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Summary record of the 2283rd meeting

Topic:
State responsibility

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

of paragraph 9, to be replaced by the words "a revised set of draft articles".

4. Mr. CALERO RODRIGUES, Mr. EIRIKSSON, Mr. GÜNEY, Mr. KOROMA, Mr. PELLET, Mr. Sreenivasa RAO, Mr. RAZAFINDRALAMBO, Mr. ROSENSTOCK, Mr. VERESHCHETIN, Mr. VILLAGRAN KRAMER and Mr. YANKOV took part in a discussion on those proposals and on the advisability of amending the text.

5. Mr. EIRIKSSON, Mr. ROSENSTOCK and the Special Rapporteur proposed that the phrase "and the Commission should not deal, at this stage, with other activities which in fact cause transboundary harm" should be added after the first sentence of paragraph 6 and that the second part of the third sentence of the paragraph, reading ", namely whether to continue with the same or a similar exercise in respect of activities causing transboundary harm." should be deleted.

6. Mr. BARBOZA (Special Rapporteur) said that, as he had already submitted two reports on prevention, it would suffice if, with a view to submitting a revised set of draft articles on the question of activities involving risk, he re-examined the draft provisions on prevention proposed in those two reports. On that point, his next report would thus contain nothing that was really new. With a view to making progress on the consideration of the topic and since his mandate under the terms of paragraph 9 of the Working Group's report was not restrictive, he therefore intended to propose, at the next session, draft articles on civil liability as well as on other aspects of activities involving risk.

7. The CHAIRMAN, summing up the discussion, noted that the Commission did not wish to reopen the substantive debate, which was precisely what it had sought to avoid when setting up the Working Group.

8. If there was no objection, he would take it that the Commission decided to take note of the report of the Working Group on the topic of international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.470), as orally amended by Mr. Eiriksson, Mr. Idris and Mr. Rosenstock, whose proposals had received general support.

It was so agreed.

The meeting rose at 12.10 p.m.

2283rd MEETING

Friday, 10 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, 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. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 2]

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

ARTICLE 5 *bis and*

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

1. Mr. ARANGIO-RUIZ (Special Rapporteur), summing up the discussion, said he wished first to express his gratitude to his colleagues for their contributions to the debate. Whether they had agreed or disagreed with his proposals, the members of the Commission had performed with great merit the vital task of monitoring his work and providing him with their critical appraisals, without which no progress could be made on a difficult topic.

2. He wished to emphasize two points. First, the debate had been so rich that he could not hope to respond fully and adequately to all the points made. However, none of those valuable remarks would be lost and due account would be taken of them in the Commission's report. Second, he would not be endorsing all of the suggestions for changes in the draft articles in question. The final decision would, in any case, be up to the Drafting Committee and the Commission as a whole. If he found himself in the minority on any particular issue, he would bow to the will of the majority and have his dissenting opinion put on record.

3. In respect of draft article 11 (Countermeasures by an injured State), there appeared to be general approval of the idea that resort to countermeasures was subject to two basic conditions: the actual existence of an internationally wrongful act committed by the State against which the countermeasures were taken, and a prior demand for cessation and/or reparation. One question had been how specific such demands should be and it had been stressed that an excessive burden should not be imposed on the injured State. In his view, while it did not necessarily have to be formulated in such precise terms as those required when a case was brought before an arbitral tribunal or before ICJ, the prior demand or claim

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* Resumed from the 2280th meeting.

[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.

must obviously be clear enough for the offending State to assess the situation in detail and to make a reasonable response. Thus, the requirement of a prior demand was clearly linked to the concept of an adequate response by the wrongdoing State. Furthermore, the adequacy of the response must surely be judged also by the way in which the injured State had made its demand. The type of countermeasures envisaged by the injured State would also determine the nature of its claims.

