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Summary record of the 2278th meeting

Topic:
State responsibility

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

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

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

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

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

The meeting rose at 11.30 a.m.

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

2278th MEETING

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

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 2]

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

ARTICLE 5 *bis* AND

ARTICLES 11 TO 14[3] (*continued*)

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

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

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

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

2. Draft articles 11 to 14 provided a partial reply to those questions, although their wording was not always felicitous. The various chapters of the fourth report also answered, and supplemented, each other in a balanced way which brought out the Special Rapporteur's qualities of realism and resolution. Because of his spirit of realism, he started in every case from the basis of existing law, and that served as a reminder that the topic of countermeasures lent itself readily to codification. The rules on countermeasures incorporated elements which were peculiar to the law on responsibility, so far as concerned the definition of the actual concept of countermeasures, as well as elements taken from general international law, so far as concerned the stipulation of the conditions of recourse to countermeasures and of certain cases of prohibition. It was in the latter area that the Special Rapporteur's resolution became apparent, as shown by the wording of paragraph 2 of the reformulated draft article 14.[4] Some measures of constraint had effects that were more damaging than an armed attack and they should be excluded unequivocally from the scope of countermeasures. In such cases, the rules on countermeasures took the Commission into the realm of the progressive development of international law.

3. The view of those who had proposed that general, vague or ambiguous wording should be adopted should, in his opinion, not be accepted. In any event, the formulation of a legal rule was a slow process and that slowness allowed the system into which the rule had to be incorporated to make the necessary adjustments. When it came to the formulation of rules of law, as to recourse to countermeasures, it was all a question of opportunity. One must know how to seize the opportunity when it arose and the formulation of rules on countermeasures was a good opportunity to do useful work in the area of the progressive development of the law. The Commission should be grateful to the Special Rapporteur for his proposals.

4. In his third report, the Special Rapporteur had treated the existence of an internationally wrongful act as the fundamental condition. But was not the fundamental condition for the exercise of the right to have recourse to countermeasures rather the existence of actual harm that could be objectively assessed? The Special Rapporteur had in fact understood that point, since, in draft article 11, the exercise of countermeasures was confined to the injured State alone. More precision with regard to the nature and gravity of the harm would, however, make for a more helpful and less general reading of that article.

5. Another aspect of countermeasures which the articles under consideration had not really taken into account was the time factor. In the interval between a finding of non-reparation of harm and the application of the preconditions for the exercise of countermeasures, an event could occur which was attributable to the victim and which was not necessarily connected with the original harm. Could the occurrence of such an event make the exercise of countermeasures pointless? In the relations between State A and State B, there would be an equivalence of situation, as it were, inasmuch as either could threaten countermeasures. Should that equivalence of situation not operate as an exception to the exercise of countermeasures and have a place among the conditions set forth in draft article 12? There was a natural progression from the concept of equivalence of situation to the question of proportionality of countermeasures. Proportionality was not, of course, a condition for the exercise of countermeasures. It was a characteristic of the countermeasure which was evaluated, after it had been exercised, in the light of a whole set of parameters. It presupposed the existence of a relationship in which the measure corresponded to the harm. But that relationship was not constant: it could vary according to the seriousness of the harm and of any obstacles caused by failure to cooperate on the part of the author of the internationally wrongful act, as also on account of the time that had elapsed. Those various factors would inevitably have an effect on the intensity with which the injured State reacted. The detailed analysis of the question of the criteria governing proportionality in chapter IV of the fourth report should be supplemented by an analysis of the elements or factors of proportionality which would help to underline its dynamic and flexible nature.

6. There was room for improvement in the drafting of article 13. The words "out of proportion" should be replaced by the word "disproportionate". He was also troubled by the drafting device whereby the internationally wrongful act and the effects thereof were together treated as a factor common to the gravity of the act—a subjective concept indeed, and one for which no criterion of assessment whatsoever was proposed. Since gravity was, in the final analysis, the basis for assessing proportionality, it would be advisable, when redrafting article 13, to present the concept of gravity in more precise terms so as to make article 13, the lynchpin of the regime of countermeasures, more workable.

7. Mr. VERESHCHETIN said that he congratulated the Special Rapporteur on his fourth report and on his proposed draft articles, which reflected his usual thoroughness and would help the Commission make progress in its work on the topic of State responsibility. As he had expressed his viewpoint at length when the third report had been under consideration (2265th meeting), he would confine his remarks to two questions dealt with in chapters VII and VIII of the report, namely, so-called self-contained regimes and a plurality of equally or unequally injured States.

8. The Special Rapporteur took the view that countermeasures were a necessary evil inherent to the existing climate of international relations and to contemporary international law. It was, however, probable that, because of the deficiencies in the international legal system and the defects of institutions and the level of "collectivization" of remedies, States would demand, for a long time to come, that they should be able to take unilateral measures—or "horizontal" countermeasures as the Special Rapporteur called them in contrast to the "vertical" countermeasures applied by international bodies. He, too, recognized that unilateral countermeasures were a necessary evil and that they should therefore be given a strict framework and be limited to the maximum. However, while the report and draft articles did refer to such limitations, it seemed to him that, in his interpretation of

[4] See 2277th meeting, footnote 9.

self-contained regimes, the Special Rapporteur had departed from that general line concerning the limitation of countermeasures by objecting to their characterization as "residual" under the general regime, as opposed to the special regimes under multilateral agreements which regulated the consequences of a breach of those agreements. From that standpoint, there were certain inconsistencies in the Special Rapporteur's approach. Self-contained regimes were described by the Special Rapporteur as a "*bien juridique* of major importance". Such regimes tended to limit the situations in which a State would set itself up as judge and jury and take the law into its own hands. Of course, not all "treaty" regimes guaranteed adequate remedies or excluded recourse to the means provided for under general international law. But that tended to confirm that the question of the acceptability of unilateral countermeasures could be answered only after an analysis of the relevant multilateral convention.

