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Summary record of the 2291st meeting

Topic:
Other topics

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could not be regarded as generally acceptable, it was not reasonable . . .”.

Paragraph 54, as amended, was adopted.

The meeting rose at 1 p.m.

2291st MEETING

Tuesday, 21 July 1992, at 3.05 p.m.

Chairman: Mr. Christian TOMUSCHAT

Present: 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. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada.

Draft report of the Commission on the work of its forty-fourth session (*continued*)

CHAPTER III. *State responsibility (continued)* (A/CN.4/L.478 and Corr.1 and Add. 1-3)

B. *Consideration of the topic at the present session (continued)* (A/CN.4/L.478 and Corr.1 and Add.1-3)

3. THE THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*) (A/CN.4/L.478 and Corr.1 and Add.1-3)

(b) *Elements relevant to the inclusion of a regime of countermeasures in the draft articles (continued)* (A/CN.4/L.478 and Add.1 and 2)

(v) *The relationship between the regulation of countermeasures and the proposed part 3 on settlement of disputes (continued)* (A/CN.4/L.478)

1. The CHAIRMAN invited the Commission to resume consideration of chapter III of its draft report, beginning with paragraph 55.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

2. Mr. EIRIKSSON said that the words “it was proposed” should be replaced by “the suggestion was made”, in order to avoid implying that the Commission itself was taking a particular position.

Paragraph 56, as amended, was adopted.

Paragraph 57

3. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the words “He pointed out”, in the last sentence,

should be replaced by “He recalled” and that the words “indicated as” should be inserted before “suitable for judicial settlement”. Two new sentences should then be added, to read: “The Commission should not be discouraged by the reservations made in 1985 and 1986 to the previous Special Rapporteur’s draft articles of part 3. The present international situation was quite different and more encouraging.”

4. Mr. EIRIKSSON said he endorsed the Special Rapporteur’s proposals. In the third sentence, reference had been made to a decision of the “Working Group of 1963”.¹ The sentence had to be amended because a working group did not have the authority to take a decision.

It was so agreed.

5. Mr. JACOVIDES said he supported the amendment proposed by the Special Rapporteur, which reflected the position he himself had taken during the debate.

6. Mr. CALERO RODRIGUES said that he would appreciate clarification of the phrase “at least two of the four categories of disputes falling within the ambit of State responsibility”, in the last sentence of the paragraph.

7. Mr. ARANGIO-RUIZ said that, under Article 36, paragraph 2, of the Statute of ICJ, States parties to the Statute might recognize as compulsory the

. . . jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

It was on that basis that he had stated that at least two of the four categories referred to in Article 36, paragraph 2, of the Statute, namely, those corresponding to paragraphs (c) and (d), fell clearly within the ambit of State responsibility.

8. Mr. CALERO RODRIGUES said that the last sentence of paragraph 57 should be redrafted to read: “At least two of the four categories referred to in Article 36, paragraph 2, of the Statute of the International Court of Justice might fall within the ambit of State responsibility.”

It was so agreed.

9. Mr. VERESHCHETIN asked whether the first sentence, which indicated that countermeasures represented the only means of ensuring respect for international obligations, accurately reflected the Special Rapporteur’s views.

¹ Sub-Committee on State Responsibility which reported to the Commission at its fifteenth session. See *Yearbook . . . 1963*, vol. II, document A/5509, pp. 227-259.

10. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as understood in a very broad sense, countermeasures were the basic means of ensuring respect for international obligations. Mr. Vereshchetin was most likely referring to other measures, such as actions taken by the Security Council in particular cases; however, such actions did not enter into the present debate. He would, for the sake of compromise, be willing to change the first sentence to say that countermeasures represented the "most important" rather than the "only" means.

11. The CHAIRMAN recalled that in his book entitled *How nations behave*, Henkens had pointed out that it was not only fear of countermeasures that made nations comply with international law.

12. Mr. VERESHCHETIN said the Special Rapporteur had himself demonstrated in several of his reports that countermeasures were an evil of modern international life—an unfortunate result of the fact that the world was not properly organized—and that there was a whole spectrum of other measures available, including retortion and actions by the Security Council.

13. Mr. ARANGIO-RUIZ (Special Rapporteur) said he agreed that the first sentence was rather strong. True, States complied with their international obligations in response to many factors, both positive and negative. Furthermore, he did not agree that countermeasures should always be considered as negative factors. They were not the ideal solution, but the international community would have to live with them for the foreseeable future. In the first sentence, therefore, the words "they represented the only means of ensuring" should be replaced by "they represented, for the time being, the most important means of ensuring".

