YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1992

Volume I

Summary records of the meetings of the forty-fourth session
4 May-24 July 1992

UNITED NATIONS
NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the Yearbook of the International Law Commission are abbreviated to Yearbook . . . , followed by the year (for example, Yearbook . . . 1990).

The Yearbook for each session of the International Law Commission comprises two volumes:
Volume I: summary records of the meetings of the session;
Volume II (Part One): reports of special rapporteurs and other documents considered during the session;
Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the Yearbook issued as United Nations publications.

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This volume contains the summary records of the meetings of the forty-fourth session of the Commission (A/CN.4/SR.2253-A/CN.4/SR.2294), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.
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<td>Mr. Ahmed Mahiou</td>
<td>Algeria</td>
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<tr>
<td>Mr. Awn Al-Khasawneh</td>
<td>Jordan</td>
<td>Mr. Vaclav Mikulka</td>
<td>Czechoslovakia</td>
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<tr>
<td>Mr. Gaetano Arangio-Ruiz</td>
<td>Italy</td>
<td>Mr. Guillaume Pambou-Tchivounda</td>
<td>Gabon</td>
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<tr>
<td>Mr. Julio Barboza</td>
<td>Argentina</td>
<td>Mr. Alain Pellet</td>
<td>France</td>
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<td>Mr. Mohamed Bennouna</td>
<td>Morocco</td>
<td>Mr. Pemmaraju Sreenivasa Rao</td>
<td>India</td>
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<tr>
<td>Mr. Derek William Bowett</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
<td>Mr. Edilbert Razafindralambo</td>
<td>Madagascar</td>
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<tr>
<td>Mr. Carlos Calero Rodrigues</td>
<td>Brazil</td>
<td>Mr. Patrick Lipton Robinson</td>
<td>Jamaica</td>
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<tr>
<td>Mr. James Crawford</td>
<td>Australia</td>
<td>Mr. Robert Rosenstock</td>
<td>United States of America</td>
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<td>Mr. John de Saram</td>
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<td>Mr. Gudmundur Eiriksson</td>
<td>Iceland</td>
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<td>Mr. Edmundo Vargas Carreño</td>
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<td>Mr. Peter Kabatsi</td>
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<td>Mr. Vladlen Vereshchetin</td>
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<td>Sierra Leone</td>
<td>Mr. Francisco Villagran Kramer</td>
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<td>Mr. Mochtar Kusuma-Atmadja</td>
<td>Indonesia</td>
<td>Mr. Chusei Yamada</td>
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<td>Mr. Alexander Yankov</td>
<td>Bulgaria</td>
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### OFFICERS

**Chairman:** Mr. Christian Tomuschat  
**First Vice-Chairman:** Mr. Carlos Calero Rodrigues  
**Second Vice-Chairman:** Mr. Andreas J. Jacovides  
**Chairman of the Drafting Committee:** Mr. Alexander Yankov  
**Rapporteur:** Mr. Edilbert Razafindralambo

Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel, represented the Secretary-General and Mr. Vladimir S. Kotliar, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General.
AGENDA

The Commission adopted the following agenda at its 2253rd meeting, held on 4 May 1992:

1. Organization of work of the session.
2. State responsibility.
4. The law of the non-navigational uses of international watercourses.
5. International liability for injurious consequences arising out of acts not prohibited by international law.
6. Relations between States and international organizations (second part of the topic).
7. Programme, procedures and working methods of the Commission, and its documentation.
8. Cooperation with other bodies.
9. Date and place of the forty-fifth session.
10. Other business.
ABBREVIATIONS

CSCE  Conference on Security and Cooperation in Europe
ECA   Economic Commission for Africa
ECE   Economic Commission for Europe
EEC   European Economic Community
FAO   Food and Agriculture Organization of the United Nations
GATT  General Agreement on Tariffs and Trade
ICJ   International Court of Justice
ICRC  International Committee of the Red Cross and Red Crescent
ILA   International Law Association
OAS   Organization of American States
OAU   Organization of African Unity
OECD  Organisation for Economic Cooperation and Development
PCIJ  Permanent Court of International Justice
UNCED United Nations Conference on Environment and Development
UNEP  United Nations Environment Programme
UNESCO United Nations Educational, Scientific and Cultural Organization

* *

I.C.J. Reports  ICJ, Reports of Judgments, Advisory Opinions and Orders
P.C.I.J. Series A  PCIJ, Collection of Judgments (nos. 1-24: up to and including 1930)
P.C.I.J. Series A/B  PCIJ, Judgments, Orders and Advisory Opinions (nos. 40-80: beginning in 1931)

* *

NOTE CONCERNING QUOTATIONS

Unless otherwise indicated, quotations from works in languages other than English have been translated by the Secretariat.
MULTILATERAL CONVENTIONS

cited in the present volume

Source

HUMAN RIGHTS


PRIVILEGES AND IMMUNITIES, DIPLOMATIC RELATIONS


ENVIRONMENT AND NATURAL RESOURCES

International Convention on Civil Liability for Oil Pollution Damage (Brussels, 29 November 1969) Ibid., vol. 973, p. 3.

LAW OF THE SEA

LAW APPLICABLE IN ARMED CONFLICT


and Additional Protocols I and II (Geneva, 8 June 1977) Ibid., vol. 1125, pp. 3 et seq.

LAW OF TREATIES


NARCOTIC DRUGS


CIVIL AVIATION


LIABILITY


TERRORISM


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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FORTY-FOURTH SESSION

Held at Geneva from 4 May to 24 July 1992

2253rd MEETING

Monday, 4 May 1992, at 3.10 p.m.

Acting Chairman: Mr. Husain AL-BAHARNA
Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafrinalamb, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiain, Mr. Vargas Carreno, Mr. Vereshchetin, Mr. Villaigran Kramer, Mr. Yamada, Mr. Yankov.

Opening of the session

1. The ACTING CHAIRMAN declared open the forty-fourth session of the International Law Commission.

Statement by the Acting Chairman

2. The ACTING CHAIRMAN, speaking on behalf of the Bureau at the forty-third session, extended a warm welcome to the members of the Commission. He said that the expertise of the new members would undoubtedly contribute to the effectiveness of the Commission's work. He was sure that the spirit of collegiality and mutual esteem that was one of the distinctive features of the Commission would prevail in the five years ahead, as it always had in the past. Unfortunately, the outgoing Chairman had been prevented from attending the meeting, but would be present the next day, when the Commission would doubtless provide him with an opportunity to review the developments which had taken place in the Sixth Committee in connection with the Commission's report.

Statement by the Legal Counsel, Representative of the Secretary-General

3. Mr. FLEISCHHAUER (Legal Counsel, Representative of the Secretary-General), speaking on behalf of the Secretary-General, welcomed the members of the Commission and reiterated his congratulations to all members on their election or re-election. He said that, while many changes had taken place in the United Nations during the past few years, and especially the past few months, the Organization's fundamental concerns remained the same. Among them was the progressive development and codification of international law, which it was incumbent upon the General Assembly to promote under Article 13, paragraph 1 (a), of the Charter of the United Nations. Indeed, progressive development and codification of international law were important both for the maintenance of international peace and security and for the building of international cooperation. The new Secretary-General was deeply committed to the promotion of international law and to the enhancement of the role of the Organization in international affairs. He wished the Commission complete success in accomplishing the tasks which lay ahead and expressed the hope that the new term of office of members would be as fruitful as the one recently concluded.

The meeting was suspended at 3.20 p.m. and resumed at 3.40 p.m.

Election of officers

4. The CHAIRMAN expressed his thanks to members for the confidence they had shown in him and assured them that he would do everything in his power to make the session a success, although he could hardly hope to match what had been achieved under his predecessor at the previous session. In welcoming new members, he remarked that the Commission would shortly be called upon to determine new topics and, while continuing to apply the methods which had proved so effective in the past, might wish to strengthen its working capacity by adopting new procedures from time to time. A high degree of flexibility would, of course, be needed. In particular, when a topic could not be adequately addressed without some consideration of arguments of legal policy, the Commission should devise a mechanism for obtaining information which, although not of a strictly legal
nature, was none the less relevant to the issues under discussion. The Commission’s record showed that it had always succeeded in overcoming difficulties and he hoped that, with the cooperation of all concerned, it would continue to achieve highly positive results.

Mr. Calero Rodrigues was elected First Vice-Chairman by acclamation.

Mr. Jacovides was elected Second Vice-Chairman by acclamation.

Mr. Yankov was elected Chairman of the Drafting Committee by acclamation.

Mr. Razafindralambo was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/441)

The agenda (A/CN.4/441) was adopted.

5. The CHAIRMAN said that the order of consideration of the agenda items would be decided later, based upon the proposals of the Enlarged Bureau. The question of new topics would be considered under item 7 (Proclamation).

The meeting was suspended at 4 p.m. and resumed at 4.50 p.m.

Organization of work of the session

[Agenda item 1]

6. The CHAIRMAN said that the Enlarged Bureau proposed that the Commission should take up the topic of the draft Code of Crimes against the Peace and Security of Mankind on the following day, 5 May, at which time the Special Rapporteur would introduce his tenth report. The discussion in plenary would continue until 13 May. The consideration of State responsibility would start on 14 May and would, in principle, end on 29 May, but could go on into June, if need be. The Drafting Committee would meet in the afternoons, starting on 6 May. Mr. Yankov, the Chairman of the Drafting Committee, would be holding consultations on the Committee’s membership. Members of the Planning Group would hold their first meeting on 7 May under the chairmanship of Mr. Calero Rodrigues. The decision on the membership of the Planning Group would depend upon the chairman of the Drafting Committee.

7. Mr. CALERO RODRIGUES (Chairman of the Planning Group) said the Planning Group was open-ended. Everyone was invited to attend and participate.

8. The CHAIRMAN suggested that the request contained in paragraph 6 of General Assembly resolution 46/54 of 9 December 1991, regarding the planning of the Commission’s activities and its methods of work, should be considered under item 7.

9. Mr. ROSENSTOCK said he hoped that some of the mornings until 13 May could be assigned to the Planning Group. It was disappointing that consideration of State responsibility was not to begin until 14 May.

10. The CHAIRMAN said that the Commission was flexible in its approach. If there were no speakers on the list, one morning meeting could be devoted to the programme of the Planning Group.

11. Mr. ROSENSTOCK said that a concerted effort must be made to set aside time for the Planning Group; that should not be made contingent upon the absence of speakers on the list on a given morning.

12. Mr. CALERO RODRIGUES (Chairman of the Planning Group) said that the Planning Group might meet at least one afternoon a week. In addition, when time allotted to the plenary was not used, it could be devoted either to the Drafting Committee or the Planning Group, as necessary.

13. Mr. ARANGIO-RUIZ drew the attention of the members of the Commission to conference room document 1, which reproduced the draft articles on State responsibility. He said it was his assumption that the Drafting Committee would begin consideration of draft articles 6-10 of part 2. As Special Rapporteur, he had introduced his third report1 at the previous session and was looking forward to the comments of members. It was to be hoped that the Drafting Committee would complete its drafting of the articles on the legal consequences of internationally wrongful acts, with the exception of crimes and of part 3 of the draft, which concerned implementation, and that the plenary would adopt them on first reading.

14. Mr. YANKOV (Chairman of the Drafting Committee) said that about 10 articles on the topic of international liability for injurious consequences arising out of acts not prohibited by international law had been referred to the Drafting Committee; presumably they would be included in the Committee’s programme of work. It was to be hoped that the relevant articles on State responsibility could be completed at the present session and that a start could be made on some of the draft articles on international liability.

15. Mr. ARANGIO-RUIZ said it was important for one or more English speakers and one or more French speakers to be regular members of the Drafting Committee. The Committee was open-ended, but it should not be used by non-members to deliver speeches they had wanted to deliver in plenary, because that would interfere with the Committee’s work.

16. The CHAIRMAN said he took it that the Commission agreed to the plan of work proposed by the Enlarged Bureau, bearing in mind Mr. Rosenstock’s request that sufficient time should be allotted to the Planning Group.

It was so agreed.

The meeting rose at 5.15 p.m.

1 See Yearbook... 1991, vol. II (Part One), document A/CN.4/440 and Add.1 for text and vol. 1, 2238th meeting, paras. 2-24 for introduction.
2254th MEETING

Tuesday, 5 May 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 Rodríguez, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabati, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiham, Mr. Vargas Carreno, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN recalled that, at the forty-third session, the Commission had concluded its consideration of the draft Code on first reading and had requested Governments to submit their comments and observations on it by 1 January 1993. It would therefore be unable to begin the second reading until the 1993 session. The inclusion of the item on the agenda of the present session responded, however, to the request contained in paragraph 3 of General Assembly resolution 46/54 of 9 December 1991. The report (A/CN.4/442) which was before the Commission dealt with the issue referred to in the resolution, namely, the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court.

2. Mr. THIAM (Special Rapporteur) said that he had intended to submit a draft statute for an international criminal court to the Commission, but had been dissuaded from doing so by General Assembly resolution 46/54. He had, therefore, endeavoured to consider further the idea of an international criminal court by referring in his tenth report to certain issues already discussed at preceding sessions and by tackling some new ones. Part one of the report was devoted to the consideration of certain objections to the possible establishment of an international criminal court. In that connection, he referred to an article by Mr. Bennouna which had appeared in the *Annuaire français de droit international* in which the latter had mentioned some of the problems that might give rise to doubts about the advisability of establishing such a court: the Commission was not, however, called upon to judge the validity of any decision to be taken in that respect, since that was not the mandate it had received from the General Assembly. The champions and opponents of the establishment of an international criminal court continued to cross swords without convincing one another; the arguments on both sides were known and therefore he had summarized them only briefly in the report. Part two dealt with six more specific issues, which were presented in the form of possible draft provisions, but not draft articles which the Commission would have to refer to the Drafting Committee; that explained the rather unusual style in which the provisions were drafted. Furthermore, he had decided not to draw up an inventory of all the problems arising in connection with the issue, but had simply drawn attention to the most important ones, on whose solution the establishment of the court would depend.

3. Two alternative possible draft provisions were proposed in connection with the first issue, that of the law to be applied, which read:

ALTERNATIVE A

The Court shall apply international criminal law and, where appropriate, national law.

ALTERNATIVE B

The Court shall apply:

(a) International conventions, whether general or particular, relating to the prosecution and prevention of crimes under international law;
(b) International custom, as evidence of a practice accepted as law;
(c) The general principles of criminal law recognized by the United Nations;
(d) Judicial decisions and teachings of highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law;
(e) Internal law, where appropriate.

Alternative A was generic, while alternative B was analytical. Alternative B was to be found in all earlier drafts on the question, except for the draft which had been prepared by the 1953 United Nations Committee on International Criminal Jurisdiction, on which alternative A was based.

4. The second issue was that of the jurisdiction of the court *ratiorne materiae*, which had already been discussed at length at the preceding session by those in favour of exclusive jurisdiction and those in favour of concurrent jurisdiction with national courts. The possible draft provision read:

1. All States Parties to this Statute shall recognize the exclusive and compulsory jurisdiction of the Court in respect of the following crimes:

- Genocide;
- Systematic or mass violations of human rights;


3 For summary of discussion, see *Yearbook... 1991*, vol. II (Part Two), paras. 106 et seq.
Apartheid;
Illicit international trafficking in drugs;
Seizure of aircraft and kidnapping of diplomats or internationally protected persons.

2. The Court may take cognizance of crimes other than those listed above only if jurisdiction has been conferred on it by the State(s) in whose territory the crime is alleged to have been committed and by the State which has been the victim or whose nationals have been the victims.

3. The Court shall not be competent to hear appeals against decisions rendered by national jurisdictions.

On that problem, to which he did not dare hope to have found a fully satisfactory solution, the idea underlying the draft provision was one expressed at the last session, namely, that certain crimes, such as genocide, were of such a nature that they could not but come within the exclusive jurisdiction of the court. Paragraph 1 thus listed a number of such crimes and it would be for the Commission to decide whether to add to or delete from the list. In respect of other crimes, the court would have jurisdiction only by conferment. As to the question of which States would be empowered to confer jurisdiction on the court, it would be as difficult to expand their number indefinitely as to dispense with the conferment-of-jurisdiction rule. The explanation for paragraph 3 was that the question of the competence of the court to hear appeals had been discussed at length at the Commission's preceding session and then in the Sixth Committee of the General Assembly. The text, which was drafted in negative terms, was probably unsatisfactory, but it would provide an opportunity for the members of the Commission to make their views known on that aspect of the question.

5. He had not perhaps addressed the third issue, that of complaints before the court, as clearly as he should have done at the preceding session when he had referred to the public right of action and several members of the Commission had rightly made the point that States could not exercise an international public right of action. Only the Security Council or a prosecutor's office could do so.

6. The possible draft provision he was proposing on complaints before the court read:

1. Only States and international organizations shall have the right to bring complaints before the Court.

2. It shall be immaterial whether the person against whom a complaint is directed acted as a private individual or in an official capacity.

The real question was who could bring a complaint before the court. The answer was naturally that cases would be brought before the court by States and, in addition, by international organizations. It mattered little whether the complaint related to an individual having acted in a personal capacity or one vested with some official power. He would nevertheless like the members of the Commission to tell him whether they thought that certain juridical persons under municipal law, such as anti-racist or human rights associations, whose goals were universal, might not also bring complaints before the court. In that connection, he explained that he had deliberately avoided using the word "saisine" (referral), which was a civil law term, in the draft provision.

7. As to the fourth issue, on proceedings relating to compensation, he was proposing a possible draft provision which read:

1. Any State or international organization may bring proceedings to obtain compensation for injury sustained as a consequence of a crime referred to the Court.

2. A State may also bring such proceedings on behalf of its nationals.

It might be asked whether, in addition to States and international organizations, associations of the type to which he had just referred might not also institute proceedings before the court to obtain compensation for moral injury, and what the relationship between the court and ICJ would be in such a case. A State victim of a crime might bring a complaint before the court and, when the case was considered, institute a civil action before the same body. But it might also institute proceedings to obtain reparations before ICJ under Article 36, paragraph 2, of the Court's Statute. In that case, would ICJ have to wait until the international criminal court had ruled on the criminal nature of the act or could it ignore its existence?

8. As to the fifth issue, on handing over the subject of criminal proceedings, he was proposing two alternative possible draft provisions which read:

ALTERNATIVE A

The handing over of an alleged perpetrator of a crime to the prosecuting authority of the Court is not an extradition. The International Criminal Court is deemed for the purpose of this Statute a Court common to all the States Parties to the Statute, and justice administered by this Court shall not be considered as justice emanating from a foreign court.

ALTERNATIVE B

Every State Party to this Statute shall be required to hand over to the prosecuting authority of the Court, at the request of the Court, any alleged perpetrator of a crime coming within its jurisdiction.

The words "handing over the subject" in the title had been used advisedly because it did not seem possible to speak of extradition in such cases. If States agreed to establish an international criminal court, it would be inconceivable that the court could obtain the handing over of an accused person only through extradition.

9. Concerning the sixth and last issue, on the double-hearing principle, he recalled that some members of the Commission, but not many, had been in favour of giving the court appeal jurisdiction, an approach vigorously opposed by others, who had taken the view that allowing the court to review rulings of national courts would undermine the sovereignty of States. After due consideration, he had tried to propose an intermediate solution, which read:

1. The Court shall be both a court of first instance and a court of final appeal in respect of criminal cases within its jurisdiction.

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6 Ibid., paras. 116 et seq.
8 See footnote 6 above.
2. Nevertheless, in order to guarantee the double-hearing principle, a special chamber of judges, excluding those who were involved in making a ruling, may consider an appeal against that ruling.

For some members of the Commission, the right of appeal of the person found guilty was a basic human right. Perhaps those who supported that line of reasoning could agree to paragraph 2 of his text.

10. He hoped that his work, however imperfect, would serve as a basis for discussion. He had not wanted to revert to the problem of the method of establishing the court, for that was a matter for political rather than judicial bodies. He personally did not think that it was enough for the General Assembly to adopt a resolution establishing such a court: a convention to which States would accede was also necessary.

11. The CHAIRMAN thanked the Special Rapporteur for the introduction to his report.

12. Mr. CALERO RODRIGUES, on a procedural point, noted that the report of the Special Rapporteur consisted of two parts, the first dealing with objections to the possible establishment of the court and the second with more specific problems, such as the jurisdiction of the court or the organization of its proceedings. If each speaker intended to discuss all those questions in the same statement, a protracted discussion might well ensue at a very general level, whereas it was probably time to be more specific. He therefore proposed starting with a general discussion on part one, followed by a discussion on part two, during which members could state their views on each of the problems raised by the Special Rapporteur. The Commission would not be short of time at the current session and it would be easier for each of the members, in particular the new ones, to speak briefly on each question and then receive replies. Used flexibly, that method would be conducive to fruitful discussions.

13. The CHAIRMAN said that he would like to know what the members of the Commission thought of that proposal.

14. Mr. ROSENSTOCK said that he supported the proposal, but was in favour of going into some of the problems discussed in the commission’s report on the work of its forty-second session in greater depth once the specific questions had been considered.

15. Mr. YANKOV said that he also supported the proposal by Mr. Calero Rodrigues, but wondered when and how the Special Rapporteur would reply to the speakers: after the consideration of each question or at the end of the discussion? As Chairman of the Drafting Committee, he stressed that the method chosen might also have an impact on the work of that body.

16. Mr. ARANGIO-RUIZ said that the Commission should either decide to adopt simultaneously and in a single instrument a draft Code of Crimes against the Peace and Security of Mankind and the statute of an international criminal court or abandon the idea of a draft Code because such a Code would then be largely inoperative.

17. An international criminal court would not undermine the sovereignty of States any more than the system of universal jurisdiction, which, in practice, subjected the nationals of a State to the jurisdiction of another State without an acceptable guarantee of a fair trial. The Commission and its parent body, the General Assembly, had been playing hide-and-seek for several years. The General Assembly had never given the Commission any clear answers when the latter had asked whether it should deal with the specific problem of the establishment of an international criminal court and had, instead, always invited the Commission to consider the issue further. As a result, the Commission had never regarded it as part of its mandate to consider the problem as thoroughly as it might have done and the Special Rapporteur had, for fear of displeasing the Sixth Committee or the General Assembly, restricted himself to making a few comments on the subject rather than undertaking a real study. Yet it was for the Commission, composed as it was of legal experts, to decide whether the Code was feasible without an international criminal court. If it took the view that the Code was feasible only in conjunction with an international criminal court, it should say so to the General Assembly and work on the statute of that court. If it did not regard the establishment of an international criminal court as feasible, it should acknowledge that the Code was utopian. If the Commission did not take that decision, which was incumbent upon it, the same problem would arise year after year and the same question would be put to the General Assembly.

18. Mr. RAFAEL Pimenta said that he supported Mr. Calero Rodrigues’ proposal, which was in keeping with the practice regularly followed in the Commission and the Sixth Committee and which would allow the new members of the Commission to take the floor as they saw fit on either part of the report. However, that should not prevent members who so wished from speaking on both parts of the report at the same time, perhaps at the end of the discussion.

19. Mr. PELLET said that he also supported Mr. Calero Rodrigues’ proposal, but was concerned that too much flexibility might make it a dead letter.

20. With regard to the comments by Mr. Arangio-Ruiz, the issue raised in part one of the report was of fundamental importance and he did not share Mr. Thiam’s point of view that the Commission was not mandated to discuss the question of the desirability of establishing a court. General Assembly resolutions 45/41 of 28 November 1990 and 46/54 of 9 December 1991 had requested the Commission to study proposals for the establishment of a court and it was for the Commission to say whether such a court was feasible or not, from the legal point of view at any rate.

21. Mr. GÜNTER said that he also supported Mr. Calero Rodrigues’ proposal.

22. Mr. ARANGIO-RUIZ said that the first part of Mr. Thiam’s report dealt with proposals for the establishment of an international criminal court, but, in his view, the question of the link between the court and the Code must be considered before any other questions to which the establishment of an international criminal court might give rise. The Commission had produced ex-
The jurisdiction of the international criminal court would be much more limited; but the question had not been settled.

Mr. IDRIS said that he found Mr. Calero Rodrigues' proposal interesting, but hoped that the way in which the discussion was to be divided up would also enable the Commission to review the topic comprehensively, without, however, engaging in a lengthy Sixth Committee-style political debate. He also hoped that the general debate and the subsequent point-by-point consideration of the issues dealt with in part two of the report would not prejudice the prospects of the possible draft provisions being prepared by the Special Rapporteur.

Mr. KABATSI said that the Commission’s duty was not to put questions to the General Assembly, but to make specific proposals which the General Assembly could accept, reject or amend. He wondered whether it was really necessary to consider the possibility of establishing an international criminal court. Could the jurisdiction of ICJ not be expanded in such a way as to entrust it with the implementation of the Code?

Mr. PELLET said he feared that, if the Commission accepted Mr. Rosenstock’s proposal, as amended by Mr. Mikulka, it would be setting out on an interminable marathon. The fact was that the Commission could not definitively settle the problem of the statute of the possible international criminal court at the current session. However, the general debate and the discussion on the various issues set out in the report should make it possible to clarify ideas and, on that basis, to make some headway.

Mr. THIAM (Special Rapporteur) said that he agreed with the proposal by Mr. Calero Rodrigues.

With regard to substance, he recalled that, as early as 1950, the Commission had indicated that it considered the establishment of an international criminal court possible and desirable and it had not changed its mind since then. As Special Rapporteur, he felt bound by that view, unless the Commission decided to call it into question.

Replying to the comment by Mr. Rosenstock, he said that, of the large number of issues raised in the Commission’s 1990 report, he had focused on those ideas which seemed crucial for the establishment of an international criminal court, with perhaps one exception, namely, the expansion of the jurisdiction of ICJ. In that connection, he recalled that the Commission had not recommended the establishment of a criminal chamber, since it would require the amendment of the Statute of ICJ and hence of the Charter of the United Nations.

As Special Rapporteur, he was entirely in the hands of the Commission and he expected it to provide specific guidelines, without which the discussions would make no progress. He dared hope, though he in no way overlooked the problems, that a consensus of ideas and a will would emerge. In due course, at the conclusion of the discussion at the current session, he would propose that the Commission should set up a working group on the topic under consideration, even though there was a danger that a working group would merely reflect the Commission’s divergent views.

In the meantime, he proposed that the Commission should consider his tenth report according to the method suggested by Mr. Calero Rodrigues.

The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to split the consideration of the report into two parts, as suggested by Mr. Calero Rodrigues, with a general debate on part one and then a specific discussion on each of the questions covered in part two, on the understanding that that approach would be applied with the necessary flexibility.

It was so agreed.

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12 Ibid., para. 145.
37. Mr. BENNOUINA, taking note with interest of the report submitted by the Special Rapporteur, said that he wished to raise a number of preliminary questions in connection with the establishment of an international criminal court to which answers would be required.

38. The first concerned the relationship between the draft Code and the possibility of establishing such a court. The question was fundamental, and must be answered without delay, to avoid making the same mistake as in the 1950s, when the two topics had been regarded as separate and the Commission had come to grief on both of them. In fact, the court was ultimately only the embodiment of the Code and had no existence in its own right. That was why he regretted that the question of the Code and that of the court had been considered separately—albeit no doubt for practical reasons—when they were actually closely related. The Commission, which was now called upon to consider the question of the establishment of an international criminal court, still had to bear in mind the spirit of the Code and its shortcomings, as well as the problems of methodology that had arisen during the drafting. Two of those problems remained and were the key to any progress.

39. The first methodological problem was to determine whether the Code should apply to both individuals and States or to individuals alone. The Commission had decided early on that it would only apply to individuals, leaving the question of its application to States in abeyance. The question was coming up again, however, since the State could always be discerned behind certain of the crimes listed in the draft Code, such as State terrorism, aggression, genocide and colonialism. A court whose jurisdiction would extend to States could not be viewed in the same light as a court whose function was to try individuals only. A judgement against a State was not based on the same logic or technique as a judgement against a person. The Commission had to solve that problem, for, otherwise, it would keep cropping up or ambiguities would remain.

40. The second methodological problem had to do with universal jurisdiction and its relationship to the establishment of an international criminal court. The question had already been raised and the draft Code had been prepared on the basis of the principle of universal jurisdiction, without, however, prejudicing the establishment of a universal criminal court, so that some provisions of the draft Code which were valid within the context of universal jurisdiction would have to be amended if an international criminal court were established. It might be asked whether the two types of jurisdiction—universal jurisdiction and the jurisdiction of an international criminal court—were mutually exclusive or whether they could exist concurrently. In other words, did the establishment of an international criminal court imply the abandonment of the principle of universal jurisdiction? Did it mean that all States would definitively lose their jurisdiction, or could the two systems coexist? Would it be possible to have recourse to the international court only in certain cases, when the exercise of universal jurisdiction gave rise to serious problems? Would it not be possible for the court of a third country to have trial jurisdiction, possibly with international participation?

41. In the case of certain crimes, such as aggression or mercenarism, moreover, it would be inconceivable to separate charges against an individual from charges against the State. While it was not difficult to determine the responsibility of a head of State or a minister, what would happen if it was the parliament which decided, by a majority vote, by consensus, or anonymously, by secret ballot, to attack another country or to finance terrorism? Could it be charged? That was one of the many questions that had been asked, but not answered.

42. Crimes against the peace and security of mankind were the corollary of peace-keeping activities, which were the responsibility of the United Nations Security Council. However, the question of the relationship between the Security Council and any future international criminal court had also not been answered and neither had that of the relationship between the powers of the Security Council and those which would be conferred on a judge called upon to determine the existence of an act of aggression, for example. Under Article 39 of the Charter of the United Nations, it was the Security Council that determined the existence of an act of aggression. Who then was the judge? The question had been raised in the Commission, but had been left in abeyance because it was so difficult. Accordingly, the Security Council would not be bound by the Code any more than it was bound by General Assembly resolution 3314 (XXIX) of 14 December 1974, on the definition of aggression. If the Council took action, it did so by virtue of Article 103 of the Charter. The question was thus what the relationship would be between the Charter of the United Nations and the Code. Would the Charter take precedence over the Code? The issue had to be considered from the legal point of view.

43. There was another preliminary question, namely, whether the Code would be binding on all States or only on those that had subscribed to it and, consequently, whether the jurisdiction of the international criminal court would be general or confined to States parties. The answer to that question was vital and the case of ICJ and the European Court of Human Rights provided no guidance, as they involved two entirely different systems with different objectives.

44. The question of penalties had also not received adequate attention. Was it possible to conceive of a code that would not provide for penalties and of a criminal court that would devise the applicable penalties ad hoc? What then would become of the nulla poena sine lege principle? It would, moreover, be difficult for an international court to apply internal law in that area, because it varied considerably from one State to another, witness the penalty of capital punishment, which had been abolished in some countries, but retained in others for various reasons.

45. Another question was who would have the right to bring a case before the international court? All possibilities had been considered and the Special Rapporteur had even spoken of a prosecutor’s office attached to the international court. In his own view, it would be better not to transpose certain notions of internal law into international law. In States, the prosecuting authority was the representative of the executive; that would mean that the
47. If an international court was actually created, it would represent a world executive, which seemed far-fetched. Moreover, would the prosecutor’s office act on its own initiative or solely upon request and, if so, at whose request? The question remained. The best thing would perhaps be to envisage a kind of popular right of action whereby any State could bring a case before the court and, if the possibility of bringing proceedings was extended to individuals, to provide for screening to prevent frivolous claims, as was done for the European Court of Human Rights, for instance.

46. Yet another question concerned the power of the international court to carry out investigations or inquiries, which would allow the examining magistrate attached to the international court to go to any given country to hold an inquiry or take evidence. That would probably be extremely difficult.

47. If an international court was actually created, it would, of course, have to be established in a particular country and the question of the seat of the court and of the immunities linked to the sovereignty of the State where the court had its seat, along with the question of the place where sentences would be carried out, would probably have to be examined.

48. Turning to the general considerations which formed the subject of part one of the Special Rapporteur’s report, he noted that the establishment of an international criminal court was far from being decided. In resolution 46/54 of 9 December 1991 the General Assembly merely invited the Commission to study the possibility of establishing such a court. It was for the Commission to answer the crucial question whether or not such a court was necessary and whether or not the Code could be applied without it. It should also not be forgotten that there already existed an international order: the prospective court must not transform it, but rather blend in with it.

49. The problem was not one of efficiency, as the Special Rapporteur seemed to suggest in his report, but one of the relationship between international law and internal law, between sovereignty and the international order. The principle “try or extradite” had been distilled by the existing international order and any modification of it would be tantamount to modifying the international order. As for the lack of objectivity of national courts, there was a real risk of that not only for weak States, which were not always capable of countering the moves of certain criminal organizations, as the Special Rapporteur stated in the report, but also for strong States like France, a permanent member of the Security Council—the kind of stir the Touvier case was currently creating there among public opinion was well-known. In that connection, he again stressed the need to avoid any comparison with ICJ and the European Court of Human Rights, which were cited by way of example in the report, for ICJ, the main judicial organ of the United Nations, had been set up in the aftermath of the Second World War and the European Court formed part of a highly integrated political system, that did not yet extend to the world order. It should also not be forgotten that, as already pointed out at the preceding session, the establishment of an international criminal court would inevitably have repercussions on the constitutional order of some States. Those were the issues on which the Commission should reflect during its debate and to which there was no ready answer. He reserved the right to revert to certain points raised in the report of the Special Rapporteur, whom he congratulated on his contribution to the work of the Commission.

50. Mr. FOMBA said that all documents relating to the item under consideration should be circulated to the members of the Commission, and particularly to the new members, at the proper time. It would have been helpful, for example, if the new members could have acquainted themselves with the 1990 report so as to have an initial insight into the problems involved in the establishment of an international criminal court. He wished, however, to congratulate the Special Rapporteur on the competence with which he had outlined those problems and proposed solutions to them. In particular, he had placed the question in its proper philosophical and political perspective and he (Mr. Fomba) endorsed his conclusions in their entirety.

51. As to the choice between universal jurisdiction and special institutional jurisdiction, his own inclination was to opt for the latter solution, given the current stage of legal knowledge and the advantages and disadvantages of the two systems. The rule of universal jurisdiction was not always satisfactory, as was apparent from the current disputes between the Libyan Arab Jamahiriya, and the United States of America, the United Kingdom of Great Britain and Northern Ireland, and France, respectively. Special institutional jurisdiction was the more logical solution, first of all, from the legal standpoint, since the principle nullum crimen sine lege, nulla poena sine lege meant that there could be no international crimes without penalties laid down by international law and without international institutional machinery to impose them and, secondly, from the political standpoint, inasmuch as States which recognized the logic of an international code should take that logic to its conclusion. The prerequisite, of course, was to gain the widest possible political acceptance. At all events, States could not turn a deaf ear to the appeals of the universal conscience.

52. He would confine himself to those few remarks, given the little time he had had to consider the question, but reserved the right to speak again.

Drafting Committee

53. The CHAIRMAN announced that the Drafting Committee would be chaired by Mr. Yankov and would be composed of Mr. Al-Baharna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eriksson, Mr. Fomba, Mr. Koroma, Mr. Mahiou, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Vereshchetin and Mr. Villagran Kramer. Mr. Razafindralambo would participate ex officio in his capacity as Rapporteur of the Commission.

54. Mr. YANKOV (Chairman of the Drafting Committee) said that the composition of the Drafting Committee had been determined in keeping with the requirements of geographical distribution and of the
representation of the various legal systems throughout the world. As a general rule, the Drafting Committee would meet twice a week, on Monday and Wednesday afternoons. It could also meet in the mornings if there were no speakers for the plenary meetings.

Planning Group

55. The CHAIRMAN announced that the Planning Group would be chaired by Mr. Calero Rodrigues and the other members would be Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Thiam, Mr. Vargas Carreño and Mr. Yamada.

The meeting rose at 1 p.m.

2255th MEETING

Wednesday, 6 May 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. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. The CHAIRMAN said that, as decided at the previous meeting, the Commission would concentrate on aspects related to part one of the Special Rapporteur's report (A/CN.4/442), deferring detailed consideration of part two until later in the week.

2. Mr. VERESHCHETIN said that the question of an international criminal jurisdiction could be regarded either as directly linked to that of the draft Code of Crimes against the Peace and Security of Mankind or as having a broader dimension that would include jurisdiction over crimes which in legal doctrine were often termed crimes of an international character. Such crimes normally fell within national jurisdiction. Unfortunately, in the draft Code itself that issue was not fully clarified. The question also had specific practical aspects in that States might be reluctant to surrender part of their sovereign rights in a prosecution involving their own citizens. Recourse to international criminal jurisdiction should be seen as the exception rather than the rule; moreover, it should concern in the main the crimes covered by the draft Code, in view of the risks they entailed for the international legal order as a whole.

3. The international criminal responsibility of individuals in accordance with the norms of international law was one of the forms of responsibility of States for the commission of an international crime, a topic which would have to be addressed in due course in the context of State responsibility. When it referred to the responsibility of individuals, the draft Code was understood to cover crimes in the commission of which the State generally played some role. Individuals committing such crimes must be amenable under the norms of international law, even if they were not liable under those of internal law. However, crimes of an international character, as distinct from international crimes, were basically punishable in accordance with the norms of national law.

4. If a direct link was established between the Code and an international criminal jurisdiction, there would be fewer problems to be solved, but if the Code was not to be backed up by such a court, it would lose most of its significance. Admittedly, it was difficult to imagine that a State which pursued policies of apartheid or genocide or was engaged in mass violations of human rights would be prepared to punish those responsible in its domestic courts. That did not mean the Commission should wait until work on the draft Code was completed before studying the problems raised by the institution of an international criminal court, and in particular those of the applicable law, the penalties to be imposed and the question whether the court's jurisdiction would be exclusive or optional.

5. Crimes of an international character in which responsibility lay with individuals were of great concern to the international community, but suppressing and punishing them would require, first of all, considerable cooperation between States in concluding special conventions and international instruments. As a rule, the competence of the court with respect to such crimes should be optional.

6. Mr. VILLAGRAN KRAMER said that he saw an international criminal court as a means of controlling unilateral actions by countries which had the economic power and the necessary means to impose their will on small countries. His object, therefore, was to avoid the
possibility of ending up with the equation: a code without a court, or a court without a code.

7. From the legal standpoint, it was dangerous to link the court to the draft Code, since it would inevitably lead to an absurd situation in which there could be a court which had no statute yet did have jurisdiction, although over what or whom was not known. Alternatively, a code without a court would merely serve to fill out those chapters of Latin American penal codes that dealt with a range of offences, such as piracy, which fell within national jurisdiction wherever they were committed.

8. The whole question of the Code and the court involved a political decision and a sense of political opportunity. The latter was particularly evident in the cases of General Noriega of Panama and that of Iraq. It had been noted in the Sixth Committee, for example, that as the crisis in Iraq had become more acute, the interest in the draft Code and in a court had increased.

9. It was fitting to recall that, in the 1940s, the founders of the United Nations had been anxious to dispel any feeling of guilt that had arisen, with the institution of the Nürnberge Tribunal, at the violation of the nullum crimen sine lege principle. Young lawyers of that era had been keen to see the establishment of a code and judicial machinery with a view to strengthening the law and preventing a recurrence of similar situations. In that connection, the writings of French jurists in the 1940s and 1950s, which had made a significant contribution to the question, merited consideration. It had gradually become apparent, however, that the whole question of creating an international criminal court was highly complex, since it involved the responsibility of those who took the political decisions which violated a rule of law. The whole apparatus of the State was affected and weakened, for the people who had to be punished were people at a high level in the State hierarchy. As Hans Kelsen had observed, it was a characteristic of international law that the State applied penalties unilaterally and, unilaterally, carried out a series of acts designed to correct certain conduct or to establish a special system of penalties. He was thinking not only of reprisals but also of cases involving heads of State such as General Noriega of Panama, who had been taken prisoner by the United States of America and removed to Florida for trial. That was permissible under international law, but not under national law. He was not criticizing the United States Government, but the case was typical of unilateral action by a major Power. There was thus an interesting relationship between the Nürnberg trial and the Noriega case.

10. When the State of Israel had sent its agents to seize criminals in various parts of the world and take them to Israel for trial, without any extradition formalities, no voice had been raised by any of the major Powers in protest, nor—something that was particularly interesting—by any member of the Group of 77, at what could have been a violation of the law. Why was that so? Again, the "Achille Lauro" case had caused much concern, yet no lawyer had spoken up to say that those responsible should be tried, as indeed they should be.

11. He also had in mind the case of unilateral action by the Government of the United States of America when Libya had been the object of direct reprisals in the form of a bombing raid by United States armed forces on the private sanctuary of the head of State of Libya to teach him a lesson. The Lockerbie incident involving the Pan American Airways aircraft and Libyan intelligence agents showed that there was a whole range of actions by Governments, and criminals, which would sooner or later give rise to unilateral action. The question posed by the Special Rapporteur, therefore, was clear: should the policies of the major and other Powers—those that took unilateral action—set the standard? The maxim nemo debit esse iudex in propria causa applied to civil, not criminal, law. The only legal criterion that counted was the quality of the legal systems of the nations that took unilateral action and the extent of their respect for the principles of a fair trial and due process of law. Those guarantees, which General Noriega had enjoyed, could not be offered by all countries and legal systems. The right to a defence was guaranteed selectively in some cases.

12. On a point of terminology, he noted that the Special Rapporteur preferred the French term droit international pénal, whereas in Spanish it was customary to use the term derecho penal internacional. If necessary, however, the Spanish-speaking members of the Commission would no doubt be able to make the necessary accommodation.

13. His main concern was the kind of court to be established. Apparently, the new trade arrangements between Canada and the United States of America provided not only for arbitration tribunals for the settlement of disputes but also for panels. While he was not quite certain of the precise scope of the concept of a panel in international law, he would point out that General Assembly resolution 44/39 of 4 December 1989, on international criminal responsibility of individuals and entities engaged in illicit trafficking of narcotic drugs across national frontiers used the term "an international criminal court or other international criminal trial mechanism". Furthermore, the idea had been mooted of setting up a criminal chamber at ICJ, and the same idea was currently being studied in a number of regional bodies, such as the Inter-American Legal Committee.

14. Issues of relevance to the matter had also been considered by the European Court of Human Rights and the Inter-American Court of Human Rights. In the Velásquez Rodríguez case, for instance, the Government of Honduras had been accused of serious human rights violations. In establishing responsibility for the commission by Government agents of serious crimes under Honduran and international law, and in awarding compensation to the victims, the Court had shown that States were prepared, in certain defined areas, to allow investigation and to consent to the imposition of penalties, irrespective, in theory, of the rank of the persons responsible.

3 Italian passenger ship seized in the eastern Mediterranean on 7 October 1985.

4 Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, Decisions and Judgments, No. 4.
15. His response to the mandate conferred on the Commission was extremely positive and he considered that the Special Rapporteur’s report was moving in the right direction, namely, towards the establishment of an international criminal court.

16. Mr. JACOVIDES said that the draft Code of Crimes against the Peace and Security of Mankind was important and had taken on added significance in view of recent developments on the world scene. Accordingly, it should have its rightful place in the corpus of current international law. As a complete legal instrument encompassing the three essential elements—crimes, penalties and jurisdiction—it could and should serve the purpose of deterring and punishing any violation of its provisions.

17. It had rightly been decided to consider the two parts of the Special Rapporteur’s tenth report in separate stages, which would afford new members of the Commission an opportunity to reflect on the item as a whole. While there was, of course, room for divergent views, it must be borne in mind that the item was not new and should be seen in its proper perspective. A considerable amount of productive work had been done in the Commission and the General Assembly, and much progress had been achieved. The adoption of the draft Code on first reading at the previous session meant that the Commission was well on the way to bringing a major undertaking to fruition. It had also marked a major step forward in the progressive development of international law and would be a highlight of the United Nations Decade of International Law. 6 No doubt it would be necessary, once the comments and observations of Governments were received, to take a closer look at certain aspects which required re-examination, as was in fact acknowledged in paragraph 173 of the Commission’s report on the work of its forty-third session. 7 For his own part, he considered that, while the Code should be comprehensive, care should also be taken to ensure that it would be lean and would encompass legally definable crimes so as to ensure that it was as acceptable and effective as possible. In other words, since the first reading had been completed there should be no backsliding so far as the substance of the Code was concerned, and the Commission, in its new composition, should look forward not backward. Much remained to be done with regard both to crimes and penalties and also to jurisdiction and that should take the form of constructive additions.

18. He fully sympathized with the Special Rapporteur in his predicament in trying to arrive at a suitable approach to the question of establishing an international criminal jurisdiction. For years the General Assembly had been asked for clear guidance on that point, but the response so far had been less than satisfactory, albeit for understandable reasons. Some delegations in the Assembly held that international developments warranted a much more positive approach, particularly in the aftermath of the Gulf war and in view of the current situation in Libya, and a number of influential voices had been heard to advocate the setting-up of an international criminal court, for example, that of the Foreign Minister of Germany, Hans-Dietrich Genscher, who, in his statement before the General Assembly at its forty-sixth session, had called for the setting up of an international criminal court with jurisdiction in such cases as crimes against humanity, crimes against peace, genocide, war crimes and crimes against the environment, and those of President Carlos Andrés Pérez, of Venezuela and Nathan Shamuyarira, the Foreign Minister of Zimbabwe, in the context of the summit meeting of the Security Council held on 31 January 1992. Unfortunately, however, no unambiguous mandate had emerged from the debate in the Sixth Committee. The Commission should make a recommendation to the General Assembly to authorize it to proceed with a clear mandate to draft the statute of an international criminal court.

19. It had been argued, both in the Commission and elsewhere, that there could be no Code of Crimes against the Peace and Security of Mankind unless there was an international criminal jurisdiction to administer it. To that double negative, he would respond with a double positive: there should be both a Code—indeed the list of crimes had already been adopted on first reading—and a court, as well as penalties. They were not only desirable but feasible, given the necessary political will. He also agreed with all the points made by the Special Rapporteur in response to possible objections to the establishment of an international criminal court. As in any major and innovative undertaking, there would be difficulties and pitfalls, but it was not beyond the collective capacity of the Special Rapporteur and the Commission to overcome those obstacles.

20. The world was going through a very difficult period in international relations, with trends towards integration in some regions, counter-trends towards disintegration in others, and consequent opportunities and perils. The situation called for more than ever before for clarity and predictability in international law. Mr. Bennouna (2254th meeting) had remarked on the need to settle the issue of who could be tried under an international criminal jurisdiction, the State or the individual. There had been considerable divergence of opinion in the early debates on the topic in the Commission, but there seemed to be some agreement that jurisdiction should be confined to individuals as a practical compromise enabling further progress to be made. However, as could be seen from draft article 5 of the Code, adopted in 1991, the prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of any responsibility under international law for an act or omission attributable to it. As correctly pointed out in the commentary, the draft article left intact the international responsibility of the State. That aspect came under the rubric of State responsibility, which would be further discussed in due course. Paragraph (21) of the commentary to article 19 of part 1 of the draft on State responsibility 7 also pointed out that the punishment of individuals who were organs of the State certainly did not exhaust the prosecution of the international responsibility incumbent upon the State for internationally wrongful acts which were attributed to it in such cases.

5 Proclaimed by the General Assembly in resolution 44/23 of 17 November 1989.
6 Yearbook... 1991, vol. II (Part Two), chap. IV.
by reason of the conduct of its organs. The State might
thus remain responsible and be unable to exonerate itself
from responsibility by invoking the fact that the indi-
viduals who had committed the crime had been pros-
ecuted or punished. It could be obliged to make repara-
tion for injury caused by its agents. The point was one
which provided a link between the draft Code and the
topic of State responsibility.

21. Mr. BOWETT said that there would be little point
in having a code without an international criminal court,
although it would be theoretically possible for such a
court to function without a code: after all, the Nürnberg
Tribunal, ICJ and some national courts did not have
comprehensive criminal codes. However, a charge
brought against an individual would have to identify a
specific offence recognized in some instrument of inter-
national law.

22. A criminal prosecution would begin with a com-
plaint, lodged either by a State or an international
organization. A trial would not automatically follow,
since an independent body would have to be established
to decide whether the evidence submitted was sufficient
to justify bringing the individual to trial. The facts of the
case would have to be determined, and the precise nature
of the charge. If there was a code, reference would be
made to the relevant provision; if not, the offence would
have to be identified on the basis of recognized princi-
ples of international law, and that might prove to be a
more difficult exercise.

23. The Special Rapporteur's report suggested a dis-
tinction between crimes over which there would be ex-
clusive jurisdiction and crimes over which jurisdiction
would be purely optional. The former category was de-
digned to cover such crimes as genocide, systematic vio-
lation of human rights, apartheid, drug trafficking, sei-
zure of aircraft and kidnapping of diplomats or internation-
ally protected persons. Some were already covered in conventions which provided for universal ju-
risdiction, but it should be asked whether States were
likely to surrender their own jurisdiction in relevant in-
stances. Optional jurisdiction would cover all other
crimes, but in the absence of a code it would be very dif-
ficult to define the crimes falling within that category.

24. The question also arose of the nature of consent to
the jurisdiction. His understanding was that all the par-
ties would accept the exclusive jurisdiction of the court,
but that optional jurisdiction would be open to a State
which was either the State in whose territory the crime
had been committed or the State which was the victim,
or whose nationals were the victims, of the crime. It
seemed curious that the State which had custody of the
accused was not among the States which would have to
accept optional jurisdiction, since that was, after all, the
State that would have to hand over the accused person
for trial. In his view, the Commission should strive to
achieve the most flexible system possible, one which
might incorporate a code in which the different crimes
would be categorized in groups and the States becoming
parties to the court's statute would be free to accept its
jurisdiction in relation to any of the groups identified.
States should also be entitled to consent to the jurisdic-
tion on an ad hoc basis.

25. Acquisition of custody of the accused by the court
was a simple matter, for the draft provisions required all
States parties to the statute to hand over the alleged of-
fender. That would not preclude the need for detailed
and complex arrangements with the host State, namely,
the State in which the court functioned, for detention of
the accused would presumably be by the host State
authorities.

26. As to the trial itself, who would bear the burden of
the prosecution, and who the defence? Did the accused
have the right to choose his own counsel? Were there to
be formal guarantees of a fair trial? Most important per-
haps, could the court require any State party to the stat-
ute to produce vital evidence? Would there be rules gov-
erning admissibility, confessions, corroboration and the
use of evidence? One simple device might be to adopt
the host State's rules in criminal proceedings. In the
event of a conviction, what law determined the penalties,
and where was the person sentenced to be imprisoned?
Presumably, there must be some prior arrangement with
the host State. What about civil claims for compensa-
tion? It would seem from the draft Code that such claims
brought against an accused individual might relate to
injury to the complainant State or international organiza-
tion or to injury to nationals of the complainant State.
He had serious doubts about the wisdom of inter-
medling strictly criminal proceedings against individ-
uals and civil claims for damages. An international court
would find such a mixture difficult to handle. If compen-
sation to the actual victim was being considered, crim-
nal courts were familiar with the notion that compensa-
tion could be awarded as part of the penalties.

27. As he understood it, the report envisaged a system
of appeals from the full court to a chamber. That was a
reversal of the normal procedure and might be impracti-
cal. As to the composition of the court, he hoped that it
would not be a full-time tribunal, for he suspected that
the members would be underemployed for many years.
Again, some consideration must be given to financing
such a body.

28. The tenth report was imaginative and stimulating
and had prompted his questions on how such a system
would operate in practice. Many difficult issues were in-
volved, and he trusted that the Commission would pro-
vide the Special Rapporteur with the guidance needed.

29. Mr. RAZAFINDRALAMBO said that the tenth re-
port, which was characterized by great clarity and preci-
sion, unfortunately retained the idea of parallel interna-
tional and national jurisdictions. The Special Rapporteur
appeared to favour an international criminal jurisdiction
that was both exclusive and optional, something which
presupposed maintaining national jurisdiction in certain
areas: that was the most that could be expected at the
current time, for States continued to be jealous of their
sovereignty.

30. His own preference was for an international crimi-
nal jurisdiction which offered a minimum guarantee of
impartiality in conflicts of interest between a strong
State and a weaker one, especially a developing country.
He did not follow the logic of contesting the objectivity
of international jurisdiction, since no State questioned
the need to resort to such an arrangement. One example
was the general recognition of the value of international arbitration, even though considerable economic interests, and even a State's reputation, might be at stake. The problems of sovereignty raised by the prosecution of crimes were complex, but States had already made concessions regarding sovereignty, particularly in the field of human rights, and there was general agreement that human rights violations were international crimes. The example cited by the Special Rapporteur, the European Court of Human Rights, was pertinent, as was the Human Rights Committee, to which individuals could address complaints of human rights violations by States.

31. He agreed with the conclusions contained in part one of the tenth report. An international criminal jurisdiction must be included in the draft Code: members would recall that the relevant General Assembly resolutions had always linked consideration of the question of an international jurisdiction to the drafting of a code. From the outset, the Commission had taken the view that such an instrument must contain a section on implementation, because otherwise it would be an empty shell. A section of that kind must incorporate an international criminal jurisdiction mechanism which, regardless of its nature, would be directly linked to crimes under the Code.

32. Mr. SHI said that the Special Rapporteur's report gave the Commission much food for thought and helpful guidance.

33. In view of the increasing seriousness of international and transnational crimes, international cooperation in preventing and combating crime was perhaps desirable, but not necessarily feasible. Any attempt to establish an international criminal court would currently meet with insurmountable obstacles, the foremost being State sovereignty, the very foundation of the international community. The establishment of an international criminal court called for the surrender by States of part of their sovereignty, failing which such a court would remain an academic exercise. Yet, at the present stage in international relations, such a surrender of sovereignty was virtually impossible. Previous attempts to establish an international criminal jurisdiction of a permanent nature under the auspices of the United Nations had ended in failure, and previous draft statutes on such a court had been shelved. On several occasions, the Commission had had to request guidance from the General Assembly as to whether a statute for an international criminal court should be prepared in connection with the work on the draft Code of Crimes against the Peace and Security of Mankind. The General Assembly had never replied in definitive and positive terms. Currently, the Commission's mandate on the topic was simply to analyse the issues and explore the feasibility of the establishment of such a court or other international criminal trial mechanism, and not to draft a statute. It was therefore clear that the General Assembly was well aware of the sensitivity, complexity and virtually insuperable obstacles inherent in establishing an international criminal jurisdiction.

34. It had been argued that the trial of major war criminals of the Second World War by the Nürnberg and Tokyo Tribunals amply demonstrated the practicality of establishing ad hoc international tribunals, despite the rather primitive stage of inter-State relations at that time. Yet the conditions for setting up ad hoc tribunals of that nature no longer existed. The unconditional surrender of the then enemy States and the control of those States under allied military government had placed them at the mercy of the allied Powers.

35. Members of the Commission were aware that, although criminal responsibility was attributed to individuals, States were behind the crimes committed, and the people responsible held high, or even the highest, positions in Government. There had been much talk that the head of State of Iraq should be brought to trial by an international tribunal on charges of having launched a war of aggression. How could Iraq be expected to hand over its own head of State for trial by an international court? One great Power had used armed force against a small State in order to arrest a high government official alleged to be involved in international drug trafficking. Was the use of force against a small State for the purpose of arresting an alleged criminal justified under international law? It must also be remembered that every post-war academic community had criticized the Nürnberg and Tokyo Tribunals, citing the principles *nullum crimen sine lege* and *nulla poena sine lege*.

36. It had also been argued that, with the end of the cold war, the concept of sovereignty was on the wane and conditions were ripe for the establishment of an international criminal court. However, international relations were still very unstable and regional crises and armed conflicts were on the increase. Old alliances might be replaced by new ones and international tensions were also building up. In such circumstances, it was in the interest of States, large and small, strong and weak, rich and poor, to develop friendly relations and to cooperate in all fields of international life on the basis of the sovereign equality of States and the other principles enshrined in the Charter of the United Nations. Any relinquishing of sovereignty by small or medium-sized States might play into the hands of a few big Powers.

37. At the risk of making a political statement, he would add that law could never be separated from politics, for law was always in the service of something. He did not believe in law for the sake of law. A decision recently taken in the Libyan case by IJC was certainly not an example of law for law's sake, whether one agreed or disagreed with the decision.

38. Mr. ROSENSTOCK said he challenged the view that the law applied by the Nürnberg trials was in some sense *ex post facto*. That would appear to ignore developments in the League of Nations between the wars. No one had had any doubts at the time of the launching of a war of aggression that the international community had already taken a position on the criminal nature of launching such a war. The record should not suggest that the

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Footnote:

9 Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992, p. 3. The Court found "that the circumstances of the case are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures."
Commission as a whole shared the view earlier expressed about the Nürnberg trials.

The meeting rose at 12.20 p.m.

2256th MEETING

Thursday, 7 May 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. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekeley, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. Mr. PAMBOU-TCHIVOUNDA, noting that the tenth reports (A/CN.4/442) was a continuation of the earlier reports and of the first part of the Commission’s work, which had culminated in 1991 with the adoption on first reading of articles 1 to 26, said that, in his view, it was only right that the normative side of the draft Code should go hand in hand with an institution. He was not so sure, however, that consideration of proposals for the establishment of an international criminal court or other international criminal trial mechanism, to borrow the terms of General Assembly resolution 46/54 of 9 December 1991, corresponded to the logic of the Code of Crimes as it had been understood until 1990. There were two possibilities. Either it was a question that touched on the very essence of an international court, in which case the objections referred to in the report could be significant, or else it was a purely technical question, in which event the problem did not arise. The establishment of an international court with responsibility for the application of the Code simply became a practical matter that could be resolved in the light of the relevant statutory provisions and once the preliminary points of theory had been settled. It was, however, precisely those preliminary points which seemed to cast doubt on the objections referred to in the report; and that was surprising inasmuch as the Commission had already adopted the substance of those preliminary points on first reading.

2. The international situation in recent years had highlighted the need for machinery that could ensure the rule of law in international relations and recent events had shown that there was a trend towards a curtailment of the influence of sovereignty—the concept on which most of the objections summarized in the tenth report centred. In virtually every international forum, Government representatives advocated the constitution of large groupings, whatever the name they were given—whether community or federation—and whatever the fate reserved for such proposals. The problem of the restriction of sovereignty therefore did not arise solely in connection with the establishment of an international court for the punishment of crimes against the peace and security of mankind. Moreover, the democratic ideal was becoming increasingly universal and it was not possible at one and the same time to aspire to a law-abiding internal order and to allow States to evade the rule of law in their external conduct. There was no doubt that, on the one hand, the concept of international peace and security, which was a codified concept, and, on the other, that of the peace and security of mankind, which was in the process of being codified, would ultimately merge. Everything that could be done on behalf of mankind—and it was that endeavour which the draft Code and the idea of establishing an international criminal court reflected—was also valid in the case of States. An international criminal court would be a tangible manifestation of the Code. It was therefore necessary and it would be an additional link in the chain of deterrent and repressive machinery already in force at the international level.

3. Mr. Idris said that, so far as the progressive development and codification of international law was concerned, it was not possible, no matter how specialized the subject might be, to ignore the prevailing climate of international relations. At the present time, there was an extremely serious and complex crisis which, in the economic field, was marked by growing poverty, mounting unemployment, increasing international debt, collapsing commodity prices and rising protectionist barriers. There was a risk that that state of affairs, which shattered the hopes of a better world for the poor, might be reflected, at the political level, in an era of instability and world imbalance as a result of which conflicts of apocalyptic dimensions would be unleashed. From the legal standpoint, the consequences could be an increasingly politicized understanding of international law and, therefore, more hesitation in its codification. Against that background, it was appropriate to envisage the establishment of an international criminal court, a question which had already been discussed extensively in various forums and the various aspects of which the Commission should now analyse with a view to arriving at some common ground for further work. Also, the political will of Governments was a vital factor without which there could be no concrete results.
4. In his view, the Code and the court went hand in hand. If the Code of Crimes against the Peace and Security of Mankind came into being, its credibility would depend largely on the existence of some machinery for its implementation, preferably in the form of an international criminal court. The principle of universal jurisdiction was not a satisfactory remedy, first, because it was controversial, secondly, because of its weaknesses in terms of infrastructure and, lastly, because it was politically sensitive for a national court to pass judgement on the conduct of a foreign Government. The establishment of an objective and impartial court would help to advance international criminal law and to secure uniformity in the punishment of international crimes, and that was in the interest of all nations. It would also serve to remedy deficiencies in domestic procedures and extradition policies.

5. There remained other complex questions, such as the composition of the court, its procedure and the means to enforce its sentences. So far as the procedure for submitting complaints was concerned, he, like Mr. Bowett (2255th meeting), considered that an independent body should be entrusted with the verification of all the evidence in a case before it was brought before the court.

6. Mr. ROSENSTOCK said he agreed with the view that, if the Code was not to be an empty shell, it had to be implemented through an international criminal court. However, the Commission should also indicate that the establishment of a court did not necessarily imply the need for a code. Other conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, might serve as a basis for the jurisdiction ratione materiae of the court, assuming that certain technical problems could be solved. In that way, it might be possible to put an end to what Mr. Arangio-Ruiz had described as the game of hide-and-seek between the Commission and the General Assembly (2254th meeting).

7. That having been said, he did not necessarily agree with the Special Rapporteur's reasoning in part one of the report. For example, he failed to see why internal pressures to prevent a State from surrendering a criminal to justice would be much less if it were a matter of bringing the criminal before an international criminal court rather than of extraditing him to another State. Many problems would certainly have to be solved before all objections to the establishment of an international court were removed, but the Commission should try to solve them if it wanted the General Assembly to take a decision on the momentous issue before it.

8. He reiterated his support for Mr. Calero Rodrigues' suggestion (2254th meeting) concerning the organization of work, which, with some extra effort and with the help of the secretariat, ought to enable the Commission to complete its task at the forty-fifth session. The Commission might make a start by considering some of the questions identified in part two of the report. During that time, the Special Rapporteur might, with the help of the secretariat, draw up a list of questions which were not touched upon in the report, but which had come up in the course of the debate or had already been raised in the report of the Commission on its 1990 session. Such an orderly process would enable the Commission to illuminate and/or remove a sufficient number of obstacles to the establishment of an international court for the General Assembly to have to take a decision one way or the other on the issue or, failing that, to recognize that the international community was powerless, through lack of political will, to decide the matter.

9. In conclusion, he said that his comments at the preceding meeting on the subject of the Nürnberg trial in no way contradicted what Mr. Shi had said about the very special nature of the situation in 1945 and the need to view the Nürnberg precedent in that context.

10. Mr. MIKULKA said that, in resolution 46/54, the General Assembly did not invite the Commission to consider the idea of an international criminal court as such, but to consider it within the framework of the draft Code and with a view to the implementation of the latter; he therefore feared that some of the Special Rapporteur's proposals, particularly those relating to the law to be applied, might take the Commission beyond the scope of its mandate. With regard to the implementation of the articles adopted on first reading, he (Mr. Mikulka) drew a distinction between, on the one hand, crimes which had been committed by individuals with the consent or on orders of the State and, for that reason, involved State responsibility, and, on the other hand, crimes of an extremely serious nature which had been committed by individuals acting on their own behalf and were often covered by special international conventions. Those two categories of crimes might require different types of punishment. So far as the first category was concerned, the only international experience that could be drawn upon was that of the Nürnberg and Tokyo Tribunals. The punishment of other international crimes was based on the principle of universal jurisdiction.

11. The solution to the problem of penalties would depend on the choice of the mechanism for the implementation of the Code. If universal jurisdiction were adopted, the system of penalties might be based on that provided for in the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the International Convention against the Taking of Hostages and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in which States undertook to punish the offences in question by penalties corresponding to their seriousness. That system made it possible to introduce a unifying factor, while taking account of the diversity of penalties in internal law. A unified system of penalties to be incorporated in the draft Code would be required, however, if the implementation of all or part of the Code was to be entrusted to an international criminal court.

12. In setting up a mechanism for the implementation of the Code, the Commission also had to bear in mind the mechanisms already established under several conventions for the punishment of certain categories of international crimes and avoid any contradiction in that regard. He therefore endorsed the view expressed by some

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members of the Commission at the forty-third session that it might be possible to combine the system of universal jurisdiction with the establishment of an international criminal court. The court would try crimes committed by persons who could not be judged without some evaluation having been made, at the international level, of an act of the State, such as aggression, threat of aggression, intervention, colonial domination or apartheid. The crimes covered in the other articles of the draft Code would come within the jurisdiction of national courts or, in other words, universal jurisdiction. In his view, the jurisdiction of the court, thus circumscribed, should be established ipso facto by its statute and should be exclusive and compulsory.

13. With regard to the crime of aggression and the possibility that the court might have to abide by a decision of the Security Council, care should be taken, whatever the solution adopted, to avoid upsetting the balance of competences established by the Charter of the United Nations in the field of international peace and security.

14. The idea of establishing an international criminal court had received valuable encouragement at the latest session of the General Assembly. The years to come would show whether that had been a passing reaction to a particular crisis or a more lasting trend. The Commission should not miss the opportunity to contribute its stone to the common edifice.

15. Mr. FOMBA requested that the 40 or so questions identified in the report of the Commission on its 1990 session should be listed and made available to the Commission in order that the members might refer to specific points and engage in a genuine debate in which different or conflicting points of view could be expressed.

16. Mr. VARGAS CARREÑO said that the fact of defining certain crimes in the Code, which would have the effect of making the definitions part of internal law and applicable by national courts, was in itself a noteworthy contribution to the codification and progressive development of international law.

17. The majority trend was towards the establishment of an international criminal court and he personally was in favour of it, but the Commission had to adopt a pragmatic approach and not lose sight of certain inevitable limitations. For example, at least in the case of crimes such as illicit international trafficking in drugs or the kidnapping of diplomats, States were not prepared to give up the exercise of their sovereignty and the international criminal court should have only subsidiary jurisdiction. Similarly, the competence of the court to review decisions handed down by national courts or to hear appeals against them should be ruled out and the bringing of an action before the court should not be made contingent on the exhaustion of domestic remedies, for the two types of jurisdiction were completely different.

18. A further limitation was that some regional agreements had been concluded for the purpose of punishing systematic violations of human rights and they had their own machinery, such as the European Court of Human Rights and the Inter-American Court of Human Rights. It should also be borne in mind that, under Article 103, the Charter of the United Nations enjoyed constitutional supremacy and that States were required under Articles 25 and 39 of the Charter to abide by a Security Council determination of an act of aggression.

19. Mr. KUSUMA-ATMADJA said he regretted that, in the definitions contained in the draft Code, a distinction had never been made between crimes in which the perpetrator was linked to a State and those in which the perpetrator acted on his own, and that national sovereignty was therefore an obstacle to the implementation of the Code and to action by the international criminal court, even if the two institutions were found desirable. He therefore suggested that the Code should be divided into two parts.

20. For the crimes defined in part one (Aggression, threat of aggression, genocide and war crimes), the international criminal court and the Security Council would have concurrent jurisdiction, although the Security Council would have primary jurisdiction because it was able to react rapidly. In those cases, the jurisdiction of the court might be only optional, its purpose being to punish the perpetrator of the crime personally.

21. For the crimes defined in part two, the court would have concurrent jurisdiction with national courts, the latter having primary jurisdiction and the court subsidiary, but compulsory, jurisdiction. That category of crimes would include the recruitment, use, financing and training of mercenaries, international terrorism, illicit trafficking in narcotic drugs and wilful and severe damage to the environment. The problem of such limited cases as apartheid and systematic or mass violations of human rights would, however, remain.

22. If the Code was taken to mean a set of provisions forming a coherent whole, as was the case in the Roman law countries, he was afraid that its drafting would be laborious, but, if it was taken to mean a body of rules defining material jurisdiction, such rules already existed in conventions, treaties and other international instruments and needed only to be consolidated and codified.

23. If no distinction was made between those two categories of crimes, the problem of national sovereignty would inevitably arise in cases of crimes in which the perpetrator, by his very functions, was indissolubly linked with the State.

24. The Commission did not really need to restrict itself to the crimes enumerated: it could very well add to the list. Bearing in mind Part XII of the United Nations Convention on the Law of the Sea, he proposed that the definition of wilful and severe damage to the environment should be expanded to include damage brought about by the exploitation by a State of resources in its territory in a way that caused severe prejudice to another State. Such an act was surely the responsibility of the State, even if the perpetrator was a natural or legal person. Moreover, it was extremely difficult to regulate that type of problem in a bilateral framework because the State concerned might well disregard the protests of the injured neighbouring State. He would include the wilful misuse of biotechnology in the list of such "technolog-
cal crimes”. The idea of a scientist of one State manipulating the genetic make-up of animals that were then let loose to spread destruction in a neighbouring State was no longer in the realm of science fiction. That would be a personal act falling first within the jurisdiction of the State concerned, but, if the State did not take action, it could come within the concurrent jurisdiction of an international criminal court.

