

Document:-
A/CN.4/SR.2273

Summary record of the 2273rd meeting

Topic:
<multiple topics>

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

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

2273rd MEETING

Tuesday, 16 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/443,¹ A/CN.4/L.469, sect. D, A/CN.4/L.470, A/CN.4/L.476, ILC(XLIV)/Conf. Room Doc.2)

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPporteur (*continued*)

1. Mr. BARBOZA (Special Rapporteur), summing up the discussion on the topic, said that some of the more general issues would be dealt with by the informal open-ended working group that was to be set up and he would turn first to the question of prevention.

2. Some members had queried the notion of "prevention" after an incident had occurred. The meaning of the term was sufficiently clear from paragraph 22 of the sixth report,² as well as from both of his subsequent reports. All the international instruments on liability for specific activities that he had consulted used the term in the same context. As to measures of prevention before an incident occurred, some members thought they should be of a binding character; others accepted the idea of making them recommendatory and placing them in an annex; still others preferred to wait until the end of the exercise before deciding on the character of the preventive measures. One member wanted international organizations to play the role assigned to them in the sixth report.

3. The reason for placing preventive measures in an annex was precisely to deprive them of any binding character. As for the objection that the hypothesis developed in his latest report changed the subject of the draft from liability to responsibility for wrongfulness, the statements he had made followed the reasoning of the jurists of the World Commission on Environment and Development. There was one exception to wrongfulness in principle, and the scope of the topic lay within that ex-

ception, as he intended to show. Some members, he noted, favoured treating activities involving risk and activities with harmful effects separately.

4. Draft article I, proposed for the annex on preventive measures, provided for both prior authorization and prior steps by the State in which the activities were to be carried out, and for action by that State to ensure that preventive measures were taken by the operators. No objection had been raised to the second of those proposals. However, the proposal for prior authorization accompanied by prior steps had led to a number of comments. One member held the view that each prior step should be placed in a separate article, in order to distinguish each aspect of the prevention process, and that prevention should include an obligation on the operators to take out insurance, as contemplated in draft article 16 (Unilateral preventive measures) in the sixth report.³ Actually, it was not important where that obligation was placed in the draft, provided it was included. It was logical that the insurance obligation should be complied with before authorization was given, since it was a means of ensuring that compensation could be paid. However, it was important not to confuse the damage with the compensation. Another view was that the State should compel, rather than induce, operators to comply with their obligations of prevention. But there could be no question of binding obligations in what was, after all, a set of guidelines.

5. The proposal for prior authorization had been criticized on two counts: first, that it was obvious and need not be made explicit; and second, that such a requirement would be unacceptable to States since it signified interference in their internal affairs. He felt that prior authorization should remain, for it had the effect of bringing the State concerned into the picture. In regard to impact assessment of transboundary harm, he agreed that some threshold such as "significant" harm should be included, perhaps by specifying in a use-of-terms clause that a reference to harm or risk always meant significant harm or risk.

6. Draft articles IV and VI, on prior consultations, had attracted most comment, with the suggestion that article IV should be deleted. It was argued that if the consequence of activities with harmful effects was significant transboundary harm, such activities must in principle be prohibited under general international law, which would bring the matter into the field of State responsibility for wrongfulness. If such activities were permitted under certain conditions, article VI would suffice to cover both types of activities, those with harmful effects and those involving risk. In both cases, the States concerned were required to enter into consultations. However, there was a difference between the consultations envisaged in the two sets of circumstances. Article VI contained the words "consultations, if necessary", because the harm was potential, whereas in article IV consultations were assumed to be essential because the State of origin could not authorize the activity in question without them. If the activity was permitted under certain conditions, some advantages would presumably be offered to the affected

¹ Reproduced in *Yearbook* . . . 1992, vol. II (Part One).

² *Yearbook* . . . 1990, vol. II (Part One), document A/CN.4/428 and Add.1.

³ *Ibid.*, annex.

State by way of compensation, and would be spelt out during the consultations.

7. Furthermore, as the jurists of the Brundtland Commission had opined,⁴ if the harm caused by the activity was substantial but far less than the overall technical and socio-economic cost of preventing or reducing it, the State of origin should enter into negotiations with the affected State in order to secure equitable technical and financial conditions for carrying out the activity. As explained in his report, pending such consultations activities with harmful effects would not be regarded either as clearly lawful or as clearly unlawful. Hence the activity would be permissible if the balance of interests tilted in favour of the activity. It would be for the affected State to decide if that was so, since the State of origin would be negotiating under the handicap that its proposed activity was in principle prohibited, a factor which gave the affected State a virtual veto. It had been asked why consultations should take place at all when the State of origin knew that the activity in question would produce transboundary harm. The answer was that the State of origin might consider that the balance-of-interests test would prove favourable to the activity, and that the affected State might agree to it if offered some advantages in compensation. Moreover, the damage to be caused might not be significant in the eyes of the affected State if, for instance, it took place in a deserted area.

8. In connection with draft article V, on alternatives to an activity with harmful effects, it had been pointed out that the present formulation deprived the State of origin of its capacity to conduct or regulate the activity. Naturally, the State of origin might, of its own accord, refuse to authorize an activity which was bound to cause harm, or which could not be adequately compensated. In that case, there would be no need for the affected State to request anything, but where the State of origin refused to make any compensation, the affected State would be able to ask it to seek alternative solutions. A further objection raised was that the article did not give sufficient protection to the affected State in such cases and that instead, the activity in question should be prohibited.

9. One member suggested that a more precise definition was needed of the purpose of the consultations envisaged in draft article VI. It had been rightly observed in connection with draft article VII that the State of origin should not be expected to comply with all the provisions of draft article II, but only with the consultation procedure. Some criticism had also been voiced of the last sentence of the article.