It was so agreed.

Paragraph 57, as amended, was adopted.

(vi) Conditions for the legality of countermeasures (A/CN.4/L.478 and Add.1)

Articles 11, 12 and 13 as proposed by the Special Rapporteur in his fourth report

Paragraphs 58 to 60

Paragraphs 58 to 60 were adopted.

Paragraph 61

14. Mr. VILLAGRAN KRAMER said the first sentence, which stated that the existence of an internationally wrongful act had been widely recognized in the Commission as the *sine qua non* condition for lawful resort to countermeasures, did not correspond to his perception of what had taken place during the debate. As it stood, the sentence implied an overall legal endorsement of reprisals as a whole. It had to be reworded to reflect the fact that there were two opposing views within the Commission on that issue.

15. The CHAIRMAN said that he too was dissatisfied with the first sentence. Had any member actually expressed the view that a State could resort to countermeasures in the absence of an internationally wrongful

act? He suggested that the word "widely" should be deleted.

It was so agreed.

Paragraph 61, as amended, was adopted.

Paragraphs 62 to 65

Paragraphs 62 to 65 were adopted.

Paragraph 66

16. Mr. VILLAGRAN KRAMER said that the phrase "there was general agreement", in the first sentence, did not reflect what had actually happened during the debate. It would be more accurate to say that there had been a consensus, rather than general agreement.

17. The CHAIRMAN said that the word "general" should be deleted from the first sentence.

Paragraph 66, as amended, was adopted.

Paragraph 67

Paragraph 67 was adopted.

Paragraph 68

18. Mr. KOROMA proposed that the word "alleged", in the second sentence, should be inserted before "offending State".

19. Mr. EIRIKSSON said he wondered if the Special Rapporteur would object to giving specific details about the "recent case" referred to in the third sentence.

20. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the case had been brought to his attention by a member of the secretariat and he had not had adequate time to study it properly. The view had been expressed within the international community that, in the case in point, countermeasures might have been used too hastily. It was still an open question and he would prefer not to mention it by name in an official United Nations document.

21. The CHAIRMAN said that the sentence could be interpreted as charging ICJ with being an instrument of power politics. Because of its delicate nature, it would be preferable to delete the sentence.

22. Mr. ROSENSTOCK said that he had no objection to deleting the sentence. However, if it remained, it should not be altered to include any more details since the Special Rapporteur had not been specific in that regard either in his report or during the debate.

23. The CHAIRMAN said that the Commission could not add to the sentence a form of language that had not been used by the Special Rapporteur.

24. Mr. KOROMA said that he would prefer to delete the sentence altogether. Otherwise, the phrase "dealt with by both the Security Council and the International Court of Justice" should be deleted.

25. Mr. JACOVIDES proposed that the phrase "as exemplified by a recent case, dealt with by both the Secu-

rity Council and the International Court of Justice” should be deleted.

26. Mr. BENNOUNA said that the Commission was dealing with a delicate situation. Everyone knew that the matter in question was that of the Lockerbie case,² which had been considered by the Security Council and ICJ, and during which countermeasures had been taken before the accused State had had an adequate chance to justify its actions.

27. Obviously, the final decision on the wording of paragraph 68 lay with the Special Rapporteur. However, he personally agreed with Mr. Eiriksson that, if the Commission referred to a case in its report, the details of the case should be provided in a footnote. Otherwise, mention of the case should be deleted from paragraph 68 and the sentence in question should refer simply to recent practice in a matter considered by United Nations bodies.

28. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that, in the last sentence of the paragraph, the words “as exemplified by a recent case, dealt with by both the Security Council and the International Court of Justice” should be replaced by “as a current case might exemplify”.

29. Following an exchange of views in which Mr. ARANGIO-RUIZ (Special Rapporteur), Mr. MAHIOU, Mr. ROSENSTOCK and Mr. VILLAGRAN KRAMER took part, the CHAIRMAN suggested that the Special Rapporteur’s proposal should be adopted.

It was so agreed.

Paragraph 68, as amended, was adopted.

Paragraphs 69 and 70

Paragraphs 69 and 70 were adopted.

Paragraph 71

30. Mr. VILLAGRAN KRAMER, referring to the Spanish version, said it had not been his impression that the Commission had elevated the concept of proportionality to the level of a principle of international law. He therefore proposed that the words *en virtud del principio de la proporcionalidad* should be replaced by the words *en virtud de la proporcionalidad*.

31. Mr. CALERO RODRIGUES pointed out that, in the English version, the expression used was “test of proportionality”.

Paragraph 71 was adopted, as amended in the Spanish version.