25. In addition to the inductive tradition of Roman law, which was built on concepts, and the empirical tradition of common law, which was based on acts, there was room for the Asian tradition, which regarded law and justice not as an exercise in logic, but as the instrument for achieving the goal of an ideal balance. The Commission thus had a unique opportunity to produce a synthesis of those three traditions.

26. Mr. PELLET, commenting on the mandate given to the Commission in General Assembly resolution 46/54, said that first, unlike the Special Rapporteur, he did not think that the Commission had made its position sufficiently clear on the question in judging the establishment of an international criminal court feasible and desirable. That might well be the Commission’s conviction, but it had not yet persuaded the General Assembly, which was still considering the matter and still putting questions to the Commission.

27. Secondly, the General Assembly had once again sent the issue back to the Commission by requesting information to enable it to give the Commission guidance. In fact, the General Assembly was refusing to assume its responsibilities. Accordingly, the Commission should be firm and indicate that, in the absence of instructions from the General Assembly, it did not consider itself able to pursue its consideration of the topic. The alternative would be for the Commission to start, once and for all, on the drafting of the statute of an international criminal court, assuming that article 18, paragraph 1, of its Statute authorized it to do so, which he doubted. He favoured the first alternative because, in order to continue its work, the Commission needed a clear picture. He agreed with other speakers that the Commission must either assume its responsibilities or finally resolve to prevail upon the General Assembly to do likewise by helping the Special Rapporteur draft a very firmly worded chapter for the report of the Commission on the topic.

28. It was thus with a great deal of hesitation that he took the floor in a general debate that had hardly been reflected in the first part of the report under consideration.

29. Concerning the links between the Code and the court, it was possible, as had already been pointed out, to envisage a court without a code or a code without a court or even no code and no court. He personally was in favour of both the Code and the court. Unlike some members of the Commission, however, he did not see the logic of complementarity and believed that, on the contrary, the two things must be separate.

30. With regard to the Code, the draft submitted to the General Assembly had two shortcomings: it did not go far enough and it went too far. It did not go far enough in the sense that the regime applicable to crimes against the peace and security of mankind was treated too vaguely to have any real influence on the decisions of national courts. It went too far, first, because the list of crimes was too long and thus detracted from their particularly monstrous nature and, secondly, because the definition of those crimes repeated controversial definitions that were unacceptable to certain States and had been taken from instruments that differed greatly. A clear, succinct list of exceptionally serious crimes, along with the definitions required for the applicable legal regime, would have been perfectly adequate.

31. He was therefore in favour of a code, but not the draft Code as it stood. If the proposed court was to be linked to the Code, he would have difficulty accepting it. He was not, however, insensitive to Mr. Mikulka’s point of view and conceded that General Assembly resolution 46/54 drew a link between the question of the court and that of the Code, but nothing prevented the Commission, in the exercise of its mandate, from voicing an opinion to the contrary.

32. Whatever might have been said, a code without a court would not be useless: a code that was acceptable as to substance might well be applied by national courts and serve as a kind of beacon for them. A court without a code would also not be useless: as had already been said, a number of conventions determined the legal regime for crimes such as genocide or apartheid and the international criminal court could apply them, at least to States parties, just as it could adjudicate on the basis of the general principles of law and international custom.

33. In fact, the real problem seemed to be that of the jurisdiction of the court. As had already been recalled, the State could be discerned behind the individuals whom the court was called upon to try. What was true for many crimes was all the more true for the “genuine” crimes against the peace and security of mankind: how could anyone imagine that aggression, genocide, the establishment of an apartheid regime, the maintenance of colonial domination by force or the systematic use of torture as a means of government could be the acts of isolated individuals? Things had to be seen realistically. In such cases, the State would not take part in proceedings against itself by handing over its nationals or by requesting that they should be brought to trial. It was only if the aggressor State was defeated or the apartheid regime dismantled, for example, that an international court could take effective action. That would be rare and it was not certain that a permanent court was necessary; there was always the possibility of recourse to ad hoc bodies, along the lines of the Nürnberg Tribunal.

34. However, the proposed court might serve other purposes entirely. He shared the sentiment of legal outrage created by the kidnapping, trial and sentencing of a foreign head of State—General Noriega—by a great Power. If there had been an international criminal court, matters might perhaps have turned out differently. Similarly, the existence of an international criminal court might have provided an honourable way out for Libya in the Lockerbie affair. France might also have been able to exorcise its old Second World War demons if it had had
the possibility of referring Touvier and other collaborators to a court of that kind.

35. In order to ensure that an international criminal court was useful, however, it would be necessary to abandon the outline that was taking shape, as well as dreams of establishing a permanent Nürnberg-type tribunal. It would be better to concentrate on setting up a court to which States could, on a selective basis, hand over their own nationals and foreigners responsible for crimes to which the principle of universal jurisdiction normally applied, in the latter case with the agreement of the State of which they were nationals. That would be reasonable and a considerable achievement as well, since it offered the only possibility of making progress.

36. In conclusion, he said that, in resolution 46/54, the General Assembly had not asked the Commission to prepare a draft statute of an international criminal court: it had asked it to consider proposals for the establishment of such a court or other international criminal trial mechanism. In fact, there had been few such proposals in the Commission and the Sixth Committee. The Commission, which was not short of time at the current session, could thus, as Mr. Rosenstock had suggested, set up a working group, which, together with the Special Rapporteur, would try to draw up a systematic inventory of the possibilities, without confining itself to the statutory rules of the proposed international criminal court. There were many such possibilities. For example, it might be possible to have observers—active, if necessary—in proceedings before national courts: that would not have been out of place during the trial of General Noriega; nor would it be if Libya decided to bring its nationals accused of terrorism to trial. The possibility might also be considered of an international criminal court which would simply state the law, while national courts conducted the trials and handed down the sentences: that would solve some practical problems and ensure that the sacrosanctity of national sovereignty was upheld. Another possibility was to establish several specialized international courts or to have recourse to ICIJ by means of advisory opinions, which might be binding. The fact was that the Commission would not achieve much if it stuck to the Nürnberg model.

37. Mr. CRAWFORD said that he was now in favour of the idea of an international criminal court, whereas he had previously been against it, but what the court would be like still had to be decided.

38. The first point to bear in mind was that the Commission had rightly decided that the court would not have jurisdiction in respect of States. It had also been recalled that jurisdiction in criminal matters normally lay with States themselves: they had at their disposal the constitutional and other machinery to guarantee respect for the rule of law during the investigation and in the conduct of the trial. In the present case, however, legal traditions differed considerably from one country to another and it would be pointless to hope to draft a code of international criminal procedure on the basis of those divergent traditions.

39. For its part, the international criminal court should first and foremost serve as a facility. Its jurisdiction would thus not be compulsory, since it was unreasonable to think that States would agree in advance to recognize its authority. Nor would its jurisdiction be exclusive: national courts would retain their powers in respect of the acts or situations provided for in their domestic legislation.

40. The international criminal court would nevertheless serve a purpose: it would in any case make it possible to avoid the stumbling block of retroactivity and would rule dispassionately in cases involving State officials who had committed State crimes.

41. With regard to the question whether there could be a code without a court, or a court without a code, that depended on the type of code in question. The crimes set out in the current draft were, by virtue of their definition or characteristics, those committed by persons acting as agents of the State. Aggression, threat of aggression, apartheid or international terrorism involved—somewhat paradoxically in the latter case—agents of the State. Colonial domination and the other forms of foreign domination, genocide and systematic or mass violations of human rights were typical of the crimes resulting from the actions of State officials. By definition, foreign intervention must be linked to State conduct. That was not always true of the recruitment, use, financing and training of mercenaries or of wilful and severe damage to the environment. Only one crime was not, by virtue of its specific features, linked to State conduct and that was drug trafficking. Indeed, that crime had no place in the draft Code and, if it were to be added, it would be to meet the request of certain States which were victims of such trafficking and feared for the integrity of their criminal justice system. There was, however, another way to assist them: such crimes could, for example, be brought before a regional court.

42. A problem of legitimacy thus arose where a court of a particular State sought to try an individual implicated in such State crimes. To avoid any accusation of "justice of the victors", as had been seen at the Nürnberg trials, or of "justice of the victims"—two ideas that were equally repellent—the best solution was a criminal trial mechanism rather than a permanent court. The climate was favourable to further reflection within the Commission along those lines.

The meeting rose at 12.50 p.m.

2257th MEETING

Friday, 8 May 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. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda,
Mr. Pellet, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetic, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Organization of work of the session (continued)*

[Agenda item 1]

1. The CHAIRMAN said that the established pattern of work of the Commission allowed for four morning meetings of the plenary and four afternoon meetings of subsidiary bodies each week. As usual, it would be possible for the Commission to hold 10 meetings during the last week of the session, and the International Law Seminar would be provided with the requisite services. If he heard no objection he would take that it suggested pattern of work met with the approval of the Commission.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

2. Mr. GÜNEY said that the Special Rapporteur was to be commended for his tenth report (A/CN.4/442), which responded to a complex subject in a spirit of pragmatism and accommodation.

3. Referring to part one of the report, he pointed out that, in the absence of a specific request by the General Assembly to take a decision on the matter, the idea of establishing an international criminal court seemed premature. It was for the Commission to decide not on the desirability, but rather on the feasibility, of establishing such a court or other international mechanism, and it must then state its position within the limits of its advisory functions.

4. Given the well-known reservations of States regarding an international mechanism with exclusive or optional jurisdiction, the Commission must pay heed not only to the legal, but also to the political, implications. Recent initiatives taken by many States had reflected the need to work towards the establishment of an international jurisdiction, but doubts persisted as to its feasibility, because the relevant crimes already came under the peremptory norms of international law, the general rules of international law or the rules laid down in widely accepted multilateral treaties which, in view of the limited cooperation in extraditing those accused, left national institutions and courts with the task of prosecuting and punishing offenders. Despite the risk entailed in modifying the present international procedures, the lack of a replacement system had increasingly made itself felt. A direct link between the court and the Code would not make the task any easier. There were already a number of courts that operated without a code. At the present stage, the most realistic approach, and the one most consonant with realities in the international community, would be for the Commission to explore the possibility of an ad hoc jurisdictional criminal trial mechanism.

5. Mr. MAHIOU, referring to the question of a possible link between the Code and the international criminal court, said there were many options, but some were better than others. A code alone was indeed conceivable, yet in the absence of a court it would be ineffective, because there would be no way to follow up on the Code’s provisions. Conversely, an international criminal court without a code would mean that certain crimes would be condemned by the international conscience, but that there would be no way of punishing them in the absence of universally acceptable rules or definitions of those crimes. Establishing an international criminal court and a code separately would seem to be absurd, because they must obviously be interrelated. It was to be hoped that, following discussion in the Commission, the nature of that interrelationship would emerge and recommendations could be sent to the General Assembly. It was time for the Commission to take a clear position in its recommendations.

6. It was important not to confuse the issue of the desirability and that of the feasibility of an international criminal court. Admittedly, the General Assembly had instructed the Commission to consider the question of feasibility, but it was difficult to separate the two concepts. Back in 1950 the General Assembly had requested the Commission to take a clear stand on both questions and the Commission had decided that it was both desirable and feasible to establish a court.3

7. Mr. Bennouna (2254th meeting) had alerted the Commission to the danger of the excessive impact of domestic law. Actually, it was important to bear in mind that no domestic law was perfect and therefore it would be all the more difficult to achieve a universally satisfactory result by means of an international mechanism. The Commission must find solutions where it could, but it must also call on the General Assembly and on States to take a position on the problems that went beyond the Commission’s mandate.

8. He supported the suggestion already made by a number of other members to establish a working group to help the Special Rapporteur in drawing up an inventory of problems facing the establishment of such a court, along with a list of possible solutions, and in drafting recommendations to the General Assembly to serve as guidance in taking a decision.

9. Mr. AL-BAHARNA said he was in favour of an international criminal court along with a criminal code, because neither could function without the other. He had

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* Resumed from the 2253rd meeting.
1 For texts of draft articles provisionally adopted on first reading, see Yearbook...1991, vol. II (Part Two), chap. IV.
3 See 2254th meeting, footnote 11.
already made his position known in earlier statements and would therefore restrict himself to addressing the substantive issues raised in the Special Rapporteur's excellent report.

10. In part one of the report, the Special Rapporteur first responded to the objection to an international court on the grounds that the current system of international proceedings based on universal jurisdiction had been functioning satisfactorily. Although the argument that both the trial and sentencing of the accused might be affected by domestic pressures was correct, it ought to be stressed that the universal jurisdiction system had yielded results that were in fact far from satisfactory. States had often failed to conduct even preliminary inquiries, particularly in cases where the crime had a strong political dimension.

11. Secondly, the Special Rapporteur responded to the contention that an international criminal court might be politicized. Personally, he agreed, and would even argue that politicization at the national level might well be greater than at the international level.

12. Thirdly, the Special Rapporteur dealt with objections raised because of the complexity of the problems posed, and, indeed, debates in the Sixth Committee seemed to highlight the fact that a great many legal and political obstacles must be overcome before the court could become a reality. True, States would have to agree on, inter alia, jurisdiction, rules of procedure, evidence and penalties, yet such questions were, as pointed out in the report, no more complex than those encountered by States in establishing other international judicial bodies. Furthermore, the Commission was authorized under General Assembly resolution 46/54 of 9 December 1991, paragraph 3, to consider further the issues concerning the establishment of an international criminal court. In view of that mandate, the Commission should not fail to come to grips with all of the issues, thereby forfeiting the opportunity of drafting the statute of the proposed court. Moreover, it would be unfortunate to shy away from the task of drafting a statute at a time when a consensus was slowly beginning to emerge in the Commission. Thus, as a first step towards overcoming divergent opinions, the Commission should adopt specific proposals on the various questions in that regard, so as to form a basis of discussion.

13. As to the argument that an international court would be less capable of guaranteeing protection of human rights than would a national court, which was bound by constitutional provisions of domestic law covering such rights, he agreed with the Special Rapporteur that the international situation seemed to point to just the opposite conclusion.

14. In part two of the report, containing possible draft provisions on a number of topics, two alternatives were discussed for the law to be applied by an international criminal court. The first used a generic formula and the second an enumerative method. As the generic formula, namely international criminal law, was not a term of art with a fixed meaning and content, it was inappropriate in the sense in which it was employed in the second paragraph of the commentary. He was therefore not in favour of alternative A. Alternative B would be acceptable if it was modified to reflect the functions and purposes of an international criminal court. In its present form, it was defective in form and content. What had to be determined was the function of that article and whether it prescribed the "formal" sources of law. Presumably it indicated the "material" sources governing international criminal jurisdiction, in which case, the article should not be patterned on Article 38 of the Statute of ICJ, which was concerned with inter-State disputes. Rather, it should reflect the function of the court, which was to try individuals, groups and States. The differences in the functions of ICJ and the international criminal court should be borne in mind in formulating the provision on the law to be applied by the latter. The Special Rapporteur himself appeared to have reckoned with that fact, for he affirmed that, as a rule, the principles relating to basic human rights were undoubtedly applicable under international criminal law. If that was so, why were the principles relating to human rights not included in the law to be applied by the court? Plainly, the material sources of law enumerated in the draft article were incomplete.

15. Subparagraphs (a), (b) and (c) of alternative B were acceptable in principle, but the formulations were in the main based on Article 38 of the Statute of ICJ. It would be better to have a simpler version, reading: "(a) International conventions; (b) International custom; (c) General principles of law recognized by States". Subparagraph (d) caused some misgivings. First, judicial decisions, and teachings of highly qualified publicists could not be grouped together, and second, the characterization of judicial decisions as subsidiary means for the determination of rules of law was open to criticism. Instead, the Commission might adopt the expression "judicial decisions" simpliciter. Subparagraph (e) called for further reflection.

16. The possible draft provision on jurisdiction ratione materiae differed substantially from that presented in the ninth report. While the ninth report had proposed optional jurisdiction, the tenth spoke of a dual regime of compulsory and optional jurisdiction. While it might be desirable to confer compulsory jurisdiction on the court in respect of the crimes enumerated in paragraph 1, he doubted whether it was feasible at the present time. The court's jurisdiction would be not only compulsory but exclusive, a limitation that made matters worse. He would much prefer the version contained in the ninth report, which conferred optional jurisdiction on the court. Again, paragraph 2 did provide for optional jurisdiction in respect of crimes other than those mentioned in paragraph 1, but that solution might not be workable. Even paragraph 3 of the new draft, which precluded appeals against decisions rendered by national courts, was open to criticism inasmuch as it deprived the court of an international role. Conceivably, the court could play a role when there was a challenge to the penalties imposed by the
criminal court. It might be recalled that paragraph 4 of the jurisdictional article in the ninth report had in fact provided for such a contingency.\footnote{Ibid.}

17. The wording of paragraph 1 of the possible draft provision on complaints before the court\footnote{For text, see 2254th meeting, para. 6.} was a marked improvement over the draft proposed in the previous report, but he still had a number of reservations. First, the word "complaint" might not be the most appropriate, because it had more than one meaning. The Commission might therefore consider using a more suitable term that accurately reflected the Special Rapporteur’s intended meaning. In any case, the words "before the Court" needed to be changed. If the matter was brought before the court at the complaint stage and a decision was therefore taken to commit the accused to trial, the court’s integrity and independence would be compromised. Hence, the words "appropriate prosecuting authority" should be substituted for "Court". Without prejudice to those remarks, he was not completely in favour of vesting the right to prosecute exclusively in the prosecuting body. Under the scheme of universal jurisdiction, States currently had the right to institute proceedings in respect of international crimes, and any possible derogation would require a saving clause. Obviously, the Commission should review the draft provision.

18. He was sympathetic to the idea that human rights organizations should be permitted to bring a complaint before the court, but it should be handled with utmost care. Only human rights organizations whose work had received the acclaim of the international community should be permitted to bring a complaint or an action. He agreed with paragraph 2 of the draft provision to the effect that the official capacity of the perpetrator of a crime should not constitute a defence.

19. The broad principle underlying the possible draft provision on proceedings relating to compensation,\footnote{Ibid., para. 7.} namely, that the victims of a crime, whether States or individuals, should be compensated for injury sustained as a consequence of a crime referred to the court, commanded his support, but certain fundamental questions needed to be resolved first. For example, what was the meaning, scope and function of the compensation envisaged? How was it to be determined and to whom would it be payable? A still more basic question was whether the primary function of the proposed court should not be the rendering of criminal justice, and whether the question of compensation should not be given secondary importance or be managed quasi-judicially by a commission acting as a sub-organ of the court system.

20. Alternative B of the possible draft provision on handing over the subject of criminal proceedings to the court\footnote{Ibid., para. 8.} was perhaps preferable because it imposed a legal duty upon the State to hand over the alleged perpetrator, whereas alternative A merely described the legal nature of the transfer of the alleged offender to the court. Imposing a duty in that context not only offered the advantage of greater precision but also made it easier for States where internal judicial procedures had to be completed before such a transfer could be effected. On the other hand, many States might have difficulties in complying with an unqualified duty. The Commission would have to exercise great care in weighing up all the implications of the proposed provision.

21. As to the “double-hearing” principle,\footnote{Ibid., para. 9.} the concept of an appeal was indeed a basic human right and the proposed court ought to have an appellate infrastructure, but the assizes system outlined in the commentary was not perhaps entirely suitable for an international criminal justice system. As for paragraph 2 of the draft provision, a cursory reference to the double-hearing principle was insufficient; the draft statute should provide a detailed set of rules on the appellate system.

22. Lastly, he wished to thank the Special Rapporteur for his promptness in producing a set of possible draft provisions on the proposed international criminal court, thus imparting momentum to the Commission’s response to the invitation contained in paragraph 3 of General Assembly resolution 46/54.

23. Mr. de Saram, addressing the general question of the desirability and feasibility, or otherwise, of creating an international criminal jurisdiction, said he appreciated the questions raised by the Special Rapporteur as to the general approach the Commission should adopt on the subject of the creation of an international criminal jurisdiction. As had been noted, there were substantial difficulties still attending the question of the draft Code of Crimes and that of an international criminal jurisdiction. There was, as well, an absence as yet of clear directives from the Sixth Committee. General Assembly resolution 46/54 enabled the Commission to consider whether or not an international criminal court, in the full sense of the term “court”, or, alternatively, a more modest procedure: “an international criminal trial mechanism” would be a more realistic and, in the circumstances, the more appropriate course. It was true that many difficulties existed in the way of creating an international criminal jurisdiction. Yet, there had been other occasions in the past when seemingly insuperable difficulties had been overcome in the Commission and other United Nations legal bodies. Thus, to be hopeful that appropriate and generally acceptable solutions would eventually be found on the various aspects that now seemed to pose such extraordinary difficulty, might not be in fact so over-idealistic. The difficulties, however, needed to be fully faced, and having regard to the obvious requirement of consensus in the Commission’s proceedings and of the importance of securing widest possible governmental adherence to whatever recommendations the Commission was to make, it would seem unrealistic for positions in favour of the creation of an international criminal jurisdiction to be pitched too high. Thus, to speak of the creation of an international criminal court—in the sense of a permanently established body (in the nature of ICTY) would, in the light of the record of discussions hitherto in the Commission and in the Sixth Committee, seem somewhat unrealistic. A more modest course would seem the more appropriate, namely, the creation, perhaps by international convention, of an
ad hoc tribunal—to be convened under a procedure that would preclude unreasonable use and, most important, provide safeguards which States would consider adequate and acceptable from the point of view of the considerations relating to their sovereignty.

24. The consideration was inescapable, nevertheless, that from time to time there were international occurrences of such enormity and magnitude that they shocked and aroused the conscience of the world. There had been, moreover, an ever-growing global consciousness, as in recent years in the environmental field. Thus, it was perhaps time that the Commission should begin to concentrate somewhat more on just how an international criminal jurisdiction might possibly be created, in a manner generally acceptable to all countries, rather than on the problems in the way of its establishment. It seemed unlikely that the subject of an international criminal jurisdiction would ‘simply go away’.

25. The point could also be made with some measure of justification that the existence of an international criminal trial mechanism might serve to some degree as a deterrent to international criminal behaviour.

26. There were, nevertheless, a number of specific and difficult aspects that would have to be examined very closely—whether the court was envisaged as a permanently established body or a more modest ad hoc institution. These included the question of the role of the Security Council under the Charter of the United Nations on matters of peace and security. There was also the question, if the creation of an international criminal jurisdiction was ever to be a reality, whether some limitation on the scope of such jurisdiction might not be necessary. It might well be that, to secure the necessary consensus and widest possible adherence such jurisdiction might have to be limited to crimes to be defined in the draft Code.

27. As to the methods of the Commission’s work at its present session, it should perhaps be noted that a number of matters that had been referred to in the discussion might also have been considered in the Commission, the Sixth Committee, and other legal committees between the years 1950 and 1953.

28. The discussions in the Sixth Committee the previous year had not perhaps been as full and as detailed as they might have been. It would perhaps be helpful both to the Commission itself and to the Sixth Committee (and ensure that everyone was on the same “plateau of awareness” and on the same “wavelength” when consideration was given, particularly to the more specific and technical matters) if a comparative table of the provisions of some of the principal statutes and draft statutes for international criminal jurisdictions could be put together. Such a table would, at the very least, be extremely informative to many delegations in the Sixth Committee, and it would be of interest to the Commission as well to see how some of the matters referred to in discussions might have been dealt with in other statutes or draft statutes. The discussions in the Commission in the early 1950s suggested that there were then seven such statutes. There would be more at the present time and some selection would, of course, be necessary.

29. Mr. YAMADA said that an international mechanism, possibly involving the establishment of an international criminal court, was essential for directly prosecuting perpetrators of acts such as aggression. He endorsed the counter-arguments advanced by the Special Rapporteur in his tenth report against objections raised in the General Assembly to the possible establishment of an international criminal jurisdiction. Having participated in the past two sessions of the Sixth Committee, he had formed the impression that representatives were somewhat in the dark as to the nature of the court they were discussing, and therefore tended to confine themselves to generalities. Even among those who favoured the establishment of an international criminal court, many had taken a cautious approach and had expressed reservations. In order to obtain political guidance from the General Assembly, the Commission should present it with a clearer picture of the issues involved; for example, it might prepare a table showing some of the principal options with their respective merits and drawbacks.

30. Without losing sight of the international community’s ultimate goal of defining crimes against the peace and security of mankind and establishing a mechanism which would have jurisdiction over the prosecution and punishment of the perpetrators of such crimes, the Commission should proceed with caution and settle for a solution that stood a chance of commanding broad acceptance in the contemporary world. Clearly, the international community would, for the present, have to rely on national institutions for most of the executive functions: making inquiries, collecting evidence, apprehending offenders, and so on. It might also be obliged to depend on national courts for many of the proposed system’s judicial functions. The Commission should therefore consider the question of judicial assistance from national institutions.

31. He agreed that emphasis should be placed on arriving at a concept of an international criminal court which was feasible and viable in the world of today. In particular, he agreed with Mr. Bowett’s suggestion (2255th meeting) that each successive step in criminal proceedings should be examined separately. Similarly, Mr. Pellet (2256th meeting) was right in that, theoretically at least, the draft Code and the establishment of an international criminal court did not have to be linked together and that, for the purposes of the present exercise, it might be advisable to try to separate the two issues. However, the close connection between them in the minds of many representatives in the General Assembly had to be taken into account. As to the Commission’s working methods, he supported the Special Rapporteur’s suggestion (2254th meeting) for the establishment of a working group to assist him.

32. Mr. YANKOV, remarking that a specific request from the General Assembly to the Commission such as the one contained in paragraph 3 of resolution 46/54 was a somewhat rare occurrence, said that the Commission’s report on the question of an international criminal jurisdiction should be in two parts, the first analytical and the second containing proposals for the establishment of an international criminal court or other international criminal trial mechanism. Of course, the report must not fail to reflect doubts and reservations about the proposals re-
lating to the establishment of a court, but proposals would certainly have to be formulated.

33. Three main trends had emerged so far, both in the Commission and in the Sixth Committee. The first was a definitely positive approach in favour of the establishment of an international trial mechanism in connection with crimes listed in the Code, it being understood that international criminal jurisdiction should be confined to individuals perpetrating such crimes. The opposite view was that the establishment of an international criminal court was not feasible, largely because no State would be willing to surrender its jurisdiction in criminal matters.

A third approach, which might be described as sceptical, consisted in accepting the general principle of an international criminal body but at the same time emphasizing the great complexity of the matter. Personally, he found it difficult to make a clear-cut choice between those three positions. The difficulties involved were formidable, but they should not be considered insurmountable, even though certain objections could not be overlooked and prevailing international realities had to be taken into account.

34. A number of members had referred to the Nürnberg Tribunal and its Charter, but part of the Charter consisted of what could be described as a mini-code of crimes against peace and humanity, as well as war crimes. The same was true to some extent of the European Convention on Human Rights, which was likewise a hybrid, one part containing material rules and the other being in the nature of a code. Despite numerous examples of persistent or emerging nationalism, there was increasing awareness of the need for mutual self-restraint in sovereignty so as to enhance legal order worldwide.

The international community was moving towards interdependence, cooperation and the adoption of common values. The Charter of the Nürnberg Tribunal testified to the vast importance attaching to world public opinion as far back as August 1945. Why should the twenty-first century not be prepared to go ahead with the establishment of an institution that would have judicial functions in the field of crimes against the peace and security of mankind?

35. He agreed that, without an international trial mechanism, the Code would have at best a declaratory significance. The effectiveness of both the Code and the international criminal court would depend on them being closely interlinked, if possible in the form of a single instrument consisting in one part of material rules and in the other of procedures to be applied. The Code and the statute of the court would thus form one instrument. It was also important that there should be broad recognition of the court and consensual adherence by States to its jurisdiction.

36. In his view, it was feasible to envisage an international criminal court with jurisdiction in respect of the crimes listed in the Code, but caution and realism were called for in determining the scope of both the Code and the court. With regard to the court's jurisdiction materiae, the Commission should identify the various categories of crimes against the peace and security of mankind, in particular a category which would cover crimes committed by individuals acting on behalf of a State, taking into account the criteria laid down in articles 2 and 3 of the draft Code as adopted on first reading.

All attempts to classify crimes under the Code also required great circumspection, since any classification depended on the circumstances of a given case: drug-trafficking, for example, might involve private individuals or legal entities, in addition to an element of State responsibility. The same might be true of the recruitment, use, financing and training of mercenaries. However, certain crimes, such as aggression or the threat of aggression, or colonial domination, prima facie involved the responsibility of the individual acting on behalf of the State as well as the international responsibility of the State itself. The question therefore arose whether there should be two different trial mechanisms to consider the two categories. That question, however, was of such complexity as to require much more extended reflection.

37. There should be a close relationship between the international criminal court and national jurisdictions, and the former should avail itself of existing national practice. It should not have exclusive jurisdiction, and the rule of exhaustion of local remedies should apply where appropriate.

38. With regard to the alternatives of compulsory and optional jurisdiction, it would be preferable at the present stage to restrict the scope of optional jurisdiction, especially in view of the fact that Article 36 of the Statute of ICJ had often been used as an escape clause, and that the effect of the many reservations to paragraph 2 of the article, concerning compulsory jurisdiction, had been virtually to nullify its application.

39. Mr. Bennouna was right to say (2254th meeting) that careful consideration should be given to the relationship between the court and the Security Council, especially in connection with Articles 24 and 39 of the Charter of the United Nations. The international criminal court should not, in his opinion, act as an appeal court in respect of judgements by national courts, but it might be possible to envisage an appeal procedure within the court itself.

40. In conclusion, he supported the proposal to establish a working group to analyse the Special Rapporteur's report and the discussion at the present session with a view to drawing up concrete proposals. The working group might consider compiling a list of relevant international instruments which would provide the legal grounds for the material rules and, to some extent, the procedural provisions.

41. Mr. VERESHCHETIN asked whether some consensus had been reached in the Commission to exclude States from the jurisdiction of the international criminal court. Had there been a comprehensive discussion of the issue before a decision was taken to that effect? It was his impression in general that the so-called debate in the Commission often took the form of a series of monologues, with little interchange of views.

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42. The CHAIRMAN said that the issue had indeed been discussed at great length and it had been decided to confine consideration to jurisdiction over individuals for the time being, on the understanding that the Commission could revert to the topic of jurisdiction over States at a later stage.

43. Mr. KOROMA and Mr. SZEKELY said they had discussed at great length and it had been decided to

44. Mr. THIAM (Special Rapporteur) said that he had long regretted the absence of genuine debate in the Commission’s deliberations, but pointed out that that had not always been the case.

45. Mr. PELLET said that he agreed in principle with those members who had pleaded in favour of an informal dialogue. He also agreed that the Special Rapporteur should, from time to time, sum up the discussion.

46. Commenting on the first section of part two of the Special Rapporteur’s report, he said that the concept of an international criminal court was in itself acceptable, even if he was highly sceptical about the value of the whole exercise. Such a court did not seem to respond to the needs of contemporary international society, which required more flexible machinery that was in tune with reality.

47. The French term droit pénal international should indeed be replaced by droit international pénal, since that emphasized the essentially international character of the rules to be applied, but he was not altogether certain that the notion covered by either of those formulas was sufficiently well-established to be set forth in such concise terms as those used in alternative A in the Special Rapporteur’s possible draft provision on the law to be applied. Alternative B, which adopted the enumerative method, was closely modelled on Article 38 of the Statute of ICJ, yet he wondered whether that was appropriate in the case of an international criminal court, since the functions of the two jurisdictions were different and Article 38 had recognized defects.

48. In indicating the origin of the applicable rules, as he believed was advisable, it should not be forgotten that, in the case in point, it was a question not of settling disputes between States but of trying individuals accused of international crimes. If the general framework of Article 38 was accepted, therefore, great care must be taken to adapt it as narrowly as possible for the purposes of the exercise in which the Commission was engaged and to couch the list set forth in the possible draft provision in more specific terms. Broadly speaking, the rules to be applied by the international criminal court should be of three kinds: first, rules applicable to the definition of the crimes of which the accused was suspected; secondly, rules designed to protect the human rights which the accused should enjoy; and, thirdly, rules governing the conduct of the trial. On that basis, he would suggest that the opening clause of alternative B should be worded along the following lines: “The court, which shall have the task of trying accused persons brought before it for crimes characterized as such under international law, shall apply, with due respect for the rights of the defense.”;

49. While he was not altogether happy about the list in alternative B, he was prepared to go along with the principle. Specifically, he agreed that the court should apply international conventions, as provided for in subparagraph (a), but was concerned at the reference to the prosecution and prevention of “crimes” under international law, something which might encourage the court to proceed by analogy. It would be better for the international conventions to be relevant to the object of the trial and applicable to the crimes with which the accused was charged, as provided for in the draft statute of the international criminal court prepared by ILA. He also concurred that the international criminal court should apply international custom, as provided for in subparagraph (b), but wondered why the Special Rapporteur had dropped the adjective “general” which, in Article 38, paragraph 1 (b), of the Statute of ICJ, rightly appeared before the word “practice”. Again, the court should apply the general principles of criminal law, as provided for in subparagraph (c), but he was surprised indeed at the inclusion of the words “recognized by the United Nations”. The general principles of criminal law were principles common to all States and were essential to ensure the proper and humane conduct of the trial. In his view, it was in the form of principles common to the different States, and in that form alone, that municipal laws should be relevant.

50. He was at a loss to understand why subparagraph (e) had been included in alternative B. As PCIJ had opined in a famous dictum:

From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts . . .

It was not, in his view, for an international court to apply the rules of municipal law as such. The European Court of Human Rights certainly did not do so; it merely ensured that municipal law was in conformity with international principles as laid down in the relevant human rights convention. There was no reason why the same should not apply in the case of an international criminal court.

51. He had no objection to the inclusion, in subparagraph (d), of judicial decisions and doctrine, though the exact wording of Article 38 of the Statute of ICJ, which was perfectly satisfactory, should have been used; alternatively, the report should have contained some explanation for the departure from that wording. Something was lacking from that provision, however, for Article 38 went back a long way and was possibly already outdated at the time it was drawn up. In particular, the role of the resolutions of international organizations, and, above all, of the General Assembly and Security Council of the United Nations, could not be ignored. The functions of the proposed court and the Security Council were none the less different. Even if the Security Council did not characterize a given incident of armed action as aggression, that did not necessarily mean that, legally speaking, there was no act of aggression. Care should be taken to

ensure that the functioning of the court was not paralysed as a result of political paralysis in the Security Council. On the other hand, it would be scandalous if some States, even though they were aggressors, could hide behind the veto. The court should not be limited by some obligation to yield before a negative finding of the Security Council. Should the Security Council arrive at a positive determination, however, there would be a strong presumption that its resolution was binding on the court, since the Security Council had the power of determination in the matter of the maintenance of international peace and security. On the other hand, such a resolution was not to be regarded as the gospel truth, in legal terms, and the court should always satisfy itself that any given decision of the Security Council was legally correct.

52. He felt the gravest concern at the position taken by ICJ in its Order of 14 April 1992 in regard to the Lockerbie case. If he had understood correctly, the Court took the view that, inasmuch as the Security Council’s resolutions were imputed with the superior legal force conferred by Article 103 of the Charter, the Court could not but defer to it. That seemed to be a refusal by the Court to perform its proper functions. Obviously, in the vast majority of cases, the binding legal force of the Security Council’s decisions would be recognized, but those decisions must at least not be contrary to the norms of jus cogens and they should certainly not be contrary to the Charter of the United Nations itself, which was definitely superior to any findings of the Security Council. The point called for careful consideration, particularly with reference to the Lockerbie case. He had the greatest respect for ICJ, but some aspects of its jurisprudence were open to criticism.

53. The Lockerbie case also showed that there was a great risk that the problem of the relations between the international criminal court and the Security Council might go much further and arise in connection not only with the crime of aggression but also with other issues. Libya and the Libyan authorities were not being held responsible for an act of aggression but were being accused of a form of terrorism, perhaps State terrorism.

54. The resolutions of the General Assembly itself could be of great relevance to the future international criminal court. For example, article 18 of the draft Code adopted by the Commission in 1991 had rightly characterized the maintenance by force of colonial domination as a crime against the peace and security of mankind, which inevitably presupposed that the General Assembly would have a major say in defining what constituted a colonial situation. In that area, therefore, the General Assembly enjoyed a very significant power of determination. The question was to what extent would the future court be bound by a determination that a situation was, or was not, a colonial situation. It was a very complicated problem to which he had no ready answer. The Commission should reflect on the place of the resolutions of international organizations, and particularly of the Security Council and the General Assembly, in the enumeration in the proposed draft provision.

55. It was important to bear in mind, first, that such resolutions could be of decisive importance in characterizing a crime and, secondly, that neither the Security Council nor the General Assembly were free to do just anything, and while their decisions had to be followed, in the case of a mere recommendation, some thought should be given to its legal force. In a de jure international organization such as the United Nations, those organs were bound to respect certain rules of law, in any event the norms of jus cogens and of the Charter of the United Nations itself; and the international criminal court, like ICJ, should satisfy itself that that was indeed the case.

56. He was not opposed in principle to differentiated degrees of jurisdiction according to the kind of crime involved, but he had serious doubts as to the merits of the list of crimes in paragraph 1 of the possible draft provision on jurisdiction of the court ratione materiae. Illicit international trafficking in drugs, seizure of aircraft and kidnapping of diplomats were not matters that could properly be dealt with by the exclusive jurisdiction of the court. He was also a little sceptical about systematic or mass violations of human rights. On the other hand, it was surprising to see no reference in the list to aggression or threat of aggression or, indeed, to intervention. Consequently, there should be a distinguishing principle, namely that the crimes must be exceptionally serious, fundamental and genuinely prejudicial to the dignity of mankind as a whole, if they were to be included in a list for which the jurisdiction of the court would be compulsory. In other words, when, behind the accused, it was in fact the State that was being tried, it would be reasonable to provide for the compulsory jurisdiction of the court. That did not, of course, apply to the kidnapping of diplomats or illicit international trafficking in drugs, which were usually the result of an act not of the State but of private persons. For the court to have compulsory jurisdiction, therefore, the crimes must be crimes in which the State was implicated. In such cases it was pointless to expect the State to sit in judgement upon itself and it was therefore desirable for an international court to be set up.

57. Paragraph 2 of the possible draft provision also seemed to raise fairly complicated issues. It had been suggested that the Special Rapporteur had in mind a sort of optional clause, comparable to Article 36, paragraph 2, of the Statute of ICJ, but that was not immediately apparent from the terms of paragraph 2 of the draft provision. It was perfectly possible to provide for an optional clause, but how could a case be brought before the court if there was no obligation to do so? Could that be achieved by referring a matter to, or bringing an individual before, the court, or by accepting the compulsory jurisdiction of the court in advance? Those were two very different approaches, as different as taking a case before ICJ on the basis of an agreement or on the basis of Article 36, paragraph 2, of its Statute. The point required clarification.

58. Irrespective of whether jurisdiction was compulsory or optional, it was necessary to determine who...
could bring proceedings against an individual before the court. Surprisingly, paragraph 1 of the draft provision, unlike paragraph 2, gave no indication as to the State or States that could do so. In that respect there seemed to be an unfortunate lack of symmetry between the two paragraphs.

59. International society was not, in his view, ready for an actio popularis, even for the most serious crimes, since that would open the door to all kinds of excesses. Had it been otherwise, both Saddam Hussein and George Bush might well have had to appear before ICJ, which seemed to be neither reasonable nor desirable. Consequently, he maintained the view that only the State on whose territory the crime was committed should be able to bring a case, and even that was going rather far. Also, it would be advisable to provide some means to deter States from seizing persons contrary to international law, so as to avoid a proliferation of cases such as those of Eichmann, Barbie and Noriega; no matter how unsavoury such individuals might be, their arrest did no credit to the States concerned and steps should be taken to guard against such excesses.

60. He agreed in principle with paragraph 3 of the draft provision. Other important aspects of jurisdiction remained to be considered, however, such as jurisdiction ratione personae, which had been dealt with only from the limited angle of jurisdiction ratione loci, and also jurisdiction ratione temporis.

61. He did not agree with Mr. Crawford (2256th meeting) about the retroactivity of the Nürnberg rules. Even though the Nürnberg Tribunal had been established after the crimes in question had been committed, the rules applied had been in force prior to its establishment. On that point he agreed with Mr. Rosenstock (2255th meeting). He also considered that a rule as to the compétence de la compétence should be included in the statute of the proposed court as well as some machinery to prevent frivolous requests, which could be very prejudicial to the proposed court.

62. It was necessary to pursue further leads and possibilities while also using imagination in responding to the real needs of the international community.

63. Mr. THIAM (Special Rapporteur) pointed out that, as was apparent from his earlier reports, he had already dealt with most of Mr. Pellet’s points. He urged members to concentrate on the practical, rather than the academic, aspects of the issue.

64. Mr. KOROMA said that, in elaborating the draft Code, the Commission should confine itself for the time being to jurisdiction over individuals, but in the longer term, the question of jurisdiction over States was still open to discussion.

65. Mr. ALBAHARNA said it seemed Mr. Vereschchetin had inferred from his statement that he (Mr. AlBaharna) was of the view that charges might be brought against States in the international criminal court. In fact he had been referring to the wording of paragraph 1 of the possible draft provision on complaints before the court to the effect that:

Only States and international organizations shall have the right to bring complaints before the Court.

66. As a further clarification relating to a comment by Mr. Pellet, for the purposes of alternative B, subparagraph (c) of the possible draft provision on the law to be applied, he preferred the simpler formulation in Article 38, paragraph 1 (c), of the Statute of ICJ, which affirmed the general principles of law recognized by civilized nations, provided “States” was substituted for “civilized nations”, the latter term being by now somewhat antiquated.

67. Mr. THIAM (Special Rapporteur) said he must point out that many of the issues raised by Mr. Pellet related to part two of his report, on which he had yet to submit his additional comments to the Commission during the discussion.

68. Mr. BENNOUNA said that he had two preliminary comments on part one of the report. The first was that the concepts of universal jurisdiction and an international criminal court were not incompatible, and the second was that the international community clearly needed a jurisdiction to which it could turn, when required, as could be seen from the recent difficulties that had arisen in connection with the suspects in the bombing of the Pan American Airways passenger aircraft over Lockerbie. What was required was a highly flexible system which could make use of applicable rules drawn from an international convention or even national law, and which took into account the concern of States for the principle of sovereignty.

The meeting rose at 12.50 p.m.

2258th MEETING

Tuesday, 12 May 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereschchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Statement by the outgoing Chairman

1. The OUTGOING CHAIRMAN expressed his appreciation to all members of the Commission and the secretariat for their concern over his well-being during the grave events in his country, thanked Mr. Al-Baharna for
presiding over the opening of the forty-fourth session of the Commission, and welcomed the Commission's new members.

2. He said that, having had the honour of representing the Commission at the forty-sixth session of the General Assembly and of introducing in the Sixth Committee the report of the Commission on the work of its forty-third session,¹ he had, on that occasion, reported on the progress made on the items the Commission had been requested to consider. The General Assembly had been favourably impressed by the work accomplished at the Commission's forty-third session and had expressed its appreciation, in resolution 46/54 of 9 December 1991, for the completion of the final draft articles on jurisdictional immunities of States and their property and the provisional draft articles on the law of the non-navigational uses of international watercourses and on the draft Code of Crimes against the Peace and Security of Mankind. It had also approved the recommendation of the Commission that, with the completion of the draft articles on jurisdictional immunities of States and their property, a convention should be elaborated on the basis of those draft articles. In resolution 46/55 of 9 December 1991, the General Assembly had thus decided to include in the provisional agenda of its forty-seventh session an item entitled "Convention on jurisdictional immunities of States and their property" and to establish a working group to examine issues of substance arising out of the draft articles and the question of the convening of an international conference, to be held in 1994 or subsequently, to conclude a convention on the question. General Assembly resolution 46/54 invited the Commission, within the framework of the draft Code, to consider further the issues raised concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter, and it drew the attention of Governments to the importance of presenting, in writing, by 1 January 1993, their comments and observations on the draft Code and on the draft articles on the law of the non-navigational uses of international watercourses.

3. The General Assembly had also recognized the role of the Commission in the fulfilment of the objectives of the United Nations Decade of International Law.² As the leading body responsible for the codification and progressive development of international law, the Commission ought to be at the forefront in developing and shaping the activities undertaken during the Decade. Given the importance of the topic for the international community, the changes taking place in international relations and the call for the establishment of a new world order, the Commission should seek to identify an area of study in which it could make a contribution to enhancing the role of international law in contemporary society, for example, the application of international humanitarian law to the United Nations peace-keeping forces. Although such forces were becoming more universal, humanitarian law did not specifically apply to them. The Commission might undertake an in-depth study of the matter by setting up a working group, inter alia, to analyse all relevant materials with regard to the Decade and to ensure liaison with Governments, international and regional organizations, non-governmental organizations and all other bodies participating in the Decade in order to learn their views on the matter.

4. The General Assembly had expressed its appreciation for the efforts of the Commission to improve its procedures and methods of work and requested the Commission to consider thoroughly the planning of its activities and programme for the term of office of its members and its methods of work in all their aspects, including the possibility of dividing its annual session into two parts, and to continue to pay special attention to indicating in its annual report, for each topic, those specific issues on which expressions of views by Governments, either in the Sixth Committee or in written form, would be of particular interest for the continuation of its work.

5. As part of its traditional policy of cooperation with other legal bodies, the Commission had been represented in Strasbourg by Mr. Pellet at the session of the European Committee on Legal Cooperation. For his part, he had attended the thirty-first session of the Asian-African Legal Consultative Committee, held in Islamabad, Pakistan. The report of the Commission had been favourably received, the discussions in the Committee having focused on the draft Code and the non-navigational uses of international watercourses. In February 1992, some members of the Commission, invited in their personal capacity, had taken part in a fruitful meeting on the draft Code organized by the International Institute of Higher Studies in Criminal Sciences in Courmayeur, Italy.

6. In conclusion, he thanked the members of the Commission and the secretariat for their unwavering support and for the confidence they had placed in him. He congratulated Mr. Tomuschat on his election as Chairman of the Commission and wished him and the other members of the Bureau every success in the exercise of their functions.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

7. Mr. AL-KHASAWNEH said that the current debate highlighted a fundamental question: that of the relationship between the Commission and the Sixth Committee of the General Assembly. Clearly, the Commission had

¹ Official Records of the General Assembly, Forty-sixth Session, Sixth Committee, 22nd meeting, para. 4 et seq.
² See 2255th meeting, footnote 5.
³ For text of the draft articles provisionally adopted on first reading, see Yearbook ..., 1991, vol. II (Part Two), chap. IV.
been unable to obtain policy guidance from the discussions in the Sixth Committee on the subject under consideration any more than from General Assembly resolution 46/54. As a result, the Commission's codification work had been hampered, since the subject was at the intersection of law and policy and many possible options were policy options, at least in principle. As that situation was unlikely to change, the Commission should take it upon itself to formulate a specific, bold, and yet realistic proposal and to submit it to the General Assembly, which would then have to decide either to approve or reject it.

8. For the time being, the question that arose was whether there was a need for an international criminal court. He was convinced that such a court would help strengthen the system established by the Charter of the United Nations for the peaceful settlement of disputes. It would avoid offending the susceptibilities of States without sacrificing justice and thus reduce friction between countries and threats to international peace and security. The current system of universal jurisdiction was far from satisfactory because the absence of priority was a source of conflicts of jurisdiction and competing claims and was prejudicial to the cause of justice.

9. The assertion had been made that an international criminal court would infringe on national sovereignty. Although the principle of respect for national sovereignty must not be underestimated, he did not see why a State would accept universal jurisdiction, yet refuse, for example, to hand over its nationals to an international court.

10. The work of an international criminal court would have a beneficial impact on the development of international criminal law, but it must not be at the mercy of every event. The court would not need to be permanent or to have a permanent secretariat, but it should not be left dormant, and cases must not be brought before it solely for reasons of political opportunism.

11. For the time being, the Commission might explore all possibilities, including recourse to ICJ and the formation of panels of international observers. However, the ultimate goal should be to establish an international criminal court that had its own existence and dual jurisdiction: exclusive for the most serious crimes against the peace and security of mankind and optional for the others.

12. Mr. THIAM (Special Rapporteur), summing up the discussion on part one of his tenth report, said he had had the impression that there had been an early second reading of the draft Code. It was not that there was no correlation between the establishment of an international criminal court and the draft Code, but the problem of that correlation was dealt with in part two of his report.

13. The question the Commission must answer at the current stage was simple: was it possible to establish an international criminal court? On that point, the debate had revealed three trends.

14. A substantial majority of the members of the Commission, although with some qualifications, like those expressed by Mr. Al-Khasawneh, Mr. Bowett, Mr. Crawford, Mr. Jacovides, Mr. Pambou-Tchivounda, Mr. Razafindralambo and Mr. Rosenstock, had spoken in favour of establishing an international criminal court, pointing out—on the basis of examples as diverse as the trial of General Noriega in the United States of America, the Gulf war, the attacks on aircraft in which Libya was being singled out, and the Touvier case in France—that the lack of an international criminal court was leading States to take unilateral measures which were unacceptable. The fact was that that situation, which could only benefit the strongest States, was tantamount to a denial of justice when a State, or one of its courts, refused to try a case because it involved one of its nationals. An international criminal court would fill that gap.

15. The second trend was represented by the members of the Commission who had highlighted the political and technical problems to which the establishment of an international criminal court would give rise and had said that they would prefer the Commission to move towards a more flexible mechanism which was more compatible with State sovereignty. Some proposals had been made to that effect. Mr. Pellet (2256th meeting), for example, had mentioned the participation of active observers in proceedings instituted before national courts or the possibility of requesting advisory opinions from ICJ. However, he (the Special Rapporteur) did not think that those proposals would be really effective. Trials were in principle public and open to any observer who wished to be present and the establishment of a mechanism composed solely of observers would thus not be a crucial innovation. The advisory opinions which would be requested from ICJ could not constitute the trial mechanism referred to in General Assembly resolution 46/54. Other, more specific, proposals had been made, but would require more detailed consideration. Mr. de Saram (2257th meeting) had proposed the establishment of an ad hoc court, but he personally was suspicious of such courts, which would be of the Nürnberg type and were established after the commission of the alleged crimes. Perhaps Mr. de Saram had been thinking more in terms of an institution along the lines of PCIJ. However, if it was a matter of choosing judges from a list and determining the applicable law, would that not be arbitration rather than international criminal law? The proposal did nevertheless deserve further consideration and clarification.

16. Other members of the Commission, who could be associated with that trend, had simply outlined the political and technical problems involved in establishing an international criminal court, without proposing any solutions. State sovereignty had been described as a major and virtually insurmountable political problem. He doubted that that was the case in the modern-day world, where political integration, which meant giving up some national prerogatives, was making headway, particularly in Europe, and was beginning to take shape elsewhere, for example, in Africa. The Commission should not ignore that trend. With regard to technical problems, Mr. Bennouna (2254th meeting), for example, had pointed out that criminal responsibility was a responsibility of the individual and that it was sometimes difficult to determine the responsibility of those in Government or parliament. In reply, it might be said that the responsibility of the members of a Government was collective; that was, moreover, the solution the Nürnberg
Tribunal had adopted with the theory of conspiracy. If a minister did not agree with a decision of the Government, he could resign. If he did not do so, it was because he endorsed that decision. As far as the responsibility of members of parliament was concerned, parliamentary debates were public, as were the votes of the members. There was thus no lack of clarity in the case of those two institutions. At the same time, there was an instructive case-law in that connection concerning courts, which were notoriously impenetrable in that they conducted their deliberations in camera. For example, there had been a British ruling that the members of a court could be prosecuted for a crime against humanity if their decision constituted an illicit act, that is to say, a criminal act, or if they had applied an unjust law or unjustly applied a just law. It stated that the principle of the secrecy of the proceedings and of the voting must give precedence to the overriding concern of justice when, through those proceedings and that vote, a crime had been committed and when the responsibility of each member participating in the decision was to be determined. If that were the case, he did not consider that secrecy was an argument which the perpetrator of a criminal act could invoke to shield himself from justice.

17. In referring to aggression, Mr. Bennouna (2254th meeting) had also mentioned the problem of the jurisdiction of the Security Council and of the future international criminal court. He himself had raised the question some years previously, pointing out that it would arise only if the international criminal court adopted a position contrary to that of the Security Council. If the Security Council did not give a ruling—and that was not a far-fetched idea, since it was a political and diplomatic organ—the international criminal court could take whatever decision it thought fit. If there was a veto by a permanent member of the Security Council, that “non-decision” would not be binding on the international community as a whole or, consequently, on the international criminal court. If the Security Council did give a ruling, the international criminal court would have to consider the appropriateness of the decision it would be called upon to take in order to avoid being flagrantly at odds with the Security Council and thus avoid disputes between the plaintiff State and the State which was being prosecuted. If the Security Council did determine that there had been an act of aggression and if the international criminal court concluded otherwise, there would be no agreement between the plaintiff State and the State being prosecuted, the former sheltering behind the Security Council’s decision and the latter rejecting it. The same would be true in the opposite case. The problem was undoubtedly delicate and it was up to the Commission to arrive at a solution in all conscience. He had therefore not included the crime of aggression as one of the areas within the exclusive jurisdiction of the international criminal court.

18. The third trend, which was represented by Mr. Shi (2255th meeting) and was just as respectable as the other two, was in favour of maintaining the status quo.

19. Ultimately, apart from the problem of national sovereignty, the solution to which depended on the political will of States, all the other issues boiled down to purely technical problems that were not insurmountable. A clearly affirmed political will would thus be enough to enable the Commission to make headway in its work.

20. In conclusion, he recalled that, in 1950, the Commission had appointed two rapporteurs to study the advantages and drawbacks of establishing an international criminal court and that, having considered their two reports, it had stated that it was in favour of doing so. The Commission was naturally free to change its mind 40 years later, but, if it did so, would have to indicate the reasons why. In his view, developments in the international situation in no way justified such a reversal. If the Commission maintained its position, it must put an end to a now outmoded discussion and press ahead. In order to do so, it might set up a working group, as it had already been proposed, entrusting it with preparing a draft which would be submitted to the General Assembly; if that solution seemed premature, it might continue to review all the aspects of the question in plenary. If the working group solution was adopted and it was borne in mind that, with one or two exceptions, the members of the Commission favoured the establishment of an international criminal court, it would, in his view, be necessary for the working group to compile all the arguments in favour of establishing the court and to prepare a document along those lines which would reflect the general consensus.

21. Mr. ROSENSTOCK said that, since he had never expressed a categorical opinion on the question of establishing an international criminal court, he was surprised to be included among those in favour of it. The Special Rapporteur was entitled to give his impressions of the debate on the question, but his statement must not be regarded as a summary of the discussion which all members of the Commission were supposed to approve.

22. The CHAIRMAN said that the comments of special rapporteurs were of a purely personal and subjective nature.

23. Mr. THIAM (Special Rapporteur) said that he never said anything which could be binding on members of the Commission. He might also be wrong, since it was always difficult to provide a summary with which everyone would agree. He was not unaware that Mr. Rosenstock had always had considerable reservations about the establishment of an international criminal court, but he had not given up hope of seeing him change his mind.

24. Mr. ARANGIO-RUIZ said he continued to believe that the Code and the court should go hand in hand and that there could be no Code without a court. However, he did not consider that the Commission should, as Mr. Thiam seemed to be suggesting, simply submit to the General Assembly a list of the arguments in favour of the establishment of an international criminal court. It would also have to decide whether and to what extent such a court was genuinely necessary or indispensable for the proper implementation of the Code, carry out a comparative study of the results which would be achieved, with or without the court, and review the various possibilities of co-existence between an international
criminal court and national courts, taking into account all possible solutions, some of which had already been mentioned, particularly by Mr. Bowett (2255th meeting).

25. Mr. KOROMA said that he agreed with Mr. Arangio-Ruiz.

26. Mr. SZEKELY said that he agreed with the proposal by Mr. Arangio-Ruiz. On the basis of the comparative study, the Commission would be able to take a definitive decision for or against the establishment of an international criminal court, thus enabling the General Assembly to provide guidance on the matter, as stated in resolution 46/54.

27. Mr. THIAM (Special Rapporteur) said that the relationship between the Code and the international criminal court was dealt with in part two of his report and members could therefore revert to the matter. For Mr. Arangio-Ruiz’s information he explained that he had not meant that the Commission should not submit to the General Assembly arguments opposed to the establishment of an international criminal court, but merely that, as the majority of members favoured the establishment of such a court, the Commission should not simply mention the various views that had been expressed, but should actually take a stand on the matter.

28. The CHAIRMAN said that Mr. Koroma’s proposal with regard to humanitarian law as it applied to the peace-keeping forces was extremely useful and should be examined by the Planning Group without further delay.

29. The discussion would concentrate next on part two of the Special Rapporteur’s report and, in particular, on the questions of the law to be applied and jurisdiction.⁶

30. Speaking as a member of the Commission, he said that the court should, in his view, be a facility afforded to States rather than an element of a world government; in so far as possible, therefore, its jurisdiction should be optional. Indeed, it would be virtually impossible to divest national courts of the jurisdiction they already had under existing conventions and general international law. That did not mean that national courts could deal with all the crimes set forth in the Code, for, unless there was some future development in the existing law, their jurisdiction was always subject to two limitations, namely, the immunity of foreign politicians and the relative effect of international treaties.

31. The court could operate as an ad hoc institution and the answer to the question of the conferment of jurisdiction was to be found in the traditional rule whereby a State could, in the case of its own nationals, decline jurisdiction—in the event, in favour of the international criminal court—provided that there was an international element to the case.

32. In the case of foreign nationals, however, the traditional rules concerning the determination of jurisdiction—with regard to extradition, for instance—would have to be radically modified for it must not be forgotten that the court would have to try crimes that were an affront to the conscience of mankind. It would therefore be better not to have to secure the consent of the State in whose territory the crime had been committed, for, otherwise, persons who committed atrocities in their own country might be absolved of all responsibility and apartheid or genocide committed against a minority in the State, for instance, might go unpunished. Consequently, the system to be devised could certainly not be based on the traditional rules of international criminal law. In the case of certain crimes, there would be automatic, though not necessarily exclusive, jurisdiction. The institution of criminal proceedings would then depend mainly on the prosecutor’s office attached to the international court. In order to counteract the inherent weakness of an international authority vis-à-vis those who were in power or members of parliament, various possibilities could be envisaged. For example, the relevant prosecutor’s office could be required, at the request of at least three States, to consider the case and, where appropriate, to draft the indictment; or a committee of the General Assembly consisting of 15 members selected according to the normal rules of geographical distribution could take a two-thirds majority decision on the institution of proceedings, in which event the prosecutor’s office would open a file with a view to deciding whether the case should be referred to the court.

33. In other cases, it would in principle suffice if, under the ordinary rules of jurisdiction, the victim State conferred jurisdiction on the court. Certain difficulties might arise in practice, however. For instance, if the immunity of the individual concerned had to be waived, action by the victim State would not be enough. Similarly, in the event of potential conflict between two States in which certain acts could be qualified as aggression or intervention by one of the parties, it would be very difficult for an international prosecutor’s office to find grounds for its action. There, too, intervention on the part of the international community, possibly through the committee he had suggested, would be necessary.

34. Turning to the question of the law to be applied, he said that, so far as substantive law was concerned, the court would be bound by the nullum crimen sine lege, nulla poena sine lege rule. In that connection, a conviction could in principle be founded only on written law, even if the possibility of criminal penalties imposed pursuant to customary law and the general principles of law could not be ruled out altogether. There was far greater scope in the case of procedure. He therefore doubted whether the applicable law could be summarized in a single clause. In that connection, alternative A of the possible draft provision might give the impression that the court could apply only “the” criminal international law, in the sense of a universally applicable law, whereas the position depended on the status of the ratification of conventions on the subject. As to alternative B, he doubted the need to reproduce Article 38 of the Statute of the ICTY so faithfully, since the function of the international criminal court would not be to rule on inter-State relations, but to impose penalties on individuals on behalf of the international community. Accordingly, it would have to apply, on the one hand, all those rules that prescribed a certain course of conduct for individuals and, on the other, those rules that stipulated the modal-

⁶ For texts of possible draft provisions, see 2254th meeting, paras. 3 and 4 respectively.
ities of judicial proceedings, should the substantive rules be infringed. Only on a subsidiary basis could the international criminal court take account of the general rules of international law.

35. Subparagraph (a) of alternative B seemed to lose sight of substantive law inasmuch as it referred to conventions relating to the prosecution and prevention of crimes or, in other words, to procedure. Subparagraph (c), on the other hand, referred only to criminal law, an expression normally understood as distinct from procedural rules. He approved of the reference to internal law, since, basically, a person could be prosecuted only if he had broken a law by which he was bound, namely, a rule of internal law, which might be based on, and possibly meant to implement, international law. In that case, internal law was not just a fact, but the basic basis without which there would be no criminal proceedings.

36. Given the difficulty of finding the right answers to all the many questions that arose, he supported the idea that a working group should be set up. He also proposed that the students attending the International Law Seminar should be invited to consider certain items, in small groups.

37. Mr. KOROMA said that every State was bound by the constitutional guarantees enjoyed by its nationals when deciding on their fate and, in particular, when it handed them over to another authority.

38. The CHAIRMAN said he agreed that, when waiving its personal jurisdiction over its nationals, a State must respect all the guarantees laid down under internal law and international law.

39. Mr. CALERO RODRIGUES said that, like the Special Rapporteur, he considered that the term "criminal international law" should be adopted, in English as in French, to distinguish that new branch of law from traditional "international criminal law" which referred only to the international application of criminal law. Since the statute of the court must indicate which law the court was to apply, a generic and global definition, such as that in alternative A, should not be retained, as it would confer on the court jurisdiction that was too broad in scope. As to the analytical and enumerative definition in alternative B, he, like other speakers, regretted that it was modelled on Article 38 of the Statute of ICJ. The only new element compared to that Article—the reference to internal law in subparagraph (c)—did not seem very apt, as it did appear to be applicable in practice. Quite apart from the fact that, in that case, internal law would be no more than the reflection of international law, it would lead to uncertainty and confusion.

40. With regard to the subparagraphs taken from Article 38 of the Statute of ICJ, it was necessary, in his view, to come back to the basic question of the link between the Code and the court. The Code, which was, after all, the codification of substantive law, must define the crimes, lay down the penalties and indicate the judicial mechanism for its application. As for the court, its main function was to apply the Code and that should be clearly stated. If some crimes which should have come within the jurisdiction of the court were left out of the Code, the statute should mention, in addition to the Code, the instruments which defined those acts. With regard to jurisdiction, the instrument establishing the court, which would be of a purely procedural nature, should list not the crimes, but the instruments of substantive law which defined those crimes. He was very doubtful about subparagraph (b), since criminal law must be particularly precise and clear, and that was not typical of custom. He was not convinced of the usefulness of subparagraph (c), which was incomplete and superfluous, though he recognized that general principles could shed light on the application of the law. As to subparagraph (d), he considered, like certain writers, that it was not for the court to apply judicial decisions and teachings of highly qualified publicists of the various nations, but to use them to ascertain and interpret the rules of law. The provision was also quite unnecessary, in his view.

41. Turning to the question of jurisdiction, on which he had already touched, he said that, in the case of an international criminal court, there could be no question of optional jurisdiction or of the conferment of ad hoc jurisdiction. States parties to the instrument establishing the court were bound to accept its jurisdiction over the crimes defined in the instruments referred to in its statute. The criminal law had to be strict and, if States were not ready to accept that, they should not become parties to the statute of the court and the Code. He was aware of the risks of that position, since it could rule out the possibility of an international criminal court, but it was better to have no court than the semblance of a court. As he was opposed to optional jurisdiction, he did not favour paragraph 2 of the draft provision on jurisdiction; nor could he accept paragraph 3, for, in his view, the question of appeal against decisions handed down by domestic courts should not be brought into the picture. The court should have compulsory jurisdiction over crimes committed by individuals and defined as crimes under international law in the international instruments specified in the statute; and the Code would be the main instrument of substantive law. The procedural provisions should be set forth in the statute.

42. Mr. MIKULKA said that, since the Special Rapporteur saw no substantive difference between alternatives A and B of the draft provision on the law to be applied, he would refer to alternative B, which lent itself to more detailed comments. In subparagraph (a), there was no specific reference to the Code as a primary source of applicable law. True, in his commentary, the Special Rapporteur implied that the Code, if adopted, would be one of the international conventions referred to in the subparagraph. However, even in such a case, reference to the Code would be justified because it would bring out more clearly the two possible dimensions of the international criminal court, which would be a mechanism for the implementation of the Code, but also a more complex and more ambitious mechanism. Such a reference would, in addition, make it easier for the General Assembly to consider the problem by offering it a clear choice between two separate possibilities. He entirely agreed with what had already been said with regard to the words "recognized by the United Nations" in subparagraph (c) and would therefore not comment on them, but he noted that alternative B was modelled on Article 38 of the Statute of ICJ and he wondered whether the analogy was entirely appropriate, since ICJ dealt
with disputes between States, whereas the future interna-
tional criminal court was to deal with crimes committed
by individuals. Bearing in mind the principle of *nullum
crimen sine lege* he suggested that the provision should
end with the third subparagraph, especially as there
might be doubts about the exhaustive nature of the list of
subsidiary means for the determination of rules of law.
In that connection, Mr. Pellet (2257th meeting) had re-
ferred to the problem to which General Assembly resolu-
tions gave rise. But were the decisions of the Security
Council not also subsidiary means for the determination
of rules of law? The best course would be simply to de-
lete subparagraph (d). Subparagraph (e) was liable to
create some problems and, read in the light of article 2 of
the draft Code, might cause uncertainty. It should also be
deleted.

43. With regard to the draft provision on jurisdiction,
said he that paragraph 1 gave rise to many questions; in
particular, it did not refer to crimes such as aggression,
threat of aggression, intervention or colonialism, which
were usually committed by agents or representatives of
States and should logically come under the jurisdiction
of an international court, whether permanent or ad hoc.
In his opinion, the Commission should tell the General
Assembly that, from a technical point of view, it consid-
ered such crimes to come within the jurisdiction of an
international criminal court. It would then be for the
General Assembly to decide whether or not that solution
was politically acceptable. His own view was that para-
graph 1 as proposed by the Special Rapporteur listed
crimes for which the jurisdiction of the court should be
optional or concurrent. The crimes in question, by virtue
of special conventions, came largely within the scope of
universal jurisdiction and there was no reason to deprive
national courts of the competence to try them. The con-
ferment of jurisdiction on the international criminal
court should be specifically stated and based on special
circumstances. As to paragraph 3, although he shared the
view that the court should not be competent to hear ap-
peals against decisions rendered by national jurisdic-
tions, he was not sure that it was necessary to say so ex-
pressly, since the court could obviously not exercise
such a function without a provision to that effect.

44. Mr. IDRIS said that the terms in which alternative
A of the draft provision on the law to be applied was
drafted were too general to solve the problems that arose
in that regard, since the development of international
criminal law had not been homogeneous. The provision
was based on a draft dating back to 19537 and important
events, to which he had already referred when speaking
on part one of the report under consideration (2256th
meeting), had taken place in international relations dur-
ing the past 40 years. Alternative B was, however,
drafted in enumerative form on the basis of a principle to
which there could be little objection, since that was the
method used in all previous drafts relating to the estab-
lishment of an international criminal court except the
one produced by the United Nations Committee on Inter-
national Criminal Jurisdiction. Unlike the Special Rap-
porteur, he did not think that there was no substantive
difference between the two alternatives; on the contrary,
they were, in his view, different both in form and in sub-
stance.