10. As pointed out in the discussion, the reference in draft article VIII to consultations held under draft articles III and V was incorrect; the reference should be to articles IV and VI. It had also been asked why there should be a procedure for the settlement of disputes if the activities in question were not unlawful. A settlement mechanism to resolve differences arising during negotiations to achieve an agreed regime would be more in the nature of a conciliation device. His intention, however,

had been to provide some procedure whereby the facts about the activity could be brought out: to determine, for instance, whether harm was inevitable, whether certain elements could be replaced in order to make the activity acceptable, whether the harm was really significant, and whether the balance of interests lay in favour of the activity being lawful. Depending on the circumstances, a conciliation procedure might also be in order. The procedure should be left flexible; since the provisions were recommendatory in nature, it was not possible to flesh out the details. Obviously, if the provisions on liability were binding, then damage would be compensated; if not, general international law must fill the gap. The detailed procedural obligations (chapter III of the draft articles) originally proposed in his fifth report⁵ had been considered too burdensome for the State of origin, and he had therefore been asked to propose a simplified procedure. He had sought to do so in the sixth report, but there had been difficulties in accepting binding provisions on procedure. Accordingly, he had conceived the idea of very general guidelines. If a new activity in the State of origin caused objections from a potentially affected State, consultations could offer the means of resolving the difficulty. In the absence of a detailed procedure, States would be recommended to cooperate, and to display the good faith inherent in all international transactions.

11. As to draft article IX, on factors involved in a balance of interests, views in the Commission were divided. One member had expressed total bewilderment, feeling that the article belonged neither in a convention nor in a recommendation, and that it should be confined to a commentary. His own opinion had always been that draft article IX, formerly article 17, was not suitable for inclusion in a set of binding legal rules, but it could be fitted into recommendations in an annex. On further reflection, however, he had to admit that it played an important role, since it helped to determine the character of the activity in question: if the balance of interests was in favour of the activity, it could be regarded in principle as not prohibited by international law. In the case of an activity with harmful effects, the door would be open for consultations designed to allow the activity to be treated as lawful. In one member's view, the concept of a balance of interests in draft article IX should reflect the views stated in the report and draw a distinction between activities involving risk and activities with harmful effects. It could perhaps be reviewed in order to reflect the criterion of legality contained in the report of the Brundtland Commission.⁶

12. The definition of risk had led to some discussion. The report itself suggested that the text of the definition should be divided between article 2 and a commentary and that suggestion had found favour with some in the Commission. One member did not consider it necessary to introduce the notion of "significant risk"; the risk would be relative for the State on whose territory the activity took place. For instance, the risk inherent in the operation of a nuclear reactor in a State that used sophisticated technology would be less than the risk stemming

⁴ See 2268th meeting, footnote 11.

⁵ *Yearbook* . . . 1989, vol. II (Part One), document A/CN.4/423.

⁶ See 2268th meeting, footnote 11.

from another nuclear reactor in a different State that used more elementary technology. However, the definition did not attempt any uniform estimation of degrees of risk; a different estimate could be made if the State of origin presented sufficient evidence. Nevertheless, there must be a minimum threshold of risk to bring the activity within the scope of the draft articles. A fair estimation of the magnitude of the risk involved could be obtained by weighing the level of the potential damage against the likelihood of its occurrence.

13. As for the definition of harm, a preference had been expressed for omitting any definition of "significant" or "important" harm, a task which could be left to the courts. One member could not agree with the text of article 1, paragraph 10 (c), of the Convention on Civil Liability for Damage Caused During Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels quoted in the report, a definition which apparently confused the notion of damage with its consequences. In that Convention, the term used was "costs", in other words, the cost of restoration of the environment, a criterion which itself was a measure of the damage. Between that concept and the concept of indemnity or compensation for the damage, there was only one small step, which nobody would hesitate to take. Concern had also been expressed about damage to the "global commons". However, the Commission had not reached a firm decision to include the "global commons" within the scope of the draft. Instead, the idea had been mooted of including it in a separate topic. The addendum to the sixth report might serve as an introduction to that subject.

14. Personally, he failed to see the parallel one member had drawn between liability and responsibility. At most, they could be represented by two intersecting lines. If the factor generating liability was the risk, and the factor generating reparation was the harm, where was the parallel with responsibility for wrongfulness, since the factor generating responsibility was the breach of an obligation? Material damage, as the factor giving rise to reparation, was the only point at which the two lines crossed. There were two points to bear in mind with respect to material damage. First, there were the obligations of conduct, where no material damage was required for a breach of the obligation to occur; hence such damage was not a factor giving rise to reparation. Second, the meaning of reparation was itself completely different in the two cases. In the case of responsibility, reparation stemmed from the new obligation arising from the breach of the primary obligation; risk played no role in determining the responsibility. In the case of liability, the compensation given had nothing to do with the breach of an obligation, since it formed part of the primary obligation. Where the primary obligation was not fulfilled, the secondary obligation of reparation came into being. That secondary obligation had been present all along, in case the primary obligation was not fulfilled. It should not be confused with the primary compensation, given as a sort of guarantee for the risk created.

15. Lastly, any decision to refer the articles to the Drafting Committee should be postponed until the working group had discussed them.

16. The CHAIRMAN said that a meeting of the informal open-ended working group would be held that day. Pending its deliberations, no decision would be taken to refer the draft articles to the Drafting Committee.

It was so agreed.

State responsibility (continued)* (A/CN.4/440 and Add.1,⁷ A/CN.4/444 and Add.1-3,⁸ 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 14⁹ (continued)

17. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report on State responsibility (A/CN.4/444 and Add.1-2).

18. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, at that stage, he would confine his introductory remarks to the first part of his fourth report, contained in document A/CN.4/444 and to the proposed articles 11 and 12, which read:

Article 11. Countermeasures by an injured State

An injured State whose demands under articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act is entitled, subject to the conditions and restrictions set forth in the following articles, not to comply with one or more of its obligations towards the said State.