Paragraph 72

32. Mr. BENNOUNA said that the third sentence was extremely complicated: it should be simplified to make it understandable to the reader.

33. The CHAIRMAN suggested that the words “an unlawful act of an irreversible kind” should be replaced by “an unlawful act having irreversible consequences”.

It was so agreed.

Paragraph 72, as amended, was adopted.

Paragraph 73

Paragraph 73 was adopted.

Paragraph 74

34. Mr. EIRIKSSON said that the words “proposed by the Special Rapporteur” should be added at the end of the first sentence.

It was so agreed.

35. Mr. BOWETT, referring to the second sentence, said that it would be helpful if a sentence could be added to explain what exactly was the difference between the substantive and instrumental consequences of countermeasures.

36. Mr. VERESHCHETIN, agreeing with Mr. Bowett, said that, while he was not opposed to the use of the term “substantive and instrumental consequences” in the report, he would object strongly to introducing it into the articles.

37. Mr. CALERO RODRIGUES said he, too, agreed that an explanation of the term in question was required. He was a little concerned to note, however, that paragraph 12 referred to the “instrumental consequences of an internationally wrongful act”. Possibly a cross reference was needed.

38. Following an exchange of views in which Mr. BENNOUNA, Mr. BOWETT and Mr. ROSENSTOCK took part, Mr. ARANGIO-RUIZ (Special Rapporteur) said that the problem in fact arose from an error. He therefore proposed that the word “countermeasures”, in the second sentence of paragraph 74, should be replaced by “internationally wrongful acts” and that, for the sake of clarity, an appropriate cross reference should be included.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraph 75

39. Mr. BENNOUNA proposed that, after the phrase “the element of retribution would remain present in both the substantive and instrumental consequences” the words “of internationally wrongful acts” should be inserted to clarify the intended meaning.

40. Following an exchange of views in which Mr. BOWETT, Mr. KOROMA, Mr. PELLET, Mr. MAHIOU, Mr. RAZAFINDRALAMBO, and Mr. VERESHCHETIN took part, Mr. ARANGIO-RUIZ (Special Rapporteur) said he agreed to the amendment proposed by Mr. Bennouna, which reflected his own intention.

Paragraph 75, as amended, was adopted.

² See 2255th meeting, footnote 8.

Paragraphs 76 to 80

Paragraphs 76 to 80 were adopted.

Paragraph 81

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the words "and to article 4 of part 2 as adopted on first reading" should be inserted at the end of the paragraph.

Paragraph 81, as amended, was adopted.

Paragraph 82

42. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that two sentences should be inserted at the end of the paragraph, reading: "As regards in particular the reference made by one member to Articles 41 and 42 of the Charter of the United Nations, the Special Rapporteur noted that caution should be exercised in that respect in view of the non-egalitarian structure of the international body entrusted with the implementation of those articles. It was also with that consideration in mind that the Special Rapporteur had expressed serious perplexities about article 4 of part 2 as adopted on first reading".

43. Mr. BOWETT proposed that the word "non-egalitarian" should be deleted.

44. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he could accept that change.

Paragraph 82, as amended, was adopted.

Paragraphs 83 to 92

Paragraphs 83 to 92 were adopted.

Paragraph 93

45. Mr. ROSENSTOCK proposed that the word "widely" should be inserted in the last sentence, after the word "therefore".

Paragraph 93, as amended, was adopted.

Paragraph 94

46. Mr. ROSENSTOCK proposed that the word "widely" should be inserted before "considered to be reasonable".

Paragraph 94, as amended, was adopted.

Paragraphs 95 to 114

Paragraphs 95 to 114 were adopted.

(vii) Prohibited countermeasures (A/CN.4/L.478/Add.2)

Article 14 as proposed by the Special Rapporteur in his fourth report

Paragraph 115

Paragraph 115 was adopted.

Paragraph 116

47. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the penultimate sentence of paragraph 116 should be reformulated to read: "Referring to the doctrine accord-

ing to which the prohibition laid down in Article 2, paragraph 4, of the Charter of the United Nations should be subject not only to the exception envisaged in Article 51, but also to other exceptions, he took the view that such a doctrine—with regard to which he had expressed strong reservations in his report—should in any case not affect the prohibition of armed reprisals. If and to the extent that the said doctrine was acceptable, it could only cover those hypotheses in which resort to force might be justified by the grave emergency situations for which Articles 42 to 51 of the Charter had been devised—situations which might or might not justify, according to the case, a broadening of the concept of self-defence, but not an exception to the prohibition of armed countermeasures in reaction to an internationally wrongful act."

