Document:-
A/CN.4/SR.2238

Summary record of the 2238th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

French version, which already appeared at the end of paragraph 1. Neither declarations nor communications, however, were acts.

101. Mr. EIRIKSSON said that, although he was not really in a position to analyse the precise tone of Mr. Pellet's proposal, he realized that it did pose a problem. He would remind members of the difficulties that had arisen when it had been necessary, in the provision that now formed the subject of paragraph 3 of article 3, to make a choice between the noun "attempt" and the verb "attempts". In any event, in proposing the addition of the words "of an act constituting" it was not his intention to modify the substance of the articles in question.

102. Mr. PELLET said he continued to think that a threat was not an act in itself, but since he objected in principle to article 16, in any event, he did not feel he had the right to impose his views as to the way in which it should be worded.

103. The CHAIRMAN, speaking as a member of the Commission, said that the declarations, communications and demonstrations referred to in paragraph 2 of article 16, could be regarded equally as acts of aggression and as threats of aggression.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said he considered, in the light of the discussion, that it would be best to make the fewest possible changes to article 16. He therefore proposed that the Commission should adopt the following wording for paragraph 1:

> "1. An individual who as leader or organizer commits or orders the commission of a threat of aggression shall, on conviction thereof, be sentenced [to . . .]."

Paragraph 2 would remain unchanged.

105. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to adopt article 16 as amended by the Chairman of the Drafting Committee.

Article 16, as amended, was adopted.

106. The CHAIRMAN invited the Commission to adopt articles 17 and 18.

107. Mr. PELLET said that he was absolutely opposed to those articles.

108. Mr. CALERO RODRIGUES pointed out that the question of the words which appeared between square brackets in paragraph 2 of article 17 had still not been dealt with.

109. The CHAIRMAN suggested, in the light of those comments, that the Commission should revert to articles 17 and 18 at the next meeting.

It was so agreed.

The meeting rose at 1.10 p.m.

2238th MEETING

Wednesday, 10 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

State responsibility (A/CN.4/440 and Add.1,[1] A/CN.4/L.456, sect. E, A/CN.4/L.467, ILC(XLIII)/Conf.Room Doc.5)

[Agenda item 2]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on State responsibility (A/CN.4/440 and Add.1).

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the chapter dealing with the regime of countermeasures was the most difficult one in the whole topic of State responsibility, even if confined to delicts. It also formed the very core of part 2 of the draft articles, which was itself central to the topic. The codification of the regime of countermeasures was characterized by two features, the first being the drastic reduction in, if not total absence of, any analogies with municipal law. Whereas it had been possible in the case of substantive consequences to draw on municipal law, when it came to instrumental consequences it was necessary to contend with an entirely different structure. The second feature was that in no other area was the lack of an adequate institutional framework for present or conceivable future regulation of State conduct so keenly felt. He was thinking, in particular, of two aspects of the sovereign equality of States—the propensity of any State to refuse to accept any higher authority, and the contrast between the equality of States in law and their inequality in fact. The self-evident nature of that remark in no way detracted from its importance.

3. Practice in the matter was abundant, but often the recourse to unilateral measures did not conform to the existing rules, still less to what was desirable in the matter of the progressive development of international law, and it was difficult at times to identify the precise content of some of the general rules. Uncertainty was manifest in the doctrine of the so-called "self-contained" regimes,

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

and it was hard to identify future trends in the development of the law, as well as the avenues the Commission could explore in seeking to improve it. One of the crucial aspects of that area of the progressive development of international law related to the impact of the de facto inequality between States: the Commission's task appeared to be to devise ways and means of reducing the impact of that inequality. He had argued in his second report[2]—though not without challenge—that the secondary rules on cessation and reparation operated equally to the advantage or disadvantage of *all* States: any State, weak or strong, could find itself in the position of the injured State or of the wrongdoer. While that might apply to substantive consequences, however, it could certainly not be said of countermeasures, in which respect there was an enormous difference between States that were powerful and rich and States that were weak or poor. His third report, therefore, was concerned with the identification of the specific problems involved in the legal regime governing countermeasures, and its purpose was to elicit comment and reaction. In view of the wide variety of terms used, before taking up substantive matters, he had dealt with terminology; he trusted that that would help to avoid misunderstanding. Also, he had often used the word "reprisals" as a synonym for countermeasures, though he realized that that word was generally disliked because of the implication it carried of the use of force; considered in its proper context, however, it should not be deemed to include any element of violence. He had also used the word "measures" as an abbreviation for "countermeasures".

4. The first major problem considered in the third report was whether, and to what extent, an internationally wrongful act was a precondition for the lawfulness of a particular countermeasure. In the view of some, a bona fide belief on the part of the injured State that an unlawful act had been committed against it was sufficient; others, however, argued that such a belief was not enough and that there must actually have been an unlawful act. Any State which reacted on the basis of its own belief, even if held in good faith, would do so at its own risk. That point was covered basically by part 1 of the draft,[3] which defined the conditions under which an internationally wrongful act would be held to have been committed and under which the act in question was attributable to a State. It was not necessary therefore to deal with it in any of the articles on countermeasures. The way in which the matter was handled was obviously connected with the question whether there was any prior claim for reparation and any prior recourse to a dispute settlement procedure, for which negotiations were a prerequisite.