Article 12. Conditions of resort to countermeasures

1. Subject to the provisions set forth in paragraphs 2 and 3, no measure of the kind indicated in the preceding article shall be taken by an injured State prior to:

(a) the exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it is a party; and

(b) appropriate and timely communication of its intention.

2. The condition set forth in subparagraph (a) of the preceding paragraph does not apply:

(a) where the State which has committed the internationally wrongful act does not cooperate in good faith in the choice and the implementation of available settlement procedures;

(b) to interim measures of protection taken by the injured State, until the admissibility of such measures has been decided upon by an international body within the framework of a third-party settlement procedure;

(c) to any measures taken by the injured State if the State which has committed the internationally wrongful act fails to

* Resumed from the 2267th meeting.

⁷ Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

⁸ Reproduced in *Yearbook . . . 1992*, vol. II (Part One).

⁹ For texts of proposed draft articles 11 and 12, see para. 18 below; for 5 *bis*, 13 and 14, see 2275th meeting, para. 1.

comply with an interim measure of protection indicated by the said body.

3. The exceptions set forth in the preceding paragraph do not apply wherever the measure envisaged is not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered.

The remaining parts of the report (A/CN.4/444/Add.1-2) and the articles proposed in them would be presented at a forthcoming meeting, since the relevant documents had only just been distributed.

19. His own knowledge of Spanish was not sufficient to deal with the problem of lack of Spanish-language sources raised by Mr. Villagran Kramer (2267th meeting); and the modest honorarium of a special rapporteur did not enable him to obtain paid assistance in the matter. He therefore urged the secretariat to provide special rapporteurs with digests of extracts from Spanish legal writings. The same was, of course, true with regard to material in Arabic, Chinese and Russian.

20. A few members had expressed concern that practice had not been adequately covered in the third report (A/CN.4/440 and Add.1). Actually, it had been excluded intentionally, except where it served to identify problems discussed or was reflected in the literature. It was deliberately left for the fourth report, as was indeed clearly explained at the beginning of the report.

21. There were six essential elements in draft article 11. The first was that resort to countermeasures presupposed that an internationally wrongful act had been committed. In other words, there should be no doubt that the actual existence of an internationally wrongful act was a basic condition for countermeasures to be taken.

22. The second element was that the reference to “demands under articles 6 to 10” on the part of the injured State served a dual purpose. In the first place, it announced the important condition that a demand for cessation/reparation must have been addressed to the law-breaking State. In the second place, it underlined the difference—or at least one of the differences—between countermeasures and self-defence. Obviously, no demand would be necessary for resort to self-defence under Article 51 of the Charter of the United Nations. The third element was an additional negative requirement introduced by the reference in article 11 to the absence of an adequate response from the law-breaking State. He was tentatively proposing the expression “adequate response” in order to meet the exigency of security for both of the parties involved in the responsibility relationship and the equally important exigency of flexibility. He did not exclude, however, the addition of further requirements, such as timeliness.

23. The fourth element in the article was the distinct reference to “conditions” and “restrictions”. The fifth element was to be found in the words “not to comply with one or more of its obligations towards the said State”, which set forth the well-known elementary definition of countermeasures, namely, of what he would prefer to call reprisals. The only point to be stressed with respect to the quoted phrase was that it implied the abandonment of the distinction between the so-called “reciprocity measures” or reprisals, on the one hand, and

other “non-reciprocal” countermeasures or reprisals, on the other hand. That distinction, in his view, would not be useful. A different position of principle had been taken by the previous Special Rapporteur, Mr. Riphagen, in his draft articles 8 and 9.¹⁰ As far as he himself was concerned, his only regret was that, by abandoning the distinction made by his predecessor, he could no longer use the technically correct term “reprisal”.

24. The sixth element in article 11 was his tentative proposal to eliminate the wording contained in earlier drafts: “in order to protect its legal rights” or “in order to obtain cessation and/or reparation”. He had eliminated that form of language so as to avoid taking any stand on the question of the function of countermeasures discussed in the fourth report. As explained in the third report, an effort should be made to learn more from State practice but, as indicated in the fourth report, that practice did not reveal enough with regard to the finality and purpose of compensation, and in particular whether any punitive element was present. As he saw it, although the punitive intent was likely to be present in the mind of the State organs which decided to resort to a countermeasure against a wrongdoing State, it was not appropriate to recognize a corresponding right on the part of the injured State to chastise. On the other hand, it would be equally inappropriate to intimate expressly that no such intent could be pursued. The matter should be left simply to the practice of States, subject of course to the general rule of proportionality. Speaking in his personal capacity as an observer of inter-State relations, he would say that States did in fact punish one another, something the Commission had acknowledged when it had adopted—at least in plenary—the essence of draft article 10 (Satisfaction and guarantees of non-repetition). In any case, a punitive function of measures could not easily be contested with regard to crimes; and he could hardly see much difference between the most serious among “delicts” and the “crimes” indicated in article 19 of part 1.¹¹

25. Article 12 could be divided into four closely connected but quite distinguishable parts. The first concerned the question of prior communication in general and was reflected in paragraph 1 (b), which was intended to define, albeit in general terms, a requirement implicit in the wording “demands under articles 6 and 10”, in article 11, when there was no adequate response. Appropriate and timely communication of the injured State’s intentions had been considered indispensable not only by Mr. Riphagen but also by the Commission during the debate on part 3 of the draft proposed by the former Special Rapporteur. Two points arose in that connection. The first was his own choice of dealing with the matter in part 2, rather than wait for the implementation clauses in part 3. The requirement of appropriate and timely communication should be laid down at the very outset of the regulation of countermeasures, since it was much too important a condition of lawful resort to unilateral measures for it to be moved to part 3, which was to govern the further problem of the new general obligations relat-

¹⁰ For texts of draft articles 6 to 16 of part 2 as referred to the Drafting Committee, see *Yearbook... 1985*, vol. II (Part Two), pp. 20-21, footnote 66.

