human rights, restrictions on the lawful resort to countermeasures should be confined to the core human rights. The right to own property, for example, should not be included among the rights the infringement of which by way of countermeasures should be declared inadmissible. That was not to say that the Commission should list the human rights it considered important enough to be protected from the taking of countermeasures against a State: the matter should be left to the further development of human rights law.

9. He would discuss the inviolability of specially protected persons at greater length later, together with self-contained regimes, of which it was an example. Great caution was needed in that regard and the Commission should draw inspiration from the *raison d'être* of diplomatic immunities. If diplomats were not protected by diplomatic immunities, they were by the international law of human rights. A prohibition should be placed on countermeasures that might seriously hinder the normal conduct of diplomacy: a limitation that should not be understood, however, as condemning, for example, the breaking-off of diplomatic relations as a reprisal by one

[5] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[6] General Assembly resolution 2131 (XX) of 21 December 1965.

[7] Signed at Helsinki on 1 August 1975.

State against another. Rightly, the question had been raised as to why it was necessary to mention the relevance of *jus cogens*. Everyone knew that the rules of *jus cogens* existed and that, being what they were, those rules were not subject to derogation and thus could not be violated by a State resorting to a countermeasure simply because the State in question was reacting to an international breach. However, just as express mention should be made of the prohibition of armed force, express mention should also be made of the prohibition of any countermeasure not compatible with the rules of *jus cogens*. He would return to the question of obligations *erga omnes* in the fourth report, but it was clear that a State that resorted to a countermeasure should not do so to the detriment of the legal rights of States having nothing to do with the wrongful act.

10. Plainly, the regime of countermeasures formed the core of the law of State responsibility and, at the same time as being the most crucial part it was also the most problematic. In studying the regime of substantive consequences it was possible to rely to a considerable degree upon municipal law analogies, but no such assistance was available in respect of the instrumental consequences of internationally wrongful acts. In no other area of international law was the extent of the emperor's nakedness so apparent, so to speak. Institutional means of redress were very few and where they did exist were not always satisfactory. Generally speaking, the international community was more concerned with maintaining security than with the consequences of breaches of international law; even the Charter of the United Nations was of little help on that score. The implementation of the rules on State responsibility remained in the hands of States, and inevitably the inequalities between States in terms of wealth and power were felt more acutely in the area of countermeasures than anywhere else. The fact that countermeasures were for the most part decided and applied unilaterally was inconvenient for both parties in the responsibility relationship. The allegedly lawbreaking State found itself at a disadvantage in that it had to face the unilateral choices of the State it had allegedly injured. An injured State, for its part, was subject to conditions and restrictions which placed it at a disadvantage whenever it faced a stubborn, unyielding lawbreaker. The prohibition of the use of force and the obligation to respect human rights and humanitarian interests placed a law-abiding injured State in great difficulty in securing cessation of wrongful conduct and obtaining adequate reparation. Those factors diminished the effectiveness of both the primary and secondary rules. The only way to come to grips with those negative factors lay in a very serious effort on the part of the Commission and the Sixth Committee to strengthen the dispute settlement procedures to be envisaged in part 3 of the draft. While reserving the right to revert to that subject *ex professo* in due course in an ad hoc report, he had put forward some preliminary thoughts in his fourth report on the basis of an analysis of the developments in dispute settlement obligations since the First World War. He would revert to the issue when the Commission came to consider the fourth report, but thought it useful at that stage to draw attention to the conclusions he had reached, so as to facilitate the debate later on.

11. Mr. JACOVIDES said that the item on State responsibility provided the Commission with an excellent opportunity to make a major impact not only in codifying but also in progressively developing the relevant rules. It had been on the agenda for a very long time and, in his view, the Commission should concentrate on it as much as possible during the current session and for the remainder of the present quinquennium, giving the topic priority, if necessary, over others less central to the mainstream of contemporary international law, such as the item on relations between States and international organizations. Completion of the work on State responsibility during the United Nations Decade of International Law[8] would constitute a major achievement and would be well received by the General Assembly, which found it difficult to understand why the Commission was taking so many years to make headway. Last but not least, it should be remembered that, in the debate on the draft Code of Crimes against the Peace and Security of Mankind, it had been agreed by way of compromise to restrict it to individuals, on the understanding that criminal responsibility of States would be covered under the item on State responsibility. In view of that link, it was essential for progress on State responsibility to keep pace with progress on the draft Code; otherwise, the validity of the compromise would be placed in jeopardy.