9. To affirm that States, even States which had concluded the relevant special agreements, always had the right to have recourse to unilateral countermeasures, in other words, to reprisals, was a priori tantamount to vesting that right with the value of a *jus cogens* rule, and that, in his view, was not in keeping with the progressive development of international law. He therefore did not agree with the Special Rapporteur's conclusion that, by making the general rules with respect to the application of countermeasures "residual" or secondary rules, as compared to self-contained regimes, the very purpose of the codification and progressive development of the law of State reponsibility undertaken by the General Assembly through the Commission would be defeated. He for his part had come to the opposite conclusion, although he agreed with the Special Rapporteur that any derogation from the general rules on unilateral countermeasures should, in principle, derive from treaty instruments, not from unwritten rules.

10. In his view, the problem of a plurality of equally or unequally injured States should be examined with the same intention not to enlarge, but to place the maximum limits on the regime of unilateral countermeasures. Like other members of the Commission and various authors who had expressed their view on the matter, he considered that, in the case of violations, or of wrongful acts known as "delicts", only "directly" injured States had the right, as a general rule, to have recourse unilaterally to countermeasures. Even though the concepts of "directly injured States" and "indirectly injured States" were not very clearly defined, it was not by rejecting them that one would clarify the rights and obligations of States which were linked to *erga omnes* rules and define the rules of the regime of unilateral countermeasures.

11. As to the introduction of an additional article 5 *bis* to recognize the same rights "of riposte" for States which had not been directly injured, he agreed that the breach of an *erga omnes* rule should give rise, above all, to a collective reaction or to action by institutional mechanisms. The Special Rapporteur had also mentioned that idea in his report, but it was not reflected in his draft articles. For that reason, the ideas the former Special Rapporteur, Mr. Riphagen, had put forward in that connection, in his draft article 11,[5] should perhaps not be rejected too quickly.

12. He too considered that it would be preferable in the case of countermeasures to speak of "a suspension" rather than of the "cessation" of the effect of the obligations of the injured State towards the wrongdoing State. That would underline the temporary nature of countermeasures, which could, at a certain point, when they no longer served a purpose, themselves become wrongful acts. He also shared the view of some colleagues who considered that the drafting of articles on State responsibility, particularly in the case of delicts, should not be linked to the question of the powers of the Security Council of the United Nations.

13. Lastly, even if the comments he had just made on some parts of the report seemed important to him, they did not relate to the substance of the report and he could therefore say that he generally shared the Special Rapporteur's approach, the objective of which was to place the maximum limits on, or even, in certain cases to prohibit, recourse to unilateral countermeasures. He was thus of the opinion that the draft articles submitted by the Special Rapporteur could certainly be referred to the Drafting Committee. He believed, however, that, at some point in its work on the draft articles on State responsibility, the Commission should include in the body of the articles or in the commentaries a provision on the object of countermeasures and on the fact that the means of protection of the right breached, in the event of a delict, was not just a matter of the application of unilateral measures, within the meaning of article 30 of part 1.[6] Countermeasures, in the broadest sense of the term, comprised a whole set of legal measures which would ensure the protection of a primary legal relationship or secure reparation for the damage caused and which ranged from retortion to the measures taken by international bodies. If that was spelt out, it would prevent any impression that the Commission believed that it was possible to react to one evil—namely, to a violation of a right—only by another evil—namely, by another violation of a right.

14. Mr. AL-KHASAWNEH expressed his congratulations to the Special Rapporteur on his fourth report, a richly documented and closely argued report in which the distinctive style of the author was felt throughout.

15. As Mr. Shi had reminded the Commission (2267th and 2273rd meetings), the instrumental consequences of internationally wrongful acts had formerly been called "means of compulsion short of war", but it was now fashionable to speak of peaceful reprisals and, more fashionable still, of peacetime unilateral countermeasures. Such consequences might be grouped together as "tertiary rules" in view of the distinction the Commission had made between primary and secondary rules. Ultimately, however, the name used would be more a matter of legal taste than of substance or established technique. Whatever the measures were called, the important thing was that, by resorting to them, States took

[5] See 2273rd meeting, footnote 10.

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

the law into their own hands. It was possible that, in certain circumstances, that might be legally and morally defensible and that countermeasures would serve as a sanction for the rules of international law to compel compliance with the primary obligations which had been breached. It was nevertheless obvious that no system was static and that, by definition, the goal of the system of international law was to establish the rule of law at the international level. That goal would not be achieved if express provision was made in the codification for a decentralized reaction to breaches of rules.

16. In the introduction to his third report, the Special Rapporteur drew attention to the two main features of the regime of instrumental consequences. The first was the drastic reduction in, if not total absence of, any similarities with private law. In his own view, however, that was debatable. For instance, the principle *inadimplenti non est adimplendum* was known to have evolved by analogy from private law and it was also known, thanks to Anzilotti, when the transformation had taken place. In the *Diversion of Water from the Meuse* case, Anzilotti had said that the principle was ". . . so just, so equitable, so universally recognized, that it must be applied in international relations also".[7] Another opinion cited by the Special Rapporteur in his fourth report was Morelli's view that:

> The analogy with penalty in municipal law is, in the case of reprisals, stricter than in the case of satisfaction.[8]

In such a case, the analogy with municipal penal law was stricter in the case of an instrumental consequence than in the case of a substantive one. Other cases, some of which were cited in the report, showed that the collapse of the analogy between instrumental consequences and private law concepts and institutions was not as drastic as the Special Rapporteur's introduction to the third report suggested. However, he must immediately add that, for totally different reasons, he agreed with the Special Rapporteur's conclusion that, in the realm of instrumental consequences, the Commission could not make the essential choices with such a high degree of confidence as to their ultimate soundness as it had been able to do when studying the substantive consequences. Indeed, in the present situation, caution was much to be preferred to self-confidence and doctrinal certainty, for several reasons.