¹¹ For text, see *Yearbook... 1980*, vol. II (Part Two), p. 32.

ing to the settlement of disputes concerning the interpretation and application of the rules contained in the draft.

26. Article 12 differed in another way from the corresponding drafts proposed by Mr. Riphagen, more particularly from the rigid provisions that had been proposed by the previous Special Rapporteur in articles 1 and 2 of part 3.¹² By adopting a more flexible formulation, he hoped for his own part to meet some of the criticism levelled at those detailed provisions in the Commission.

27. The next and most important point was in paragraphs 1 (a) and 2 (a), which dealt with prior exhaustion by the injured State of dispute settlement procedures. The matter had been covered in paragraph 1 of his predecessor's article 10, reading:

No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.¹³

28. The first main difference between that formulation and the one he was now proposing was the criterion of availability. In the earlier proposal, a reference was made solely to the purpose of the international settlement procedure, namely "in order to ensure the performance of the obligations mentioned in article 6". In the draft he now proposed, the sources of availability were much broader, namely "general international law, the Charter of the United Nations, or any other dispute settlement instrument to which it is a party". Under the earlier proposal, availability was understood to cover in principle only third-party settlement procedures which could be set in motion by unilateral application. In the new text, availability would expressly include all the procedures listed in Article 33 of the Charter, from the most simple negotiation to the most stringent forms of judicial settlement before ICJ. In that way, maximum restraint was imposed on the injured State to prevent it from resorting to reprisals prematurely.

29. Unlike the earlier formulation, article 12 did not fail to mention expressly—in favour of the injured State—the factor represented by the way in which the wrongdoing State reacted to any dispute settlement attempts made by the injured State using one of the available procedures. Paragraph 2 (a) stipulated that the condition set forth in paragraph 1 (a), namely prior exhaustion of all the amicable settlement procedures available did not apply where the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and the implementation of available settlement procedures. Suggestions to improve the wording would be welcome, but the provision should bring some balance into the relationship between the injured State and the wrongdoers in the evaluation of the existence or otherwise of that essential condition for the lawfulness of an act of reprisal, namely the exhaustion of available settlement procedures. Since the scope of availability had been broadened, it was obviously essential to place some burden upon the wrongdoing State.

30. Subparagraphs (b) and (c) of paragraph 2 were largely similar to the corresponding proposals made by his predecessor. He would revert to any differences after hearing the remarks and questions of his colleagues, and preferred to await comments on paragraph 3 before discussing it.

31. Mr. ROSENSTOCK said that the Special Rapporteur's third and fourth reports were brilliant expositions of his conceptual approach and of the reasoning which had led him to propose draft articles 10 to 14 as well as changes in articles 2 and 5. The Commission had before it the makings of a draft convention which should help to codify and progressively develop the law of State responsibility. There were, however, some problems to be overcome.

32. The first was that, as the Special Rapporteur had acknowledged, his predecessor's draft for part 3, on dispute settlement, could not be regarded as generally acceptable. Therefore it was not reasonable to base the draft of part 2 on a belief that Governments were ready to accept part 3, which mandated a meaningful settlement procedure. Such a meaningful procedure meant a procedure that could give a binding answer concerning the wrongfulness of the initial act and order reparation expeditiously. States could accept such a dispute settlement regime in a particular case and part 2 could be constructed in such a way as to encourage them to do so. To expect across-the-board acceptance of such a regime for the whole of international law and to predicate part 2 on such a premise none the less seemed unpromising.

33. Certain aspects of the debate had wandered into unnecessary areas and given rise to some untenable statements. For example, it was neither necessary nor wise to attempt to reopen the question of the scope of the prohibition against armed reprisals so adequately encapsulated in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations¹⁴ and the *travaux préparatoires*. It was equally unwise and unnecessary to attempt to reopen the question as to whether the term "force" in Article 2, paragraph 4, of the Charter of the United Nations meant armed force. Speculation as to why the Latin American proposal had been rejected at the San Francisco Conference was as pointless as it was dubious. It was certainly disturbing to hear General Assembly resolution 2131 (XX) of 21 December 1965 cited as a basis for questioning the long-standing view in that respect. The context of the adoption of that resolution, the statements made at the time and the extensive records of the discussion in the Special Committee on Principles of International Law concerning Friendly Relations and Cooperation among States and elsewhere left no reasonable grounds for such an effort. If the Commission's present task was to analyse the basis for the principle of non-intervention in the Charter of the United Nations in the form in which it had been accepted as a legally significant statement, it would be well to look elsewhere than in Article 2, paragraph 4. Fortunately, that was an exercise in which the Commission need not engage at present. It was also dis-

¹² For texts, see *Yearbook... 1986*, vol. II (Part Two), pp. 35-36, footnote 86.

¹³ See footnote 10 above.

¹⁴ See 2265th meeting, footnote 5.

turbing to hear another member not only engage in the dubious act of according normative value to the General Assembly's Definition of Aggression¹⁵ but also misquote it. The Definition of Aggression did not speak of the first use of force as creating a presumption that aggression had transpired; rather, it spoke of a "first use of armed force by a State in contravention of the Charter". As a participant in the negotiation of the text in question, he could state categorically that that point had been crucial to the success of the negotiation. Happily, that too was not a question to be reopened at present, but he did not wish to leave a misleading record.

