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Summary record of the 2279th meeting

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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]

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[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).

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

ARTICLE 5 *bis and*

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

1. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's fourth report (A/CN.4/444 and Add.1-3) was stimulating and well-researched. The first issue to be addressed was whether provisions on countermeasures should be included in the draft articles at all. On that point, he disagreed with Mr. Shi (2273rd meeting), who had suggested that they should be left aside, at least temporarily. The right to take countermeasures was one of the remedies available to an injured State and any failure on the Commission's part to deal with the matter would mean that the old rules would continue to apply. He felt strongly that the Commission should try to establish a new and improved regime. The fact that, in the past, reprisals had at times been a pretext for abuses, far from deterring the Commission, should prompt it to seek innovative solutions. A useful parallel could be drawn with humanitarian law: the existence of a ban on the use of force did not mean that resort would never be had to force. Hence, the *jus in bello* could not be dispensed with. Failure to set out appropriate rules on countermeasures would not help to combat the dangers involved and the Commission was plainly under an obligation to deal with what was, admittedly, an unpleasant chapter of its work.

2. He supported the Special Rapporteur in his approach of not imparting a punitive character to countermeasures, yet draft article 11 was much too poor in substance, for it did not properly define the function of countermeasures. The draft should clearly spell out that countermeasures were a remedy designed to induce the wrongdoing State to return to the path of lawfulness.

3. Actually, all countermeasures were essentially interim measures of protection. He concurred with Mr. Barboza (2277th meeting) that the injured State had the right temporarily to suspend performance of its own duties. As soon, however, as the wrongdoing State complied once again with its obligations, the countermeasures that had been taken had to be lifted. The term "countermeasure" should appear somewhere in the body of article 11. The present wording did not make it possible to distinguish countermeasures from measures of self-defence.

4. The main issue in regard to article 12 was whether countermeasures could be taken only after all procedures for the amicable settlement of disputes had been exhausted. The distinctions made in the report were not reflected in the proposed formulation. Mere reference to "all" procedures was utterly inappropriate. Article 33 of the Charter of the United Nations mentioned negotiation as a method of peaceful settlement. Thus, the rules suggested by the Special Rapporteur would favour the wrongdoing State, a solution that was unjust and clearly not viable. On no account should the Commission adopt a rigid rule that would encourage breaches of international law.

5. Like Mr. Calero Rodrigues (2278th meeting), he was somewhat puzzled by the formulation in article 12, paragraph 3, but once it was properly grasped the paragraph appeared to set out a fairly simple rule, namely that no State could, before peaceful settlement procedures were exhausted, adopt countermeasures which endangered international peace and security and justice. Actually, such a rule was neither necessary nor appropriate. It was, of course, taken from Article 2, paragraph 3, of the Charter of the United Nations, an article that prohibited the use of force as a means of settling disputes. In his opinion, that provision was not really applicable to situations resulting from the taking of countermeasures, though widely differing views could indeed be held on that point.

6. Instead of relying so much on dispute settlement procedures—some of which were ineffective and all of which were lengthy and cumbersome—the Special Rapporteur should have emphasized the general need to collectivize countermeasures, translating them into sanctions by the organized international community, rather than keeping them within the bilateral relationship between the wrongdoer and the victim. In that respect, article 2 of part 2 pointed in the right direction, although the wording was much too abstract and general. As a matter of principle, procedures under existing international treaties had to take precedence. There might still be a fallback position for the injured State to take countermeasures unilaterally. As he saw it, the focus was wrong in chapter VII of the report, where the Special Rapporteur had attempted to show that there was no such thing as a self-contained regime. Instead, emphasis should be laid on favouring collective responses to unlawful conduct. There were few regimes at present which provided for organized collective action against wrongful acts. Those mechanisms, however, should be treated as models to be followed in other fields of international life.