4. He did not wish to minimize the importance of precise demands or claims. There had to be a way of guarding against the tendency of powerful States to resort to countermeasures without more ado. One recent example, dealt with by both the Security Council and ICJ, seemed to demonstrate the inappropriateness of making vague, undefined charges against a State. At the same time, resort to countermeasures should not be unduly delayed by requiring from the injured State data that would be too difficult for it to collect.

5. One member had rightly observed that an event might be attributable to the injured State and have no bearing on the initial internationally wrongful act. That member had wondered whether the concept of equivalence of acts which would provide the underlying basis for compensation should not operate as an exception to the use of countermeasures. In his own view, such a case would fall under the rule of proportionality and the principle of causation. Another member had felt that one condition of resort to countermeasures should be that the lawbreaking State itself had not taken appropriate action. That condition was, in principle, included in the concept of adequate response.

6. It had also been suggested that damage was a basic condition for the use of countermeasures. He would agree with such a view, provided damage was understood in the broad sense of injury, which would also include a merely legal or moral injury. A related matter was the extent of the damage, which served as justification for the type and gravity of the countermeasure. That aspect was covered by the test of proportionality, damage being, in his opinion, one of the criteria by which proportionality could be assessed.

7. There was general agreement in the Commission that the phrase "not to comply with one or more of its obligations", contained in article 11, encompassed in a succinct manner the entire range of measures to which the injured State could resort and thus avoided complex problems of definition. Several members had suggested replacing the words "not to comply with" by "to suspend the performance of" in order to emphasize the provisional character of the countermeasures. Others maintained the article should specify that, once their purpose had been achieved, countermeasures would cease forthwith, and that they could be resorted to only in order to oblige the wrongdoing State to comply with secondary substantive obligations. A distinction had been drawn between interim and final countermeasures; the view had been expressed that even where they were taken in response to an irreversible unlawful act, countermeasures should aim at securing cessation and reparation and should therefore be reversible. He, as well as other members, had pointed out that replacing "not to comply with" by "to suspend the performance of" called for further reflection, since such a change might restrict the scope of application of countermeasures to obligations of a continuing character and exclude obligations requiring the achievement of a specific result. It had also been observed that certain obligations could not be physically suspended, and therefore it would be necessary to find a word which combined the ideas of suspension and termination. Actually, the issue of the reversibility or irreversibility of the countermeasures and of the purpose of such measures would fall within the scope of proportionality.

8. One member had remarked that the omission from article 11 of any reference to the purpose of the countermeasure did not rule out a punitive function, as was demonstrated by the text of article 10 (Satisfaction and guarantees of non-repetition).[4] Indeed, several members had considered that article 11 did not adequately deal with the purposes of countermeasures and should contain an express prohibition of any punitive end. His own opinion was that retribution would always be one of the functions of a countermeasure, even if the expressly stated goals were confined to cessation and reparation. Any abusive use of the punitive function of countermeasures would violate the rule of proportionality.

9. Some members had felt that the order of the articles in the section under discussion should be rearranged—a matter which could be dealt with by the Drafting Committee. It had been suggested that the word "countermeasures" should appear in the body of article 11 itself, but mention of the word in the title was surely more than adequate. It had also been said that 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" should be eliminated, since that requirement was already covered by article 12. Again, the question had been asked whether the phrase "have not met with adequate response" included cases of no response at all; in his view, it did. While all those suggestions were very useful, some might be mutually incompatible or might conflict with other requests made by members. All those matters should be considered by the Drafting Committee.

10. As to article 12 (Conditions of resort to countermeasures), it had been claimed that the requirement of the exhaustion of all the amicable settlement procedures available, as provided for under paragraph 1 (*a*), was excessive, particularly in regard to negotiations and arbitration. He could not agree, on three grounds. First, in a case where the offending State might, in order to escape its obligations, attempt to misuse a negotiated settlement or arbitration procedure, he was certain the injured State would be able to demonstrate the other State's lack of good faith. Secondly, as provided broadly in paragraph 2 (*b*) of article 12, the injured State could take interim measures of protection. Thirdly, the injured State was protected against delaying tactics on the part of the wrongdoing State by the provisions of paragraph 2 (*a*), according to which any failure to cooperate in good faith

[4] For text, see *Yearbook... 1990*, vol. II (Part Two), para. 388, footnote 291.

in the choice and the implementation of available settlement procedures exempted the injured State from the need to exhaust all the available procedures.