45. As to jurisdiction, the Special Rapporteur was pro-
posing a dual exclusive and optional regime: States
which acceded to the statute of the future court would
recognize its exclusive jurisdiction for certain crimes
characterized by their extreme seriousness and by the
massive damage they caused to mankind and would con-
fer optional jurisdiction on the court in respect of other
crimes. In that connection, he realized that the Commis-
ion ought not to be too ambitious and that the Special
Rapporteur had tried to reach a compromise between the
trend in favour of exclusive jurisdiction and that in fa-
vour of the normal application of the law. Some prob-
lems nevertheless remained. In the first place, interna-
tional realities, common sense and wisdom made it
impossible to ignore the conferment-of-jurisdiction rule.
Secondly, how were crimes to be separated into two
groups, with those in the first group being explicitly
listed and therefore subject to the compulsory jurisdic-
tion of the court and those in the second coming under
the court’s optional jurisdiction? It must be borne in
mind that the legal consequences of crimes in the second
group could be just as serious as those of crimes in the
first group. Thirdly, who was to decide whether a crime
should come under the compulsory or the optional juris-
diction of the court: the State concerned, an organ of the
court or the court itself? Fourthly, even in the case of op-
tional jurisdiction, it was quite possible that four States
might be concerned: the State in whose territory the
crime had been committed, the victim State or the State
whose nationals had been the victims of the crime in
question, the State of which the perpetrator of the crime
was a national, and the State in whose territory the per-
petrator of the crime had been found. The point was not
inconsequential because, for example, in the case of the
last-mentioned State, the decision to hand over or not to
hand over the perpetrator of the crime to the court could
be tantamount to recognition or non-recognition of the
court’s jurisdiction. Yet the text proposed by the Special
Rapporteur referred only to the State in whose territory
the crime was alleged to have been committed and the
victim State. To make the jurisdiction of the court de-
pendent on the decision of too many States might admit-
tedly give rise to procedural difficulties, but to reduce
the number of States entitled to take the decision could
also lead to practical problems.

46. Would it not be advisable—especially from the
point of view of those who, like himself, considered that
there could not be a code without a court—to say that the
court had jurisdiction over all crimes covered by the
Code? The opposite method of limiting the jurisdiction
of the court to some of those crimes, while excluding
some others, would weaken the effect of the judiciary
as a whole and stand in the way of the development of
the fundamental principles of international criminal law.

47. Mr. BOWETT recalled that he had previously
(2255th meeting) expressed a preference for a system
whereby the court would be attached to the Code, the
Code thus providing the applicable law. If a different
system were chosen, namely, that of a court operating
without the Code, he would favour alternative B of the
draft provision on the law to be applied, limited to sub-

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7 See 2254th meeting, footnote 4.
48. He hoped that the Commission would request the Special Rapporteur to proceed with the study of the jurisdiction of the court ratione materiae on two alternative bases, at least until the General Assembly had made its preference known to the Commission: either exclusive jurisdiction of the court for certain crimes and optional jurisdiction over the other crimes covered by the Code or—and he would prefer that idea—entirely optional jurisdiction, leaving States free to specify which of the crimes covered by the Code they would accept as being crimes under the jurisdiction of the court. States would make their decision known either at the time of the signature of the statute of the court or later on an ad hoc basis.

49. There was also the question of which States would be required to have accepted the jurisdiction of the court in a given case: the State in whose territory the crime had been committed, the State of which the accused was a national, or the State which had been the victim of the crime or whose nationals had been the victims of the crime. Furthermore, would the consent of one or more of that group of States be needed in order for the court to be able to exercise its jurisdiction? The question was a difficult one and the Commission would have to deal with it. He personally considered that the State in whose territory the alleged perpetrator of the crime was found should be required to hand him over to the competent court and that the obligation should be binding on all States parties to the statute of the court.

50. In the event that a competent political organ of the United Nations had already determined that a State had committed an unlawful act—whether aggression, genocide or apartheid—he wondered what effect such a finding would have on the operation of an international criminal court and suggested that a distinction should be drawn between the various organs that might make such a determination. Like Mr. Pellet (2257th meeting) and the Special Rapporteur, he thought that, if the Security Council made no finding, the court would be entirely free to act in its judicial capacity. However, if the Security Council concluded that there had been a breach of international law, how would the jurisdiction of the court be affected? It could be argued that the court should be bound by the decision of the Security Council, it being desirable that all United Nations organs should speak with one voice; a further advantage would be that the court would not have to delve into the complex facts of the case in order to arrive at the same conclusion as the Council. But equally convincing arguments could be found against the idea of binding the court by a decision of the Security Council. In principle, he thought it undesirable that a judicial organ should be bound by a decision emanating from a political organ. However, it should be borne in mind that the decision of the Security Council would relate only to the responsibility of the State concerned, and would say nothing on the question of individual responsibility, which would be a matter for the court alone to decide. If, of course, it was the General Assembly which determined that a crime of apartheid or of aggression had been committed, the situation would be clear; Article 25 of the Charter of the United Nations would not have to be applied. The view of the General Assembly would simply form part of the evidence which the court would have to take into account, but by which it would not be bound.

51. Mr. THIAM (Special Rapporteur) said that the words "recognized by the United Nations" in subparagraph (c) of alternative B of the draft provision on the applicable law should read "recognized by nations".

52. Mr. AL-BAHARNA said that it would be better to refer to "States" rather than to "nations".

53. Mr. YANKOV suggested that the Special Rapporteur might use article 53 of the Vienna Convention on the Law of Treaties as a model.

54. Mr. THIAM (Special Rapporteur) said that the word "prevention" in the English text of subparagraph (a) of alternative B should be replaced by a more appropriate term.

The meeting rose at 1.05 p.m.

2259th MEETING

Wednesday, 13 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Giney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


\(^1\) For text of the draft articles provisionally adopted on first reading, see Yearbook... 1991, vol. II (Part Two), chap. IV.
\(^2\) Reproduced in Yearbook... 1992, vol. II (Part One).
Possible establishment of an International Criminal Jurisdiction (continued)

1. The CHAIRMAN said that the Commission would continue its discussion of part two of the Special Rapporteur’s report (A/CN.4/442), concentrating first on the law to be applied and jurisdiction, and then on complaints before the court and proceedings relating to compensation.3

2. Mr. YANKOV said it was necessary to be clear about the sources of the international criminal law to be applied by the proposed international criminal court. The sources fell into two main categories, the first being transnational jurisdiction ratione personae, which generally fell within the competence of States. In such cases, the alleged criminals were individuals and the sources were for the most part to be found in the jurisprudence of domestic criminal law, since international tribunals had not yielded a sufficient body of case-law to provide the requisite guidance. The other principal source lay in international treaties and conventions and, to some extent, customary international law.

3. The first question was the degree of applicability of Article 38 of the Statute of ICJ to an international criminal court. It was important to determine the extent to which the Special Rapporteur’s possible draft provision on the law to be applied, and especially alternative B, was in conformity with the format and content of that Article. The process of interaction between treaty law and customary law seemed to be less dynamic in the field of international criminal law than in some other areas of international law. At the present time, new rules and principles emerged primarily from treaty law. However, they did sometimes evolve from legislation enacted by States, a process which was conducive to greater harmonization and unification of criminal law.

4. With regard to alternative A, it would be appropriate to make specific reference to the statute of the court and the applicable international conventions. One complex problem yet to be resolved was that of the legal status of the obligations to be undertaken under the Code by States which ratified the Code but were not parties to the relevant conventions.

5. He preferred alternative B and thought that subparagraph (b) should be included in the draft provision, even if custom did play a fairly limited role in international criminal law. However, subparagraph (c) should either be deleted or substantially amended, perhaps by referring to “the general principles of law as recognized by the international community”. In its present formulation, subparagraph (d) could be misleading, since it could be understood to refer either to judicial decisions of national courts or to decisions of international tribunals. As to subparagraph (e), internal law as such could not be considered as applicable law by an international criminal jurisdiction unless the parties in a given case explicitly expressed their consent to that effect in the agreement to bring the case before the court.

6. Another important issue was the relationship between the Code and the statute of the court, on the one hand, and specific international instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide, on the other. It might be useful if the Special Rapporteur paid particular attention to that matter.

7. He agreed that there should be a provision on the court’s jurisdiction ratione personae, preferably one stipulating that the jurisdiction applied to individuals, regardless of whether they were government officials or private individuals. It could perhaps precede the draft provision concerning jurisdiction ratione materiae. He wondered, however, why aggression had not been included in the crimes listed in that provision, although he recognized that others mentioned in the draft Code had also been omitted. What was needed was a moderate and realistic approach to the scope of the jurisdiction, and the optional jurisdiction should not be broader than the compulsory jurisdiction. If it were, the Code might prove to be of largely declaratory significance. Lastly, the rule affirmed in paragraph 3 of the possible draft provision on jurisdiction ratione materiae regarding appeals was at best questionable, but at the present stage it might be prudent to retain the Special Rapporteur’s provision as formulated.

8. On the question of entitlement to initiate proceedings before the court, the possible draft provision was highly restrictive. It might be preferable to adopt a more liberal approach than was reflected in paragraph 2.

9. Mr. SHI said that any scepticism he might feel about the feasibility of establishing an international criminal court at the current stage of development in inter-State relations in no sense implied a wish to obstruct a more thoroughgoing analysis of all the issues connected with such a court. On the contrary, a comprehensive analysis of all the issues involved would enable the Commission to comply with the mandate given to it by the General Assembly in resolution 46/54 of 9 December 1991. The Special Rapporteur had repeatedly made it clear that his possible draft provisions were not intended to form part of a draft statute for an international criminal court, the elaboration of which, in any case, the General Assembly had not entrusted to the Commission.

10. There was no substantive difference between alternative versions A and B, submitted by the Special Rapporteur in respect of the law to be applied. However, neither of them was satisfactory. In the first place, international criminal law, in the sense of what the Special Rapporteur would refer to as droit international pénal, was not universally recognized as a branch of international law and as a discipline, or indeed even as a concept. A system of international criminal law would necessarily incorporate three elements, namely an international criminal code, an international criminal jurisdiction and a mechanism for the imposition and enforcement of penalties. He agreed with the view expressed by some members that a code of crimes against the peace and security.

3 For texts of possible draft provisions, see 2254th meeting, paras. 3, 4, 6 and 7 respectively.
of mankind would amount to little without the backing of an international criminal jurisdiction. The Code, of course, be applied by national courts, but that could lead to discrepanties in its application and thus render it less effective. On the other hand, the establishment of an international criminal jurisdiction was far from practical at the current stage of development in international relations: despite the end of the "cold war", power politics were likely to remain a feature of international relations and it was unlikely that States would be prepared to make the necessary concessions in respect of their sovereignty so that such a court could function. While he was not optimistic that the draft Code would ultimately take the form of a binding international convention, since many felt that it was too soon to speak of international criminal law in the full sense of the term, he none the less hoped for the best.

11. As to alternative B of the proposed draft provision, international criminal law must have its own distinguishing characteristics: its sources could not be the same as those of traditional international law. If the court were to apply custom, as well as general principles of law and subsidiary means for the determination of the rules of law, for instance, it would have far too much discretion, and that would do little to guarantee its impartiality, prestige and objectivity. True, article 15, paragraph 2, of the International Covenant on Civil and Political Rights did provide for the possibility of the application in criminal proceedings of general principles of law recognized by the community of nations, but the wisdom of transposing that notion to the statute of an international criminal court was doubtful. The guiding principle should rather be that of precision, as required by the maxim nullum crimen sine lege, nulla poena sine lege; in other words, there should be a convention to lay down precise definitions of the crimes covered and the penalties to be imposed. Even though the Nürnberg and Tokyo Tribunals had already applied custom and general principles of law, they had been established to meet the requirements of an extreme situation. Accordingly, he agreed that the sources of law to be applied by the international criminal court should derive solely from international treaties and conventions.

12. In the matter of the court’s jurisdiction, the Special Rapporteur envisaged a dual regime, consisting, on the one hand, of exclusive jurisdiction and, on the other, of optional jurisdiction. The fact that a State was party to the statute of a court did not necessarily mean that it automatically conferred jurisdiction on that court. He also agreed with the terms of article 26 of the 1953 revised draft statute, on attribution of jurisdiction. So far as paragraph 1 of the draft provision on jurisdiction ratione materiae was concerned, the crimes of genocide, systematic mass violations of human rights and apartheid could be committed only by States, whereas illicit international trafficking in drugs, seizure of aircraft and kidnaping of diplomats were generally committed by individuals. As to the first category of crimes, unless the special circumstances in which the Nürnberg and Tokyo Tribunals had been established obtained, it would be impractical to demand that a State should hand over the allegedly responsible individual for trial by the international criminal court, particularly where such an individual occupied a high government position. In such cases, there was no way of apprehending the alleged offender other than by the use of armed force against the State concerned, in which event the people of that State would inevitably suffer. What was more, with exclusive jurisdiction as envisaged by the Special Rapporteur, many States would be reluctant to become parties to the statute of the court. In the second category, namely, crimes where the State was not involved, forms of international cooperation like Interpol, extradition treaties, treaties of judicial assistance, and universal jurisdiction, made an important contribution to prevention. The defects in forms of cooperation of that kind could be remedied through the joint efforts of States; the obstacles in that respect were far easier to overcome than those inherent in establishing an international criminal court.

13. He agreed entirely with paragraph 3 of the draft provision, for most States would certainly not accept the idea of an international court having jurisdiction to hear appeals against decisions handed down by their own national courts and any system for submitting such decisions to the international criminal court would be regarded as a flagrant infringement of sovereignty.

14. On the principle of two-tiered jurisdiction, he also agreed that an international criminal court should sit both as a court of first instance and as a court of appeal. It would be helpful if, as already suggested, a chamber of the court could sit to hear proceedings at first instance, appeals being heard by the full court.

15. Mr. MAHIOU said that, before commenting on the two draft provisions, he wished to make a preliminary remark. He noted that Mr. Pellet (2257th meeting), when speaking of the draft Code adopted by the Commission on first reading in 1991, had referred to "your" Code and "your" draft and to the Code "you" had adopted. He was somewhat perplexed by the use of those words, since any draft was adopted by the Commission as a whole, which worked by consensus. Even if that consensus was imperfect, imperfection was perhaps in the nature of a consensus. In adopting the draft Code on first reading—a draft Code that necessarily gave rise to differing reactions—the Commission had engaged in a collective endeavour. He found it difficult to understand why anyone should disavow the paternity of that endeavour, even if it was somewhat putative.

16. As to the provisions proposed by the Special Rapporteur with respect to the law to be applied by the international criminal court, alternative A required considerable amplification, while alternative B gave rise to certain objections and prompted some comment, as indeed was the Special Rapporteur’s intention. The most important part of alternative B was contained in paragraph (a), relating, as it did, to international conventions, which were by far the most important source of international law, all other sources being of secondary importance. In that connection, he wondered whether a distinction between sources should not be made according to the type of norms covered. The distinction sometimes made between norms of conduct and norms of prevention, for instance, might perhaps have a greater impact in

4 See 2254th meeting, footnote 4.
international law than in domestic law. Norms of conduct were those norms that enabled an act or omission to be qualified as a crime. Any such qualification should, in his view, be based on international conventions and possibly also on general principles of law, but there were serious doubts about custom. In that connection, Mr. Shi had referred to article 15 of the International Covenant on Civil and Political Rights, from which it would appear that, in the human rights field, the basis for qualifying an act as a crime was international law in general. Particularly striking, however, was the fact that article 15 made no mention at all of custom as a source of law, from which he could only deduce that the intention was not to make a customary rule the basis for qualifying an act as a crime. If that was so in the case of human rights, how could a customary rule be used for the infinitely more serious offences of crimes against the peace and security of mankind?

17. The position was different in the case of norms of prevention—namely, the norms that set forth the conditions governing the institution of proceedings and the imposition of penalties—since they were mainly of a procedural nature. If such rules could not be derived from international conventions or from the general principles of law, then they could be derived from custom and also perhaps, in certain cases, from domestic law. They could also be determined with the aid of such auxiliary sources as judicial decisions and perhaps even doctrine.

18. The draft provision on the court's jurisdiction ratiome materiae was the most complex and sensitive in the whole draft and could be said to signify the point at which all the difficulties, both of international law in general and of the draft Code in particular, converged, since it involved State sovereignty and the issues of compulsory jurisdiction, optional jurisdiction, exclusive jurisdiction and concurrent jurisdiction. There was also the additional problem of the States concerned in the punishment of the crime, there being at least four possible States. It was not at all clear, therefore, that a generally satisfactory solution would be found.

19. One difficulty lay in the link between the content of the Code and the court, inasmuch as the former could have an influence on the latter and vice versa. If the Code was confined to a few particularly serious crimes—the approach he favoured—it would be logical to opt for the exclusive jurisdiction of the international criminal court. The problem, however, was to reach agreement on the list of crimes to be covered by such exclusive jurisdiction. If, on the other hand, the Code was to cover many crimes, some of which were already dealt with by national courts, he failed to see how compulsory or exclusive jurisdiction could be introduced and believed that it would instead be necessary to opt for concurrent jurisdiction. For instance, assuming that the court was given jurisdiction to deal with cases of illicit trafficking in drugs, a veritable army of judges would be required to deal with the tens of thousands of people now being sought for that crime throughout the world. In other words, there were difficulties of a practical nature that precluded the inclusion of certain crimes in the draft Code.

20. One, somewhat simplistic, suggestion, which satisfied him neither intellectually nor legally, was that the court should have jurisdiction over any crime referred to it by a State on the basis of an international convention. The draft Code would specify, with regard to each of the crimes it covered, whether or not the international criminal court would have jurisdiction. That solution would overcome the need to find a global solution of principle on the question of jurisdiction, which was problematic and might prove impossible to resolve at that stage. It was important not to become entangled in a question of principle to which there was no ready solution. His suggestion would also mean that it would be left to States to decide on the area over which the court would have jurisdiction and whether or not they wished to make use of the instrument placed at their disposal.

21. Mr. PELLET, referring to Mr. Mahiou's initial point, said that, if Mr. Mahiou's argument was carried through to its logical conclusion, members of the Commission would be placed in an impossible situation, and it might even have been necessary to proceed to a vote. It would be far better to recognize that a member might oppose an instrument approved by the Commission but not the transmittal of that instrument to the General Assembly. He reiterated that he was not in favour of the draft Code in the form in which it had been adopted.

22. In reply to a request by Mr. VERESHCHETIN, Mr. MAHIOU repeated his proposal concerning the jurisdiction of the court.

23. Mr. RAZFINDRALAMBO referred Mr. Vereshchetin to the summary records, in which opinions expressed and suggestions made during the debate were duly reflected. It was perhaps regrettable that the Special Rapporteur had refrained in his tenth report from summing up, however briefly, the discussions previously held on the issues now before the Commission. While it was naturally inevitable that new issues should arise in the light of views expressed in the Sixth Committee and as a result of the presence of many new members in the Commission, it was none the less desirable, in the interests of progress, to avoid going over ground which had already been covered. Almost all members had spoken in favour of the approach adopted by the Special Rapporteur in establishing a link between the draft Code and the future court. The possible draft provisions on the law to be applied and on the court's jurisdiction ratiome materiae, although distinct from one another, should thus be seen as being closely linked. Alternative A of the draft provision on the applicable law was, in his view, inadequate in both form and substance, and could give rise to diverging interpretations. Alternative B was more appropriate, but the formulation "crimes under international law" in subparagraph (a) should be replaced by "crimes against the peace and security of mankind".

24. Like Mr. Yankov and Mr. Calero Rodrigues (2258th meeting), he had doubts as to the reference to "international custom" in subparagraph (b). There was practically no international custom in criminal law that was not incorporated in international instruments such as the Universal Declaration of Human Rights,5 the Interna-

5 General Assembly resolution 217 A (III) of 10 December 1948.
tional Covenant on Civil and Political Rights and the 1949 Geneva Conventions and the Additional Protocols thereto. He therefore questioned the desirability of making international custom a specific element of the law to be applied.

25. Subparagraph (c) gave rise to an objection of a similar nature. Most general principles of criminal law recognized by States were embodied in existing treaty law, including, *inter alia*, part one of the draft Code itself. The subparagraph should be amended to read: "The general principles of law and, more particularly, of criminal law and criminal procedure recognized by States".

26. Subparagraph (d) posed no difficulty, but the reference to internal law in subparagraph (e) was out of place and should be dropped. The 1953 draft had envisaged a completely different system and should not serve as a model in the present instance.

27. As to the question of jurisdiction *ratione materiae*, the problem with the proposed separation of crimes into two categories—the first to include crimes in respect of which the court would exercise exclusive jurisdiction, and the second to include crimes in respect of which its jurisdiction would be optional—was that no objective criterion seemed to have been used in assigning crimes to either category. For example, although the first category included illicit international drug trafficking, seizure of aircraft and kidnapping of diplomats, it failed to include a crime as serious as aggression. The suggestion that crimes should be categorized according to whether they did or did not entail State involvement was ingenious, but it was unlikely to prove acceptable to a large number of States. The system with the best chance of gaining wide acceptance would seem to be one whereby conferment of jurisdiction would be required in the case of all crimes directly or indirectly involving State responsibility. As had been proposed in the Sixth Committee, a procedure could be instituted whereby States might recognize the exclusive and compulsory jurisdiction of the court in respect of certain crimes under the Code, to be selected by themselves in the light of their interests. The provision in paragraph 1 would then apply only to crimes such as genocide and apartheid, which, under international conventions in force, fell within the scope of national jurisdiction. He agreed with paragraph 3 of the draft provision, which, by ruling out the hearing of appeals against decisions rendered by national courts, followed a virtually unanimous view expressed in both the Commission and the Sixth Committee. Lastly, a table should be drawn up showing those fundamental questions on which some measure of agreement had been reached. Such a table, which might perhaps be prepared by a special working party set up for the purpose, would greatly assist the General Assembly in issuing more detailed guidelines to the Commission.

28. Mr. ROSENSTOCK thanked the Special Rapporteur for his helpful report, which illuminated the key issues with which the Commission must deal. It was to be hoped that the Special Rapporteur and the working group assisting him would be able to produce a list of key issues and a rough outline. The Commission must consider the possibility of ad hoc tribunals, which could be called into being as necessary. As to part two of the report, he looked forward to receiving the views of the working group. It was not necessary to draft a perfect system in order to provide a basis for the General Assembly to take a decision on whether to proceed with some form of international criminal jurisdiction. All the relevant issues must be raised, the issues clarified, and suggestions made as possible guidance for the General Assembly.

29. In the matter of the law to be applied, he wondered whether there was sufficient clarity regarding the content of an international criminal law or relevant international custom. Mr. Yankov was right to say that a body of customary law was likely to develop. A new approach, which neither excluded nor included a reference to custom, could avoid the risks that Mr. Calero Rodrigues (2258th meeting) and a number of other members, including himself, saw in connection with international custom, and the possibility would be left open for future development. With reference to alternative B, did subparagraph (d) mean substantive rules or only procedural ones, and where would the principle of *non bis in idem* fit in?

30. Subparagraph (e) referred to internal law and he understood the position of those who cautioned against mixing the two systems, but eliminating a reference to internal law or failing to incorporate internal law in some way would leave enormous gaps. The International Convention against the Taking of Hostages, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, for instance, depended on internal law in order to function properly. The working group might wish to consider whether viable short cuts could be made by using what already existed, albeit in a different context. Perhaps aspects of the 1953 approach or another innovative method would help in resolving the problem. Otherwise, the task was too large and complex.

31. One way to deal with the issue of the law to be applied would be to list the international conventions that would apply, including, either initially or once it was widely ratified, the Code itself.

32. With regard to the draft provision on jurisdiction of the court *ratione materiae*, exclusive jurisdiction in certain types of cases had an obvious appeal. However, the majority of representatives who had discussed it in the General Assembly had not been in favour of it. Mr. Mahiou's was not perhaps the best solution. The Commission might wish to provide the General Assembly with alternatives, one of which should be an entirely optional system of jurisdiction. If it suggested that exclusive jurisdiction was the only possible approach, the General Assembly would reject it outright.

33. Again, the draft Code did not adequately define the critical concept of systematic or mass violations of human rights. It was to be hoped that that question could be dealt with in due course in the commentary. As to seizure of aircraft and kidnapping of diplomats, the conventions on the protection of diplomats and on the taking of hostages were separate instruments, and it might not be helpful to create a hybrid. More important, to include the Convention for the Suppression of Unlawful Seizure of
Airplane, and not the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation would place the Commission in the absurd position of elaborating a regime that failed to cover the Pan Am flight 103 case. Moreover, was it useful to include apartheid and colonialism in the Code and was there anything in either of those questions not adequately covered, or capable of being covered, under the crimes of systematic or mass violation of human rights or the use of force. A more neutral and less anachronistic form of language on both points would help depoliticize matters.

34. Whether the Commission chose exclusive or concurrent jurisdiction, it would have to consider how many States must give consent. Was the consent needed from any State other than the State in which the accused was found? Could consent be regarded as granted by all States parties to the statute? If consent was required from all victim States, the Pan Am flight 103 case would mean consent from 30 or 40 States. If the Code required the consent of the State of nationality of the accused, that would be alien to extradition practice. If an American citizen went to Italy to rob a bank and then fled to Switzerland, and if, for the sake of argument, the United States of America had no extradition treaty with Italy, but Switzerland did, no one would think it appropriate to ask the United States whether the American citizen should be extradited to Italy. The argument that the State of nationality was necessary reflected a concern to politicize the system. As long as the Commission insisted that permission must be granted by the State of nationality, even though the crime had not been committed there and the individual was not in the territory of that State, it was suggesting, as might well be the case, that the international community was not ready to set up an international criminal court.

35. Another question was the relationship between the Security Council and an international criminal jurisdiction. In that context, he did not wish to leave unchallenged the criticism of the decision and reasoning of ICJ in the recent Libyan Arab Jamahiriya v. the United States of America and Libyan Arab Jamahiriya v. the United Kingdom cases. There was no system of judicial review in the United Nations system. ICJ had no choice but to defer to the judgment of the Security Council. It was irrelevant that in the cases in point it had no reason not to.

36. He agreed with Mr. Bowett (2258th meeting) that if the Security Council held that aggression had taken place, such a finding was binding on the court, the question of individual responsibility being obviously a separate issue. A more difficult scenario was one in which the Security Council voted, by 8 votes to 7, not to adopt a resolution that an act of aggression had taken place. Was the court free to find that aggression had, in fact, taken place, and was that acceptable? What would happen if the Security Council voted 14 in favour and 1 against such a resolution, the one vote against being that cast by a permanent member? In such an instance, the Security Council would have determined that aggression had not taken place. Was it reasonable to envisage the court coming to a different conclusion within the same system? To what extent could a system tolerate two bodies reaching different conclusions? Ignoring the views of the Security Council on such issues as aggression entailed serious risks for the stability of the international system as a whole.

37. Mr. Vereshchetin, referring to Mr. Razafindralambo’s remark, said that only two summary records in English and only one in Russian had been circulated so far. In such circumstances it was to be feared that any reaction to proposals made orally at the current session would have to be deferred until the next session. What method should the Commission adopt? If the object was simply to hear the views of one member after another, without asking questions, receiving clarifications or attempting to thrash out an agreement, then the present system was adequate. He wondered, however, whether that system was not at least partly to blame for the slow progress made on some important topics. With all due respect, he felt unable to follow Mr. Razafindralambo’s advice.

38. On the question of the law to be applied, he preferred alternative B and had no objection to its being closely modelled on Article 38 of the Statute of ICJ. Everyone was agreed that the decisions of the future court should be based principally on international law, and Article 38 of the Statute listed the main sources of international law. In principle, at least, the Special Rapporteur’s approach was therefore correct. The fact that subparagraph (a) of alternative B referred to “crimes under international law” rather than “crimes under international criminal law” was to be welcomed. Like Mr. Shi, he came from a country where the legal system did not regard international criminal law as an existing branch of international law.

39. Subparagraphs (b) and (c) as orally amended by the Special Rapporteur did not give rise to any difficulties, and he was likewise prepared to endorse subparagraphs (d) and (e), bearing in mind the qualifying reference to “subsidiary means” in (d) and the use of the words “where appropriate” in (e); it went without saying that when the court applied internal law, as it no doubt would be obliged to do in the matter of penalties, it would have to do so on the basis of international law.

40. In regard to the court’s jurisdiction ratione materiae, he continued to believe that a link existed between the draft Code and the future court. Once the Code came into existence, the court would concern itself principally with crimes under the Code. Unfortunately, the draft Code in its present form failed to draw a clear distinction between international crimes and crimes with international consequences. In that connection, he wondered whether, instead of one possible draft provision on the subject, the Commission might not prepare two provisions, the first relating to the jurisdiction of the court in the early stages of its existence prior to the adoption of a Code and the second applicable once the Code became part of international law. Under the first, more modest draft provision, the court’s jurisdiction would be confined to crimes recognized as such under existing international conventions, the court serving as an additional
guarantee that such crimes would not remain unpunished. Under the second draft provision, the court would have compulsory jurisdiction in respect of crimes defined in the Code. Such a solution, although somewhat different from the one he had proposed earlier (2255th meeting), would seem appropriate in the light of comments made by other members in the course of the discussion.

41. As a more general suggestion, it might be useful to prepare a document listing those issues on which the positions adopted by members were identical or at least reasonably close. All seemed to agree, for example, that the court’s jurisdiction ratione materiae should be limited to individuals. Most members would prefer its jurisdiction ratione materiae to be limited, at least in the early stages, to crimes of an international character already recognized as crimes under international conventions in force, and many members appeared to think that it would be fitting to list the relevant conventions. A degree of agreement also seemed to exist on the point that, although a link undoubtedly existed between the Code and the court, the two issues could, at the present stage, be discussed in parallel to some extent independently; and a number of members were of the view that the jurisdiction of the court ratione materiae might be expanded at a later stage, as and when States desired, and once the Code was adopted. Without claiming that the Commission was of one mind on all or most of those issues, he felt that an effort should be made at the present session to draw up such a list, possibly with the help of the working group set up to assist the Special Rapporteur. In that connection, would it not be possible to set aside one or two days towards the end of the session for further consideration of the item? Apart from anything else, such a list would facilitate the task of the Commission’s Rapporteur in drafting the report on the work of the session.

42. Lastly, the secretariat should be requested to provide the Commission at its next session with a comparative table of proposals advanced previously in connection with certain aspects of the international criminal court issue, such as the law to be applied, the court’s jurisdiction ratione materiae, penalties, and so on. It would be most useful to members of the Commission to know what their predecessors, including the 1953 United Nations Committee on International Criminal Jurisdiction, and various governmental and non-governmental organizations, as well as individual authors, had had to say on those subjects.

43. The CHAIRMAN assured Mr. Vereshchetin that by raising questions he was entirely within the rules of procedure and the practice of the Commission. He disagreed with Mr. Razafindralambo’s observations: it was useful to be able to ask for clarification if certain doubts remained after a member had spoken.

44. Concerning the timetable, if the Commission had not exhausted the issues, it could revert to the report. In any event, the Commission must discuss the report of the working group assisting the Special Rapporteur. In his view, at least two more weeks in June or July had to be assigned to the question of an international criminal court. Owing to many uncertainties, it had not been possible to draft an exact timetable for the entire session. As to the second suggestion, the secretariat could provide the proposals submitted by other intergovernmental bodies and private groups, and the working group should have the most important ones before it.

45. Mr. CRAWFORD said that priority should be given to the issue of an international criminal jurisdiction, upon which a debate had been developing, and to State responsibility, even if it meant not dealing with the topic of international liability to any degree at the current session.

46. Mr. YAMADA, referring to the law to be applied by an international criminal court, said he saw no substantive difference between alternatives A and B of the possible draft provision, but preferred alternative B, because it was more specific. He was, none the less, concerned about the scope of the source of the law for criminal punishment if all the categories in alternative B were approved. The Special Rapporteur intended to have the court deal not only with criminal punishment, but also compensation to the victim of a criminal act, and for that reason he might have adopted a broader source of law. For his part, he would revert to the question of compensation at the appropriate point in the discussion, but if the Commission accepted dual functions for the court, two distinct sets of laws would need to be applied.

47. Clearly, the rule nulla poena sine lege must be observed. Article 38 of the Statute of ICJ could not serve as a precedent: the scope of the source of law must be more limited than that. In his opinion the law to be applied for punishment of crimes was in the international conventions referred to in subparagraph (a) of alternative B. The other subparagraphs could only have a subsidiary function in interpreting and determining existing international criminal law.

48. In order to make sure a fair trial was held, criminal procedural laws must be carefully defined; yet international law was lacking in that regard. Consequently, procedural laws should be included in the statute of the court.

49. The establishment of exclusive and compulsory jurisdiction in respect of the most serious international crimes was the final goal of the international community, but he doubted whether it would be acceptable to the majority of States. They might accept it for crimes like genocide and apartheid, and some weaker States might do so for illicit international trafficking in drugs. However, that crime was currently dealt with effectively by a great number of States through their national mechanisms. Most of the drug cases handled in his country related to international trafficking. Japan had excellent arrangements for judicial assistance with countries in Asia and with Canada and the United States of America. China, Indonesia, Singapore, Malaysia and Thailand, in particular, had severe penalties for drug offenders, and they were combating drug trafficking successfully. Japan would like to retain its national jurisdiction and would be hesitant to recognize the exclusive and compulsory jurisdiction of the international court, because that might jeopardize the existing legal structure. In his view, it
would be more practical to have a regime of optional jurisdiction and specific consent by States.

50. Mr. KOROMA, seeking clarification from Mr. Yankov on an earlier remark, asked why he had reverted to customary law in the definition of crimes. Mr. Vereshchetin had said that the draft Code did not draw a distinction between international crime and crimes of an international character, but what would be the impact of making such a distinction? As he understood it, Mr. Vereshchetin had expressed a preference for compulsory jurisdiction for crimes of an international character.

51. Mr. VERESHCHETIN said that there was a need to distinguish between two categories of crimes containing international elements. The first category was that of international crimes, for which States were always responsible, especially crimes against the peace and security of mankind. In addition, there was a second category of crimes containing international elements, which he would call crimes of an international character, and which usually were not linked to the political actions of States. He had in mind all crimes dealt with under specific existing conventions, for example drug trafficking, the seizure of aircraft or international terrorism. If the Commission sought to draw a distinction between jurisdiction for international crimes and for crimes of an international character, a problem arose in that the Code had been resolved; it should discuss the jurisdiction existing procedures for prosecuting criminals under international crimes, whereas it should have optional jurisdiction for crimes of an international character. That would supplement existing procedures for prosecuting criminals under existing conventions. There must be a guarantee that in no circumstances would crimes go unpunished.

The meeting rose at 1.05 p.m.

2260th MEETING
Thursday, 14 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Giney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Tentative item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. Mr. PAMBOU-TCHIVOUNDA said that the questions of the applicable law and the jurisdiction of the court ratione materiae, discussed at the beginning of part two of the report (A/CN.4/442), were closely associated with the jurisdictional function of the mechanism for the implementation of the Code, even if that mechanism might also have to implement other conventions, whether existing or to be adopted.

2. The idea of achieving peace through the rule of law in international relations, which had been present in so many minds during the period between the two World Wars, would thus take shape and the supremacy of the future court would be reflected in the fact that there would be no possibility of appealing against its decisions. Those decisions would therefore be extremely serious and could not be taken by just any mechanism. Deciding, on the basis of the law, the fate of someone who had committed a serious breach of morality and international law was a measure to create a healthier society, the implementation of which would depend on the quality of the means employed; hence the need for a careful definition of the crimes to be punished and the rules to be applied for that purpose.

3. In his tenth report, the Special Rapporteur proposed two alternatives for a possible draft provision on the law to be applied; the first was generic and the second more descriptive. He would not comment on those texts, which had already been discussed by many speakers. In his view, moreover, the point was not so much to choose between the alternatives as to combine them in a single text, the introduction to which would be alternative A, while alternative B, which would make the Code the primary source of the applicable law, would also list its other constituent elements. The provision might read: "The court (or the tribunal) shall apply international criminal law as established by the Code of Crimes, conventions, custom, general principles, judicial decisions and teachings and, where appropriate, internal law."

4. The list of sources of the applicable law had been extensively criticized both as to its principle and as to its content and attention had rightly been drawn to the gaps in the text, which did not mention General Assembly resolutions or Security Council decisions. He had doubts, however, about the suggestion that references to custom, judicial decisions, teachings and, above all, internal law should be deleted. That enumeration probably...
did seem like a mixture which would be inconsistent with the *nullum crimen sine lege* rule, but it must not be overlooked that, in the tenth report, the concept of the applicable law covered both substantive law and procedural law. As shown by the reference to the general principles of criminal law, the report adopted a general approach to the concept of the applicable law.

5. It would be a mistake not to recognize that the role of international custom and internal law served that purpose as well because that would limit the specific functions of the criminal court judge in sentencing an individual or individuals who had been found guilty. Both internal law and custom had a key role to play in that regard, not in determining that a punishable act had been committed, but in establishing responsibility and deciding which penalty was to be imposed. The members of the court, who would be chosen on the basis of their experience, would be guided—perhaps even without realizing it—by the legal system of which they were the product.

6. With regard to jurisdiction, the possible draft provision⁴ had been designed to take account of a dual regime: paragraph 1 assigned a major role to the principle of general and compulsory jurisdiction, while paragraph 2 embodied the principle of optional or ad hoc jurisdiction. In the implementation of that dual regime, however, the jurisdiction of the court or, in other words, its ability to fulfill the mission of creating a healthier society for which it had been established, seemed to depend on the will of States and, in particular, the State in whose territory the crime had been committed. The provision’s design seemed to be faulty in two ways: in terms of law and in terms of logic. In terms of law, it was faulty because taking cognizance should not be confused with jurisdiction (paragraph 2 seemed to place more emphasis on taking cognizance than on jurisdiction); it was also faulty in terms of logic because the question of jurisdiction came before that of cognizance. The question of jurisdiction depended on the nature of the punishable act. How then could the jurisdiction of a criminal court be subject to the will of one State, which would be free at any time to call that option into question? That was the proposed system’s weak point and it should be remedied before the Commission went any further in its study of the question of jurisdiction. In so doing, the Commission would realize that the principle of a dual regime should either be restricted or abandoned and it would question whether discriminatory treatment could be allowed in the implementation of the Code.

7. In his view, the Code should serve as a point of departure; it should be specifically referred to and the exclusive jurisdiction of the court or the “trial mechanism” should be provided for on the basis of the crimes defined in the Code. The list in paragraph 1 would then no longer serve any purpose. Subordinating the authority of the court to the attitude of the General Assembly or the Security Council towards a de facto situation in which the United Nations could not punish those responsible without running the risk of endangering its own existence would be tantamount to denying the court its character of an institution that was independent of the United Nations system and responsible for safeguarding international public order.

8. Mr. THIAM (Special Rapporteur) said that the words “The general principles of criminal law recognized by the United Nations” in subparagraph (c) of alternative B of the draft provision on the law to be applied should be replaced by the words “The general principles of law recognized by the community of nations”, as in article 15, paragraph 2, of the International Covenant on Civil and Political Rights.

9. Mr. VILLAGRAN KRAMER said that Latin American lawyers had held an exchange of views on the establishment of an international court during which they had questioned whether the course of world events would have been the same if an international criminal court had existed in the 1970s or the 1980s. In the 1990s, if Iraq had suffered total defeat and had surrendered unconditionally, as the Axis Powers had done in 1945, would the countries which had participated in Operation Desert Storm have set up a Nürnberg-type tribunal? If so, what would have been the applicable law? It was recognized that, while the Nürnberg experience had been entirely positive in political terms, it had not been entirely satisfactory in legal terms. That was why the international community had, ever since, entertained the idea of establishing a court that would prevent the victors from acting unilaterally and ensure that the vanquished were not always the only ones to be tried.

10. As matters now stood, if the Commission stopped dealing only with aggression and started looking into crimes such as drug trafficking or the recruitment of mercenaries, it would find that it would not be so difficult to establish an international court. From that point of view, aggression and intervention should stop being the focus of legal experts’ attention.

11. On the question of aggression, however, there was one important preliminary issue, namely, the determination of the crime by the Security Council. In that connection, writers on law had made it sufficiently clear that it was a State, not an individual, that was found guilty of aggression and that, when the Security Council exercised its powers under Chapter VII of the Charter of the United Nations—for example, to apply sanctions or decide on collective action against a State—it did so on the basis of the conduct of that State. A finding by the Security Council acting under Chapter VIII of the Charter or by the competent organ of a regional organization of aggression against a State could thus have consequences before a court, whether national or international. It would therefore be interesting to see what effect the existence of an international court might have on the function of the Security Council to make such a determination, since the Council would then have to assess the nature of the act of aggression and the judicial implications of its finding.

12. With regard to the jurisdiction of the court, he said that, as a lawyer, he was inclined to be in favour of compulsory jurisdiction, but, from a political point of view, he could see the advantages of optional jurisdiction. He nevertheless submitted the following problem for the Commission’s consideration: what would happen if the perpetrator of an international crime who was a national of a State not party to the instrument establishing the international criminal court asked to be brought before that

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⁴ Ibid., para. 4.
court because he had no confidence in the impartiality of justice in his own country?

13. The discussion on the applicable law had been very useful. Now that the Commission was about to modernize the law, it must once and for all go beyond ideas that had been valid at the time of the establishment of PCIJ and learn a lesson from research and legal thinking on the law to be applied by international courts. There could be no disagreement among the members of the Commission on treaties and the general principles of law: the positive law enshrined in treaties was obviously appropriate in the present context, as were the traditional principles of criminal law, such as the principle of respect for procedural guarantees. As to internal law, there was every reason to believe that the members of an international court would not fail to look to it for the general principles of criminal law that would be applicable. Such a link with internal law should not worry the Commission. Moreover, the court might have to apply internal law in the case of related offences committed in connection with the crimes specifically within its jurisdiction and governed by international law. As far as custom was concerned, he agreed with Mr. Calero Rodrigues (2258th meeting) that lawyers had demonstrated its role to be at least as important as had been believed and that there was no need to place too much emphasis on that source of law. With regard to judicial decisions and teachings, he shared the views already expressed.

14. Turning to the question of the crimes listed in paragraph 1 of the possible draft provision on jurisdiction, he recalled that the United Nations tended to adopt a special convention for every type of crime and that, whenever the authors of one of those conventions asked whether the crime in question was a crime both in internal law and in international law, they left the door open for the implementation of their text by an international court. That would, however, in no way prevent the instrument establishing an international criminal court from somehow specifying the crimes whose alleged perpetrators would be brought before the court, whether or not those crimes were already covered by an international convention. In the Special Rapporteur’s view, it was essential to do so.

15. In conclusion, he requested clarifications concerning the mandate of the working group that was to be set up. Whatever mandate was decided, he considered it essential that the text to be submitted to the General Assembly should be final or close to it, should clearly indicate the main aspects of the proposed international criminal court and should specify the crimes which would come within its jurisdiction.

16. The CHAIRMAN said that the working group’s mandate would be carefully defined.

17. Mr. ROBINSON said that the law to be applied depended on whether an instrument such as the Code would be the basis for the court’s jurisdiction. If so, the law to be applied would be defined by that instrument, although it might be useful to add a reference to customary international law, assuming that it was not incompatible with the instrument in question. For example, article 293 of the United Nations Convention on the Law of the Sea provided that the court or tribunal having jurisdiction was to “... apply [the] Convention and other rules of international law not incompatible with [the] Convention.”

18. It would, however, seem clear that the court must apply international law in its two constituent elements: conventional treaty law, namely, the relevant international conventions, including, but not limited to, conventions dealing with crimes under international law, and customary international law, as derived from the practice of States and as was applicable in a particular case, which would be more relevant to other aspects of the court’s work than to the identification of acts. It was to be hoped that the final text would include both elements.

19. With regard to alternative A of the possible draft provision, he considered that, although the term “international criminal law” was used in the United Nations and other bodies, it was an overstatement about an area of law that was still in embryo. In fact, the international criminal court would be called on to apply international law based purely and simply on conventional law and customary international law.

20. He did not like the reference to “national law” either because that concept raised doctrinal and even metaphysical difficulties about the monist or dualist nature of international law. If the court applied national law, it would do so at the direction of international law and not as an independent area of law. He therefore proposed that alternative A should be redrafted to read: “The court shall apply international law, comprising international conventions and international custom as evidence of a practice accepted as law”.

21. Turning to alternative B, he said that, although he took the view that the sources of the law to be applied were confined to international conventions and international custom, he was in favour of proceeding from the general to the particular. With regard to subparagraph (a), he agreed that the court would apply international conventions, but he was not sure that it would apply only conventions relating to the prosecution and prevention of crimes under international law. In taking its decisions, it might well also have to refer, and not just in a tangential manner, to conventions dealing with other matters and conclusions drawn from an analysis of other conventions might even be an important part of its ratio decidendi. It would therefore be enough to state that the court applied international conventions.

22. Concerning subparagraph (b), he noted that, unlike other members, the idea that the court applied international custom held no terrors for him. As had already been said, criminal law required certainty and express written provisions, no doubt because the liberty of the individual was at stake. Two points must be made on that matter, however. First, regardless of the regime established for the court, the scope of customary law would be relatively small, since, for the most part at any rate, the constituent elements of international crimes would be defined in the Code or in international conventions. Not that that ruled out custom, but it would not play as significant a role as others appeared to have anticipated. Secondly, it was difficult to see how international custom as evidence of a practice accepted as law provided a less secure basis in international criminal law
than in other areas of law. It might be that custom as evidence of a practice accepted as law was more difficult to establish, but that did not answer the fundamental question whether it should be applicable. Moreover, the application of customary law would often give rise to rules that protected the accused.

23. He regarded subparagraph (c), whether in the form originally proposed or as subsequently amended by the Special Rapporteur, as inconsistent. Any general principle of criminal law recognized by the international community, for example, the principle *nullum crimen sine lege*, would qualify as a rule of customary international law.

24. He agreed with those members of the Commission who were in favour of the deletion of subparagraph (d) and he had already explained why he also favoured the deletion of subparagraph (e). He proposed that alternative B should be amended to read:

"The court shall apply:

(a) International conventions;

(b) International custom as evidence of a practice accepted as law."

25. He preferred the regime of compulsory and exclusive jurisdiction for all international crimes of a serious nature. He took compulsory jurisdiction, as opposed to optional jurisdiction, to mean that, if a State accepted the statute of the international criminal court, it automatically accepted its jurisdiction for those crimes. His understanding of exclusive jurisdiction was that the international criminal court alone had jurisdiction under its statute for the crimes specified therein, in contrast to a system of concurrent jurisdiction, in which the court as well as States had jurisdiction for certain crimes under the statute. It was in that sense that compulsory and exclusive jurisdiction represented an ideal to be attained. If that was not possible because of political reality, however, he could accept a system in which the court had compulsory and exclusive jurisdiction for certain carefully defined crimes, whereas jurisdiction for other crimes would depend on the consent of the States concerned following acceptance of the court’s statute.

26. In any event, he was against a system of concurrent jurisdiction, whether in the sense that the court as well as States had jurisdiction for the same crimes or in the sense in which, for a particular crime, the State was competent for the investigation and the court for the prosecution. Such a system would only lead to confusion and would not preserve national sovereignty. He was therefore happy that the Special Rapporteur had not suggested anything of the sort, although paragraph 2 of the draft provision on jurisdiction of the court *ratione materiae* was not perfectly clear on that point.

27. He would have preferred a longer list for the crimes enumerated in paragraph 1 of the draft provision on jurisdiction.

28. He also wondered how the jurisdiction of the international criminal court could be reconciled with the jurisdiction that States had for crimes under many international conventions, in particular with regard to extradition and mutual legal assistance. How were the States parties to those conventions to be released from their obligations under those conventions? For example, of the five crimes listed in paragraph 1, four were governed by conventions that gave individual States the right to try offenders. That raised the question of the application of successive treaties relating to the same subject-matter, which was dealt with in article 30 of the Vienna Convention on the Law of Treaties. Would the regime of the international criminal court supersede that of the conventions? Would States parties to those conventions be willing to surrender their jurisdictional rights under those instruments to the international criminal court? Under the typical treaties dealing with the punishment of an international crime, a State party that had jurisdiction for the crime was entitled to apply for the offender’s extradition if he had not been prosecuted by the State in whose territory he was currently found. Clearly, a regime requiring the State in whose territory the offender was found to hand him over and confer jurisdiction on an international court for trial would be incompatible with the right of other States parties that had established jurisdiction for that offence to require his extradition for trial in their territory. Was that situation dealt with under article 30 of the Vienna Convention on the Law of Treaties? Could those treaties establishing a regime for the prosecution and punishment of international crimes be said to have the same subject-matter as a treaty establishing an international criminal court? There could, of course, be a provision that, for States parties to both sets of treaties, the new treaty regime establishing an international criminal court took precedence over the many instruments dealing with the prosecution of international crimes. But that would not be appropriate, since it was not the whole regime of those treaties that was at issue, but only that part dealing with the prosecution and extradition of offenders.

29. Those questions could not all be answered at the present stage, but the new regime obviously had to be reconciled with the regime established under the various international conventions, especially since, whatever the regime adopted for the identification of crimes for which the international court would have jurisdiction, more than half of such crimes would come from existing international conventions.

30. With regard to paragraph 2 of the draft provision, there needed to be further discussion of the criteria for identifying those States that could confer jurisdiction on the court (optional jurisdiction). As it stood, the provision appeared to contain cumulative references to both criteria: the criterion of the State in whose territory the crime was alleged to have been committed and the criterion of the State that had been the victim or whose nationals had been the victims of the crime. It would seem that both criteria must be satisfied before jurisdiction could be conferred. Usually, a State party to an international convention dealing with the prosecution of a crime had jurisdiction when the crime had been committed in its territory or when the offender was found in its territory: the Convention for the Suppression of Unlawful Seizure of Aircraft and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation had never gone beyond that point. On the other hand, later instruments provided that any State party that
had established its jurisdiction for the crime on any one basis was entitled to exercise its criminal jurisdiction over the offender or, in other words, to put him on trial.

31. His first reaction was to question the cumulative nature of the two criteria in paragraph 2 and to ask whether they should not be separate, with either of them being applicable. Upon reflection, however, he saw merit in the Special Rapporteur's approach. Both the State in whose territory the crime had been committed and the victim State should have a say in deciding whether to confer jurisdiction on the court. Furthermore, he had difficulty accepting the victim State as the sole criterion, which was not present in earlier international conventions: that was a difficult concept and it was open to abuse. Requiring that it exist alongside the criterion of the territorial State before jurisdiction could be conferred was therefore appropriate and his only doubt was whether the criterion of the State in whose territory the alleged perpetrator of the crime was found should not also be retained.

32. Lastly, although it might be premature to discuss ways of reconciling the jurisdiction of the international criminal court and that of the Security Council with regard to aggression, he expressed an interest in the distinction drawn by Mr. Bowett (2258th meeting) and endorsed by Mr. Villagran Kramer between a determination by the Security Council, which was necessarily related to the conduct of States, and the judgements of the court, which concerned individuals. He would welcome any solution that took account of political realities while ensuring the independence, prestige and respectability of the court.

33. Mr. FOMBA said that, in his view, the answer to the question of the law to be applied and the jurisdiction of the international criminal court ratione materiae lay in the interpretation given to the maxim nullum crimen, nulla poena sine lege. The consequences differed according to whether the interpretation was strict or broad.

34. If the maxim was interpreted strictly, formal, or written, law could be perceived behind the word lex. Accordingly, the application of the maxim to international criminal law, and hence to the international criminal court, would mean that the crimes and penalties would be laid down in written law, namely, the Code. In other words, inasmuch as crimes against the peace and security of mankind were defined in the Code, the court would have to apply only the Code. The advantage of that would be to reduce, and properly circumscribe, the body of rules to be applied. The word lex as understood in the broad sense, on the other hand, could be interpreted as denoting law in general, whether or not it was written. In that case, the body of rules was not simple: it was composite and difficult to determine precisely, and that meant that the court might apply various categories of rights. Having regard to the strict character of criminal law—whether national or international—that solution would be ineffective, in his view, and should therefore be dropped.

35. A strict interpretation of the same maxim was also tantamount to concluding that the court should have jurisdiction only over the crimes defined in the Code, and that such jurisdiction must be exclusive and compulsory. Yet, there was no unanimity either on the list of crimes set forth in the Code, or on their legal regime or the sensitive issue of the surrender of the sovereign jurisdiction of States in criminal matters.

36. Did that mean that, according to the relentless logic of the maxim, the Commission must propose that the court should apply "the Code, the whole Code and nothing but the Code" on an exclusive and compulsory basis? If so, should the Code not be reviewed for the purpose of making it less rigorous, particularly by reducing the list of crimes to the lowest possible common denominator? Above all, how was the compulsory accession of States to be achieved?

37. Would it not be preferable to depart from that logic and to show more modesty and also more realism by recommending flexible solutions which, without losing sight of the future, would take account of current political realities and offer some chance of guaranteeing a minimum of efficiency in the prevention of crimes against the peace and security of mankind? As he had not thought the matter through completely, if that were indeed possible, he could not provide an entirely satisfactory answer to those questions. However, he supported the judicious proposals made by certain members of the Commission and, in particular, by Mr. Mahiou (2259th meeting).

38. Mr. KOROMA said that he did not altogether see what Mr. Robinson had meant when he had referred to a conflict between certain international instruments and the Code. True, the various instruments must be reconciled and the Commission had in fact looked into the matter when it had considered the draft Code on first reading. The question of how that could be achieved remained, however. In the case of the definition of aggression laid down in article 15, paragraph 2, of the draft Code, the Commission had drawn on the Charter of the United Nations itself, as well as on other instruments and on General Assembly resolutions. In that connection, he would remind members that the Nürnberg Tribunal had applied all the international instruments of the times and that those who had been brought before it had known that, under the terms of those instruments, their activities had been unlawful. The draft Code itself was, as he saw it, one way in which the various instruments on the subject were reconciled and he did not think that there was any real risk of conflict.

39. He would like to have some clarification about Mr. Villagran Kramer's question on the relationship between the future international criminal court and the Security Council, having regard to the most recent resolution adopted by the Security Council with respect to Libya. Although the Security Council was supposed to judge solely the conduct of States, it had in that case requested a State to hand over two of its nationals so that they could be tried; according to the assumption adopted thus far, that would, precisely, come within the jurisdiction of the court.

40. Mr. ROBINSON said that, whatever approach the Commission took and whether or not it incorporated in

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the Code all the provisions of the various international instruments, so that the Code would provide the source of the law to be applied, there would still be a risk of conflict, not so much from the point of view of the accused as from that of the State which considered that it had the right to prosecute. All States parties to those instruments, other than the State which surrendered the particular individual to the international court, had the right, under those instruments, to insist on the extradition of that individual so that it could try him. That was where the conflict arose and that was why he had suggested that a provision should be added to the draft Code to the effect that the new regime would prevail over the other international conventions. So far as he knew, the problem had never been considered in any significant way by the Commission or the Sixth Committee of the General Assembly. The Commission must therefore take up the issue if it really wanted to do useful work.

41. Mr. VILLAGRAN KRAMER said that, in the case of crimes such as aggression or apartheid, the Security Council qualified the conduct of a State and therefore imposed sanctions on that State, whereas, in the case of certain other crimes, the measures taken were directed mainly at individuals. In his view, the measures taken by the Security Council in the case of aggression should not limit the action of the court; quite the contrary, as the decisions of the Security Council were binding on the court, the court must try those responsible for the crime. As to the resolution concerning Libya, in his view, the Security Council had not judged the conduct of a State, but had taken a decision regarding an act of terrorism, which, by its very nature, necessarily had to be attributed to specific individuals; that did not mean that the decision had not been motivated by the fact that the situation could have led to an international conflict. In other cases, too, such as that of Iran, the fact that the Security Council had taken action had not stopped other bodies from considering the matter. Lastly, no provision of the Charter of the United Nations could be interpreted as constituting an obstacle to the action of a court, even following the intervention of the Security Council.

42. Mr. CRAWFORD said that, in his view, no provision added to the Code could prevent the risk of conflict with existing conventions, since it would have no binding effect on third parties. Moreover, under such conventions, States parties would have universal jurisdiction. That was a serious problem and one that would not be easy to solve.

43. Mr. ROBINSON explained that his proposal was that it should be stated clearly that the Code would prevail over other instruments for States which were parties both to the new regime and to existing international conventions.

The meeting was suspended at 11.30 a.m. and resumed at noon.

44. Mr. CRAWFORD said he understood that the Special Rapporteur had divided the members of the Commission into two camps; those who were in favour of the establishment of an international criminal court and those who were not. He himself fell into the first of those categories, but that did not mean he did not wish to know more about the nature of the court and what it would do.

45. With regard to the question of the law to be applied, he believed, like Mr. Pellet (2257th meeting) and Mr. Yankov (2259th meeting), that it was essential to specify the crimes that would come within the jurisdiction of the court, independently of any general references to international law or international criminal law. He understood that the proposal to refer to national law had given rise to objections, but that seemed inevitable. Perhaps, if the aim was to give the mechanism to be set up a degree of flexibility, it was even necessary to consider whether the court could apply certain elements of national law as such.

46. The question of jurisdiction ratione materiae lay at the heart of the discussion. Yet the draft provision on the subject was, as it stood, unsatisfactory and unworkable, in his view. The first problem related to the choice of crimes over which the court would have exclusive and compulsory jurisdiction. In the first place, the draft provision ran counter to other relevant international conventions such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, under the terms of which it was for national courts to prosecute. In any event, in the present or even future, state of international relations, it was inconceivable that there would be an international criminal court vested with exclusive and compulsory jurisdiction, divorced from all prosecuting mechanisms, for such a broad range of crimes. Some members of the Commission, like Mr. Shi (2259th meeting), went so far as to criticize the very idea of such a court because it would be confronted with the following dilemma: either the persons charged would have committed the crime in their private capacity, in which event national jurisdiction would be enough, or they would have committed it on behalf of the State, which would never give them up to be prosecuted by an international court. Those arguments led him to think that, although the court might have its uses, it certainly could not have exclusive and compulsory jurisdiction. Paragraph 1 of the possible draft provision on jurisdiction was therefore unacceptable.

47. The regime of optional jurisdiction was an easier solution to envisage, provided that all its aspects were specified. The court would then have jurisdiction in well-defined cases and in accordance with the provisions of international instruments that States themselves were ready to accept. Paragraph 2 of the draft provision, how-
ever, did not, first of all, deal with jurisdiction *ratione materiae* as such, but with the precondition for the existence of such jurisdiction. Secondly, it was not expressly tied to the Code or to the treaties in force, so that a State could impose on the international criminal mechanism the obligation to try someone for any crime whatsoever. Thirdly, it placed too much emphasis on the consent of the victim State, which was not necessarily the best placed to rule on the jurisdiction of a court—not to mention that such a solution was unworkable in the case of mass violations. Fourthly, it paid no regard to the State of nationality, when consent was necessary in the case of those countries where criminal jurisdiction was closely associated with nationality. Finally, the draft provision gave the right to a State to bring a case before the court without any control mechanism, which was debatable.

48. As to paragraph 3, he agreed with the view that it was unnecessary. Since the right of appeal did not exist unless it was expressly conferred, there was no reason to exclude it.

49. Mr. GÜNEY said that the jurisdiction of the court and jurisdiction in respect of a criminal action were the first two questions raised by the establishment of a criminal court, which, as the Special Rapporteur had noted, enjoyed the support of most of the members of the Commission. In his view, the court should be used only on an ad hoc basis in order to take cognizance of particularly serious and odious crimes.

50. With regard to the applicable law, alternative B proposed by the Special Rapporteur could serve as a basis for discussion. According to that text, the court would apply primarily the international conventions relating to the prosecution and prevention of crimes under international law, the general principles of criminal law recognized by the United Nations and the applicable procedural rules. The application of international custom was, in his view, not to be ruled out entirely, but, for the time being, it would be better not to mention it, as Mr. Rosenstock (2259th meeting) had suggested. It was also not necessary to mention judicial decisions and teachings as means for the determination of rules of law.

51. As to the question of jurisdiction *ratione materiae*, he could not see the need for a list of crimes. Concerning paragraph 2 of the draft provision on that question, he thought that the obligation to hand over to the court the perpetrator of a crime should not be restricted to the State in whose territory the crime had been committed. The obligation should be extended to all States parties to the statute of the court. Lastly, the court should not be bound by the decisions of a political organ when those decisions were concerned solely with inter-State relations.

52. Mr. de SARAM, referring to the Special Rapporteur’s review of the trends apparent in the Commission’s consideration of the general question of the desirability and feasibility of creating an international criminal court or an international criminal trial jurisdiction, stated that, since the Commission proceeded by way of consensus and it was desirable to secure the widest possible accession of States, the establishment of an international criminal trial mechanism, envisaged as one of the possible options in General Assembly resolution 46/54, would be preferable to the establishment of a permanent court, which a number of speakers had favoured. In his view, the more realistic and, accordingly, the more appropriate course would be an ad hoc court, not a body in permanent existence: one that would be established by a convention and convened, whenever necessary, under a procedure that was generally acceptable, would ensure against unreasonable usage, and would be sensitive as well to the important concerns of States for matters affecting their sovereignty. That would be the first step in a long and gradual process of establishing an international criminal court and would have the advantage of not disrupting the existing system, which was based in large part on the adequacy of national legal systems and a network of conventions establishing the rules governing extradition. Though it appeared to him to be premature for the Commission, at its present session, to endeavour to reach a definitive conclusion on the issue of permanent status or otherwise; nevertheless much of the preparatory work towards the preparation of an appropriate statute for the court, with alternative provisions, where necessary, for a permanently established body or a body to be convened ad hoc from time to time, when necessary, could begin at the present session of the Commission, together with consideration of the many related questions, such as those raised in part two of the Special Rapporteur’s report, that would, of course, need to be resolved in a generally acceptable manner if an international criminal court or an international criminal trial jurisdiction were ever to become a reality.

53. The establishment by the Commission of a working group, for the detailed work necessary and for the preparation of a report and recommendations to the Commission was an eminently sensible course. It would be extremely useful for the Commission and, subsequently, for the Sixth Committee, and would contribute to more orderly and non-repetitive discussions, if the working group and the secretariat could put together a comparative table of the provisions of the principal statutes and draft statutes that existed, though admittedly some selection would have to be made as to what were the most appropriate. It would also be very helpful, though perhaps not possible at the present session of the Commission, if it were possible for the working group and the secretariat to prepare as well an accompanying explanatory note of annotations, in summary and enumerative style, showing the principal positions that had been taken in earlier United Nations’ discussions on the various provisions. As he had already noted, many of the comments being made at the current session recalled those already stated in the Commission and the Sixth Committee in earlier discussions in 1990 and 1991 and, indeed, more than a quarter of a century ago, between 1950 and 1953, when the question of establishing an international criminal court pursuant to article VI of the Convention on the Prevention and Punishment of the Crime of Genocide had been raised. Such an annotated comparative table, though its preparation would take time and effort, would serve as a continuing and easily accessible reference document that would help ensure that all delegations in the Sixth Committee were on the same level of awareness in the debate, and thus in a position to participate fully in the determinations to be made on the various and important questions involved.
54. Very careful consideration would need to be given in the working group to the difficult and sensitive question of the procedures through which an ad hoc court could be convened from time to time in a manner that would prevent unreasonable usage and provide as well for adequate safeguards with respect to the understandable sensitivities of all States on matters relating to their sovereignty. The equally difficult and sensitive question of how the role of the Security Council under the Charter of the United Nations would have to be accommodated would also have to be thought through; such as on the question of the offences in the field of peace and security, and the procedures through which offences in the field of peace and security might be brought within an international criminal trial jurisdiction.

55. A governing consideration in the many determinations that would have to be made in the course of the work of the Commission on the two questions of the substantive law to be applied and jurisdiction, would have to be that any provision the Commission adopted should meet the exacting requirements of criminal law as to greatest possible precision in language. When the provisions adopted on first reading were circulated to Governments, the latter would not fail to submit them to lawyers who had broad experience in the defence of the accused and the technicalities of criminal law and for whom precision in the use of language was crucial.

56. If precision was to be the governing consideration, it seemed to him that, in respect both of jurisdiction and of the law to be applied, the Commission could not escape the necessity of giving very serious consideration to the view that crimes to be covered by the international criminal trial jurisdiction and the law to be applied by that jurisdiction should be only as eventually defined and provided for in the Code and, additionally, in such further instruments, such as, for example, conventions supplementary to the Code that might be concluded from time to time by States specifically to place an additional crime or crimes within the jurisdiction of the international criminal court. The suggestion that the international criminal trial jurisdiction should only cover, or perhaps also cover, crimes identified and described in particular conventions, to be appropriately listed, seemed on first impression to be attractive because it might avoid some of the problems that could arise when considering the question of the offences to be brought within the jurisdiction. Yet, it seemed to him that there was still a difficulty present that made that suggestion somewhat less attractive; namely, that unless a convention was specifically designed for the purpose of placing a crime or crimes within an international criminal trial jurisdiction, there was a very real possibility that the language adopted in a convention might not be as precise as it should be to meet the extraordinary degree of precision required in criminal law.

57. In conclusion, he said that more detailed discussion and the answers to the many questions raised would be greatly facilitated by the report of the working group and still more by the comparative table which he hoped would be prepared.

58. The CHAIRMAN assured Mr. de Saram that his proposal would be taken into consideration.

59. Mr. SZEKELY said that he thought that alternative B of the draft provision on the applicable law was preferable and he would adopt an analytical approach in suggesting amendments to the text, which should list the various international legal instruments characterizing offences as the primary source of international criminal law. In that connection, he had no difficulty in accepting subparagraph (a), but he considered that the international conventions dealing with the prosecution and prevention of crimes under international law were not the only relevant ones. There were other international conventions which related to human rights, the right to life, torture or slavery and which were sources of internationally applicable law. He therefore thought that a subparagraph referring to other general or special international conventions defining certain crimes should be added after subparagraph (a).

60. The primary sources of law would be listed in the first two subparagraphs and the third subparagraph would list the subsidiary sources that would facilitate the application and interpretation of the primary sources. The third subparagraph might be based on Article 38 of the Statute of ICJ and refer to certain international conventions, whether general or special, such as the Vienna Convention on the Law of Treaties, or to other instruments such as the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity. The text would then continue with the last four paragraphs of alternative B, which referred to international custom, as evidence of a practice accepted as law, the general principles of law and, in particular, criminal law, judicial decisions and teachings of highly qualified publicists of the various nations and, lastly, internal law, where appropriate.

61. He did not intend to repeat what the preceding speakers had said and would therefore refer to the question of jurisdiction 
ratione materiae from the point of view of legal philosophy rather than from the technical point of view. He too found himself hesitating between his inclinations as an international jurist and the need to design a legally viable mechanism. A balance must therefore be struck between the two possible types of aspirations: on the one hand, the hope—perhaps illusory—that the international community would agree to recognize the compulsory and exclusive jurisdiction of the future court and, on the other, the establishment of an optional mechanism, which would be fragile, since some States would be parties to it, while others would stick with universal jurisdiction; all of that would actually be a de facto and de jure reflection of the inequality of the subjects of such a system of justice and would in the end be subject entirely to the political will of States.

62. More specifically, he agreed with some of the other members that the instrument establishing the court should list the instruments defining the crimes within its jurisdiction, the most important one being the Code. He had misgivings, however, about what would happen in the case of illicit international trafficking in drugs, not only because the court would not be able to deal with the thousands of crimes of that kind that were committed,
but also because the Code might conflict in that respect with the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

63. He was not satisfied with the draft provision on jurisdiction and wondered what kind of justice would confer jurisdiction on the court for genocide, but not for war crimes, for the kidnapping of diplomats, but not for terrorism against innocent victims, and for international drug trafficking, but not for aggression in the form of colonialism and intervention. The result would be to demolish international criminal justice.

64. He was in favour of a court which had jurisdiction for all crimes under international law. That should be the purport of any recommendation submitted to the General Assembly.

65. Mr. KABATSI said that, if the intention was to prevent crimes against the peace and security of mankind, an international criminal trial mechanism must be established to apply known international criminal law, which was basically the draft Code of Crimes against the Peace and Security of Mankind. However, to stipulate that such a court should apply internal law would be unrealistic, except where internal law was only a transposition of international law. An international criminal court could not in fact know every country’s internal law and its task would therefore be difficult, both in determining the relevant internal law and in applying it. Alternative A of the draft provision on the law to be applied was too imprecise and he preferred alternative B, but hoped that both subparagraphs (b) and (e) could be deleted, since they were not in keeping with the requirements of stringency in criminal law.