7. He agreed with the Special Rapporteur's remarks on proportionality, but failed to see the reason for the extensive treatment in chapter V of cases of the use of force. Since the Commission was not engaged in a study of the Charter of the United Nations, it was sufficient to state that countermeasures involving the use of force were unlawful. On the other hand, it would have been useful to draw the dividing line between countermeasures and self-defence. Obviously, a State acting in self-defence could resort to armed force. Personally, he entertained serious doubts about economic and political measures as forms of coercion. The fact that a measure was prohibited under the principle of non-intervention did not mean that such a measure was prohibited as a reaction to unlawful conduct, in other words, as a countermeasure. He therefore did not agree with article 14, paragraph 2. The problems touched upon in that provision could be covered by the principle of proportionality.

8. The limitation relating to human rights set out in article 14, paragraph 1 (*b*) (i), was welcome, but the drafting stood in need of improvement. The qualification

[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.

"fundamental" in the expression "fundamental human rights" did not really reflect the Special Rapporteur's view that only elementary human rights should be inviolable. In any event, the report should have mentioned Additional Protocol I of 1977 to the 1949 Geneva Conventions. A specific reference to humanitarian law should be included in the draft articles, for to date the most important prohibitions of countermeasures existed under humanitarian conventions.

9. The formulation of article 14, paragraph 1 (*b*) (ii), was too vague. Only essentials should be immune from countermeasures. He also had serious misgivings about the exception spelt out in paragraph 1 (*b*) (iv), an exception that related to the effect of an obligation *erga omnes* as understood by the Special Rapporteur. For his own part, he did not believe that such a conceptual gap existed between rules of *jus cogens* and rules derived from obligations *erga omnes*. In the *Barcelona Traction*[4] case, ICJ had referred precisely to that problem. When basic interests of the international community were at stake, all States were duty bound to respect those interests. Thus, the concepts of *erga omnes* obligations and *jus cogens* were largely similar in scope. Nevertheless, the Special Rapporteur's very personal concept had led him to attach the label of obligation *erga omnes* to human rights that did not count amongst the most elementary. The provisions of paragraph 1 (*b*) (iv) would appear to exclude any countermeasures with regard to rights protected under a multilateral treaty. Thus, if German citizens in a foreign country were deprived of their freedom of movement, which was protected by article 12 of the International Covenant on Civil and Political Rights, Germany would not be able to retaliate by restricting the corresponding rights of citizens of that foreign country in Germany because Germany had pledged to uphold freedom of movement not only *vis-à-vis* that country but also other States parties to the Covenant. Such a view was wrong: a special relationship existed between Germany and the country in question on account of its violation of the Covenant.

10. In that respect, he fundamentally disagreed with the Special Rapporteur's attempt to show that, in the case of a breach of a multilateral obligation concerning human rights or the environment, all States were in the same position. In particular, the footnote in chapter VIII B in which he discussed categories of injured States in the case of an act of aggression, showed that the Special Rapporteur had constructed a legal edifice on shaky foundations. According to the Charter of the United Nations, although the prohibition of aggression constituted a general rule which was binding on all States in their mutual relationships, it was the direct victim of aggression that had the primary right of self-defence. Admittedly, other States could be involved in collective self-defence, but ICJ, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, had drawn a clear distinction in legal status between the actual victim of aggression and other States which, in a somewhat artificial sense, could be said to be "legally affected", when it stated that ". . . there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack".[5] What applied to self-defence should apply to countermeasures as well. A State that was not directly harmed was not in the same legal position as the primary victim of an internationally wrongful act. The concept defended by the Special Rapporteur was a purely theoretical one and was not in accord with practical realities, although it could find some support in the terms of article 5 of part 2, provisionally adopted by the Commission.[6] The position regarding the remedies available to States not directly harmed was not resolved by article 5 *bis* suggested by the Special Rapporteur. Such States should be directed to act through collective channels, whereas the direct victim should enjoy a greater freedom of action. While the actual victim appeared not to be treated favourably enough by the Special Rapporteur, remote States, which had no genuine link with the unlawful act were given a role which they did not deserve and were not able to discharge. Lastly, he would point out the significance of the fact that, in the judgment he had mentioned, ICJ had used throughout the term "third States" when referring to States other than the injured State itself.