5. On the question of the function of countermeasures, there was a divergence between those who believed that it was exclusively compensatory, and those who believed that it was punitive. In his view, the Commission should not enter into that argument. Under both national and international law, and in the case of both substantive and instrumental consequences, countermeasures and remedies had the dual function of securing compensation and exacting retribution, though obviously, depending on the nature of the wrongful act, one or other of those two functions would predominate in a particular case. More important than the question of the function of countermeasures, perhaps, was the question of the aims pursued by a State in resorting to such measures. Those aims were important. It was one thing if a State resorted to countermeasures to obtain reparation which had been denied or if the offending State pleaded that there was no case to answer. It was another thing if a State attempted to resort to countermeasures, simply with a view to establishing a dialogue between the injured State and the offending State or in order to have recourse to a dispute settlement procedure.

6. In the case of a prior demand for reparation, two main trends emerged, both of which related to the question of the aims pursued by the injured State in resorting to countermeasures. A minority of legal writers took the view that there was no need, as a matter of law, to address a demand for cessation or reparation to the offending State before reprisals were taken. A different position was held by those who espoused the classical theory of State responsibility whereby reprisals were seen essentially as a means of coercion for obtaining cessation and/or reparation. According to that theory, it was natural to assume that an act of reprisal could not, as a rule, be lawfully resorted to before a protest and demand made for cessation and/or reparation had first proved unsuccessful. The essence of the latter view was that the consequences of an internationally wrongful act were not merely of a compensatory nature but were also retributive. However, there were important exceptions to the idea that reprisals, whatever their function, could not lawfully be resorted to unless a demand for cessation and/or reparation had been unsuccessful. Wengler, for instance, believed that the aggrieved State could lawfully resort to reprisals without any preliminaries in the event of *dolus* on the part of the law-breaking State. It had also been suggested that no preliminaries were required for measures to be taken against a State responsible for an international crime. Yet others saw an exception in the case of an internationally wrongful act of a "continuing character" under article 25 of part 1 of the draft, or in the case of economic measures. Still others believed that, in the case of economic measures, a prior demand was unnecessary. He was disinclined to agree with that opinion, because countermeasures were mainly economic once the use of force was excluded. A more accurate study of international practice would provide more reliable information on the effective legal relevance of a prior demand for reparation. Only on that basis would it be possible to determine to what extent a provision, which made such a demand a prerequisite for the lawful resort to any measures, would be the subject merely of codification or of a desirable progressive development of international law. In terms of progressive development, the rules laid down by his predecessor in 1985 in articles 1 and 2 of part 3 of the draft[4] could perhaps be improved by specifying more narrowly the requirement of prior

[2] *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/425 and Add.1, para. 33.

[3] Provisionally adopted on first reading at the thirty-second session. See *Yearbook ... 1980*, vol. II (Part Two), pp. 26 *et seq.*

[4] Referred to the Drafting Committee at the thirty-eighth session. See *Yearbook ... 1986*, vol. II (Part Two), p. 35, footnote 86.

demand in relation to given kinds of measures or to the aims pursued.

7. One key problem, which related to the question of prior demand for reparation and/or cessation and to the aims pursued, concerned the impact of dispute settlement obligations. In that connection, a distinction had to be made between the general obligation concerning peaceful settlement, on the one hand, and any specific agreement between the alleged wrongdoer and the alleged injured party, on the other. So far as the latter was concerned, a number of legal writers took the view that the commitments deriving from specific agreements between the injured State and the wrongdoer should, under given conditions, have a decisive impact on the lawfulness of the measures taken. In other words, in given cases, prior recourse to one or more of the procedures envisaged would be a condition of lawful resort to countermeasures.

8. In that regard, he had referred in his report to the position taken by the International Law Institute as reflected in a resolution it had adopted in 1934. A distinction had to be drawn between an instrument that opened the door to a unilateral application by the injured State to an international body for dispute settlement, and an instrument that was merely an agreement to arbitrate—a *pactum de contrahendo*—which would require an ad hoc agreement between the parties on any procedure to be implemented. In his opinion, it should be made clear whether the requirement of availability, which was provided for in his predecessor's draft, referred to the possibility of an automatic unilateral application for a third-party procedure, or to the case where a third-party procedure could be opened only on the basis of an ad hoc agreement. In both cases, the procedure should be regarded as available for the purposes of maintaining the obligation of the injured State to resort to the procedure in so far as it was available to convince the other party. Measures of a less serious kind could, of course, be applied to try and coerce the other party to agree to arbitration or to come to a settlement.