12. He congratulated the Special Rapporteur on the thoroughness and erudition of the third report, dealing with the legal regime of measures an injured State could take against a State that committed an internationally wrongful act. The discussion was to be confined for the present to measures applicable to the case of delicts or ordinary wrongful acts, analogous measures in the case of international crimes being deferred for consideration at a later stage. The Special Rapporteur was right to draw attention in the introduction to the contrast between the equality to which every State was entitled in law and the factual inequalities which tempted stronger States to impose their economic and military power, a contrast that manifested itself particularly in countermeasures for wrongful acts. It was the small and medium-sized States which, as a matter of self-interest or even self-preservation, had to rely on the protective effect of international law and make their contribution to its efficacy. Moreover, it was in that connection that progressive development of international law through such concepts as *jus cogens*, obligations *erga omnes*, the recognition of the existence of hierarchically higher rules and principles embodied in the Charter of the United Nations—concepts which should be given special weight in the Commission's work in general and in its work on State responsibility in particular—came into play. The Commission could make a constructive contribution to lifting the concept of State responsibility from its traditional context, where the emphasis was placed primarily on injury to aliens, to a contemporary context of international public order and the interests of the international community at large.

13. The report spoke of "the evocation of the hazy and ambiguous concept of a 'new international order' ". Notwithstanding the fact that several parts of the world

[8] See 2255th meeting, footnote 5.

were at present suffering from what might be described as a new international disorder, the concept of a new international order was to be welcomed, but only if it acquired proper legal meaning and led to an international legal order. That was impossible unless the new world order was predicated, not on a directorate of the powerful, but on equal justice for all members of the international community. A proper balance had to be struck between, on the one hand, action taken against violations of human rights which imperilled peace, and on the other, abusive unregulated encroachment on the domestic jurisdiction of States and erosion of their sovereignty. Proportionality and rejection of double standards were essential elements in determining the propriety of countermeasures. First and foremost, decisions had to be taken in accordance with the letter and spirit of the relevant provisions of the Charter of the United Nations.

14. Self-defence should be seen as a unilateral armed reaction against an armed attack. While legitimate under certain circumstances, it should be considered an exceptional measure, since the basic rule under the Charter was a complete prohibition of the use of force in international relations. Accordingly, self-defence should be carefully circumscribed. In his view, the relationship between Article 2, paragraph 4, and Article 51 of the Charter provided the best test of the latitude allowed, with Article 51 being narrowly interpreted because a broad interpretation would open the door to abuse by stronger States. The tendency in present-day international law should be to apply self-defence restrictively. As for the concept of self-help, he agreed that it was too general and imprecise to be considered in the present context. Similarly the term "sanctions" should be confined to measures adopted by an international body, the Security Council being the most obvious example. Retortion, in the sense of unfriendly measures taken in response to equally unfriendly, but not *per se* unlawful, acts, should not find a place in the draft.

15. As to reprisals, in the sense of conduct which was unlawful *per se*—inasmuch as it would entail violation of the right of another State—but which lost its unlawful character by virtue of being a reaction to a wrongful act committed by the other State—the Commission should also adopt a restrictive approach and interpret the scope of reprisals as narrowly as possible. The term "countermeasures" should include the generality of measures that might be resorted to in order to seek cessation or redress; as the Special Rapporteur pointed out in the report, the Commission itself, in the context of draft article 30 of part 1, understood it as including measures traditionally classified as reprisals as well as sanctions decided on or applied by international bodies. The term "reciprocal measures" used in the context of countermeasures was a particular application of the broader concept of reciprocity which applied to various areas of international law and relations. The taking of countermeasures on a reciprocal basis would be intended to restore the balance between the position of the offending State and that of the injured party and would thus differ from reprisals as defined earlier.