Paragraph 116, as amended, was adopted.

Paragraphs 117 to 130

Paragraphs 117 to 130 were adopted.

Paragraph 131

48. Mr. EIRIKSSON said he objected to the expression "the right to the environment," in the third sentence.

49. The CHAIRMAN, in response to a suggestion by Mr. RAZAFINDRALAMBO, proposed that the phrase "the right to a clean and wholesome environment" should be used instead.

Paragraph 131, as amended, was adopted.

Paragraphs 132 to 141

Paragraphs 132 to 141 were adopted.

Paragraph 142

50. Mr. ARANGIO-RUIZ (Special Rapporteur), in reply to a query by Mr. EIRIKSSON, explained that the first sentence of paragraph 142 expressed his own view. He suggested that the words "in his opinion" should therefore be inserted after "emphasized that".

Paragraph 142, as amended, was adopted.

Paragraphs 143 to 147

Paragraphs 143 to 147 were adopted.

Paragraph 148

51. Mr. EIRIKSSON proposed that the word "against" should be inserted after "retaliated", in the second sentence.

Paragraph 148, as amended, was adopted.

Paragraph 149

52. Mr. ARANGIO-RUIZ (Special Rapporteur) proposed that the words "the effects of resort to" should be inserted after the phrase "the analogy with", in the last sentence.

Paragraph 149, as amended, was adopted.

(c) *The question of countermeasures in the context of articles 2, 4 and 5 of part 2 adopted on first reading at previous sessions of the Commission (A/CN.4/L.478/Add.3)*

(i) The question of self-contained regimes

Paragraph 150

53. Mr. PELLET pointed out that, in the French version, the phrase *n'auraient pas le droit*, in the second sentence, was ambiguous. It should read: *n'ont pas le droit*.

Paragraph 150, as amended, was adopted.

Paragraphs 151 to 158

Paragraphs 151 to 158 were adopted.

(ii) The relationship between the draft articles and the Charter of the United Nations

Paragraph 159

54. Mr. PELLET queried the statement, in the second sentence, that the Security Council “was not, according to the doctrinal view, empowered, when acting under Chapter VII, to impose settlements under Chapter VI . . .”. Referring to the settlement of the frontier dispute between Iraq and Kuwait, he wondered whether that statement represented the Special Rapporteur’s own opinion or was based on a study of the doctrine in the matter.

55. Mr. ARANGIO-RUIZ (Special Rapporteur) said that it had been his intention to insert the adjective “prevaling” before the words “doctrinal view”. He was unaware of any sources to show the prevalence of any other view. Certainly, in the light of recent decisions and recommendations by the Security Council which were contrary to that doctrinal view, the matter should be carefully considered at the Commission’s next session. The view recorded in paragraph 159 was based on the combined effect of Chapters VI and VII of the Charter.

56. Mr. ROSENSTOCK said he thought that it would be difficult, in the light of recent practice, to describe the doctrinal view referred to in paragraph 159 as “prevailing”. It might perhaps be described as the “preferred” doctrinal view.

57. Mr. ARANGIO-RUIZ (Special Rapporteur) said he disagreed. The doctrinal view referred to in paragraph 159 was the prevailing view among scholars as to the present state of the law. It might, admittedly, have been modified through an evolutive interpretation of the Charter of the United Nations by States, but he did not agree that the Security Council, which was a political body, had sole authority to interpret Chapters VI and VII of the Charter. He suggested the Commission should avoid dealing with the problems of the Security Council in that respect. He was inclined, for that reason, to dispense with article 4 of part 2 of the draft.

58. Mr. PELLET suggested that in the French text, the phrase should be *selon la doctrine dominante*.

59. Mr. VERESHCHETIN suggested that, to avoid any ambiguity, the second sentence of paragraph 159

should begin “In the opinion of the Special Rapporteur . . .”. Not all the members of the Commission shared that opinion.

60. Mr. BENNOUNA said that paragraph 160 conveyed the Special Rapporteur’s opinion regarding article 4.

61. Mr. JACOVIDES, referring to the *South-West Africa* cases,³ said that paragraph 159 raised a problem of interpretation of the Charter of the United Nations, and especially of Article 25. It should be made clear that the view expressed was the Special Rapporteur’s.

62. The CHAIRMAN proposed that, as suggested by Mr. Vereshchetin, the second sentence should be amended to read: “While, in the opinion of the Special Rapporteur, the Security Council was empowered under the Charter . . .”.

It was so agreed.

Paragraph 159, as amended, was adopted.