66. The question of the compulsory or optional jurisdiction of the court would depend on what kind of court the international community wanted. A cumbersome and rigid mechanism was unlikely to survive, whereas an unduly lightweight mechanism would be difficult to set up and would not have the necessary authority. He therefore considered that the international criminal court should have compulsory, but not necessarily exclusive, jurisdiction and that it might be wise to wait a little in order to be in a position to establish a robust mechanism rather than one which would be anaemic and unable to solve existing problems. A court with optional jurisdiction would not have been able to find a way out of the deadlock in the Lockerbie case between the United States of America and Libya. The international community should be able to rely on an international criminal court in order to eliminate crimes against the peace and security of mankind.

The meeting rose at 1.10 p.m.

2261st MEETING

Friday, 15 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. Mr. KUSUMA-ATMAJDA, referring to the misgivings expressed by Mr. Crawford at the preceding meeting, said that reluctance to institutionalize the use of force—a sentiment with which he was entirely in sympathy—should not rule out readiness to define the conditions under which the use of force might be resorted to if necessary.

2. With reference to the possible draft provision on the law to be applied, he recalled his earlier suggestion (2256th meeting) that a distinction should be drawn between criminal acts committed by individuals on behalf of the State and those committed by individuals in their personal capacity. In the case of crimes in the first of those categories, the issue of sovereignty was a real impediment; he could not agree with arguments to the effect that invoking national sovereignty in connection with such cases merely revealed a lack of political will. However, sovereignty was not relevant to acts committed in a personal capacity. He had no difficulty with subparagraphs (a) and (b) of alternative B, but the reference to the general principles of criminal law in subparagraph (c) was unnecessarily restrictive; in certain borderline cases, such as those of culpable negligence, it might not be clear whether civil or criminal law was involved. The subparagraph should read: “The general principles of law recognized by the community of nations”, “nations” being preferable to “States” in that context. Subparagraphs (d) and (e) were acceptable in view of the qualifying reference to “subsidiary means” in (d) and the use of the clause “where appropriate” in (e); in that connection, he would point out that internal law could in some respects be more advanced than international law. Indeed, in some instances, international law might be unclear or even non-existent.

3. As to the court’s jurisdiction ratione materiae, the court should have exclusive and compulsory jurisdiction.

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1 For text of the draft articles provisionally adopted on first reading, see Yearbook... 1991, vol. II (Part Two), chap. IV.
3 For text, see 2254th meeting, para. 3.
4 Ibid., para. 4.
in respect of the first category of crimes and concurrent jurisdiction in respect of the second category. Where matters were dealt with by a special convention, whether global or regional in character, the court's jurisdiction should be optional. The point was an important one in view of the present-day level of integration within the international community.

4. Referring to points raised at earlier meetings by Mr. Villagran Kramer (2255th meeting), Mr. Robinson (2260th meeting) and Mr. de Saram (2257th meeting), he expressed the opinion that the international trial mechanism established to deal with crimes in the first category should not be a permanent court or a criminal chamber of ICJ—even if the Statute of ICJ could be amended to allow the establishment of such a chamber—but, rather, an ad hoc tribunal established by a treaty and linked with the system relating to action with respect to threats to the peace, breaches of the peace and acts of aggression provided for in Chapter VII of the Charter of the United Nations, under which authority with regard to such action was vested in the Security Council. The question of the precise stage in the proceedings under Chapter VII at which the international court should be activated would require careful consideration at a later stage.

5. Mr. KOROMA said that, had he been present when the Commission had embarked on the discussion, he would have suggested that the question of the desirability of establishing an international criminal court should be considered only after conclusions had been reached on technical aspects of the problem, such as the applicable law and the jurisdiction of the court. Such an approach would seem more logical and he suggested that it should be activated in the Commission's report on the consideration of the item at the present session.

6. He stressed the need for a high standard of precision in defining the applicable law, not only from the point of view of safeguarding the rights of the accused, but also making sure that serious offences did not go unpunished. With regard to alternative B of the possible draft provision on the law to be applied, the fact that international conventions, including the draft Code itself, would certainly constitute the main applicable law did not preclude reliance on customary law, especially in the case of new crimes not yet defined by any convention. On no account should perpetrators of such crimes be allowed to find refuge in a claim of non liquet simply because there was as yet no international convention to cover them. Cases in which international custom was applied should, of course, be very limited, but it should not be forgotten that the Nürnberg and Tokyo Tribunals had had to rely on customary law. In some situations it might be necessary to view General Assembly resolutions, particularly those adopted unanimously or by an overwhelming majority of the international community representing all geographical regions, as part of customary law. A unani
mously adopted resolution would meet the test of “international custom, as evidence of a general practice accepted as law” referred to in Article 38, paragraph 1 (b), of the Statute of ICJ, as well as that of article 53 of the Vienna Convention on the Law of Treaties which defined a peremptory norm of general international law (jus cogens) as a norm accepted and recognized by the international community of States as a whole.

7. Among the general principles of criminal law referred to in subparagraph (c) of the draft provision, one could cite such principles as nulla poena sine lege, nulla poena sine lege and the double jeopardy rule, all of which were fundamental principles which the court must apply. The judicial decisions referred to in subparagraph (d) also had a role to play and should undoubtedly serve as a subsidiary means for the determination of rules of law. The inclusion of internal law, where appropriate, among the sources of law was, in his view, correct. In that connection, he endorsed the views expressed in the Special Rapporteur's commentary. The provision concerning the applicable law should ensure maximum flexibility of the system while at the same time fully safeguarding the rights of the accused. In conclusion, he drew attention to article 15, paragraph 2, of the International Covenant on Civil and Political Rights, which provided for the trial and punishment of any person for ... any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

8. The court's jurisdiction should be determined by the Code. As the draft Code attempted to confine itself to the most serious crimes, such as aggression, genocide and mass violations of human rights, including apartheid, States should initially have the option to bring any of those crimes before the court. That would provide States with a tribunal for trying very serious offences and, if the tribunal gained in reputation because it was impartial and objective, more and more cases would be brought before it. Jurisdiction should be optional because, if it was made compulsory, the court would not be attractive to States.

9. A determination by the Security Council did not relieve an individual of personal responsibility. The court must have the possibility to find that the Geneva Conventions had been violated and to try individuals for their personal responsibility, even if the Security Council had held that an act did not constitute aggression. Thus, decisions of the Security Council should not always be binding on the court, whose impartiality and objectivity were at stake. If the Security Council concluded that an act did not constitute aggression, it did not follow that the act itself did not qualify as a crime under the Geneva Conventions.

10. Mr. ROBINSON, speaking on a point of clarification, said that when he had proposed (2260th meeting) the deletion of the reference to judicial decisions from subparagraph (d) and to internal law from subparagraph (e) of alternative B, he had not been suggesting that their deletion prevented the court from availing itself of judicial decisions and of internal law. He had merely meant that they should not be specified as applicable law. The court could refer to them in carrying out its work and, indeed, it would be necessary for it to do so.

11. The CHAIRMAN said that that point certainly had to be looked into by the working group and the plenary.

12. Mr. ROSENSTOCK said that, as he had understood it, Mr. Koroma had stated that the court's action
on aggression required a finding by the Security Council that such an act had been committed, but that, if the Security Council had not concluded that aggression had been committed, that did not prevent the court from trying individuals for other crimes, either those set forth in the draft Code or in other conventions. If that was Mr. Koroma’s point, he agreed with it entirely.

13. Mr. PELLET said that he was against linking the court and the Code and was surprised that none of the members of the Commission in favour of such linkage had proposed the obvious: that the court should apply the Code.

14. He disagreed with the members of the Commission who had spoken out against international custom and cited the example of the International Convention on the Suppression and Punishment of the Crime of Apartheid. Although the modalities of that instrument were unacceptable to many States, there was general agreement that apartheid was a crime against the peace and security of mankind. South Africa was not a party to that Convention and, if it one day decided to bring those responsible for apartheid to trial, he wondered what court would have jurisdiction. If the Commission eliminated custom from the law to be applied by the court, it would deprive the court of the possibility of taking any decision on such a question.

15. In subparagraph (d) of alternative B of the possible draft provision on jurisdiction, he did not think that the words “judicial decisions and teachings of highly qualified publicists of the various nations” should be deleted because they had been taken from Article 38 of the Statute of ICJ and it was therefore legitimate to include them in the provision. The point was not to apply judicial decisions and teachings of highly qualified publicists as such, but merely to use them “as subsidiary means for the determination of rules of law”, as stated in the last part of subparagraph (d).

16. With regard to internal law (subpara. (e)), the court would have to refer to provisions of internal law, but it would never have to apply internal law. The Commission should not state that an international court could apply internal law. Instead, it must specify that it was the cases that had been brought before the court that were at issue. The court might be asked to apply internal law as a material source, but not as a formal one. However, the report had listed only formal sources.

17. Concerning the relationship between the Security Council and the court, a number of members had pointed out that the Security Council ruled on acts by States, whereas the court would judge acts by individuals. That did not, however, answer the question whether the court was bound by a finding of the Security Council. For example, was the court bound by a decision of the Security Council concerning a person accused of having ordered or participated in an act of aggression? It was not so easy to separate acts of States and acts of individuals. The court therefore had to ensure that the Security Council had acted in conformity with the Charter of the United Nations and international law. Thus, even if the Security Council did not conclude that aggression had taken place, the court was not bound by that decision. That view might not please the permanent members of the Security Council, including France, but he stood by it.

18. Lastly, he said that, in French, it would be more accurate to use the term cour criminellem internationale in place of cour pénales internationale in order to underline the seriousness of the crimes in question.

19. Mr. VILLAGRAN KRAMER said he thought that it might be necessary to make a distinction in the Code between crimes and offences and he asked Mr. Arangio-Ruiz for his view.

20. He endorsed the comment Mr. Robinson had made the previous day (2260th meeting) to the effect that it would be useful for the court to apply internal law and he suggested that the Commission should postpone its discussion of the relationship between the Security Council and the court with regard to the question of aggression and that it should bear in mind the decisions of ICJ in the United States Diplomatic and Consular Staff in Tehran case, the Military and Paramilitary Activities in and against Nicaragua case and the two cases recently brought by Libya in connection with the Lockerbie bombing.

21. The CHAIRMAN pointed out that the draft Code of Crimes against the Peace and Security of Mankind had originally been called the draft Code of Offences against the Peace and Security of Mankind, but had been renamed to underline the particularly odious character of the acts with which it dealt.

22. Mr. ARANGIO-RUIZ said that he favoured neither of the two proposed alternatives for the provision on the law to be applied. He found particularly objectionable the use, in both cases, of the expression “where appropriate”, which was typical of international commercial arbitration proceedings when tribunals were vested by the parties with the power to do virtually whatever they pleased so far as their sources of law were concerned. In addition, alternative B was couched in terms that were very similar to those used in the Statute of ICJ, which were inappropriate for an international criminal court. The main thing was that the Code should stipulate clearly which rules should be applied by the court. It was also essential for the convention that embodied the Code to include a provision whereby every State party to the convention would be required to incorporate the terms of the Code into its own legal system. Any State not complying with that obligation would be in breach of the convention.

23. As to the relationship between the Security Council and the international criminal court, the court should not have to bow before any decision of the Security Council. That was, however, a complex and wide-ranging issue which might call for an ad hoc report by the Special Rapporteur.

24. He was not certain why Mr. Villagran Kramer had asked him about the words “crimes” and “offences”,

5 I.C.J. Reports 1980, p. 3.
7 See 2255th meeting, footnote 8.
since he was not an expert in that particular aspect of the matter. In so far as the question related to the topic of State responsibility, however, he had decided that it would be better, in the context of draft article 19 (International crimes and international delicts) of that topic to leave crimes aside for the time being. In any event, he increasingly felt that crimes were in fact only a more serious form of delicts. Any distinction between crimes and delicts in the context of that draft article was made solely with regard to the consequences, although he was unable at the present stage to recommend precisely what form that distinction should take. The draft Code, however, was a code of crimes and, as such, delicts had no place in it.

25. Mr. CALERO RODRIGUES said that he would like Mr. Koroma to confirm that he really was proposing that the international criminal court could rely on resolutions of the General Assembly where conduct was deemed by those resolutions to be a crime, but was not recognized as such in any international instrument. Was he also proposing that, if the court could find no law to qualify an act as a crime and if it was itself convinced that the act in question was a crime, it could go ahead and punish the individual concerned? If that were so, it would seem to be vesting the international criminal court with quite extraordinary powers.

26. Mr. KOROMA said it was his view that, where repeated resolutions of the General Assembly reflected the opinio juris of the international community, the court could use those resolutions as a subsidiary means of applying the law. In other words, he had been referring to resolutions not on their own, but in the general context of customary international law.

27. Secondly, he considered that, if a grave offence not covered by any specific law was committed, the court should not, having regard to what he would term international common law, allow that offence to go unpunished.

28. Mr. CRAWFORD said that he could not agree with the proposition that criminals could be charged under the Code for offences against an as yet to be conceived common law of mankind. What was required in the case of the criminal court was definition and precision. The nullum crimen sine lege principle was not to be answered by a proposition that there was no lacuna in international law insomuch as the two operated at different levels.

29. Mr. YAMADA said that he had no difficulty with the possible draft provision on complaints before the court. As the Special Rapporteur pointed out, however, the Commission should discuss the question of which international organizations should be made eligible to bring proceedings before the court. In that connection, he noted that, under the terms of Article 96 of the Charter of the United Nations and Article 65 of the Statute of the Special Tribunal for the Former Yugoslavia, the organizations eligible to seek an advisory opinion of the Court were the organs of the United Nations and the specialized agencies. In the specific case of the international criminal court, however, he would suggest that that list should be expanded to include certain other international and regional intergovernmental organizations such as OAS, OAU and possibly also ICRC, whose function it was to administer humanitarian law, as reflected in the 1949 Geneva Conventions. He did not, however, favour the inclusion of non-governmental organizations, as it would be difficult to draw a line between those that could and those that could not be accepted. The working group might wish to consider the matter in more detail and draft an appropriately worded proposal to define which organizations were eligible to bring proceedings before the court.

30. Mr. CALERO RODRIGUES said that it had emerged from the discussion on the institution of criminal proceedings at the Commission's forty-third session that there was a difference between the formal institution of such proceedings and the submission of a case for consideration by the court. The general feeling had been that the formal institution of criminal proceedings should be the prerogative of a special public organ—a kind of prosecutor's office—which would be attached to the court and would probably operate under its supervision. The submission of cases for possible prosecution, on the other hand, would be a right of States and possibly of some organizations as well.

31. He noted that, in his tenth report, the Special Rapporteur had adopted the word "complaints", which appeared in human rights and other documents. While he was not altogether happy with that word, he considered that, as no better one had been found, it should be used for the time being pending the adoption of some more suitable word at a later date.

32. That States could refer cases to the international criminal court or to a prosecutor's office was so self-evident that it would not be a very controversial issue. The main question was whether other entities such as non-governmental organizations should be recognized as having that right. His own view was that they should and that the draft provision on complaints should so stipulate. After all, if a State or organization suggested that proceedings should be instituted, that did not mean that the court would necessarily take up the case; only the prosecutor's office would decide whether or not the case would be formally brought before the court.

33. Although the draft provision referred to international organizations, he saw no reason why FAO or UNESCO, for instance, should have the right to bring a case before the court—a right that was in fact already vested in each and every member State of those organizations.

34. It had been suggested that certain national organizations of a humanitarian character should also be able to refer a case to the court. He was not sure that that would be a good idea, given the problems that would almost inevitably arise. He was also not sure that ICRC, which had been mentioned in the same connection, would like to have such a power. For the time being, it would be best, in his view, if the right to bring a case be-
fore the international criminal court was confined to States and non-governmental organizations.

35. Mr. YANKOV, noting that under the second paragraph of article 24 of chapter III of the draft Statute adopted by the International Association for Penal Law in 1927\(^*\) international criminal proceedings could be instituted by any State, said that he wondered what precisely that meant. The Special Rapporteur, in his report, had identified at least four groups of States, but it should perhaps be made clear in the commentary whether the right to institute proceedings before the court would apply to all four groups. If so, that could create considerable difficulty in the case of a multilateral treaty which might include a requirement concerning consent to jurisdiction by all parties to the treaty.

36. The reference to international organizations in paragraph 1 of the possible draft provision might be interpreted as covering both intergovernmental organizations, whether regional or global, and non-governmental organizations and also, possibly, such entities as the European Community. There was, of course, the possibility that, where not only the intergovernmental organization, but also its member States, had the right to bring proceedings before the court, there would be duplication. He had no ready answer to that problem, which called for special consideration.

37. Reference had been made to ICRC, but, as he understood the position, it had always been the practice of ICRC not to become involved in disputes and he therefore doubted whether it would be interested in instituting proceedings before the court.

38. The question of the institution of proceedings also arose in connection with the separation of powers as between the Security Council and the international criminal court, particularly in the case of aggression—a question that would arise time and again. He would merely point out that, even in the case of the imposition of sanctions under Articles 41 and 42 of the Charter of the United Nations, the object of such sanctions was to secure the maintenance of international peace and security; such sanctions did not provide for any measures that would lead to the punishment of those who actually perpetrated or were involved in an act of aggression.

39. He agreed in substance with paragraph 2 of the draft provision, but would suggest that it should be couched in more positive terms, so as to provide that proceedings should be instituted against natural persons, regardless of their rank and position.

40. Mr. IDRIS said that the requirement that only States and international organizations should be entitled to bring complaints before the court and that the submission of a complaint by the injured State would be necessary to institute proceedings implied that the court could not institute proceedings in its own right, a situation which was markedly different from that of some national courts, where an action could be brought by the prosecutor’s office.

41. He wondered what justification there was for limiting the right of action to States and international organizations and what would happen if neither, for political reasons, wished to lodge a complaint, even if an international offence had been committed and the injury had been duly established. It might also be asked why certain legal persons in internal law or having an international or universal character were denied the right to bring complaints before the court.

42. Paragraph 2 of the possible draft provision stated that it was immaterial whether the person against whom a complaint was directed had acted as a private individual or in an official capacity. In view of the seriousness of the crimes in question, persons vested with the power of command must not be able to claim that they had acted in an official capacity in order to be relieved of their personal responsibility, a principle clearly established by the Nürnberg Tribunal.

43. He also wondered what would happen in the event of dommages collatéraux, such as human rights violations, caused by actions carried out by a State or a group of States against another State in the name of international legality.

44. Mr. CRAWFORD said that the formal right to institute proceedings before the court was normally vested in a public official—in the case of his own country, the Attorney-General. That official was empowered to decide, on the basis of the evidence produced, whether or not proceedings should be instituted. However, he agreed with the view that the prosecutor’s office should not, at least while the court was still at an early stage of its existence, be authorized to take that decision unilaterally. In his opinion, the right to bring complaints before the court should be restricted to States parties to the statute of the court, particularly in the light of the high cost of such proceedings, as could be seen from the prosecutions which had been brought in connection with domestic war crimes legislation in Australia and which had cost millions of dollars.

45. At the same time, he could see no reason why evidence could not be brought to the attention of the prosecutor’s office by a non-governmental or other relevant organization in support of a possible complaint. There was no justification for limiting that function to the authorities of States parties. As it stood, the draft provision on complaints before the court did not distinguish between the different aspects of the complaints procedure.

46. Mr. ROBINSON said that he was unsure whether the possible draft provision was intended to be wholly substantive, or whether, as would be appropriate, it should also deal with some of the procedural rules relating to complaints. In particular, the role of the prosecutor’s office should be clarified.

47. Paragraph 1 of the draft provision raised the question of the conditions under which States and international organizations were vested with the right to bring complaints before the court. In his view, Mr. Crawford

was correct in regarding that right as belonging solely to States parties to the statute of the court and he could not see what role international organizations could play if they were not to be parties in their own right.

48. He queried the relevance of paragraph 2 to the context in which it was placed, since it seemed to be more substantive than procedural, although he had no difficulty with the proposition it affirmed.

49. The CHAIRMAN said that a fairly complex structure might be required for the complaints procedure, particularly as far as appeals were concerned, and, in that connection, he noted that there was a United Nations body to review decisions of the United Nations Administrative Tribunal that might serve as a model for appeals procedures in the court.

50. Mr. MIKULKA said that the draft provision on complaints had two aspects, the first being “active” in that it concerned the entitlement to bring complaints before the court, while the second was “passive” and related to the question of who might be the subject of such complaints. It might be better if the two aspects were covered in separate provisions.

51. He agreed with Mr. Yankov that the statute of the court should contain a provision on jurisdiction ratione personae which would unequivocally state that the court had jurisdiction to try cases involving crimes against the peace and security of mankind committed by individuals, whether or not they were acting in an official capacity. Such a provision might be based on paragraph 2 of the possible draft provision on complaints.

52. Paragraph 1 of that draft provision was crucial and he agreed with those who were in favour of the court’s exclusive and compulsory jurisdiction in respect of crimes such as aggression, threat of aggression, intervention and colonialism. In such cases, it was impossible to agree with the view that an unlimited number of States should have the right to bring complaints before the court and that international organizations should also enjoy that right, since the latter had no role to play in connection with universal jurisdiction. If such a role were to be assigned to them, it would be very difficult to reconcile the international criminal trial mechanism with universal jurisdiction as already provided for by many international conventions. In his view, States would not be keen to accept the jurisdiction of the court if international organizations were also entitled to intervene in a procedure which was not open to them in internal law. In particular, it was unclear how an international organization could comply with some of the obligations that would be established, such as that of handing over suspects.

53. An exception would be the Security Council, the only international organ that was competent to determine the existence of an act of aggression or other use of force in contravention of the Charter of the United Nations and to take any necessary measures to restore international peace and security. It should therefore be entitled to bring complaints before the court.

54. It would be difficult to agree that every State should enjoy such an entitlement unless there was a specific link between the State concerned and the suspected criminal. In order to establish such a link, it would not be satisfactory to use the criterion of nationality or that of the injured State, namely, the State whose nationals had been the victims of the crime in question. In his opinion, the right to bring complaints before the court should be restricted to the State in whose territory the presumed offender was found. That should apply in the case of crimes within both the exclusive and the optional jurisdiction of the court.

55. Mr. RAZAFINDRALAMBO said that he would like to know whether Mr. Crawford believed that the right to bring complaints before the court should be restricted to States parties to its statute solely because of the costs involved in the proceedings.

56. Mr. Robinson seemed to be concerned about the lack of a link between the two paragraphs of the draft provision on complaints. The second paragraph of the commentary nevertheless appeared to have a direct bearing on the issue. Under the regime envisaged by the Special Rapporteur, a two-tiered procedure would be followed, consisting, first, of bringing the complaint before the court and, secondly, of setting in motion a public action at the international level. There was thus an organic link between the two paragraphs of the draft provision.

57. Mr. CRAWFORD said that the only person who could refer a case to the court was, to use the French term, the procureur général or another comparable public official of the State concerned. However, it was not the responsibility of that official to search out criminals, at least in the early stages of the court’s existence. The right to bring a complaint, on which the procureur général would be entitled, after investigation, to act, should be restricted to only in States parties to the statute of the court, but there need be no restriction on the right of other States or of an international organization to bring evidence of a crime under the Code to his attention in order to assist him in carrying out his functions.

58. He had some misgivings about Mr. Mikulka’s suggestion that the Security Council should have the right to institute proceedings, since the Council’s decision might be seen as having determined the issue which was the subject of those proceedings. The suggestion should, however, be given further consideration.

59. Mr. VERESHCHETIN said that he saw the Special Rapporteur’s possible draft provision as setting out certain basic principles rather than as establishing specific procedures, an exercise which would require more detailed consideration at a later stage.

60. The title, “Complaints before the court”, did perhaps give rise to some problems, at least in the English version, and it might be better to change it to read: “Submission of cases to the court”.12
61. In paragraph 1 of the draft provision, reference should also be made to intergovernmental organizations and he tended to agree with the view that there should be some limitation on the categories of organizations entitled to apply to the court. Perhaps, as Mr. Mikulka had suggested, the right should be confined to the Security Council.

62. He supported the view that the two paragraphs of the draft provision should be separated and that paragraph 2 should be placed elsewhere in the draft, since it dealt with jurisdiction ratione personae.

63. Mr. ROBINSON said that procedural aspects needed to be discussed before the Commission could arrive at a definitive formulation of the two paragraphs of the draft provision on complaints. He noted that there seemed to be a divergence of opinion on the procedural steps to be followed, for example, in connection with the arrangements for bringing complaints before the court. The possible draft provision as it stood tended to obfuscate the role of the prosecutor’s office in that process and the second paragraph of the commentary did not give any reason for not including a paragraph specifically dealing with that role.

64. In identifying the circumstances in which States had the right to bring complaints before the court, the underlying consideration was to establish the conditions under which they had locus standi. He took the view that the right to institute proceedings should be confined to States which had recognized the statute of the court and he believed that there was a necessary relationship between paragraph 1 and alternative B of the draft provision on handing over the subject of criminal proceedings to the court. As a minimum, one of the categories of States entitled to bring complaints before the court should be the State which was identified in alternative B of that draft provision as the State in which the alleged perpetrator was found.

The meeting rose at 1.05 p.m.

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2262nd MEETING

Tuesday, 19 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fombrum, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshcheticin, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. Mr. VILLAGRAN KRAMER said that General Assembly resolution 46/54, paragraph 3, offered the Commission a much wider range of possibilities than the establishment of a court stricto sensu, as the use of the term ‘‘mechanism’’ showed. An intellectual effort was therefore required to go beyond the usual concepts of criminal law under the Roman or common law systems. Conceived as a dialectic between the prosecution acting on behalf of the State and the collective interest, on the one hand, and the defence of an accused person, on the other, a trial or procès pénal was not the only possible option. In other parts of the world, there was another system, under which any person could institute proceedings before the public prosecutor, known as a denuncia, which, unlike a complaint, did not necessarily involve an indictment.

2. To be sure, at the international level, in moving towards a centralization of international law—which would not necessarily yield the best results—it was not possible to deprive States, the principal subjects of international law, of their right of accusation, which was a feature of a criminal trial. For that reason, he welcomed the wording of paragraph 1 of the possible draft provision on complaints before the court⁵ and the flexibility with which the text provided for a concurrent system that allowed States and international organizations to bring complaints before the court. The United Nations, the most active of international organizations, should be allowed to bring a complaint before the court, although it should not have any exclusive right in that regard. He ruled out the idea of a United Nations prosecutor, but the United Nations Office of Legal Affairs might set up, under the Legal Counsel, a body of legal experts of different nationalities to assist in the prosecution, for several years at least.

3. If States retained the right to prosecute the perpetrator of a crime as part of a trial in the traditional sense of the term, perhaps it should also be possible for an accused national of a country that had not accepted the jurisdiction of the international court to be judged by it if he so wished. A person accused of an odious crime might fear that the fundamental rights of the defence would be violated in the event of a trial in his own country and an international criminal trial mechanism would then be of considerable interest. He thus believed that the thrust of the draft provision, namely, the possibility

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¹ For text of the draft articles provisionally adopted on first reading, see Yearbook... 1991, vol. II (Part Two), chap. IV.


³ For text, see 2254th meeting, para. 6.
for States and international organizations and the United Nations, in particular, to bring complaints before the court, had to be retained.

4. Mr. KABATSI said that he endorsed paragraph 1 of the possible draft provision, which did not prevent States that had the right to bring a complaint before the court from doing so on behalf, for example, of national or regional human rights organizations. Under that system, complaints could be filtered and the court would not be overburdened, since States or international organizations would decide whether complaints were worth taking before the court.

5. Paragraph 2 was acceptable, but, as it was a substantive provision, it was perhaps out of place in a text on procedure.

6. Mr. FOMBA pointed out that the problem raised by paragraph 2 of the possible draft provision did not relate directly to bringing complaints before the court and that the rule of the irrelevance of the official position of the person accused of a crime had been set forth in texts of differing legal value, such as the Nürnberg Principles adopted by the Commission in 1950 or article 3 of the draft Code adopted on first reading.

7. The basic question was whether the system for bringing complaints before the court should be "closed" or "open"; it being understood that both alternatives had their advantages and disadvantages. A closed system would mean that the beneficiaries of the right to bring complaints would be confined to a few subjects of international law, whereas other potential, and more or less comparable, beneficiaries would be ruled out. Such a restriction must be considered from both the legal and the practical points of view. The other alternative would be to open the list of those who could bring complaints before the court, which might seem to be a more democratic solution, but whose legal and practical validity likewise had to be demonstrated.

8. What, then, was the system on which paragraph 1 of the possible draft provision was based and, above all, was the text sufficient? Notwithstanding its clear wording, questions remained. For example, must States entitled to bring a complaint be parties to the Code and to the statute and, if so, did that hold good for all States parties to the Code and to the statute or only for some? Must international organizations be of a universal or regional character? It might also be useful to consider, as the Special Rapporteur had done, whether the bringing of a complaint must be open to legal persons of internal law, such as anti-racism or human rights organizations.

9. Four sets of proposals had been made during the discussions in the Sixth Committee in 1991 and to the work of the last two sessions of the Commission.

10. In the Commission, six possible categories of subjects of law had been identified during the 1990 discussion: (a) all States; (b) all States parties to the court's statute; (c) any State which had an interest in the proceedings by virtue of the four traditional criteria of territorial and personal jurisdiction; (d) international organizations of a universal or regional character; (e) non-governmental organizations; and (f) individuals. The Commission had also discussed two possible restrictions on the right of submission: requiring the consent of all States which had an interest in the case and requiring authorization either of the General Assembly or of the Security Council.

11. During the Commission's discussion in 1991, when there had been agreement on drawing a distinction between instituting criminal proceedings and bringing a case before the court, three trends of opinion had been expressed. An international system had been proposed in which the specific organs would be competent to institute proceedings against the perpetrators of international crimes, the role of States being confined to making the court aware of the crimes and the persons thought to have committed them and calling attention to the possibility of instituting proceedings; the right to bring charges would be entrusted to a prosecutor's office attached to the court. Another proposal had foresaw granting the right to bring a complaint to entities other than States, such as non-governmental or intergovernmental organizations, and indeed to individuals, in order to facilitate the prosecution and punishment of crimes against the environment, as well as war crimes and other human rights violations, for which it might be useful if humanitarian organizations took action. Lastly, it had been proposed that not only States, but also the General Assembly and the Security Council, as well as national liberation movements recognized by the United Nations, should be allowed to refer cases, the argument being that crimes against the peace and security of mankind could not be committed without the help or consent of a State.

12. Given the wide range of viewpoints, he would confine himself to a number of general comments. As stated in the report of the Commission on its 1990 session, the choice related to the question of how limited the right to submit cases should be and it was therefore important to have a precise idea of the nature of the legal relationship

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4 Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgement of the Tribunal. Reproduced in Yearbook... 1985, vol. II (Part Two), p. 12, para. 45.

5 For summary of discussions, see document A/CN.4/L.469, sect. C.

6 For summary of discussions, see Yearbook... 1990, vol. II (Part Two), paras. 135 et seq.

7 For summary of discussions, see Yearbook... 1991, vol. II (Part Two), chap. IV.

8 See footnote 6 above.
at issue. Although the relationship was clear between individuals and the international community, the concept of an international community did not lend itself to a strict legal definition. The choice would depend on whether a community of primary subjects or secondary subjects of international law was being contemplated and whether a legal or political approach to that community was taken. Moreover, the international community, which was not a subject of international law, could not act on its own and must rely on its members or representatives, namely the States parties to the Code and to the statute of the court, assuming that international community was confined to its strictly legal sense. It was also possible, however, in looking at the international community from the sociological point of view, to make the public and systematic denunciation of criminals the purpose of the right to bring a complaint. In that case, it would be necessary to determine whether such a solution was practical, for example, by referring to general international human rights law and taking stock of the work the treaty bodies were doing in that regard.

13. Mr. de SARAM, referring to the subject of complaints before the court, said that national systems of criminal law provided for a number of preliminary review procedures between the time when a crime was first reported to the appropriate authority and the formal act of accusation served on the accused. In the case of lesser crimes, such preliminary review procedures were relatively brief and simple. They were longer and more elaborate in the more serious crimes, conducted in some countries in a lower criminal court in what were often referred to as "non-summary proceedings", which were similar in purpose, but not necessarily in all modalities, to hearings before a "grand jury" in other countries.

14. Thus, one of the questions to be considered was what such preliminary review procedures should be, in the case of an international criminal court, and at what stage they should be interposed. Some measure of guidance could be obtained from a comparative analysis of other statutes and draft statutes, some of which contained elaborate provisions on the subject, while others contained relatively simple provisions. As an example of a simple provision, reference could be made to the Convention for the Creation of an International Penal Court, which had been adopted at Geneva in 1937, but had never entered into force: and in particular to article 2, paragraph 1, article 23, and article 25, paragraph 1, thereof, which read, respectively:

... each High Contracting Party to the present Convention shall be entitled, instead of prosecuting before his own courts, to commit the accused for trial to the [International Criminal] Court;

A High Contracting Party who avails himself of the right to commit an accused person for trial to the [International Criminal] Court shall notify the President of the Court through the Registry;

The Court is seized so soon as a High Contracting Party has committed an accused person to it for trial.

15. The question of what the appropriate review procedures should be and at what stage they should be interposed, in the case of an international criminal court, was one among a number of other fundamental and possibly interrelated matters, which, it seemed to him, should be collectively considered and appropriately resolved. They included such questions as: Should the court be permanent or rather a court whose statute was established by convention but which would only be brought into existence and convened by way of a generally acceptable procedure providing for safeguards against unreasonable use and for the protection of the sovereignty of States? How could the responsibilities of the future court in respect of individuals be reconciled with the responsibilities, under the Charter of the United Nations, of the Security Council in respect of States? Should the jurisdiction of the court be limited exclusively to the crimes defined in the Code or should it be broader in scope? In a particular case, what should be the relationship between the jurisdiction of the court and the existing jurisdiction of national courts? There was also, of course, the overall question which loomed over the Commission's consideration of the entire subject of an international criminal court, namely whether it would, in the light of all the circumstances, be more realistic and therefore more appropriate for the Commission not to set its sights too high, but rather to keep its sights somewhat lower, in dealing with those fundamental and admittedly difficult matters.

16. One of the most sensitive issues was that of the entities which should have direct access to the international criminal court. Clearly, they should include the States parties to the convention establishing the international criminal court, as well as States which became parties to the convention on an ad hoc basis for the purpose of submitting a specific case to the court, as was similarly permissible under the Statute of ICJ. Yet, should other entities also have direct access to the court and, if so, who should they be? If the Commission were to consider the question more in the abstract than in reality, there would be relatively little difficulty in the way of providing generally acceptable answers, and, he would, considering matters in the abstract, readily answer that in the case of an international crime, direct access to the court should, for humanitarian reasons and because of the rising and welcome tide of global consciousness, be as wide as and as open as possible. However, such an answer would not take account of the realities and would not in the real world propose a feasible course, and thus be a satisfactory response, however idealistic it might be. The Commission had inevitably to view matters in the context of realities and the Commission was also, of course, very much, if not entirely, in the realm of progressive development.

17. He was hopeful, however, that, in time, the Commission, together with the Sixth Committee, would succeed in working out by consensus generally acceptable solutions to all such fundamental issues so that an international criminal trial mechanism might eventually see the light of day.

18. Referring to Mr. Koroma's comment at the 2261st meeting that some members of the Commission seemed to place undue emphasis on the importance of precision in criminal law, he said that he might have been one of the members to whom Mr. Koroma had referred. The requirement of precision should not, of course, be carried...
to the point where it defeated the purpose of the Commission’s endeavours, which was the creation, if at all possible, of an international criminal trial jurisdiction. It should, however, not be overlooked that criminal law, which the Commission entered in formulating a code of crimes and the statute of an international court, had certain unique characteristics. To emphasize the requirement of precision when legislating in the field of criminal law was not to favour the guilty while remaining insensitive to the innocent; indeed, a precisely drafted statute guaranteed the successful prosecution of the guilty and prevented wrongful accusation of the innocent. Many criminals went free because of imprecision on the part of lawmakers. There was nothing the guilty liked better than an imprecisely drafted law and, with it, the likelihood of acquittal on a technicality. Moreover, there were many who might be physically on the periphery of criminal conduct, but who would not, in law, be criminally responsible. One of the main reasons why, at the end of the 1940s, the United Nations War Crimes Commission had entrusted its records to the Secretary-General, subject to very restrictive limitations on disclosure, had been to ensure that individuals who might have been physically on the periphery of crimes, but had not participated in them, should not be identified or, still less, accused as war criminals. The presumption of innocence, the heavy burden of proof required to dislodge that presumption and the safeguards embodied in the special rules of evidence and procedures applicable to criminal proceedings made criminal law a very specialized field.

19. Mr. ROSENSTOCK said that, while the issues under consideration were certainly serious and complex in nature, the constituent elements of some of them could perhaps be simplified. In his view, only States parties to the statute of the court and possibly, in some cases, the Security Council should have the right to bring complaints before the court. It would be helpful if the proposed working group were to list the problems referred to by Mr. Bowett in his first statement (2255th meeting) and those just referred to by Mr. de Saram so that the General Assembly might have an accurate sense of the problems to be solved. The working group should also try to reduce some of those problems to their essentials and envisage more modest international trial mechanisms. In that connection, it should be recognized that, even in the rather unruly modern-day world, trials for aggression would be extraordinarily rare. It was no accident that, quite apart from the right of veto, there had been so few determinations of aggression by the Security Council. What Mr. Mikulka (2261st meeting) had said about the key role of the Security Council in such cases had been extremely wise and reasonable. Such an approach was easy to criticize at the theoretical level, but, in practice, it was difficult to imagine one that would be more widely accepted.

20. Except for the Security Council, he did not see a role for international organizations, non-governmental organizations or even ICRC in instituting criminal proceedings. Of course, if ICRC were to express an interest in such a role, the matter would have to be reconsidered in the light of that organization’s special responsibilities. It would, however, seem reasonable to grant any State party to the statute of the court the right to bring complaints. The idea embodied in Article 35 of the Statute of ICJ that, under certain conditions, a non-State party might be authorized to have recourse to the Court’s services might also be given consideration. If the Commission were to follow the civil law model and look to an independent institution empowered to prosecute, it would run into a great deal of trouble. Would such an institution be a standing one—and therefore extremely costly—or an ad hoc one? Would States be willing to grant it the enormous role such institutions played in the civil law system? It might be better to follow the common law system and recognize the prosecutor not as a quasi-independent seeker after truth, but as an adversary committed to presenting one side of the case in a crucial controversy out of which the truth would emerge. It would be for the working group to consider the problem in depth.

21. He agreed with Mr. Crawford (2261st meeting) that any State or international organization should be free to provide information that was necessary for the consideration of the complaint. One problem was that the writ of the court might not necessarily be sent to all States in possession of evidence.

22. He regarded the idea of compensation as radically out of place and capable only of creating further confusion.

23. He was generally in favour of the proposals concerning the handing over of the subject of criminal proceedings to the court. It might be useful for States to distinguish between extradition and the act of turning the accused over to a court, thus eliminating the possibility that a State might refuse to extradite its own nationals. Some elements of the traditional law relating to extradition—which protected human rights, as well as the authority and concerns of the territorial State, should, however, not be neglected.

24. Lastly, he expressed the view that, in planning the work of the session, the Commission should give particular attention to the need to make as much progress as possible not only on the topic of State responsibility, but also on the item under consideration.

25. Mr. GÜNEY said that the conditions for the exercise of the right of public action had to be determined. To whom should the right to bring complaints before the court be granted? In his view, it should be granted to States: the victim State, the State in whose territory the crime had been committed, the State of which the alleged perpetrator was a national and the State in whose territory the accused was found. He agreed with other members that, with the exception of the Security Council, international organizations should not have the right to bring complaints; nor should non-governmental organizations and juridical persons under municipal law pursuing a universal goal, as referred to in the commentary.

26. Mr. KOROMA said the issue of who could bring a complaint before the court was important for many reasons. First of all, the Commission was dealing with...
grave crimes, such as aggression, genocide and the mass violation of human rights, which could involve the nationals of many States; all members of the Commission were agreed that that kind of crime engaged the interest of the international community as a whole. In the circumstances, should it be only the injured State or the State whose nationals had suffered from the crime that should be able to bring a complaint before the court? And, since the interests of the international community as a whole were engaged, should that community as constituted by the United Nations—its custodian of international peace and security—have such a right? He also wondered whether, from the sociological standpoint, the international community should be given the possibility of instituting an *actio popularis* or a class action.

27. Furthermore, it was essential to prevent any abuse of the judicial process for political purposes or propaganda, which meant that some control over that process would have to be introduced, while none the less ensuring that those who committed crimes were prosecuted. Such control should, in his view, be exercised at the indictment level. But who would determine the merit of the indictment? In his view, it could not be other than the court itself.

28. In the case of the gravest crimes, such as aggression and genocide, the Commission had discussed the possibility of vesting the court with compulsory jurisdiction, in which case the complaint would be brought before the court when there was a serious allegation that a grave crime had been committed. In other cases, it was possible that the court would derive jurisdiction from the States parties to its statute.

29. Turning to paragraph 1 of the draft provision on complaints before the court, he said that the Working Group would have to make it clear which States were concerned: the injured State, the State of which the accused was a national, the State in whose territory the accused was found or all the States which made up the international community and which had been injured by an act of aggression? The Special Rapporteur stated in his commentary that:

> It is obvious that no State has the right itself to exercise directly a power that has been vested in the court alone or in an authority competent to bring a public action at the international level. It is equally obvious, however, that any State injured by an international offence has the power to bring a complaint before the court.

Without that second sentence, he would have asked himself whether an injured State would be entitled, as it should be, to bring an action before the court if the Security Council had failed to determine that an act of aggression of which that State had been the victim had taken place.

30. The question whether international organizations should be allowed to bring a case before the court had elicited a number of comments. It had been said that the United Nations, as the official representative of the international community, regional organizations and intergovernmental organizations, and even some non-governmental organizations, such as ICRC, should have that right. For his own part, he considered that it would be advisable, at least initially, to confine such a right to States Members of the United Nations. If it were subsequently discovered that the United Nations could be regarded in certain cases as a subject of international law, that right could perhaps be extended to it.

31. Unlike Mr. Rosenstock and Mr. Mikulka (2261st meeting), he doubted whether the Security Council should have such a power. True, it was recognized that the Security Council was the custodian of the maintenance of international peace and security, but there were times when, for one reason or another, it did not live up to its responsibility. Nor should the right of veto be overlooked, for those States which enjoyed it might not allow the Security Council to bring a matter before the court. Moreover, once the Security Council had determined that there had been an act of aggression, it would be difficult for the court to decide otherwise, given the weight which the decisions of the Security Council carried. Several members of the Commission had said that the Security Council’s decisions would not be binding on the court. The international community, however, would probably have difficulty in accepting that the court could take a direction that was contrary to that of the Security Council. In order to obviate such a difficulty and in order not to compromise the judicial process, the best thing would be to leave the Security Council out of the matter. He did not think that the right to bring an action should be extended to ICRC, as constituted, even if it was the custodian of international humanitarian law.

32. Paragraph 2 of the draft provision, which was merely a repetition of a provision of the draft Code, was superfluous.

33. In reply to Mr. de Saram, he said that the Commission should take care not to appear to favour the alleged perpetrators of very serious crimes. It was, however, important not to lose sight of the need for precision in the definition of crimes.

34. Mr. ROBINSON said that Mr. Mikulka’s idea (2261st meeting) of empowering a body such as the Security Council, where decision-making was fraught with difficulty, to bring a case before the court was surprising, and even alarming. What would happen, for instance, if the Security Council referred a case of aggression to the court and subsequently arrived at a decision in the same case which was contrary to the decision of the court?

35. Mr. THIAM (Special Rapporteur), summing up the discussion on the law to be applied and the jurisdiction of the court *ratione materiae*, said he was gratified to see that the Commission wanted to move forward in the search for solutions to the problems connected with the establishment of an international criminal court or other international criminal trial mechanism. He reiterated that it had not been his aim to raise all the problems in his report or to propose solutions or even tentative solutions; he had, rather, wanted to prompt as wide-ranging and as detailed a discussion as possible and, on that score, he was more than satisfied.

36. With regard to the law to be applied, the first question raised had been whether that right should be

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11 Ibid., para. 3.
confined to the Code. At the current stage, he did not want to limit the law that could be applied in that way, first of all, because the Code was still only at the draft stage and also because it covered only certain categories of international crimes—crimes against the peace and security of mankind or, in other words, the most serious crimes. He had made a point of proceeding with caution and of not being unduly optimistic. Had Mr. Shi (2259th meeting) not said, for instance, that there was little chance of the Code one day becoming an instrument that could be applied? He had therefore preferred to refer to conventions in general. If the Code was to take the form of a convention one day, it would become part of that category of sources of law. If not, the international criminal court could do without the Code and still be an institution that was acceptable to the international community.

37. It was alternative B of the draft provision on the law to be applied that had found favour with the Commission, although there had been some criticism. The first criticism, which was purely a matter of drafting, was that he had taken Article 38 of the Statute of ICJ as a model. That was only partially true, however, for similar forms of wording were to be found in a number of other draft conventions on the establishment of a criminal court, some of which dated back to before the establishment of the United Nations. For instance, article 18 of the draft Convention for the establishment of a United Nations war crimes court, of 30 September 1944, read:

The Court shall apply:

(a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war between the parties thereto;

(b) International customs of war, as evidence of a general practice accepted as law;

(c) The principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience;

(d) The principles of criminal law generally recognized by civilized nations;

(e) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

Another example was article 23 of the draft Statute of the International Penal Court which had been drawn up in 1927 by the International Law Association and which read:

The Court shall apply:

(1) International treaties, conventions and declarations, whether general or particular, recognised by the States which are before the Court;

(2) International custom, as evidence of a general practice accepted as law;

(3) The general principles of Public or International Law recognised by civilised nations;

(4) Judicial decisions, as subsidiary means for the determination of rules of law;

Doctrines of highly qualified publicists may also be referred to.

38. Nor did he accept the second criticism, which involved substance, that it would not be possible in the present case to draw on Article 38 of the Statute of IJC.

39. The elements listed in alternative B of the draft provision had given rise to considerable controversy. The members of the Commission had generally stated that they were in favour of referring to international conventions, subject to their content. It was true that not all international conventions could serve as the basis for a criminal action, since not all of them were universally accepted. Apartheid, for example, had been included, after lengthy discussion, in the list of crimes against the peace and security of mankind, not in accordance with the International Convention on the Suppression and Punishment of the Crime of Apartheid, but in accordance with the peremptory norms of international law.

40. Custom had been the most disputed element and some had gone so far as to say that the nullum crimen sine lege principle ruled out any possibility of basing a criminal action on custom. On that point, he ventured to recall that the draft Code covered different categories of crimes, including war crimes. However, in the case of war crimes, custom was inseparable from their definition. Moreover, article 1, paragraph 2, of Additional Protocol I to the 1949 Geneva Conventions referred expressly to "established custom" and the commentary thereto stated that:

... despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment.

He considered that it was impossible to detach custom from the applicable law, particularly in international law, which was essentially customary.

41. Referring to the general principles of criminal law recognized by nations, he pointed out that, since the Hague Conventions of 1899 and 1907 respecting the laws and customs of war on land, a similar provision analogous to the Martens clause had been used in all the relevant codification instruments. There was thus no question of ignoring it.

42. Jurisprudence was a source of law in many legal systems and played a particularly important role in the common law countries, where the judge could create law.

43. In connection with internal law, he emphasized that the generally accepted principle in the issue under consideration was that of the conferment of jurisdiction. The international criminal court could not take cognizance of a case unless the States concerned—the State in whose territory the crime had been committed, the victim State, the State of which the suspected perpetrator of

12 For text, see Historical survey of the question of international criminal jurisdiction, p. 116, appendix 10.
13 See 2261st meeting, footnote 11.
15 Incorporated into the Preamble to the 1907 Hague Conventions. It provides, in essence, that the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law, and whether or not the parties to the conflict are bound by the relevant treaty law.
the crime was a national and the State in whose territory the suspected perpetrator was found—had recognized its jurisdiction. However, the possibility could not be ruled out that one of those States might make the conferment of jurisdiction on the court subject to the application of its internal law, provided, of course, that the latter was not in conflict with the general principles of criminal law. It was difficult to believe that the international criminal court would never be called upon to apply internal law in a given case, even though it would obviously have to apply international law first.

44. Replying to Mr. Mikulka’s comment that, under article 2 of the draft Code, the characterization of an international crime as a crime against the peace and security of mankind was independent of internal law, he pointed out that that would not prevent the international criminal court from applying internal law in connection with other aspects of the action.

45. With regard to the jurisdiction of the court, he said that he had not referred to jurisdiction ratione personae, it being understood for the time being that “the Court shall try individuals”, as was stated at the preceding session in a possible draft provision. In the same text, he had also proposed a provision stipulating that the court should have cognizance of any challenges to its jurisdiction, thus giving it authority to consider matters relating to its jurisdiction.

46. He noted that, with few exceptions, the members of the Commission had stated that they were in favour of the conferment-of-jurisdiction rule, since the court could not take cognizance of a case if jurisdiction had not been conferred on it by the States concerned. He recalled that the corresponding draft provision, submitted at the preceding session, had been regarded as too rigid by some members, who had feared that no case would ever come before the court if its jurisdiction was subject to that rule. At the current session, he had therefore submitted an intermediate solution, which provided for exclusive jurisdiction in respect of certain crimes. That solution had also been sharply criticized and he expressed the hope that the working group would find a solution on which everyone could agree.

47. He had been reproached for not having indicated a criterion for dividing crimes into two categories, depending on whether or not they would come within the exclusive jurisdiction of the court. It was true that he had not included aggression in the category of crimes within that exclusive jurisdiction, in view of the Security Council’s jurisdiction in that regard, which must not be overlooked. He nevertheless recalled that, at the preceding session, he had proposed a possible draft provision under which States wishing to bring a complaint of aggression had to go through the Security Council and that that proposal had been rejected. He would therefore like the Commission’s guidance on that point. He had learned very little from the debate which had just taken place and in which contradictory opinions had been expressed.

48. The case of genocide did not give rise to any difficulties, since the Convention on the Prevention and Punishment of the Crime of Genocide was widely accepted. Apartheid was mentioned largely for the record, since it was in the process of disappearing, but there was no guarantee that it would not reappear somewhere in the world in other forms. Illicit international trafficking in drugs was a crime against humanity that was of great concern to the international community and it was, moreover, in connection with that crime that the General Assembly had requested the Commission to consider the question of an international criminal court. It went without saying that only trafficking on a large scale was being taken into account.

49. The list of crimes for which the court would have exclusive and compulsory jurisdiction was not final: it could be shortened or lengthened.

50. He was not unaware of having proposed a dual regime of jurisdiction: exclusive jurisdiction and optional jurisdiction. He had intended to be cautious, however, since his proposal for solely optional jurisdiction had been rejected at the preceding session, although that principle seemed to be accepted at the current session.

51. He was aware that the proposed working group would have an extremely difficult task, since it would have to propose flexible and viable solutions on the basis of a debate during which opposing points of view had been expressed.

52. Mr. MIKULKA, replying to the comments made by Mr. Koroma and Mr. Robinson on his proposal to give the Security Council the right to bring a complaint for a crime of aggression before the court, said that a decision by the Security Council, which dealt with the conduct of States, not with that of individuals, would not prevent the court from deciding that an individual was guilty on account of his participation in an act of aggression committed by a State. The question of the extent to which the Security Council might be bound by a decision of the court was purely academic. It was hard to see how the Security Council could first bring before the Court a complaint in respect of aggression against the representative of a State and then characterize the act of that State on the basis of the decision of the court. The Security Council had to take a prompt decision in the event of aggression and it could not wait for the outcome of difficult and complicated proceedings before the criminal court. It was true that the Security Council’s action could be paralysed by the right of veto, but he did not think that that argument was sufficient to deny the Security Council the possibility of bringing a complaint before the court, even in cases where it had already determined the existence of an act of aggression.

53. The CHAIRMAN invited the members of the Commission to continue their consideration of part two of the Special Rapporteur’s report and, in order to save time, to express their views simultaneously on the three points yet to be considered, namely proceedings relating to compensation, handing over the subject of criminal proceedings to the court, and the double-hearing principle.
54. Mr. CALERO RODRIGUES recalled that, at the Commission's preceding session, the question of compensation had been discussed only in connection with the question of total or partial confiscation of stolen or misappropriated property. It was, moreover, by no means obvious that the matter needed to be discussed at all and he was inclined to agree with Mr. Rosenstock that there were quite enough problems to be solved without the issue of compensation. If the Commission wished to discuss it, however, the question was whether the international criminal court would have jurisdiction in the matter and, if not, before which courts proceedings relating to compensation could be brought. Would they be national courts? In no case should the compensation issue be dealt with by ICJ, which could hardly take cognizance of an action brought by an individual. Accordingly, it would be better to leave the issue aside for the time being.

55. With regard to the question of handing over the subject of criminal proceedings to the court, it was clear that the alleged perpetrator of the crime had to be handed over to the court if he was to be judged by it. As the Special Rapporteur stated in his commentary, there was no substantive difference between alternatives A and B of the draft provision proposed on that point. However, alternative B seemed clearer and it might be expanded, although that did not really seem necessary, to incorporate the idea expressed in alternative A that handing over the alleged perpetrator of a crime to the prosecuting authority of the court was not an act of extradition.

56. As to the double-hearing principle, he was not sure that the right of appeal was a fundamental human right, but he thought it fair that the principle should be incorporated in a system of international criminal justice. He also endorsed paragraph 2 of the possible draft provision if it meant that the court would be composed of several chambers and that a decision taken by one of those chambers could be reviewed, either by another chamber, or by the plenary court. Greater precision was needed, however, since review did not necessarily entail a complete re-examination of the case and could be limited to a verification of the correctness of the proceedings. Such a system, which was that of the pourvoi en cassation (application for judicial review) in French law, might perhaps be more readily acceptable.

57. Mr. CRAWFORD said that he agreed with Mr. Rosenstock and Mr. Calero Rodrigues that provisions on compensation for injury had no place in the draft Code.

58. Referring to the possible draft provision on handing over the subject of criminal proceedings to the court, he said that he associated himself in principle with the comments made by Mr. Calero Rodrigues. States parties should certainly be required to hand over to the court persons properly charged before the court. It was not sufficient, however, to state that "handing over . . . is not an extradition"; the argument in alternative A should be elaborated and added to alternative B. He hoped that the prosecutorial system to be established would contain special guarantees so that the preliminary hearing normally required in extradition proceedings could be dispensed with. However, all those points were dependent on the general provision that would be adopted on the question of handing the accused over to the court.

59. With regard to the double-hearing principle, he agreed with the Special Rapporteur that some provision would be required. Within the context of a very detailed scheme for a court, which, for the present, did not exist, it would, however, be necessary to spell out the precise nature of the appeals that could be brought.

60. Mr. YAMADA said that he had difficulty in visualizing how the court could concurrently deal with criminal matters and civil proceedings concerning compensation. In Japan, there was a strict division of labour between criminal and civil courts. That did not mean he was opposed to the system, which worked in other countries, such as France. In his view, however, the main purpose of an international court should be the punishment of the perpetrator of an international crime and it would be unwise to expand the court's function beyond criminal proceedings.

61. Before commenting on the possible draft provision on handing over the subject of criminal proceedings to the court, he wished to come back to the question of complaints before the court, with regard to which some confusion seemed to have arisen because the discussion had not been based on a common understanding of criminal procedure. He understood that that draft provision related only to bringing a case to the attention of the court and not to prosecution. Any State having accepted the jurisdiction of the court should surely have the right to bring a case to the attention of the court regardless of whether or not nationals of that State were involved or whether the crime had or had not been committed in that State's territory. Some intergovernmental organizations could also be made eligible to bring the case to the attention of the court when States might hesitate to do so for political reasons. Once the complaint had been brought, however, the next step was the indictment of the accused and the question which arose in that connection was the nature of the prosecuting authority. In alternatives A and B of the draft provision on handing over the subject of criminal proceedings to the court, the Special Rapporteur referred to "the prosecuting authority of the court", which presumably meant that the prosecuting authority would be a branch of the court. It should be borne in mind, however, that legal regimes concerning criminal prosecution differed widely from country to country. In France, for example, a large part of the prosecuting function belonged to the judiciary, whereas, in the Anglo-American and Japanese systems, it belonged to the executive. Would the prosecuting authority be independent of the court? Such a solution might help to guarantee the court's neutrality. In any case, the organizational aspect of the prosecuting authority warranted careful consideration.

62. That being said, he supported the idea that handing over the alleged perpetrator of a crime should not be regarded as an act of extradition. He preferred alternative B of the possible draft provision, but thought it necessary to stipulate very clearly that a State which had accepted the jurisdiction of the court in respect of a crime
was under an obligation to produce for trial by the court any alleged perpetrator of the crime who was found in its territory. Lastly, in order to avoid mistrial, the Commission should also discuss the question of various forms of assistance from States, such as the submission of investigation reports and the production of evidence and witnesses. Other steps in the sequence of criminal proceedings might be considered at a later stage.

63. Mr. YANKOV said that, at the present stage of work on the draft Code, a discussion on compensation might raise more questions than it could provide answers; it might be advisable to consider compensation proceedings simply as a possibility or an option. In that connection, he noted that the possible draft provision made no reference to the rule of the exhaustion of local remedies. He also drew the Special Rapporteur’s attention to the fact that Article 36, paragraph 2 (d), of the Statute of ICJ, referred to in the report, dealt with reparation for the breach of an international obligation by a State rather than by an individual and that it would therefore not be possible to have recourse to ICJ on the basis of that article.

64. With regard to the draft provision on handing over to the court, he preferred alternative B. The explanation that the handing over of an alleged perpetrator of a crime was not an extradition would be more appropriately placed in the commentary than in the article itself.

65. As to the double-hearing principle, the proposed working group might usefully envisage possible means of providing an appeals panel or chamber so as to furnish all guarantees for a fair trial; to that end, he suggested that the appeals body should be empowered to take into consideration all facts, evidence and other pertinent elements that might assist it in adopting a final decision.

66. The CHAIRMAN noted that the majority of the members of the Commission were in favour of the establishment of a working group to consider and analyse the main issues to which the report of the Commission on its forty-third session had given rise in connection with the establishment of an international criminal court, or, in the words of General Assembly resolution 46/54, ‘other international criminal trial mechanism’. The working group should also take account of all the points discussed by the Special Rapporteur in his ninth and tenth reports and considered by the Commission at its forty-third and forty-fourth sessions, and draft specific recommendations on the various issues it would consider and analyse within the framework of its mandate. The working group would be chaired by Mr. Koroma and composed of Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Crawford, Mr. Idris, Mr. Jacovides, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. de Saram, Mr. Vereshchetin and Mr. Villagran Kramer, with Mr. Thiam, in his capacity as Special Rapporteur, participating ex officio.

The meeting rose at 1 p.m.

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TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN invited further comments on the possible draft provisions contained in the Special Rapporteur’s tenth report (A/CN.4/442), on proceedings relating respectively to compensation, handing over the subject of criminal proceedings to the court, and the court and the double-hearing principle.2

2. Mr. GÜNEY said that the draft provision on proceedings relating to compensation was in conformity with the general principles of the right to compensation and, as worded, was satisfactory. Inasmuch as international criminal law was the reflection of internal law, proceedings for compensation could be separated from, or joined with, criminal proceedings. International organizations, however, should enjoy that right only when they had been the victims of a crime.

3. The obligation to surrender to the court an accused person who was the subject of criminal proceedings should apply to all States parties to the statute of the court from the time when they had acceded to it and that rule was in fact set forth in alternative B of the draft provision proposed by the Special Rapporteur. It was self-evident that the surrender of the accused to the court was not an act of extradition and alternative A of the draft provision was therefore superfluous in that particular context.

1 For text of the draft articles provisionally adopted on first reading, see Yearbook... 1991, vol. II (Part Two), chap. IV.
3 For texts, see 2254th meeting, paras. 7, 8 and 9 respectively.

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2263rd MEETING

Wednesday, 20 May 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusumatmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.
4. With regard to the principle of the right of appeal, or what the report termed the "double-hearing principle", although that right was one of the fundamental guarantees in any international criminal proceedings, it would involve a lengthy and complex process. He therefore wondered whether consideration might not be given to a court of appeal or even a system of internal appeal heard by judges who had not participated in the decision that was the subject of the appeal. The system of appeal which obtained under certain systems of national law and under which only points of law, not points of fact, were considered should have no place in an international criminal court.

5. Mr. VILLAGRAN KRAMER said that it would always be open to the Security Council to bring proceedings before the international criminal court through the Secretary-General of the United Nations, the most appropriate precedent in that connection being the advisory opinion of ICJ in the case concerning Reparation for Injuries Suffered in the Service of the United Nations.

6. The questions of compensation and civil claims might arise as preliminary issues — or a posteriori. In the case of such issues, it was therefore necessary to be as flexible as possible so that claims could be decided by the court in the light of the relevant general principles of law.

7. As to whether the same court should deal with the civil and criminal aspects of a case, he considered that the possibility of the international criminal court dealing with both aspects should be viewed in a favourable light, particularly given the linkage with the double-hearing principle.

8. Further options should be explored in the case of both civil liability and the hearing of appeals and he wondered whether ICJ might not have a role to play in that regard. The working group to be appointed by the Commission should also consider the relationship between the civil aspects of the crime and appeals against sentence.

9. The purpose of criminal trials was to institute proceedings against offenders. Accordingly, extradition should not enter into the picture, particularly since it would only be prejudicial to the interests of the international community.

10. Mr. SZEKELY said that, if the international criminal court was to try individuals only, he would not be in favour of the inclusion in the statute of an article on compensation. All matters pertaining to that question were better left to other judicial machinery, such as ICJ. In that way, the international criminal court would deal with criminal law and sentencing in the true sense of the terms.

11. The two alternatives of the draft provision on the handing over of an individual to the court were not mutually exclusive, but complementary. Since the wording of each provision was clear, they should, in his view, both be included in the statute of the court. Alternative A was important because of the kind of reforms that would have to be introduced into domestic legislation if the statute of such a court was to be brought into force; that was particularly true in the case of extradition and where the State involved was not a party to the statute. Alternative A would also make it easier to take advantage of the many extradition treaties in force between States and of certain treaties for mutual assistance in legal and, specifically, in criminal law matters.

12. So far as the double-hearing principle was concerned, the formula should be reversed so that a case would be heard in first instance by a chamber of the court and appeal would lie to the plenary court.

13. Mr. ROBINSON said he doubted whether the question of the institution of proceedings for compensation for injuries suffered as a result of a crime referred to the court was within the scope of the mandate that the General Assembly had given the Commission. That mandate related to the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism. Whatever might be involved in those differing concepts, they all had one common feature, namely, proceedings leading to the punishment of convicted offenders, as opposed to proceedings leading to the payment of compensation. A forum already existed to deal with the latter.

14. The Commission might wish to seek further instructions from the General Assembly on whether it should consider the question of compensation. If the General Assembly gave such instructions, one of the questions raised by paragraph 2 of the possible draft provision was whether, under the customary rule concerning exhaustion of domestic remedies, a national would be required to exhaust those remedies before his State was entitled to bring proceedings before the court for compensation.

15. With regard to the handing over of the subject of criminal proceedings to the court, he preferred alternative B of the two alternatives proposed for the possible draft provision. If it were necessary to state that the surrender of a person to the court was not in the nature of an extradition — and he doubted whether it was necessary — that statement could be added to alternative B. One question the draft provision left unanswered was whether a State, when handing over a person to the court, would be entitled to hold domestic proceedings to determine whether its own standards with regard to the protection of human rights and other matters had been met. As the draft provision was worded, once an offender was found in the territory of a given State, there was an obligation on that State to hand the offender over to the court. That seemed to contrast with the position under various international conventions for the prevention and punishment of specific crimes. The States parties to those conventions, unlike the States parties to the statute of the court, had some discretion inasmuch as it was left open to them

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to hold an extradition hearing; if that hearing resulted in a decision not to extradite for reasons relating to their internal law, the State party concerned was obliged to submit the case to its competent authority for prosecution. The situation thus appeared to be different under the draft provision, and perhaps rightly so.

16. He had great difficulty with the pre-condition for the imposition of an obligation on a State to hand over a person to the court, namely that the person to be handed over must be the alleged perpetrator of a crime which fell within the jurisdiction of the State. That differed markedly from existing international conventions which imposed an obligation on a State in whose territory an alleged offender was found. A State's jurisdiction was not necessarily coterminous with its territory. If the jurisdictional tentacles of certain States and the resultant unwarranted incursions into the territory of other States were to be avoided, an obligation should be imposed, as in most extradition treaties, on the State in whose territory the alleged offender was found.

17. The reference to "double hearing", which he had at first taken to mean the non bis in idem principle, was not clear. It was better to avoid such labels and to explain exactly what was meant. What was apparently meant in the present case was the right of an accused to a second hearing or appeal, although, in many systems of law, an appeal was not regarded as a hearing.

18. Mr. KOROMA said that the Special Rapporteur had reminded the members of the Commission that, under certain domestic legal systems, proceedings relating to compensation could be combined with criminal proceedings. Even some of the systems which had not originally allowed claims for compensation together with criminal proceedings were now embracing the idea in order to ensure that a victim was compensated by the individual who had caused him the harm.

19. That was particularly relevant in the case of grave and mass violations of human rights in which individuals suffered serious injury. He considered that serious thought should be given to the possibility of including a provision in the statute of the court on the compensation of victims of crimes and he was at a loss to understand why such a provision would discourage States from acceding to the statute of the court. On the other hand, he saw no reason to involve ICJ, for, if such a claim were to be submitted to that Court, it would inevitably reconsider the whole range of evidence already examined by the international criminal court. What was more, there might be a disparity in the findings of the two bodies. In his view, it would therefore be wise to avoid any possible conflict by providing that the international criminal court would deal with both aspects of the matter, namely, punishment and compensation.

20. The handing over of the subject of criminal proceedings to the court was the next logical step after the determination of the applicable law and the question of jurisdiction. The possible draft provision had the merit of precluding the need for the complicated process of extradition proceedings. Under the terms of alternative B, every State party would be required to surrender an accused person to the court at the request of the court. At the same time, however, it was essential to ensure that the principle of fundamental justice was observed and the basic human rights of the accused respected. In particular, he trusted that the principle of the surrender of an accused person would exclude the illicit kidnapping of an alleged offender in another State, for to make such a person stand trial before the international criminal court would obviously be contrary to the provisions of its statute. He also trusted that there would be no illegal surrender of persons, as had apparently happened in one case that was currently sub judice.

21. The possible draft provision on the question of appeal, or "double hearing", should have a place in the statute of the court. The right of appeal was a basic human right and was enshrined in the International Covenant on Civil and Political Rights. Either the full court or a special chamber of judges, composed of judges other than those who had delivered the earlier judgement, should rule on an appeal, which could be an appeal on fact or on law or an appeal against sentence. The actual composition of the court should, however, be determined in the light of the gravity of the case.

22. It had been suggested by some members of the Commission that, in the case of claims for compensation, domestic remedies should be exhausted first. It was not clear to him why that was so and he would be grateful for clarification.

23. Mr. RAFAINDRALAMBO said that the two paragraphs of the draft provision on proceedings relating to compensation dealt with the situation where proceedings before the international criminal court for the commission of a criminal act were instituted against an individual, who might be personally liable to pay for the injury caused. However, the Special Rapporteur did not seem to have taken account of the case in which a civil action was also brought against the instigator of, or accomplice in, the criminal act. Such cases might concern aggression, genocide and other crimes against humanity, including war crimes, in which the State could be prosecuted as being civilly liable. A similar situation would exist in cases involving legal persons of public law on whose behalf a crime under ordinary law had been committed.

24. The problem posed by such cases was of considerable practical importance, since only a State would be in a financial position to make compensation for the substantial harm caused to the victim State. One solution was to be found in the application of article 5 of the draft Code, which affirmed the principle of a State's responsibility for an act or omission attributable to it. By virtue of a civil action, a State might find itself the subject of proceedings before the international criminal court, a situation which States might not be willing to accept. If, however, the civil action was to remain the sole prerogative of ICJ, individuals seeking compensation would be completely without recourse should the State of which they were nationals decline to institute proceedings, whether for political or other reasons. He therefore believed that those who would prefer not to deal with the question of compensation in a specific provision of the draft Code might have some justification for their view. Without such a provision, the court would have broad discretion to apply the general principles of law.
25. Of the two alternatives proposed for the draft provision on handing over the subject of criminal proceedings to the court, he preferred alternative B, which was both simple and comprehensive. Alternative A was too much like a definition, which would not be appropriate in the context of a criminal code.