34. However, the most important point with regard to those and other interesting issues touched upon by the Special Rapporteur, such as the scope of Article 51 of the Charter of the United Nations, was that they were not essential to the completion of the Commission's task. Any attempt to deal with those issues would mean drifting away from the possibility of finishing the assigned task in a timely fashion. Similarly, it was a questionable approach to quote highly restrictive comments made several decades previously by Hans Kelsen on the ambit of the authority of the Security Council. However interesting, all those matters did not need to be debated in order to produce a meaningful text on State responsibility.

35. As to the draft articles, he entirely concurred that the legitimacy of any countermeasures or reprisals required the prior existence of a wrongful act. It was neither fitting nor reasonable to include procedural obligations as additional preconditions. Even if a broadly accepted rigorous regime in part 3 meant that preconditions could be placed on countermeasures, the same was not true of interim measures of protection. An injured State was entitled to protect itself—within limits—but not subject to any preconditions.

36. So far as countermeasures in general, as distinguished from interim measures of protection, were concerned, it seemed reasonable to require that the injured State should make a demand of the wrongdoing State, but it did not seem to be reasonable to require, as a precondition, that all amicable procedures available under general international law must have been exhausted. Paragraph 2 (a) of article 12 did not solve the problem. In view of the fact that international dispute settlement processes were slow and time-consuming, it would be more reasonable, and more likely to persuade the wrongdoing State to come to the table, if countermeasures were subject not to preconditions but, in certain circumstances, to conditions subsequent. In other words, a regime in which the right to impose countermeasures would be suspended if the wrongdoing State agreed to a dispute settlement procedure that could reach a legally binding determination as to the wrongfulness of the act and require reparation. So long as the State taking the countermeasures had reason to believe it was engaged in proceedings that formed part of an institutional framework ensuring some degree of enforcement, the justification for countermeasures might disappear, but not before.

37. As to proportionality, mathematical exactitude was neither attainable nor desirable; it was the grossly disproportionate that should be regulated. There was no point in spurring argument as to whether a given countermeasure was slightly more, or slightly less, severe than the original wrongful act. As a rough gauge, account should be taken of the importance of questions of principle which might arise out of the initial breach as well as of the damage suffered or, to use the words of draft article 13, "the gravity of the internationally wrongful act and of the effects thereof". In that connection, he wondered whether a formulation for the criteria of proportionality along the lines suggested in addendum 1 to the fourth report—which took the right approach—did not obviate the need for any distinction based on different kinds of wrongfulness on the part of a State. If provision could be made for adequate differences of degree, there was no need to complicate the task by carrying over from part 1 dubious efforts to create differences in kind. Whether it was necessary to speak, as did the Special Rapporteur in that addendum, of the "two evils", thus suggesting a moral equivalency between the breach and the reaction to it, was another matter.

38. The general thrust of the proposed draft article 14 (Prohibited countermeasures) was reasonable though it was best to avoid excessive detail, and highly subjective phrases such as "susceptible of endangering" were neither prudent nor supported by customary or other norms. If it was necessary to arrive at some specific form of wording on that point, in place of general language based on Article 103 of the Charter of the United Nations, the language of the report where it referred to measures aimed at the subordination of the exercise of the target State's sovereign rights, might provide a better basis than the draft suggested. The reference to the normal operation of diplomacy also seemed to go somewhat further than was required. He could not help wondering whether the Special Rapporteur, by trying to drive too many nails into the coffin of the *dicta* of ICJ in the *Case concerning United States Diplomatic and Consular staff in Tehran*,¹⁶ on special regimes, was not creating problems. It might be wise to indicate at some point in the commentary that the inclusion of paragraph (c) (iii) in draft article 14 did not suggest that *jus cogens* did, or did not, relate to anything that was not covered by the other subparagraphs.

39. The report did not clarify whether there were non-treaty-based *erga omnes* obligations that did not amount to peremptory norms.

40. He agreed with the Special Rapporteur's arguments in favour of the deletion of draft article 2 of part 2: since he himself supported any measures that would simplify the text without doing damage to it, he was inclined to deletion rather than revision.

41. The Special Rapporteur's objections to the concepts of non-directly injured, specially affected, and third States seemed persuasive, particularly in the case of a right to cessation and the general entitlement to reparation. Article 5 as previously drafted¹⁷ did not seem to

¹⁵ See 2267th meeting, footnote 11.

¹⁶ See 2261st meeting, footnote 5.

¹⁷ For text, see *Yearbook . . . 1992*, vol. II (Part Two), chap. III.

solve entirely the problem of the application of subsequent articles in part 2 to differently injured States. The second addendum to the report seemed to suggest that that was not really a problem, but he was not certain that that was true in all situations. While he did not object to proposed article 5 *bis* as such, it did not add anything essential and he would prefer not to complicate the draft further.

42. He did not agree that the whole section on countermeasures should be deleted or that deletion would cast doubt on the long-established recognition of countermeasures under customary international law and on the correct and explicit language of article 8 of part 1 of the draft. It would be a pity to give up on the question of countermeasures without trying to deal with it. If the effort proved too difficult, a simplified approach could be considered before the effort was abandoned altogether.

43. Provided that unnecessary issues were avoided, it should be possible to complete work on the first reading of parts 2 and 3 and to re-examine some of the complex issues raised in part 1 during the current quinquennium. The Commission should tailor its programme of work to the achievement of that goal.

44. Mr. JACOVIDES said that a number of important elements concerning the nature and role of countermeasures had already been emphasized during the Commission's earlier discussion on the Special Rapporteur's third report (A/CN.4/440 and Add.1).¹⁸ In particular, it had been noted that the scope of countermeasures should be restricted and narrowly defined, that they should not be punitive but should aim at restitution and at reparation/compensation, and that they should be the subject of an extensive system of third party dispute settlement which must be applied objectively, if at all. It had further been stressed that, under Article 2, paragraph 4, of the Charter of the United Nations, armed countermeasures were prohibited, that, in the area of countermeasures, peremptory norms clearly were not subject to derogation, and that other limiting factors, such as violations of basic human rights, were also relevant. The fact that the third report had been the subject of some criticism in no way detracted from those positive elements.