17. The first was that the application of countermeasures was fraught with the likelihood of abuse, largely because of power disparities among States. That was a matter which had received ample attention during the debate. It should be noted, however, that abuse was not the prerogative of rich and powerful States alone; in small and poor States, when the decision-making process was arbitrary and no distinction was drawn between foreign relations and personal relations, countermeasures could lead to an escalation which would endanger the stability of diplomatic relations and trade and cultural agreements and impair the movement of persons and goods across frontiers. It would, of course, be argued that the countermeasures envisaged in the draft would not have such effects, since safeguards would also be provided against disproportionality and punitive intent. It was the question of the punitive function of countermeasures which brought him to the second reason why he thought that the Commission must exercise caution.

18. The presence of a punitive function of countermeasures could usually be gleaned from the pronouncements which accompanied them. Mr. Villagran Kramer (2276th meeting) had said that the European Community and the United States of America tended to present the countermeasures they took in a "sophisticated way". For example, the action taken by the United States Congress in amending the 1948 Sugar Act, thereby reducing the sugar quota for Cuba "in the national interest", could be compared with the Cuban reaction to that measure, namely, the expropriation of United States property, which was cited by the Special Rapporteur in chapter I of his fourth report as a case characterized by a punitive element. In both cases, a punitive intent had probably been present, but, in the case of the United States action, it had been better concealed because of the existence in that country of more sophisticated legal and legislative machinery. It was not insignificant that the three cases cited by the Special Rapporteur in his report as cases where there had been a punitive intent concerned newly independent third world States: Cuba, Indonesia and Libya. It was important to bear that in mind because it had been suggested during the debate that the Commission was in a position to eliminate the punitive function of countermeasures by linking proportionality, not to the gravity of the wrongful act, but to the interest to be protected. That might indeed reduce the punitive impact of countermeasures, but, since the true intent of countermeasures could be carefully concealed, it was doubtful whether the problem could be solved so easily.

19. The third reason for urging caution was the inadequacy of the concept of proportionality as an effective limit to the scope of countermeasures. The former Special Rapporteur had been aware of that, stating that:

> . . . if the substantive limitation of proportionality is subject to divergent interpretations (or is perhaps not even strictly applicable), and in particular if the allegation of an intentionally wrongful act having been committed is itself disputed, the first unilateral reaction could in turn lead to a counter-reaction, thereby entailing a danger of escalation.

The late Paul Reuter had given an eloquent example of how proportionality itself was inherently open to divergent interpretations in his dissenting opinion in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*:

> I accept the Tribunal's legal analysis, in particular, the idea that, in order to assess the proportionality of the countermeasures, it is necessary to take into account not only the actual facts, but also the questions of principle raised by them. These questions should, however, be considered in the light of their probable effects. Hence proportionality should be assessed on the basis of what actually constituted the dispute rather than exclusively on the basis of the facts before the Tribunal.[9]

[7] *P.C.I.J., Series A/B, No. 70*, judgment of 28 June 1937, p. 50.

[8] For source, see relevant footnote to chapter I B.

[9] United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 448.

20. The problems that arose in that area were further compounded when it was considered that countermeasures were not confined to reciprocal measures. It was noteworthy that the Special Rapporteur had not followed the distinction made by his predecessor between action taken by way of reciprocity (art. 8) and corresponding to the obligation breached, on the one hand, and a reaction by way of reprisal (art. 9) with regard to obligations other than the one breached. It was thus possible that a breach in one field of law could trigger off a countermeasure in another area of relations between the States concerned that was totally removed from the area in which the original obligation had been breached. In the words of Karl Zemanek:

> In cases not involving reciprocal measures, proportionality is difficult to determine, especially in the absence of a universally shared value system as parameter and mandatory third-party procedure for determination.[10]

In such cases, it was no exaggeration to say that proportionality was a misnomer because it gave the impression that there was a yardstick against which the reasonableness of action and reaction could be accurately measured, whereas, in fact, there was none. He therefore found it difficult to accept the proposals made during the debate that the categories of prohibited countermeasures should be reduced because proportionality would fill any existing gaps, such as the proposal that paragraph 2 of the new draft article 14 submitted by the Special Rapporteur should be deleted. He agreed with Zemanek's view that:

> For the protection of essential interests of States, it would seem preferable to enlarge the group of norms which are protected from reprisals and abandon proportionality for the rest instead of relying for protection on a vague concept which is subject to individual judgements.[11]

21. The fourth reason for advocating caution was that it was not possible to be sure that the four exceptions listed in article 14, paragraph 1 (*b*), covered all possible prohibited countermeasures. In that connection, he referred to the example of treaties establishing boundaries or ceding territories which, under the 1969 Vienna Convention on the Law of Treaties, were not subject to the rule of fundamental change of circumstances because of the importance of ensuring their stability and durability. In the case of a treaty which had been concluded, but not yet implemented, to cede back a territory on the expiry of a lease, could the State which had agreed to cede the territory (State A) invoke the fact that the other State (State B) had breached an obligation owed to it under a multilateral treaty on the protection of human rights by violating the rights of its citizens in order to suspend performance of the treaty? It might also be asked whether it would be advisable to provide expressly in the draft for the prohibition of countermeasures that would seriously prejudice the right of self-determination. It might, of course, be argued that such a prohibition was already covered by article 14, paragraph 1 (*b*) (iii), which referred to the norms of *jus cogens*, but he hoped that the Special Rapporteur would consider that question.

22. Similarly, the prohibition of countermeasures which were not in conformity with the rules of international law concerning the protection of fundamental human rights could be amplified in order to specify which categories of human rights should constitute an exception. In his report, the Special Rapporteur took the view that the right to own property should not be included among the human rights to be protected against countermeasures. That approach was based on categories rather than on the importance of the rights in question and a similar categorization should therefore be included in the draft articles. Unlike the Special Rapporteur, he believed that the right to own property should be protected. It would be in the interest both of capital-exporting countries and of third world countries to have protection against, respectively, nationalization and the freezing of assets as countermeasures. Countermeasures should be essentially a matter between States and their effects on private individuals should be kept to a minimum. That was, moreover, the fifth reason for being cautious when dealing with the regime of instrumental consequences, since countermeasures could take the form of collective punishments. It was disconcerting to find that the extensive powers once granted during an armed conflict, as, for instance, in the 1936 British Trading with the Enemy Act, had become part of the law of peace and gave the executive in many developed countries the power to freeze the assets of private individuals as part of peacetime unilateral remedies. Although such measures were said to be temporary and reversible, some of them had been in force for decades.