26. The principle embodied in the draft provision on the court and the double-hearing principle was based on the assumption that the proper administration of justice entailed the right to successive hearings by two tiers of the judiciary. Obviously, the principle, which was valid in civil procedure and in criminal procedure, had limits. Cases of minor importance did not require a double hearing, but, in the most serious cases, a trial by jury was held both in first instance and on final appeal; that was true of the French criminal law system and similar arrangements existed in many other countries, especially in Africa. Its merit lay in the fact that justice was actually administered by the people, as represented by the jury. However, a system whereby a court of cassation or a supreme court acted as the final arbiter in a case was obviously of a different nature, since such courts were empowered only to review the application of the law and not the facts of the case.

27. The double-hearing principle was not recognized in absolute terms in either system. However, what seemed to be at issue was the general principle of international criminal law embodied in article 14, paragraph 5, of the International Covenant on Civil and Political Rights, which stated that:

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

He considered that the Special Rapporteur was thus correct in believing that the draft Code should include a special provision relating to the double-hearing principle.

28. The principle should, of course, be applied rigorously, along the lines of article 14, paragraph 5, of the Covenant, since the double-hearing provision would be meaningless unless two tiers of the judiciary were involved. In such a system, cases in first instance should be heard by junior, or associate, judges and appeals assigned exclusively to more senior judges sitting in banc. A system where judges at the same level of seniority within the hierarchy were called upon to review the decisions of their peers could be seen as a travesty of justice in that it would call into question the reputation of the judges in first instance and, by extension, the credibility of judgements of the international criminal court itself.

29. Mr. VERESHCHETIN recalled that Mr. Koroma had rightly asked why the victim of a crime should not be compensated by the offender. It should be pointed out that those who considered that a specific provision on compensation should not be included in the draft did not necessarily mean that there should not be compensation: the question was how such compensation should be made. It was quite likely that cases before the international criminal court would involve damages on such a scale that no physical person, or group of physical persons, would be able to make restitution in the event of an award by the court. It was for that reason that some members of the Commission, including himself, would prefer not to deal with the issue now, since it involved the whole question of State responsibility. Compensation was an important and complex topic which should be dealt with separately.

30. Mr. ROBINSON said that Mr. Koroma had also raised the question whether internal law and procedures would apply prior to the handing over of a suspect to the international criminal court. As the draft provision on that question stood, it required a State to hand over the suspect once that person was in the territory of that State. It would not avail a State in that position to argue that some requirement of its internal criminal law had not been met in order to evade compliance with that obligation. States accordingly would have to consider seriously whether they could accept the provision as currently drafted. If it so wished, the Commission could include wording in the provision which would take account of certain features of internal law, but he did not think that that would be a good idea.

31. The question of the exhaustion of domestic remedies arose in connection with paragraph 2 of the draft provision on compensation and Mr. Koroma had asked whether the same issue would not also arise in relation to criminal proceedings. In reply, he would say simply that the customary rule relating to the exercise of diplomatic protection by a State in respect of its nationals did not apply in the case of criminal proceedings.

32. Mr. FOMBA said he agreed with the Special Rapporteur that any injury suffered as a result of a criminal act should give rise to compensation, but the problem that arose was whether the right to claim compensation should be exercised before an international criminal court or before some other court, whether domestic or international. The machinery for such actions was well established at national level; it provided that the criminal proceedings and the civil action could be either separated or joined and that, in the latter case, it was for the judge of the criminal court to rule on the two counts. The proposal to transfer that system to international criminal law would give rise to practical difficulties, particularly in terms of the amount of work it would create for the court. It might therefore be possible to envisage separate actions, using such traditional procedures as diplomatic protection and recourse to ICJ under Article 36, paragraph 2 (d), of its Statute.

33. He saw no substantive reason why humanitarian associations or organizations should not be entitled to bring proceedings for compensation before the international criminal court.

34. He fully agreed with the idea that a person who was the subject of a criminal prosecution should be handed over to the court and with the Special Rapporteur's view that the procedure should be distinguished from that of extradition. Of the two alternative versions of the draft provision, he preferred alternative B, since it established a legal obligation, and acceptance of that obligation would imply acceptance of the terms of alternative A.

35. He supported the double-hearing principle and welcomed the Special Rapporteur's clarity and scientific approach in dealing with the issue. He had established
the basic rule that the international criminal court was both a court of first instance and a court of final appeal and had gone on to argue the case for the double-hearing principle, which took account of the fact that no court was infallible and that appeal was an important legal safeguard. An efficient mechanism would be based on the establishment of a special chamber which would not include the judges who had taken part in a particular decision and which would be called upon to review that decision on appeal. Although the proposal might be considered unorthodox, it would ensure effective internal monitoring of the lawfulness of the court’s decisions. The arrangements for the practical organization of the court’s proceedings would have to wait until its statute had been finalized, but the Special Rapporteur’s proposal warranted serious consideration.

The meeting rose at 11.50 a.m.

2264th MEETING

Friday, 22 May 1992, at 10.05 a.m.

Chairman: Mr. Carlos CALERO RODRIGUES

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bovett, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 3]

TENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

POSSIBLE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion on part two of his report.

2. Mr. THIAM (Special Rapporteur), noting that the discussion on the question of complaints before the court had concentrated on paragraph 1 of the possible draft provision,3 said that it was a provision which dealt with principle, not procedure, and its purpose was to provide, on the one hand, that only States, and not individuals, were empowered to bring a complaint before the court and, on the other, that all States were concerned whether or not they were parties to the statute of the court. That right to bring a case should not be confined to States parties, since, by referring a matter to the court, a State that was not a party was, in a sense, showing that it had confidence in the court and that it wished to become a State party. What had to be ascertained was in which capacity a State—again, regardless of whether it was a party to the statute of the court—could bring a complaint before the court. The answer was that a State must have been the victim of an international crime, whether or not the act had been committed in its territory and whether or not the alleged perpetrator was one of its nationals. Furthermore, it was impossible for a prosecutor to refer a case to the court, as some members of the Commission had envisaged. The role of the prosecutor—the custodian of law and order—would be to receive complaints, if necessary, to initiate inquiries and to draw up the indictment.

3. As to international organizations, it should not be forgotten that they had certain interests to protect. An international organization could itself be a victim of aggression against its property or its agents, in which case it was for the organization and not for the State to bring a complaint. International organizations should be regarded as legal persons under public law which had interests separate from those of their member States and they should therefore be able to refer a complaint to the court in the same capacity as States.

4. He realized that paragraph 2 of the draft provision was not absolutely necessary, since it already appeared in the draft Code. If the Code was adopted, there would be no reason for retaining the provision. If it was not, the court would at least know that it mattered little whether the individual who was the subject of the complaint had acted in his personal capacity or as the representative of a State.

5. With regard to proceedings relating to compensation,4 he was not sure that the question had no place in the draft because the court dealt mainly with criminal cases, as some members of the Commission believed. In internal law, it frequently occurred that a criminal court had to rule in criminal proceedings and at the same time in the civil proceedings which arose out of them and he saw no reason why an international criminal court could not do likewise. Nor did he see why the international criminal court should be denied that possibility on the pretext that only ICJ would have jurisdiction in proceedings for compensation. He therefore trusted that the draft provision would be taken into consideration.

6. The draft provision on the handing over to the court of the alleged perpetrator of a crime3 had given rise to many reservations which were justified in particular by

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1 For text of the draft articles provisionally adopted on first reading, see Yearbook . . . 1991, vol. II (Part Two), chap. IV.
3 For text, see 2254th meeting, para. 6.
4 Ibid., para. 7.
5 Ibid., para. 8.
the need to take account of the basic human rights which were protected by extradition treaties. In his view, the handing over to the court of the alleged perpetrator of the crime should be automatic; it was an obligation of all States parties to the statute of the court. The court could also conclude extradition agreements with States that were not parties to the statute. In any event, if an international criminal court was established, it was necessary to have confidence in it, to allow it to perform its function and not to paralyse its action by provisions that would render it ineffective and futile. He appreciated that alternative A of the draft provision, which was longer and of a more explanatory nature than alternative B, had not found favour with the Commission. The actual principle of handing over the perpetrator should, however, not be open to question.

7. He understood the hesitancy of some members with regard to the draft provision on the double-hearing principle. It was true that, inasmuch as the court was the highest international criminal body, it would be anomalous for its decisions to be reconsidered on appeal. Under some legal systems, no appeal lay against decisions handed down by the highest national courts. The decisions of ICI were themselves final. Admittedly, they did not relate to questions of individual freedom, but they could have an effect on the property of the persons concerned. He therefore considered that no appeal should lie, either on a point of fact or on a point of law, against the decisions of the international criminal court and he was prepared to drop the provision if that was the Commission’s wish.

8. Mr. Crawford, referring to the question of complaints before the court, said that Mr. Thiam had referred in his summing up to one possibility that was not reflected in the draft provision, namely, that international organizations, in their capacity as legal persons, could bring a complaint before the court if they were the direct victim of an international crime, and not merely because the crime was one of general concern to them, as envisaged thus far. He would like to know what procedure should be followed if the system of prosecution adopted did not provide for a public prosecutor.

9. Mr. THIAM (Special Rapporteur) said that the procedure would be the same whether the complaint was submitted by a State or by an international organization. The injured international organization would submit a complaint to the authority empowered to receive complaints, which would be the prosecutor if a prosecutor’s office was set up; if there was no prosecutor’s office, it would have to file its complaint directly with the court. The main thing was not to divest international organizations of the right to bring a complaint.

10. The CHAIRMAN said that the point to be clarified was whether international organizations could bring a complaint only if their interests were directly affected or whether they could do so on a general basis, like any State, or in other words, even if they were not themselves the victim of a crime.

11. Mr. THIAM (Special Rapporteur) said that it would not be essential for an international organization to have itself been the victim of an international crime for it to be able to bring a complaint before the court; it would suffice for it to have been injured indirectly by a criminal act which had, for instance, interfered with its objectives.

12. In that connection, he wished to revert to the question of whether or not the Security Council could bring a complaint before the court. Inasmuch as it was the function of the Security Council to safeguard international peace and security, it should, in his view, be able not only to take the measures provided for in that respect under the Charter of the United Nations, but also to bring before the international court any complaint against natural persons allegedly responsible for criminal acts that were prejudicial to international peace and security. In the case of aggression, for example, the Security Council could simply determine the existence of the aggression, leaving it to the international criminal court to determine the individual responsibility of the perpetrators of the aggression. That was not a new or original idea, since it already appeared in many drafts according to which any complaint of that kind should first be referred to the Security Council or the General Assembly before being considered by an international criminal court.

13. Mr. VERESHCHETIN asked whether, in the event that individuals were prosecuted before the international criminal court for an act of aggression that had caused suffering to tens of thousands of people, who were in principle entitled to compensation, the Special Rapporteur considered that individuals or any one particular individual tried by the court, could be required to pay such compensation.

14. Mr. THIAM (Special Rapporteur) said that the internal law rule concerning the so-called liability of the principal—which was in fact enshrined in the draft Code, since it provided that a State could be obliged to make reparation for injury caused by its agents—should be transposed, in some way, into international law. In the case of aggression, if those in power or officers of high rank were prosecuted before the court, it was the State in whose name or on whose behalf such individuals had acted that would have to pay compensation. From the procedural standpoint, it was conceivable that such a State would be brought before the court by a simple summons to answer for the consequences under civil law of the act of aggression.

15. The CHAIRMAN said that the question seemed to arise above all in the case of compensation which was claimed from an individual and which, in actual terms, would inevitably be far less than the compensation which could be claimed from a State. In the case of crimes against the peace and security of mankind and, in particular, of the crime of aggression, it would therefore be easier to seek compensation from the State than from a head of State convicted in criminal proceedings. Viewed

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6 Ibid., para. 9.

7 See commentary to article 5 in Yearbook... 1991, vol. II (Part Two), chap. IV.
from that standpoint, however, the question might rather come within the topic of State responsibility.

16. Mr. THIAM (Special Rapporteur) said that he agreed, but pointed out that there was no sharp divide between issues relating to the topics dealt with by Mr. Arangio-Ruiz, the Special Rapporteur on State responsibility, and himself, respectively. In that connection, he referred to article 19 of part 1 of the draft articles on State responsibility. Once an act had been characterized as an international crime engaging the responsibility of its perpetrator, State responsibility deriving directly from the act could not be ruled out.

17. Mr. VILLAGRAN KRAMER said that the examples of the European Court of Human Rights and the Inter-American Court of Human Rights, which dealt with violations committed by States and the compensation of the victims, suggested that it might be possible for an international criminal court to rule in matters of compensation. The Special Rapporteur should clarify whether, if the statute of the international criminal court gave it jurisdiction to deal with serious violations of human rights, the regional human rights commissions in Africa, the Americas and Europe would have the right to bring complaints before the prosecutor of the court.

18. Mr. THIAM (Special Rapporteur) said that human rights commissions dealt only with violations committed by States in respect of their own nationals. Such cases were not part of the topic under consideration and were consequently not within the jurisdiction of the international criminal court. In the event of serious and systematic violations of human rights going beyond the context of the State, however, the question of the right of national organizations serving a humanitarian purpose to bring complaints before the court had been raised in the report and was still open.

19. Mr. PAMBOU-TCHIVOUNDA said that he would like to have a clearer idea of how an international criminal court might conclude extradition agreements with States.

20. Mr. THIAM (Special Rapporteur) said that the idea that the international criminal court might be able to conclude extradition agreements with States had not been his, but had been put forward by certain authors, including Cherif Bassiouni. No State would be able to request the extradition of an individual on behalf of the court. The court would therefore have to have legal personality which would enable it to conclude extradition agreements.

21. The CHAIRMAN pointed out that the Special Rapporteur’s report dealt with extradition only in the case of States not parties to the statute of the court; since, for States parties to the statute, the court was not a foreign State. However, the question would naturally have to be considered in greater depth.

22. Mr. KOROMA said that, in view of the many variables involved, the question of compensation had to be given further consideration. In the case, for example, of a chain of responsibilities going from high-ranking agents of the State to their subordinates, the amount of compensation payable by each one could not be the same, since they would not all have the same financial means. The amount of compensation would also depend on the nature of the crime.

23. The possibility of a case being brought before ICJ was not, in his view, entirely theoretical; the offender might be insolvent, in which case the victim might wish to claim compensation from the State.

24. He also thought that, contrary to what the Special Rapporteur had said, the majority of the members of the Commission had stated that they were in favour of the double-hearing principle. Provision should therefore be made for an appeal procedure, either before a special chamber of the court or in some other way.

25. The CHAIRMAN said that he agreed with Mr. Koroma on the last point.

26. Mr. THIAM (Special Rapporteur) said that, while he was not personally in favour of the idea that the decisions of so important a trial mechanism as the international criminal court should be subject to appeal, he was nonetheless opposed to it, as shown by the fact that he had drafted a text providing for an appeal procedure. He nevertheless referred to the example of ICJ whose decisions, which might have far-reaching consequences as far as property was concerned, were final in every respect. It would be for the Commission to take a decision.

27. With regard to Mr. Koroma’s first point, he said that the State was answerable for damage caused by its agents. In that connection, he stressed the importance of distinguishing between the penalty, or punishment, and compensation, which was designed to remedy the consequences of the crime.

28. Mr. YANKOV, referring to the manner in which the Commission should proceed with its consideration of the item, proposed that it should conclude its exchange of views and that the Working Group should study the various questions raised. Once the Commission had considered the report of the Working Group, the Chairman of the Commission could try, with the assistance of the Special Rapporteur, to formulate guidelines for the use of the Drafting Committee and the Commission in their further work on the subject of the international criminal court.

29. The CHAIRMAN confirmed that the questions would all be reconsidered in greater depth both in the Working Group and in plenary.

30. Mr. KOROMA stressed that the Commission should try to hold genuine exchanges of views instead of formal debates, which did not contribute to the development of the law.

31. Mr. KUSUMA-ATMADJA said he regretted that, in his summing up, the Special Rapporteur had not referred to the trends in relation to the topic as a whole as they had emerged from the discussion. He personally

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8 See 2261st meeting, footnote 8.
had found that there were two main trends: that of those who proposed out-and-out rejection and that of the optimists who hoped that a solution might one day be found. However, he believed that there was also an intermediate position, namely, that, if the Commission was not too ambitious, it would be able to draft a text that could answer the questions the General Assembly and the Sixth Committee had asked in connection with an international criminal court in the general sense of the term. Some speakers had made very useful proposals that should be reflected in the Commission’s work. However, it might be for the Working Group or the Drafting Committee to identify the trends that would make it possible to find such an intermediate solution and consider the question more realistically.

32. The CHAIRMAN said that the Special Rapporteur had done his best at the current meeting to provide answers to specific questions on part two of his report. He agreed, however, that, generally speaking, a summary of opinions and trends would be helpful once the consideration of the topic had been completed at the current session. The question should be brought to the Planning Group’s attention.

33. Mr. THIAM (Special Rapporteur) said he was sure that the Working Group, which had taken note of all the views expressed, would have useful ideas on how to draft the report to the General Assembly, which should reflect the two main trends in the Commission.

34. The CHAIRMAN said that those comments concluded the discussion on the Special Rapporteur’s tenth report and that the consideration of the topic would be resumed in the Working Group chaired by Mr. Koroma. The Commission would come back to it after it had received the Working Group’s report.

The meeting rose at 11.20 a.m.

2265th MEETING

Tuesday, 26 May 1992, at 10 a.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. Giney, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetic, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR

ARTICLE 5 bis and

ARTICLES 11 TO 14

1. The CHAIRMAN invited the Special Rapporteur to give a brief summary of the contents of his third report on State responsibility (A/CN.4/440 and Add.1) for the benefit of the new members of the Commission. He recalled that that report had been introduced at the previous session. Consideration of the fourth report (A/CN.4/444) would begin later.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had decided to conform to fashion and speak of countermeasures instead of reprisals, but if he should refer to measures or to reprisals at any time, they should be understood as being synonymous with countermeasures. He happened to prefer the term reprisal because it was clear when a distinction was drawn with self-defence and retortion.

3. With regard to the beginning of the “operative” part of the third report, the first point in connection with the regime of countermeasures was the basic condition for lawful reprisals: the existence of an internationally wrongful act, or—to use a term proposed by one of the new members—a breach, whether of short duration or ongoing. Bona fide belief that a breach had occurred was not in itself sufficient justification to resort to a countermeasure. Such a belief on the part of State A, allegedly injured by a breach allegedly committed by State B, could, once it had been found that there was in fact no breach or that State B was not the wrongdoer, only diminish the degree of unlawfulness, and therefore liability, of State A for having resorted to an unjustified reaction. The existence of a breach and its author need not, however, be the object of a prior determination by a judge, arbitrator or political body, except to the extent that a settlement procedure was envisaged.

4. A second point was the function of countermeasures, which some considered to be strictly compensatory, whereas others believed that measures of that kind were also, or even mainly, punitive. He was inclined to take the view that both elements were present, although in varying degrees, depending on the case. Undoubtedly, in resorting to a countermeasure an injured State would feel that it was securing not just compensation but also the satisfaction that fell to an injured party as a result of meting out some kind of punishment. In his opinion, the Commission should not state explicitly either that the

1 Reproduced in Yearbook... 1991, 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.
4 See Yearbook... 1991, vol. I, 2238th meeting, paras. 2 et seq.
function of countermeasures was partly compensatory or was partly punitive or that it was both. The draft article should not state either that countermeasures should pursue reparation only. The matter should simply be left untouched: the more so as a punitive function could hardly be denied in the case of crimes, and it would be awkward if that had to be made explicit in any provision dealing with crimes. It should also be kept in mind that the qualitative difference between the breaches labelled as "delicts" and those labelled as "crimes" might well prove to be, in a last analysis that had yet to be made, only one of degree, probably of degree of fault. The most serious among the "delicts" would thus appear to be so close to the supposedly distinct category of crimes that a distinction from the viewpoint of the presence or absence of punitive consequences would be difficult to justify in practice as well as in theory.

5. A third point was whether and to what extent resort to countermeasures was subject to conditions to be met by the injured State. Conditions fell under two headings: a prior demand for cessation and/or reparation, protest or the like, and prior resort to and exhaustion of dispute settlement procedures. The problems that arose under those two headings, particularly the prior resort to dispute settlement procedures, were crucial in devising a regime for countermeasures. He would revert to the question later, but would simply note for the time being that he had placed the question of conditions in part 2 of the draft, thereby departing from the practice of his predecessor, who had placed most of it in part 3.

6. The next point concerned those further conditions for lawful reprisals that derived from the prohibition on the use of force, respect for human rights, the law of diplomatic relations, respect for the rights of third parties and the peremptory norms of international law. After such solemn proclamations as those made in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States and in other United Nations and non-United Nations instruments, there could be no doubt that armed countermeasures were prohibited by the terms of Article 2, paragraph 4, of the Charter of the United Nations. The universal view of scholars, one with which he disagreed, was that Article 2, paragraph 4, of the Charter had become a rule of customary international law. The prohibition and condemnation of armed reprisals should be expressly included in one of the articles on State responsibility. One must, of course, not overlook that part of the doctrine which raised the question whether the failure to implement Articles 42 to 47 of the Charter, the core of the United Nations collective security system, did not justify an "evolutive" interpretation of Article 2, paragraph 4, to allow exceptions to the prohibition contained therein. He was referring to the doctrine according to which the prohibition laid down in Article 2, paragraph 4, should be subject not only to the exceptions envisaged in Article 51 of the Charter but also to other exceptions not expressly provided for in Article 51. However, such a doctrine could only cover if, and in the measure in which it might be acceptable, those hypotheses in which resort to force might be justified by the grave emergency situations for which Articles 42 to 51 had been devised. Even though some of those hypotheses might call for a broadening of the concept of self-defence, that would not justify an exception to the prohibition of armed countermeasures against an internationally wrongful act. States invariably invoked self-defence, and not situations calling for reprisals or countermeasures, when they resorted to force in response to what they regarded as grave emergency situations. That did not prove that armed reprisals were admissible; and, indeed, the actions in question had been condemned by the Security Council on more than one occasion.

7. With regard to the meaning of the term "force", in his third report he had given a brief outline of the different doctrinal positions on the unlawfulness of certain economic and political countermeasures. Force could be taken to mean more than armed force, and he referred in that connection to the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, the Declaration on Friendly Relations already cited, the Final Act of the Conference on Security and Cooperation in Europe and various regional instruments, in particular the Charter of the Organization of American States. In a number of those texts, the prohibition of certain forms of political and economic coercion had been dealt with under the principle of non-intervention. Although State practice was not abundant in that respect, political and economic measures had been frequently resorted to and were regarded as admissible as countermeasures. Yet their admissibility was not exempt from a number of restrictions. In practice, there seemed to be a trend towards prohibiting political and economic measures that jeopardized the territorial integrity or political independence of the State against which they were taken.

8. As to compatibility with respect for human rights, restrictions on the lawful resort to countermeasures should be confined to the core human rights. The right to own property, for example, should not be included among the rights the infringement of which by way of countermeasures should be declared inadmissible. That was not to say that the Commission should list the human rights it considered important enough to be protected from the taking of countermeasures against a State: the matter should be left to the further development of human rights law.

9. He would discuss the inviolability of specially protected persons at greater length later, together with self-contained regimes, of which it was an example. Great caution was needed in that regard and the Commission should draw inspiration from the raison d'etre of diplomatic immunities. If diplomats were not protected by diplomatic immunities, they were by the international law of human rights. A prohibition should be placed on countermeasures that might seriously hinder the normal conduct of diplomacy: a limitation that should not be understood, however, as condemning, for example, the breaking-off of diplomatic relations as a reprisal by one

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5 General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

6 General Assembly resolution 2131 (XX) of 21 December 1965.

7 Signed at Helsinki on 1 August 1975.
State against another. Rightly, the question had been raised as to why it was necessary to mention the relevance of *jus cogens*. Everyone knew that the rules of *jus cogens* existed and that, being what they were, those rules were not subject to derogation and thus could not be violated by a State resorting to a countermeasure simply because the State in question was reacting to an international breach. However, just as express mention should be made of the prohibition of armed force, express mention should also be made of the prohibition of any countermeasure not compatible with the rules of *jus cogens*. He would return to the question of obligations *erga omnes* in the fourth report, but it was clear that a State that resorted to a countermeasure should not do so to the detriment of the legal rights of States having nothing to do with the wrongful act.

10. Plainly, the regime of countermeasures formed the core of the law of State responsibility and, at the same time as being the most crucial part it was also the most problematic. In studying the regime of substantive consequences it was possible to rely to a considerable degree upon municipal law analogies, but no such assistance was available in respect of the instrumental consequences of internationally wrongful acts. In no other area of international law was the extent of the emperor's nakedness so apparent, so to speak. Institutional means of redress were very few and where they did exist were not always satisfactory. Generally speaking, the international community was more concerned with maintaining security than with the consequences of breaches of international law; even the Charter of the United Nations was of little help on that score. The implementation of the rules on State responsibility remained in the hands of States, and inevitably the inequalities between States in terms of wealth and power were felt more acutely in the area of countermeasures than anywhere else. The fact that countermeasures were for the most part decided and applied unilaterally was inconvenient for both parties in the responsibility relationship. The allegedly lawbreaking State found itself at a disadvantage in that it had to face the unilateral choices of the State it had allegedly injured. An injured State, for its part, was subject to conditions and restrictions which placed it at a disadvantage whenever it faced a stubborn, unyielding lawbreaker. The prohibition of the use of force and the obligation to respect human rights and humanitarian interests placed a law-abiding injured State in great difficulty in securing cessation of wrongful conduct and obtaining adequate reparation. Those factors diminished the effectiveness of both the primary and secondary rules. The only way to come to grips with those negative factors lay in a very serious effort on the part of the Commission and the Sixth Committee to strengthen the dispute settlement procedures to be envisaged in part 3 of the draft. While reserving the right to revert to that subject *ex professo* in due course in an ad hoc report, he had put forward some preliminary thoughts in his fourth report on the basis of an analysis of the developments in dispute settlement obligations since the First World War. He would revert to the issue when the Commission came to consider the fourth report, but thought it useful at that stage to draw attention to the conclusions he had reached, so as to facilitate the debate later on.

11. Mr. JACOVIDES said that the item on State responsibility provided the Commission with an excellent opportunity to make a major impact not only in codifying but also in progressively developing the relevant rules. It had been on the agenda for a very long time and, in his view, the Commission should concentrate on it as much as possible during the current session and for the remainder of the present quinquennium, giving the topic priority, if necessary, over others less central to the mainstream of contemporary international law, such as the item on relations between States and international organizations. Completion of the work on State responsibility during the United Nations Decade of International Law 8 would constitute a major achievement and would be well received by the General Assembly, which found it difficult to understand why the Commission was taking so many years to make headway. Last but not least, it should be remembered that, in the debate on the draft Code of Crimes against the Peace and Security of Mankind, it had been agreed by way of compromise to restrict it to individuals, on the understanding that criminal responsibility of States would be covered under the item on State responsibility. In view of that link, it was essential for progress on State responsibility to keep pace with progress on the draft Code; otherwise, the validity of the compromise would be placed in jeopardy.

12. He congratulated the Special Rapporteur on the thoroughness and erudition of the third report, dealing with the legal regime of measures an injured State could take against a State that committed an internationally wrongful act. The discussion was to be confined for the present to measures applicable to the case of delicts or ordinary wrongful acts, analogous measures in the case of international crimes being deferred for consideration at a later stage. The Special Rapporteur was right to draw attention in the introduction to the contrast between the equality to which every State was entitled in law and the factual inequalities which tempted stronger States to impose their economic and military power, a contrast that manifested itself particularly in countermeasures for wrongful acts. It was the small and medium-sized States which, as a matter of self-interest or even self-preservation, had to rely on the protective effect of international law and make their contribution to its efficacy. Moreover, it was in that connection that progressive development of international law through such concepts as *jus cogens*, obligations *erga omnes*, the recognition of the existence of hierarchically higher rules and principles embodied in the Charter of the United Nations—concepts which should be given special weight in the Commission's work in general and in its work on State responsibility in particular—came into play. The Commission could make a constructive contribution to lifting the concept of State responsibility from its traditional context, where the emphasis was placed primarily on injury to aliens, to a contemporary context of international public order and the interests of the international community at large.

13. The report spoke of "the evocation of the hazy and ambiguous concept of a 'new international order'". Notwithstanding the fact that several parts of the world

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8 See 2255th meeting, footnote 5.
were at present suffering from what might be described as a new international disorder, the concept of a new international order was to be welcomed, but only if it acquired proper legal meaning and led to an international legal order. That was impossible unless the new world order was predicated, not on a directorate of the powerful, but on equal justice for all members of the international community. A proper balance had to be struck between, on the one hand, action taken against violations of human rights which imperilled peace, and on the other, abusive unregulated encroachment on the domestic jurisdiction of States and erosion of their sovereignty. Proportionality and rejection of double standards were essential elements in determining the propriety of countermeasures. First and foremost, decisions had to be taken in accordance with the letter and spirit of the relevant provisions of the Charter of the United Nations.

14. Self-defence should be seen as a unilateral armed reaction against an armed attack. While legitimate under certain circumstances, it should be considered an exceptional measure, since the basic rule under the Charter was a complete prohibition of the use of force in international relations. Accordingly, self-defence should be carefully circumscribed. In his view, the relationship between Article 2, paragraph 4, and Article 51 of the Charter provided the best test of the latitude allowed, with Article 51 being narrowly interpreted because a broad interpretation would open the door to abuse by stronger States. The tendency in present-day international law should be to apply self-defence restrictively. As for the concept of self-help, he agreed that it was too general a reaction to a wrongful act committed by the other State—the Commission should therefore be guided by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties as countermeasures, his own position would be to rely as much as possible on the relevant provisions of the 1969 Vienna Convention on the Law of Treaties and, where the Convention failed to cover the issue, to apply countermeasures on the narrowest possible scale. He shared the Special Rapporteur's opinion that the problem of so-called self-contained regimes should be dealt with not in the section of part 2 concerning countermeasures but, rather, in the section or chapter covering the general principles of the content, forms and degrees of international responsibility.

15. As to reprisals, in the sense of conduct which was unlawful per se—inasmuch as it would entail violation of the right of another State—but which lost its unlawful character by virtue of being a reaction to a wrongful act committed by the other State—the Commission should also adopt a restrictive approach and interpret the scope of reprisals as narrowly as possible. The term "countermeasures" should include the generality of measures that might be resorted to in order to seek cessation or redress; as the Special Rapporteur pointed out in the report, the Commission itself, in the context of draft article 30 of part 1, understood it as including measures traditionally classified as reprisals as well as sanctions decided on or applied by international bodies. The term "reciprocal measures" used in the context of countermeasures was a particular application of the broader concept of reciprocity which applied to various areas of international law and relations. The taking of countermeasures on a reciprocal basis would be intended to restore the balance between the position of the offending State and that of the injured party and would thus differ from reprisals as defined earlier.

16. He concurred with the Special Rapporteur that lawful resort to countermeasures presupposed internationally unlawful conduct of an instantaneous or continu-
under which they had locus standi. Without precluding the possibility of expressing different views or seeking improvements, it might be advisable to take that article as the starting point for further work on the subject. The matters raised under the heading of substantive limitations issues involved some fundamental points of public policy in present-day international law and offered welcome opportunities for the Commission to make its mark in the codification and progressive development of the law. He shared the prevailing view, referred to in the report, that the prohibition of the use of force in international relations set forth in Article 2, paragraph 4, of the Charter of the United Nations had become a part of general, unwritten international law and a peremptory norm from which no departure could be allowed by treaty or otherwise. It could safely be stated that resort to reprisals involving armed force was prohibited by international law. He noted with approval Mr. Bowett's views on that issue, as quoted in one of the footnotes, and endorsed the Special Rapporteur's opinion to the effect that the Commission could hardly admit any derogation from the prohibition of armed reprisals as implied in Article 2, paragraph 4, of the Charter and emphasized in the relevant part of the Declaration on Friendly Relations.

19. The Special Rapporteur was correct to say that the limitation based on respect for human rights and fundamental humanitarian principles represented a further restriction of the liberty of States to resort to forms of reprisals inconsistent with those rights and principles. However, in order to remain within the bounds of reality as well as of law, it was important to define the threshold beyond which countermeasures could be allowed in response to an unlawful act, since not every human right could qualify as constituting an absolute limitation. The inviolability of specially protected persons was widely and rightly accepted as another limitation on reprisals, particularly in the case of heads of State and diplomatic envoys. That notion was deeply rooted in classical international law, and there was every reason to continue to observe it. However, exceptions could be envisaged, for example restrictions on freedom of movement of diplomatic envoys on the basis of reciprocity, and the exact demarcation line would have to take into account State practice. Lastly, there could be no doubt about the additional limitation on countermeasures imposed by rules of jus cogens and obligations erga omnes. Measures involving a violation of such rules or obligations would certainly be unlawful, something that had already been duly accepted by the Commission. However, while the principle of jus cogens was clear and its existence duly and solemnly accepted in the 1969 Vienna Convention on the Law of Treaties, its exact legal content had never been defined by an authoritative body. It had been the subject of study by scholars and was often referred to in legal writings, yet it remained largely undefined. Since the Commission was currently engaged in a search for topics for its long-term programme of work, it would be well worth considering the possibility of trying to define the legal substance of the principle of jus cogens.

20. He would offer his comments on the fourth report in due course. He would simply note that the texts of proposed draft articles 11 and 12 set out therein contained no reference to the questions examined in the chapter of the third report dealing with substantive limitations issues. What might the reasons be for that omission and did the Special Rapporteur deal with them elsewhere? He also wished to draw attention to the reference, in the fourth report, to the Report of ICJ to the General Assembly, in which the President of the Court, Sir Robert Jennings, stressed that the Court could perform an even more active role in the settlement of disputes if its advisory jurisdiction were more widely utilized by States and by organs of the United Nations. The Secretary-General had welcomed the suggestion and had noted that even disputes that were predominantly political in nature often had a legal component, and a non-binding pronouncement in such cases might facilitate their solution by such means as negotiation and mediation. The suggestion was both wise and appropriate. It should be given the attention it deserved.

21. Mr. VERSHCHETIN said that he had been impressed by the lucidity and thoroughness with which the Special Rapporteur had gone about an extremely complex assignment. He shared the Special Rapporteur's view that unilateral or "horizontal" countermeasures in the case of delicts should not be considered in isolation or as a means of punishing a law-breaking State, but primarily as a means employed by an injured State to secure cessation of the wrongful act and to obtain compensation and a guarantee of non-repetition.

22. At the present stage in the development of international law it would be appropriate to put forward specific preconditions and limitations regarding the application of such measures. The conditions and limitations related both to the preliminary requirement of cessation of the unlawful act and compensation in the broad sense of that term, as well as to establishing a reasonable time-limit for fulfilling that preliminary requirement. That also applied to the condition of prior use of available procedures for the settlement of disputes, whether the general procedures provided in Article 33 of the Charter or the specific procedures contained in treaties between the injured State and the law-breaking State. He also agreed with the Special Rapporteur that countermeasures could only be justified in a very few cases. As noted in the report, States had already taken such a position before the Second World War, but that position was even more consonant with contemporary developments in international law, taking into account, in particular, the Helsinki process and the ending of the "cold war" and the consequent emergence of new opportunities for more effective use of existing mechanisms and procedures for the peaceful settlement of disputes.

23. In that connection he wished to draw attention to the Special Rapporteur's important observation that the Commission's work on State responsibility should strengthen and develop those procedures, and particularly procedures for judicial settlement and arbitration. Although that would be the subject of part 3 of the draft articles, even during the examination of the nature and conditions of admissibility of unilateral countermeasures the Commission should keep in view the future task of
enhancing the role and broadening the spectrum of peaceful means for the settlement of disputes and consequent limitation of the scope of countermeasures. For that reason, there should be no relaxation in the requirement of prior recourse to the existing procedures for the peaceful settlement of disputes before resort to countermeasures.

24. Another issue was that of the countermeasures to be considered admissible as unilateral action on the part of States. Should such measures be specified in the draft articles? Or should they be expressed in the most general terms, as in the proposed draft article 11 contained in the Special Rapporteur’s fourth report? The Special Rapporteur had not been entirely consistent in his approach: he seemed to have taken the term “countermeasures” as being synonymous with “reprisals”, but had not confined himself to considering reprisals as countermeasures and had also referred to other measures, such as suspension and termination of international treaties or specific articles thereof, and reciprocal measures. Nor had the Special Rapporteur been wholly consistent in dealing with such measures as retortion: on the one hand, he did not include retortion as a countermeasure whose application was subject to regulation within the framework of State responsibility, while, on the other, he had quite correctly noted that, under the Charter of the United Nations, a State should in certain circumstances refrain from both countermeasures and retortion. It followed that retortion could not always be regarded as a legitimate action from the standpoint of international law.

25. In any case, the text of the articles on countermeasures should more clearly affirm the Commission’s position on the question whether countermeasures were to be understood as being coterminous with reprisals and whether the conditions for the application of various countermeasures were identical. Even a first scrutiny of draft article 11 in the Special Rapporteur’s fourth report revealed that much remained to be done in providing clarification in that field, and he hoped that the Special Rapporteur would be prepared to shed some further light on the issue.

26. Other important questions arose in connection with reprisals involving the use of armed force, and the Special Rapporteur’s treatment of Article 2, paragraph 3, of the Charter. He would address those aspects of the report at a later stage.

27. Mr. CALERO RODRIGUES said that the Commission had already considered the substantive consequences of internationally wrongful acts, and it was now time to address the “instrumental” consequences, namely the rights of the injured State to take action to ensure that the State committing the act complied with its secondary obligations.

28. Although the Special Rapporteur’s third report gave evidence of his usual scholarship and lucidity, the major drawback was that it did not propose any draft articles, which was all the more regrettable in that part 2 of the draft articles on State responsibility had been on the Commission’s agenda since 1980, and it might have been hoped that a more practical approach would have been adopted by now. As it was, only a few articles had been submitted for the Commission’s consideration. At the same time, he wished to point out that he had found the Special Rapporteur’s third report extremely useful for teaching purposes.

29. At the present stage, however, the Commission’s comments should provide the basis for suggestions and proposals by the Special Rapporteur for draft articles. Since the fourth report did contain proposed draft articles, he could not but regard a discussion focusing on the third report as largely academic. That was particularly true of the frequent references in the third report to the need to refer to the practice of States: no specific examples of such practice had been given in the third report, but were provided in abundance in the fourth. In any case, the Commission’s primary task was to arrive at adequate rules of law, an exercise to which excursions into the realm of legal history could only be of peripheral relevance.

30. In general, the Commission should be extremely circumspect in its approach to State practice. Countermeasures ultimately implied that States were entitled to take the law into their own hands. The administration of the substantive rights of an injured State should be increasingly entrusted to impartial bodies empowered to determine whether an internationally wrongful act had been committed and whether an injury had in fact been suffered, and if so, the extent of that injury. There would always be cases in which the imperfect nature of the mechanism would be such that some latitude remained for direct and independent action on the part of States which considered themselves injured, but the Commission’s efforts should be directed towards reducing the scope for such unilateral initiatives to a minimum, since they often led to abuses. If a State considered that it had been injured, and if it was more powerful than the State it regarded as the wrongdoer, it was easily tempted to resort to countermeasures, a situation of which the Special Rapporteur was clearly not unaware, as could be seen from the introduction to his third report, which the Commission would do well to keep in mind in its future deliberations on the topic.

31. Mr. CRAWFORD said that he, too, would have preferred to comment on the third report in conjunction with the fourth. He would confine himself for the moment to asking whether the Special Rapporteur could provide a tentative outline of the remaining provisions to be included in parts 2 and 3, and whether he considered a first reading of the complete text of the articles on State responsibility would be feasible during the current quinquennium.

32. Mr. KOROMA said he had initially gained the impression from the third report that the Special Rapporteur was reopening issues which had already been resolved, but it had become apparent from his statement that he had been endeavouring to ensure that, whatever the rules the Commission might eventually adopt, they must be predicated on doctrines and general principles of international law. In effect, the third report provided a kind of distillation of the issues involved and furnished a considerable volume of valuable material which should be taken into account when the Commission came to consider the fourth report.
33. The CHAIRMAN pointed out that, in deference to those members whose working language was not English, consideration of the fourth report had been postponed until it was available in all the working languages.

34. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the difficulties mentioned by Mr. Calero Rodrigues had been influenced by the fact that, since January 1985, when he had first joined it, the Commission had allocated at least one third of its time to the draft Code of Crimes against the Peace and Security of Mankind. That was the main reason why, at the previous session, he had been unable to benefit from guidance by members on the issues raised in his third report. True, the draft Code was important, but he wondered whether it was really necessary to concentrate upon it to that extent, to the detriment of the other topics before the Commission.

35. He strongly disagreed that a report was of no use unless it contained draft articles. There had been occasions in the past when reports without articles had been placed before the Commission and the purpose of such reports had been to enable members to draw the relevant conclusions regarding doctrine and practice, and thus to provide the Special Rapporteur with the necessary guidance. It would be unwise to adopt articles without first exploring all the issues. As for the future, he would not be able to submit any draft provisions on the problematic category of international "crimes" of States unless he had first secured the guidance of the Commission's views on the main issues raised by the distinction set forth in article 19 of part 1: that, on the basis of a report without articles. The fact that he had been unable to secure the Commission's guidance before drafting articles 11, 12, 13 and 14 did not mean that the issues raised in his third report did not warrant discussion. Indeed, Mr. Calero Rodrigues had also mentioned that he had used some of the material for teaching purposes.

36. He had asked Mr. Vereshchetin to be kind enough to let him have his questions in writing, and would therefore reply at the next meeting. As to Mr. Crawford's point, he proposed to deal in his fifth report, in 1993, with crimes and with part 3 of the draft. He had already asked the secretariat to collate all the relevant doctrinal and jurisdictional material for a preliminary study to be carried out for the second reading of part 1 of the draft. He would start to prepare, in his sixth report, for that second reading. It was to be hoped that the Commission would complete the second reading of part 1 and the first reading of parts 2 and 3 during the current quinquennium. Draft articles 11 to 14 would conclude part 2 of the draft, except for the difficult matter of crimes and for certain other provisions, including articles 2 and 4. It might also be necessary to include a short provision, incorporated perhaps in the draft as article 5 bis, to clarify the position of not materially affected or less directly affected States. Lastly, part 3 of the draft would deal with dispute settlement as pertaining to State responsibility. It was an extremely important subject and one on which it was essential to receive the views of members.

37. The CHAIRMAN pointed out that a request had been addressed to all Special Rapporteurs to submit their plans for future treatment of their items to the Planning Group. On that basis the Group could establish a programme for the quinquennium which would be placed before the Commission.

38. Mr. IDRIS said that, rather than discuss the procedural aspects of the matter, the Commission should hear the statements of members. For the purposes of efficient organization of its work, however, it was first necessary to have the answer to three questions: When would the Special Rapporteur make his supplementary comments on the third report? When would the Special Rapporteur introduce his fourth report? And when would the addendum to the fourth report be circulated?

39. Mr. JACOVIDES noted that the articles proposed by the Special Rapporteur in his fourth report did not deal with the substantive limitations issues addressed in the third report. He asked if it was the Special Rapporteur's intention to cover those issues in subsequent draft articles.

40. The CHAIRMAN said that the Special Rapporteur would make his supplementary comments on the third report at the next meeting. The fourth report could not be introduced until it was available in all the working languages, which would probably be towards the end of May or the beginning of June. In addition, the addendum had only just been submitted and the Special Rapporteur would be absent for the first two weeks in June. The target date for reopening the discussion on countermeasures, therefore, was 16 June 1992.

41. Mr. CRAWFORD said that it would be a matter of considerable concern to him if the Commission were to consider any part of part 1 before completing consideration of parts 2 and 3 and the commentaries on first reading. They were not separate items but part of an integral whole. The first priority during the present quinquennium should be to complete an integrated set of draft articles on State responsibility.

42. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, at the request of his predecessor, Mr. Riphagen, a list of materials had been collated with a view to preparing the second reading of part 1 of the draft. That list, which appeared to be quite valuable for both doctrine and practice, was now outdated. The work should be resumed as soon as possible. It was equally essential for the Codification Division to proceed as soon as possible to carry out a study of the said materials with a view to preparing a digest of the doctrine and practice concerning the matters covered by the 35 articles of part 1. The secretariat should undertake that work, as he did not have the money to pay for it to be done. Replying to Mr. Jacovides' question, he indicated that there would indeed be an article on substantive limitations issues in the forthcoming addendum to his fourth report.

43. Mr. ERIKSSON said that the Commission should embark on the second reading only if it was certain of completing it during the current quinquennium.

44. Mr. BENNOUNA said that he shared the views of Mr. Crawford and Mr. Erikkson.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said that whether or not the Commission would be able to complete its work on the draft articles in parts 2 and 3 of
the draft during the current quinquennium would also depend on what the Drafting Committee was able to achieve.

The meeting rose at 1 p.m.

2266th MEETING
Wednesday, 27 May 1992, at 10 a.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. Giiney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 5 bis and
ARTICLES 11 TO 14

1. Mr. ARANGIO-RUIZ (Special Rapporteur), continuing the recapitulation of his introduction to his third report on State responsibility (A/CN.4/440 and Add.1) for the sake of new members, referred to the question of so-called self-contained regimes. He said that they were characterized by the fact that the substantive obligations they set forth were accompanied by special rules concerning the consequences of the violation of those regimes. The analysis of international practice showed that multilateral treaties, particularly the constituent instruments of international organizations, often contained such rules, the main feature of which was that their implementation frequently involved the role of an international body, either in monitoring compliance or in discounting, implementing or authorizing measures to be taken in the event of violations. The question was whether the rules constituting the so-called self-contained regime affected—and, possibly, in what way—the rights of States parties to resort to the countermeasures provided for under general international law.

2. With regard to the so-called "legal order" of the European Economic Community, the Court of Justice of the European Communities had repeatedly confirmed the principle that member States did not have the right to resort to unilateral measures under general law (see consolidated cases 90-91/63 and case 232/78). Some scholars shared that point of view, but others maintained that the faculté to resort to the remedies afforded by general international law could not be excluded when the recourse mechanisms provided for within the framework of the Community had been exhausted. Generally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties: in their view, the element of reciprocity was not set aside and even the choice of the contracting States to be members of a "community" could not be regarded as irreversible, at least as long as those States remained sovereign entities and legal integration had not been achieved.

3. It would appear to follow that the Community's system did not really constitute a self-contained regime, at least not for the purposes of countermeasures. The claim that it would be legally impossible, as a last resort, for member States to fall back on the measures afforded by general international law did not seem to be justified, at any rate not from the point of view of general international law. As pointed out by White, that type of claim appeared to be based more on political considerations than on legal reasoning.

4. The other two examples of so-called self-contained regimes, namely the rules on the protection of human rights and the rules on diplomatic relations and the status of diplomatic envoys, were even less convincing.

5. With regard to human rights, the literature was divided, but the prevailing view clearly ruled out the possibility that universal or regional conventional systems in that area could constitute self-contained regimes.

6. As to the International Covenant on Civil and Political Rights, he was inclined to agree with Tomuschat, ...
Meron, Simma and others\(^8\) that, given the content of article 44 of that instrument, it did not constitute a self-contained regime.

7. Although the literature was more cautious about the system established by the 1950 European Convention on Human Rights, the prevailing view was that that system did not prevent the member States of the Community from resorting to the remedies afforded by general international law. Article 62 of the Convention affirmed the right to resort to dispute-settlement procedures other than those set up by that instrument.

8. In referring to those two human rights systems, he himself had had the occasion to affirm that the obligations they embodied were subject to the general rules of international law, regardless of any particular procedures made available to individuals, groups or States. Similarly, Henkin\(^9\) had stated that the procedures envisaged in the Covenant and the European Convention were intended to supplement, and not to supplant, the general remedies available to parties in the event of a violation by another party. A number of recent cases, which he discussed in his fourth report, appeared to support the view that there was no such thing as a self-contained regime for human rights, the only difficulty in those cases being that it was not always easy to distinguish between countermeasures \textit{stricto sensu} and cases of mere retraction.

9. In the view of some, GATT and diplomatic law also constituted self-contained regimes, but, there again, the implementation of the provisions of those instruments would not seem to mean the abandonment of the regime of countermeasures provided for by general international law. The self-contained nature of diplomatic law, in particular, was contested. The most convincing theory on that subject was that any restrictions on "diplomatic" countermeasures derived not from any specificity of diplomatic law, but from the normal application, in the area of diplomatic law, of the general rules and principles constituting the regime of countermeasures. That was the position taken by Simma and, to a certain extent, by Dominicić.\(^10\)

10. None of the systems envisaged would appear to constitute \textit{in concreto} a self-contained regime. Furthermore, the analysis of those systems raised most serious doubts as to the admissibility, even \textit{in abstracto}, of the very concept of self-contained regimes as subsystems of the law of State responsibility or, to use the expression employed by the previous Special Rapporteur, Mr. Willem Riphagen, "closed legal circuits". To be sure, substantive rules or any more or less articulate and organized set of such rules might well introduce provisions to ensure that the consequences of their violation were better regulated. In certain cases, the aim pursued might be either to monitor violations more effectively through ad hoc machinery or to prevent a reaction to a violation from compromising the general purpose of the breached rule. But, in so doing, the rules in question did not exclude the validity or application of the rules of general international law with regard to the substantive or instrumental consequences of internationally wrongful acts. Those ad hoc rules merely represented derogations from the general rules, such derogations being admissible only to the extent that they were not incompatible with the general rules. No derogation from the essential rules and principles which governed the consequences of internationally wrongful acts and which were inherent to international relations and international law was conceivable. For example, no conventional provision would be admissible that led to a derogation from the principle of the prohibition of the use of force, the rule of respect for fundamental rights, the basic imperatives of diplomatic relations, the obligation to respect the rights of third States, the principle of proportionality or the rule under which the lawfulness of any unilateral measure must be assessed in the light of that measure's ultimate legal function.

11. It therefore seemed reasonable to assume that a State joining a so-called self-contained regime did not, in so doing, abstain from exercising a part of the rights or \textit{facultés} of unilateral reaction it possessed under general international law to such an extent as to exclude any possibility of a derogation from the accepted regime. Of course, any State that accepted a regime of that nature would be bound, when confronted with a breach of an obligation under that regime, to react first, assuming it wished to do so, in conformity with the regime's provisions. But that did not exclude the possibility of resorting to the remedies afforded by general international law, a possibility whose latitude varied according to the effectiveness of the remedies envisaged by the conventional regime.

12. The use of the remedies provided for and allowed under general international law was and must remain possible at least in two cases. The first was that in which the State injured by a violation of the system resorted to the conventional institutions and secured from them a favourable decision but was not able to obtain reparation through the system's procedures: clearly, the injured State might then lawfully resort to measures which, although not covered by the system, were available to it under general international law. The second case occurred when the internationally wrongful act was a continuing violation of the regime. There again, the injured State was under an obligation, except of course where it was entitled to act in self-defence, to resort first to agreed conventional procedures. If, however, the offending State persisted in its unlawful conduct while those procedures were in progress, the injured State might resort simultaneously to any an "external" measures to protect its primary or secondary rights without jeopardizing a "just" settlement of the dispute through the procedures provided for under the system.

13. He had reservations about draft article 2 of part 2 as adopted on first reading\(^11\) for reasons analogous to those concerning the concept of self-contained regimes or "closed legal circuits". In view of the link between the subject of that draft article and the problem of so-

\(^8\) Ibid
\(^9\) Ibid.
\(^10\) Ibid.
called self-contained or other special regimes, the Commission should revert to that draft article and not wait until it had been considered on second reading. For reasons partly connected with the same problem, he also had doubts about draft article 4.\textsuperscript{12}

14. Turning to the question of the so-called "non-directly injured", "non-directly affected" or "non-specially affected" States, he recalled that the concept had emerged in the Commission and in the Sixth Committee for the first time in 1984 in connection with the definition of an injured State. Certain scholars had begun using it in preference to the term "third State", which had been employed in the same sense. He had ruled out the expression "third State" from the start because it designated States extraneous to a legal relationship. But the terms "non-directly injured State" or "non-directly affected State" were no better and were very ambiguous, particularly in the light of the definition of injured State that the Commission appeared to have retained.

15. An essential element of the definition of injured State, more or less satisfactorily reflected in the text of article 5,\textsuperscript{13} was that an internationally wrongful act consisted not only or not necessarily in the inflicting of unjust material, namely physical, damage: more broadly, it was or resulted in the infringement of a right, such infringement constituting the injury, whether or not damage had been caused. A State could thus be injured by the breach of an international obligation even if it did not suffer any damage other than the infringement of its right. Hence, in each particular case the essential starting point in identifying the injured States for the purposes of the legal consequences of an internationally wrongful act was to determine which States had suffered in the absence of, or in addition to, any material, physical damage, an infringement of their rights.

16. In the traditional view, all international obligations were such that, even when they were established by a multilateral treaty or a customary rule, their violation infringed the right of only one or a few given States. It seemed, however, that that was not always true. Although most international rules, like most provisions of internal law, continued to set forth obligations of the traditional kind, namely, obligations the violation of which affected only the rights of one or more given States, other rules apparently escaped such a bilateral pattern: the rules protecting a general or collective interest that must be complied with in the interest of all the States to which they applied. According to Spinedi:

\ldots mention had been made in that connection of rules designed to safeguard interests common to all States or to all the States of which a given body was composed, and not to each one separately.\textsuperscript{14}

Rules concerning disarmament and arms control, promotion of and respect for human rights and environmental protection—in general and in areas not falling within the jurisdiction of any State—fell into that category. The same scholar, cited in the fourth report, also stressed that:

The provisions of draft article 5, paragraphs 2 (e) (ii) and (iii), 2 (f) and 3, as adopted on first reading, referred specifically to the legal relationships or situations determined by the violation of such rules.

17. Today, the debate did not so much concern the existence of \textit{erga omnes} obligations: the main issue in the area of State responsibility was to establish the consequences of the fact that \textit{erga omnes} obligations corresponded to \textit{omnium} rights. It was therefore important to determine, in the perspective of a possible violation, the exact situation of the various States for whose benefit such obligations existed. Were those States in the same situation as States qualifying as injured under rules other than \textit{erga omnes} rules? Were all States considered as injured under an \textit{erga omnes} rule in the same situation? If not, how did their situations differ and what were the consequences of those differences? All those questions raised doubts about the concepts of "non-directly injured" State, "non-specially affected" State and "third State".

18. Having rejected the concept of "third State", he intended to show why the other two concepts were also unacceptable.

19. To show that the concept of a "non-directly injured" State was inappropriate, it might be useful to take the example of a violation of \textit{erga omnes} rules on the protection of human rights. As was generally acknowledged, rules of that type created among the States to which they applied a legal relationship characterized by the obligation to ensure the enjoyment of human rights for everyone, irrespective of nationality. A violation of its obligation by State A would therefore constitute a simultaneous infringement of the corresponding right of States B, C, D, E... and, as the right in question was the same for all, namely, the right to have State A respect the human rights of all those under its jurisdiction, the violation did not affect any one of those States more or less directly than the others. Of course, differences might manifest themselves in certain cases. For instance, if the violation by State A of its obligation constituted a violation of the human rights of individuals more closely related to an injured State B, ethnically or otherwise, State B might feel particularly affected. Even in such a case, however, one could not say that State B's injury was legally more direct than that suffered by States C, D, E...\textsuperscript{15}

20. Another example would be the breach of an \textit{erga omnes} obligation relating to the protection of the environment in outer space or in any area whose contamination or pollution would have an adverse effect for the whole planet. For example, an internationally wrongful act causing depletion of the ozone layer would have a concrete impact on all States and constitute a legal injury for all States parties to the multilateral treaty setting

\textsuperscript{12} Ibid.
\textsuperscript{13} Ibid.
\textsuperscript{14} See footnote 7 above.
\textsuperscript{15} Ibid.
forth the breached obligation. There again, there would be an infringement that was the same for all rights that were the same for all. At most there could be qualitatively or quantitatively different injuries. Even if all States were not exposed in the same way to the adverse impact of the depletion of the ozone layer, in no case could those differences be defined by distinguishing between “direct” and “less direct” or “indirect” injury. Once again, the concept of a non-directly injured State appeared to be logically untenable.

21. A further example would be the unlawful closing by coastal State A of a canal situated within its territorial waters and linking two areas of the high seas. Such an act would affect many interests, namely (a) those of any State whose ships had been on the point of entering the canal when the restriction had been put into effect; (b) those of any State whose ships had been sailing towards the canal in order to traverse it; and (c) those of all other States because, according to the law of the sea, all States were entitled to the free use of the canal. In that case, too, there were no “indirectly” injured or affected States. All States having the right to the free use of the canal were legally injured by the decision of State A. There would, of course, be differences between the three groups of States he had mentioned, but only in respect of the extent of the material, physical damage sustained or feared.

22. The conclusion thus seemed to be that the distinction between directly and indirectly injured States did not hold water. The examples cited indicated that the application of such a distinction would lead, in some cases, such as those of human rights, and, possibly, the global environment, to all States whose right had been infringed by a violation being considered as indirectly injured States and, in other cases, such as the violation of freedom of navigation or commission of aggression, to the improper presentation in terms of “directness” or “indirectness” of differences relating only to the nature or extent of the injury.

23. The only reasonable starting point for the substantive and instrumental consequences of a violation of erga omnes obligations, as well as the consequences of a violation of any other kind of international unilateral or multilateral obligation, thus appeared to be the characterization of each injured State’s position according to the quality and degree of the injury sustained.

24. However, the fact that the breach of erga omnes obligations resulted in the existence of a plurality of injuried States, combined with the fact that those States might not be injured in the same way or to the same degree, complicated the responsibility relationship. With regard to the substantive consequences of the breach, the question was whether, to what extent and under what conditions the States thus equally or unequally injured were all entitled to claim cessation, restitution in kind, pecuniary compensation, satisfaction and/or guarantees of non-repetition. With regard to the instrumental consequences, the question was whether, to what extent and under what conditions the various equally or unequally injured States could lawfully resort to sanctions or countermeasures. Until the present, those problems had been considered in connection with wrongful acts frequently labelled as “crimes”. They might well arise, however, also with regard to the consequences of more common wrongful acts usually referred to as “delicts”.

25. The problems could arise in two possible ways. One was that the relevant rules—erga omnes or more or less general rules—would envisage procedures for the monitoring and sanctioning of violations. However, the other was that such procedures might not exist or might not be exhaustive.

26. He believed that the particular problems raised by the violation of erga omnes obligations—wrongly presented in terms of a plurality of “indirectly” or “directly” injured States—called neither for amendments to the draft articles adopted or proposed so far nor for the adoption of ad hoc draft articles. Those problems, which were more correctly to be identified in terms of a plurality of equally or unequally injured States, called simply for a proper understanding and application of the general rules so far adopted or proposed. The only useful, and probably indispensable, ad hoc provision would be the addition of a new draft article 5 bis to article 5 as adopted on first reading and defining the “injured State”. The additional draft article would simply provide that, whenever an internationally wrongful act affected more than one injured State, each of those States was entitled to the rights and facultés laid down in the relevant articles.

27. In reply to a question by Mr. Crawford (2265th meeting), he recalled that he had submitted two reports on State responsibility to the Commission, in 1988 and 1989, each containing a set of articles which had been referred to the Drafting Committee. So far, the Committee had done nothing about them, despite his plea in 1991 (2238th meeting) that it should give the topic some consideration. The time that had elapsed since 1988 and 1989 could not but have an adverse effect on the preparation of draft articles in the sense that anything written or said on the subject then was now liable to be out of date or forgotten. He also wished to make it absolutely clear that, early in the year, he had been asked by the secretariat to be present in the Commission throughout the month of May, as Mr. Barboza would not be free before June and the Commission intended to devote most of the current session to the consideration of their two items. He therefore did not see why the Commission had chosen to deal with the item on the draft Code first. In his view, the consideration of his third report on State responsibility during the first three weeks of the session—even if that report did not contain any draft articles—would have enabled the Commission and the Drafting Committee to familiarize themselves with the topic and gain time by facilitating the discussion of the fourth report, especially for the Commission’s new members. The Special Rapporteurs and the members of the Drafting Committee would thus have been aware of the views of the members of the Commission on the question of countermeasures and a draft could have been prepared.

by the Drafting Committee by the end of the session. He therefore deeply regretted that the Commission had not deemed it appropriate to consider his third report earlier and that the draft articles referred to the Drafting Committee in 1988 and 1989 had not yet been dealt with by that Committee.

28. The CHAIRMAN said that he did not want to prolong the debate on organizational matters. He recalled that the Commission had decided to set up a working group on the question of the establishment of an international criminal court and that, in order to enable the Working Group to begin its work, it had been necessary to give priority to the consideration of that topic in plenary.

29. Mr. BENNOUNA said that the Special Rapporteur's third report on State responsibility was extremely detailed and full, but it could be criticized as not being sufficiently action-oriented. It was important not to lose sight of the objectives of the Commission, whose basic function was to consider draft articles with a view to the preparation of a draft convention. However, some parts of the report did not serve any purpose and did not lead to any specific conclusions.

30. With regard to countermeasures, his general view was that the Commission had to proceed very cautiously, with every possible guarantee, because that question related to the question of the limits of internal law and to the problem of the inequality of States. Above all, the Commission must be careful not to appear to be saying that might was right. It should also be borne in mind that the literature referred to by the Special Rapporteur was essentially Western, and more particularly European, and that the practice, which was that of the most powerful States, had been designed to suit their purposes and was therefore not necessarily to be taken into account. In order to codify that part of State responsibility and since there was little lex lata, it was necessary to rely on the major indisputable principles of international law, such as the prohibition of the use of force and the obligation to settle disputes by peaceful means. It was undeniable that no State could unilaterally apply sanctions that affected the entire world. A State could take measures only to defend itself and to defend its rights. That principle would have to be borne in mind when each draft article was considered in detail.

31. In the first part of the report, the Special Rapporteur reviewed a wide range of concepts and measures which were, in his own opinion, confusing. It would be preferable to use only the term "countermeasures", which was more neutral, for example, than the term "reprisals", which contained the idea of a breach of international law and a balance of power. Self-defence could be taken into account only in the context of the rules of the Charter of the United Nations or, in other words, as an exception to the general prohibition of the use of force in the event of armed attack—once again, so as not to appear to be saying that might was right. As to the concept of self-help, which was also mentioned in the report, he did not think it had any legal foundation whatever and served only to broaden the scope of the concept of self-defence. The term "sanctions" should, as the Special Rapporteur himself stated, be reserved for measures of a punitive nature adopted by an international body. With regard to retribution, he agreed with the Special Rapporteur that the concept should not find a place within the framework of a codification of State responsibility. The concept of reprisals should be rejected outright because reprisals were often associated in practice with the cold-blooded use of force; it would be better to use the term "countermeasures" which was more general in nature. The question of reciprocity should be considered together with the problem of proportionality. On the question of the suspension and termination of treaties, he said he was not convinced that the law of State responsibility went further than the law of treaties and he did not think it necessary to go beyond the framework of the Vienna Convention on the Law of Treaties, which codified international law in that regard.

32. As to that portion of the report dealing with the internationally wrongful act, he said that the existence of an internationally wrongful act, the precondition for the application of countermeasures, had to be established in an objective manner by an impartial third party. The belief of the injured State was not enough; several signs must point to the fact that a wrongful act had been committed.

33. The Special Rapporteur had been too subtle in his treatment of the question of the functions of measures and the aims pursued, which were dealt with later in the report. His own view was that the purpose of such measures was restitutive and compensatory and he was therefore not in favour of assigning them a punitive or afflicative function, for, in such a case, their use would be restricted to the handful of States which had the means to inflict punishment, and that once again gave rise to the problem of the inequality of States. However, the distinction was far from clear-cut because, once the measure had been taken, it was very difficult to tell the difference between compensation and punishment.

34. With regard to the issue of a prior claim for reparation, it was indisputable that the use of a countermeasure presupposed a prior claim of reparation. There had to be a protest or a claim for cessation or reparation on the part of the injured State, since that was the only way for it to safeguard its rights. Lex lata in that regard was clearly not satisfactory and improvements would therefore have to be made, more especially to ensure better protection of prospective weaker parties, as the Special Rapporteur had stated in the report.

35. As to the impact of dispute-settlement obligations, he agreed with the idea of working out adequate and appropriate settlement procedures based on the provisions of Article 33 of the Charter of the United Nations. Time-limits would have to be set in order to prevent the offending State from using delaying tactics to avoid such procedures and hold up countermeasures. The possibility could also be envisaged of the injured State adopting provisional measures with a view to protecting its rights.

36. Proportionality was clearly necessary, given the inequalities in the balance of power between States. The aim of the State which took the countermeasure should be to protect its rights and secure cessation and compensation for the damage suffered; and it was from that
standpoint that the requirement of proportionality should be viewed.

37. With respect to the suspension and termination of treaties, he had the impression that there was some confusion between the regime of suspension and termination, which, in his view, formed part of the law of treaties, and the consequences of a breach of a treaty, which came more within the scope of the law of responsibility. The Special Rapporteur might wish to examine the matter further. As to the issue of so-called self-contained regimes, it seemed obvious that priority should be given to those regimes before turning to general international law.

38. On the problem of differently injured States, he said that he agreed with the conclusion reached by the Special Rapporteur, namely that the position of "non-directly" affected States should be left to depend simply on the normal application of the general rules governing the consequences of internationally wrongful acts, in view of the fact that the peculiar features of the position of "non-directly" affected States might well be just a matter of degree. That was in fact self-evident, so that there was virtually no need for the preceding line of argument. Also, the concept of "injured State" could perhaps be brought closer to the concept of "interest in taking action".

39. With regard to substantive limitations issues, he wondered whether it would not have been better to start by setting forth the peremptory norms, not only because it was always necessary to proceed from the general to the particular, but also because those rules already contained the principles of the prohibition of force and respect for human rights and other humanitarian values; it was therefore unnecessary to develop those principles, other than by way of example, since it was believed, and in that he supported the Special Rapporteur, that established law should actually limit recourse to countermeasures. Care should also be taken not to give too broad a meaning to the concept of basic rights, since a State could not take countermeasures against individuals. As for the inviolability of specially protected persons, he agreed with the Special Rapporteur that there was a need to draw a distinction between their physical inviolability and the privileges and immunities they enjoyed.

40. The work carried out by successive Special Rapporteurs on State responsibility should make it possible for the Commission to forge ahead on that topic and start drafting some draft provisions. If the Commission really wanted to do a good job, that must be the focus of its efforts, since State responsibility was a basic element of international law that had yet to be codified. The time had come for the Commission to be more efficient in that area.

41. Mr. BOWETT said that, like the Special Rapporteur, he believed that the generic term "self-help" should be avoided. He also agreed that the concept of retribution had no place in a draft on State responsibility, since, in that case, the conduct complained of and the reaction to that conduct were lawful acts. Furthermore, he was very doubtful about the utility of the concept of reciprocity, for reciprocal measures were merely a form of countermeasures which, by their very nature, were proportionate and therefore did not constitute a separate category. Apart from those reservations, he endorsed the classification of the kinds of measures to be considered. With regard to the conditions for the legality of countermeasures—using that term in the broad sense—he considered that the prior existence of a wrongful act, was, of course, essential, but that, at the stage when the injured State was contemplating countermeasures, there was no objective determination that a wrongful act had been committed: there was only a bona fide belief on the part of the State resorting to the countermeasures. As for the second suggested precondition of a prior claim for reparation, he would agree to it in the sense that there must be a prior notification of the breach complained of by the injured State to the wrongdoing State, since the latter had the right to know what unlawful act it was alleged to have committed. The complaining State therefore had to identify the unlawful act and call for the cessation of the breach. It would, however, be unreasonable to expect the injured State at that stage, prior to any countermeasure, to specify the reparation it would demand. That kind of claim would come much later.