16. He concurred with the Special Rapporteur that lawful resort to countermeasures presupposed internationally unlawful conduct of an instantaneous or continuing character and that the bona fide belief on the part of a State that it had been or was being injured by an internationally wrongful act was not in itself sufficient. That position was in accord with the general philosophy of allowing restrictive application of countermeasures. The same general consideration dictated his answer to the issue raised as to the functions and purposes of the countermeasures. While countermeasures might contain a punitive element, the emphasis should be on restitution and compensation rather than on punishment. He also agreed that lawful resort should not be had to acts of reprisal before a protest and demand for cessation and/or reparation had first proved unsuccessful, and he noted with approval the Special Rapporteur's statement that, if the area were not covered satisfactorily *de lege lata*, improvements might have to be sought, more especially to ensure better protection of prospective weaker parties, as a matter of progressive development. Similarly, and more significantly, the trend in the draft under consideration should clearly be to encourage the peaceful settlement of disputes through third-party procedures. That principle was set out in Article 2, paragraph 3, and Article 33 of the Charter of the United Nations, and there had recently been a great deal of activity in that regard, not only at the international but also at the regional level, within the framework of the Conference on Security and Cooperation in Europe and elsewhere. The answer to the question of the impact of dispute settlement obligations applied principally to forcible countermeasures but was relevant to non-forcible measures as well. It was to be hoped that an effective system of dispute settlement would be adopted under part 3 of the draft, and he fully agreed with the Special Rapporteur's views on that subject as expressed in the report.

17. The problem of proportionality was undoubtedly a crucial element in determining the validity of countermeasures. The proportionality rule was not only the modern doctrine but was also firmly rooted in classical international law and in judicial practice. While the principle itself was hardly open to doubt, there might be some room for debate about its precise scope and application in the present context. He had every confidence that the Special Rapporteur would guide the Commission towards the most suitable formulation of the law in that respect. With regard to the regime of suspension and termination of treaties as countermeasures, his own position would be to rely as much as possible on the relevant provisions of the 1969 Vienna Convention on the Law of Treaties and, where the Convention failed to cover the issue, to apply countermeasures on the narrowest possible scale. He shared the Special Rapporteur's opinion that the problem of so-called self-contained regimes should be dealt with not in the section of part 2 concerning countermeasures but, rather, in the section or chapter covering the general principles of the content, forms and degrees of international responsibility.

18. He would point out that the problem of differently injured States had already been discussed and, after due deliberation, the Commission had adopted draft article 5,[9] and more particularly, subparagraphs (*e*) and (*f*) defining differently injured States and the circumstances

[9] For text, see *Yearbook... 1985*, vol. II (Part Two), p. 25.

under which they had *locus standi*. Without precluding the possibility of expressing different views or seeking improvements, it might be advisable to take that article as the starting point for further work on the subject. The matters raised under the heading of substantive limitations issues involved some fundamental points of public policy in present-day international law and offered welcome opportunities for the Commission to make its mark in the codification and progressive development of the law. He shared the prevailing view, referred to in the report, that the prohibition of the use of force in international relations set forth in Article 2, paragraph 4, of the Charter of the United Nations had become a part of general, unwritten international law and a peremptory norm from which no departure could be allowed by treaty or otherwise. It could safely be stated that resort to reprisals involving armed force was prohibited by international law. He noted with approval Mr. Bowett's views on that issue, as quoted in one of the footnotes, and endorsed the Special Rapporteur's opinion to the effect that the Commission could hardly admit any derogation from the prohibition of armed reprisals as implied in Article 2, paragraph 4, of the Charter and emphasized in the relevant part of the Declaration on Friendly Relations.

19. The Special Rapporteur was correct to say that the limitation based on respect for human rights and fundamental humanitarian principles represented a further restriction of the liberty of States to resort to forms of reprisals inconsistent with those rights and principles. However, in order to remain within the bounds of reality as well as of law, it was important to define the threshold beyond which countermeasures could be allowed in response to an unlawful act, since not every human right could qualify as constituting an absolute limitation. The inviolability of specially protected persons was widely and rightly accepted as another limitation on reprisals, particularly in the case of heads of State and diplomatic envoys. That notion was deeply rooted in classical international law, and there was every reason to continue to observe it. However, exceptions could be envisaged, for example restrictions on freedom of movement of diplomatic envoys on the basis of reciprocity, and the exact demarcation line would have to take into account State practice. Lastly, there could be no doubt about the additional limitation on countermeasures imposed by rules of *jus cogens* and obligations *erga omnes*. Measures involving a violation of such rules or obligations would certainly be unlawful, something that had already been duly accepted by the Commission. However, while the principle of *jus cogens* was clear and its existence duly and solemnly accepted in the 1969 Vienna Convention on the Law of Treaties, its exact legal content had never been defined by an authoritative body. It had been the subject of study by scholars and was often referred to in legal writings, yet it remained largely undefined. Since the Commission was currently engaged in a search for topics for its long-term programme of work, it would be well worth considering the possibility of trying to define the legal substance of the principle of *jus cogens*.