9. The other category of peaceful settlement obligations was in a sense more important. He had in mind the general obligations under Article 2, paragraph 3, and Articles 33 to 38 of the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations,[5] the Manila Declaration on the Peaceful Settlement of International Disputes[6] and Principle V (Peaceful settlement of disputes) of the Final Act of the Conference on Security and Cooperation in Europe[7] as well as subsequent developments in the context of that Conference. Some of those developments were in fact somewhat more encouraging than the Declaration on Friendly Relations so far as the development of peaceful settlement procedures was concerned. Save for that part which coincided with the principle laid down in Article 2, paragraph 4, of the Charter of the United Nations, concerning the prohibition on the settlement of disputes by force, he found it more difficult to accept the proposition that the principle laid down in Article 2, paragraph 3, had become a rule of customary general international law. Some legal writers believed that the latter principle condemned as unlawful any unilateral countermeasure resorted to, first of all, prior to the submission of appropriate demands for reparation or cessation and, secondly, prior to bona fide recourse to the peaceful settlement procedures provided for under Article 33 of the Charter of the United Nations.

10. Other legal writers, however, interpreted the second of those requirements as applying only to measures involving force. That was linked to the idea that Chapter VI of the Charter of the United Nations covered only such disputes as might endanger international peace and security. Personally, he was inclined to think that, within the framework of the draft on State responsibility and of the chapter on countermeasures, the more demanding of those two views concerning the obligations of the injured State should be accepted, namely, that there should be a strict obligation to have recourse to a procedure for the peaceful settlement of disputes before resort was had to any countermeasure. It was a key problem for the codification and progressive development of the law in general and for the regime of countermeasures in particular.

11. A crucial question concerned the requirement of proportionality. In the 1920s, two well-known writers had argued that proportionality was not a legal requirement but merely a moral obligation. Contemporary doctrine, however, was decidedly in favour of such a requirement. The prevailing definitions of proportionality were formulated in negative terms. The International Law Institute, in the 1934 resolution to which he had referred, had demanded that the measure should be proportional to the gravity of the offence and the damage suffered. A less strict concept emerged from the *Air Service* award which had referred to "some degree of equivalence" and to the fact that judging the proportionality of countermeasures could at best "be accomplished by approximation",[8] while it had been held in the *Naulilaa* case[9] that reprisals should not be out of all proportion to the unlawful act. The previous Special Rapporteur, who had been one of the arbitrators in the *Air Service* award, had seemed to agree that the requirement of proportionality should be formulated in less stringent terms. For his own part, he was inclined to favour a stricter formulation and considered, first, that the requirement should be expressed in positive, not negative, terms; and second, that proportionality should be a requirement with respect not only to the nature of the act but also to other elements, including the attitude of the wrongdoer and the aim pursued by the reacting State.

12. One delicate problem that had not, perhaps, been adequately dealt with so far was the suspension and termination of treaties and the regime to which such sus-

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

[6] General Assembly resolution 37/10 of 15 November 1982, annex.

[7] Signed at Helsinki on 1 August 1975.

[8] See *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No.E/F.80.V.7), pp. 443-444.

[9] *Portuguese Colonies* case (Naulilaa incident), ibid., vol. II (Sales No. 1949.V.1), pp. 1011.

pension and termination should be subject within the framework of State responsibility as distinct from the regime to which it was subject for the purpose of the law of treaties. As was well known, the relevant rules of the law of treaties covered such matters as the kind of treaty breaches that justified suspension or termination; the conditions in the presence of which a treaty could be suspended or terminated totally or in part; and the requirements with which the injured State had to comply in order lawfully to proceed to suspension or termination. It was for the purposes of codification and progressive development of the rules of general international law that the United Nations Conference on the Law of Treaties had adopted article 60 of the 1969 Vienna Convention on the Law of Treaties and the auxiliary provisions embodied in articles 65-67, 70 and 72 of that Convention.

13. The question arose, however, whether the rules of general international law concerning suspension and termination of treaties as unilateral measures were available to the injured State in response to any internationally wrongful act. If so, the legal regime of suspension and termination of treaties within the framework of the instrumental consequences of an internationally wrongful act should cover such cases as suspension or termination of a treaty, or any rule or part thereof, in response to any infringement of one or more of the obligations deriving from the same treaty, including not only the material breaches covered by article 60 of the Vienna Convention but also minor breaches of any international obligation in respect of which article 60 provided neither for suspension nor for termination; suspension or termination of a treaty, or any rule or part thereof, in response to a breach of any other treaty or treaties; and the suspension or termination of a treaty in response to a breach of a rule of general international law, whether it was an ordinary customary rule or a rule of *jus cogens*. It followed that the legal regime of suspension and termination of treaties must first be studied in the light of the rules and principles tentatively explored so far with regard to countermeasures in general. In that connection, he would refer, for example, to the limitations regarding the kind of measures to which recourse could be had and regarding the conditions that must be met before recourse could be had to something such as prior demand for cessation or reparation and prior recourse to a dispute settlement procedure.