23. He was advocating caution in tackling the regime of instrumental consequences not because he believed that countermeasures should not be provided for in the draft, but only because he thought that the subject called for the greatest possible specificity. That might mean taking another look at some of the concepts with which the Commission had been working so far, such as the concept of proportionality, for, when lawyers left room for argument, there was much room for injustice. He had not thought it necessary to comment on those parts of the report which he fully endorsed, such as those relating to *sommation*, the role assigned to the third-party settlement of disputes and the Special Rapporteur's conclusion that a prior breach was a precondition for resort to countermeasures.

24. On the question of self-contained regimes, he agreed with Mr. Crawford (2277th meeting) that there was no need for the Commission to take a decision, since what was involved was always the interpretation of treaties. He recalled, however, that, in the *Case concerning United States Diplomatic and Consular Staff in Tehran*,[12] ICJ had not considered the 1961 Vienna Convention on Diplomatic Relations as a self-contained regime, but had taken account of the body of international law relating to diplomatic immunities, emphasizing its customary nature. That case at least had not been a matter of the interpretation of a treaty. Moreover, while he agreed with the Special Rapporteur that, in all situations, there was a fall-back on the remedies provided for by international law, he urged that further thought should be given to the concept of self-contained regimes. The tendency in the field of State responsibility was to establish

[10] *Encyclopedia of Public International Law*, vol. 10, p. 372.

[11] Ibid.

[12] See 2261st meeting, footnote 5.

different regimes for the various types of responsibility. Such compartmentalization would bring greater precision and clarity into the rules governing instrumental consequences and might also make for a more accurate assessment of proportionality. With regard to the concept of a plurality of unequally injured States, he asked the Special Rapporteur whether the duty of non-recognition contemplated by the former Special Rapporteur under article 14 in the case of crimes should not form part of the instrumental consequences not only in the case of crimes, but also in that of delicts. It seemed that, when there was a plurality of differently injured States, non-recognition and abstaining from rendering aid and assistance were particularly appropriate instrumental consequences. At any rate, he would be grateful for any guidance the Special Rapporteur could provide.

25. Mr. CALERO RODRIGUES said that draft article 13 clearly expressed the principle of proportionality developed in chapter IV of the Special Rapporteur's fourth report and he had only two questions on it. The first was whether, instead of saying that a measure should not be "out of proportion" to the gravity of an internationally wrongful act, might it not be better to say, as the former Special Rapporteur had done, that a measure should not be "manifestly disproportionate" to the gravity of the act. That question could, however, be settled by the Drafting Committee. The second question, which could also be dealt with by the Drafting Committee, concerned the placement of draft article 13, which seemed to break the natural continuity between draft article 12 (Conditions of resort to countermeasures) and draft article 14 (Prohibited countermeasures). It would probably be better to deal with proportionality either in a second paragraph of draft article 11 or in a separate article which would follow article 11.

26. Under the title of "Prohibited countermeasures", draft article 14 established the substantive limitations to countermeasures, as analysed in the third report and addendum 1 to the fourth report, namely, prohibition of the use of force, protection of human rights, inviolability of specially protected persons, *jus cogens* and *erga omnes* (or *erga pluribus*) obligations. With one or two exceptions, he agreed with the substance of the provisions, but the wording might still be improved by the Drafting Committee.

27. The use of armed force was prohibited by the Charter of the United Nations and it was difficult to accept the opinion of the Special Rapporteur that, even though it was prohibited *de jure*, the use of armed force seemed to be increasingly accepted de facto. Even if that view was realistic, as it certainly was, the Commission could not allow the possibility of "reasonable" armed reprisals, for that would mean putting aside a clear-cut provision of higher law embodied in the Charter. On that point, he was in full agreement with the Special Rapporteur. He also agreed with him that, in the framework of State responsibility and the consequences of delicts committed by States, the Commission did not have to be concerned with the concept of self-help or "armed intervention for humanitarian purposes": the prohibition of armed countermeasures should be clear and unrestricted.

28. The Commission should also not try to interpret Article 2, paragraph 4, of the Charter of the United Nations, leaving that task to ICJ. As a result of the combined effect of the new paragraph 2 and the revised version of paragraph 1 (*a*), however, the Commission would be interpreting that provision if it accepted the new version of draft article 14 and retained the words in brackets in paragraph 1 (*a*).

29. Even if the possibility of interpretation was ruled out, there was still the very thorny question whether the prohibition should apply to measures of force other than armed force. As he understood it, the Special Rapporteur had proposed two solutions. In the original version of draft article 14, the Special Rapporteur had suggested the prohibition of ". . . any . . . conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken;" in the revised version of article 14, omitting the reference in brackets to the Charter, the prohibition of the threat or use of force would cover not only armed force, but also ". . . any extreme measures of political or economic coercion jeopardizing the territorial integrity or political independence of the State against which they are taken." In both cases, he believed, like the Special Rapporteur, that countermeasures should not be considered legitimate if they threatened the territorial integrity or political independence of the State against which they were applied. Such extreme coercion—even if its purpose was to compel a State to comply with an international obligation which it had violated—should not be allowed: measures of that type would, in any case, be contrary to the principle of proportionality that the Commission seemed prepared to accept, as clearly explained by Mr. Bowett (2277th meeting). It should be borne in mind that the provision in question and the prohibition it contained were envisaged as a reaction to an international delict, namely, a breach of an obligation which was not "essential for the protection of fundamental interests of the international community", as stated in article 19 of part 1 of the draft articles.[13] The Commission should give subsequent consideration to what countermeasures could lawfully be taken against more serious breaches, or crimes; it was at that time that it should discuss to what extent the application of countermeasures should be widened. Nevertheless, given his approach to the concept of countermeasures and his faithfulness to the traditional Latin American position on that matter, which was currently embodied in inter-American instruments and resolutions, he doubted very much whether, even in the case of crimes, he could accept the authorization of measures which might actually result in the destruction of a State, even a State responsible for an international crime. For the moment and in respect of delicts, he could only reaffirm his endorsement of a strict prohibition of countermeasures which endangered the territorial integrity or political independence of a State. The choice between the two versions of article 14 proposed by the Special Rapporteur could be left to the Drafting Committee, since those texts did not differ in substance and, for the time being, neither should be excluded.