20. He would offer his comments on the fourth report in due course. He would simply note that the texts of proposed draft articles 11 and 12 set out therein contained no reference to the questions examined in the chapter of the third report dealing with substantive limitations issues. What might the reasons be for that omission and did the Special Rapporteur deal with them elsewhere? He also wished to draw attention to the reference, in the fourth report, to the Report of ICJ to the General Assembly, in which the President of the Court, Sir Robert Jennings, stressed that the Court could perform an even more active role in the settlement of disputes if its advisory jurisdiction were more widely utilized by States and by organs of the United Nations.[10] The Secretary-General had welcomed the suggestion and had noted that even disputes that were predominantly political in nature often had a legal component, and a non-binding pronouncement in such cases might facilitate their solution by such means as negotiation and mediation.[11] The suggestion was both wise and appropriate. It should be given the attention it deserved.

21. Mr. VERESHCHETIN said that he had been impressed by the lucidity and thoroughness with which the Special Rapporteur had gone about an extremely complex assignment. He shared the Special Rapporteur's view that unilateral or "horizontal" countermeasures in the case of delicts should not be considered in isolation or as a means of punishing a law-breaking State, but primarily as a means employed by an injured State to secure cessation of the wrongful act and to obtain compensation and a guarantee of non-repetition.

22. At the present stage in the development of international law it would be appropriate to put forward specific preconditions and limitations regarding the application of such measures. The conditions and limitations related both to the preliminary requirement of cessation of the unlawful act and compensation in the broad sense of that term, as well as to establishing a reasonable time-limit for fulfilling that preliminary requirement. That also applied to the condition of prior use of available procedures for the settlement of disputes, whether the general procedures provided in Article 33 of the Charter or the specific procedures contained in treaties between the injured State and the law-breaking State. He also agreed with the Special Rapporteur that countermeasures could only be justified in a very few cases. As noted in the report, States had already taken such a position before the Second World War, but that position was even more consonant with contemporary developments in international law, taking into account, in particular, the Helsinki process and the ending of the "cold war" and the consequent emergence of new opportunities for more effective use of existing mechanisms and procedures for the peaceful settlement of disputes.

23. In that connection he wished to draw attention to the Special Rapporteur's important observation that the Commission's work on State responsibility should strengthen and develop those procedures, and particularly procedures for judicial settlement and arbitration. Although that would be the subject of part 3 of the draft articles, even during the examination of the nature and conditions of admissibility of unilateral countermeasures the Commission should keep in view the future task of

[10] *Official Records of the General Assembly, Forty-sixth Session, Plenary Meetings*, 44th meeting.

[11] Ibid.

enhancing the role and broadening the spectrum of peaceful means for the settlement of disputes and consequent limitation of the scope of countermeasures. For that reason, there should be no relaxation in the requirement of prior recourse to the existing procedures for the peaceful settlement of disputes before resort to countermeasures.

24. Another issue was that of the countermeasures to be considered admissible as unilateral action on the part of States. Should such measures be specified in the draft articles? Or should they be expressed in the most general terms, as in the proposed draft article 11 contained in the Special Rapporteur's fourth report? The Special Rapporteur had not been entirely consistent in his approach: he seemed to have taken the term "countermeasures" as being synonymous with "reprisals", but had not confined himself to considering reprisals as countermeasures and had also referred to other measures, such as suspension and termination of international treaties or specific articles thereof, and reciprocal measures. Nor had the Special Rapporteur been wholly consistent in dealing with such measures as retortion: on the one hand, he did not include retortion as a countermeasure whose application was subject to regulation within the framework of State responsibility, while, on the other, he had quite correctly noted that, under the Charter of the United Nations, a State should in certain circumstances refrain from both countermeasures and retortion. It followed that retortion could not always be regarded as a legitimate action from the standpoint of international law.