11. In the course of the discussion, great emphasis had been placed on the lack of clarity of article 12, paragraph 3, which did certainly stand in need of improvement. His intention in drafting the paragraph had been to recall the terms of Article 2, paragraph 3, of the Charter of the United Nations. Under paragraph 2 (*a*), (*b*) and (*c*), certain countermeasures were exempted from the requirement of exhaustion of all possible amicable settlement procedures. Such countermeasures should at least be subject to the condition of not endangering international peace and security, and justice. International peace and security might be endangered not only by direct threats or acts of aggression but also by State conduct which might provoke such threats or acts. The requirement that countermeasures should not endanger justice was a useful complement to other conditions of resort to countermeasures, for instance proportionality. In addition, a requirement of that kind might satisfy those members who believed that the interim measures contemplated under paragraph 2 (*b*) and (*c*) were intended to protect the legal rights of both the injured State and the wrongdoing State.

12. Rather than eliminate parts of article 12, he would prefer to incorporate some additional formulation, perhaps in paragraph 3, or in a separate paragraph. He had in mind a provision similar to the one contained in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations[5] that related to the peaceful settlement of disputes, and to Principle V, paragraph 5, of the Helsinki Final Act,[6] whereby the parties to a dispute must "refrain from any action which might aggravate the situation to such a degree as to endanger the maintenance of international peace and security and thereby make a peaceful settlement of the dispute more difficult". The Declaration on Principles of International Law concerning Friendly Relations referred both to the principle of non-aggravation and to acting in accordance with the purposes and principles of the United Nations.

13. The comments regarding article 13 (Proportionality), had been more varied and most of them could be handled by the Drafting Committee. A suggestion had been made that only "grossly disproportionate" or "totally unequal" countermeasures should be prohibited. He believed that such a solution would give the injured State too much leeway and might lead to abuse. Furthermore, such a form of language was even less restrictive than the words "manifestly disproportionate", proposed by the previous Special Rapporteur. In fact, any countermeasure that was disproportionate, no matter what the extent, should be prohibited.

14. One member had expressed regret that the draft articles under discussion had eliminated the distinction made by the previous Special Rapporteur between reciprocal measures and reprisals. Reciprocal measures, however, were also reprisals and could be applied disproportionately. Countermeasures other than reciprocity did exist and might well be the ones most frequently used. Thus, in most cases "countermeasure" was a misnomer, and all such measures presented the same difficulty.

15. In fact, he wondered whether it might not be preferable to assess proportionality in terms of elements other than the gravity of the wrongful act and its effects. One member had suggested that proportionality should be evaluated in relation to the purpose of the countermeasure and had raised the question of whether a group of States could, on the grounds that another State was violating human rights, refuse to honour its obligations towards that State, when the actual objective was to impose on that State a particular economic and social system. His own view was that the refusal by the group of States to honour its obligations was not so inappropriate if the violations of human rights were linked to a particular economic and social system.

16. He hoped he had made it clear why he had decided, in drafting article 13, not to use the word "manifestly" before "out of proportion". During the debate, it had been suggested that the words "not be out of proportion" should be replaced by "not be disproportionate", but the Drafting Committee could discuss that point. Finally, a suggestion had been made that the provision on proportionality should be placed after article 11 so as not to break the continuity between articles 12 and 14 and to emphasize that the rule of proportionality was designed to temper the effects of the right provided for in article 11.