[13] Ibid., footnote 8.

30. He agreed with the Special Rapporteur that countermeasures should not infringe on fundamental human rights, diplomatic relations, the rules of *jus cogens* or the rights of third States. That did not necessarily mean that he accepted the wording of the draft articles, but, if the Commission was in agreement on the substance, drafting questions could be left to the Drafting Committee.

31. With regard to the new article 5 *bis* proposed by the Special Rapporteur, he noted that article 5, as provisionally approved by the Commission,[14] indicated in detail—some had said excessive detail—how to identify an injured State. If an internationally wrongful act resulted in injury to more than one State and if the articles established the rights of injured States, it seemed obvious that each injured State was entitled to both substantive and instrumental rights, in accordance with the provisions of the draft articles. New bilateral relations would be established between the State which had committed the internationally wrongful act and each injured State, account being taken in the relationship of the nature and seriousness of the injury each State had suffered. One injured State might, for example, be entitled to compensation, another to satisfaction, and another might prefer *restitutio naturalis* or compensation. That seemed so obvious that it might be asked whether it had to be expressly stated. Yet, after an interesting chapter on the problem of a plurality of equally or unequally injured States, the Special Rapporteur was proposing a provision to that effect in article 5 *bis*. He himself did not think such an article was necessary. However, if the Commission agreed with the Special Rapporteur that it was useful and "probably indispensable", he had no objection to its inclusion in the draft articles.

32. Mr. Sreenivasa RAO said that the question of countermeasures used or usable in response to a wrongful act had been brilliantly developed in the various reports submitted by the Special Rapporteur and had given rise, both within and outside the Commission, to a rich debate in which some diametrically opposed views had been expressed. While some saw the codification and progressive development of the law in that area as essentially serving the interests of the powerful and economically privileged States, others saw countermeasures as a necessary evil and considered that their careful regulation was in the interest of both the strong and the weak, the rich and the poor. In addition, while some wanted a strict definition of the scope of countermeasures, others believed that those measures should be left in general to the discretion of States. Opinions also differed with regard to the conditions or limitations which should govern the use of countermeasures. In that connection, questions had been raised as to the role of procedures for the peaceful settlement of disputes, the content of the test of proportionality, the relevance of interim measures, the scope of the powers and functions of multilateral instruments, bodies and organizations, including the Security Council, and, above all, the applicability of general principles of international law, *erga omnes* obligations and *jus cogens*.

33. Before dealing with those issues, he wished to express his gratitude to the Special Rapporteur for his candid observations. First, the Special Rapporteur had made it clear that the codification and progressive development of the law in that area was a daunting task, since there were few examples at the national level of generally accepted systems for the enforcement of international obligations and because the applicable collective instruments were only rudimentary. Secondly, the Special Rapporteur had rightly drawn attention to the fact that State practice in the matter was characterized by a lack of similarity, conformity, certainty and predictability, in the sense that the practices followed did not, to use the words of paragraph 4 of his third report, "... seem to offer. whatever the merits of each particular case, the indispensable guarantees of regularity and objectivity" and he had gone on to express his concern in the following terms:

> It is difficult at times to identify the exact content of some of the general rules called into question by some of the said unilateral practices; uncertainty is manifest in the doctrine of the so-called "self-contained" regimes; it is hard to identify future trends in the development of the law, and the avenues the Commission could prudently explore in seeking to improve it, which could be proposed to the Assembly and ultimately to States.

34. Such well-founded and carefully thought-out observations should be duly taken into account in the formulation of basic policies governing the development of an appropriate regime of countermeasures. It was obvious that much of the effort would involve making recommendations on elements to be included in such a regime in order to achieve certain objectives. In his view, those objectives should be: (*a*) to discourage self-help in general; (*b*) to promote respect for law and the primacy of law; (*c*) to encourage the settlement of disputes through means which were mutually acceptable to both parties; (*d*) to emphasize a positive and constructive role for countermeasures; (*e*) to avoid giving countermeasures a punitive function; (*f*) to preserve the territorial integrity and political independence of States; and (*g*) to secure cessation of the wrongful act and appropriate compensation or satisfaction.

35. He welcomed the fact that many members of the Commission had been against granting States unbridled freedom to use or abuse countermeasures, without regard for preconditions, without restraint and without respect for the law, even when they were supposed to be reacting to a violation of the law or a wrongful act. In that connection, he endorsed the proposal that any regime on countermeasures must have an article expressly prohibiting States from engaging in punitive reprisals or countermeasures. As Mr. Barboza (2277th meeting) had rightly pointed out, it was not enough to deal with the matter by means of the test of proportionality.

36. There was also general support for several conditions which had to be met before countermeasures could be used: first, there must be a wrongful act on the part of a State; secondly, a clear demand must be addressed to the wrongdoing State for cessation of the wrongful act and appropriate satisfaction or compensation for the damage caused; and, thirdly, in the case of disagreement with regard to the nature of the act in question or the demands made, a dispute settlement procedure should be resorted to promptly. In that connection, he recalled the

[14] See 2275th meeting, footnote 5.

recent conclusions of the American Law Institute in its *Restatement of the Law Third*,[15] as cited in chapter I C of the fourth report. He stressed that all the applicable settlement procedures acceptable to the parties must be pursued and implemented in good faith by both parties. It was above all essential to ensure that countermeasures were not taken while a peaceful settlement offer was being made and, in that regard, he drew attention to the examples of nineteenth century practice cited in a footnote to that chapter of the report. Furthermore, any peaceful settlement offer had to be reasonable. Due consideration and priority must be given to the applicable mechanisms under the Charter of the United Nations or within the framework of the United Nations or other multilateral instruments or agencies. The wrongful act itself must be one giving rise to unacceptable or significant consequences and not a minor or technical one. And, most important, the use of countermeasures should be contemplated only where it had been determined, with the help of certain objective criteria, that the wrongdoing State was profiting from the wrongful act and that it was denying, without justification, any satisfaction to the injured State while persisting in the violation.