42. It seemed to him that the third precondition suggested, namely, prior fulfilment of any obligations relating to the peaceful settlement of disputes, could not be a precondition to the right to take legitimate measures of self-defence or even reprisals or countermeasures, since that would be to ignore the time factor. The obligations in that connection could embrace negotiation, conciliation, mediation, arbitration and judicial settlement—in a word, the whole range of methods of peaceful settlement to which the two States were committed. But the implementation of that kind of measure took time and it would be quite unreasonable to expect the injured State to refrain from taking countermeasures until all those obligations had been fulfilled. It seemed to him that any provision on the matter should rest on the concept that any right to take countermeasures must be suspended, first, when the breach had ceased, and, secondly, when the wrongdoing State had accepted and implemented bona fide a method for the peaceful settlement of disputes. That would, first of all, determine whether a wrongful act had been committed and, secondly, if so, what the appropriate reparation would be. Those two determinations would not necessarily result in a binding award, but they might well come out of conciliation or mediation or even direct negotiations between the parties.

43. With regard to the functions or aims of the various countermeasures and, in particular, of reprisals, he would like the Commission to remove a certain awkwardness. Reprisals, which should be designed to bring about the cessation of the unlawful conduct and a return to legality, had traditionally been conceived as a form of punishment or as a sanction for the wrong committed. It was his view that that concept of punitive reprisals should have no place in contemporary international law and that the Commission should rather place the emphasis, first, on the aim of bringing about the cessation of the unlawful act and a return to legality, had traditionally been conceived as a form of punishment or as a sanction for the wrong committed. It was his view that that concept of punitive reprisals should have no place in contemporary international law and that the Commission should rather place the emphasis, first, on the aim of bringing about the cessation of the unlawful act and, secondly, on recourse to an agreed mode for the settlement of the dispute. Any question of sanctions should emerge only as a consequence of the process of peaceful settlement, preferably in the form of a third party procedure, which would give it an impartial character.
44. The fourth precondition, proportionality, was essential provided that it was known to exactly what the measures were supposed to be proportionate. To make the countermeasures proportionate to the injury would be tantamount to making them punitive and they would then have to fit the offence. It followed from what he had said previously that the true measure of proportionality was that the countermeasures must be such as to bring about, first of all, the cessation of the wrongful act and, secondly, recourse to peaceful settlement.

45. As to the difficult question of differently injured States, an injured State could not be denied the right to take countermeasures simply because a State which was more directly or more seriously affected did not do likewise. In that connection, he proposed that two principles should be adopted: first, any State which took countermeasures should do so at its own risk, particularly if those measures were unreasonable, disproportionate and, ultimately, unlawful. Secondly, if the emphasis was placed on the cessation of the wrongful act and recourse to peaceful settlement, the wrongful act and the legitimacy of the countermeasures would be reviewed as part of the peaceful settlement procedure, preferably under a third-party procedure, and the legitimacy of the countermeasures would be judged by reference to the question whether the State which took those measures had been directly or indirectly affected and whether it had chosen to take those countermeasures even though States affected more directly or equally had refrained from so doing. The fact that a State had been the only State to take countermeasures might not be conclusive as to the illegality of those measures, but it would be strong evidence that they were unreasonable or disproportionate.

46. He saw no particular virtue in the concept of so-called self-contained regimes. There clearly were various regimes under which States undertook specific treaty obligations with regard to the mechanisms for the settlement of disputes arising under those treaties. Such mechanisms might, however, prove to be ineffective in affording the injured State an appropriate remedy or reparation. If so, the question whether those States could fall back on the general regime of countermeasures raised a question of treaty interpretation. In short, it would be necessary to determine whether the particular treaty involved a renunciation on the part of the parties to that treaty of the right to take countermeasures under general international law, assuming that the measures provided for under the treaty were inadequate. Since the answer would be different in each case, he saw no purpose in generalizing that into some concept of "self-contained regimes".

47. Mr. ROBINSON said it was regrettable that, after so many years spent on the topic of State responsibility, the Commission still did not have before it a set of draft articles which could form the basis for an international convention. He wished, however, to make a few general comments on the content of the third report.

48. The primary flaw of the report was its overly doctrinal approach; too much attention was paid to the views of authors and to legal literature in general, compared to the amount of consideration given to State practice, although there were more references to State practice in the fourth report. It was important, however, to acknowledge the fact that the Special Rapporteur had recognized explicitly that the Commission's approach should be based on an examination of State practice.

49. Two basic questions thus arose. First, why was it necessary for the Commission to examine and define State practice in that area? Secondly, in what manner was that practice to be determined?

50. On a preliminary basis and subject to more in-depth study, he noted that there did not seem to be an abundance of State practice or at least that it did not exist in a form that would make it easy to extract customary rules from it.

51. In reply to the first question, he believed that it was only in basing itself on State practice, as distinguished from the views of scholars, that the Commission could discharge its mandate of promoting the progressive development and codification of international law.

52. The reply to the second, and more important, question was that the determination of State practice from which customary rules could be derived called for a study not only of the conduct of States which had led to decisions of international courts or arbitral tribunals, but also of conduct which had not given rise to decisions of that kind. The determination of State practice should also include an analysis of the conduct of States at the multilateral level, within the United Nations, the General Assembly and the Security Council, within regional bodies and even at the bilateral level.

53. In view of the scarcity of State practice and the difficulty of deriving from it rules of customary international law, the Commission's task in that field would be limited essentially to the progressive development of the law in the form of draft articles which States would not necessarily be ready to accept. Consequently, the Commission had to take great pains to define the theoretical underpinnings of its work and try to reconcile the interests of all States, bearing in mind their differences in size, wealth, development, military strength, economic system and capital flow situation.

54. With regard to State practice as analysed by several writers referred to in the third report, he noted that the large majority of newly independent developing countries had not contributed to that practice or, more precisely, that sufficient account had not been taken of their conduct in determining the rules of customary international law. For example, in their positions on State responsibility for the protection of aliens, a number of scholars did not take account of the conduct reflected in the objections of many small States.

55. Referring to the limitations on reprisals derived from the prohibition on the use of force contained in Article 2, paragraph 4, of the Charter of the United Nations, he acknowledged that the international community had not yet achieved the degree of cohesion which a total ban on armed reprisals presupposed. However, the Commission must start from the premise that customary international law was reflected by that Article of the Charter, the sole general exception being self-defence, as
envisaged under Article 51. If it was the Commission’s intention to develop the law beyond the scope of those Articles so as to allow armed reprisals under special circumstances, it must, given the lack of clarity in State practice, try to ensure the best possible balance between militarily strong and militarily weak States, by a careful circumscription of all the relevant parameters.

56. In connection with the paragraph of the report in which the Special Rapporteur seemed to be hinting at a dichotomy between State practice and the norms prohibiting armed reprisals, as established by Article 2, paragraph 4, and Article 51 of the Charter, he had the following technical question: had the conduct of States which, in the past 30 or 40 years, had frequently resorted to armed reprisals under conditions apparently not envisaged by those Articles, not reached the stage where it might be qualified, in terms of article 31, paragraph 3 (b), of the Vienna Convention on the Law of Treaties, as “subsequent practice in the application” of those Articles which ought to be taken into account in interpreting those provisions? If so, the Commission would then have to react in an appropriate manner to that disharmony between practice and norms.

57. Mr. BARBOZA said that, before commenting at the appropriate time on the fourth report (A/CN.4/444 and Add.1-3), as viewed in the light of the third report (A/CN.4/440 and Add.1), he wished to point out that the Commission had already considered some excellent reports that did not propose draft articles and would probably not do so again. It was certainly not wasting its time in considering such reports; quite the contrary, as demonstrated by the current debate on the third report.

58. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the purpose of the third report was not so much to cite practice as to draw attention to the questions which had been raised and to which he had replied in his fourth report by making an analysis of practice, which was, in fact, relatively extensive. Moreover, a special rapporteur who had to submit a report at each session did not always have time to polish or shorten it. The members of the Commission should bear that in mind and, if they found the third report too theoretical, they should concentrate precisely on the merits of the concepts it dealt with. He did not see why he should not have submitted the third report: it was his responsibility to draw the attention of his colleagues to the questions that he had has to answer. Anyway, the richness of the debate was ample proof that his purpose of provoking comments had been and was still being achieved.

59. According to Mr. Bennouna, he had not taken sufficient account of the doctrine of the third world countries. It was true that he had based his study of the topic principally on Italian doctrine. However, Italy offered ample opportunity for the study of international law, especially since Italian scholars, more than others, generally based their works on the literature published in all the easily accessible languages. Thus, in referring to an Italian author, especially a contemporary Italian author, he was certain that that author had studied the doctrine in a very thorough way. None the less, he would in future try to take more direct account of the doctrine of the developing countries. Also, the fact that the doctrine of the Western countries was referred to more frequently than that of the former communist countries was the result of language considerations. In his fourth report, he had given examples which had been taken from cases involving Pakistan and India, the Libyan Arab Jamahiriya and the United Kingdom of Great Britain and Northern Ireland, Ghana and France, Ghana and Guinea, Côte d’Ivoire and Guinea, and Mexico and Spain; that clearly showed that he had not limited himself to the practice of Western countries. Italian doctrine was, moreover, characterized by a very high degree of objectivity. In his reports, as well as in his statements, he had referred on more than one occasion to internationally wrongful acts committed by his country, rather than to those committed by other States. In any event, he had never sought to give greater weight to the doctrine of the powerful or wealthy countries. In fact, he believed that the law of State responsibility should be progressively developed in such a way as to serve the interests of the weaker and less privileged countries. It was precisely with a view to protecting the interests of such countries that he had stressed the need to develop procedures for the peaceful settlement of disputes, although that had certainly not been the Commission’s idea when he had initially joined it, and he still expected to meet with resistance in that respect, within the Commission and elsewhere, in the name of the deleterious idol of the sovereignty of States.

60. In his third report and in his introduction at the preceding session, he had indicated that the new international order was a rather vague, and even debatable, concept, especially in view of the lack of adequate guarantees of objectivity and impartiality. He had noted, for example, that the Western powers that had been involved in the Gulf war should not have referred to it as a war and should not have celebrated a victory at the end of the operation, as they had done: they ought rather to have referred to “measures” and to have expressed their satisfaction at having served the interests of the international community by taking the necessary measures against an aggressor. The only conceivable way to reduce the danger of distortions in the otherwise indispensable enforcement of the rule of law in inter-State relations was precisely an adequate development of judicial control of international action.

61. In respect of Mr. Bennouna’s comments, he noted that, as indicated in his introductory statements at the preceding and current sessions, the glossary at the beginning of the third report was intended simply to clarify his position with regard to terminology and, in particular, with regard to countermeasures. He did not share Mr. Bennouna’s view that “countermeasures” was a useful and clear concept. Even self-defence was a countermeasure, whence the confusion between countermeasures, reprisals and self-defence which was discussed in the fourth report. The extension of the idea of self-defence, to which Mr. Robinson had alluded was one thing; the issue of determining to what extent such an extension was lawful was another. He was not sure whether the gaps in the Charter of the United Nations with respect to the system of collective security (Art. 42 et seq.) were adequate justification for broadening the concept of self-defence, as it was defined in Article 51. He would not readily answer that question in the af-
firmative. In any event, if the concept of countermeasures against an internationally wrongful act was retained, in which case the concept would be closer to reprisals, it might then be possible to make a distinction between the issue of self-defence and the condemnation of armed reprisals.

62. With regard to Mr. Robinson's question whether the prohibition of the use of force had been influenced in a restrictive sense by State practice, he recalled that, in his oral introduction at the 2265th meeting and in his fourth report, he had stated that, in his view, such was not the case, at least with regard to the prohibition of force by way of reprisal and countermeasure against an internationally wrongful act. He had referred to several cases in which the Security Council had not agreed to consider particular military actions as self-defence.

63. As regarded the other remarks by Mr. Robinson, which he feared he had perhaps not understood completely, he could only refer Mr. Robinson to the announcement made in his third report that the practice of States would be dealt with in the fourth report. Mr. Robinson could perhaps express his views on the impact of practice as soon as the debate began on the fourth report. He would then be able to note that he (the Special Rapporteur) had already fully agreed with the Commission's task with regard to the regime of countermeasures would be mainly a matter of progressive development; and that, precisely with a view to reducing the disadvantage of the weak and less developed States.

64. He was not sure what had led Mr. Bennouna to express regret that the issues raised in the third report had not given rise to any specific conclusions, especially since he had emphasized that, on every issue under consideration, further thought was necessary.

65. He agreed that the principle of proportionality served as a counterbalance to the use of force, and acknowledged, of course, that certain obligations, such as the non-use of force and respect for human rights, were included in the category of *jus cogens*. He nevertheless considered that those obligations should be spelled out, for, while States often invoked *jus cogens*, they were far from agreeing on the exact scope of that category of rules.

66. Mr. KOROMA said that one of the problems with the third report was that it seemed to raise questions that had already been settled, such as that of armed reprisals, which was not open to further discussion: under the provisions of the Charter of the United Nations, reprisals were quite simply prohibited.

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whether the Commission was the body to bring about change in that situation.

2. As far as terminology was concerned, the notion of countermeasures was preferable to that of reprisals. It should be clear from the third report (A/CN.4/440 and Add.1) that measures of retortion were not included. When it resorted to retortion, a State behaved in a manner that was in itself perfectly lawful and required no additional justification. He therefore agreed with the Special Rapporteur that the notion of countermeasures was identical to that of reprisals, although the latter term had connotations of retribution. In strictly legal terms, he could see no difference between the two. However, in view of current political realities, the term "countermeasures" would seem to be better.

3. The only possible difference between delicts and international crimes would seem to be in the field of countermeasures. For that reason, the two categories should have been dealt with together; the Special Rapporteur had himself acknowledged that there was no clear dividing line between them. His own impression was that the third report did address the question of international crimes. Armed aggression, in particular, was a crime under article 19 of part I of the draft\(^4\) as well as under the draft Code of Crimes against the Peace and Security of Mankind. The report dealt with the primary response to armed attack, namely the right of the victim State to defend itself, and it seemed to him that to separate international crimes from the regime currently under consideration would be highly artificial. It should be avoided in drafting the relevant articles.

4. He fully agreed with the view that reciprocal measures did not deserve specific treatment. There was no valid reason for subjecting reciprocal measures to a regime which derogated from the general regime of countermeasures. A more difficult question lay in breaches of a treaty. Such a breach came within the purview of the work on State responsibility and also within the scope of the Vienna Convention on the Law of Treaties. Under the Vienna rules, procedural requirements must be complied with before a treaty was suspended or terminated. He assumed that, with regard to State responsibility, the Vienna rules would be lege speciales. None the less, it might seem odd that countermeasures could in general be adopted relatively freely, whereas simple suspension of a treaty required a complex procedure which States might consider unduly cumbersome for practical purposes. In any case, it would be useful for the Commission to acquaint itself more closely with the real impact of the relevant articles of the Vienna Convention on the Law of Treaties.

5. Any suggestion that countermeasures were generally of a punitive nature should be dismissed: concepts from the past should not be allowed to overshadow the present deliberations. Violations of the rules of international law, most of which were simply due to negligence, were a daily occurrence. In relationships between actors, each of whom had the same standing as a sovereign State, no one actor could pose as a "judge" who punished any alleged wrongdoer. The position might be different in the case of international crimes where fundamental interests of the international community were at stake, but even then, pompous terminology should be avoided. In the first place, in the absence of centralized institutions, one was usually confronted with allegations. Secondly, the international community should normally be satisfied if it merely succeeded in securing cessation and reparation. In the majority of cases, violations of international law had no factual consequences whatsoever. The main point was that countermeasures were an enforcement device applied by one State to the detriment of another and it was inappropriate to qualify, in criminal law terms, such relationships between two entities, having the same legal standing under international law.

6. One issue that called for closer examination was the proper function of countermeasures. They should be confined to provisional measures of protection, conceived as a device to enforce compliance with the primary obligation breached by the wrongdoer. If the wrongdoer then met its commitments, the action taken by way of countermeasures must, in his view, be stopped or reversed. The alternative view was that, by resorting to countermeasures, a State could obtain satisfaction for its claims. Supposing, for instance, that State A had a $10 million claim against State B, and that State B did not repay the debt, although it had the means to do so, and supposing, further, that State A then nationalized part of the property of State B in order to satisfy its claim, what would the position be if State B honoured the commitment it had failed to comply with earlier? A clear rule was needed to cover that point.

7. The question whether the wrongdoer should be given some warning also required an answer. Any allegation that a wrongful act had been committed must be brought to the notice of the defendant and the charges of the wrongdoing substantiated; otherwise anarchy would reign. The benefits of modern communications systems would obviate the likelihood of excessive delay should a requirement be imposed that formal notice be given to the alleged author State.

8. The most difficult question concerned the legal relevance to be attributed to dispute-settlement procedures, in which connection it was necessary to proceed from a number of firm propositions. In the first place, the legal regime to be established should not operate to the benefit of the wrongdoing State. Equality between the parties must be respected; if not, the rules to be drafted would rightly be criticized for lack of balance. Secondly, where there were no institutionally guaranteed interim methods of protection, general methods of dispute settlement should not debar the victim from protecting its rights by countermeasures. States could always negotiate, but diplomatic negotiations did not provide for that additional element of objective assessment which was necessary to ensure that the law was observed. He even had doubts about the possible referral of such matters to ICJ, since it might take too long to secure an order from the Court under Article 41 of its Statute. It was clear, however, that the Court of Justice of the European Community had unfettered discretion to issue binding injunctions, and for that reason alone resort to unilateral countermeasures would not be warranted.

\(^4\) For text, see Yearbook ... 1980, vol. II (Part Two), p. 32.
9. As for self-contained regimes, he agreed that the lawfulness of countermeasures depended basically on a correct interpretation of the conventional system concerned. States were free to renounce their right to take countermeasures: the regime of countermeasures did not belong to the realm of *jus cogens*. In that connection, a doctoral thesis by a student of his had concluded that, when all the relevant treaty mechanisms failed, general international law reappeared. So far as regimes based on customary rules were concerned, the question was whether some or all of the rules on which such a regime was based were of *jus cogens* character, so that there could be no derogation from them.

10. While he concurred that countermeasures should not violate human rights, only the basic human rights were relevant in that regard. Thus, life and physical integrity should not be the target of countermeasures, but if the freedom of movement of the citizens of one State was curtailed, restrictions on the freedom of movement of the nationals of the other State might be perfectly lawful. He looked forward to receiving the relevant draft articles, in which regard Additional Protocol I to the Geneva Conventions of 1949 might provide guidance.

11. Mr. VILLAGRAN KRAMER, congratulating the Special Rapporteur on an outstanding doctrinal study, said that the Commission's discussion would undoubtedly benefit from the fact that some members had already been able to take note of the report, and to analyse the legal and political concepts it advanced, in their capacity as Government representatives in other bodies.

12. In considering the question of a regime of sanctions, a distinction had to be drawn between vertical and horizontal sanctions—a distinction that was particularly appropriate in the case of international organizations.

13. The term "countermeasures", which had been used by ICI in, *inter alia*, the case concerning *Nicaragua v. United States of America*, could now be regarded as having been generally accepted.

14. While both the third and fourth reports contained a wealth of bibliographical material, the actual jurisprudence on which it was possible to rely was limited to a very few cases, such as *Portugal v. Germany*, the *Air Service Agreement award* and the case concerning *Nicaragua v. United States of America*. That was somewhat unfortunate inasmuch as it was the Commission's task to develop a broad-ranging system for the regulation of reprisals and other similar countermeasures. The doctrine referred to in the report was of high quality, yet it was a pity that of some 70 authors cited by the Special Rapporteur, only 3 wrote in Spanish.

15. It was important to draw a distinction between measures which could be regulated with a view to avoiding abuse, and measures which should be prohibited outright. Given the high degree of decentralization that now obtained, it was not possible to get a very clear overall picture. Reference to the portion of the report which dealt with reprisals, however, made it easier to grasp what Scelle had termed the "double function" concept, in the sense that certain unilateral acts were carried out by the State on behalf of the international community. That might be the area in which it was most advisable to stress to what extent unilateral action by the State was admissible under international law, to what extent the exercise of such a right, if indeed it existed, should be limited, and to what extent it should be completely prohibited.

16. As noted by the Special Rapporteur, economic reparation, or pressure, was prohibited within the framework of certain autonomous regional systems, as, for instance, under article 18 of the Charter of the Organization of American States. If the use of such pressure could be limited or prohibited regionally, there was no reason why the Commission should not apply on a larger scale what already existed on a small scale and endeavour to define the acceptable limits of economic reparation.

17. There was also an obligation to try to solve a dispute in the initial stages, something that was in keeping not only with Article 33 of the Charter of the United Nations but also with most regional systems, whose members were under an obligation to exhaust all available means for the peaceful settlement of disputes before taking any step that might involve the violation of a rule of international law. As noted in the Special Rapporteur's third report, as far back as 1934, the International Law Institute had stressed the importance of exhausting all available means for the peaceful settlement of disputes before resorting to unilateral punitive measures. In particular, it stated that, where machinery existed for the

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6 See 2261st meeting, footnote 6.
8 *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, ibid., vol. XVIII (Sales No. E.F.80.V.7), p. 417.
settlement of disputes, there could be no justification for resorting to reprisals. In other words, a State which was about to take a countermeasure was under an obligation to examine all the instruments to which it was a party, so as to determine whether there was any procedure for the settlement of disputes; if a procedure did exist, there could be no possible justification for reprisals.

18. He agreed about the importance of the prohibition on the use of force as laid down in Article 2, paragraph 4, of the Charter of the United Nations. Also, the approach adopted in the Definition of Aggression with regard to the use of force was fairly clear: the first party to resort to the use of force generated a situation that gave rise to legal consequences. Although that party could be qualified as an aggressor, two conditions had to be met, namely, there had to be a state of necessity and it must be a case of self-defence. It was clear from the debate which had led to the adoption of the Definition of Aggression that the General Assembly had been concerned to ensure that the use of force was illegal and that the safeguards were those laid down in the Charter of the United Nations and under international law in general. It was worth noting in that connection, that the American States had taken the Definition of Aggression as a basis and had modified accordingly the Inter-American Treaty for Reciprocal Assistance, concerning military and security matters, which covered the entire region, including the United States of America. An entire group of States thus regarded the initial use of force as illegal.

19. Where human rights were concerned, reprisals could not be justified, particularly since the Commission was currently engaged in exploring the possibility of making serious human rights violations committed by government officials a crime under international law, triable by an international criminal court. Some appropriate system of sanctions should therefore be introduced to punish those who committed such violations. Nor did human rights violations committed by a State justify unilateral action by other States, particularly since machinery was being introduced with a view to solving that particular problem. For instance, a system of sanctions had been established within the Council of Europe whereby any State that consistently violated human rights could be excluded from the Council. That, and other options of the same kind, should be studied further.

20. Proportionality was, of course, a sine qua non in the case of countermeasures and, as was apparent from the case involving France and the United States of America, it could serve as a useful tool. It was therefore a matter of concern that the principle of proportionality was often lacking in the action taken by some countries in response to violations of their rights or to unlawful acts. In the Middle East, for instance, and in Lebanon in particular, there had been a string of reprisals for 20 years, yet there were no modalities for determining whether or not the principle of proportionality had been observed. It might be advisable to incorporate in the draft some further indicators in that connection.

21. So far as suspension of treaties was concerned, article 60 of the Vienna Convention on the Law of Treaties certainly offered the best solution. It should be made clear that termination of a treaty as a result of serious acts did not necessarily go hand in hand with suspension of a treaty for less serious acts. The restrictions imposed on the freedom of movement of diplomatic agents by some States in reaction to the behaviour of other States was, in his view, admissible in international practice.

22. Lastly, proposed draft article 11 did not lay down any prohibition on the use of force. He would like the Special Rapporteur to give further thought to that matter.

23. Mr. MIKULKA said that the Special Rapporteur had asked the Commission to reflect on the question of secondary obligations or "instrumental" consequences arising from an internationally wrongful act and had provided a useful classification of the various categories of countermeasures. The central issue was the notion of reprisals, a classical concept which had undergone a fundamental change as a result of the emergence in international law of the prohibition on the use of force, that had acquired the status of a peremptory rule under Article 2, paragraph 4, of the Charter of the United Nations. In the last few decades the term "reprisals" had acquired a pejorative connotation. In drafting article 30 of the articles on State responsibility, the Commission had opted for a more neutral notion, namely countermeasures, which covered all the various measures an injured State might legitimately take against a State committing a wrongful act. Nevertheless, like the Special Rapporteur, he would not have any objection to retaining the term "reprisals" as an equivalent of the term "countermeasures".

24. He also agreed with the Special Rapporteur that measures of retortion should not be placed on the same level as reprisals, since they constituted lict, albeit unfriendly, actions, recourse to which was admissible even in situations in which no internationally wrongful act had been committed by the State against which the measures of retortion were applied.

25. Reciprocal measures could not be considered as a distinct category of countermeasures; they should be regarded as a specific form of reprisals. The distinguishing feature of such measures lay in the fact that their application—unlike that of other forms of reprisal—might either be intended to secure cessation of the wrongful act and compliance with the secondary obligation of reparation, in the broader sense of the term, or result in an alteration of the primary obligation between the States concerned leading to a standard different from the original obligation. The difficulty lay in drawing a line between the essentially "restitutive" objective, on the one hand, and the "derogative" objective of reciprocity on the other.

26. The suspension and termination of treaties as a measure of response to a State's unlawful conduct was sufficiently regulated by treaty law and could thus be left to the periphery of the Commission's consideration.
27. The Special Rapporteur had, on a number of occasions, indicated that the Commission should address the question of both the substantive and the "instrumental" consequences of an internationally wrongful act in the context of delicts, leaving to a later stage the question of consequences of international crimes. That had not deterred him, however, from referring in his report, to the concept of self-defence, which represented an individual or collective response to armed aggression. Actually, that question should be taken up when the Commission examined the substantive consequences of international crimes, since the issue of self-defence only arose in connection with violations of the prohibition on the use of force, which was a peremptory rule of international law (*jus cogens*). Moreover, there was a close relationship between the right to self-defence and other "instrumental measures" provided under the Charter of the United Nations as a response to acts which jeopardized international peace and security.

28. Although the notion of "sanctions" was used in doctrine and practice with different meanings, the Commission should use it to designate measures adopted by an international body in response to an internationally wrongful act which was harmful to the international community and, more specifically, for the measures set out in Chapter VII of the Charter.

29. The fact that an internationally wrongful act had objectively occurred was an indispensable prerequisite for a lawful resort to countermeasures—an exercise in which subjective considerations should play no part. The function of countermeasures adopted by way of reaction to delicts was to ensure cessation of the wrongful act and to provide reparation, not to mete out punishment.

30. The resort to reprisals should be conditional upon prior specification by the injured State of the conduct it considered wrongful, and an unsuccessful request for cessation and reparation. Proportionality was the prerequisite, if countermeasures were to be legitimate. The obligation of exhaustion of available dispute-settlement procedures should be considered with great care, since extremely complex situations might arise in connection with continuing wrongful acts where injured States should not be exposed to endless litigation while the wrongful act continued. The first priority should, in all cases, be cessation of the wrongful act.

31. Mr. SHI said that the aspects of the topic of State responsibility the Special Rapporteur had chosen to refer to as "instrumental consequences" were particularly difficult and controversial, and therefore called for considerable caution, as a number of members had already pointed out. There was a general reluctance on the part of States to countenance any form of world government, and it was therefore not surprising that they did not envisage an international law-enforcement organ. In the circumstances, a State injured by the internationally wrongful act of another State was understandably tempted to obtain redress by taking the law into its own hands. However, the various measures discussed by the Special Rapporteur in his third report reflected more than a century of State practice, and the problem facing the Commission was to determine whether such practice should be regarded as beyond dispute and suitable for codification.

32. In the introduction to his third report the Special Rapporteur had acknowledged the gap between the formal equality of States in law and the factual inequalities which tempted stronger States to impose their authority over their weaker counterparts, despite the principle of sovereign equality. That was particularly true of measures of self-help, a term which the Special Rapporteur advised the Commission to do away with. Personally, he agreed with that view, just as he could as readily do away with the term "compulsory means short of war". At the same time, a mere change in nomenclature could not change the substance of the problem. As the Special Rapporteur had candidly pointed out, in the absence of adequate third-party settlement commitments powerful or rich countries could the more easily have the advantage when it came to taking reprisals or countermeasures: the Special Rapporteur's approach simply reflected State practice in that regard. Experience also showed that "injured" States which took countermeasures were often themselves the wrongdoing States, and the States alleged to be in breach of their international obligations were themselves the victims of injustice. In fact, reprisals or countermeasures were often the prerogative of the more powerful State. Indeed, the impropriety of the concept of reprisals or countermeasures under general international law was itself mostly the outcome of the relationship between powerful States and weak and small countries which were unable to assert their rights under international law. For that reason, many small States regarded the concept of reprisals or countermeasures as synonymous with aggression or intervention, whether armed or unarmed.

33. The Special Rapporteur had reminded the Commission of its task to devise ways and means which, by way of the best of *lex lata* or careful progressive development, could alleviate the impact of the great inequality that was apparent among States in the exercise of their *faculté* to apply countermeasures, which was such a major source of concern. The problems which the Commission faced in that respect were difficult to resolve. For example, while there could be no doubt as to the necessity for the actual existence of an internationally wrongful act as a precondition for resort to countermeasures, it was far from clear who was to make such a determination. If it was to be determined unilaterally by the State intending to apply countermeasures, that would certainly be to the advantage of the more powerful States. If it was to be decided by a third party, why should there be any need for countermeasures at all? Why should the process of third-party settlement not be triggered instead?

34. Even if the Commission could arrive at a strict regime of conditional countermeasures, such a regime would be in the interest of powerful States, to the disadvantage or even the detriment of weaker or smaller States. The factual inequality rightly noted by the Special Rapporteur made it inconceivable that a weak State might effectively and in good faith take countermeasures against a powerful State in order to secure the fulfilment of obligations following an internationally wrongful act committed by that powerful State. Out of the wealth of available examples, two were particularly striking and
would suffice. Reference was made in the report to the discriminatory so-called Chinese Exclusion Act of 1888\(^{14}\) and the violation of the Immigration Treaty of 1880 between China and the United States of America.\(^{15}\) As the Special Rapporteur noted, the then Imperial Government of China had on that occasion suspended performance of its treaty obligations towards the United States of America. But had that countermeasure been of any avail? The fact was that, despite the Chinese measure, the Act had remained in force for many years and had been repealed only after the end of the Second World War, the repeal being completely unrelated to the measure taken by the Chinese Government. The other example concerned the year 1840, when the Chinese Government had lawfully prohibited the opium trade along the Chinese coast and had burnt in the open the opium stocks of British traders in Canton. The British Government had promptly reacted by sending troops on a punitive expedition to China. As a result of the action, the British had occupied Hong Kong and, \textit{inter alia}, had made China pay a large sum in compensation; and the opium trade along the coast and on the mainland of China had continued and flourished as before. Those examples amply demonstrated what disparity of power could mean in any regime of countermeasures. On the other hand, no regime of countermeasures, however strict or conditional, could in any way restrain abuse by powerful States, which—when determined to take such measures—readily found justifications for their action.

35. With the exception of Article 51, on self-defence in response to armed attack, it could hardly be said that the Charter of the United Nations authorized the use of countermeasures. Indeed, Article 2, paragraph 4, prohibited the use of force in international relations, and the term "force" could not, in that context, be interpreted to mean armed force alone. The Charter also imposed obligations of peaceful settlement of disputes on Member States, and many General Assembly resolutions provided for non-intervention in both the external and the internal affairs of States. It might well be asked whether countermeasures or reprisals, particularly as resorted to by powerful States against weaker and smaller States, were permissible under the Charter of the United Nations or with modern international law. To argue that there might be discrepancies between the Charter and the rules of general international law was tantamount to saying that what was not permitted under the Charter could be permitted under general international law. In that case, either the Charter should be amended or the relevant rules of general international law should be transferred overboard. Members of the United Nations would do well to remember Article 103 of the Charter, which provided that, in the event of such a conflict, their obligations under the Charter were to prevail.

36. It was his conviction that reprisals or countermeasures, either as \textit{lex lata} or \textit{lex ferenda}, had no place in the draft articles of part 2 of the topic of State responsibility, for the simple reason that the concept was a remnant of traditional international law which, in the light of the Charter of the United Nations and modern international law, was so uncertain and controversial that it was not suitable for codification or progressive development at the present time. The inclusion of articles on countermeasures in the draft on State responsibility, even if qualified by strict conditions, would mean, to weak or small States, the legitimation or legalization of an uncertain and controversial concept whose incorporation in the modern law of State responsibility would in no way benefit international relations. Nor would powerful States accept a regime of countermeasures that would so tie their hands as to hinder them in playing their role as guardians of the law. The Commission should decide to leave aside the concept of countermeasures and request the Special Rapporteur to concentrate instead on settlement of disputes. At the least, the Commission should ask the General Assembly for guidance and, until such guidance was forthcoming, refrain from drafting any articles on countermeasures.

37. Mr. CRAWFORD said that, while he agreed with Mr. Shi that the Commission was facing a dilemma, he doubted whether refusal to grapple with the issue was the appropriate response. In his view, the Commission was called on to try and devise a regime of countermeasures representing a suitable balance of the various interests involved. The radical course advocated by Mr. Shi amounted to abolishing countermeasures as a part of the law relating to the consequences of wrongful acts and, for that reason, was likely to make the draft as a whole unacceptable to States, whose conduct might, in consequence, be called into question. One alternative would be to say that the draft was without prejudice to any question of countermeasures, thus appearing not to abolish countermeasures but, rather, to leave them aside. However, sidestepping the issue in such a way would leave the door open to subjective exercise of the very powers whose use in former times Mr. Shi so vigorously criticized. His own comments represented, of course, only an initial reaction to the statement the Commission had just heard; a more considered response would have to await the Special Rapporteur's future proposals.

38. The Special Rapporteur had invited comments on the difficult and important problem of differently injured States. Although the report intimated some criticism of the definition of "injured State" contained in article 5 of part 2,\(^{10}\) that article had to be assumed to form part of the draft as it stood at present. Two separate categories of problems appeared to arise in connection with the question of differently injured States. The first related to the balance between reactions by various injured States in a situation where there was more than one such State under the terms of article 5. Assuming that no coordinated, collective ("horizontal") action was undertaken by those States, it was likely that each injured State would be predominantly concerned with its own relationship with the State which had committed the wrongful act. Taken alone, that conduct might seem reasonable. But what if, collectively, the conduct of all the injured States amounted to a disproportionate response? A provision to

\(^{14}\) See 2266th meeting, footnote 11.

the effect that each State should respond with due regard to the responses of other injured States would, in his view, be too vague.

39. The second and more serious category of difficulties lay in the fact that, although all injured States were equal within the meaning of article 5, one or several States would, in some situations, suffer unquestionably more damage than others. For example, State A might engage in repressive discriminatory conduct against nationals of State B contrary to the anti-discrimination provisions of human rights instruments such as the International Covenant on Civil and Political Rights. Under article 5 of part 2 of the draft, every State party to the International Covenant would be an injured State, but there could be no doubt that State B would be damaged to a significantly greater degree than others. What would be the implications of such a situation? The approach whereby no priority whatever was given to State B would give rise to some problems. Any State could, of course, call for restitution in kind, but it might well happen that State B, after engaging in lengthy diplomatic exchanges with State A, decided not to insist on restitution in kind and, instead, to accept some other form of reparation. Were other States that were injured States under article 5 to be allowed in such a case to insist upon restitution in kind? Could what might be described as a less injured State reopen the issue at will, and, if so, when, if ever, would the international dispute arising from the action of State A be definitively settled? If the test of restitution in kind was that of balance between the burden on the wrongdoing State and the benefit to the injured State, an injured State which had not suffered direct damage would have a right to demand restitution in kind because it could not obtain reparation. If, however, the test were to be, as the Special Rapporteur himself suggested, that of balance between the burden on the wrongdoer and the injury to the injured State, the problem would not arise because the injury to the State which, although injured under the terms of article 5, had not suffered any direct damage, would be relatively trivial compared with that to the directly damaged State. His own view was that, if the directly damaged State could not obtain restitution in kind, no State should be able to demand it. However, no rule to that effect was to be found in the draft. Extremely careful drafting by the Drafting Committee would be called for in that respect; an appropriate provision could perhaps be incorporated into the principle of proportionality within the context of countermeasures.

40. Mr. PAMBOU-TCHIVOUNDA remarked that a countermeasure was a negative response by a State to an allegedly negative action attributable to another State. When, however, the object of the countermeasure was to replace the negative consequence of the negative action by a positive one, the countermeasure could be viewed as a positive response. Thus, the nature and quality of the countermeasure applied had to be taken into consideration in all circumstances. The whole concept of countermeasures could perhaps have been defined more precisely in the third report. Any attempt at codification in the field of countermeasures had to proceed, at least implicitly, on the assumption that countermeasures were acceptable under international law. That was clearly suggested by the copious references to case law in the footnotes to the report, from which it appeared that, in the present state of affairs at least, resort to countermeasures was an inherent faculty of sovereign States. The question arose, however, whether countermeasures remained acceptable within the framework of integrated structures freely entered into by sovereign States. Should the codification of the regime of countermeasures merely endorse the existing case law, or should it endeavour to go beyond it?

41. In his view, any regime of countermeasures should at least base itself upon the case law referred to in the third report.

42. As to that portion of the third report dealing with an internationally wrongful act as a precondition, he doubted whether such an act was the condition for resorting to countermeasures. The proof needed to justify a countermeasure concerned less the internationally wrongful act itself than the damage caused by that act. The requirement of a real and direct damage would have three advantages: it would eliminate abuses in resorting to countermeasures; it would restrict the number of States that could claim the right to resort to such measures; and it would reduce the inherent risk of a subjective evaluation of damage that triggered resort to countermeasures. The regime that the Commission was seeking to create must provide for a prior establishment of damage as the precondition for countermeasures, something which in turn would serve as the basis for a prior claim for reparation, dispute-settlement obligations and proportionality. He would point out that proportionality depended on the degree of damage, and its assessment also depended upon whether the damage was material or moral.

43. It was to be hoped that the regime of countermeasures would contain one or more provisions on its compatibility with pre-existing mechanisms in domestic law, particularly legislative mechanisms, or one or more provisions making it impossible for States to express reservations about the regime.

44. Mr. FOMBA said that the Special Rapporteur's report displayed his mastery of a subject that was both important and difficult. Recently, France and a number of African countries had undertaken numerous, illegal expulsions of Malian nationals. Clearly, a weak State such as Mali could do nothing against the illegal acts of a powerful State like France. That example showed the political nature of the problem of countermeasures and underlined the need to undertake codification and progressive development of the response to "ordinary" internationally wrongful acts which took more account of the position of weak States. That way, the future legal regime of countermeasures would take on its full importance as a shield against abuses by powerful States.

45. In the matter of terminology, he was in favour of employing the more neutral and generic term "countermeasure". To confer a legal character on a countermeasure, an internationally wrongful act had first to have taken place. With regard to the function of countermeasures, it was difficult to distinguish clearly between the compensatory and the punitive aspects. Emphasis should be placed upon the prior demands for cessation and/or reparation. As to dispute-settlement obligations, the in-
46. The essential problem of proportionality must be formulated more precisely and an effort must be made to define clear criteria for its application. In respect of the suspension and termination of treaties, he was in favour of confirming the regime of article 60 of the 1969 Vienna Convention on the Law of Treaties but it was also necessary, from a broader standpoint, to envisage the suspension of the performance of certain obligations deriving from multilateral treaties and *jus cogens*. The issue of so-called self-contained regimes was a political phenomenon that should be dealt with separately.

47. The problem of differently injured States should not be the subject of a special article, because in reality the issue was to determine which State had a legal interest in taking action. As to substantive limitations, clearly the first rule should be respect for peremptory rules and *erga omnes* obligations or other rules deriving therefrom: the unlawfulness of resort to force, respect for human rights, and the inviolability of diplomatic and consular envoys. With regard to the resort to force, the legal scope of Article 2, paragraph 4, of the Charter of the United Nations was clear, indisputable and absolute, and there could be no question of maintaining that certain forms of unilateral resort to force had survived and must be taken into consideration. A more coherent regime of countermeasures must, however, be set up and efforts towards the progressive development of law must be intensified, albeit cautiously. For example, it might be worth considering to what extent the concept of force should be expanded to include economic coercion. On the question of the inviolability of diplomatic and consular agents, inasmuch as the distinction made by the Special Rapporteur had raised doubts, he was in favour of having States retain positive diplomatic and consular rights. As to respect for human rights, the Commission might try to agree on the relative scope of the global concept of "basic human rights".

48. In order to carry out its task in the progressive development of law, the Commission must prevent abuses in the matter of countermeasures yet make them sufficiently effective to guarantee cessation and reparation. To that end, a procedure must be developed for the settlement of disputes, in particular when a third party was involved.

49. In closing, he wished to express his support, by and large, for the views expressed by Mr. Bennouna (2266th meeting) and Mr. Jacovides (2265th meeting).

50. Mr. ARANGO-RIJUZ (Special Rapporteur) said that he would respond to the remarks on his third report in greater detail when he came to introduce his fourth report.

51. The question of the lack of articles had been raised again, but he would point out that articles were difficult to draft as long as doubts persisted as to their content. The fourth report attempted to draft an article on that difficult problem, and he hoped to be able to improve on it by the time he introduced that report. He was precisely awaiting constructive comments from the members of the Commission.

52. It was surprising that in one of the statements earlier in the meeting, a member of the Commission had introduced a new concept of an internationally wrongful act, although the term had appeared in the 35 draft articles already adopted.

53. Regarding Mr. Shi's suggestion that the draft should not contain any reference to countermeasures and should focus instead on the peaceful settlement of disputes, the previous Special Rapporteur, Mr. Riphagen, had made suggestions in the Commission that had fallen far short of his own proposals on the peaceful settlement of disputes.

54. As to the matter of the Security Council raised by the Chairman, he agreed that the Council was the only institution available to the international community for maintaining international peace and security. It was precisely in view of that that it would be necessary for the Commission to take a close look at article 4, of part 2, which concerned the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. Although the Security Council had the right to take measures to put an end to fighting, it was not empowered to settle disputes or to impose a solution to a dispute. As announced, he would have to address that problem in connection with article 4 of part 2 of the draft, in due course.

55. The CHAIRMAN said that discussion of State responsibility would resume around 16 June, when the Commission would consider the Special Rapporteur’s fourth report.

The meeting rose at 1 p.m.

17 Ibid.

2268th MEETING

Tuesday, 2 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenthal, Mr. Shi, Mr. Thiam, Mr. Vereshchetic, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN welcomed the participants in the International Law Seminar, who were attending the meeting, and invited the Special Rapporteur to introduce his eighth report (A/CN.4/443).

2. Mr. BARBOZA (Special Rapporteur) said that he first wished to draw to the attention of the members of the Commission the summary of the discussion held in the Sixth Committee of the General Assembly during its forty-sixth session (A/CN.4/L.469, sect. D), the Rio principles on general rights and obligations; and the draft Framework Convention on Climate Change and draft Convention on Biological Diversity. He recalled that the Commission had already considered 33 draft articles, 10 of which, relating mainly to scope, principles and the use of terms, had been referred to the Drafting Committee, which had, at the Commission's forty-first session, been reduced to nine. It had also been agreed that draft article 2 (Use of terms) was to remain "open" in order to include new terms or change the meaning of those already selected, as necessary. In an appendix to the report under consideration, he had developed the concepts of risk and harm dealt with in draft article 2. He emphasized the basically provisional nature of the draft articles on which members were being requested to express their views. The purpose was to enable him to identify the main schools of thought in the Commission. He would have to wait until the Drafting Committee had considered the texts before it in order to have a clearer idea of the direction in which the subject would develop in the future. In the meantime, he proposed that the Drafting Committee should also review draft article 10 (Non-discrimination), to which there had been no objection during the consideration of the sixth report.

3. The aspect which the Commission needed to re-examine in the light of the discussions it had already held and those in the Sixth Committee was that of prevention, which was easier to understand now that several international instruments on the matter had seen the light of day and there was a growing body of legal literature. In that connection, he cited several examples which illustrated the intense legal activity in that field both in European and in United Nations bodies. The draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, prepared by the Council of Europe, was perhaps the instrument that came closest to the Commission's work because, unlike most of the conventions, it covered all types of dangerous activities, not only a specific one.

4. The main purpose of the proposals presented in the eighth report was to transform obligations of prevention into simple guidelines for Governments. While reparation had to do with harm, risk could not be linked with prevention for the simple reason that the kind of responsibility called for by activities involving risk was a form of strict liability, which was known in French as responsabilité pour risque, meaning a type of liability which required the liable party to provide a certain kind of compensation, regardless of any preventive measures it might have adopted. As he had explained in his report, the rules of prevention—in the sense of prevention before an incident had happened—were quite different from the concept of "prevention" after the incident and were not contained in liability conventions or draft conventions, which referred to measures to be taken to prevent the harmful effects of an incident from extending beyond national jurisdiction. How could the Commission reconcile the idea of placing obligations of prevention in an annex of a non-binding nature with that of not deciding for the time being on the final nature of the draft articles which would be submitted to the General Assembly? By treating the texts on prevention as guidelines, the Commission would not be prejudging the final decision it would take on the nature of the other draft articles. Even if the other draft articles also became guidelines, there was no reason why both sets of articles could not be included in the same document. However, the Commission might decide to eliminate any reference to prevention before the incident without affecting the final instrument in any particular way.

5. The first part of the eighth report dealt precisely with the question of whether the draft articles should include obligations of prevention together with obligations of reparation. Obligations of prevention were divided into procedural obligations (arts. 11 to 15) and unilateral preventive measures (art. 16). As a majority in the Commission was against keeping procedural obligations in the text, he had incorporated them in an annex as guidelines for Governments, which read:

ANNEX

In respect of the activities referred to in draft article 1, and in the interest of fuller compliance with its obligations and principles, the following provisions are in the nature of recommendations, without prejudice to any corresponding responsibilities arising under international law.

1 Reproduced in Yearbook... 1992, vol. II (Part One).
5 For texts and summary of discussion, see Yearbook... 1988, vol. II (Part Two), pp. 9 et seq.
7 For text, see Yearbook... 1990, vol. II (Part One), document A/CN.4/428 and Add.1, annex.
9 See footnote 7 above.
Article I. Preventive measures

The activities referred to in article 1 of the main text should require the prior authorization of the State under whose jurisdiction or control they are to be carried out. Before authorizing or undertaking any such activity, the State should arrange for an assessment of any transboundary harm it might cause, and should ensure, by adopting legislative, administrative and enforcement measures, that the persons responsible for conducting the activity apply the best available technology to prevent or to minimize the risk of significant transboundary harm, as appropriate.

Article II. Notification and information

If the assessment referred to in the preceding article indicates the certainty or the probability of significant transboundary harm, the State of origin should notify the States presumed to be affected regarding this situation and should transmit to them the available technical information in support of its assessment. If the transboundary effect may extend to more than one State, or if the State of origin is unable to determine precisely which States will be affected, the State of origin should seek the assistance of an international organization with competence in that area in identifying the affected States.

Article III. National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin should cooperate in good faith with the other States concerned in providing any information that it is able to provide, depending on the circumstances.

Article IV. Activities with harmful effects: prior consultation

Before undertaking or authorizing an activity with harmful effects, the State of origin should consult with the affected States with a view to establishing a legal regime for the activity in question that is acceptable to all the parties concerned.

Article V. Alternatives to an activity with harmful effects

If such consultations show that transboundary harm is unavoidable under the conditions proposed for the activity, or that such harm cannot be adequately compensated, the affected State may ask the State of origin to request the party requesting authorization to put forward alternatives which may make the activity acceptable.

Article VI. Activities involving risk: consultations on a regime

In the case of activities involving risk, the States concerned should enter into consultations, if necessary, in order to determine the risk and amount of potential transboundary harm, with the aim of arriving at an arrangement with regard to such adjustments and modifications of the planned activity, preventive measures and contingency plans as will give the affected States satisfaction, on the understanding that liability for the harm caused will be subject to the provisions of the corresponding articles of the main text.

Article VII. Initiative by the affected State

If a State has reason to believe that an activity under the jurisdiction or control of another State is causing it significant harm or creating a risk of causing it such harm, it may ask that State to comply with the provisions of article II of this Annex. The request should be accompanied by a technical explanation setting forth the reasons for such belief. If the activity is found to be one of those referred to in article 1 of the main text, the State of origin should pay compensation for the cost of the study.

Article VIII. Settlement of disputes

If the consultations held under articles III and V above do not lead to an agreement, the parties should submit their differences for consideration under the procedures for the settlement of disputes set out in Annex . . .

Article IX. Factors involved in a balance of interests

In the case of the consultations referred to above and in order to achieve an equitable balance of interests among the States concerned in relation to the activity in question, these States may take into account the following factors:

(a) Degree of probability of transboundary harm and its possible gravity and extent, and likely incidence of cumulative effects of the activity in the affected States;
(b) The existence of means of preventing such harm, taking into account the highest technical standards for engaging in the activity;
(c) Possibility of carrying out the activity in other places or with other means, or availability of other alternative activities;
(d) Importance of the activity for the State of origin, taking into account economic, social, safety, health and other similar factors;
(e) Economic viability of the activity in relation to possible means of prevention;
(f) Physical and technological possibilities of the State of origin in relation to its capacity to take preventive measures, to restore pre-existing environmental conditions, to compensate for the harm caused or to undertake alternative activities;
(g) Standards of protection which the affected State applies to the same or comparable activities, and standards applied in regional or international practice;
(h) Benefits which the State of origin or the affected State derive from the activity;
(i) Extent to which the harmful effects stem from a natural resource or affect the use of a shared resource;
(j) Willingness of the affected State to contribute to the costs of prevention or reparation of the harm;
(k) Extent to which the interests of the State of origin and the affected States are compatible with the general interests of the community as a whole;
(l) Extent to which assistance from international organizations is available to the State of origin;
(m) Applicability of relevant principles and norms of international law.

6. Although some members wanted to keep unilateral measures of prevention as "real" obligations, he believed that obligations of that kind were primary rules whose breach gave rise to State responsibility. The introduction of State responsibility, however, made for a two-fold problem: on the one hand, Governments were extremely reluctant to become parties to instruments containing clauses on State responsibility, as was apparent from the studies carried out by Handl and by Doeker and Gehring, to which he had referred in the report, and, on the other, the difficulties of a procedural nature relating to the method for the settlement of disputes and to the court competent to decide cases concerning relations between States and individuals could not be ignored. That was why he had eliminated all obligations of prevention from the instrument. He had, however, included

10 Roman numerals have been used to differentiate the draft articles proposed by the Special Rapporteur for possible inclusion in an annex from those forming the main body of the instrument.
a caveat in the introduction to the annex which applied in particular to activities with harmful effects where the negligence of the State in taking the measures suggested in draft article 16 might, in some cases, be found to be in breach of the existing obligations.

7. Whatever the nature of the annex to which such obligations were confined, should prevention measures be treated jointly or separately? There was only one important difference between measures relating to a particular activity: the content of the consultation. In his view, all the measures could be treated jointly; unilateral measures and legislative and administrative measures imposed on the State the same kind of burden, regardless of the type of activity concerned. Because activities with harmful effects caused transboundary harm in the course of their normal operation, they should not be permitted unless there was some form of prior consent between the States. Activities involving risk which had been authorized by the State of origin would not require the prior consent of the States likely to be affected provided that the State of origin was prepared to compensate them if damage occurred and to do so within the framework of a regime which recognized, in principle, the liability of the operator for damage. The object of consultation with the affected States should be to draw up provisions on prevention that would ensure that the activity was secure.

8. An important condition for the legality of an activity which caused or created the risk of causing transboundary harm as a result of environmental interference was mentioned in the report of the Experts Group on Environmental Law of the World Commission on Environmental and Development. It stated that, for an activity to be lawful

... the overall technical and socio-economic cost or loss of benefits involved in preventing or reducing such risk [must far exceed] in the long run the advantage which such prevention or reduction would entail.\(^1\)

9. That statement referred to activities which were not prohibited, regardless of the harm they caused or the risk they created, because they were useful or even necessary to the life of modern societies, or, if one preferred, to the balance of interests test. He would like to know whether or not such a proviso should be included in the draft, bearing in mind that draft article IX of the annex could perhaps provide sufficiently flexible criteria to ensure a proper balance of interests.

10. In the appendix to the report, he had re-examined the definition of the concepts of risk and harm in the light of instruments drawn up after draft article 2 had been referred to the Drafting Committee. The reference to risk as a separate element might become a dangerous form of shorthand to denote an element which was inseparable from certain activities falling within the scope of the draft. The concept of risk would serve no purpose if it was referred to as separate from activities involving risk. Since the point was to identify those activities, it was also necessary to define what was meant by risk and, above all, by significant risk. The elimination of obligations of prevention did not exempt the Commission from defining the concept of risk in draft article 2. That was why he had included some ideas in his report which might be of interest to the Commission and, in particular, to the Drafting Committee, whose task it was to consider draft article 2.

11. Some international instruments referred to in the appendix defined activities involving risk narrowly, generally by making use of lists of activities, substances or technologies. The Commission had preferred a general definition of activities involving risk and had therefore discarded lists of an exhaustive nature. In the appendix, he gave some indications which seemed to pinpoint more closely activities involving risk.

12. Equally important, in his view, was a definition of the concept of harm and, in particular, of environmental damage, which, following a recent trend, included the idea of compensation not only for reasonable measures of reinstatement actually undertaken or to be undertaken, but also such aspects of the status quo ante as it had been impossible to restore. The solution proposed in draft article 24\(^12\) was supported by recent doctrine and practice.

13. He drew attention in that connection to the definition laid down in the Guidelines prepared by the Task Force of the Economic Commission for Europe, which he had cited at the end of the report.

14. Taking into account what was said in the report, he would like the Commission to indicate whether the provisions on prevention should be incorporated in an annex as guidelines for Governments. The Commission had a choice between three options: to treat the provisions on prevention as guidelines, to delete any reference to prevention prior to the accident, which could easily be envisaged, or, something he did not recommend, to retain unilateral measures of prevention as "real" obligations.

15. Those members who would prefer the provisions to appear as guidelines in an annex might wish to give their views on the content of the annex he had proposed. In accordance with the wishes expressed by some members of the Commission at preceding sessions, the procedure was a flexible one and simpler than those envisaged earlier.

16. He also looked forward to hearing members' opinions about the definitions proposed in the appendix, bearing in mind, however, that draft article 2 was in the hands of the Drafting Committee and any reopening of the general debate on whether the concept of risk should prevail over that of harm or vice versa or on which of those two concepts should form the basis of the draft articles would be very disruptive, especially as an approach based on the "risk-prevention" duo was bound to be misleading.

17. The Commission had at its disposal a number of articles from which it could perhaps extract the elements of an instrument to propose to the General Assembly. If

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\(^1\) Environmental Protection and Sustainable Development: Legal Principles and Recommendations (London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1987), p. 80.

\(^12\) See footnote 7 above.
prevention was eliminated, what would be left was liability proper and, in keeping with an international practice of growing importance, it should take the form of civil liability. It went without saying that the draft articles would include some obligations of a very general nature to ensure the smooth functioning of the civil liability system, such as the non-discrimination principle on which several provisions of the chapter in question were based. Within the framework of civil liability, some thought should be given to the "polluter pays" principle, which had not so far been authoritatively defined. The role of States should be one of residual liability in some extreme cases, as in that of the nuclear conventions where insurance or other guarantees could not cover all the damage. It might also include some cases where the sources of damage could not be identified, but that was a new field which warranted a great deal of further thought.

18. He welcomed the fact that, at the current session, the Drafting Committee would consider the draft articles which had been referred to it and to which, as already stated, draft article 10 (Non-discrimination) should be added. Without some pronouncement on the part of the Drafting Committee at the current or at the next session, it would be of little or no avail to go on producing new reports. Responsibility for fulfilling the mandate of the General Assembly was not his alone, but that of the Commission as a whole.

19. Mr. CRAWFORD said that the report gave rise to a problem of a general nature, that of the distinction between the topic under consideration and the topic of State responsibility and the continuing reservations or prohibitions which some members of the Commission apparently had in that regard.

20. From the point of view of terminology, he fully agreed with the Special Rapporteur's proposal that the word "acts" in the title of the topic should be replaced by the word "activities". With that change and on the understanding that the scope of the topic as thus broadened was confined to the injurious consequences of activities which were in themselves lawful, the Commission could cease to worry whether it was drafting rules on international liability for injurious consequences of activities not prohibited by international law or on State responsibility. By persisting in that false debate, it was in danger of achieving no results at all, since, in the final analysis, it had to propose rules on the topic under consideration which involved obligations and those obligations would, in turn, necessarily involve the responsibility of States.

21. As to the problem raised in the report with regard to procedural obligations of prevention and, in particular, their location in the future instrument, he thought that the Special Rapporteur's preference for a purely recommendatory set of guidelines was the result of his conception of the topic as a whole and, more specifically, of strict liability for actual damage. The Special Rapporteur took the view that there was no point in imposing obligations of prevention on a State which would be subject to strict liability if the damage eventually occurred. He accepted that position in principle, but was not sure that the Commission could take a final decision on the issue. His own view was that it would be more useful to establish proper prevention procedures in advance, although it was true that a regime of strict liability would encourage even the most reluctant States to take some measures of prevention. Nevertheless, he was prepared for the time being to accept the Special Rapporteur's proposal that obligations of prevention should be consigned to an annex, not only because to proceed in that way seemed preferable to providing no obligation of prevention at all, but also because the solution would enable the Drafting Committee to make substantial progress on the contents of those obligations and leave aside the decision as to where in the draft they should appear.

22. He agreed with the approach to the problem of prior consultations described in the report. On the one hand, a State should not be able to externalize the costs of, for example, its industrial activities by imposing burdens on other States while keeping the benefits entirely to itself; and, on the other, neighbouring States should not have a veto over a State's projected activities, provided that appropriate procedures had been followed to minimize the risk of harm. That approach was, moreover, consistent with the nature of the obligations envisaged in the annex.

23. Lastly, he thought that the questions of definition discussed at the end of the report were matters of detail and drafting, except for the important issue whether the word "appreciable" or the word "significant" should be used to qualify harm. It was difficult to solve that problem in the abstract before deciding on the contents of the substantive articles. He understood the Special Rapporteur's interest in the definition adopted by the ECE Task Force on Responsibility and Liability regarding Transboundary Water Pollution, which provided, in particular, that if no threshold had been agreed, damage occurred where an affected State was required, as the result of the activity on the territory of the State of origin, to take measures in the interest of the protection of the environment or population or rehabilitation measures, but he did not think that the definition could serve as a criterion for the threshold of harm because of its subjective nature and the disparities that might exist between the States concerned with regard to environmental standards and their economic situation. The definition might, at most, be useful as a precondition in the sense that a neighbouring State should not be able to claim reparation from the State of origin if it had not taken any preventive measures itself.

24. Mr. VILLAGRAN KRAMER said that the complex and delicate nature of the topic made it necessary to revert to the fundamentals of the law in the field under consideration.

25. If there was a point where the topic converged with that of State responsibility, it was surely the theoretical equality of States before the law and their de facto economic inequality. The Special Rapporteur was therefore right to build his argument on the concept of equity, especially as UNCED was to deal precisely with the de facto inequality of States and the important role which the highly industrialized countries would have to play by taking on greater obligations than the developing countries. That did not mean that a developed country
had to assume more civil liability than a developing country, but the possibility could not be ruled out that a developing country which had to make reparation for transboundary harm could be completely ruined if it was bound to provide *restitutio in integrum*.

26. He wondered about the future of the topic under consideration as UNCED was about to begin and about the role of the Commission at a time when the Council of Europe, the European Community and other specialized bodies were preparing or had completed drafts of major legal instruments. While the Commission should not overlook that trend in the development of international law, it should also base itself on the general principles deriving from the case law in the field, which was not abundant, but was none the less of great practical value and included the *Island of Palmas* case,13 the *Trail Smelter* case,14 the *Corfu Channel* case15 and the *Gut Dam Claims*.16 There were basically four general legal principles: a State could not use its territory or allow its territory to be used in any way which resulted in harm to other States; a State could not derive benefit from an activity or act without taking responsibility for the consequences of that activity or act; harm in any form gave rise to reparation; and the risk of harm had to be minimized or even eliminated, in so far as possible. The topic was complicated by the fact that certain preventive measures might give rise to a violation of a rule and, accordingly, to responsibility for a wrongful act and by the fact that, at the same time, reparation had to be made for the harm suffered. Two types of responsibility came into play. In common-law terminology, the first was called "responsibility", while the second was known as "liability", as recalled by the Special Rapporteur in his seventh report.17

27. The draft declaration to be considered by UNCED18 embodied principles which were closely related to the issues being dealt with by the Special Rapporteur. According to that text, cooperation was no longer only a principle, but also an obligation of States. The Commission had to take account of that document, which had significant political implications. It had to take a decision that would enable it to move forward in the debate on the topic under consideration and, in that connection, he wished to know whether some of the 11 texts cited in the eighth report, such as the draft convention of the Council of Europe,19 could be made available to the members. It would be helpful to know whether the Commission would be considering the report on its own or whether it would be discussing other documents at the same time. It should be borne in mind that the Commission had not yet reached the stage of preparing a draft to be submitted to States. For the time being, its task was to prepare a compilation, as it were, of the applicable legal principles. Substantive and procedural obligations should be distinguished from one another and he would have no objection if the latter were placed in an annex, in the form of recommendations. In his view, the procedural rules were the least important because work in that area was well advanced as a result of the work already done on the law of the non-navigational uses of international watercourses.

28. Mr. ERIKSSON said that he was among those who believed that, on the basis of the work done by the Special Rapporteur, the Drafting Committee should now be able to prepare a set of draft articles which could be submitted to the General Assembly within two years. In that connection, the report should be useful to the Drafting Committee, particularly as far as the definitions were concerned.

29. He had already offered suggestions on certain articles, to which he hoped that the Drafting Committee would give serious consideration, but he also wished to stress the need to broaden the scope of the proposed articles. As UNCED was about to begin, it seemed appropriate to view the topic under consideration in the context of the environment. To that end, the Commission might learn a great deal from the efforts being made in international bodies to elaborate environmental law, most recently in the work carried out in preparation for that Conference.

30. It should be recognized that the centre-piece of the articles would be the obligation to make reparation for significant transboundary harm. That obligation was equivalent to the so-called "polluter pays" principle in the environmental context. Clearly, that self-evident rule was not accepted without qualification, although it could be expected to gain further support at UNCED. He therefore believed that the Commission would be able to establish the principle that States should negotiate on the level of reparation in certain specific cases. The articles should thus define some of the criteria which were to be taken into account during such negotiations and which might be different from those applicable to activities involving risk, but they should not contain provisions on implementation.

31. He had long advocated setting up a system of civil liability, first, because it would provide a more speedy remedy for the injured party; secondly, because it would encourage the establishment of an effective international insurance scheme; and, thirdly, because it would serve to reduce tension between States. Nevertheless, the experience gained during the preparation of the draft articles on international watercourses had shown that agreement did not go beyond some limited general principles.

32. His view on the fundamental question of risk was that, while the draft articles should deal with any activity which might give rise to transboundary harm, they should concentrate in particular on activities involving significant risk. For such activities, it would be necessary to establish rules of prevention and reparation that were different from those applicable in the case of harm. There would thus have to be an article on the relationship with the rules applicable to State responsibility. He was also in favour of establishing certain thresholds to limit the scope of the articles on the basis of the extent of the damage and, possibly, as a political concession, the

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15 I.C.J. Reports 1949, p. 4.
18 See footnote 2 above.
19 See footnote 8 above.
extent of the knowledge States had of activities carried out under their jurisdiction.

33. The articles should embody a general obligation on the duty of prevention, restricted to activities involving significant risk. In that case as well, it would be better to have general criteria rather than an elaborate implementation mechanism. As had often been said, Governments might not be ready to accept draft articles having as broad a scope as those on which the Commission was working. Yet the Commission had a mandate to do important work in that field and, without being too ambitious, it should act boldly and move ahead. With regard to its method of work, he believed that, as it had already done two years previously in preparing the draft articles on jurisdictional immunities, the Commission should wait until the Drafting Committee had completed its consideration of a full set of articles before submitting the results of its work to the General Assembly.

The meeting rose at 11.30 a.m.

2269th MEETING

Friday, 5 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Vereshchitin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. BARBOZA (Special Rapporteur), in reply to comments made by Mr. Villagran Kramer at the previous meeting linking continued consideration of the item with the conclusions of UNCED, said that the specific issues the Commission was called upon to consider would be discussed only superficially at that Conference, the agenda of which, as everyone was aware, was extremely full. He was grateful to members who had already spoken on the item. However, while general comments were always useful and welcome, he would particularly like to hear the views of members on the main issues raised in the report, namely, whether all matters pertaining to obligations of prevention, or at least the procedural articles relating thereto, should be consigned to an annex—a question of great importance, in his opinion—and, secondly, the question of the definitions proposed for article 2. He appealed to members to address those matters.

2. Mr. GÜNEY said that, before commenting on the points raised in the report, he wished to air his misgivings, in some cases amounting to reservations, with regard to codification of a topic which should not be treated outside the framework of the application of the normal rules governing State responsibility.

3. The idea of a list of dangerous activities, based on the concept of dangerous substances, had failed to meet with the Commission's or the Sixth Committee's approval. Instead of preparing a list, the Commission should therefore endeavour to define dangerous activities, using a flexible form of language that could be adapted in the light of future developments.

4. International liability for injurious consequences was a complex subject that gave rise to both legal and political questions. The draft articles should deal principally with the-civil liability of operators, the liability of States for harm being merely residual. The system proposed would constitute a considerable development in international law, since, as the Special Rapporteur pointed out in the report, States had thus far been reluctant to assume responsibility/liability in existing conventions or drafts regulating certain activities involving risk. Neither Principle 21 of the Stockholm Declaration nor the development of the concept of preventive diligence of States set forth in various conventions on environmental protection were sufficiently well-established in law to be considered ready for codification.

5. At the present stage in the development of international law in the field under consideration, the Special Rapporteur's proposal that the obligations of prevention should be consigned to an annex consisting of purely recommendatory provisions was pragmatic and sensible and he supported it as regarded both procedural obligations and obligations of due diligence. Placing the provisions on prevention in the body of the draft would raise the issue of the relationship between State responsibility for wrongful acts and State liability for lawful activities; a State of origin which failed to respect the primary obligation of prevention would become guilty of an unlawful act. In that context, he expressed doubts with regard to the theory of fault, which placed the burden of proof on the victim, to the detriment of the principle of strict liability, which placed the burden on the author of the harm.

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

6. The discussion on the topic in the Sixth Committee had brought out the need to pay particular attention to the interests of developing countries, which had neither the financial resources nor the necessary technical knowledge to prevent or minimize the adverse consequences of activities carried out under their jurisdiction and therefore had a greater need than did the industrialized countries for clear and strict provisions defining the respective roles of the State of origin and the victim State.

7. If the provisions on prevention were placed in the body of the draft, joint treatment could be given to activities involving risk and activities with harmful effects. As the Special Rapporteur pointed out in the report, the State had, in either case, to adopt certain legislative, administrative and enforcement measures within the context of the concept of due diligence to prevent the harm from exceeding the tolerable threshold and becoming significant. A certain element of subjectivity existed with regard to the State of origin, which might not have accepted all the international instruments invoked within the framework of the codification exercise. That point required closer study.

8. The paragraphs of the report on the need to consult were, in principle, satisfactory. It should none the less be made clear that neighbouring or riparian States would not have a right of veto over the lawful activities of other States. Activities involving risk would, in any case, be lawful provided the State of origin assumed strict liability for harm caused. As for activities with harmful effects that caused harm in the course of operation, prior consultations would be necessary to take due account of the balance between the interests involved. Extending the scope of the draft articles to include activities involving a risk of harm would make the task of the Special Rapporteur and of the Commission unduly difficult. It was important to avoid imposing ill-defined obligations on States; separate rules to govern risk of harm, on the one hand, and actual harm, on the other, would be preferable. A State had the sovereign right to undertake lawful activities in its territory provided it took steps to ensure that those activities did not cause transboundary harm. It was gratifying to note that the Special Rapporteur subscribed to that principle.