17. The prohibition on military force set forth in article 14, paragraph 1 (*a*), was obviously uncontroversial, apart from the question whether reference should be made to Article 2, paragraph 4, of the Charter of the United Nations. Two points had, however, been raised about the relationship to self-defence and the treatment of economic and political coercion. As to the first point, some members had questioned the desirability of elaborating on the impact of the prohibition of force and one had argued that the matter could be settled simply by referring to the express prohibition on armed reprisals laid down in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations. Other members had contended that the justifications for the use of force he had cited in his report should in fact reflect the attempts to broaden the scope of the only legitimate exception to the use of force, namely, self-defence, and that the report failed to indicate that claims of self-defence often served to cloak other, unavowed, aims. It had also been said that the doctrine espousing a broad interpretation of the concept of self-defence was based on pre-Charter cases which were no longer relevant to modern thinking and that the lawfulness of self-defence based on necessity was not generally accepted either as doctrine or by States themselves.

18. While he had no doubt that the Commission's draft should condemn armed reprisals, there were a number of instances in which resort to force might obscure the elementary prohibition of armed reprisals set forth in the

[5] See 2265th meeting, footnote 5.

[6] Ibid., footnote 7.

Declaration he had already mentioned. The draft would serve as an important reminder of the confusion surrounding the concepts of self-help, self-defence, pre-emptive self-defence, state of necessity, humanitarian intervention and armed intervention for the protection of nationals, as well as of the need to distinguish countermeasures of that kind from the countermeasures with which the Commission was concerned. The problem was compounded by the use of the all-embracing term "countermeasures". In that connection, he did not think he had accepted too readily the arguments of those States which had resorted to the use of force in breach of Article 2, paragraph 4, of the Charter of the United Nations and which had stretched the sense of Article 51 of the Charter to an unacceptable limit.

19. His proposals on the other main point raised—economic and political coercion—had met with considerable criticism, though he believed that there was substantial support for a prohibition on such coercion, particularly among Latin American members of the Commission. He trusted that the issue would be settled by the Drafting Committee at the Commission's next session. The question had also been raised as to the source of a prohibition on political or economic coercion. Did it derive from Article 2, paragraph 4, of the Charter of the United Nations or an equivalent rule of general international law, or from the principle of non-intervention? Actually, if there was a condemnation of economic and political coercion, it mattered little whether it was formulated by reference to Article 2, paragraph 4, of the Charter or to the principle of non-intervention. If, therefore, it was felt that, given the increasing economic interdependence of nations and the analogy with armed force, such a rule should be laid down as a matter of the progressive development of the law, the Drafting Committee could perhaps deal with the matter, with respect both to the actual formulation of the provision and to the source to which the prohibition should be attributed. The matter of the use of the word "extreme", which had also been questioned, could likewise be referred to the Drafting Committee.

20. The rest of the comments on article 14 had been concerned, for the most part, with points of drafting. In that connection, he wished to explain that, in using the term "fundamental human rights" in paragraph 1 (*b*) (i), it had not been his intention to question the wording of the Charter—wording which he had, as a matter of fact, had occasion to defend, together with the Chairman of the Commission, in the context of the discussion which had taken place some years earlier on the definition of "injured State" in article 5 of part 2 of the draft. He had merely wished to identify the essential core of human rights and fundamental freedoms to be safeguarded from any violation to which they might be subjected as a consequence of a countermeasure. Another vague concept was that of human rights from which there should be no derogation, but, there again, the Drafting Committee could perhaps deal with the issue.

21. He had serious doubts as to the substance and drafting of the restriction with regard to diplomacy. Apart from the severing of diplomatic relations, which should continue to be available as a countermeasure, diplomats should be respected in their person, as a matter of respect for their human rights, and also in their function, in order not to jeopardize diplomatic exchanges. He would not, however, be inclined to extend the prohibition in question too far.