14. A problem arose where recourse to suspension or termination of a multilateral treaty as a countermeasure affected the rights of States other than the law-breaking State. Some legal writers suggested that a distinction should be drawn between "reciprocal" or "divisible" multilateral treaty obligations, on the one hand, and "integral" or "indivisible" multilateral treaty obligations, on the other. While the first group of obligations could be suspended or terminated by the injured State unilaterally, there could be no lawful suspension or termination in the case of the second. Unilateral suspension or termination of compliance with obligations by the injured State by way of a reprisal would be detrimental to other States participating in the treaty and would go beyond the mere legal injury which derived simply from the infringement of the treaty. Other writers took the view that a distinction should instead be made between termination and suspension: termination of a multilateral treaty would be inadmissible where any participating States were "third" States in relation to the breach. Suspension, on the other hand, would be admissible. Paragraphs 1 (*a*), (*b*) and (*c*) and paragraph 2 of draft article 11 as proposed by the previous Special Rapporteur in 1985 were partly in conformity with the distinction between divisible and indivisible obligations. Paragraph 2 was acceptable in substance. It covered the case where the multilateral treaty provided for a procedure in the event of a breach and for the kind of measures that should be taken collectively by the participating States *vis-à-vis* the wrongdoer. So far as paragraph 1 of article 11 was concerned, he had strong doubts about the distinction between the three hypotheses. In particular, he wondered whether the question of suspension of compliance with certain obligations should not be envisaged within a wider context to cover not only multilateral treaties but also rules that provided for *erga omnes* obligations. That would be more in conformity with article 17 of part 1 of the draft. Multilateral treaties should also provide that an injured State could terminate the treaty unilaterally if the internationally wrongful act was a manifest violation that destroyed the very purpose and object of the treaty. He had in mind, for example, disarmament treaties.

15. He had strong doubts about the so-called self-contained regimes. Some of the commentary in that connection had perhaps overstated the issue. For example, the European Community system might well be considered a self-contained regime, although not in absolute terms. That did not exclude the possibility that, under certain conditions, a State might resort to measures outside of the European Community framework. The elaboration of the regime of countermeasures should, if possible, be free from the hypnotising influence of a concept under which a group of States was confined within a particular system, thus preventing those States from resorting to countermeasures in the case of injury.

16. Another important issue was the problem of differently injured States. It was as perplexing as that of self-contained regimes. Clearly, in the case of a breach of an international obligation, considerable differences could exist between injured States, as the concept of "injured State" was defined in draft article 5 of part 2: some States might be affected directly, others might be affected indirectly, while others might fall between those two extremes. In any event, he did not believe that there was a need for a special article dealing with the case of the indirectly injured State. In the final analysis, the distinction between indirectly and directly injured States was merely a matter of the degree to which a State was affected by a wrongful act. Thus, the position of each injured State should be left to depend simply on the normal application to that State, based on the circumstances of the specific case, of the general rules governing the substantive and instrumental consequences of internationally wrongful acts.

17. The concept of the indirectly injured State concerned more than just countermeasures. A morally affected State—for example, one that had been injured by a breach of a treaty on human rights—would not be entitled to compensation. However, it would be entitled to claim from the offending State *restitutio*, and possibly

compensation, for the morally and physically injured victims; it would be entitled to seek satisfaction and guarantees of non-repetition; and it would be entitled to apply reprisals of a proportional nature. It was therefore clear that the question of the non-directly injured State had an impact not only on the right to resort to countermeasures but also and most importantly on the rights to cessation and reparation, which constituted the substantive consequences of an international wrongful act.

18. The remainder of his third report dealt with substantive limitations issues, which included the unlawfulness of resort to force; respect for human rights; the inviolability of diplomatic and consular envoys; and compliance with imperative rules and *erga omnes* obligations. In the case of force, he had extended the scope to include the question of whether all forms of armed reprisals or countermeasures were prohibited, as provided for under the Declaration on Friendly Relations and under Article 2, paragraph 4, of the Charter of the United Nations. Some claimed that certain forms of unilateral reprisals had survived those sweeping prohibitions or should be resuscitated as a justifiable form of reaction, particularly in the case of reprisals against guerrilla activities or violations of human rights. It was clear that such views were unacceptable and that such practices should be condemned: the Commission was duty-bound to take that position in view of the fact that the prohibition under the Charter of the United Nations was sacrosanct and did not admit of any exception. At the same time, the Commission should not ignore the existence of such practices as it elaborated the regime of countermeasures. If certain States found themselves obliged to resort to violence, it was because adequate and effective remedies for action in the case of an internationally wrongful act were not available. To curb the temptation to resort to force, a more comprehensive system of countermeasures had to be elaborated and greater efforts had to be made in the area of progressive development of the law.

19. The Western countries had long interpreted the concept of force to mean military force. The concept had been modified with the 1970 Declaration on Friendly Relations and the 1973 oil embargo. Since that time, some Western countries had begun to reconsider the matter, moving closer to the views of the developing and socialist countries, which advocated the prohibition of certain types of economic coercion. As far back as 1977, he himself had maintained that there were cases in which economic force might be seen as equivalent to military force.