25. In any case, the text of the articles on countermeasures should more clearly affirm the Commission's position on the question whether countermeasures were to be understood as being coterminous with reprisals and whether the conditions for the application of various countermeasures were identical. Even a first scrutiny of draft article 11 in the Special Rapporteur's fourth report revealed that much remained to be done in providing clarification in that field, and he hoped that the Special Rapporteur would be prepared to shed some further light on the issue.

26. Other important questions arose in connection with reprisals involving the use of armed force, and the Special Rapporteur's treatment of Article 2, paragraph 3, of the Charter. He would address those aspects of the report at a later stage.

27. Mr. CALERO RODRIGUES said that the Commission had already considered the substantive consequences of internationally wrongful acts, and it was now time to address the "instrumental" consequences, namely the rights of the injured State to take action to ensure that the State committing the act complied with its secondary obligations.

28. Although the Special Rapporteur's third report gave evidence of his usual scholarship and lucidity, the major drawback was that it did not propose any draft articles, which was all the more regrettable in that part 2 of the draft articles on State responsibility had been on the Commission's agenda since 1980, and it might have been hoped that a more practical approach would have been adopted by now. As it was, only a few articles had been submitted for the Commission's consideration. At the same time, he wished to point out that he had found the Special Rapporteur's third report extremely useful for teaching purposes.

29. At the present stage, however, the Commission's comments should provide the basis for suggestions and proposals by the Special Rapporteur for draft articles. Since the fourth report did contain proposed draft articles, he could not but regard a discussion focusing on the third report as largely academic. That was particularly true of the frequent references in the third report to the need to refer to the practice of States: no specific examples of such practice had been given in the third report, but were provided in abundance in the fourth. In any case, the Commission's primary task was to arrive at adequate rules of law, an exercise to which excursions into the realm of legal history could only be of peripheral relevance.

30. In general, the Commission should be extremely circumspect in its approach to State practice. Countermeasures ultimately implied that States were entitled to take the law into their own hands. The administration of the substantive rights of an injured State should be increasingly entrusted to impartial bodies empowered to determine whether an internationally wrongful act had been committed and whether an injury had in fact been suffered, and if so, the extent of that injury. There would always be cases in which the imperfect nature of the mechanism would be such that some latitude remained for direct and independent action on the part of States which considered themselves injured, but the Commission's efforts should be directed towards reducing the scope for such unilateral initiatives to a minimum, since they often led to abuses. If a State considered that it had been injured, and if it was more powerful than the State it regarded as the wrongdoer, it was easily tempted to resort to countermeasures, a situation of which the Special Rapporteur was clearly not unaware, as could be seen from the introduction to his third report, which the Commission would do well to keep in mind in its future deliberations on the topic.

31. Mr. CRAWFORD said that he, too, would have preferred to comment on the third report in conjunction with the fourth. He would confine himself for the moment to asking whether the Special Rapporteur could provide a tentative outline of the remaining provisions to be included in parts 2 and 3, and whether he considered a first reading of the complete text of the articles on State responsibility would be feasible during the current quinquennium.

32. Mr. KOROMA said he had initially gained the impression from the third report that the Special Rapporteur was reopening issues which had already been resolved, but it had become apparent from his statement that he had been endeavouring to ensure that, whatever the rules the Commission might eventually adopt, they must be predicated on doctrines and general principles of international law. In effect, the third report provided a kind of distillation of the issues involved and furnished a considerable volume of valuable material which should be taken into account when the Commission came to consider the fourth report.

33. The CHAIRMAN pointed out that, in deference to those members whose working language was not English, consideration of the fourth report had been postponed until it was available in all the working languages.

34. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the difficulties mentioned by Mr. Calero Rodrigues had been influenced by the fact that, ever since 1985, when he had first joined it, the Commission had allocated at least one third of its time to the draft Code of Crimes against the Peace and Security of Mankind. That was the main reason why, at the previous session, he had been unable to benefit from guidance by members on the issues raised in his third report. True, the draft Code was important, but he wondered whether it was really necessary to concentrate upon it to that extent, to the detriment of the other topics before the Commission.