9. Lastly, the proposed recommendatory provisions on prevention should be reviewed and defined more clearly as regarded both content and scope. In the present era of increasing liberalization and privatization of national economies, direct liability for transboundary harm should devolve upon the private operator. In the draft under consideration, priority should therefore be given to civil liability, and the question of the obligation of vigilance of States in respect of activities with harmful effects should be left aside. The concept of risk and its relationship with the operator’s liability certainly required further in-depth consideration.

10. Mr. PAMBOU-TCHIVOUNDA said that, in view of the far-reaching implications of the proposals put forward in the report concerning the obligations of prevention, as well as those concerning article 2, he could not agree that the general-debate phase was over. The proposal that an essential part of the draft—a part dealing not with technical aspects of the topic but with substantive ones—should be consigned to an annex was curious indeed, and it would be still more curious if the annex pointed, as it were, in a direction different from that of the draft itself. The resulting instrument could not possibly be homogeneous or consistent. Without the prevention provisions, the draft articles as a whole would remain an empty shell, and the Commission would have laboured to no avail. Whatever the difficulties involved, the Commission must shoulder its responsibilities and, with the assistance of as many authoritative views as could be obtained, tackle every aspect of the topic, bearing in mind each one of its multiple facets. The legal aspects of the industrial policies of States were shaped by all those facets—economic, financial, ecological, technological or political—as well as by their own development requirements and the means available to meet them. Hence the principle of obligations of prevention was inevitably relative in nature. Moreover, the fact had to be borne in mind that laws governing new technological inventions and their applications were generally enacted only after the invention had caused or threatened to cause a disaster. In defining the obligations of prevention, the Commission should strive to define their precise limits and indicate the threshold beyond which a State would be considered as failing to comply with the prevention principle. It should also endeavour to define the precise nature of preventive measures and determine their precise implication for States. Much of that task still lay ahead, and he therefore reiterated the view that the general-debate phase was far from over.

11. Mr. CALERO RODRIGUES expressed congratulations to the secretariat on producing the summary record of the 2268th meeting, if only in one language, in time for the 2269th. So far as he was aware, that achievement was a “first” in the Commission’s experience. He hoped that the other language versions of the record would be distributed shortly and that the standard thus set would be maintained in the future.

12. The Special Rapporteur was right to say that the time for general discussion was over, although, of course, it was quite appropriate for new members to express their views. The Commission already had a certain basis for its work on the topic. It had been guided throughout the exercise by the tentative schematic outline prepared by the previous Special Rapporteur. The sixth report by the present Special Rapporteur, containing no less than 33 articles described as “experimental”, also provided an excellent basis. The articles in chapters I (General provisions) and II (Principles) were already with the Drafting Committee; those on prevention, liability and civil liability were still before the Commission. No articles on settlement of disputes had been proposed so far, but their inclusion was now contemplated by the Special Rapporteur, as could be seen from the commentary to draft article VIII included in his eighth report.

13. The Special Rapporteur had requested members’ views on whether the articles on prevention should be placed in an annex and presented simply as recommendations. At the previous session, it had been agreed that the nature of the entire instrument would be decided at some future date. He was, therefore, not certain that the Commission needed to decide immediately on the exact nature of the articles on prevention. It would be better simply to evaluate and, if necessary, modify the draft articles, thereby arriving at a set of provisions which could then be incorporated either into a convention or into an instrument of a non-binding character.

14. Draft article I,\(^5\) which would be more appropriately titled “Assessment”, established the obligation of a State to assess the potential transboundary harm of any activity falling within the scope of article 1 of the main text. Draft article I established a basic principle: activities which created an appreciable risk of causing transboundary harm should require the prior authorization of the State under whose jurisdiction or control they were to be carried out. Prior authorization was reasonable, but he wondered if it should have the character of a requirement. In many cases, it was not certain whether the activity fell into the category of activities creating an appreciable risk. Nonetheless, he would endorse the basic idea that a State was under an obligation to control any activities on its territory that might fall within the scope of the main articles.

15. Draft article II dealt with notification and information to States that might be affected by transboundary harm. He agreed fully with the Special Rapporteur that information was closely linked to notification. The notification and information procedure should be followed in cases where transboundary harm was certain or probable. The article was innovative in that it covered both activities involving risk and activities with harmful effects, an interesting and useful distinction, which was also reflected in draft article IV. Thus far, the Commission had mainly given its attention to prevention in the case of activities involving risk; it had not given much consideration to activities which were certain to have harmful effects. Yet, there were effective measures to be taken in the case of an activity that would necessarily give rise to harm, for example by establishing a regime of compensation. It might be useful for prevention of activities involving risk and prevention of those with harmful effects to be treated separately. In both cases, it was important to have a clear definition of the activities in question and to determine a threshold for risk and for harm.

16. Draft article III was helpful and might even encourage States to accept the instrument as a whole. Draft article IV, the substance of which was satisfactory, called for a State to hold consultations with potentially affected States before undertaking or authorizing an activity with harmful effects. The article represented the first instance of a separate provision relating to activities with harmful effects. While not entirely satisfied with the wording of draft article V, he endorsed the underlying concept, which represented an intermediate step between consultations and prohibition. Draft article VI, on consultations in the case of activities involving risk, was acceptable in substance, but it ought to provide a more precise definition of the purpose of such consultations.

17. Draft article VII concerned initiatives on the part of the affected States, which had to be afforded an opportunity to intervene. However, he did not agree that a State, if it had reason to believe that an activity under the jurisdiction or control of another State was causing it significant harm or creating a risk of causing such harm, should, as provided for under that article, have the right to invoke draft article II. Rather, the potentially affected State should be entitled to call for consultations, which would then be carried out as if they had been initiated by the State of origin. The last line of draft article VII, which required the originating State to pay for the cost of any study undertaken by the affected State, was unnecessary and should be eliminated.

18. As to draft article VIII, the Commission should indeed establish a special procedure for the settlement of disputes and such a procedure should specify precisely under which articles a settlement procedure could be invoked. At the same time, if the provisions were not mandatory, it would be difficult to institute that type of procedure. It should be noted that draft article VIII referred to “the consultations held under articles III and V”. However, there was no mention of consultations in draft article III. Draft article IX listed factors that might be taken into account by States in the case of consultations. Such a list was not useful and could be removed.

19. He had been among those who had objected to having a set of procedural obligations on prevention. The Special Rapporteur had revised the text to such an extent that he was no longer proposing purely procedural articles; rather, the draft articles on prevention combined procedural and substantive obligations. Consequently, as they currently stood, those draft articles could, if necessary, take on a mandatory character.

20. Mr. VERESHCHETIN said that, as long as the Commission did not establish a precise framework for the subject-matter under discussion, the Drafting Committee would hardly be in a position to make progress on the draft articles, and the Special Rapporteur would have difficulty continuing his work in such conditions.

21. The Commission must say whether it intended to confine itself to the General Assembly’s instructions and consider the obligations arising out of injurious consequences of activities not prohibited by international law, or whether it would establish new primary obligations of prevention whose violation would lead to secondary obligations and responsibility in the classic sense. Those were two separate questions, but they could be interrelated, for example, by considering the set of problems associated with the prevention of transboundary harm and liability for such harm. But that would require formulating the task differently and asking the General Assembly to alter the agenda accordingly. Assuming that a new agenda item was introduced, the Commission would then need to deal with three issues: establishing obligations in respect of the prevention of transboundary harm; responsibility that arose out of the violation of such obligations; and liability arising out of transboundary harm.

\(^5\) For texts of draft articles I to IX, see 2268th meeting, para. 5.
regardless of those primary obligations. He took the Commission’s terms of reference to be confined to the third set of issues alone; furthermore, the terms of reference contained no mention of transboundary harm.

22. To demonstrate his point he cited the example of the Convention on International Liability for Damage Caused by Space Objects, the only such instrument providing for the absolute liability of States for transboundary harm. It contained no measures for preventing harm, but only measures for compensation. During discussions in the Drafting Committee, it had been argued that, since all cosmic activities were associated with risk, there was no need to regulate prevention and that it was logical to turn immediately to the question of compensation for harm. Along those lines, the Commission too could begin by dealing with the question of liability for consequences of activities associated with risk and then, having resolved that problem, turn to other issues, including prevention. To take another example, the Committee on the Peaceful Uses of Outer Space was currently drafting rules for the use of nuclear power sources in outer space, and it was precisely because the use of nuclear power sources in space objects entailed a particular risk that rules and technical measures to eliminate or at least minimize that risk were being devised in parallel with rules pertaining to liability associated with those concrete activities; such rules must also institute liability for harm caused.

23. Those examples showed the need to formulate the task as clearly as possible from the outset. In his view, it was preferable to combine measures concerning prevention and measures concerning liability only when dealing with very specific activities. Unfortunately, the Commission had complicated its work. It had not determined what it meant by the term “international liability” and had instead focused on abstract questions of prevention in disregard of the concrete activities involved. That would make it very difficult to achieve positive results.

24. One of the three issues he had mentioned would need to be addressed, even if the agenda was not amended: the question of liability for transboundary harm arising out of activities not prohibited by international law. It would seem logical to deal with the subject at the present time and to leave such issues as prevention in abeyance. He therefore agreed with the Special Rapporteur’s proposal to include the articles on the prevention of transboundary harm in a separate document for consideration later. He did not mean to imply that the issue of prevention was less important or that it should not be examined, but that problem did not fall within the mandate of the Commission, which had not even resolved the question it had been asked to consider.

25. The Commission could begin by determining how it intended to define the term “international liability.” The English term had no equivalent in Russian, French, Spanish or a number of other languages. The Commission must also decide whether international liability concerned only relations between States, as was his understanding, or whether it also included the civil liability of natural and legal persons. Agreement on that score must be reached before the drafting of the specific articles could begin. Furthermore, was international liability within the scope of the topic to be taken to mean absolute liability, regardless of fault, or were there other forms of liability? He agreed with the Special Rapporteur that, irrespective of its position on the articles on prevention, the Commission must still define risk and harm from the outset, or at least produce a working hypothesis. Again, the question of the basis in general law of compensation for transboundary harm arising out of activities not prohibited by international law was still unclear.

26. Citing well-known legal precedents and Principle 21 of the Stockholm Declaration, scholars often referred to custom in connection with the need to ensure that activities carried out within the national boundaries or under the jurisdiction of a State did not cause harm to the territory of other States or to areas beyond the boundaries of its jurisdiction. On the one hand, if that general principle of international law was recognized, the Commission’s entire structure of liability for injurious consequences arising out of activities not prohibited by international law collapsed, and the very justification for the whole topic of liability in its present formulation ceased to exist. In that case, the Commission should discuss responsibility for breach of obligations of States, in other words, it should come back to the general regime of responsibility. On the other hand, if the Commission considered that such custom did not exist, how could it expect States to be willing to agree to obligations to compensate any transboundary harm arising out of activities not prohibited by international law? He saw a vicious circle developing, a danger that was also present if the Commission decided to take as a basis for liability the assumption that transboundary harm violated the territorial sovereignty of the injured State: once again, the problem reverted to one of breach of obligations, in other words, responsibility in the classic sense.

27. In view of the complexity of the problem and the doubts as to the possibility of establishing a general legal regime of liability for harm arising out of activities not prohibited by international law, an effort should be made to draft a regime with specific parameters for its application, particularly with regard to the nature and degree of risk. He was convinced that the slow progress being made on the subject was due to the lack of agreement on the conceptual framework of the problem.

28. Mr. PELLET said he was surprised that Mr. Vereshchetin had asked the Special Rapporteur to deal separately with the various problems posed by the subject-matter but had himself not addressed the issue of prevention, on which the Special Rapporteur had sought to focus in his eighth report.

29. Mr. Vereshchetin and Mr. Calero Rodrigues had pointed out that the Commission’s terms of reference made no mention of the question of transboundary harm. Perhaps the Commission should not confine itself to that issue. In the area of international human rights law, for example, States were expected to protect the rights of their own population, and the Commission might consider whether, in cases of serious harm to health or the

6 See footnote 2 above.
environment, it ought not to tackle the question of the protection of the population of a State.

30. Mr. VERESHCHETIN, replying to Mr. Pellet’s remarks, reiterated that as long as the Commission failed to define the parameters of the topic it would be unable to make progress on drafting individual articles. He did not insist on the need to deal with transboundary harm, although he was inclined to take the view that that was of overriding importance. However, it was not mentioned in the Commission’s mandate, and that, too, showed that the topic must be clearly defined before the individual articles could be drafted. He agreed with many of the Special Rapporteur’s conclusions, including the need to examine the question of prevention separately and to define risk, harm, and so on, but once again, that could only be done once the Commission had agreed upon its terms of reference.

31. Mr. YANKOV said that the Special Rapporteur’s report provided a lucid overview of the topic and he was to be commended for his perseverance in exploring such a complex matter. Clearly, it was time for the Commission to provide guidelines for future work.

32. The issue of prevention had to be dealt with, whatever the Commission ultimately decided with respect to the nature and place of the relevant provisions in the draft. One could not discuss activities which might cause significant transboundary harm without considering preventive measures. At the same time, if prevention was viewed as an obligation deriving from a primary rule, it then overlapped with the topic of State responsibility. The Special Rapporteur might, therefore, consider adding a provision which dealt with the interface between the issues of risk and harm and that of State responsibility.

33. The trend in recent years had been to broaden the concept of prevention, mainly in relation to containment of the harmful effects of a particular activity. For example, the United Nations Convention on the Law of the Sea referred to the prevention, reduction and control of pollution of the marine environment. In general, provisions on prevention had been designed not to prevent the harmful incident altogether but to limit the extent of the harm caused. However, some draft conventions provided for measures aimed at preventing the very occurrence of damage and, in certain cases, such measures were envisaged even where there was inadequate or inconclusive scientific evidence to prove the causal link between certain activities and the damage or impact.

34. The Commission should provide the Special Rapporteur with clear guidelines for elaborating the provisions on prevention and confine itself, at the present stage, to formulating a general principle relating to the obligation of States to adopt appropriate legislative and other measures to prevent, reduce and control the risk of transboundary harm. The Commission should review the provisions on prevention carefully but should postpone any decision on the nature of those provisions until the character of the entire instrument had been determined. Again, a start should be made, as soon as possible, on formulating substantive and procedural provisions relating to the international liability of States and civil liability.

35. There was no need to include in the text all the possible parameters relating to the risk and threshold of transboundary harm. They could, if necessary, be included in an attached list. It would be preferable to use the term “significant” rather than “appreciable” in reference to both risk and transboundary harm.

36. Limited though it currently was, treaty practice in the field of the protection of the environment and conservation of natural resources should serve as a guide in the work on the topic under consideration. However, he agreed with other members that the topic should not be confined to environmental issues.

37. As to the recommendatory provisions on prevention, the concept of prior authorization, contained in draft article I, needed further clarification; otherwise, certain States might find in such a requirement a justification for rejecting the entire instrument. He was in general agreement with the substance of draft article II, on notification and information, but would have liked the role of regional and other competent organizations to have been spelt out in detail, either in the draft article itself, or at some appropriate point in the commentary. There was a body of treaty law on, for example, the protection and preservation of the marine environment, though he recognized that existing conventions on the regional seas were not very effective mainly because, apart from the Mediterranean Sea Action Plan, they provided for only very general measures. Draft article VIII was not adequate. A much more elaborate provision was needed, irrespective of the proposal—which he supported—for an annex setting forth the details of the mechanism for the settlement of disputes.

38. By and large, he agreed with the proposed draft articles and endorsed the Special Rapporteur’s suggestion that they should be regarded as experimental, to provide the basis for a coherent set of rules on prevention.

39. Mr. BOWETT said that, like Mr. Vereshchetin, he did not, as a novice on the Commission, have a clear picture of what was a highly complex topic. In particular, he did not see where the provisions on prevention were going to fit into the topic as a whole. It would therefore be of great assistance if the Special Rapporteur could provide the Commission with an overall scheme of the entire topic. His general feeling was that the Commission might well end up with what were no more than guidelines. If the guidelines appeared to work in practice, and if States were prepared to accept them, there might come a stage when they could be embodied in a more legal and compulsory form. That stage, however, probably lay some way ahead.

40. In his report, the Special Rapporteur rightly drew a fairly basic distinction between two distinct categories of activities, which should be kept quite separate in any draft the Commission prepared. The first category concerned activities involving risk, in other words, activities in which harm was possible but by no means certain, while the second category concerned activities having a harmful effect, in other words, activities where harm was

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7 Formed the basis for the Convention for the Protection of the Mediterranean Sea against Pollution and Protocols thereto, signed at Barcelona on 16 February 1976.
well-nigh inevitable or possibly even already occurring. It followed that, inasmuch as those two categories were fundamental and should be kept separate, they must be defined with care. Yet, while the draft provided the elements for a definition of activities involving risk, it did not do so for a definition of activities with harmful effects. In that connection he agreed entirely with Mr. Calero Rodrigues that both categories of activities should be defined in terms of the threshold of damage or harm, because there were certain kinds of potential or actual harm that would be so minimal that it was not really necessary to provide for them in the draft.

41. On the assumption that the two categories of activities could be defined, he believed that the draft articles on prevention were sensible and sound. Draft article I, which imposed an obligation on the State to authorize risky activities within its own territory, made eminently good sense and he agreed in particular with the obligation to precede any activities that had the potential for transboundary harm with an environmental impact assessment. He also considered that draft articles II and III must both be right and had no difficulty in endorsing draft articles VI and VII as part of the approach to prevention in relation to activities involving risk. However, in the case of activities with harmful effects, which were the subject of draft articles IV, V and VII, there was a requirement of prior consultation which did not apply to activities involving risk. He wondered, therefore, what the purpose of such prior consultation was. Presumably it was to arrive at an agreed regime which would permit such activities notwithstanding their harmful effects; that might involve either modification of the original scheme proposed by the State authorizing the activities or even possibly some element of compensation for the interests in other States that would be harmed by those activities. Draft article IX, on factors involved in a balance of interests, was one of the most attractive features of the draft and the concept it embodied was extremely helpful. There was, however, one rather difficult question. If the activities concerned produced harmful effects in the territory of a neighbouring State, they were, on one view, unlawful. If that were so, why were they being dealt with under a topic concerned with activities that were not unlawful? The answer apparently—and it was in fact altogether contained in the report—was that, if the activities, though producing harmful effects, were carried out pursuant to an agreed regime or other form of consent, then the very fact of consent precluded wrongfulness; in other words, though prima facie unlawful, they could not be treated as unlawful as they were activities carried out pursuant to consent. The next question which arose was why there was a need for a provision on settlement of disputes if no unlawful acts were involved. He was not certain what the answer was. Perhaps the Special Rapporteur had in mind the possibility that, in the course of the activities, there could be conduct involving a breach of the agreed regime, in which event there would be an unlawful act and that would provide the basis for a dispute settlement provision. Or perhaps the Special Rapporteur had in mind the possibility that differences might arise between the States involved during the course of negotiations to reach agreement on an agreed regime. In that event, a dispute-settlement mechanism would be more in the nature of a conciliation device to assist the parties in arriving at agreement on an eventual regime.

That was a point on which the Special Rapporteur would no doubt wish to provide the Commission with guidance.

42. Mr. KOROMA said that, though not a newcomer to the Commission, he too experienced some difficulty in understanding the purpose and direction of the draft and, in particular, of the Special Rapporteur's eighth report. The Commission should, by that stage, have built the basic structure of the edifice, even if certain fittings had yet to be added. He agreed that a schematic outline of the topic would have been helpful and possibly, in his summing up, the Special Rapporteur might wish to provide the Commission with some guidance in that connection.

43. He would like to know whether the Special Rapporteur's suggestion was in fact that the topic should be divided into two sections, the first dealing with obligations, and the second, in the form of an annex, consisting mainly of recommendations. So far as he knew, the Commission's earlier decision not to concern itself for the time being with the nature of the instrument but to endeavour to elaborate the regime and then to take a decision on whether to have a convention, modern rules, or guidelines remained valid. Another question, which should have been raised in the report, concerned the need for the topic on liability and the way in which it differed from the topic of State responsibility. Under the regime of State responsibility, for example, the author State would be expected to pay compensation for a wrongful act, whereas, under the regime of liability, the author State would be expected to pay compensation even for an act that was not prohibited by international law. That difference was due to the fact that, in the case of a wrongful act, compensation could be expected to be higher, while, in the case of a lawful act, there could be mitigating circumstances, as in space exploration, for instance. Secondly, in the case of State responsibility, a stigma attached to the wrongful act, something which did not apply in regard to the regime of liability.

44. It had been generally agreed that the title of the topic should be aligned with the French and other language versions not only for reasons of linguistic harmony but also because the topic should in fact deal with activities not prohibited by international law. For instance, the construction and operation of a dam on a State's territory was a lawful activity. However, if that dam burst, causing harm to another State, liability was incurred and compensation was due. That was the kind of act with which the topic was concerned, as was apparent from the understanding reached by the Commission.

45. In constructing a regime for injurious consequences arising out of activities not prohibited by international law, certain criteria would have to be elaborated and, to that end, the Commission should revert to basic principles. Thus, it was first necessary to determine the scope of the topic, which, as was clear from the Commission's earlier decisions, was not confined to the environment or to ultra-hazardous activities. The next stage would be for the Commission to determine the principles and rules to be applied and, having done so, it might then decide to codify, or progressively develop, them in the form of obligations and recommendations.
46. One of the issues dealt with in the report, and repeatedly considered by the Commission, was whether the basis of liability should be risk or harm. Most members thought it should be harm, and for good reason. If liability were to be based on risk, it would tend to restrict the topic, since liability would arise only if it were established that the activity was risky at the time it was embarked upon. Paradoxically, it would also tend to enlarge the scope of the topic, inasmuch as every human endeavour involved a measure of risk. To give the topic a firm footing, therefore, liability should be based on harm, although that did not mean that risk had no place in the determination of compensation. The view that liability was based on harm was also borne out by a long line of case law, which showed that the State's duty to use its territory so as not to cause harm to others was now a universal rule. It was also recognized in a number of treaties, such as the Treaty Banning Nuclear Weapons Tests in the Atmosphere in Outer Space and Under Water and in the Helsinki Rules on the Uses of the Waters of International Rivers. Harm caused to others, therefore, lay at the very heart of the topic of liability.

47. Other factors to be taken into consideration in determining liability included the concept of reasonableness, balance of interest, and due diligence. The Commission would also have to decide whether the standards of strict and absolute liability should apply to the topic of liability as well as to the topic of State responsibility. That was necessary as a matter of policy and on account of the principle that he who suffers harm must not be left to bear the harm alone and that the victim of harm must be paid compensation.

48. It was essential for the main debate to take place in plenary, since the Commission was engaged in the progressive development of the law in an important area. The Drafting Committee should, of course, be left to formulate the various articles, but it should not be seen to replace the plenary, all the more so as there were no summary records of the Drafting Committee's discussions.

49. Mr. ROSENSTOCK said that, as another newcomer to the Commission, he experienced the same problems as did Mr. Vereshchetin. His perplexity was exacerbated by the fact that the solution to at least part of the problems raised by Mr. Bowett seemed to be a legal fiction, which worried him even more. He believed the problem was in part due to a perception of a practical reality and an attempt to deal with it, which could not safely be discussed in plenary without distancing the hopes of progressive development even further. A happy compromise might perhaps be to have an informal meeting of the Commission, off the record, to see whether some measure of agreement as to the foundation of the topic could be reached. It would be utter madness to set about constructing the floors of the building before agreeing on its foundation.

The meeting rose at 1.10 p.m.

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1. Mr. COROMA, continuing his statement from the preceding meeting, recalled that he had compared the topic to a building with a foundation and a roof already in place while construction was going on. He had attempted at that meeting to define the scope of the topic and had proposed that the English title should be brought into line with that of the other languages. He had also stressed that the topic constantly had to be distinguished from that of State responsibility.

2. In formulating the regime for the topic, the Commission had to bear in mind the basic principles; the most important was that harm as opposed to risk was the basis of the obligation to make reparation and it had been embodied in the draft declaration considered by UNCED. The fact that harm was essential in order to establish the obligation to make reparation was, in his view, basically what distinguished liability for lawful activities having injurious consequences from responsibility for wrongful acts.

3. The Commission's goal was not to establish a regime of strict liability or liability for risk. It had to take account of factors such as reasonableness, due diligence, the balance of interests, equity and the need not to hinder scientific progress or economic development in defining the regime of liability for lawful activities.

4. He was, however, convinced that any harm had to be compensated, that the victim should not be left to bear the loss and that States had to see to it that activities carried out in their territory did not cause harm to other

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1 Reproduced in Yearbook... 1992, vol. II (Part One).
2 See 226th meeting, footnote 2.
States. Those were legal principles that had been embodied in arbitral and judicial decisions.

5. With regard to draft articles I to IX proposed for the annex, he said that the provisions on prevention should be drafted in the form of obligations not to cause harm and should deal with two important aspects: harm caused to a neighbouring State and harm caused to the "global commons". On the first point, it was necessary to avoid giving States a right of veto over the activities of neighbouring States, since that was not the purpose of the draft articles. On the second point, the international community as a whole had collective responsibility for the "global commons", the marine environment and the ozone layer; that did not mean that activities were prohibited, but that States were under an obligation not to cause harm to the environment. In that connection as well, harm was the core of the distinction between the topic under consideration and that of State responsibility. It must therefore be borne in mind that, when a prohibition was laid down, any violation might move the question into the realm of State responsibility.

6. He had some doubts about the need for certain articles which stated obvious facts, such as draft article I relating to prior authorization by the State of origin for activities to be conducted in its territory. He did not know of any example of an activity such as the ones which were dealt with in the context of the topic and which could be undertaken without the prior authorization of the State of origin.

7. He also thought that States did not like being told how to manage their own affairs, as draft article I did by providing for the adoption of legislative, administrative and enforcement measures. In that connection, reference might, of course, be made to human rights conventions which established that kind of obligation, but that was an entirely different matter. In the context of the topic under consideration, some latitude should be left to States to decide how to implement the obligations they had undertaken. He referred in that connection to principle 11 of the draft Declaration of UNCED, which had vague wording on the obligations of States.

8. He did not see the purpose of draft article II, which established the obligation of the State of origin, if there was a certainty or probability of significant transboundary harm, to notify States presumed to be affected, and would welcome clarifications by the Special Rapporteur. In such a case, the State of origin should simply refrain from undertaking the activity in question. The draft article also did not say what the States presumed to be affected should do after having received the notification or technical information.

9. He also had doubts about draft article IV because, if the State of origin was aware that an activity was going to have harmful effects, it should refrain from undertaking or authorizing it.

10. Draft article V seemed to place an unfair burden on the affected State by requiring it to ask for alternative solutions which would make the activity acceptable; that was hardly realistic. It would be unfair to place the same burdens on the State of origin and on States which would probably not derive any benefit from the activities in question, but which were most likely to be affected by them.

11. The Special Rapporteur's proposal that States should assume residual liability in the event of the insolvency of the operators would go against the trend, particularly in Europe, towards making the operators assume liability for preserving the environment. Besides, a provision of that kind would not serve the interests of the developing countries in the case of activities carried out in their territory by multinational companies.

12. In conclusion, he believed that the Commission should first state the applicable principles and then try to apply them by identifying the obligations to which they corresponded, taking into account the factors already referred to in building the desired legal structure. The elements were all contained in the report, but they now had to be structured.

13. Mr. BARBOZA (Special Rapporteur) said that, in the light of the discussions at the last two meetings, some explanations were called for.

14. The topic under consideration did give rise to technical problems, but the Commission would be able to solve them. The substance of the topic was not difficult, but it raised the question whether the instrument should contain a chapter on compensation for victims of transboundary damage or whether matters should be left as they were under the existing provisions of general international law. In that connection, some members had maintained and continued to maintain that no rule of general international law made it an obligation for a State to provide compensation for the consequences of an activity not prohibited by international law. However, if general international law did contain a rule on compensation, the Commission should codify it; if not, it should propose one to fill the gap, as part of its task of progressively developing the law.

15. The starting point was transboundary damage, which was the only basis for compensation. "Risk" came afterwards in defining the scope of the draft articles. As to the kind of accountability that should be proposed for that type of damage, he recalled that, when the topic had been created, as one separate from that of State responsibility, what had obviously been meant was some kind of strict liability and the term "responsibility for risk" had been used in the early documents. There were only two types of responsibility in law: one arising out of the breach of an obligation and the other resulting not from a breach, but arising out of an act causing damage.

16. The reason why the question of strict or causal liability, or responsibility for risk, had come to the Commission's attention was that such liability for lawful activities had been imposed in treaties regulating certain dangerous activities, as in outer space, in the nuclear industry or in the transport of oil by sea.

17. Strict liability in international law, as in internal law, was closely associated with activities involving risk and, in that category of activities, there was a nucleus
which warranted the description "ultra-hazardous activities". It was therefore logical that the Commission, whose mandate was to deal with that type of accountability, which was different from responsibility for wrongful acts, should focus on the only cases in international law in which a legal mechanism was used for liability without a breach of an obligation or, in other words, international conventions governing activities involving risk. The draft articles which he had submitted in the fourth report therefore dealt only with activities of that kind. The Commission should quite simply have tried to state the principles and rules governing international liability for lawful activities, taking them, in so far as possible, from the following sources: (a) a few well-established principles, such as the sic utere tuo rule based on international decisions including the Trail Smelter, Corfu Channel, Gut Dam, Island of Palmas and Lake Lanoux cases and on international declarations which were widely accepted, such as Principle 21 of the Stockholm Declaration, which set limits to the use by a State of its own territory; (b) the conventions on specific activities which he had already mentioned; and (c) general international practice.

18. The Commission and the Sixth Committee had nevertheless wanted the study to include two further aspects, namely, prevention and activities with harmful effects, and that had considerably complicated the technical problems. First of all, the purpose of the eighth report was to deal with the difficulty of making rules on prevention coexist with rules of liability and that explained why he had suggested that the rules on prevention should be placed in an annex, in order to keep them as guidelines at least. However, if the Commission wanted to keep prevention in the main text, in accordance with the wishes of some of its members, States would have obligations of due diligence whose breach would give rise to State responsibility for wrongfulness. That was feasible, provided that measures were taken to distinguish State responsibility from the civil liability of private operators.

19. As he had already pointed out in his report, it was unusual for a regime of prevention to go together with a regime of strict liability. Preventive measures were specific requirements of a technical nature which States had to follow, but such international standards were, of course, rules of conduct and States were responsible for any breach of those rules, even if no damage had occurred. Such a severe regime was conceivable in a specific convention relating to a very dangerous activity, but not in a general convention on dangerous activities. In his view, such measures could form a regime that was independent of liability. Nothing prevented States from adopting separate conventions drafted in general or specific terms and containing international standards of prevention which would involve legal consequences even if no incident had occurred. However, he was not in favour of borrowing from the regime of prevention and liability adopted to cover activities in outer space, as suggested by some members. That regime was wholly atypical and the only one which imposed absolute State liability. In that connection, he recommended a careful reading of the footnote in which he had discussed the work of Doeker and Gehring.

20. As to the other source of difficulty, activities with harmful effects, what distinguished them from activities involving risk was that they created a certainty of damage through their normal operation. The classic example was the Trail Smelter case, in which the State of origin had been aware that the activity in question produced fumes which were being carried to a neighbouring country and causing damage and that, if the industrial process went on unchanged, the affected State would continue to suffer damage. In that case, the two parties involved had had a different perception of the law, but not of the facts. The Court had decided that the damage had to be compensated and that the industrial process had to be modified so as not to continue causing harm. In their report, however, the jurists in the Experts Group on Environmental Law of the World Commission (also known as the Brundland Commission) on Environment and Development had taken the view that such activities might be permitted if the overall socio-economic cost of prevention would, in the long run, far exceed the actual cost of prevention. Of course, the affected State would have to give its consent and it might well insist that its territorial integrity should be respected, whatever benefits the State of origin might derive from the activity, or it might give its consent to the activity in return for certain advantages. Until such consent had been given through consultations, the activity in question was in a legal limbo, since it was not prohibited by international law and was therefore part of the topic under consideration. That was why a consultation procedure was provided for in the report.

21. Another case of activities which were not prohibited, but which had harmful effects, was that of activities which produced creeping pollution, especially long-distance pollution or, in other words, pollution caused by daily activities such as domestic heating and automobile traffic leading imperceptibly to a level of transboundary damage that exceeded the tolerable threshold. Such activities were, however, part of modern life and could not be prohibited with one stroke of the pen. The only possible solution in that case was consultation, as proposed in the report. That solution might seem innocuous, but to bring large and small States to the negotiating table was already a major accomplishment.

22. At any rate, the Commission would have to consider the question of activities with harmful effects and there would be time to decide at a later stage whether they warranted separate treatment. For the moment, that did not seem to be the case.

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5 See 2268th meeting, footnote 14.
6 Ibid., footnote 15.
7 Ibid., footnote 16.
8 Ibid., footnote 13.
9 United Nations, Reports of International Arbitral Awards, vol. XII (Sales No. 63.V.3), pp. 281 et seq.
10 See 2269th meeting, footnote 2.
11 See 2268th meeting, footnote 11.
23. Some 33 articles had been submitted to the Commission. They were all tentative and, in some cases, they might not be fully consistent, but they did contain all the elements the Commission needed in order to draft an instrument.

24. Replying to comments made at the preceding meeting, he pointed out that his seventh report, which had been redistributed at the present session, contained a summary of the work on the topic. The view that, before going any further, the Commission should define certain legal concepts such as liability, seek a clear mandate from the General Assembly and change the name of the topic, if necessary, was, in his opinion, not reasonable.

25. Article II of the Convention on International Liability for Damage Caused by Space Objects, cited in support of that view, stipulated that:

A launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft in flight...

but it did not contain a definition of the term "absolute liability" which was, in any case, a common law term, not one used in Roman law. Most conventions on liability simply stated the consequences of certain acts and those consequences were precisely the liability that was imposed. Only the type and number of exceptions that were permitted made it possible to decide whether such liability was absolute or strict.

26. The Council of Europe's draft Convention on civil liability for damage resulting from activities dangerous to the environment also contained no mention whatever of "strict liability". The Commission had debated the issue more than once and had decided to postpone a decision until its draft articles were complete. There was no real difficulty as far as its mandate was concerned. When it had considered the topic as a whole, it would know exactly what title it should recommend for the topic. Once it had considered activities with harmful effects, it would be in a better position to decide whether they should be treated separately or within the scope of the topic. All the necessary definitions could then be incorporated in the draft articles.

27. He was inclined to believe that the Commission could continue its work according to its usual procedures. The Drafting Committee was now considering the first draft articles and it might propose texts which would meet with the approval of the plenary, which was free to decide on them. That had been done in the case of the apparently intractable subject of the law of the non-navigational uses of international watercourses and a solution was thus possible in the present case.

28. Mr. PELLET said that, apart from a few general considerations which did not call for any comments, the report dealt with two quite separate problems: prevention, on which he would now speak, and the development of certain concepts, which he would discuss at a later stage.

29. The Special Rapporteur had sometimes been accused of not closing the general debate on the scope of the topic and of proposing a new reading each year which was then revised the following year. That was, however, not the case now. The singular merit of the eighth report was that it attempted to submit a consistent set of draft articles on a particular aspect of the topic, namely, prevention. He was therefore surprised that the report, which dealt with relatively technical problems, should give rise to such a general debate whereas the Commission should be supporting the Special Rapporteur's efforts to make progress in the drafting.

30. He welcomed the Special Rapporteur's decision to treat prevention as a matter of priority because it was the only "hard" element of an unsettled topic in which it was not easy to identify the "hard" obligations of States, at least with regard to reparation, which was the heart of the matter. States were, however, clearly bound to be vigilant in limiting or, if possible, preventing significant transboundary harm caused by supposedly lawful activities. That was a well-established principle of general international law and it should be the hard core of the draft articles and the focus for the codification of the topic.

31. The Special Rapporteur was nevertheless reluctant to adopt that approach. He gave the impression in the report that it would lead to methodological problems by shifting the ground from lawful activities, the only subject-matter under consideration, to non-compliance with international law, which came under the topic of State responsibility. Like the Special Rapporteur, he did not believe that that was an insuperable objection. Even if the Commission confined itself to lawful activities, it would do well to decide at what point they ceased to be lawful. To be precise, they ceased to be lawful when the State under whose jurisdiction or control they were taking place was not sufficiently vigilant. Hence the need to deal with prevention and with the obligation of vigilance. Up to that point, he thus agreed with the Special Rapporteur that prevention could properly be covered by the draft and that that should be the starting-point of the entire codification exercise, since it was the only principle on which the progressive development of international law in that field could be based.

32. He could therefore not understand what had prompted the Special Rapporteur to suggest that what appeared to be the hard core of his topic should be included in an annex and even less why the provisions of the annex should be purely recommendatory, since prevention was always better than cure, and the obligation in question was a hard obligation that was well established in positive law, for States had an obligation to exercise vigilance over activities conducted in their territory in order to prevent and minimize any damage that might be caused. The basic question was how to expand on and refine the wording of draft article 8, as referred to the Drafting Committee, and he was rather puzzled why the convention itself should contain an apparently firm, clear article, which, even though it might require some drafting amendments, established the principle that

\[12\] Ibid., footnote 17.
\[13\] Ibid., footnote 8.
\[14\] Ibid., footnote 5.
there was an obligation of prevention, and why the consequences arising out of the principle embodied in that article would be included in a non-binding annex. His own objection to that approach stemmed from his belief that the provisions in question were binding provisions of hard law, not mere recommendations without any clear-cut legal status.

33. As he had said before, he disagreed with Mr. Calero Rodrigues and Mr. Yankov (2269th meeting) that a decision on the legal nature of the end product of the Commission's discussions could be postponed until a later stage. A draft treaty was not prepared in the same way as a draft recommendation or a draft guideline and he was afraid that, if the Commission kept changing its mind about the form of the instrument it was drafting, there would be even more doubts on its substance.

34. Referring to draft articles I to IX, in what was presented as an annex containing recommendations on prevention, he said that he was not happy with the Special Rapporteur's convoluted definition of the concept of prevention as "measures taken after the incident to contain or minimize the harm". The Special Rapporteur was moreover not entirely consistent with that definition and the draft articles departed from it to some extent. He did not disagree with the idea that, once the damage had occurred, the State must continue taking measures to prevent it from getting worse, but he found it rather strange that measures taken after the occurrence of the incident giving rise to liability should be described as preventive.

35. As to the substance, he was not at all convinced by the Special Rapporteur's explanations of why he had not included preventive measures proper in the draft articles or, in other words, why he had not provided that the State must take measures prior to the incident giving rise to reparation. If he had understood the report properly, the partial silence of the draft in that regard was the result of the fact that the conventions establishing strict liability were silent as well. Accordingly, the Special Rapporteur concluded in his commentary to draft articles VI that the State had no obligation of due diligence. That was wholly incompatible with draft article 8, on prevention, which had been referred to the Drafting Committee, and it contradicted the decision in the Trail Smelter case. Conventions were silent on that point not because there was no obligation of due diligence, but because the obligation was sufficiently well established and was based on a firm enough customary obligation that it did not have to be reaffirmed in conventions on specific subjects. That was not true in the case of the general text for the codification and progressive development of international law which the Commission had been requested to prepare. The Special Rapporteur's draft was therefore somewhat unbalanced. It dealt only with one particular type of what might, oddly enough, be called "curative prevention" and wrongly remained silent on genuine prevention, which was at least as crucial.

36. Leaving aside the preamble to the annex, the principle of which he did not accept, as he had just explained, he said that draft article I, which was closely modelled on former draft article 16, dealt with a variety of issues. It provided for a number of different operations: an assessment of the risk and the potential harm which might be caused by the activity in question; the adoption of legislative, administrative and enforcement measures to prevent or minimize the risk of harm; and the prior authorization of those activities by the State under whose jurisdiction or control they were to be carried out, subject to compliance by the operator with the measures adopted during the second phase. The draft article called for at least four comments. First, although the Special Rapporteur had announced that he would not be dealing with "preventive prevention", that was in fact the subject of the article. Secondly, for the sake of clarity, the three phases should have been more clearly distinguished and each one should have a separate article or paragraph in the order in which they were to be taken. Thirdly, he was not at all persuaded by the reasons given in the seventh report to explain why the provision contained no reference to an insurance system. Of course insurance was linked to reparation and that was the reason given for no longer including the idea of insurance in draft article I. However, the responsibility of the State to encourage or oblige operators to take out insurance was not part of reparation, but of prevention and of what had to be done before the activity could be carried out or the authorization for the activity could be given. Fourthly, the State of origin or under whose control the activity was to be carried out should not encourage operators to take the measures referred to in the commentary to draft article 16, but require them to take out proper insurance, failing which the authorization in question should be withheld.

37. Draft article II, which was based on former draft article 11, did not give rise to any particular problems, except that it would be logical for the other States which were potentially affected by the activity also to be informed before the prior authorization was given. The same was true of cooperation which should take place among the States concerned. He was, moreover, sceptical about compulsory assistance of international organizations in helping the State of origin identify the affected States.

38. Draft article III also did not seem to give rise to any particular problems, although there might be some discussion about its implementation and the situation in that regard should be clarified. He was not happy with the proposed wording of the next three draft articles. His reservations were the result of the fact that he was still not convinced of the need to distinguish between activities with harmful effects and activities involving risk. As he understood it an activity with harmful effects was an activity which caused damage regardless of the precautions taken. According to the Special Rapporteur,

There is already a considerable body of international theory and practice to support the view that transboundary harm caused by these activities, when significant, is, in principle, prohibited under general international law.

If that was true—and he was not sure it was—such activities were themselves prohibited by general international law, since by definition they caused such harm in the course of their normal operation; in other words, their consequences were necessarily prohibited by international law. In those circumstances, liability for lawful activities gave way to responsibility for wrongfulness and such activities no longer had any connection with the draft articles. Draft article IV should therefore be de-
39. If, however, the starting point was the idea that activities with harmful effects could be lawful, at least under certain conditions, contrary to what was stated in the report, there was no valid reason for distinguishing between activities with harmful effects and activities involving risk. In both cases, consultations must be held between the State of origin and the potentially affected State or States and draft article VI would suffice for both kinds. In either case, he did not see the need for draft article IV.

40. Although the Special Rapporteur explained in his commentary that draft article VI took a new approach, it seemed to be based on former draft article 14, whose simpler and more direct wording he preferred. In draft article V, the comparison with draft article 20 in the sixth report seemed to be to the latter’s advantage, for at least one basic reason, namely, that the initiative was left to the State of origin, which had to decide what had to be done to limit the risk inherent in the activity and that was the least that could be done in the case of activities which, by definition, were not prohibited by international law. The present wording of draft article V actually amounted to a prohibition of such activities, since the State of origin was no longer able to decide how they were to be conducted or regulated.

41. He could endorse the idea underlying draft article VII, but had some reservations about the wording. It was a good thing that a State potentially affected by an activity could take the initiative for holding consultations, both before and after the authorization, and even when the activity in question had started or damage was becoming apparent. But why have a reference to draft article II of the annex? The reference ought to be to the provisions on consultations. Moreover, the idea that the State of origin would bear the cost of the study was completely utopian: that would be the best way of preventing the parties from achieving an amicable settlement and it overlooked the fact that the activities were assumed to be unlawful. Punishing the State of origin in that way was quite unacceptable and was, in any case, entirely unrealistic.

42. It was difficult to form a view of draft article VIII, which referred by mistake to draft articles III and V instead of to draft articles IV and VI, since the annex it mentioned did not yet exist. A provision of that kind should recall the general obligation concerning the peaceful settlement of disputes and, if necessary, refer to an annex providing for a particularly flexible and speedy means of settlement in order to compel States to hold proper consultations.

43. Draft article IX, which had been taken from former draft article 17, was hopelessly puzzling, not because he objected to the ideas which it embodied and which were quite correct, but because he did not think it belonged in a set of draft articles, whether they became a genuine convention on prevention or remained the kind of “soft law” text to which the Special Rapporteur appeared to be resigned and which would itself be regrettable. Those ideas should be placed in the commentary, where they could be expanded on and added to.

44. In conclusion, he said he hoped that seven of the nine draft articles submitted in the eighth report would be referred to the Drafting Committee and that draft articles IV and IX would be dropped. He also hoped that, instead of labouring over general provisions which were not ready either for codification or even for the progressive development of international law, the Drafting Committee would agree to confine itself initially to the draft articles on prevention in the broad sense, whether or not they had been selected by the Special Rapporteur, and try to prepare a coherent set of draft articles dealing only with prevention and the obligation of vigilance. Such draft articles would be self-contained and might be submitted on first reading to the General Assembly quite soon.

45. Mr. ROBINSON said that the report contained a well-balanced mixture of background material and draft articles which served to advance the Commission’s work on a topic that was full of conceptual and doctrinal difficulties.

46. Before commenting on the recommendatory provisions on prevention that were proposed for the annex, he had some points to make about the conceptual problems. He could see no objection to changing the word “acts” in the English title of the topic to the word “activities”, which would make it clear that reference was being made to liability for injurious consequences of activities which were not themselves unlawful and which were therefore not prohibited by international law, although certain acts committed during the conduct of such activities might be wrongful. The distinction, although a little artificial, might be workable. The fact that such acts were committed during the conduct of activities which were in themselves lawful would provide a justification for treating them within the scope of the topic and the Commission’s mandate. The change in the title of the English version would make it more consistent with the other language versions, especially the French, and also with draft article 1 of the revised version of the draft articles proposed by the Special Rapporteur in his fifth report, which specified that the articles applied to “activities”. The annex proposed in the eighth report also referred to “activities”. It therefore seemed that the Commission had already decided to deal with “activities” rather than with “acts”. Why, then, did it not fully embrace the logic of that approach, which called for the treatment not only of certain lawful activities, but also of acts committed in the course of those activities which were unlawful and prohibited by general international law? Turning to the proposed annex, he said he did not think that the provisions on prevention should take the form of recommendations. He reserved the right to come back to the issue at a later stage, when the Commission considered the nature of the instrument to be prepared.

15 See 2269th meeting, footnote 4.

16 See 2268th meeting, footnote 6.
47. With regard to draft article I, he did not agree with those who were saying that the question of the prior authorization of the activities by the State under whose jurisdiction or control they were to be carried out was a wholly internal matter. It was appropriate to provide, in instruments such as the one now in preparation, that such activities must be authorized in advance by the State of origin, with the important result that that State would be in breach if such activities were carried out on its territory without its prior consent.

48. In his view, the phrase "the State should arrange for an assessment of any transboundary harm it [the activity] might cause" was too vague. Did it mean that the State was bound to carry out the assessment itself, whenever it was not the operator, or merely that it had to ensure that the operator made the assessment?

49. He did not know whether the Commission had taken a decision on the question whether the topic included caused harm in areas beyond national jurisdiction. The definition of transboundary harm in article 2 (c) of the revised draft articles did not establish any link between harm and those areas. Yet areas belonging to the common heritage of mankind, such as the seabed beyond the limits of national jurisdiction, required just as much protection as areas lying within national jurisdiction. The lack of agreed institutional machinery to monitor the use of those areas was not an argument against applying the draft articles to them.

50. It had been pointed out that the proposed annex contained no definition of a threshold. However, the idea of a threshold for transboundary harm was defined in draft articles I and II, according to which harm must be "significant". He nevertheless noted that article 2 (c) of the revised draft articles stated that the expression "transboundary harm" always meant "appreciable harm". The wording of the texts must therefore be harmonized. "Significant" was apparently a higher threshold than "appreciable" and, according to the report, there was a considerable body of opinion and practice in support of the view that transboundary harm, when significant, was prohibited by general international law. As to the choice of terms, he was content for the moment to acknowledge the existence of a rule of general international law prohibiting transboundary harm when it attained a certain level. However, since the term "significant" was used in article I, it should be used throughout the annex.

51. No threshold for "risk" was defined in draft article I of the annex and, although such a definition was more relevant for draft article VI, it was also applicable to draft article I. Article I of the revised text of the draft articles of the main text used the term "appreciable risk". The same term should therefore be used throughout the annex.

52. In the light of draft article II of the annex and the purpose of the annex in general, he was persuaded that the articles on prevention should be more than mere recommendations. Since the activities in question posed a threat to the environment of States and thus to their economic development, those articles should form part of a binding instrument, with provisions that were appropriately mandatory and appropriately recommendatory. In particular, as in the draft articles on the law of the non-navigational uses of international watercourses, the articles on notification, information and cooperation should be not only exhortatory, but also mandatory, in keeping with the developing norms of international cooperation.

53. Draft articles IV and VI dealt with activities with harmful effects and with activities involving risk, in an order that should have been reversed, and reflected the main thrust of the draft articles, namely, the distinction between the two categories of activity. That distinction, which held throughout the annex, had been opposed by at least one member of the Commission, who was of the opinion that liability could flow only from harm, not from mere risk. That view seemed to overlook the fact that the exhortation to consult under draft article VI arose not from mere risk, but rather from activities involving a risk of transboundary harm. In that connection and in accordance with his views on draft article I, he suggested that draft article VI should reflect the applicable thresholds and should thus make reference to "activities involving an appreciable risk of transboundary harm".

54. While activities involving risk were lawful and activities with harmful effects were wrongful, the regimes applicable to each of the two categories of activities were essentially identical, meaning that they were based on consultations with a view to reaching agreement on certain measures to be taken, including preventive measures. It seemed somehow illogical to elaborate the same regime for the two types of activities.

55. In the case of activities involving risk, the States concerned were requested to enter into consultations in order to establish a regime of preventive measures. Since such activities were lawful, there could be no question of requiring the consent of the affected State in order for such activities to be carried out in the State of origin. In the case of activities with harmful effects, the State of origin was also urged to enter into consultations with the affected State with a view to establishing a legal regime for those activities which would be acceptable to all parties. However, since those activities were wrongful, consultations necessarily meant obtaining the consent of the affected State. If that consent was withheld, the activities would then be prohibited and subject to a dispute settlement procedure. Yet, in the absence of precise criteria under which the consent of the affected State should be given, it was highly probable that any difference would be resolved in favour of the affected State, given that the activities in question were prohibited activities.

56. Draft article IV did not specify that, in the case of avoidable harm, the object of the consultations was to obtain the agreement of the affected State regarding the establishment of an acceptable legal regime of prevention. That should be made clear, since the term "consultation" was very often used in cases where there was no obligation to obtain consent. Consequently, draft article IV should specify the characteristics of a legal regime for which the consent of the affected States was requested in the case of avoidable transboundary harm.

57. In the event that the harm was unavoidable and the affected State refused to consent to the activities with harmful effects, the State of origin would seem, then, to
be unable to carry out such activities, as they were wrongful. Did that give the affected State the power of veto, as indicated in the commentary to draft article VIII? He thought that would be the case, but could see no alternative, since a State could hardly be expected to give its consent to an activity which would cause it harm.

58. He wondered what might be the grounds of a dispute under draft article VIII? The State of origin and the affected State would start from different positions, depending on whether the case fell within the scope of draft articles IV or VI. In the case of draft article VI, the State of origin was dealing with lawful activities, while, in draft article IV, it was dealing with wrongfull activities. Yet, he did not see exactly what the basis of the dispute would be. A dispute was usually based on the assertion of a right. But what right did the State of origin have in relation to an activity with harmful effects which was wrongful and prohibited? It might be possible to define in an annex the conditions under which the consent of the affected State could be given, a consent which would cleanse the activities with harmful effects of their wrongfulness. It might also be a question of determining, in the case where consent had been refused, whether that refusal was justified in terms of the conditions set forth in the proposed annex.

59. In respect of draft article V, it was his view that, in the case where transboundary harm was unavoidable or where it was established that such harm could not be adequately compensated, the interests of the affected State were not sufficiently protected simply by allowing it to ask the State of origin to request alternative solutions from the operator. That issue was discussed in the report. It should be specified that, if the operator was unable to put forward acceptable alternatives, the State of origin could not authorize the proposed activities.

60. The concept of a balance of interests, referred to in draft article IX, was useful and the corresponding discussion in the report was very interesting. However, in his view, there was a significant difference between the discussion and the application of the concept. The concept was, in fact, discussed as an exception to the obligation of the State of origin or, more correctly, to the request for international measures envisaged, draft article IX did not give due consideration to that balance as constituting an exception to the establishment of prevention regimes, as called for under draft articles IV and VI. In addition, the concept of a balance of interests, which should be retained, should be reflected, as it was in the report, in a manner which distinguished between activities involving risk and activities with harmful effects: those activities involved different regimes and the balance of interests might very well vary from one to the other.

61. He thanked the Special Rapporteur for his report. He considered unreasonable the view held by certain members of the Commission that the report should have dealt with the conceptual basis of the topic, which had been on the Commission's programme of work for 14 years. At the same time, a return to that conceptual framework would enable the new members of the Commission to grasp more clearly the essence of the topic. In that connection, he welcomed the proposal by Mr. Rosenstock (2269th meeting) for the holding of an informal discussion on the issue.

62. Mr. Sreenivasa RAO said that the principle of liability, which had until recently applied to situations of known causes and effects, had acquired new dimensions as a result of industrial and technological development. Several new activities regarded by States and the international community as important for the socio-economic standpoint and central to their well-being—such as the exploitation of oil resources, the development and use of atomic energy for peaceful purposes, and the construction of chemical plants and large dams—raised issues of liability when accidents or incidents resulted in harm on an unprecedented scale. Most of those activities had been the object of national and international regulation. Liability for any resultant damage had to be assessed in the light of the principles to be observed with regard to operation, prevention and mitigation of damage, and must also respond to the concern of the community to preserve and continue to promote the activity in question. Furthermore, in order to determine the content of the obligation of reparation, it was necessary to take account of the magnitude of the damage that might be caused and also of the fact that, in certain cases, the causal link between the activity and the damage could not be established with certainty. Accordingly, in the case of ultra-hazardous activities, a liability regime had been developed on the basis of the principle of strict liability, which was itself founded on the basic principle of absolute liability. By virtue of those principles, an operator was liable for any damage caused by an ultra-hazardous activity he had undertaken, regardless of any measures he had taken to prevent or mitigate the damage and of the causal link between the activity and the damage. External intervening factors, such as acts of sabotage and war, would, however, shift the liability from the operator to those responsible for the act concerned. Furthermore, a limit had been set to the liability of the operator or the State and supplementary means of funding had been made available to ensure that justice was rendered to the victims of damage. Under the regime of liability thus developed over the years, the role assigned to the State, as opposed to the operator, consisted essentially of providing the administrative, legislative and judicial infrastructure necessary for the examination of complaints and the settlement of disputes. It was rare, however, for those functions to give rise to the liability, or even responsibility, of a State in the event of accidents or incidents, which gave rise only to the liability of the operator. The State was, however, expected to improve its administrative, legislative and judicial response, within the limits of its technological and financial capabilities, wherever there was a failure of its control in a given area.
63. The growth in population, the increase in poverty, the widening gap between the rich and the poor, and, above all, the continued conflict between various groups which used weapons and methods of warfare that were dangerous for the environment had contributed to the deterioration of the environment, the pollution of air and rivers, desertification and deforestation. Environment and development were now irrevocably intertwined and there was an ever-increasing awareness that man should cease to conquer the environment and should instead respect it and learn to remain within the limits of environmentally sustainable growth. All States must endeavour to arrive at commonly accepted international regimes for the exploitation of natural resources, the oceans, outer space and rivers. Even if such regimes could be developed, it would be a long time before they became operational; in the meantime, questions of damage and compensation for damage caused by certain human activities both within the State and across frontiers were bound to exacerbate international relations and to test the principle of good neighbourliness, which, in the modern age, was no longer confined to immediate neighbours. Those questions could no longer be viewed from the same standpoint in a world where the rich must help the poor, where self-interest lay in protecting the common interest and where community responsibility took precedence over individual responsibility and liability. It was apparent too that the present generation and future generations would have to pay for the callous behaviour of previous generations towards their fellow men and above all towards nature and the environment. No regime of liability, whatsoever, would be able to save the innocent victims of those activities and to compensate for the damage that was bound to occur as a result of pollution of the environment, deforestation, floods and rising sea levels, for instance.

64. For that reason, the approach adopted by the Commission thus far in responding to its mandate with respect to the development of suitable guidelines and principles in the matter of liability could be only provisional. The Commission had still not fully understood the context in which such principles or guidelines would operate. It relied unduly on the concept of State responsibility, particularly with regard to prevention, which played into the hands of the real or more directly responsible agents of damage, namely, the operators and multinational corporations which remained beyond the jurisdiction of any one State. In the end, any concept of State liability would only be inequitable and impose onerous responsibilities on a large number of developing countries which were struggling, with their modest means, to develop resources, meet international debt obligations and eradicate poverty. Such a concept was also likely to lead to more conflicts between States and to expose the limits to the capacity of States—even the most advanced—to govern in so far as they were required to ensure that any operation conducted within their borders did not cause transboundary harm or to pay for the harm to which it gave rise.

65. The regime of notification and consultation among States, which seemed straightforward on the face of it, could virtually put an end to the freedom and sovereignty a State enjoyed over its territory, resources and people, since everything it undertook would be subject to the approval or veto of the other State or States and would depend on their development priorities.

66. The logical conclusion was that a liability regime could succeed only within the context of the known parameters of State practice and development. The new concerns about the environment and development went beyond that concept. Any liability regime could play only a limited role within the context of a policy framework that had yet to evolve. Also, the principle of strict liability did not form part of the principles being discussed at UNCED. On the question of prevention, he considered that the points raised in the Special Rapporteur's report and during the discussion were valid only in certain contexts. The principle of consultation, for instance, was applicable only in the case of activities likely to cause harm that could be accurately assessed by technical means, as in the case of the construction of a dam. On the other hand, when the causal link between the planned activity and its effects was difficult to establish, the principle of consultation no longer had any point. Yet the draft articles contemplated several situations of that kind. There was also a risk of the sovereignty of States being infringed, so that the principle did have its limits.

67. He also considered that the terms used should be selected with care to avoid any confusion. Measures of prevention were applied before the harm occurred. It would therefore have been preferable to have spoken of measures to prevent and mitigate the damage, which were also at issue. Furthermore, measures of prevention differed according to whether they were applied by the State or the operator. The former were in fact regulatory measures and were precisely what the operator had to apply.

68. Mr. YAMADA said that, according to the documents on the topic dating back to 1980, there was a wide divergence of views among the members of the Commission on many key elements. It was difficult for him to grasp where the Commission stood and where it was headed. The subject was indeed a complex and difficult one, but he understood the disappointment of some Member States at the slow progress made, particularly against the background of the speed with which treaty norms on various specific environment-related activities were currently being developed. A pronouncement on the subject had to be made without too much delay. At the same time, he was gratified to note that the Drafting Committee had before it draft articles on the question, but he feared that the Drafting Committee had not received much clear guidance from the Commission on the future course of its work and it might be desirable to discuss the matter in plenary.

69. With regard to scope, the Commission should clarify the types of harm to be covered by the draft articles. The prevailing view was that the Commission's work should cover both activities involving risk and activities with harmful effects and the Special Rapporteur had amended draft article 1 as proposed in his sixth report accordingly. His own view was that activities involving risk had to be the core of the Commission's work. In the case of ultra-hazardous activities, such as oil activities and nuclear activities, there were already many specific treaties which governed liability and repa-
ration and which the Commission could use to establish
general principles applicable to activities involving risk.
It was possible, however, that any recommendations by
the Commission for the establishment of a liability re-
gime for activities involving risk might not prove readily
acceptable to Governments. The Commission should
nevertheless make a pioneering effort in that field.

70. Activities with harmful effects gave rise to a con-
tceptual problem. In the final analysis, they should be-
long to the realm of State responsibility. It was difficult
to conceive of a legal regime where it would be lawful to
inflict harm on someone provided that compensation was
paid. There were, of course, cases of compensation for
harm caused by such lawful acts as expropriation. There
were also cases of compensation for activities whose
wrongfulness was precluded on grounds such as force
majeure. However, those cases all belonged to the realm
of State responsibility.

71. The fact was that, at present, there were many ac-
tivities with harmful effects which were not prohibited
by international law, for various reasons. Sooner or later,
however, they were bound to be regulated and trans-
ferred to the State responsibility regime. Like Mr. Calero
Rodrigues (2269th meeting), he also believed that the
draft articles themselves should contain precise provi-
sions on the relationship between the regime of interna-
tional liability for injurious consequences of activities
that were not prohibited and the regime of State respon-
sibility, not only conceptually, but also from the point of
view of their practical application to specific situations.

72. Although the Commission had agreed that, at the
present stage in its work on the topic, it would not con-
side the question of the nature of the instrument to be
formulated, he welcomed the Special Rapporteur’s pro-
sal for the inclusion in an annex, in the form of recom-
mendations, of all questions relating to obligations of
prevention or, in other words, for the separation of those
obligations from obligations of reparation. It would be
better for the Commission to give priority consideration
to the question of reparation and for the draft articles ba-
sically to establish the principles governing the matter.
The question of obligations of prevention might be dealt
with separately.

73. He had serious doubts whether the various instru-
ments referred to in the appendix to the eighth report
could serve as a sufficient basis for the changes he pro-
posed to make to draft article 2 of the main text. That ar-
ticle was meant to be of a universal character, whereas
the provisions in question were recommendatory in na-
ture or applicable to specific situations or particular re-
regions.

74. Lastly, he had no objection to the principle of non-
discrimination, which was dealt with in the new draft ar-
ticle 10, but he would like it to be made clear that the
victim of harm should be able to obtain compensation at
a level in keeping with internationally recognized stand-
ards, for example, through the courts of his State of resi-
dence.

The meeting rose at 1 p.m.
concerned, the scope of the possible strict liability of the State would differ, depending on whether it involved harm to the environment or harm caused by activities involving exceptional risk. It was difficult to lay down a firm definition of the latter type of activity as the concept was far too vague and it was not possible to identify such activities clearly. A strictly legal definition, in which the emphasis was placed on the fact that the harmful effects of such activities could be effaced only by the exercise of the greatest care by the State would not, on its own, be sufficient. The other possible kind of definition, namely, incorporating a list of activities likely to come within such a category and a reference to the various kinds of harmful consequences that might ensue, was limited by scientific and technological developments and knowledge. Such activities could therefore be defined only in generic terms, in other words, by indicating their main characteristics. Indeed, the word “exceptional” denoted not only the catastrophic nature of the harm likely to be caused but also the type and relative rarity of the harm. Moreover, experience gained from domestic laws dictated the need for the utmost prudence.

4. The concept of harm to the environment was a priori easier to pinpoint, though the actual situation was more complex. If that concept were defined as degradation of the natural elements, its vagueness, and the need to incorporate qualitative factors, immediately became apparent. Accordingly, the interdependence and mobility of the constituent elements of the environment meant that the law had to break free from ideas that were too firm and too territorial. None the less it was possible to arrive at sufficiently clear and agreed definitions, as demonstrated in the case of the term “pollution” where used in reference to the sea. So far as international ecological harm was concerned, its origins—both human and industrial—and also its consequences must be determined.

5. The question of liability for harm to the environment had occupied a central place in the reports by Mr. Quentin-Baxter, the previous Special Rapporteur. At the outset, Mr. Quentin-Baxter had taken the view that protection of the environment was a field particularly suited to the application of strict liability, from which all reference to the unlawfulness of the original act was absent; he had, however, subsequently gone on to stress the primary obligations imposed on States with respect to protection of the environment. For his own part, he agreed with Pierre-Marie Dupuy that positive law on liability for harm to the environment in no way differed from the basis of the ordinary law on the international liability of States for the commission of a wrongful act. That view was borne out by article 235, paragraph 1, of the United Nations Convention on the Law of the Sea, article V of the resolution on the legal rules concerning pollution of rivers and lakes in international law, adopted by the Institute of International Law, and paragraph 13 of the document entitled “Responsibility and liability of States in relation to transfrontier pollution”, adopted by the Council of OECD in 1984. The latter document also referred to the minority view favouring a regime of strict liability, whereby the State within whose jurisdiction the polluting activity was carried out would be required to make reparation for the transboundary harm caused, irrespective of any precautions that it might have taken. That would mean the introduction of a system of strict liability, for the element taken into consideration was not the conduct of the State concerned, judged in subjective terms, but the occurrence of harm beyond the area falling within the jurisdiction of that State, judged in objective terms. That position, also upheld by some developing countries, particularly in the course of the negotiations on article 235 of the United Nations Convention on the Law of the Sea, reflected the desire to change the direction of contemporary international law. It did not, however, reflect practice, which was characterized by two main features: a dearth of precedent, and particularly of case law, and the almost total preference of States for pursuing channels of diplomatic negotiation and consultation rather than applying the costly and cumbersome procedures for the determination of international liability.

6. Prevention involved a strictly legal obligation inasmuch as it was based on the fundamental right of human beings to a healthy environment. The customary rule of due diligence, which lay at the heart of that obligation, covered such aspects as the elaboration of legal and administrative measures and regulations, consultation with neighbouring States and the use of impact studies. The question arose whether all the specific implications of diligence should be made compulsory by spelling them out in the body of the text or whether they should be covered by a simple reference to unilateral obligations. In other words, should all the obligations to be imposed on States—whether of conduct, result or means—be dealt with? A priori he favoured a flexible solution, similar to that proposed by the Special Rapporteur, but it was important not to lose sight of the fact that, regardless of the solution chosen, international law was and should remain consensual.

7. Mr. de SARAM, expressing appreciation for the Special Rapporteur’s eighth report, said that the topic before the Commission lay within a fast-moving area, and there was as yet no international consensus on what was a major legal issue, namely whether, in the event of damage being caused on the territory of State B as a result of an activity not prohibited by international law carried out on the territory of State A—and in the absence of any prior agreement applicable to the case—it could be said, as a matter of law, that State A, by reason solely of the fact that an activity on its territory caused damage on the territory of State B, was under legal obligation to compensate State B for such damage. The answer would, of course, depend on whether State A was under a primary obligation—or, to use the shorthand term, an “obligation of result”—to ensure that an activity on its territory did not result in damage on the territory of State B, or whether the obligation was only an “obligation of conduct”, namely, an obligation to exercise all due diligence in ensuring there was no damage. It was on the question of what constituted the primary obligation between the two States involved in such a case, where there was no prior applicable agreement between them, that the fundamental differences of view arose—differences exacerbated by the magnitude of the harm
that could ensue from activities not prohibited by international law. In the absence of any prior applicable agreement, the question of the nature of the primary obligation between the two States would have to be determined in the light of customary international law or in the light of general principles of law. It seemed to him and, he believed, to many others in the Commission, that there were difficulties in asserting, one way or another, what in such a case the primary obligation exactly was, or, at least, there had been and, it seemed to him, still were, deep-seated differences of view on the matter in the Commission. It was a question that had kept arising over many years not only in the course of the Commission’s discussions on the present topic but also in the course of its preparation of the draft articles on the law of the non-navigational uses of international watercourses. In the latter connection, he drew attention to draft article 7 (Obligation not to cause appreciable harm), previously draft article 8, and to the footnote to the commentary stating that certain members reserved their positions because it was not clear from the article and the commentary whether the article was meant as a rule of State responsibility or liability.³

8. It was, he believed, a deep-seated concern as to what ought to be asserted to be the primary obligation between States where—in a case where no prior applicable agreement applied—an activity not prohibited by international law on the territory of one State caused damage on the territory of the other, that had led Mr. Quentin-Baxter, the previous Special Rapporteur, to propose in his schematic outline,⁴ in 1982, that there should be a prior balancing of interests in consultations between States—consultations whose moral, if not legal, basis lay in such principles as sic utere tuo ut alienum non laedas—with a view to determining in advance, at the planning stage, whether, in the event of an activity in one State causing damage on the territory of another, a duty to compensate would or would not arise. The balance-of-interests concept was also one of the principal features of the recommendatory provisions on prevention now proposed by the Special Rapporteur, as was apparent from draft article IX.

9. It therefore seemed that, in the case he had referred to, the question of the nature of the primary obligation between State A and State B and the related question whether that obligation would differ depending on whether or not the activity was extra-hazardous, hazardous or otherwise, would continue to occupy the Commission and international lawyers for some time to come.