20. He had some reservations about the substantive limitations on resort to countermeasures, arising from the notion of the inviolability of specially protected persons. It was his impression that the issue had given rise to a certain amount of exaggeration. A distinction should be made between the case of the inviolability of the person or the premises of a diplomatic envoy and that of the privileges and immunities of diplomatic envoys, where reprisals might be justified.

21. He was not able to propose a solution to each of the matters dealt with in the report. One thing was clear: it was unlikely, particularly with respect to delicts, that there would be in the short- or even the medium-term, an adequate degree of institutionalization, at least at the international level, of remedies available to injured States. While there were examples of regional institutionalization, those cases were rare. For the time being, the only area in which some modest developments might be expected was that of political and military security. Thus, with the exception of infrequent cases of regional or special institutionalization, remedies against "ordinary" internationally wrongful acts were limited to inorganic inter-State measures, a system which, in the absence of any real centre, could be euphemistically termed "decentralized".

22. In view of those considerations, the Commission was duty-bound to pursue two objectives. First, it should be much more generous in its formulation of all the articles relating to countermeasures. Secondly, it should make greater efforts towards progressive development in that area. In pursuing those objectives, the Commission had to fulfil two requirements which might not be fully compatible. The first was to ensure that countermeasures were not abused by allegedly injured States. The second was to define countermeasures which were effective enough to guarantee cessation and reparation. The difficulty lay in the fact that effectiveness decreased as restrictions increased. The absence of effectiveness led in turn to violations of the restrictions and eventually to use of force. The only way to strike a balance between those two requirements was to develop dispute settlement procedures, in particular third party settlement procedures. In that connection, the requirement of prior resort to settlement procedures should be made as strict as possible. That should be done in respect of the general non-specific procedures provided for under Article 33 of the Charter of the United Nations and in respect of such specific procedures as arbitration, judicial settlement and consideration as well. In particular, the Commission should go beyond what was currently provided for under article 10.

23. It would be premature to discuss part 3 of the draft in detail. Settlement of disputes was, for obvious reasons, an area in which it would be more difficult to achieve progress. Articles 3, 4 and 5 of part 3 needed considerable improvement. At the same time, he pointed out that a number of members of the Commission had taken a prudent attitude with regard to the question of dispute settlement. Most members were concerned that States might not be willing to accept significant innovations, especially in the context of State responsibility, which covered practically every area of international relations. In spite of those considerations, the Commission should be courageous and imaginative in its approach to the present topic. Members should bear in mind that they were participating in the Commission as individuals and not as government representatives. Therefore, the Commission was in a position to put forward certain far-reaching proposals which it deemed necessary for the progress of international law even if such proposals might not be immediately acceptable to States. In that regard, he wished to recall the views of Gilberto Amado, who, while discouraging adventurous proposals, had insisted that the Commission should be imaginative and not be discouraged by the difficulties its drafts might eventually meet on the part of Governments. In the field of State responsibility, the Commission should do any-

thing with regard to countermeasures, except leave things as they stood.

24. Finally, at the forty-fifth session of the General Assembly, a question had been raised in the Sixth Committee about the status of the topic of State responsibility and the time-frame for the completion of the project. The current status of the work was that part 1 had been completed on first reading; the Commission was currently considering the section of part 2 concerning delicts and had yet to consider the difficult issue of the regime of crimes. Part 3 also remained to be examined, although a considerable portion would already have been discussed under part 2. What remained to be done could surely be completed within the next five years. Thus, within that time-period, parts 2 and 3 could be adopted on first reading; in addition, there might be enough time for a second reading of part 1, on which research had already begun.

25. Mr. McCAFFREY said that he had two questions in connectionwith dispute settlement obligations and so-called self-contained regimes. He was thinking particularly of the *Air Service* case. Two sources, the 1934 report of the International Law Institute and the judgment of ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*,[10] stated that prior recourse should be had to any applicable dispute settlement regime. However, in the *Air Service* case, the arbitral tribunal had held that there was no requirement to have prior recourse to a tribunal which had not been constituted at the time when the countermeasures in question were taken; consequently, it was permissible to take countermeasures without going through the dispute settlement procedure. Did the Special Rapporteur think it was advisable to have an inflexible rule whereby States must always have prior recourse to dispute settlement procedures? Should cases such as *United States Diplomatic and Consular Staff in Tehran* be treated similarly to the *Air Service* dispute?

26. Secondly, he wondered whether the General Agreement on Tariffs and Trade would qualify as a self-contained regime. It was indeed a multilateral treaty, and contained specific provisions stating which actions could be taken by States parties in the event of a breach. According to that Agreement, the only permitted responses were those spelt out therein; responses outside the regime of the Agreement were not permissible.

27. Lastly, he welcomed the Special Rapporteur's invitation to the Commission to adopt an imaginative and forward-looking approach to the topic.