37. The debate had helped to identify several limitations on the use of countermeasures. The most important of all was the reaffirmation of the fundamental principle that the use of armed force was prohibited as a countermeasure in response to any initial wrongful act not involving armed attack or the use of armed force. The principles enunciated in Article 2, paragraph 4, and Article 51 of the Charter of the United Nations had to be fully respected; otherwise, there was a risk of endangering the future of the world order, already delicate and in jeopardy. The legitimate countermeasures in question were not measures taken in the exercise of the right of self-defence, which was governed by the Charter. The countermeasures which could be taken should be in conformity with the rule of law. Since such measures were to be recognized by law, they should not fall outside the realm of law. That principle had been clearly stated in the arbitral award in the *Air Service Agreement* case between the United States of America and France, which also clearly stated that countermeasures should not be taken where means forming "... part of an institutional framework ensuring some degree of enforcement of obligations"[16] were available. ICJ had taken a similar position in the *Case concerning United States Diplomatic and Consular Staff in Tehran*.[17]

38. The test of reasonableness and proportionality was equally important. In other words, the countermeasures to be taken had to be, first, proportional to the seriousness of the wrongful act and, secondly, designed to achieve the objective of the cessation of the wrongful act and to settle any possible dispute arising from that act by mutually acceptable peaceful settlement procedures.

39. In that connection, some tried to make a distinction between retortion and reprisals and between the test of equivalence and that of proportionality. It had also been maintained that proportionality was not the same as equivalence. He believed that the difference between those two concepts was only one of degree and assessability. The test of proportionality could in no case be stretched to justify the use of totally disproportionate means, methods or measures or results which were out of proportion to the consequences of the wrongful act. In that sense, proportionality had to be judged in terms of its conformity with equivalence, and that followed logically from the position agreed on by the Commission: given that they were sanctioned by law, countermeasures must operate within the realm of law and must be reasonable. That had been stressed in the arbitral award in the *Air Service Agreement* case, in which it was stated that the objective of the countermeasures was to "... restore in a negative way the symmetry of the initial positions".[18] In other words, the arbitral tribunal had been referring to some form of restitution or equivalence and the Special Rapporteur had reflected that idea in chapter VI of his third report.

40. The issue of limitations on the use of countermeasures involving essentially economic or political measures which did not amount to the use of force was rather complex and the manner in which that issue was dealt with in State practice, doctrine and even, to some extent, by the Special Rapporteur led to some confusion.

41. In that connection, it should first be made clear that no State was entitled to use economic or political pressure as a countermeasure if it had the effect of jeopardizing the territorial integrity or political independence of the wrongdoing State. The Special Rapporteur had been perfectly clear on that point in the last paragraph of chapter V B of his fourth report. Secondly, most of the economic and political measures taken by the States were not countermeasures *stricto sensu*: they were measures which were not prohibited by international law, as, for example, the cessation of development aid given freely by one State to other States out of considerations of mutuality of interests. Thirdly, it was generally acknowledged that a State could not resort to countermeasures if only its interests were infringed, not its rights. That distinction between interests and rights was especially important to bear in mind, since it often tended to get blurred in international relations. Lastly, it should be recalled that the use of economic measures as a strategy and as a countermeasure was governed strictly by several international agreements and self-contained regimes, both multilateral and bilateral. It was therefore important not to exaggerate the use of economic measures as countermeasures outside the scope of self-contained regimes.

42. An interesting fact that commended itself from a study of State practice was that States often resorted to economic measures in order to persuade the wrongdoing State. The measures were frequently of a low intensity and generally did not give rise to concerns about international peace and security, even if they involved intense disagreement and resentment which affected develop-

[15] The American Law Institute, *Restatement of the Law—The Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn., 1987), pp. 380 *et seq.*

[16] United Nations, *Reports of International Arbitral Awards*, vol. XVIII, p. 445.

[17] See 2261st meeting, footnote 5.

[18] See footnote 16 above.

ment plans and hence brought about a certain cooling of relations and later of negotiations. In that sense, much of the heated discussion about countermeasures was perhaps a bit misplaced and even unwarranted.

43. In that regard, as some members of the Commission had stressed, it would be better to leave undisturbed the so-called self-contained regimes, namely, regimes governed by treaties. In fact, the Special Rapporteur had reached almost the same conclusion when he had said:

> Any "external" unilateral measures should thus be resorted to only in extreme cases, namely, only in response to wrongful acts of such gravity as would justify a reaction susceptible of jeopardizing a *bien juridique* very highly prized by both the injured and the lawbreaking State. In other words, the principle of proportionality will have to be applied in a very special way—and very strictly—whenever the measures resorted to consisted in the suspension or termination of obligations deriving from an allegedly "self-contained" regime.

44. He himself would go even further. When States entered into specific treaties, particularly of a comprehensive nature and when they specified certain sanctions for any violation of the treaty regime, they expressly excluded all other measures under any other system. Of course, it would be useful if the parties could clearly express their intent in that regard, as the Special Rapporteur recommended, but that was not always necessary and the intention could be ascertained otherwise. In the absence of a specific indication of intention, the presumption would be in favour of exclusion rather than inclusion, in accordance with the persuasive maxim *expressio unius est exclusio alterius*.