35. He strongly disagreed that a report was of no use unless it contained draft articles. There had been occasions in the past when reports without articles had been placed before the Commission and the purpose of such reports had been to enable members to draw the relevant conclusions regarding doctrine and practice, and thus to provide the Special Rapporteur with the necessary guidance. It would be unwise to adopt articles without first exploring all the issues. As for the future, he would not be able to submit any draft provisions on the problematic category of international "crimes" of States unless he had first secured the guidance of the Commission's views on the main issues raised by the distinction set forth in article 19 of part 1: that, on the basis of a report without articles. The fact that he had been unable to secure the Commission's guidance before drafting articles 11, 12, 13 and 14 did not mean that the issues raised in his third report did not warrant discussion. Indeed, Mr. Calero Rodrigues had also mentioned that he had used some of the material for teaching purposes.

36. He had asked Mr. Vereshchetin to be kind enough to let him have his questions in writing, and would therefore reply at the next meeting. As to Mr. Crawford's point, he proposed to deal in his fifth report, in 1993, with crimes and with part 3 of the draft. He had already asked the secretariat to collate all the relevant doctrinal and jurisdictional material for a preliminary study to be carried out for the second reading of part 1 of the draft. He would start to prepare, in his sixth report, for that second reading. It was to be hoped that the Commission would complete the second reading of part 1 and the first reading of parts 2 and 3 during the current quinquennium. Draft articles 11 to 14 would conclude part 2 of the draft, except for the difficult matter of crimes and for certain other provisions, including articles 2 and 4. It might also be necessary to include a short provision, incorporated perhaps in the draft as article 5 *bis*, to clarify the position of not materially affected or less directly affected States. Lastly, part 3 of the draft would deal with dispute settlement as pertaining to State responsibility. It was an extremely important subject and one on which it was essential to receive the views of members.

37. The CHAIRMAN pointed out that a request had been addressed to all Special Rapporteurs to submit their plans for future treatment of their items to the Planning Group. On that basis the Group could establish a programme for the quinquennium which would be placed before the Commission.

38. Mr. IDRIS said that, rather than discuss the procedural aspects of the matter, the Commission should hear the statements of members. For the purposes of efficient organization of its work, however, it was first necessary to have the answer to three questions: When would the Special Rapporteur make his supplementary comments on the third report? When would the Special Rapporteur introduce his fourth report? And when would the addendum to the fourth report be circulated?

39. Mr. JACOVIDES noted that the articles proposed by the Special Rapporteur in his fourth report did not deal with the substantive limitations issues addressed in the third report. He asked if it was the Special Rapporteur's intention to cover those issues in subsequent draft articles.

40. The CHAIRMAN said that the Special Rapporteur would make his supplementary comments on the third report at the next meeting. The fourth report could not be introduced until it was available in all the working languages, which would probably be towards the end of May or the beginning of June. In addition, the addendum had only just been submitted and the Special Rapporteur would be absent for the first two weeks in June. The target date for reopening the discussion on countermeasures, therefore, was 16 June 1992.

41. Mr. CRAWFORD said that it would be a matter of considerable concern to him if the Commission were to consider any part of part 1 before completing consideration of parts 2 and 3 and the commentaries on first reading. They were not separate items but part of an integral whole. The first priority during the present quinquennium should be to complete an integrated set of draft articles on State responsibility.

42. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, at the request of his predecessor, Mr. Riphagen, a list of materials had been collated with a view to preparing the second reading of part 1 of the draft. That list, which appeared to be quite valuable for both doctrine and practice, was now outdated. The work should be resumed as soon as possible. It was equally essential for the Codification Division to proceed as soon as possible to carry out a study of the said materials with a view to the preparation of a digest of the doctrine and practice concerning the matters covered by the 35 articles of part 1. The secretariat should undertake that work, as he did not have the money to pay for it to be done. Replying to Mr. Jacovides' question, he indicated that there would indeed be an article on substantive limitations issues in the forthcoming addendum to his fourth report.

43. Mr. EIRIKSSON said that the Commission should embark on the second reading only if it was certain of completing it during the current quinquennium.

44. Mr. BENNOUNA said that he shared the views of Mr. Crawford and Mr. Eiriksson.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that whether or not the Commission would be able to complete its work on the draft articles in parts 2 and 3 of

the draft during the current quinquennium would also depend on what the Drafting Committee was able to achieve.

The meeting rose at 1 p.m.

2266th MEETING

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

Chairman: Mr. Christian TOMUSCHAT

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

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

[Agenda item 2]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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