11. The Special Rapporteur had approached the question of countermeasures essentially in terms of the bilateral relationship between the wrongdoing State and the injured State. However, the organized international community must have a place in the draft; it appeared in the Special Rapporteur's proposals only indirectly, through the mechanisms of the dispute settlement. Control mechanisms should be built in a step earlier when determining whether countermeasures were to be applied. In that respect, the previous Special Rapporteur, Mr. Riphagen, had been more forward-looking although it had to be recognized that the international community had as yet only rudimentary ambitions in the matter. The great problem regarding countermeasures was that they should be placed under some sort of control by the international community, which was slow in assuming that role.

12. Mr. AL-BAHARNA said the Special Rapporteur's stimulating third report (A/CN.4/440 and Add.1) specified that the remedial measures an injured State could take against a wrongdoing State were self-defence, sanctions, retortion, reprisals, reciprocity, countermeasures and the termination and suspension of treaties. The nature and scope of those legal remedies remained controversial in international law and since the Commission was not called upon to codify or to develop rules of international law on them, it should refrain from doing anything likely to give rise to criticism that it was exceeding its mandate. A detailed discussion of self-defence, of sanctions or of retortion lay outside the purview of the topic of State responsibility. As to self-defence, the Special Rapporteur himself admitted in the report that the notion of self-defence involved complex legal problems, and should be left within the framework

[4] See 2278th meeting, footnote 20.

[5] *I.C.J. Reports 1986*, p. 105, para. 199.

[6] See 2266th meeting, footnote 11.

of article 34 of part 1.[7] The concept of sanctions, according to the Special Rapporteur, was "... even more problematic in the ... practice of international responsibility." As for the unfriendly notion of retortion, it should be regarded as a legal remedy for the purposes of the draft. Reprisals were defined by the Special Rapporteur, as "... the measures adopted by way of reaction to an internationally wrongful act by an injured party against the offending State." But the term "reprisals" was traditionally associated with the use of force, which was now unlawful *per se*. Moreover, the various categories of reprisals were a matter of controversy and it was therefore suggested that the term should be replaced by a more neutral one, such as "countermeasures", which was broad enough to include a range of remedial measures that an injured State might take.

13. He agreed with the Special Rapporteur's view that an internationally wrongful act must actually have been committed in order to render countermeasures lawful, and that a bona fide belief on the part of the injured State that such an act had been committed was not enough to justify a countermeasure. "Defensive" measures against a perceived or anticipated attack illustrated that point. Again, the Special Rapporteur rightly said that countermeasures could have both restitutive and penal functions, but that assertion tended to obscure the distinction between the two kinds of consequences of delicts. In his first two reports,[8] the Special Rapporteur had distinguished between "instrumental" or "procedural" consequences, and "substantive" consequences, which included cessation and restitution. The overlapping of the two categories could be seen in the fact that "instrumental" measures could be employed to secure the "substantive" remedies of restitution and reparation. There would be less overlap, and the arrangement would be more logical and practical, if the draft set out the rights and obligations of the injured and of the delinquent States in remedying the delict.

14. Chapter III of the third report discussed the purposes of countermeasures, which it defined as cessation, reparation and retribution. Retribution would not be readily acceptable, since punitive steps against co-equal States would be shunned as being reminiscent of nineteenth century international law. The retributive function should be treated as a secondary one, to be admitted only where the law had been grossly disregarded or flouted. Accordingly, the compensatory and reparative aspects of countermeasures should be given greater prominence. Prior claims for cessation and reparation should always be the mandatory first steps in a process of graduated response. He had some misgivings about Wengler's view, referred to in chapter IV, that "... the aggrieved State could lawfully resort to reprisals without any preliminaries in the event of *dolus* on the part of the law-breaking State."[9] Prior claims could be dispensed with only where there was a grave risk to life and limb, or imminent irreparable harm to property, and provided the measures adopted were designed to forestall such situations.

15. Chapter V of the report considered whether the injured State could make a lawful response before resorting to one or more of the means of dispute settlement contemplated in Article 33 of the Charter of the United Nations. His own view was that, if the act endangered international peace and security, Article 33 applied automatically; if it did not, Article 33 would not apply and the rules proposed in the draft articles would have priority. Interim measures should not be permitted in advance of the "prior demands" since they were open to abuse and likely to lead to hostilities.