45. The question also arose of the applicability of countermeasures in the event of human rights violations. He agreed with Mr. Villagran Kramer (2276th meeting) that countermeasures were not applicable in that case, for good reasons. First, human rights violations were covered by self-contained treaty regimes under contemporary international law that had been progressively worked out by States by means of consensus and in a realistic spirit. Therefore, to assume that there could be other measures available to States to enforce those treaty regimes would jeopardize that very process. Secondly, it would be very difficult to establish a measure of equivalence or proportionality in such cases because of the economic, cultural, religious and even political differences among States in the area of human rights. Thirdly, in order to enforce human rights, it would hardly be appropriate to deny the exercise of human rights as a measure of proportionality or equivalence.

46. In that connection, he found it highly persuasive to refer to the statement by the American Law Institute, cited in a footnote to chapter X B of the third report, that:

> Self-help measures against the offending State may not include measures against the State's nationals that are contrary to the principles governing human rights and the treatment of foreign nationals.

He also agreed with Schachter's opinion, as cited in the same chapter, that countermeasures involving treaty violations should not result in any violation of the 1949 Geneva Conventions for the protection of victims of war, the various human rights treaties and conventions on the status of refugees, genocide and slavery.

47. Reference had also been made to the limitations on the use of countermeasures arising from the applicability of *erga omnes* obligations and of *jus cogens*. The question of the distinction between those two concepts had been rightly raised by Mr. Rosenstock (2273rd and 2275th meetings) and Mr. Pellet (2276th meeting) had cautioned the Commission against ignoring the concept of *jus cogens*, even if it was not clear in a given case what those principles or obligations were. He himself believed it should be assumed that lawful countermeasures were subject to limitations arising from *erga omnes* obligations and from *jus cogens*, without saying so expressly unless the Commission was able, with the help of specific examples, to define those concepts and how they operated as limitations.

48. Equally important was the issue raised by Mr. Crawford (2277th meeting) about the problem of differently injured States. The Special Rapporteur had been right to draw attention to that problem, but the solution or approach to it was the one Mr. Crawford recommended, namely, giving primacy to the most directly injured State's response or lack of response and subjecting the rights of other less affected States to the strict application of the principles of lawfulness and proportionality.

49. He did not, however, agree with Mr. Crawford and other members of the Commission that the test of proportionality could adequately govern extreme measures of coercion. He failed to see how it could be claimed that a State that violated *erga omnes* obligations or a rule of *jus cogens* should be retaliated against by the injured State also violating the same obligations in equal or proportional measure. Would it also be the case that, when a State committed aggression, other States could go beyond reaction and restoration of the *status quo ante* and obliterate the political independence and territorial integrity of the aggressor State? Was there any concept of subjugated State that was valid in contemporary law, bearing in mind the Charter of the United Nations and the various precedents in that regard? He did not think so. Turning to the proposal made by Mr. Bowett (2277th meeting) about limiting the scope of the powers and functions of the Security Council so that it could not prevent States from resorting to lawful countermeasures, he believed that the proposal raised a non-issue and that it was unacceptable and legally not justifiable. For example, if most lawful countermeasures were by definition low-intensity measures not involving any threat to international peace and security, the Security Council would generally not concern itself with them and the question of any prohibition of those countermeasures by the Security Council would not arise. On the other hand, where countermeasures did threaten international peace and security, the Security Council would be justified, under the powers and functions conferred on it by the Charter and by virtue of its primary responsibility to maintain international peace and security, in issuing the necessary directions. To limit those powers of the Security Council would be to deny priority to the role it played. Furthermore, Article 25 of the Charter of the United Nations was itself a matter of great legal debate and to limit its scope categorically in the present context of the development of a regime of countermeasures would mean reversing the order of priorities and would be unaccept-

able. In other words, he believed that countermeasures must be made subject to the general principles of international law, the Charter of the United Nations and the primary responsibility of the Security Council to maintain international peace and security. Otherwise, Article 25 would be subject to an inflexible legal interpretation to which no State, however strong its political persuasion, could agree a priori.

50. With regard to the draft articles proposed by the Special Rapporteur, he considered article 11 (Countermeasures by an injured State) totally unacceptable. In the first place, raising the problem merely in terms of the absence of an adequate response from the State which had committed the internationally wrongful act meant ignoring the preconditions to which resort to countermeasures was subject, which were supported by State practice and which several members of the Commission had advocated. In the second place, granting the injured State the right "not to comply with one or more of its obligations" towards the State which had committed the internationally wrongful act was inappropriate in the circumstances and contrary to the principle of proportionality. In article 12 (Conditions of resort to countermeasures), the criterion stated in paragraph 1 (*a*) was fundamental, but it should be worded differently so that the emphasis would be on the choice and implementation in good faith of a settlement procedure that was reasonable, realistic and acceptable to all parties. The conditions set forth in paragraph 2 appeared to be biased. They should be worded in a more neutral and balanced way by requiring good faith on the part of the injured State as well, without undermining the confidence and credibility of the wrongdoing State. He agreed with Mr. Calero Rodrigues that, since interim measures of protection formed part of countermeasures, there was no need to mention them. The primacy of international peace and security and of justice, as recognized in article 12, paragraph 3, was an important criterion, since countermeasures should not be allowed to harm international relations and friendly relations among States.

51. Since he had spoken at length on the test of proportionality, he would not comment further on article 13 (Proportionality). He considered that article 14 (Prohibited countermeasures) should be redrafted and made clearer. The criterion of the protection of fundamental human rights was important, but that of the normal operation of bilateral or multilateral diplomacy was not and it should be deleted. The criterion stated in paragraph 1 (*b*) (iii) should be worded differently so that it would refer to all norms of general international law and not only to a peremptory norm of general international law and so that the door would not be left open for the law of the jungle.

52. Mr. FOMBA, referring to chapter IV of the fourth report, said that he recognized the important role played by proportionality in the analysis of countermeasures. The problem was, however, to come up with an accurate definition of its content and the criteria for assessing it. Instead of proportionality *stricto sensu*, he preferred proportionality *lato sensu* and the use of comparatively neutral wording such as "out of proportion" or simply "disproportionate", as proposed by the Special Rapporteur. As to the criteria for assessing proportionality, the principle of the indissociability of the relevant factors—both qualitative and quantitative—should prevail. It nevertheless had to be made clear that the problem of the purpose of countermeasures must not be confused with that of proportionality. With regard to chapter V on prohibited countermeasures, he agreed with the Special Rapporteur's approach of dealing separately with problems relating to *jus cogens*, provided that the intellectual coherence of that concept was respected.