45. Another positive element to emerge from the initial stage of the debate concerned the Special Rapporteur's plans for further consideration of the topic. In that connection, it was particularly important for the Commission to complete during the current quinquennium an integrated set of draft articles, with commentaries, on State responsibility. Work on the second reading of part 1 should be undertaken only if the Commission was reasonably certain of completing it during the same period.

46. While he was grateful for the wealth of legal material contained in the fourth report, there was still scope for inclusion in the report of further references to scholarly works and State practice taken from the whole spectrum of contemporary international life. There was, for instance, international legal material that was far more relevant to the international law aspects of the situation

in Cyprus, including debates in the Security Council and General Assembly and scholarly writings, than was apparent from the passing reference to the regrettable Larnaca incident cited in the report.

47. Effective third party dispute settlement procedures were a *sine qua non* in modern international law in general, but particularly in the area of State responsibility and countermeasures, affording, as they did, protection for the small and militarily weaker States. The incorporation of such procedures into major law-making treaties was now less difficult than in the past, and every effort should therefore be made to include such a system in part 3 of the draft. Resort to third party dispute settlement procedures, to which the author State and injured State were parties, was essential in the case of countermeasures and the exceptions should be narrowly construed.

48. As to the legal impact of Article 2, paragraph 4, of the Charter of the United Nations, he agreed with the late Sir Humphrey Waldock¹⁹ that armed reprisals to obtain satisfaction for an injury or armed intervention as a tool of national policy other than for self-defence was illegal under the Charter.

49. It was not sufficient to say that everyone knew rules of *jus cogens* existed. If such rules were to have the necessary degree of objectivity and predictability, their legal content must be defined by an authoritative body such as the Commission. The most obvious case of *jus cogens* from which no derogation was permitted was the principle of the prohibition of the use of force in international relations, as set forth in Article 2, paragraph 4, of the Charter of the United Nations, which was now accepted as having acquired the force of customary international law. Yet that principle was discussed separately in the report from *jus cogens* and *erga omnes*. The explanation given was only partially satisfactory and some clarification was needed. He none the less recognized that it was a separate issue which should not necessarily be considered in the already overloaded context of State responsibility.

50. On the whole, draft articles 11 to 14 and draft article 5 *bis* were on the right lines and the Special Rapporteur was to be commended for injecting into his proposed solutions an element of progressive development based on contemporary notions of international law.

51. It would be helpful, from the standpoint of precision and consistency, if, in article 11 (Countermeasures by an injured State), the word "countermeasures" could be included in the body as well as the title of the article.

52. As to the conditions for resorting to countermeasures, he welcomed the reference in paragraph 1 (a) of article 12 to the exhaustion of all the amicable settlement procedures available under general international law, the Charter of the United Nations or any other dispute settlement instrument to which it [the injured State] is a party and, in paragraph 1 (b), to the need for appropriate com-

¹⁸ See 2265th meeting, footnote 4.

¹⁹ For source, see the relevant footnote to document A/CN.4/444/Add.1.

munication of its intention to resort to countermeasures. Equally welcome was the general caveat in paragraph 3 concerning the exceptions set forth in paragraph 2 of the article. It might be advisable, however, for the Drafting Committee to consider whether article 12 should be split into two or more articles, as it was somewhat cumbersome.

53. It might have been preferable to attempt in article 13 (Proportionality) to give a more precise definition of the scope and content of proportionality though, in general terms, the wording proposed was along the right lines. He would, for all that, prefer to replace the words “not be out of proportion” by the words “not be disproportionate”.

54. Article 14 (Prohibited countermeasures), which covered the points he had raised earlier concerning substantial limitations on countermeasures (2265th meeting), was particularly gratifying. It might, however, be advisable to replace the letters “(a)”, “(b)” and “(c)” by numerals and the numerals “(i)”, “(ii)”, “(iii)” and “(iv)” by letters. Lastly, while the prohibition on the threat or use of force in breach of the Charter of the United Nations was covered by paragraph (a), peremptory norms were covered separately under paragraph (c) (iii), but without any indication that the prohibition on the use of force in international relations was a peremptory norm *par excellence*. Some way should be found to reflect that fact; no doubt, once the exact legal content of the concept of peremptory norms was clarified, the Commission would be able to use more exact terminology. Subject to that observation, he was prepared to accept the substance, if not the drafting, of the text.

55. He looked forward to continued progress on the topic so that it could be concluded, at least on first reading, during the current quinquennium.

56. Mr. de SARAM said that the question of what the Commission had come to refer to, since the preparation of part I of the draft articles on State responsibility, as the countermeasures an injured State might take in response to an internationally wrongful act was of special importance and involved uncertainties and differences of view not only on technicalities but also on fairly substantial matters. It was a question which, as the Special Rapporteur had cautioned, called for further careful examination.

57. In the first place, he wished to be quite clear, particularly as a new member of the Commission, about what the Commission meant, or did not mean, when it used the term “countermeasures”. A good place to start was paragraph (3) of the Commission’s commentary to article 30 (Countermeasures in respect of an internationally wrongful act) contained in chapter V (Circumstances precluding wrongfulness) of part I of the draft articles.²⁰ Article 30 consisted of only one sentence, providing that the wrongfulness of the act of a State, not in conformity with an obligation of that State towards another State, was precluded if the act constituted a measure legitimate under international law against that other State in consequence of an internationally wrongful act

of the latter State. Yet, the sentence was full of implications and was not as clear as the government officials who would eventually have to implement the convention on State responsibility might like. Paragraph (3) of the commentary did clarify matters somewhat, however, in explaining that:

The countermeasures with which this article is concerned are measures the object of which is, by definition, to inflict punishment or to secure performance—measures which, under different conditions, would infringe a valid and subjective right of the subject against which the measures are applied. This general feature serves to distinguish the application of these countermeasures, sometimes referred to as “sanctions”, from the mere exercise of the right to obtain reparation for damage . . . [and] are on no account to be understood as measures which must necessarily involve the use of armed force.²¹

As he understood it, therefore, when the Commission used the word “countermeasures” it meant acts that did not involve the use of armed force.