16. The concept of proportionality, discussed in chapter VI of the report, was open to a variety of interpretations. However, considerations both of principle and of logic required the Commission to adopt a restrictive approach. He questioned the Special Rapporteur's opinion, expressed in the report, that the requirement of proportionality could be formulated in the light of three elements: the injury suffered, the importance of the rule infringed, and the aim of the measure adopted. It was questionable whether the proportionality requirement was open to such precise formulation; moreover, special circumstances might apply in any individual case to warrant the consideration of different elements. The nature, manner and extent of the injury would always be relevant to the proportionality rule, but the importance of the rule infringed was not so pertinent. The Commission should not be doctrinaire in its approach to the proportionality requirement. Above all, it should avoid including some controversial aspects while excluding others.

17. Chapter VII, on the suspension and termination of treaties as countermeasures, considered whether the codification and development of the law on State responsibility raised issues not covered by article 60 of the Vienna Convention on the Law of Treaties. If it did, the Commission might prescribe rules on the suspension and termination of treaties as a countermeasure for the breach of an international obligation. The Special Rapporteur correctly said that article 60 could in no way be considered as exhausting the legal regime of suspension and termination for the purposes of the general regime of State responsibility. The same conclusion had been reached by the American Law Institute, which had stated that:

> The measures that a State may take under this section ... include: suspension or termination of treaty relations generally or of a particular international agreement or provision; ....[10]

But whatever the position under traditional international law, the Commission should not give States an unlimited right to suspend or terminate treaties. In the spirit of article 60 of the Vienna Convention on the Law of Treaties, it should limit that right to cases in which there was a material breach of an international obligation, and exclude it altogether for treaties of a humanitarian character and treaties providing for "indivisible" or "integral" obligations. Otherwise, the fundamental principle of *pacta sunt servanda* would be placed in jeopardy. The Commission should also consider whether, on humani-

[7] See 2272nd meeting, footnote 2.

[8] See 2266th meeting, footnotes 17 and 18.

[9] For source, see relevant footnote in *Yearbook... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1.

[10] See 2278th meeting, footnote 15.

tarian grounds and for the sake of the rule of law, the right to suspend and terminate treaties should be further restricted—whether, for instance, it should be limited to cases in which there was a close link between the breach of the international obligation and the treaty in question. Since the purpose of suspending or terminating a treaty was to mitigate the consequences of the breach, it was reasonable to require a nexus between the breach and the countermeasure concerned.

18. As to chapter IX, he had some misgivings about the classification of States as "directly injured" and "non-directly or indirectly injured". In practice, such a classification served no real purpose. The question of the liability of the law-breaking State ultimately turned upon the harm sustained by the injured State. The problem was adequately covered by article 5 of part 2, and there was no need either to amend that article, or to add a new chapter dealing with "indirectly injured States". The Special Rapporteur himself admitted, in his third report, that the situation of those States might well be just a matter of degree; if so, there was no need to distinguish them.

19. Chapter X dealt with the prohibition of use of force, respect for human rights, the inviolability of specially protected persons and the relevance of *jus cogens* and *erga omnes* obligations in the context of lawful countermeasures. Since there was no agreement about the detailed scope and application of those principles, it would be a fruitless endeavour for the Commission to lay down detailed provisions. It would be better to state the basic principle, using the language of the Charter of the United Nations and of other basic international instruments wherever possible, and to keep the commentary brief. Controversial or unsettled questions, such as the use of economic coercion as a countermeasure, the protection of foreign property as a matter of human rights, and the limitation of countermeasures by rules *erga omnes* should be avoided, and the Commission should include only points derived from generally accepted rules of international law.