53. As to the prohibition of the use of force, he considered that the scope of Article 2, paragraph 4, of the Charter of the United Nations was sufficiently clear and accepted by the international community so that the discussion of that question could be ended once and for all. There was no need to discuss Articles 42 to 47 of the Charter and the possible lessons to be drawn from their limited success; reference could simply be made to the general rules on the use of force. Moreover, he shared the view that allowing armed intervention on the pretext of "state of necessity" would mean endorsing the policy of the use of force, and that was inadmissible.

54. His view on the problem of economic and political measures as forms of coercion was that there should be a clear-cut prohibition of measures that jeopardized the territorial integrity or political independence of the State against which they were taken.

55. In dealing with countermeasures and respect for human rights, there was no need to list the most fundamental rights; reference might simply be made to the category of rights in question, on the understanding that the specific scope of that reference would vary *ratione temporis*.

56. As to the question of the inviolability of diplomats and other specially protected persons, he believed that positive diplomatic law had to be confirmed. The scope of inviolability might, however, be restricted to obligations whose respect was essential in order to guarantee the normal operation of diplomatic circuits. It was also obvious, as the Special Rapporteur indicated in his report, that the rules on the inviolability of diplomatic envoys had a sufficiently sound and autonomous political basis and purpose to be excluded from the operation of countermeasures.

57. With regard to the relevance of rules of *jus cogens* and *erga omnes* obligations, it did not seem necessary to dwell at length on that general restriction, which derived from the legal necessity to conform to all peremptory norms of international law. However, the Commission's position on that question, which was reflected in articles 29, paragraph 2, 30, and 33, paragraph 2 (*a*), of part 1 of the draft articles,[19] should be reaffirmed. The distinction the Special Rapporteur had made, on the one hand, between obligations arising out of rules of *jus cogens* and *erga omnes* obligations, which he appeared to equate with multilateral treaty rules and, on the other hand, between *erga omnes* obligations, peremptory norms and norms of general customary law was not very clear and he hoped that further explanations would be given. He nevertheless thought that article 53 of the 1969 Vienna

[19] See footnote 6 above.

Convention on the Law of Treaties and the judgment handed down on 5 February 1970 by ICJ in the *Barcelona Traction, Light and Power Company, Limited* case[20] already provided some clarification of the question. He supported the Special Rapporteur's idea that the prohibition of countermeasures taken in breach of *erga omnes* obligations should be stated in such a way as to cover all such obligations, whether customary or conventional.

58. Referring to the proposed draft articles, he said that he was prepared to accept draft article 13 as it stood, since he found the words "out of proportion to the gravity of the internationally wrongful act" to be satisfactory. He also generally agreed with the wording of draft article 14, as revised, but nevertheless suggested the following amendments to paragraph 1: at the end of subparagraph (*a*), the words "and the subsequent international law" should be added after the words "Charter of the United Nations"; and, in subparagraph (*b*) (ii), the words "is of serious prejudice to . . ." should be replaced by the words "prevents or hinders . . .". Consideration might also be given to the possibility of incorporating the contents of paragraph 2 in paragraph 1, but he would be prepared to agree to the solution of having a separate paragraph in order to highlight its subsidiary nature.

59. Mr. KABATSI paid a tribute to the Special Rapporteur for the remarkable work he had done. He said that the third and fourth reports on State responsibility were the outcome of an extremely scholarly and in-depth study of the topic, whose practical application was to be found in the four draft articles submitted. Draft article 11 recognized the legitimacy of countermeasures when the conditions for resort to those measures stated in draft article 12 were fulfilled. Draft article 13 was intended to limit countermeasures by applying the test of proportionality to the gravity of the internationally wrongful act and draft article 14 indicated the cases in which countermeasures were prohibited or would not be legally acceptable. The proposed texts were, in his view, a useful basis for the Commission's discussions.

60. It was a fact that countermeasures, which were measures taken unilaterally by a State or States injured by an internationally wrongful act, could be resorted to only by rich and powerful States, so that legitimating them meant strengthening the privileges of those States and committing an injustice against weaker and poorer States. That argument, which had considerable weight, had been repeatedly invoked by all those who were opposed to countermeasures. It was, however, none the less true that countermeasures existed, had always been used and were probably likely to continue to be used in the foreseeable future. Since they could not be totally abolished, they should at least be regulated and their use limited. That was the course the Special Rapporteur had adopted and he himself was prepared to follow him for the time being. The conditions for resort to countermeasures listed by the Special Rapporteur in draft article 12 were a safeguard against possible abuses and errors. It was incorrect to say that those conditions would not be respected because it took too long to apply them or because they would prevent any use of countermeasures at all. If the starting point was the principle that countermeasures were the exception rather than the rule, it should therefore not be so easy to resort to them. In any case, whatever international regime was established, it would be worth something only if it promoted the achievement of the main objective of the United Nations, as clearly spelt out in the Preamble to the Charter:

> . . . to promote social progress and better standards of life in larger freedom.

It was precisely in order to promote that objective that international law had to be developed and it should not be forgotten that power was transitory and illusory and that yesterday's mighty could become tomorrow's weak.

61. With regard to the text of the draft articles, he shared Mr. Al-Khasawneh's view about the need for caution in respect of the concept of proportionality, whose content was not very well defined and thus involved a risk of abuse. He also agreed with Mr. Sreenivasa Rao that interim measures of protection were not fundamentally different from countermeasures and that, in any case, countermeasures should also be provisional. In his view, the substance and wording of the draft articles could be further improved and that was what the Drafting Committee should try to do.

The meeting rose at 1 p.m.

2279th MEETING

Wednesday, 1 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 2]

[20] *I.C.J. Reports 1970*, p. 3.

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

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