28. Mr. ARANGIO-RUIZ (Special Rapporteur) said that there was certainly a considerable difference between the *Air Service* and the hostages cases. The lawfulness of different kinds of international acts varied from case to case, depending on circumstances. The hostages case had pointed very clearly to the consequences which might arise from a lack of institutionalization of international society. Indeed the absence of effective mechanisms was the reason why the hostages had been held for such a long time. He had therefore urged the strengthening of the system of peaceful settlement. Recourse to ICJ should always be the first step in such cases; and indeed in another recent incident involving aircraft that had been the reaction of the country involved.

29. With regard to self-contained regimes, although the General Agreement on Tariffs and Trade and the European Community treaties spelt out their own solutions, the principles of general international law remained, and must be preserved. The answer in the event of a breach of the General Agreement on Tariffs and Trade would depend on the nature of the breach and whether an effective response could be obtained through the Agreement's machinery. If not, other measures could be contemplated.

30. The CHAIRMAN said that it would be helpful to suspend the meeting so as to enable the Planning Group to meet.

The meeting was suspended at 11.20 a.m. and resumed at 12.15 p.m.

Draft Code of Crimes against the Peace and Security of Mankind[11] (*continued*) (A/CN.4/435 and Add.1,[12] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 17 (Intervention) (*concluded*)

31. The CHAIRMAN invited the Chairman of the Drafting Committee to explain the position on article 17.

32. Mr. PAWLAK (Chairman of the Drafting Committee) said that articles 16, 17 and 18 had been introduced as a group, but at the previous meeting the Commission had wisely decided to take them up separately for the purposes of adoption.[13] At that meeting, the Commission had adopted article 16 and, as far as article 17 was concerned, there were now two groups of proposed amendments. The first would have the effect of reverting to a principle that had been adopted earlier by deleting the words "by another individual" from paragraph 1 and replacing the word "intervention" by "an act of intervention". The beginning of paragraph 1 would thus read: "An individual who, as leader or organizer commits or orders the commission of an act of intervention . . .".

33. The second group of proposals concerned paragraph 2 of article 17. The question was whether the Commission wished to take action regarding the words "[armed]" and "[seriously]". The Drafting Committee had not discussed that issue and, therefore, had not reported on it.

[10] *I.C.J. Reports 1980*, p. 3.

[11] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

[13] For texts and discussion, see 2237th meeting, paras. 78-109.

34. The text of paragraph 2 had been adopted previously by the Commission and he stressed that the words "armed" before "subversive or terrorist activities" and "seriously" before "undermining the free exercise by that State of its sovereign rights" were intended to delimit the scope of intervention. The word "armed" indicated that only armed subversive or terrorist activities constituted intervention for the purposes of article 17. Similarly, the word "seriously" indicated that the article was intended to cover only a grave act of undermining a State's sovereign rights.

35. He suggested that the Commission should take a decision first on paragraph 1 and then on paragraph 2.

36. Mr. THIAM (Special Rapporteur) said that the question whether intervention should be armed or not had been discussed at great length by the Commission at previous sessions. His own view was that the square brackets round the word "armed" should be removed. Otherwise, an intervention of any kind whatsoever would be treated as a crime against the peace and security of mankind. It would be a mistaken approach because some interventions could not be described as crimes; indeed, in his reports he had given many examples of interventions of a friendly nature. If the term "armed" were left within square brackets it would be extremely difficult to determine whether a particular act of intervention could be treated as a crime against the peace and security of mankind.

37. The word "seriously", placed in square brackets in paragraph 2, was perhaps unnecessary, because any act which undermined the free exercise of a State's sovereign rights was bound to be serious. However, members might wish to keep the word without square brackets so as to introduce the idea of a scale of gravity in the matter; it would then be for the court to decide in each case whether an act of intervention was serious in character.

38. Mr. EIRIKSSON said that in paragraph 1 the word "intervention" could be replaced by "an act constituting intervention", a formulation that would create a better link with paragraph 2, in which the concept of intervention was defined for the purposes of the draft. As employed in article 17, it was not a well-recognized concept that was already a term of art.

39. Mr. PELLET said he wished to reiterate his general and absolute reservations to article 17. Unlike those he had entered with regard to earlier articles, they concerned not only the form but also the substance. He had strong reservations about the characterization of intervention as a crime against the peace and security of mankind. There were only two possibilities. Either there was an armed intervention, in which case article 17 was superfluous because that act would constitute aggression, a crime already covered by article 15, which, incidentally, gave an imperfect definition of aggression. Alternatively, if the intervention was not armed, it could not be characterized as a crime against the peace and security of mankind in the present state of international law and international relations. In either case, he objected to intervention being included in the draft under a separate article. Since it was not possible for him to oppose the article at that stage, he requested that his strong reservations should be placed on record.

40. If, however, the Commission decided to keep article 17 in the draft, removing the square brackets around the words "armed" and "seriously" would be the lesser evil. It would still not be a good solution, because there were cases of armed intervention which were perhaps unlawful under international law but which certainly did not constitute crimes against the peace and security of mankind. In that connection, he preferred to give examples taken from the history of his own country. France had engaged on a number of occasions in armed intervention in Chad. It would be quite unreasonable to contemplate branding the President of the French Republic as a criminal in those circumstances and suggesting that he should be tried by an international criminal court.