20. The fourth report (A/CN.4/444 and Add.1-3) contained a wealth of legal material expounded in a scholarly manner. Draft articles 11 to 14 reflected current trends in international law relating to the concept of countermeasures, which formed the core of the law of State responsibility in the view of the Special Rapporteur. In that light, there was no room within the norms of contemporary international law for traditional remedies such as sanctions or punitive reprisals. Personally, he welcomed the emphasis, in article 11, on the principle that resort could be had to countermeasures only when an internationally wrongful act had actually been committed by the State against which the measures were directed. The last phrase of article 11, "not to comply with one or more of its obligations towards the said State" was better formulated than the corresponding provisions in articles 8 and 9 of part 2[11] proposed by the previous Special Rapporteur, Mr. Riphagen. Equally welcome was the avoidance, in the new article 11, of the term "reprisal".

[11] See 2273rd meeting, footnote 10.

21. Article 12, he was glad to note, set out the conditions to be met by the injured State before it took countermeasures. He agreed with the Special Rapporteur that article 12 was a more flexible formulation than the corresponding provisions in draft articles 1 and 2 proposed by the previous Special Rapporteur in part 3.[12] The reference in paragraph 1 (*a*) 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" was unquestionably broader than the terms of article 10, paragraph 1, of part 2 as proposed by Mr. Riphagen. It was true that the three exceptions in paragraph 2 (*a*), (*b*) and (*c*) would, as the Special Rapporteur had said (2273rd meeting)

> ... bring some balance into the relationship between the injured 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.

However, he continued to believe that the "interim measures of protection taken by the injured State", referred to in paragraph 2 (*b*), could not be justified if they were taken unilaterally by the injured State before an international body had decided whether they were admissible. Further, for the sake of clarity, he suggested that the references to "the preceding article" and "the preceding paragraph" in article 12 should be replaced by numbered references. The words "the said body" in paragraph 2 (*c*) should be replaced by "the international body".

22. Article 13 would be better expressed in negative, rather than positive, terms. In its present formulation, the article took account both of the gravity of the wrongful act and of its effects. The Drafting Committee should consider further the extent to which countermeasures might be disproportionate. As he had already explained, in dealing with proportionality the Commission should avoid the more controversial aspects of the matter. He welcomed the scope of the limitations placed on countermeasures in article 14, but would postpone further comment in view of the substantive issues raised in that article.

23. Article 5 *bis* was described as a "very tentative draft". He had already explained his view that an article dealing with so-called indirectly injured States was unnecessary, since the definition of injured States in article 5 of part 2 was quite adequate. He therefore agreed with Mr. Rosenstock (2273rd meeting) that article 5 *bis* added nothing to the draft articles.

24. Lastly, he wished to express his appreciation to the Special Rapporteur for the distinguished contribution he had made to the codification of the topic.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said that a number of members in commenting on draft article 11, had expressed a preference for the term "suspension", rather than non-compliance, when referring to the obligations of injured States towards law-breaking States. Having reflected on the matter, he perceived a difficulty: it would be difficult for a State to confine itself to suspending an obligation not to undertake nu-

[12] Ibid., footnote 12.

clear tests, for instance, if another State had already violated a treaty obligation in that respect. He also wondered how suspension would be defined if a State had bound itself to do or to give something immediately, at a particular time. Non-compliance seemed to cover all hypothetical situations, whereas suspension would cover only some of them. He invited members to reflect on that point.

26. Mr. YAMADA said that he thanked the Special Rapporteur for his excellent and informative reports, which were particularly valuable for government officials, who had to deal with the issues at a practical level.

27. Countermeasures represented a complex and difficult question. Although there was an abundance of State practice, it was difficult to draw clear conclusions from that practice. In reality, States resorted to countermeasures and, in so doing, they often went beyond a theoretical limit of legitimacy. He appreciated but did not share Mr. Shi's view (2273rd meeting) that the Commission should not grant legitimacy to such a controversial concept as countermeasures. Refusing to deal with the issue would not improve the situation. States would doubtless continue to use countermeasures as a way of dealing with internationally wrongful acts. The extent to which States used such measures was closely linked to the existence of a procedure for the settlement of disputes. Thus, the Commission would be best advised to formulate the articles limiting countermeasures, in conjunction with a set of articles on dispute settlement procedures. The acceptability to Governments of such a legal regime could then be tested.