58. Again, the Commission distinguished countermeasures, as dealt with in article 30 of part I of the draft articles, from self-defence, as dealt with in article 34, so that self-defence meant something quite different from countermeasures. What was more, although there might be controversy as to the outer limits of self-defence, it was no longer permissible, certainly so far as the United Nations was concerned, to reach any conclusion other than that armed reprisals or, in the words of the commentary to article 30, countermeasures involving the use of armed force, were no longer permissible in international law. Article 2, paragraph 4, of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly by consensus,²² made that abundantly clear.

59. He also believed it to be the Commission’s understanding that acts which might be unfriendly to another State but were not in breach of an international legal obligation to that other State, namely, acts of retortion, did not come within the scope of what the Commission meant when it used the expression “countermeasures”. The point might none the less be made that the availability and effectiveness of measures of retortion, which could be considerable in a particular case, might raise questions as to the need for a State to turn to countermeasures.

60. Furthermore, it was the Commission’s understanding that the ability of an injured State to have recourse to countermeasures was not unlimited. It was first necessary for an injured State to believe, in good faith, that an internationally wrongful act had been committed against it and that such wrongful act was attributable to the State at which the countermeasure was to be directed. Second, in order to establish the necessity for the taking of countermeasures, and in order to distinguish an occasion for “countermeasures” from an occasion for “self-defence”, it was necessary, contrary to the case of self-defence, for the injured State (State B) first to notify the State it believed to be responsible for the injury

²⁰ *Yearbook . . . 1979*, vol. II (Part Two), pp. 115-116.

²¹ *Ibid.*, p. 116.

²² See 2265th meeting, footnote 5.

(State A): then, unless State A discontinued the wrongful act and accorded redress, State B would have to resort to countermeasures. Third, there were the five overall absolute limitations on the use of countermeasures, apart from non-use of armed force, which were enumerated by the Special Rapporteur in paragraphs (b) and (c) of article 14, namely prohibitions against acts endangering the territorial integrity or political independence of a State, acts not in conformity with fundamental human rights, acts causing serious prejudice in the diplomatic field, acts contrary to a peremptory norm of international law, and acts in breach of an obligation to a third State. Fourth, as recognized by the Special Rapporteur in his proposed article 13, there was an additional and specific limitation, namely that any countermeasure taken must be in proportion to the injury received, even though, in certain cases, the criterion of proportionality might be difficult to apply in practice. Fifthly, there was the general caveat in article 35 of part 1 that the question of possible compensation for damage resulting from the use of countermeasures remained open.

61. There were, furthermore, the particularly difficult kinds of questions that arose in cases where more than one State, and indeed perhaps several States, considered themselves injured States and entitled therefore to have recourse to countermeasures. Where, in such cases, the structure of the applicable legal relationships was essentially bilateral, the issues in such cases were perhaps relatively uncomplicated: who the injured States were; the extent to which they were entitled to take countermeasures; or the question of the proportionality, collectively and individually, of the countermeasures. The problems would tend to be even more difficult, however, where the structure of the applicable legal relationships was other than bilateral and where there was, in addition, an institutional core within that structure which itself provided for dispute settlement procedures, corrective measures or sanctions. The matter might be complicated further in cases where resort could be had not only to procedures established under the particular applicable regime but also to measures permissible under general international law; a course which would appear to be permissible unless contractually precluded by prior agreement, express or implied, between the parties—though that again might not on the face of the multilateral treaty be entirely clear.

62. A fundamental question thus arose as to whether, aside from the case of treaty relations, the “countermeasure” would in practice be such a sufficiently understood and clear a procedure as to be endorsed and recommended by the Commission as a “coercive” legal procedure in relations between States in contemporary and future international law.

63. Moreover, in response to an internationally unlawful act, the injured State could have recourse to a number of possible actions, including procedures for the settlement of disputes, retortatory measures and diplomatic protests, the effects of which in their intense form could not be considered negligible. He wondered, therefore, whether it was necessary, with an eye to the future, for the Commission to prescribe that a State believing itself to be injured might also, in effect, “take the law into its

own hands”, particularly when the ability to take effective countermeasures varied widely from State to State and when the very concept of the “countermeasure” seemed to be antithetical to some of the fundamental general principles on which the international legal community had come to rely: the sovereign equality of States, equality before the law, settlement of disputes through agreed procedures, and so forth.

64. The point was made, however, and it was one that also needed to be carefully weighed, that there were circumstances, how frequent was not known, falling outside the scope of treaty relationships and thus outside the provisions of article 60 of the Vienna Convention on the Law of Treaties, in which a State was aware that it had violated an obligation yet remained indifferent to the concerns of the injured State and unresponsive to its requests to enter into dispute settlement negotiations. Under such circumstances, it was said, countermeasures were the only realistic and equitable course. If such was the case, then it seemed to him that there was good reason for also asking that the question of the “countermeasure”, aside, of course, from what might be agreed to in treaty relationships, should be considered only in close conjunction with dispute settlement procedures, and interwoven with such procedures; and be subject to such limitations as were necessary to preclude unreasonable and inequitable use. That was reflected in articles 11 and 12, proposed by the Special Rapporteur in his fourth report.