Paragraph 160

63. Mr. ARANGIO-RUIZ (Special Rapporteur) said the first sentence of paragraph 160 should be amended to read: “In the view of the Special Rapporteur, article 4, as formulated, might open the way to difficulties. For the moment, he could think of two examples.”

Paragraph 160, as amended, was adopted.

Paragraph 161

64. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that the view reflected in the first sentence was not his own. It was an odd view, he thought, because it implied that problems arising under the Charter of the United Nations could only be resolved by the Security Council, and that no lawyer had anything to say in the matter.

65. Mr. ROSENSTOCK suggested inserting the word “those” before “problems”. An additional sentence could be inserted, reading: “Several members disagreed with the comments of the Special Rapporteur on the ground that they were inconsistent with the responsibilities of the Security Council, the object of Chapters VI and VII, and contemporary practice”. The second sentence could then begin “One member suggested . . .”.

66. Mr. MAHIOU pointed out that paragraph 161 was linked with paragraph 162, which recorded the opposite view expressed by other members of the Commission. However, since paragraph 161 was twice as long as paragraph 162, there was a disparity in the treatment of the two contrasting views.

67. The CHAIRMAN suggested that paragraph 161 should be adopted as amended by Mr. Rosenstock.

It was so agreed.

Paragraph 161, as amended, was adopted.

³ *I.C.J. Reports* 1962, pp. 319 *et seq.* and *ibid.*, 1966, pp. 6 *et seq.*

Paragraphs 162 and 163

Paragraphs 162 and 163 were adopted.

Paragraph 164

68. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the second and third sentences should be deleted and replaced by the following: "For the sake of brevity, he referred to the *Collected Courses of The Hague Academy of International Law, 1972-III* (vol. 137), pp. 629 *et seq.*, and especially 663 *et seq.* and 682-684".

Paragraph 164, as amended, was adopted.

The meeting rose at 6.05 p.m.

2292nd MEETING

Wednesday, 22 July 1992, at 10.35 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Other business

[Agenda item 10]

1. The CHAIRMAN informed the members of the Commission that the Enlarged Bureau had recommended that Mr. Robert Rosenstock should be appointed Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses. If he heard no objection, he would take it that the Commission wished to adopt that recommendation.

It was so agreed.

2. Mr. ROSENSTOCK thanked the members of the Commission for the honour they had bestowed on him.

3. The CHAIRMAN recalled that the General Assembly had authorized the Commission to send a special rapporteur to give a summary account, in the Sixth Committee, of the work of the Commission on a topic with which it had been entrusted. Initially, the Bureau had decided not to send any special rapporteur in the current year; the question had subsequently been reviewed by the Enlarged Bureau, which had, however, not come to any agreement and had not made any recommendation.

He therefore suggested that the members of the Commission should hold consultations on the question.

It was so agreed.

Date and place of the forty-fifth session

[Agenda item 9]

4. The CHAIRMAN informed the members of the Commission that the Enlarged Bureau recommended that the next session of the Commission should be held from 3 May to 23 July 1993 in Geneva. If he heard no objection, he would take it that the Commission wished to adopt that recommendation.

It was so agreed.

Draft report of the Commission on the work of its forty-fourth session (*continued*)

CHAPTER III. *State responsibility (continued)* (A/CN.4/L.478 and Corr.1 and Add. 1-3)

B. *Consideration of the topic at the present session (continued)* (A/CN.4/L.478 and Corr.1)

3. THE THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*) (A/CN.4/L.478 and Corr.1 and Add.1-3)

(c) *The question of countermeasures in the context of articles 2, 4 and 5 of part 2 adopted on first reading at previous sessions of the Commission (continued)* (A/CN.4/L.478/Add.3)

(iii) The question of differently injured States

5. The CHAIRMAN invited the Commission to resume consideration of chapter III of the draft report, starting with paragraph 165.

Paragraph 165

Paragraph 165 was adopted.

Paragraphs 166 to 170

Paragraphs 166 to 170 were adopted.

Paragraph 171

6. Mr. CRAWFORD said that, in the second sentence, the idea would be clarified by referring to "the most affected State or States" instead of "most affected State".

Paragraph 171, as amended, was adopted.

Paragraph 172

Paragraph 172 was adopted.

Paragraph 173

7. Mr. CRAWFORD proposed that, for the sake of clarity, the three issues referred to at the beginning of the paragraph should be differentiated. The beginning of the first sentence would then read: "Three other issues were raised in the present context: (a) the problem of a plurality of wrongdoing States; (b) the question of collective countermeasures, i.e. the case where the most affected