28. He wished to stress the importance of consistency between the articles in part 2 and those in part 1 of the draft. In chapter V of part 1, the wrongfulness of certain countermeasures was precluded under articles 29, 31, 32, 33 and 34.[13] Consequently, the Commission did not need to address such countermeasures in part 2; rather, it should deal in that part solely with the countermeasures to which reference was made in article 30 of part 1, namely, countermeasures in respect of an internationally wrongful act. There was also a need for separate consideration of countermeasures against international crime, an issue which was of interest to the international community as a whole. Any legal regime concerning countermeasures against international crime would certainly be distinct from one concerning countermeasures against international delicts, although it would be difficult to draw an absolutely clear line of demarcation. For the moment, the Commission should confine itself to considering countermeasures against international delicts. He hoped that the Special Rapporteur would comment in due course on countermeasures against international crime.

29. The countermeasures envisaged under draft article 11 varied. The function of interim measures was simply to protect the injured State, in other words, to prevent or mitigate the effects of a wrongful act. The most frequently used countermeasures were coercive measures to obtain cessation and reparation. At the other end of the spectrum was the injured State which took the law into its own hands, obtained the equivalent of reparation by itself and even inflicted punishment on the wrongdoing State. The Special Rapporteur had considered it inappropriate to place any express limitation on countermeasures according to their functions. He had instead attempted to limit such measures through procedural requirements and a test of proportionality. Although practical, that approach was not enough. Unless the function of the countermeasure was also taken into consideration, the prohibitions would be too vague and would be open to abuse.

30. As it stood, article 11 required the injured State to fulfil certain procedural conditions. However, those conditions were already dealt with in article 12, thus making their inclusion in article 11 redundant. He would therefore suggest deleting from article 11 the phrase: "whose demands under articles 6 to 10 have not met with adequate response from the State which has committed the internationally wrongful act".

31. He agreed in principle with the requirement under article 12, paragraph 1 (*a*), that the injured State must exhaust all the amicable settlement procedures available. Nevertheless, in some cases the requirement might place an undue burden on the injured State. After all, the injured State was a victim and was only reacting to a wrongful act; furthermore, countermeasures were not necessarily unfriendly acts. The Special Rapporteur had made interim measures exempt from procedural requirements; there might be other countermeasures, with limited functions, for which exemption from certain procedural requirements might be appropriate.

32. The principle of proportionality should play a significant role in limiting the use of countermeasures. Countermeasures were lawful acts taken in response to internationally wrongful acts. Thus it was difficult to weigh the two and arrive at an equitable balance. Even though article 13 did not go beyond the abstract common-sense notion of proportionality, it probably provided the best solution.

33. The revised version of article 14, on prohibited countermeasures, contained some controversial elements. There had to be a consensus on the exact meaning of paragraph 1 (*b*) (i), which prohibited any conduct that was not in conformity with the rules of international law on the protection of fundamental human rights. Furthermore, the paragraph should be consistent with paragraph 3 (*b*), (*c*) and (*d*) of article 19 of part 1,[14] which dealt with international crimes related to violations of human rights.

34. Paragraph 1 (*b*) (ii) of article 14 stressed the importance of keeping open the channels of diplomatic negotiations. Yet, in practice, breaking off diplomatic relations was a very effective countermeasure, used by a large number of States. He would thus prefer the formulation proposed in article 12 (*a*) by the previous Special Rapporteur, namely, that the injured State was not entitled to the suspension of obligations of the receiving

[13] See 2272nd meeting, footnote 2.

[14] See 2261st meeting, footnote 8.

State regarding the immunities to be accorded to diplomatic and consular missions and staff.

35. He agreed that, as specified in paragraph 1 (*b*) (iv), countermeasures which infringed the right of a third State were not justified. That principle had been invoked in the decision of the Portuguese-German Arbitration Tribunal concerning the "*Cysne*" case.[15] However, the Tribunal's decision had admitted that reprisals against an offending State might injure the nationals of innocent States. In his view, a countermeasure should not be deemed unlawful solely because it had an unintentional or spillover effect. In a world which was so interdependent, spillover was no longer a theoretical issue but a daily occurrence. Damage to a third party must certainly be dealt with and it would be most appropriate to attribute responsibility for that damage to the original wrongdoer.