22. He had little to add to what he had written in his reports on the concept of *jus cogens*—something about which he was not too enthusiastic. It was not the same as *erga omnes*, for there might well be *erga omnes* rules that were not peremptory. Furthermore, paragraph 1 (*b*) (iv) of article 14 did not refer to *erga omnes* rules alone. It merely defined as unlawful any countermeasures that infringed the rights of States other than the State which had committed the internationally wrongful act and against which a countermeasure was taken. That applied where there was an infringement, as a consequence of countermeasures, of rules that created rights for States other than the lawbreaking State, and regardless of whether they were customary rules or rules under a treaty other than a bilateral treaty. There was, of course, the problem of a "spill over" effect, but there again he could only trust to the ingenuity of the members of the Drafting Committee at the Commission's next session.

23. The Chairman of the Commission had noted that paragraph 1 (*b*) (iv) seemed to deprive a State party to the International Covenant on Civil and Political Rights, when its nationals were denied their freedom of movement in another State party to the Covenant, of the right to retaliate by restricting the corresponding right of the nationals of that other State because the first State was under an obligation to uphold the freedom of movement of the nationals of all the States parties to the Covenant. Such a result had been regarded as unacceptable. On that point, he could only ask the Chairman to endeavour to solve what was indeed a knotty problem.

24. He had perhaps not been clear enough on the subject of self-contained regimes and article 2 of part 2 as adopted on first reading. His intention was that such regimes—some of which beneficially reduced, to some extent, the inorganic state of inter-State relations and in that sense certainly constituted a positive element—did not completely replace the regime of State responsibility, with regard either to the substantive or to the instrumental consequences of an internationally wrongful act. As for article 2, he was merely suggesting, and he believed that some members agreed, that it should be amended to ensure that the possibility of a "fallback" was not ruled out, as it appeared to be under the present terms of the article.

25. On the problem of a plurality of equally or unequally injured States, he recognized that article 5 *bis* did not solve all the difficulties. Some of the comments made in that connection and in particular those of Mr. Crawford (2277th meeting), would assist him in considering the matter further. He nonetheless considered that a provision along the lines of article 5 was needed in order to dispel the confusion caused by the concept of an "indirectly" injured State which, in the case of human rights and also of certain aspects of the environment, could limit the possibilities for a lawful reaction that should in fact be preserved.

26. The rules set out in articles 11 to 14 were what he would term "bare" rules in the sense that they were not

accompanied, except for an indirect reference to amicable settlement procedures in paragraph 1 (*a*) of article 12, by any provisions on implementation machinery. Consequently, their application by the allegedly injured and allegedly wrongdoing States was open to abuse, which inevitably meant abuse by the powerful and rich, to the detriment of the weaker and the poorer. That point had been stressed by virtually all the speakers in the discussion. The problem had in fact been contemplated by the Sub-Committee on State responsibility when it had envisaged, in 1963, that there should be a part 3, on implementation, to correct the shortcomings of countermeasures, particularly in view of the lack of any organized international remedies for an internationally wrongful act. Undoubtedly, only with the incorporation of a part 3, imaginatively but prudently formulated, could there be any significant reduction in those shortcomings. Part 3 would provide for, and to the extent that it was accepted by Governments, would ensure an egalitarian and democratic system of implementation. In addition to negotiation, conciliation, arbitration and judicial settlement, such ancillary means as fact-finding and other forms of ad hoc inquiries would be envisaged. The requisite organs would be composed of persons mainly, but not exclusively, chosen on an ad hoc basis by the allegedly injured State and the allegedly wrongdoing State. Thus, no State which accepted the procedure should feel that its sovereign equality was significantly diminished. Indeed, that was expressly stated in the relevant section of the Declaration on Principles of International Law concerning Friendly Relations.

27. The Commission would be failing in its duty to codify and progressively develop the law on State responsibility if it did not pay the closest attention to the dispute settlement procedures to be set out in part 3. He would remind members that State responsibility was expressly covered by at least two of the four categories of disputes that could be the subject of judicial settlement, namely, those referred to in Article 36, paragraph 2 (*c*) and (*d*), of the Statute of ICJ. If such disputes were suitable for judicial settlement, they were equally suitable for settlement by arbitration, in other words, the application, by judges selected by the allegedly injured State and the allegedly wrongdoing State, of the rules of parts 1 and 2 of the draft.