41. On the other hand, if the word "armed" were retained with square brackets, the result would be to suggest the possibility of nearly all heads of State throughout the world being indicted as criminals under the article.

42. Mr. TOMUSCHAT said that he had the same objections to article 17 as Mr. Pellet. It was not necessary because the draft already contained an article on aggression. In any event, the least the Commission could do was to delete the square brackets around the word "armed". The Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States annexed to General Assembly resolution 36/103, of 9 December 1981, had greatly extended the scope of intervention and, obviously, the temptation would be to construe article 17 in the light of that Declaration.

43. Mr. SHI said that he accepted the amendment suggested by the Chairman of the Drafting Committee for paragraph 1 and favoured deletion of the words "armed" and "seriously". Subversion, even if unarmed, was always an extremely serious crime. Following the Second World War there had been many instances of Governments being overthrown by subversion without the use of armed force. Acts of that kind constituted crimes against the peace and security of mankind and were no less serious than armed intervention. As a compromise, he would none the less be prepared to accept article 17 as it stood, with the square brackets, so as to elicit comments from Governments for the purposes of the second reading of the draft. He was, however, strongly opposed to keeping the words "armed" and "seriously" in the article without the square brackets.

44. Mr. NJENGA said that he could accept the wording suggested by the Chairman of the Drafting Committee and endorsed by the Special Rapporteur. Article 17 was a very important article which should have a place in the draft and he strongly objected to the attempt to eliminate it.

45. As to the question of the use of the word "armed" to qualify intervention, he would emphasize that his own continent, Africa, afforded many examples of unarmed intervention which had caused a great deal of suffering. His own preference would, therefore, be to eliminate the word "armed". If that suggestion did not prove accept-

able, the word should be left between square brackets in order to obtain the views of the Sixth Committee and of Governments.

46. He agreed with the Special Rapporteur that it was advisable to omit the word "seriously" altogether. Among other difficulties, one question that would arise was who was to be the judge of seriousness in the matter.

47. Mr. SOLARI TUDELA expressed strong support for article 17, which, in his view, embodied a vital principle enunciated in the Charter of the United Nations, which was essential in contemporary international relations; and any violation of it constituted a crime against the international community. The word "armed" should be deleted, for unarmed intervention was just as serious as armed intervention. He was also in favour of removing the word "seriously" from paragraph 2.

48. Mr. Pellet's example was unconvincing. Under the terms of paragraph 2, the intervention in question consisted of fomenting armed subversive or terrorist activities and undermining the free exercise of a State's sovereign rights. The French interventions in Chad bore no resemblance to acts of that kind.

49. Mr. CALERO RODRIGUES said that he had reservations about the article and about the concept of intervention itself. The problem of intervention was a very difficult one and article 17 did not deal with it adequately. Paragraph 2 stated that intervention consisted of fomenting armed subversive or terrorist activities. Terrorist activities were covered by article 24, on international terrorism. In the case of subversive activities, however, article 17 was not well drafted and its provisions should deal with subversive activies by a State against another State. Intervention was undoubtedly an unlawful act, but not all acts of intervention were serious enough to warrant treatment as crimes against the peace and security of mankind. Perhaps the best solution would be not to use the term "intervention" at all but to speak of fomenting subversive or terrorist activities, organizing, assisting or financing such activities or supplying arms for the purpose of such activities.

50. Mr. Sreenivasa RAO said that he agreed with Mr. Shi and Mr. Njenga that armed subversion was not the only serious form of intervention that undermined the free exercise of a State's sovereign rights. The word "armed" should therefore be removed from paragraph 2. The word "seriously" was unnecessary.

51. Intervention was always illegal, but the position with regard to interference was somewhat different. Some forms of interference in the affairs of another State, whether for protection or for other reasons, were lawful. Article 17 did not clarify all the doubts in the matter. The subject of intervention was very complicated both from the legal and from the political point of view, the main difficulty being to determine the cases in which intervention should be treated as a crime. Perhaps the whole of article 17 could be placed in square brackets so as to invite comments from Governments on the problems at issue.

52. Mr. RAZAFINDRALAMBO said he agreed with members who had stressed that article 17 was essential to the draft. Intervention was the modern form of aggression. Nowadays, small countries were rarely the victims of armed aggression, but intervention by stronger States in various forms was a frequent occurrence. He therefore felt strongly that there was a place for article 17 in the draft code. It was, however, essential to define clearly the limits or the scope of intervention under article 17. For example, in the case mentioned by Mr. Pellet, France's armed intervention had been in response to a request by the legitimate Government of Chad. It fell clearly outside the scope of article 17. Paragraph 2 of the article spoke of "fomenting subversive or terrorist activities" and "undermining the free exercise" of a State's "sovereign rights". The words "armed" and "seriously" should be deleted. He could accept, however, the solution of retaining the square brackets as a compromise and awaiting the response of Governments in order for a decision to be taken on second reading.