36. Article 14, paragraph 2, which placed political and economic coercion in the category of force, was unacceptable and would only lead to controversy over the interpretation of Article 2, paragraph 4, of the Charter of the United Nations. While he endorsed the prohibition of countermeasures which jeopardized the territorial integrity or political independence of a State, any reference to political and economic coercion should be eliminated.

37. The Special Rapporteur's analysis of the problem of a plurality of equally or unequally injured States was very informative. However, article 5 *bis* appeared to be stating an obvious principle and he wondered if a separate article on that point was necessary. In its consideration of the articles in part 2, the Commission would have to deal with another question arising from the problem of a plurality of injured States: the relationship between the injured States and the wrongdoing States, and the attribution of responsibility to the latter.

Expression of sympathy to the Government and people of Algeria on the assassination of their President, Mr. Mohammed Boudiaf

38. Mr. THIAM said that Algeria had just undergone a terrible ordeal, the result of fanaticism and blind intolerance. He would, therefore, like to ask the Commission to demonstrate its solidarity with a country for which it had the highest regard. The events in Algeria could only serve to heighten awareness of the significance, both to the Commission and to the international community as a whole, of certain topics on which the members had been working for some time.

39. He wished to express directly to Mr. Mahiou the profound sympathy of the members. A country capable of producing men of Mr. Mahiou's calibre could certainly hope for a better future.

40. Mr. PELLET, speaking on behalf of members from the Group of Western European and other States, said that he wished to express his deepest sympathy to the Algerian people and to his colleague, Mr. Mahiou, on the assassination of President Boudiaf. That event represented the murder of the hope of an entire people, which was threatened by intolerance and hatred. In such conditions, the support of a community of jurists, such as the Commission, was not just a matter of form: the assassination of a head of State was also the death of the rule of law.

41. Mr. Sreenivasa RAO said that he joined other members in expressing his sincere sympathy to the Algerian people on the assassination of their great leader.

42. Mr. ARANGIO-RUIZ said that he, too, wished to voice his sympathy with Algeria and the Algerian people.

43. Mr. MIKULKA, speaking on behalf of members from Eastern European States, said that he wished to join with other members in their expressions of sympathy.

44. Mr. VARGAS CARREÑO, speaking on behalf of members from Latin American States, expressed sincere condolences to the Government and people of Algeria. The tragic event in Algeria only confirmed the faith of the community of lawyers in the rule of law and their rejection of all forms of violence.

45. Mr. KUSUMA-ATMADJA said that he wished to associate himself with other members in expressing sympathy to Algeria.

46. The CHAIRMAN said that the members of the Commission were profoundly shocked and moved by the assassination of Mr. Boudiaf. Violence did nothing to advance the cause of justice and, as lawyers, the members of the Commission could only deplore such acts and share in the mourning of the Algerian people.

47. Mr. MAHIOU said that the moving expressions of sympathy by members and the minute of silence that he understood the Commission intended to observe were special tributes, coming as they did from a body mandated to combat crime, and particularly terrorism, which was threatening the very foundations of the international community. He wished to thank the members of the Commission for their compassion and sorrow in response to the ignoble assassination of President Boudiaf, one of the fathers of the Algerian revolution and a man of great stature, known for his moral integrity, modesty and discretion. The perpetrators of that crime wanted, by murdering a man, to destroy a hope, which had been symbolized by the rejection of fanaticism and any act that jeopardized a nascent democracy. He was sure that the Algerian people would be able, as they had in the past, to find the resources necessary to face their ordeals with dignity and to confront the challenge of terrorist violence.

The members of the Commission observed a minute of silence in tribute to the memory of President Mohammed Boudiaf of Algeria.

The meeting rose at 11.25 a.m.

[15] See *Annual Digest and Reports of Public International Law Cases, 1929-1930* (London), vol. 5 (1935), p. 490, case No. 287.