28. With regard to the necessity test, the debate had shown a high degree of consensus in favour of a serious effort being made in the direction he had indicated, a view that was not unanimous because some members had expressed a preference for collective measures or countermeasures envisaged as sanctions by the organized international community. He had already referred to that concept in dealing with the so-called self-contained regimes. It might be acceptable in the case of egalitarian treaty systems instituting guarantees of compliance with the obligations set forth in a given regional or otherwise specialized regime, although caution was needed, along with the condition of "fallback" in situations such as those he had indicated in chapter VII of the fourth report.

29. The concept of an "organized international community" also called for caution and appropriate reservations when moving into the realm of the competence referred to in article 4 as adopted on first reading. It was one thing to invoke Chapter VI of the Charter of the United Nations, but quite a different matter to invoke Chapter VII, which might not be altogether appropriate to ensure the implementation of the rules of a convention on State responsibility with due regard for the equality of States and the rule of law in international relations. Considering that the Commission's documents were also read outside United Nations circles and notably by students of international law, he referred those readers to a course he had given at The Hague Academy of International Law,[7] international law students at least should not confuse a mere system of multilateral diplomacy with the organization of a world super-State.

30. To revert to his insistence on strengthening part 3 of the draft, he would point out that the Commission had for many years been dealing with the topic of the draft Code of Crimes against the Peace and Security of Mankind, in the course of which it had seriously envisaged the possibility of Heads of State or Government being brought for trial before the courts of a foreign State, or possibly an international criminal court. He failed to see how a Commission which envisaged such a possibility could refrain from studying with equal commitment the principle of peaceful settlement of disputes. He for one could not possibly accept the idea that the question of peaceful settlement of disputes lay outside the Commission's mandate on the present topic.

31. Mr. KOROMA said he agreed that the Commission should pay the utmost attention to part 3 of the draft. However, perhaps the Special Rapporteur would clarify whether the dispute settlement mechanism should be invoked before or after countermeasures were taken.

32. Mr. ARANGIO-RUIZ (Special Rapporteur) said that an answer could be given on the basis of paragraph 1 (*a*) of article 12, a paragraph about which Mr. Bowett (2277th meeting) had expressed some misgivings. It specified that no resort should be had to countermeasures until all dispute settlement mechanisms had been exhausted. As to the concept of "all" dispute settlement mechanisms, he wished to see part 3 of the draft strengthened, but would not go so far as to endorse a formula such as the one contained in the proposal by Switzerland in 1973 to CSCE for inclusion in the Helsinki Final Act,[8] a proposal that embodied a system which included conciliation, compulsory arbitration and compulsory jurisdiction both by ICJ and by a new court to be set up for the member countries of CSCE, which amounted to 35 at the present time. States were not yet ready to accept a proposal along those lines. His own approach would be to make provision for a high degree of availability of peaceful settlement procedures, including arbitration and judicial settlement. Broad acceptance of an expanded part 3 could help to avoid or reduce—or at

[7] G. Arangio-Ruiz, "The normative role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", *Collected Courses of The Hague Academy of International Law 1972-III*, (Leiden, Sijthoff, 1974), vol. 137, pp. 629 *et seq.*, and especially pp. 663 *et seq.*, and 682-684.

[8] Conference on Security and Cooperation in Europe, Stage I—Helsinki, Open Sessions, verbatim records, 3-7 July 1973, CSCE/I/PV.6, pp. 32 *et seq.*

least render less arbitrary—resort to countermeasures by an injured State.