53. Prince AJIBOLA said he agreed with Mr. Razafindralambo. In the developing countries acts of armed subversion or acts subverting the sovereign authority of Governments were not infrequent, and such cases were properly addressed by article 17. The article must be retained. However, the word "armed" should be deleted, since even serious acts of that nature were not necessarily carried out by force of arms.

54. Mr. BARSEGOV said that the problem of criminal responsibility for acts of intervention, and of how to punish the individuals concerned, had lost none of its political or legal significance. However, the threshold of criminality and the degree of responsibility were matters on which the Commission required the views of Governments. In its present form, the article perhaps failed to reflect the complexity of international events. There were certain rare cases of intervention of a humanitarian kind which were fully in accordance with the rules of international law and the Charter of the United Nations; indeed sometimes the purpose of the intervention was to prevent genocide, and, in a recent case, a national group had placed itself under the protection of international law for that very purpose. Such cases might recur. If the article was retained, it should be redrafted on second reading in order to provide for them.

55. Mr. DÍAZ GONZÁLEZ said he was in favour of retaining the article. The wording could be improved on second reading, at which time a decision could be made on the words in square brackets. Greater precision would be possible in the light of the comments made in the Sixth Committee. He would point out that Latin American States were continuing to suffer intervention in various violent forms: not merely armed intervention, but also the assassination of political leaders and economic intervention. He agreed with the solution proposed by Mr. Calero Rodrigues.

56. Mr. THIAM (Special Rapporteur) said he was in favour of retaining article 17 in its present form and awaiting the views of the Sixth Committee. The particular nature of intervention was already defined for the purposes of the draft. Mr. Pellet was doubtless aware that the elements of the definition were borrowed from the judgement in the case brought by Nicaragua against

the United States of America.[14] Those elements should be kept, regardless of the exact title of the article. A key element of the definition lay in the use of force or organized terror against another State. Drafting improvements to article 17 and a decision on the words in square brackets should be left for the second reading.

57. Mr. PELLET said he could not accept article 17 in its present form. Taken literally, it would mean that the President of the United States of America would have to be indicted by an international criminal court for a crime against the peace and security of mankind. It was precisely because he felt that that would be unreasonable that he objected to the article. The Commission must take a responsible stance, in the light of international realities. He did not support either United States intervention in Nicaragua, or acts of intervention by other countries, but was disturbed by the idea that they could be characterized as crimes against the peace and security of mankind. Indeed the very title of the article invited misinterpretation and misuse for political ends. He proposed that it should be replaced by "subversive activities". As to the content of the article, he agreed with Mr. Calero Rodrigues that, if the article was retained, the words in square brackets should be deleted.

58. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that the words "by another individual" in paragraph 1 should be deleted, and replaced by "an act".

59. Mr. ARANGIO-RUIZ, referring to paragraph 1, said he agreed with the views expressed by Mr. Calero Rodrigues and Mr. Pellet on the question of intervention. It was a singularly difficult concept to define. Inevitably, article 17 was somewhat vague, since a crime was a highly specific matter. However, the actions of the United States of America or any other particular country were not relevant to the condemnation of intervention as such.

60. Mr. EIRIKSSON said that he had a number of reservations about the article, but they related to the title rather than to the substance.

61. The CHAIRMAN, speaking as a member of the Commission, said that the difficulty of characterizing the crime of intervention was well known. Acts carried out with the consent of the second State would of course escape the rubric of intervention. Paragraph 2 sought to define the scope of the article, and to indicate the criminal elements in intervention. It did not take a political stance. As for paragraph 3, he felt, as a member of the Drafting Committee, that it did not properly belong in the article. However, it was a wise decision to refer the article as a whole to the General Assembly for comments and advice, with a view to making improvements on second reading.

62. Mr. BARSEGOV said that paragraph 3 was drawn from General Assembly resolution 36/103, containing the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. Likewise, the definition of aggression in the draft articles was based on the relevant General Assembly resolution.

[14] See 2209th meeting, footnote 6.

63. Mr. McCAFFREY said that although he had not spoken during the discussion, he wished to place on record that his views were unchanged since the Commission's previous adoption of article 17, without the new paragraph 1.[15]

64. The CHAIRMAN suggested that the Commission should adopt article 17 with the amendment to paragraph 1 proposed by the Chairman of the Drafting Committee. He endorsed the latter's proposal to retain paragraph 2 in its present form. Paragraph 3 would likewise be retained.

Article 17, as amended, was adopted.

The meeting rose at 1.05 p.m.

[15] Adopted as article 14 (Intervention) at the forty-first session, in 1989.

2239th MEETING

Thursday, 11 July 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/435 and Add.1,[2] A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 18 (Colonial domination and other forms of alien domination) (*concluded*)

1. The CHAIRMAN invited the Commission to resume its consideration of article 18.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook... 1985*, vol. II (Part Two), p. 8, para. 18.

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