65. There was another, and again fundamental, aspect which seemed to require consideration, perhaps on a second reading of part 1 of the draft articles. Article 30 (Countermeasures in respect of an internationally wrongful act) was contained in Chapter V (Circumstances precluding wrongfulness) of part 1 of the draft articles; meaning that a countermeasure, though a breach of an international obligation, was not, in the circumstances, “wrongful” and, in other words, was “rightful” or “permissible”. However, he wondered why the matter had not been cast in the opposite fashion: namely the countermeasure being in breach of an international obligation would itself be a wrongful act unless the State resorting to such a measure was able to establish circumstances which exonerated it from wrongdoing. The question was not a peripheral one, it was central to the matter of where the burden of proof in the particular case would lie, an important issue which could either greatly facilitate or impede international proceedings, where acquiring necessary testimony, for example, could pose unusual difficulties. The question of the basic orientation of article 30 of part 1 would accordingly, it seemed to him, at some stage, require further consideration.

66. Mr. GÜNEY said that countermeasures represented one of the most difficult and complex issues with which the Commission had to deal. Nevertheless, the conditions under which an injured State could resort to countermeasures must be made clear. That task would require imagination and a progressive outlook.

67. The term “countermeasures” was preferable to “reprisals”. Reprisals represented a violation of the law and were associated with the use of force; they should, therefore, be considered only in very exceptional cir-

cumstances. The limits under which States might lawfully take countermeasures included the prohibition of force, respect for human rights and the inviolability of protected persons. Generally speaking, countermeasures could only be taken within the framework of respect for the basic rules of international law, without the need for special reference to peremptory norms, about which differences of opinion remained.

68. Countermeasures were legitimate only where a manifestly wrongful act had been committed. Any State which made use of countermeasures in the absence of a wrongful act did so at its own risk and might be held responsible for its actions. Prior to taking any countermeasures, the injured State had first to establish the existence of the act or the presumption of guilt. In addition, the injured State had first to demand cessation and/or reparation from the State which had committed the internationally wrongful act.

69. He welcomed the Special Rapporteur's attempt to clarify the principle of proportionality, which acted as a counterweight to inequality. Countermeasures that were out of proportion to the nature of the wrongful act and the resulting harm could give rise to responsibility on the part of the State using those measures. In that connection, article 13, on proportionality, should include a reference to the harm arising out of an internationally wrongful act. The Special Rapporteur should also consider the circumstances under which failure by a State to make reparations for a wrongful act could be considered as a secondary wrongful act.

70. Further study was needed of the question of suspending or terminating treaties in response to an internationally wrongful act. Moreover, it was not appropriate to deal in the draft articles under consideration with that particular area of law, which had already been regulated in a satisfactory manner by the relevant provisions of the Vienna Convention on the Law of Treaties.

71. With the exception of acts which threatened the life or physical integrity of individuals or gave rise to irreparable harm, there were no circumstances under which a State could legitimately resort to countermeasures before having had recourse to one or the other of the procedures for the peaceful settlement of disputes set forth in Article 33 of the Charter of the United Nations.

72. State responsibility was a topic which elicited great interest within the Commission. To make its efforts in that area worthwhile, the Commission should move ahead rapidly, with the objective of completing consideration of the topic or at least undertaking a second reading of the draft articles. To that end, it would be most helpful if the Special Rapporteur could draft a plan of work before the end of the present session.

73. Mr. SHI said that the fourth report served only to confirm the views he had expressed earlier with regard to the subject of countermeasures. Countermeasures were controversial; rather than reflecting generally recognized rules of international law, they were simply power relationships in disguise. Countermeasures were not suitable for codification or progressive development

of the law. Furthermore, they did not fall within the scope of the topic of State responsibility.

74. He reiterated that for the smaller and weaker States, inclusion of countermeasures in the draft would represent the legitimization of a controversial concept; for the stronger and more powerful States any strict regime of countermeasures would be unacceptable. In addition, some members felt that it was difficult, if not impossible, to draft articles on the settlement of disputes that would be acceptable to all States. Consequently, he wished to propose that any articles on countermeasures and dispute settlement should be excluded from the topic of State responsibility. Dispute settlement might even be taken as a separate topic, since it had no inherent connection with the topic under consideration. In addition, article 19 of part 1 was controversial, impractical and of doubtful merit; that issue should be considered again on second reading.

75. In its resolution 46/54 of 9 December 1991, the General Assembly had requested the Commission to indicate those specific issues on which expression of views by Governments would be of particular interest. The Commission had come to a crossroads in its work on the topic. It was high time for it to make a bold decision or, if it was unable to do so, to seek the views of Governments on the issue. It should, therefore, refer to the General Assembly the question of the suitability of including articles on countermeasures and the settlement of disputes in the draft now being formulated.

76. Mr. ARANGIO-RUIZ (Special Rapporteur) said that more than one of his previous statements showed that he had great sympathy with the views expressed by Mr. Shi with regard to dispute settlement procedures and the need to make such procedures more effective. Nevertheless, he could not agree that countermeasures and dispute settlement procedures should be eliminated from the topic. Those matters constituted the main elements of the draft. Countermeasures, for which the conditions of use must be precisely defined, were essential because they represented the only means of ensuring minimum respect for international obligations; procedures for the settlement of disputes were in their turn equally essential because they represented the only way of preventing abuses of countermeasures.

77. Consequently, it would not be prudent to follow Mr. Shi's suggestion to request advice from the Sixth Committee. Asking a political body about technical questions was inappropriate and might even jeopardize the completeness and effectiveness of the regime of State responsibility in view of which the Commission's draft articles were being worked out. Having been entrusted by the General Assembly with the task of producing a set of draft articles on the topic of State responsibility, the Commission must be the final arbiter of what was to be included in the articles.

The meeting rose at 1 p.m.