33. Mr. VILLAGRAN KRAMER drew the attention of the Special Rapporteur and of the Commission to resolution 1991/72, on "Responsibility for violations of human rights and fundamental freedoms", adopted on 6 March 1991 by the Commission on Human Rights. Paragraph 2 of the resolution considered

> . . . that the establishment of further clear rules regulating responsibility for human rights violations could serve as one of the basic preventive guarantees aimed at averting any infringements of human rights and fundamental freedoms.[9]

The resolution went on in paragraph 3 to invite

> . . . the competent United Nations bodies to consider the question of State responsibility for violations of international obligations in the field of human rights and fundamental freedoms.[10]

He urged the Special Rapporteur to consider the possibility of putting forward some preliminary indications or even advanced ideas on the subject of responsibility for human rights violations.

34. Mr. AL-KHASAWNEH requested the Special Rapporteur to clarify two questions not covered in his comprehensive summing-up. The first was whether treaties ceding territory or establishing boundaries could possibly be considered as protected against countermeasures. The second was whether non-recognition as a response by an injured State to an internationally wrongful act could constitute a countermeasure.

35. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the case of a treaty ceding territory, the question that arose was whether an injured State could cease to comply with the treaty as a countermeasure for a human rights violation by another State. Everything depended on the kind of violation involved. In the event of a gross violation of human rights or violation of the right to self-determination of an entire people, compliance with a treaty of cession could be suspended. It was a matter of proportionality, provided no other problem arose, such as that of *jus cogens*.

36. Non-recognition was certainly a justifiable countermeasure and was in fact one of the political measures he had envisaged as countermeasures. He was thinking, of course, of cases where there was an obligation to recognize. As far as the act of recognition was concerned, States remained free to recognize or not to recognize a foreign Government or State. That did not mean, however, that the non-recognizing State could lawfully ignore the existence of the wrongdoing State—for example, send its aeroplanes to fly in that State's airspace. Viewed as a countermeasure, non-recognition was subject to the same limitations as those set for countermeasures in the draft articles.

37. Lastly, he drew attention to the Advisory Opinion handed down by ICJ in the case concerning *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*[11] on the non-recognition of South Africa's sovereignty over Namibia.

38. The CHAIRMAN said the issue was one of non-recognition by third States of an alleged change of sovereignty. As stated in resolution 2625 (XXV) of the General Assembly embodying the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations:

> No territorial acquisition resulting from the threat or use of force shall be recognized as legal.

In the 1971 Advisory Opinion referred to by the Special Rapporteur, ICJ had held that third States were ". . . under obligation to recognize the illegality of South Africa's presence in Namibia".[12]

39. Mr. ARANGIO-RUIZ (Special Rapporteur) pointed out that, as a result of the setting up of the United Nations Council for Namibia, a travel document had been established for Namibians which was recognized as a valid passport.

40. Mr. SHI said that, although he would not stand in the way of the draft articles on countermeasures being referred to the Drafting Committee, he wished to place on record his reservations regarding the inclusion of countermeasures in the draft articles.

41. Mr. Sreenivasa RAO said that a number of points raised during the discussion had not been answered. He, too, wished to place on record his reservations in terms similar to those used by Mr. Shi.

42. Mr. CALERO RODRIGUES said that the Special Rapporteur's summing-up was a very good reflection of the discussion. The Drafting Committee, in dealing with the present group of articles, should have before it the text of the record of the present meeting and of the summing-up.

43. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the reservations entered by two members confirmed his view that the provisions of part 3 should be expanded.

44. Mr. KOROMA said that he still had an open mind about the question of including provisions on countermeasures in the draft and must therefore reserve his position.

45. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to refer draft articles 11 to 14 and 5 *bis* to the Drafting Committee, for consideration in the light of the discussion.

It was so agreed.

The meeting rose at 11.40 a.m.

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[9] *Official Records of the Economic and Social Council, 1991, Supplement No. 2* (E/1991/22), p. 163.

[10] Ibid.

[11] *I.C.J. Reports 1971*, p. 16.

[12] Ibid., p. 58.