10. In the meantime, it would be unconscionable for the world community to permit damage in such cases to lie where it fell, with innocent victims having to bear the burden of loss and injury without compensation. In national systems of law, risks of extraordinary magnitude, which could not be adequately accommodated within national rules of the law of torts, were usually dealt with through insurance arrangements under which difficult questions of law, and of fact, ceased to have any substantial legal or practical significance. Moreover, he believed it to be true in many countries that the costs and delays involved in having recourse to legal advice or legal proceedings—to determine the legal rightness or wrongness of positions should a risk ever materialize—made insurance and reinsurance and, perhaps, even re-reinsurance, the only sensible and practicable course. There were several examples of similar arrangements on the international plane, in the field of treaties, where the principal purpose of the treaty was to provide for speedy and adequate compensation for damage rather than to determine, in the admittedly uncertain fields of general customary international law and general principles of law, who was responsible or liable. One of the more successful examples of such arrangements, concluded following the “Torrey Canyon” incident off the British coast in 1967, was the 1969 International Convention on Civil Liability for Oil Pollution Damage and the related 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. The two Conventions had subsequently been revised, in certain respects, following the Amoco Cadiz incident off the coast of Brittany. There were many other examples of similar treaty arrangements or proposed treaty arrangements in other fields as well. Work on insurance and reinsurance against risks of catastrophic damage, and on the “internalization” of the costs of insurance coverage as a unit of production costs, so that questions of the rightness or wrongness of positions under applicable rules of the law of torts seemed only to have a theoretical interest, was still being carried out. The list of conventions and draft conventions referred to by the Special Rapporteur in his introductory statement (2268th meeting) also demonstrated that work was currently in progress in a number of different forums.

11. He therefore trusted that reference to models of schemes for the coverage of damage could be made in the instrument that would record the Commission’s final conclusions on its work on the topic. Although a decision on the exact nature of such an instrument could perhaps only be determined at a later stage, it was important to bear in mind that it was a point that still had to be resolved. In the meantime, the suggestions put forward by the Special Rapporteur, in particular in his eighth report, provided the Commission with a helpful basis on which to pursue its work, though perhaps more in the realm of the progressive development than in the codification of the law.

12. The provisions on prevention proposed for inclusion in an annex should remain recommendatory in nature and should be couched in rather moderate terms. In an ideal situation, where relations between the States concerned were relatively stable and harmonious, the provisions of draft articles IV to IX, concerning consultations and dispute settlement, would probably work smoothly, but where relations were less than ideal, possibilities for effective consultation, not to mention dispute settlement, could be remote. For instance, the State on whose territory a particular activity was planned might decide to go ahead in any event, and, if the risk of damage materialized, the State affected might have no alternative but to have recourse to the available dispute-settlement procedure and the general principles of law. In terms of the innocent victim and of orderly proceed-

⁴ See 2269th meeting, footnote 3.
ings within the world community, it was an unfortunate scenario. The Commission should therefore examine more closely the possibility of insurance arrangements, or of some other schemes, for the coverage of damage under international conventions.

13. He agreed with Mr. Rosenstock (2269th meeting) that an exchange of views between members in a less formal setting than that of a plenary meeting of the Commission might be worthwhile.

14. The CHAIRMAN, speaking as a member of the Commission, said that, despite the wealth of material furnished by the Special Rapporteur and his predecessor, Mr. Quentin-Baxter, the Commission was still at the initial stages of its work on the topic. Although the Special Rapporteur thought that the general-debate phase was over, there was still widespread disagreement on what could and should be achieved. The feeling that there was a conceptual vacuum was by no means confined to the new members. The Commission had had continuous discussions on the issues of risk and harm, of reparation and prevention, yet it had not been able to establish clearly the aims to be pursued. To his mind, the choice to be made should not depend on subjective likes and dislikes. Rather, the Commission should endeavour to assess the objective needs of the international community, an element that seemed to be lacking in all the reports submitted by the Special Rapporteur. It needed to determine the gaps in the existing framework of rules of international law and whether it could actually make a meaningful contribution to the development of international law by drawing up general rules, which were not specifically tied to a given sector of inter-State relations. While it had been among the first to address the issues subsumed under the topic of international liability, the Commission had been largely overtaken by others. There was currently an almost dizzying abundance of instruments in the field, ranging from treaties to purely political declarations. Those recent developments had to be taken into consideration in pursuing the work on the topic.

15. The Commission should limit itself to drafting a set of principles on the rights and responsibilities of States with respect to the use of territories, areas or objects under their jurisdictional control. States would probably never accept a binding instrument restricting their freedom of action in a general fashion. The Stockholm Declaration5 and the declaration to be adopted at UNCED6 should serve as a starting-point. The Commission should first assess the "hard" substance of those declarations and then move on to improving upon and giving appropriate legal form to discussions that had taken place in forums with a predominantly political outlook.

16. One thing was certain: it was not possible to continue to discuss the report on the present topic and then set it aside in order to consider more important items. A decision had to be made on which direction to follow. He was grateful to the Special Rapporteur for his report, which would help guide the Commission in its analysis of the complex questions under consideration.

17. Mr. BENOUNA said that he appreciated the great flexibility and patience demonstrated by the Special Rapporteur over the years as he had tried to clarify some very difficult issues. He agreed with the Special Rapporteur that the general-debate phase was over. In spite of the uncertainties that remained, it was time for members to agree on certain fundamentals of the topic and to move ahead in elaborating a draft instrument.

18. The Commission had at the outset decided to treat the issue of responsibility and liability separately. The first topic concerned the responsibility of States for internationally wrongful acts. The other concerned liability for activities involving risk that were not, as yet, regulated by international law. Actually, such activities represented a gap or inadequacy in international law and were neither prohibited nor authorized by it—a fact that was appropriately reflected in the title of the present topic, which had avoided using the term "lawful acts" and stressed instead that the acts in question were simply not prohibited by international law.

19. The link between State responsibility and international liability was undeniable; the two domains could not, by definition, be completely separate from one another, particularly since State responsibility covered the field of international law in its entirety. The Commission was simply wasting its time in trying to define strict boundaries between the topics.

20. Some members of the Commission insisted on arriving at absolutes. However, that was not possible, given the nature of the present topic, which represented a grey area between law and non-law, an area that had been characterized as "soft" law. Areas which did not fall under the scope of international law were reserved for the exclusive competence of States, which, in itself, was a relative concept.

21. Admittedly, the title of the topic was not entirely satisfactory. However, the Commission should leave that question aside and concentrate on substance. The title could be modified later, once the issues had been adequately clarified.

22. In dealing with the issue of strict liability, or liability for risk, it was important to go beyond the concept of harm, and the obligation to make reparation, to the related concepts of risk and prevention. It was becoming clear that liability for risk could be dealt with only in conjunction with prevention. To deal with either subject alone was to miss the point. Prevention and reparations for harm had to be seen as a "package"; both elements had necessarily to be included in the topic.

23. As to the precise nature of the articles on prevention, the Commission should bear in mind that it was working towards the establishment of a framework convention, similar to the one successfully elaborated on the law of the non-navigational uses of international watercourses. That type of convention was abstract by definition: it simply provided a general foundation on which to construct concrete and precise rules, to be negotiated between the States themselves. He thus shared the view of

5 Ibid., footnote 2.
6 See 2268th meeting, footnote 2.
Mr. Calero Rodrigues (2269th meeting) and others that it would be premature to decide whether to place the provisions on prevention in an annex, in the form of recommendations. He did not concur with those who believed that the Commission would proceed differently depending on the nature of the text, especially since the topic under consideration represented an intermediate zone in international law. The Commission should not, at that stage, make a decision with regard to the character of any particular provision; the juridical nature of the instrument it was elaborating should be left open until work on the contents of the instrument had been completed.

24. In his eighth report, the Special Rapporteur discussed the distinction between activities involving risk and activities with harmful effects. Some members had maintained that activities with harmful effects were wrongful from the start and thus did not even fall within the scope of the topic. Such a conviction had failed to receive affirmation in the eighth report: the Special Rapporteur had simply raised the question. Moreover, there were different degrees of harm and, in some cases, States were willing to tolerate a certain level of harm, depending on the interests involved. In that connection, he endorsed the view of the Special Rapporteur, who had stressed the obligations of States to negotiate, based on the principle of a balance of interests and that of equitable conditions in carrying out a particular activity. Those principles could serve as guidelines, thus enabling States to define through negotiations the thresholds of tolerance for any particular activity with harmful effects. Again, some members wished to make a distinction between prevention before the start of an activity and prevention of the further spread of harm after it had occurred. That distinction was false, for prevention was a continuous operation and should be considered as a constant obligation on States.

25. As they appeared in the report, the recommendatory provisions on prevention contained certain redundancies and might need to be revised by the Drafting Committee. For example, both draft article IV and draft article VI dealt with the obligation of the State of origin to hold consultations with the affected States with regard to certain activities. Draft article VIII, concerning the settlement of disputes, also needed to be reworded. In that connection, it was important to avoid a situation in which a State was prevented from carrying out activities by a veto from another State. A flexible procedure for the settlement of disputes might be the solution.

26. Lastly, he wondered whether the Chairman might not assist members in arriving at some mutually acceptable guidelines on the present topic, which could then serve as a basis for the elaboration of a draft convention.

27. The CHAIRMAN said it was not clear that it was up to him to provide the Commission with a set of guidelines for its work. That task would be better carried out by the members themselves.

28. Mr. RAZAFINDRALAMBO said he had expressed regret previously that the Commission was still discussing the fundamental issues underlying the topic and was even questioning its merit. He thus appreciated the fact that, in his eighth report, the Special Rapporteur had concentrated mainly on the principle of prevention and proposed a set of concrete articles on the subject. His approach had been based on a thorough survey of the international instruments on the environment and of the efforts of various international and regional bodies working on the regulation of dangerous activities.

29. At a time when the entire world was launching an offensive against environmental degradation, the Commission had a major role to play and must not miss its chance to make an enlightened contribution, within the scope of its mandate and within the limits of its legal competence. The Commission's task was not only delicate and complex, but also vital, for the world was dominated by technology and economic power, which was giving rise to an ever-widening gap between the wealthy countries of the North and the poor countries of the South. For that reason, the developing countries could only welcome any progress towards international regulation of the injurious consequences arising out of acts not prohibited by international law. In that connection, the scepticism expressed by Mr. Pellet (2270th meeting) with regard to participation by the international organizations, as envisaged in draft article 12 of the main text was regrettable. Far from being reduced to determining which State or States would be affected by the transboundary effects of a particular activity, the role of international organizations, both universal and regional, should include the supply of technical and financial assistance to developing countries in connection with the adoption of preventive measures. He had in mind such bodies as UNIDO, IAEA and the Indian Ocean Commission. The provision defining their role might well be modelled on articles 202 and 203 of the United Nations Convention on the Law of the Sea. Preferential treatment for developing countries was, of course, a constant concern of the United Nations and was embodied in principle 6 of the principles on general rights and obligations drafted for UNCED, as well as in several provisions of the draft Convention on Biological Diversity.

30. As to the proposals on obligations of prevention contained in the report, he saw no reason for separate treatment of unilateral prevention measures relating to, respectively, activities involving risk and activities with harmful effects. As the Special Rapporteur pointed out, the role of the State was the same no matter what the activity being regulated. He agreed with the Special Rapporteur that differences between the two categories of activities did arise in relation to the need for prior consultation.

31. The proposal that all the articles on prevention should be consigned to an annex consisting of purely recommendatory provisions was attractive in its apparent simplicity, but, as already pointed out by several members, there were a number of objections. It should be remembered that it had always been the Commission's practice not to decide on the nature of a draft under consideration before completing its work on the draft. Mr. Pellet's suggestion that obligations of prevention

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7 Ibid., footnote 7.
8 Ibid., footnote 2.
9 Ibid., footnote 4.
should form the main or only subject of the Commission’s work on the topic deserved attention but appeared to ignore the existence of articles 1 to 10, already referred to the Drafting Committee. Moreover, it allowed only a minor and subsidiary role for international organizations and, most important of all, was not consistent with the Commission’s mandate from the General Assembly.

32. The various proposals advanced in the report concerning the development of some concepts in draft article 2 of the main text, and more particularly the concepts of risk and harm, should be referred to the Drafting Committee. Lastly, the Special Rapporteur was to be congratulated on a lucid, concise and constructive report, one which would undoubtedly help the Commission to make progress in drafting an international instrument of great use to the community of nations.

33. Mr. MAHIOU said that the Special Rapporteur’s declared intention to limit the discussion as far as possible to the contents of the eighth report had not, perhaps, been well served by the inclusions in the report of general comments on articles already adopted by the Commission. Referring in that connection to Mr. Koroma’s remarks (2269th meeting) to the effect that the Drafting Committee appeared to be encroaching on the role of the Commission, he stressed the need to distinguish between articles 1 to 10, which had been formally referred to the Drafting Committee, and the remaining so-called “experimental” articles, which were still before the Commission and open for discussion whenever they were touched on in a new report. The full Commission was, of course, at liberty to issue new directives to the Drafting Committee in respect of articles 1 to 10. While fully acknowledging the right of new members to raise general issues relating to the topic as a whole, he welcomed the Special Rapporteur’s approach of concentrating on one set of problems at a time in order to enable the Commission to come to grips at last with the substance of the topic. The central point addressed in the report was whether measures of prevention should be in the nature of obligations, and should therefore be included in the body of the convention envisaged, or of recommendations relegated to an annex. Two opposing positions had emerged on that important question. On the one hand, the Special Rapporteur himself, in the light of opinions voiced in the Commission and the Sixth Committee as well as of existing conventions, favoured the second alternative. At the other extreme, Mr. Pellet considered that prevention was the core of the topic and that the entire draft should be constructed around it. No doubt the truth lay somewhere between those two points of view.

34. Prevention did indeed lie at the heart of the problem, but it was situated, as it were, upstream of the area the Commission was mandated to consider. It belonged to a preliminary phase. The crucial question, as he saw it, was what happened if an activity not prohibited by international law caused injurious effects although every appropriate preventive measure had been taken. To concentrate exclusively on prevention would be merely to postpone facing up to that problem. He agreed with the opinion of the previous Special Rapporteur, Mr. Quentin-Baxter, that prevention, harm and reparation formed a continuum. As had been said, the problem was as slippery and elusive as an eel. The advances in technology, however, made it essential to grasp the eel and bring it under control.

35. The Special Rapporteur’s views as reflected in the report appeared to have undergone some modification. For his own part, he remained convinced that measures of prevention should be mandatory. He would also prefer the instrument to take the form of a draft convention, but felt that the determination of its precise status should be left until later. A framework convention along the lines of the draft articles on the law of the non-navigational uses of international watercourses was not an appropriate solution in the present case, which specifically involved liability.

36. As to the draft articles on prevention proposed for the annex, draft article I could bear some improvement. A reference to the concept of urgency should be included in the article or elsewhere among the provisions on prevention. As for draft article II, the duty to inform already existed in internal law and the proposal to introduce it in international law should not give rise to any serious objections. The saving clause in draft article III was also acceptable, but there too the drafting should be improved. So far as draft articles IV and VI were concerned, he was not yet clear in his own mind whether provisions on consultation in the case of activities with harmful effects should be different from those in the case of activities involving risk; the point undoubtedly required further analysis. Under draft article IV, a veto was possible for activities with harmful effects, because if the States concerned could not reach an agreement, the activity could not take place, whereas no such veto was possible for activities involving risk. That was one of the most important differences between the two activities. Surely, when a veto was involved, it caused problems of ensuring a balance of interests for both the State of origin and the affected State.

37. With reference to draft article VII, he wondered whether the distinction drawn in draft articles IV and VI had an impact on an initiative by an affected State, especially in regard to paying the cost of the study referred to in draft article VII. If the activity had harmful effects, clearly the affected State should receive compensation for the study it had undertaken, because it was precisely the study that had revealed the presence of injurious consequences. Yet he doubted whether there was a basis for making the State of origin pay for a study if the activities only involved risk. He endorsed draft article VIII, on settlement of disputes, but if preventive measures were to be contained in the draft convention, a mechanism was needed and should be included in the form of an annex. States should have the choice of deciding whether they wanted to start a procedure for the settlement of disputes. Lastly, while it was important to indicate to States what the basis for consultations was, the factors referred to in draft article IX should only be recommendations; otherwise, the framework would be too inflexible. He preferred to see that article as an annex that would serve as a guideline for States in dealing with the question of activities with harmful effects and activities involving risk.
38. Mr. SHI thanked the Special Rapporteur for his illuminating report, and said that it gave much food for thought. He would confine his comments to the matter of prevention. As a number of members had already pointed out, an understanding had been reached during the general debate at the previous session that the final form of the draft articles would be decided later on in the Commission’s work. Yet, in the eighth report, the Special Rapporteur proposed that the draft articles on prevention should take the form of recommendations and constitute an annex to the draft. Did that mean that the Special Rapporteur intended the entire set of draft articles, apart from the proposed annex, to be binding? If so, the draft would have to take the form of an international convention. That was certainly not in accord with the understanding reached at the Commission’s forty-third session.

39. He did not object to the inclusion of an article on prevention in the draft, but it had always been his view that for activities not prohibited by international law, failure on the part of a State to take measures to prevent accidents from occurring, or the inadequacy of such measures, could not give rise to action; otherwise, the present topic would not be any different from that of State responsibility. Liability only arose in the event of transboundary harm caused by an activity not prohibited by international law. The Commission still seemed to be divided on the activities involving risk of harm and those with harmful effects.

40. Leaving aside the issue of the final form of the draft articles, he agreed with the Special Rapporteur that articles on prevention, including procedural provisions, should not be binding. The proposed articles themselves were actually a simplified version of those presented in the sixth report, which, as the Special Rapporteur acknowledged, drew on the relevant part of the draft articles on the law of the non-navigational uses of international watercourses. As he recalled, a number of members, including himself, had pointed out at the time that the present topic was not the same as the regime of the non-navigational uses of international watercourses. In presenting his new draft articles on prevention, the Special Rapporteur had to some extent taken into consideration the comments made by members at the forty-second session. For example, some of the original articles had been omitted, and the new articles had been included in non-mandatory terms.

41. It was true that draft article I stated the obvious. For the activities covered by the present topic, it was life, property and the environment in the State of origin that would in most cases bear the brunt of the harm caused. Today, for such activities, States demanded authorization, which would be granted only after careful consideration of the relevant documents and data, including an assessment of the social, economic and environmental impact of a projected activity. That article provided for the assessment of transboundary harm, but sometimes such an assessment was not possible. For example, in the case of a satellite launch, surely it could not be determined that an accident causing transboundary harm would occur. Another example was the assessment of creeping transboundary harm. It was hardly possible to assess transboundary harm caused by the emission of carbon dioxide resulting from the use of fossil fuels in a given country. The Special Rapporteur was aware of those difficulties, because the article ended by stipulating that States should ensure that those responsible for conducting the activity applied the best available technology.

42. The other proposed articles might be useful or applicable to certain specific activities, but not as a general rule applicable to any activity within the scope of the topic. For instance, in the matter of notification and information dealt with in draft article II, if the then Soviet Union had concluded from its assessment that its nuclear-powered satellite would one day crash on Canadian territory, would it have changed its plan, and would the Government of Canada, being informed of the assessment, have agreed to the satellite being launched? In such a case, the article would be of doubtful practicality. Another example was the requirement of prior consultation for activities with harmful effects, set out in draft article IV. Suppose State A planned to build a series of power plants run on fossil fuels and State B called for consultations because it thought the power plants would emit large quantities of carbon dioxide, causing transboundary harm on its territory. Suppose also that State A had only fossil fuel resources and virtually no technology or financial resources to reduce carbon dioxide emissions or to change over to other forms of energy. In such a situation, would consultations lead to any legal regime for the activity in question as conceived in draft article IV? Requests for alternatives, called for in draft article V, would also be impractical. And what was the use of dispute settlement under draft article VIII in the event of the failure of consultations and requests for alternatives? The articles would put State A in a helpless situation, and they were also open to abuse by potentially affected States. International cooperation would be needed, not consultations, requests for alternatives or dispute settlement.

43. Lastly, if there was to be a regime of prevention, even in the form of recommendations, special consideration should be given to the needs and interests of developing countries, particularly the least developed. The draft articles proposed by the Special Rapporteur had put the developing and developed countries on a footing of formal equality, but in reality the developing countries were placed at a disadvantage.

44. He endorsed the Chairman’s views that, instead of drafting a set of articles, the Commission should formulate guidelines for States that responded to their actual urgent needs. At the thirty-ninth session, in 1987, he had suggested that the Commission should either request the General Assembly to allow it to defer consideration of the topic or should stop engaging in polemics and take a more pragmatic approach to meeting the real needs of States by formulating such guidelines. Today, the subject-matter had become very topical, and it would be

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inappropriate to make a request of that type to the General Assembly. Hence the Commission must work on producing guidelines for States; being too ambitious might well lead to complete failure.

45. Mr. IDRIS said that the subject was complex and not only involved legal issues, but also had political and economic implications. He had to confess that he experienced difficulties with the report, which did not show the development of what was a long-standing subject. The conceptual framework of the topic was not yet ready, and the basic objective was still ambiguous. In that connection, he agreed with the statements by Mr. Vereshchjetin (2269th meeting) and Mr. Sreenivasa Rao (2270th meeting) and endorsed the pertinent comments by Mr. Bowett (2269th meeting).

46. Despite worldwide concern about contemporary environmental problems, particularly in the wake of the Chernobyl accident, he was doubtful whether the present topic should be dealt with independently of the general rules of State responsibility. There was a basic substantive relationship between the topics that had not been dealt with by the Special Rapporteur or resolved by the Commission. He wondered whether a code on liability would improve the current status of international law and practice and be more efficient than an aspect-by-aspect approach geared to the adoption of realistic and carefully defined separate legal instruments.

47. The instrument now being devised was intended to cover only lawful activities. Harm, when caused without breaching an obligation, might be regarded as the result of an act beyond the control of the State concerned. In that case, there would be two victims, namely the State in which the event took place and the State suffering transboundary harm. Actually, the physical harm to the former could be more serious than to the latter. With regard to prevention, it was important to strike a balance between avoiding States their legitimate freedom of action on their territories and ensuring that they exercised due care in preventing transboundary harm arising out of their activities. The goal should be not to prohibit lawful activities, but to regulate them.

48. The records of the Commission and the current debate showed that little progress had been made. The Commission was still considering basic issues and even questioning the value and objectives of the topic. International environmental law, including that related to the "global commons" and the United Nations Convention on the Law of the Sea, had been evolving effectively outside the Commission. The Commission had been experiencing considerable difficulty in reaching a consensus, partly because the goal of its work was not clear. He was not convinced that it was too early to examine the status of the topic. Once that was decided, it would be a simple matter to clarify the content and structure of the proposed instrument. In that respect, he wondered whether it was timely and realistic for the Commission to pursue its endeavours to formulate a general and multilateral convention or whether it would be reasonable to have the results take the form of general guidelines or a declaration of general principles by the General Assembly.

49. Lastly, he supported Mr. Rosenstock's suggestion (2269th meeting) that the Commission should establish a small working group to define the basic concepts involved and focus on the form and nature of the instrument to be adopted.

50. Mr. CRAWFORD said that, as shown by the debate, there was no consensus on where to place the draft articles on prevention. For his part, he agreed with Mr. Pellet (2269th meeting) that those provisions should not be recommendatory and they should not be relegated to an annex. The status of the draft articles was still unresolved, and it was not the right moment for the Commission to decide that prevention was less important than any other aspect of the topic. It was high time for the Commission to devote closer attention to the subject, and in that context he strongly supported Mr. Rosenstock's suggestion for a working group.

51. Mr. BARBOZA (Special Rapporteur), referring to Mr. Crawford's remarks, said that he had had the impression that the Commission was in favour of placing all the procedural articles on prevention in an annex. In his report, he had suggested that the same course should be followed for unilateral measures of prevention, but that did not imply that a consensus had been reached. As he saw it, there was general agreement in the Commission on not making procedural measures binding.

52. As to the comments by Mr. Idris, there had been debate in the Commission on the difference between the present topic and the topic of State responsibility. He had sought to make that distinction clear and wished to draw attention in that regard to the record of the debate at the forty-first session.12

53. Mr. IDRIS said he did not mean to suggest that there had been no debate, but simply that it had not yielded any concrete results. The topic under consideration and that of State responsibility continued to overlap somewhat and the problem must be resolved before the articles were drafted.

The meeting rose at 12.55 p.m.


2272nd MEETING

Friday, 12 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Barboza, Mr. Bowett, Mr. Calero Rodríguez, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mabou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi,
Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. VILLAGRAN KRAMER said that the study by the Special Rapporteur highlighted the need to harmonize and reconcile the two types of State responsibility, namely, responsibility for the consequences of wrongful acts and so-called strict liability. It was understandable that some members of the Commission from industrialized countries, whose enterprises were liable to cause transboundary harm, might be concerned about the consequences theory of strict liability could have in that regard. It was not, however, impossible to regulate the question at the international level and the method which had been proposed by the Special Rapporteur and which would be to draw up a provisional list of activities that could be classified in the category of ultra-hazardous activities was very useful because it made it possible to place that theory in the specific context of risk and to distinguish it from the theory of ordinary contractual responsibility.

2. With regard to prevention, he believed that the argument that the imposition of obligations of prevention might give rise to the civil liability of the State in the event of failure to fulfil those obligations was not convincing enough to eliminate the question of prevention from the draft text under consideration. Prevention was part of the normal set of rules of law and, in the modern world, it was inherent in all human activities. The idea of imposing a lowest common obligation of prevention on States was one that had been discussed at UNCED and provisions on prevention were likely to be included in a large number of instruments that would be concluded after that Conference. The Commission could not fail to take account of that trend.

3. In reply to those who drew a distinction between preventive measures taken before harm had occurred and measures to minimize harm taken after it had occurred, he pointed out that, as the Special Rapporteur had explained, prevention had two aspects. In the first stage, it was designed to prevent significant harm from occurring and, in the second, when an accident had actually occurred, it was designed to avoid a multiplier effect, an approach which fell squarely within the framework of a rule of prevention.

4. With regard to the concept of risk, the definition given by the Special Rapporteur in the report on the basis of the three main criteria of magnitude, location and effects, was undoubtedly very useful for discussion purposes, but he thought that it would be preferable, as the Special Rapporteur himself suggested, to divide the proposed text so that the first two sentences would form a paragraph of article 2 (Use of terms), with the remainder of the wording appearing in a commentary. The best course would be to proceed as proposed by the Special Rapporteur, including his suggestion that the list of dangerous substances should be placed in an annex, if only to facilitate the discussion. He was not sure whether it was really necessary to define the concept of harm, since a rigid definition might hamper the judges in their work, particularly since it might soon become obsolete as a result of technological developments and the increasing sophistication of industrial activities. It might be better to characterize harm simply by reference to its magnitude. The important point was to make it clear that what was involved was not ordinary harm, but "substantial", "appreciable" or "significant" harm, depending on the term to be used. It might also be desirable, when defining the components of transboundary harm, to avoid the use of the awkward term choses in French or cosas in Spanish.

5. Lastly, he suggested that the Commission might give further consideration to the possibility of assigning liability for harm and hence for the resulting consequences and legal obligations to the operators or, in other words, to persons and not to States. The State was an intermediary, its role being basically that of enacting rules and regulations and ensuring that they were applied; it was the operator who was directly liable. It might be useful to give further consideration to that question of the liability of the operator, without, however, going too far in that direction.

6. Mr. MIKULKA said that he would draw the Commission's attention to the fact that the question of prevention, which was the focus of the Special Rapporteur's eighth report, and that of liability for the injurious consequences of activities which involved risk or had harmful effects, were two completely different and totally unrelated problems. In the case of State responsibility for wrongful acts, the obligation to make reparation was secondary, whereas, in the case of liability for injurious consequences arising out of acts not prohibited by international law, it was primary and it arose when an activity carried out in the territory of one State caused harm in the territory of another State, even if that activity was not wrongful and no matter whether preventive measures had been taken or not.

7. He agreed with other members of the Commission that measures of prevention should be compulsory, despite the Special Rapporteur's proposal that they should be recommendatory. The argument in the report, that the imposition of primary obligations of prevention would make any breach a wrongful and therefore prohibited act, so that the Commission would then be dealing with prohibited acts which were not part of the topic under consideration, was not convincing enough to eliminate the idea of obligations of prevention from the draft to be formulated. In view of the absence of any real progress in formulating substantive rules on liability for injurious consequences arising out of activities that were not pro-

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1 Reproduced in Yearbook... 1992, vol. II (Part One).
hibited, the formulation of a body of rules on the problem of prevention might meet at least some of the international community's needs. The duty to make reparation for transboundary harm could, however, not be subordinated to the State's obligation in respect of prevention. The obligation of reparation had to be placed in the context of the principle of equity whereby an innocent victim should not be left to bear the burden of the harm. Accepting the Special Rapporteur's idea that transboundary harm caused by activities involving risk, when significant, is in principle, prohibited under general international law. That being so, an activity of this type could exist only if there were some form of prior consent of the affected States, would mean moving from the realm of liability to that of responsibility for wrongful acts. Prior consent would then be no more than a circumstance precluding wrongfulness within the meaning of article 29 of part I of the draft articles on State responsibility. In order to keep the topic under consideration completely separate from the question of State responsibility for wrongful acts, that idea had to be discarded.

8. Mr. PELLET said that he wished to come back to the concepts of harm and risk, as discussed in the appendix to the report.

9. With regard to definitions, he said that the substance of the definition of risk proposed in the report seemed to be based on ideas that were correct, but the wording was unusual for a legal text. The text was more of an explanation than a definition and he thought that it should be placed in the commentary. It would also be preferable to have two separate paragraphs dealing with the concepts of risk and activities involving risk respectively, since risk was the probability of significant harm, whereas an activity involving risk was a type of conduct or a process involving such a probability. There was no need to go further in the body of the text, the rest of which was an explanation rather than a definition.

10. In connection with the concept of risk, there was no need to include the idea of "significance", for two reasons. First, because it would lead to endless discussion; for instance, with regard to the peaceful uses of nuclear energy, it was hardly likely that States would take the same view of the probability of an accident, depending on whether reactors were sited in their territories or came under the jurisdiction of other countries. It was undeniable that a risk existed, even with the use of sophisticated and reliable technology, and it could hardly be claimed that the peaceful use of nuclear power was not an activity involving risk, whatever the actual level of probability. The second reason, which was more theoretical, was that the problem was not the magnitude of the risk, but the magnitude of the potential harm.

11. In the light of the definition of risk which he was proposing and which was basically the same as the Special Rapporteur's, it was clear that the definition of harm must precede the definition of risk, as a matter of ordinary logic without any substantive implications.

12. The definition of harm proposed by the Special Rapporteur in the report was much more open to question than the ideas underlying his comments on risk. The list of the various categories of harm was not objectionable in itself and he would agree that loss of life, personal injury, impairment of health, damage to property, detrimental alteration of the environment and perhaps the cost of preventive measures—a matter on which he reserved his position—were all elements of a proper definition. Moreover, the definition was much the same as the one the Chairman had suggested in the draft article he had annexed to his contribution to the work edited by Francioni and Scovazzi. However, it was quite extraordinary that the word "compensation" should be used in the seemingly harmless wording of subparagraph (c) of the proposed definition because it was not in article 2 that it should be decided whether harm gave rise to compensation. He was sure that the Special Rapporteur was not trying to force the Commission's hand, but he did want to draw his attention to the fact that the provision put the cart before the horse because a reference to compensation would mean that what was being defined was not harm, but its consequences, and that would prejudice the entire issue. He therefore requested the Special Rapporteur to reassure him on that point and, at any rate, to explain why the idea of compensation was present in the middle of a definition of harm.

13. He agreed that, although there was no point in defining risk, harm must be defined. He had no particular preference as between the words "significant" and "appreciable", but he wished to draw the Special Rapporteur's attention to a number of studies on the question, including an article by Sachariew. It was, however, one thing to describe harm in relation to the definition of risk and quite another to define what was meant by "significant" or "appreciable". He fully agreed with what Mr. Villagran Kramer had said in that regard. It would be both pointless and dangerous to define the magnitude of harm, since that was primarily a matter to be decided by the courts. It would also be presumptuous and paralysing to attempt a definition that would soon be obsolete in any case because attitudes towards such matters were changing so fast. There was thus no point in embarking on a definition within a definition.

14. With regard to the concept of transboundary harm, he had no objection to the definition contained in the report, but he had two additional points to make. First, the draft should not leave out harm which did not come within the scope of that definition, but which was nevertheless well within the bounds of the topic, such as harm caused to the "global commons". It might be worthwhile asking whether the draft should be confined to harm with some extraneous element, such as trans-

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boundary for lawful acts, risk was the factor which gave rise to reparation. As Mr. Villagran Kramer had suggested, the focus should be on the duty of the operators to make reparation.

Mr. Arangio-Ruiz commented that a provision which might be acceptable in a recommendation without binding force might not be acceptable if it were to be included in a convention. For instance, he was one of the members of the Commission who held the view that a State was not bound to make reparation for harm caused by an activity which was not prohibited by international law. It would, however, be unrealistic and unrealistic to state that view in a draft convention; that would be to confuse what was desirable and what was possible, whereas the same idea might well be included, on the basis of equity, in a recommendation. He therefore reiterated that it was by no means unimportant to decide whether the Commission should be engaging in "hard" law codification leading to a convention or in flexible progressive development leading simply to recommendations. Where other issues, such as reparation, were concerned, he considered that it would be better to have standard clauses which would fit different categories of risk. In any event, a decision must be taken urgently because the nature of the discussion would change depending on the purpose of the exercise to be undertaken.

Secondly, he thought that Mr. Bennouna, Mr. Razafindralambo and Mr. Muhiu (2271st meeting) had misinterpreted his comments by attributing to him the view that the consideration of the topic should be limited to prevention. What he had meant was that prevention was not the finishing post of the Commission's discussion, but its most reliable starting line. Regardless of the tricky question whether a State was bound to make reparation when harm had occurred, there was no doubt that the State must seek to prevent harm and to limit its injurious consequences. That was settled and clear; the principles of international law involved were beyond any doubt and, indeed, had not been questioned. The rest was a matter of speculation and opinion on which the Commission was obviously somewhat divided. He hoped that the Commission could start out from firm ground before hitting stormy seas and that, just as though it were throwing a bottle into the sea, it would send the General Assembly the first part of the draft articles on prevention. After that, he would be ready to take ship with his colleagues on the way to unknown lands.

Mr. ROSENSTOCK said that, like the previous speaker, he considered it vital that there should be some consensus or general understanding on the point at which the Commission's work should begin and the order in which it should follow. It might not be possible to conceptualize that starting point in terms of State responsibility because the problem of the relationship between State responsibility and the topic under consideration was complicated by the pragmatic but somewhat artificial boundaries the Commission had adopted for the topic of State responsibility. The problem was also complicated by the fact that the issues covered first in Mr. Quentin-Baxter's and then in the present Special Rapporteur's reports were so complex that neither fault nor strict liability provided the key. It was an area in which fault and strict liability seemed to overlap to a certain degree. Perhaps the task of the Commission should be broken down into different segments to enable it to tackle the problems one by one, on the understanding that it would endeavour to cover all aspects of the problem in due course. He agreed that one aspect with which the Commission could start was prevention, in which connection many of the Special Rapporteur's proposals would provide an excellent starting point. Another issue which it should be possible to deal with and which could be taken up in the initial stages of the general study was the civil liability of operators, including provisions for insurance and funding arrangements. Thereafter, the Commission could try to tackle some of the conceptually more difficult issues.

If that approach was not acceptable as a first step, the Commission would be faced with the choice of either continuing to go round in circles or of adopting an approach that would enable it to make genuine progress. If such an approach was to have any chance of producing early results, it would be essential for the Commission to agree to draft a statement of principles or guidelines. It was no accident that, when the United Nations had broken new ground in the fields of human rights and outer space and had tackled problems of enormous sensitivity such as torture, it had first drafted a declaration. A declaration or statement of principles should not be seen as an alternative to a treaty instrument, but, rather, as a step to-
Towards the drafting of such an instrument. It was true that the Commission did not normally start by deciding between a declaration and a treaty—that it did not normally start by determining the nature of the instrument itself. But it was not prohibited from so doing. Given the extraordinary complexity of the topic, the fact that the Commission stood at the outer edge of the progressive development of the law and the magnitude of the problems it had experienced over the past decade, the Commission must demonstrate its ability to innovate by taking a decision at the current stage on the kind of instrument on which it was working. It was no longer in the period of the 1950s when Gilberto Amado had insisted that the codification work on diplomatic privileges and immunities and the law of treaties must be carried out in treaty form. Even if the Commission decided to adopt a different approach from time to time, that would not, in his view, in any way affect its primary task of preparing treaty instruments.

20. If the Commission did decide to prepare draft principles or guidelines, it should bear in mind the close connection between the topic and State responsibility, in the broad sense, of which it was in some ways a part, although the Special Rapporteur’s arguments to the contrary were not without relevance. In so doing, the Commission should focus its efforts on the area where there were the most sources, namely, the area of ultra-hazardous activities. It could then move on to the question of risk generally, referring to the helpful analysis in the report, and, in due course, deal with the harmful effects that might result from such activities. Once that base had been established, it would be possible to elaborate some principles concerning the consequences of actual harm. In that connection, he agreed with the distinction drawn by Mr. Pellet between harm, on the one hand, and compensation, on the other; the Commission should bear in mind that no society compensated for all harm and that all societies and legal systems took account of the usefulness of the activity in question, as well as the extent and nature of the damage. Basically, the Commission should proceed along the lines laid down by Mr. Quentin-Baxter and the present Special Rapporteur before the latter had been constrained to take a more ambitious leap by a few members of the Commission whose reach might have exceeded their grasp and some members of the Sixth Committee who had perhaps not fully understood the complexity of the subject. The lines laid down by Mr. Quentin-Baxter and the present Special Rapporteur were neither neat nor simple, but they provided a useful working hypothesis and, by proceeding gradually and starting with matters that were relatively easy to deal with, the Commission could perhaps achieve something. Such an approach was not an automatic guarantee of success, however, and he would warn the Commission in particular against any ill-advised attempt at generalization based on questions such as watercourses, outer space, nuclear accidents, oil pollution or the law of the sea. He endorsed Mr. Pellet’s proposal to focus initially on prevention. Either way, the Commission must find a way of getting on with the job.

21. Mr. Sreenivasa RAO said that, in tackling the topic of international liability, it was necessary to have a sense of urgency, but at the same time to act with caution. The Special Rapporteur should have backed up his arguments with concrete—even hypothetical—examples. Inasmuch as the Commission did not know for certain what it was trying to prevent with its draft or the kind of principles of prevention involved, it could not really make any progress. Was the aim to draft principles of a hortatory nature, in the hope that States would give substance to them in practice? If the Commission embarked on a path that had already been traced, its draft might duplicate existing rules; but, if it ventured on to new ground, when no consensus had been reached on a particular rule, it might scare away the States likely to accept a regime of prevention. The Commission had not yet given serious consideration to that dilemma. Thus far, it had merely toyed with concepts that were devoid of all practical interest. How could it argue in favour of its draft if there was no agreement on the source, cause and effect of harm? Had it managed at last to define what it meant by ‘‘liability’’? As matters stood, the Commission had nothing on which it could base a decision, and that was of all the more concern to him, since the life and behaviour patterns of millions of people were at stake. The Commission should therefore not treat the task entrusted to it lightly. It should narrow the scope of its exercise and adopt a realistic approach, moving forward gradually towards a reasonable rational and acceptable regime.

22. Mr. KOROMA said that he could not help feeling a certain sympathy for the Special Rapporteur, who was constantly buffeted from one position to another. International liability had, of course, developed out of State responsibility and, when considering the former, it was not possible to disregard the latter entirely. If, however, the Commission considered that liability was an autonomous topic, it should abide by its decision; otherwise, it would be better for it to call a halt to the whole exercise and to take the view that the topic of liability should be examined in the context of State responsibility. He was convinced that the past approach was the right one—and other members shared his view.

23. It was obvious that prevention had a role to play in the topic, but was it the Commission’s place to tell States what they should or should not do in their own territory? He did not believe it was. It was, however, another matter when it came to the “global commons”, the environment and maritime space.

24. In his view, it was not possible to base liability on risk alone; if an activity that was risky caused harm, however, there was then a basis for a claim. The Special Rapporteur had explained that absolute liability was unknown to systems deriving from the civil law; perhaps that was a matter the Working Group should examine, since other legal systems were familiar with the concept of strict liability.

25. Lastly, he stressed that the topic had a basis in law, doctrine and case law.

The meeting rose at 11.25 a.m.
2273rd MEETING

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

Chairman: Mr. Christian TOMUSCHAT

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


[Agenda item 5]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

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

3. The reason for placing preventive measures in an annex was precisely to deprive them of any binding character. As for the objection that the hypothesis developed in his latest report changed the subject of the draft from liability to responsibility for wrongfulness, the statements he had made followed the reasoning of the jurists of the World Commission on Environment and Development. There was one exception to wrongfulness in principle, and the scope of the topic lay within that exception, as he intended to show. Some members, he noted, favoured treating activities involving risk and activities with harmful effects separately.

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

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

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

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1 Reproduced in Yearbook... 1992, vol. II (Part One).
3 Ibid., annex.
State by way of compensation, and would be spelt out during the consultations.

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

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

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

10. As pointed out in the discussion, the reference in draft article VIII to consultations held under draft articles III and V was incorrect; the reference should be to articles IV and VI. It had also been asked why there should be a procedure for the settlement of disputes if the activities in question were not unlawful. A settlement mechanism to resolve differences arising during negotiations to achieve an agreed regime would be more in the nature of a conciliation device. His intention, however, had been to provide some procedure whereby the facts about the activity could be brought out: to determine, for instance, whether harm was inevitable, whether certain elements could be replaced in order to make the activity acceptable, whether the harm was really significant, and whether the balance of interests lay in favour of the activity being lawful. Depending on the circumstances, a conciliation procedure might also be in order. The procedure should be left flexible; since the provisions were recommendatory in nature, it was not possible to flesh out the details. Obviously, if the provisions on liability were binding, then damage would be compensated; if not, general international law must fill the gap. The detailed procedural obligations (chapter III of the draft articles) originally proposed in his fifth report had been considered too burdensome for the State of origin, and he had therefore been asked to propose a simplified procedure. He had sought to do so in the sixth report, but there had been difficulties in accepting binding provisions on procedure. Accordingly, he had conceived the idea of very general guidelines. If a new activity in the State of origin caused objections from a potentially affected State, consultations could offer the means of resolving the difficulty. In the absence of a detailed procedure, States would be recommended to cooperate, and to display the good faith inherent in all international transactions.

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

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

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4 See 2268th meeting, footnote 11.
6 See 2268th meeting, footnote 11.
from another nuclear reactor in a different State that used more elementary technology. However, the definition did not attempt any uniform estimation of degrees of risk; a different estimate could be made if the State of origin presented sufficient evidence. Nevertheless, there must be a minimum threshold of risk to bring the activity within the scope of the draft articles. A fair estimation of the magnitude of the risk involved could be obtained by weighing the level of the potential damage against the likelihood of its occurrence.

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

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

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

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

It was so agreed.


[Agrega item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 5 bis and
ARTICLES 11 TO 14 (continued)

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

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

Article 11. Countermeasures by an injured State

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

Article 12. Conditions of resort to countermeasures

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

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

(b) appropriate and timely communication of its intention.

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

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

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

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

* Resumed from the 2267th meeting.
8 Reproduced in Yearbook... 1992. vol. II (Part One).
9 For texts of proposed draft articles 11 and 12, see para. 18 below; for 5 bis, 13 and 14, see 2275th meeting, para. 1.
comply with an interim measure of protection indicated by the said body.

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

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

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

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

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

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

23. The fourth element in the article was the distinct reference to "conditions" and "restrictions". The fifth element was to be found in the words "not to comply with one or more of its obligations towards the said State", which set forth the well-known elementary definition of countermeasures, namely, of what he would prefer to call reprisals. The only point to be stressed with respect to the quoted phrase was that it implied the abandonment of the distinction between the so-called "reciprocity measures" or reprisals, on the one hand, and other "non-reciprocal" countermeasures or reprisals, on the other hand. That distinction, in his view, would not be useful. A different position of principle had been taken by the previous Special Rapporteur, Mr. Riphagen, in his draft articles 8 and 9. As far as he himself was concerned, his only regret was that, by abandoning the distinction made by his predecessor, he could no longer use the technically correct term "reprisal".

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

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

10 For texts of draft articles 6 to 15 of part 2 as referred to the Drafting Committee, see Yearbook... 1985, vol. II (Part Two), pp. 20-21, footnote 66.
11 For text, see Yearbook... 1980, vol. II (Part Two), p. 32.
26. Article 12 differed in another way from the corresponding drafts proposed by Mr. Riphagen, more particularly from the rigid provisions that had been proposed by the previous Special Rapporteur in articles 1 and 2 of part 3. By adopting a more flexible formulation, he hoped for his own part to meet some of the criticism levelled at those detailed provisions in the Commission.

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

No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

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

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

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

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

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

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

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

14 See 2265th meeting, footnote 5.
turbtng to hear another member not only engage in the
dubious act of according normative value to the General
Assembly’s Definition of Aggression but also misquote
it. The Definition of Aggression did not speak of the first
use of force as creating a presumption that aggression
had transpired; rather, it spoke of a “first use of armed
force by a State in contravention of the Charter”. As a
participant in the negotiation of the text in question, he
could state categorically that that point had been crucial
to the success of the negotiation. Happily, that too was
not a question to be reopened at present, but he did not
wish to leave a misleading record.

34. However, the most important point with regard to
those and other interesting issues touched upon by the
Special Rapporteur, such as the scope of Article 51 of
the Charter of the United Nations, was that they were not
essential to the completion of the Commission’s task.
Any attempt to deal with those issues would mean drift-
away from the possibility of finishing the assigned
work ensuring some degree of enforcement, the justifica-
tions could be placed on countermeasures, the same was
not true of interim measures of protection. An injured
State was entitled to protect itself—within limits—but
not subject to any preconditions.

35. As to the draft articles, he entirely concurred that
the legitimacy of any countermeasures or reprisals re-
quired the prior existence of a wrongful act. It was nei-
ther fitting nor reasonable to include procedural obliga-
tions as additional preconditions. Even if a broadly
accepted rigorous regime in part 3 meant that precondi-
tions could be placed on countermeasures, the same was
not true of interim measures of protection. An injured
State was entitled to protect itself—within limits—but
not subject to any preconditions.

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

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

38. The general thrust of the proposed draft article 14
(Prohibited countermeasures) was reasonable though it
was best to avoid excessive detail, and highly subjective
phrases such as “susceptible of endangering” were nei-
ther prudent nor supported by customary or other norms.
If it was necessary to arrive at some specific form of
wording on that point, in place of general language
based on Article 103 of the Charter of the United
Nations, the language of the report where it referred to
measures aimed at the subordination of the exercise of
the target State’s sovereign rights, might provide a better
basis than the draft suggested. The reference to the
normal operation of diplomacy also seemed to go somewhat
further than was required. He could not help wondering
whether the Special Rapporteur, by trying to drive too
many nails into the coffin of the dicta of ICJ in the Case
concerning United States Diplomatic and Consular staff in
Tehran, 16 on special regimes, was not creating prob-
lems. It might be wise to indicate at some point in the
commentary that the inclusion of paragraph (c) (iii) in
draft article 14 did not suggest that jus cogens did, or did
not, relate to anything that was not covered by the other
subparagraphs.

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

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

41. The Special Rapporteur’s objections to the con-
cepts of non-directly injured, specially affected, and
third States seemed persuasive, particularly in the case of
a right to cessation and the general entitlement to repara-
Artile 5 as previously drafted 37 did not seem to

15 See 2267th meeting, footnote 11.
16 See 2261st meeting, footnote 5.
17 For text, see Yearbook . . . 1992, vol. II (Part Two), chap. III.
solved entirely the problem of the application of subsequent articles in part 2 to differently injured States. The second addendum to the report seemed to suggest that that was not really a problem, but he was not certain that that was true in all situations. While he did not object to the proposed article 5 bis as such, it did not add anything essential and he would prefer not to complicate the draft further.

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

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

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

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

46. While he was grateful for the wealth of legal material contained in the fourth report, there was still scope for inclusion in the report of further references to scholarly works and State practice taken from the whole spectrum of contemporary international life. There was, for instance, international legal material that was far more relevant to the international law aspects of the situation in Cyprus, including debates in the Security Council and General Assembly and scholarly writings, than was apparent from the passing reference to the regrettable Larnaca incident cited in the report.

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

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

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

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

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

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

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18 See 2265th meeting, footnote 4.

19 For source, see the relevant footnote to document A/CN.4/441/Add.1.
munication of its intention to resort to countermeasures. Equally welcome was the general caveat in paragraph 3 concerning the exceptions set forth in paragraph 2 of the article. It might be advisable, however, for the Drafting Committee to consider whether article 12 should be split into two or more articles, as it was somewhat cumbersome.

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

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

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

56. Mr. de Saram said that the question of what the Commission had come to refer to, since the preparation of part 1 of the draft articles on State responsibility, as the countermeasures an injured State might take in response to an internationally wrongful act was of special importance and involved uncertainties and differences of view not only on technicalities but also on fairly substantial matters. It was a question which, as the Special Rapporteur had cautioned, called for further careful examination.

57. In the first place, he wished to be quite clear, particularly as a new member of the Commission, about what the Commission meant, or did not mean, when it used the term “countermeasures”. A good place to start was paragraph (3) of the Commission's commentary to article 30 (Countermeasures in respect of an internationally wrongful act) contained in chapter V (Circumstances precluding wrongfulness) of part 1 of the draft articles. Article 30 consisted of only one sentence, providing that the wrongfulness of the act of a State, not in conformity with an obligation of that State towards another State, was precluded if the act constituted a measure legitimate under international law against that other State in consequence of an internationally wrongful act of the latter State. Yet, the sentence was full of implications and was not as clear as the government officials who would eventually have to implement the convention on State responsibility might like. Paragraph (3) of the commentary did clarify matters somewhat, however, in explaining that:

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

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

58. Again, the Commission distinguished countermeasures, as dealt with in article 30 of part 1 of the draft articles, from self-defence, as dealt with in article 34, so that self-defence meant something quite different from countermeasures. What was more, although there might be controversy as to the outer limits of self-defence, it was no longer permissible, certainly so far as the United Nations was concerned, to reach any conclusion other than that armed reprisals or, in the words of the commentary to article 30, countermeasures involving the use of armed force, were no longer permissible in international law. Article 2, paragraph 4, of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, adopted by the General Assembly by consensus, made that abundantly clear.

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

60. Furthermore, it was the Commission’s understanding that the ability of an injured State to have recourse to countermeasures was not unlimited. It was first necessary for an injured State to believe, in good faith, that an internationally wrongful act had been committed against it and that such wrongful act was attributable to the State at which the countermeasure was to be directed. Second, in order to establish the necessity for the taking of countermeasures, and in order to distinguish an occasion for “countermeasures” from an occasion for “self-defence”, it was necessary, contrary to the case of self-defence, for the injured State (State B) first to notify the State it believed to be responsible for the injury...
(State A); then, unless State A discontinued the wrongful act and accorded redress, State B would have to resort to countermeasures. Third, there were the five overall absolute limitations on the use of countermeasures, apart from non-use of armed force, which were enumerated by the Special Rapporteur in paragraphs (b) and (c) of article 14, namely prohibitions against acts endangering the territorial integrity or political independence of a State, acts not in conformity with fundamental human rights, acts causing serious prejudice in the diplomatic field, acts contrary to a peremptory norm of international law, and acts in breach of an obligation to a third State. Fourth, as recognized by the Special Rapporteur in his proposed article 13, there was an additional and specific limitation, namely that any countermeasure taken must be in proportion to the injury received, even though, in certain cases, the criterion of proportionality might be difficult to apply in practice. Fifthly, there was the general caveat in article 35 of part 1 that the question of possible compensation for damage resulting from the use of countermeasures remained open.

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

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

63. Moreover, in response to an internationally unlawful act, the injured State could have recourse to a number of possible actions, including procedures for the settlement of disputes, retortory measures and diplomatic protests, the effects of which in their intense form could not be considered negligible. He wondered, therefore, whether it was necessary, with an eye to the future, for the Commission to prescribe that a State believing itself to be injured might also, in effect, “take the law into its own hands”, particularly when the ability to take effective countermeasures varied widely from State to State and when the very concept of the “countermeasure” seemed to be antithetical to some of the fundamental general principles on which the international legal community had come to rely: the sovereign equality of States, equality before the law, settlement of disputes through agreed procedures, and so forth.

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

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

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

67. The term “countermeasures” was preferable to “reprisals”. Reprisals represented a violation of the law and were associated with the use of force; they should, therefore, be considered only in very exceptional cir-
Power relationships in disguise. Countermeasures were not suitable for codification or progressive development to the subject of countermeasures. Countermeasures confirm the views he had expressed earlier with regard to the topic. Those matters constituted the main elements of the draft. Countermeasures, for which the conditions of use must be precisely defined, were essential because they represented the only means of ensuring minimum respect for international obligations; procedures for the settlement of disputes were in their turn equally essential because they represented the only way of preventing abuses of countermeasures.

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1 p.m.

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

ARTICLES 11 TO 14 (continued)

1. Mr. CALERO RODRIGUES said that he welcomed the fourth report on State responsibility (A/CN.4/444 and Add.1 and 2), which provided abundant material and careful analysis and was an outstanding contribution to the literature. He was somewhat disappointed, however, that the report itself did not fully square with the draft articles proposed. Some of the considerations developed in the report were not reflected in the articles and the articles in turn were not sufficiently clarified by the report.

2. With regard to article 11 (Countermeasures by an injured State), he noted that the word "countermeasures" did not appear in the body of the text, but it was defined by the all-embracing formula on non-compliance with obligations, namely "not to comply with one or more of its obligations". That wording was satisfactory and simpler than that proposed by the former Special Rapporteur in his articles 8 and 9. Moreover, since it covered the entire range of possible measures, it avoided the need to list such measures, as the Special Rapporteur had pointed out, and reduced the ambiguities that would derive from the meanings attached to them.

3. He nevertheless suggested that the words "not to comply" should be replaced by the words "suspend the compliance" in order to indicate the temporary nature of countermeasures. It would be even better to state expressly that countermeasures should cease as soon as their purpose had been achieved and, to be still more complete, to say that countermeasures should be resorted to only in order to obtain performance by the wrongdoing State of its secondary substantive obligations. The Special Rapporteur had, of course, explained at the preceding meeting that that omission had been deliberate and that the punitive purpose of countermeasures was not to be ruled out, adding, by way of justification, that the punitive purpose of countermeasures had already been admitted in article 10 (Satisfaction and guarantees of non-repetition). In his own view, however, there was a marked difference between the substantive and instrumental consequences of an internationally wrongful act.

4. Article 12, paragraph 1, set forth the two conditions under which countermeasures could be resorted to: the exhaustion of all available amicable settlement procedures and the appropriate and timely communication by the injured State of its intention to apply countermeasures. The second condition was of relatively minor importance. The Special Rapporteur demonstrated, in his fourth report, that opinions and practice were divided on the question whether such prior communication, or sommation, was required before the application of countermeasures, but that there was a tendency to believe that it was. The Special Rapporteur had concluded that appropriate and timely communication by the injured State of its intention to apply countermeasures must precede resort to countermeasures, and that was stated in article 12, paragraph 1 (b). He himself agreed with that conclusion and with the suggested provision. It might, of course, be alleged that, once a wrongful act had been committed, the offending State was aware of all the consequences of its act, especially if they had been codified, as well as of the obligations of cessation and reparation by which it was bound, but that it also knew that the injured State was entitled to resort to countermeasures. It was, however, one thing to know that countermeasures could be applied and another to know that the injured State was in fact ready to apply them. That might be a further inducement to the wrongdoing State to mend its ways and to comply with its obligations. The timely notification of a threat of countermeasures could thus have the same effects as the countermeasures themselves.

5. The condition that all the available amicable settlement procedures must be exhausted was of far greater importance. In fact, it was the cornerstone of the concept of countermeasures and of their role in the system devised to redress the situation created by an internationally wrongful act. In primitive societies, before States had set up appropriate rules and machinery to ensure the application of laws and respect for rights, an individual who had been wronged, or thought he had been wronged, would take the law into his own hands and seek reparation, very often in a spirit of revenge. Some individuals who were physically, economically, socially or militarily stronger than others had therefore been able to nullify the consequences of the injury they had suffered, whereas the weak and the poor had been left with-

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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.
4 See 2273rd meeting, footnote 10.
5 Ibid.
out redress. In that sense, international society was still very primitive. Even if the legal consequences of an internationally wrongful act were spelled out in detail, that would not be enough to ensure justice if the injured State was given too much latitude to act as a judge in a case to which it was a party. The day had not yet dawned when countermeasures could be abolished. It had to be recognized, as the Special Rapporteur pointed out in the introduction to his third report (A/CN.4/440), that the lack of an adequate institutional framework for the regulation of the conduct of States, even de lege ferenda, was keenly felt. However, if the Commission was to be faithful to its duty of contributing to the progressive development of international law, it must try to establish limits to countermeasures in order to correct some of the more glaring injustices to which their broad application might give rise. To establish that available amicable settlement procedures must be exhausted as a prerequisite to the application of countermeasures was therefore a welcome step which, in the words of the Special Rapporteur, could alleviate the impact of the great inequality that was apparent among States in the exercise of their faculté to apply countermeasures, which was such a major source of concern, especially since, as he had also stated, in the absence of adequate third-party settlement commitments, powerful or rich countries could more easily have the advantage over the weak or needy when it came to exercising the means of redress.

6. Under article 12, paragraph 2, as proposed by the Special Rapporteur, the condition of exhausting all the available amicable settlement procedures did not apply: (a) where the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and the implementation of available settlement procedures; (b) to interim measures of protection taken by the injured State, until the admissibility of such measures had been decided upon by an international body within the framework of a third-party settlement procedure; and (c) to any measures taken by the injured State if the State which had committed the internationally wrongful act failed to comply with an interim measure of protection indicated by the said body.

7. In the case where a State was deprived of its faculty to resort to countermeasures so that a procedure for the settlement of the dispute could be applied, it was normal that the restriction of exhausting all the amicable settlement procedures available should not be maintained if the procedure did not work because of the lack of cooperation on the part of the alleged wrongdoing State. However, he had some doubts, although they were not fundamental, about the exception referred to as "interim measures of protection", particularly with regard to the validity of that concept in the present context. The concept was well known in general international law: it referred to the initial provisional measures decided by an adjudicating body. Such measures had a limited purpose, namely, as stated in Article 41 of the Statute of ICJ, to preserve the respective rights of either party. In his view, those measures could not be applied in the context of countermeasures. He wondered whether countermeasures themselves were not some kind of "interim measures", since they were not permanent and lasted only as long as the wrong had not been corrected. They aimed at the protection of rights: they sought redress for the infringement of a right and the application of secondary rights. There was thus good reason to have doubts about the admissibility of "interim measures of protection" taken unilaterally and applied by one party in cases where countermeasures in general were excluded. It would be extremely difficult in practice to establish whether a particular measure was an interim measure of protection or an actual countermeasure. That was true, for example, in the case of the freezing of assets.

8. Article 12, paragraph 2 (c), also referred to an "interim measure of protection", but in a different sense, namely, the conventional sense of measures taken within the framework of a third-party settlement procedure. It provided that, if a State failed to comply with the interim measure, the injured State would recover its faculty to apply countermeasures. The State failing to comply was, of course, committing a new wrongful act. The fact that the act was committed in the framework of a settlement procedure indicated that the procedure was not working and that the injured State should be authorized to resort to countermeasures.

9. He had considerable difficulty understanding the language and purpose of paragraph 3 of article 12. It was an exception to the exceptions set forth in paragraph 2: it therefore meant that the injured State was free to apply countermeasures. How should the expression "measure envisaged" be understood? Did it mean one particular countermeasure or the countermeasures as a whole? If so, that would mean that a measure which might endanger international peace and security could be applied because it would be an exception to the exceptions. If, as was the most likely explanation, that provision was intended to mean that no measure could be taken in any case that was inconsistent with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered, then it was a prohibition that belonged in article 14 (Prohibited countermeasures). A provision of that kind might also be introduced in article 11, as paragraph 2, or in article 12, as a new paragraph 1. Those three solutions were the only reasonable ones. He would appreciate clarifications from the Special Rapporteur.

10. Mr. ARANGIO-RUIZ (Special Rapporteur) said that an example of an exception to the exceptions was the case where a unilateral interim measure of protection was taken by the injured State and where that measure protected only the interests of the injured State and not those of the other party. That measure could thus not be regarded as an exception for the simple reason that it was not in conformity with Article 2, paragraph 3, of the Charter of the United Nations because, although it did not endanger international peace and security, it would not meet the concern for justice.

11. Mr. BOWETT said that one of the preconditions for the use of countermeasures, namely, the exhaustion of all the amicable settlement procedures available, as established in article 12, paragraph 1 (a), would not only be unacceptable to many States, but would also be unworkable in practice. It was clear that, confronted with the demands of the injured State under articles 6 to 10, the State which had committed the internationally wrongful act would deny that any violation had occurred
and would call for negotiations. Those negotiations could easily continue for three to six months and, if they failed, the dispute could then be submitted for arbitration or to ICJ by special agreement. It was not uncommon for a special agreement to take two years to negotiate, and for a case to take at least two further years before the decision was handed down. It was unlikely that the injured State would wait more than four years to be free to take countermasures and it would be difficult for the injured State to argue that the State which had committed the wrongful act had not cooperated in good faith, as provided for in article 12, paragraph 2 (a): the latter State had every right to claim that the long negotiation process was a normal aspect of relations between States and did not imply any bad faith on its part. Consequently, the exhaustion of all amicable settlement procedures should not be a precondition for resort to countermasures, but a parallel obligation, meaning that the State which was taking the measures in question had to accompany them with an offer of a peaceful settlement procedure which, if accepted, would result in the suspension of those measures. If, on the other hand, the offer was refused, the countermasures could be resumed. That was, in his view, the only way to solve the problem; a State had to be prepared to settle a dispute through peaceful means, but resort to such means should not be a precondition to the application of countermasures.

12. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to caution his colleagues, in particular Mr. Bowett, against undue pessimism with regard to what would be acceptable or unacceptable to States. In any case, at the present stage of its work, the Commission should not be asking whether a provision would be acceptable or not. It would see how States would react when the draft had been submitted to them. He also did not see why States could not wait two years, the time to try to settle a dispute by negotiation, before taking radical measures. In any event, in the meantime, they could, if they so wished, take interim measures, provided that they took proper and just account of the interests of all concerned.

13. Mr. PELLET said he would wait until the Special Rapporteur had submitted all the addenda to his fourth report before commenting on them. For the time being, he would refer only to a very important question which had already been discussed at length by Mr. Shi (2267th meeting) and which had also been raised in the statement by Mr. Calero Rodrigues, namely, whether countermasures had a place in the draft articles. The view that they did not was strongly held by Mr. Shi because, as he saw it, resort to countermasures was a practice which, although it had been very widespread for over a century, was incompatible with the law, since countermasures were an instrument used by rich or powerful States against poorer and weaker States. Moreover, in so far as the Charter of the United Nations specifically prohibited the use of force, the Commission would be regulating unlawful conduct if it codified the law applicable to countermasures, which were, in a way, a special case of the use of force. Mr. Shi’s conclusion was that it was impossible to justify such countermasures, whether from the point of view of lex lata or of lex ferenda, and thus to include them in the draft articles. He found some measure of support for that reasoning in the judgment of ICJ in the Corfu Channel case, according to which “The Court can only regard the alleged right of intervention”—and intervention was a type of countermasure as understood by the Special Rapporteur—as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law... for, from the nature of things, it would be reserved for the most powerful States.

14. He largely agreed with that analysis, but drew quite different conclusions from it that were similar in some ways to the point of view expressed by the Special Rapporteur in the introduction to his third report. There was no doubt that countermasures were a more effective and more uncontrollable weapon in the hands of powerful States and that they should therefore not exist, but the fact was that they did exist and that, at present, there was, as Mr. Shi himself had noted, no effective and efficient system to replace them.

15. In those circumstances, the use of countermasures had to be restricted and regulated and a distinction had to be drawn between what could be tolerated for want of a better solution and what could not be tolerated, in the interests not of the strongest, but of the weakest. In fact, Mr. Shi’s reasoning should lead to the logical conclusion that the question of countermasures must be included in the draft articles, with the explanation that they could not, in any case, be an admissible response to a wrongful act. In any society, some degree of constraint was tolerable and even inevitable and the Special Rapporteur could only be commended for trying to determine the threshold and nature of a tolerable response, whatever might be thought of the rules he was proposing for that purpose. That would not really be contrary to the dictum of ICJ in the Corfu Channel case, which reflected a more radical view of the matter because, in that case, British intervention had been a physical constraint operation carried out by armed forces in the territorial waters of the State held to be responsible for a violation of internation law, and that had limited the scope of the precedent. In any event, the Court had thus set a limit on resort to countermasures of which account should be taken and, in his view, article 14 as proposed by the Special Rapporteur would serve that purpose.

16. In conclusion, he stressed that it was important for the Commission to avoid turning the discussion Mr. Shi had started on that basic question into a debate on North-South opposition. Power was a very relative concept and, in the matter of countermasures, some third world countries had no reason to be envious of certain developed countries, many of which were certainly not free from criticism. The Commission should try to draft balanced rules without worrying too much about the political background. As indicated by the Special Rapporteur in his third report, its task was to devise ways and means to alleviate the impact of the great inequality that was apparent among States in the adoption and application of countermasures. The point was not to strengthen the power of some States, but, rather, to limit its effects and to take account of the fact that it existed in States both rich and poor.

6 I.C.J. Reports 1949, p. 35.
17. Mr. Sreenivasa RAO said that the topic under discussion required more careful thought and he reserved the right to come back at greater length to its various aspects. At present, however, he wanted to comment on the question of countermeasures, which was of particular importance in the context of the codification of the law of international responsibility.

18. Inequality between States was an undeniable fact. There was thus a great temptation for the minority of the richer and more powerful States to behave as though they had always been besieged by the vast majority of weaker States and to try to make their special interest prevail over the definition of norms and rules whose true purpose was to safeguard the general interest.

19. A look at the way in which countermeasures had been applied over hundreds, even thousands, of years, would reveal that they had often been a reflection of the law of the stronger party, which had imposed them on the weaker party without bothering to obtain its consent or voluntary participation in the process. In those circumstances, could such a practice—no matter how ancient it might be—be regarded as an acceptable basis for the codification and development of international law?

20. That basic issue had already been referred to in clear and courageous terms by Mr. Shi, who considered that the practice of countermeasures was still highly debatable and could certainly not be regarded as the basis of universally recognized rules of international law. Without perhaps being quite as categorical, he too wondered what might be the logical consequences of an attempt to codify the law on that basis.

21. Mr. Pellet had said that, if countermeasures could not be abolished, their use should be limited and regulated, but such “regulation” should also take proper account of the interests and viewpoints of all the States concerned, failing which the outcome would be yet more injustice. Mr. Bowett had said that a State which took countermeasures should, at the same time, make an offer of amicable settlement to the other party which, if accepted, would inevitably lead to the suspension of the countermeasures. That was an excellent idea in so far as the imposition of countermeasures did not place the party taking them in a position of strength in the negotiations, thereby enabling it to impose its law on the other party even if the “unlawful” nature of the facts or acts which had caused it to violate an obligation was not proved conclusively. Care must be taken not to transpose into the field of law the power relationships that could exist at the political level. Only if the more powerful States showed moderation and accepted certain sacrifices would it be possible to build up a system of rules of law that would provide everybody with equitable protection.

22. Mr. ARANGIO-RUIZ (Special Rapporteur), replying to points raised, said that the Sixth Committee and many members of the Commission had stressed the need to make progress on the topic of State responsibility if it was hoped to achieve some results before the end of the current quinquennium.

23. In his view, the remarks and suggestions put forward so far by his colleagues on his third and fourth reports represented, on the whole, a step in the right direction. The debate which had developed so far on draft articles 11 and 12 would certainly be helpful for the elaboration of an adequate legal regime of countermeasures. He looked forward to the further contributions members would make on those two draft articles and on draft articles 13, 14 and 5 bis, as well as on the problem he proposed to raise with regard to article 4 of part 2 as adopted on first reading. He hoped that the debate would concentrate on the merits of the best possible regulation of countermeasures, leaving aside, at least for the time being, the doubts raised as to the appropriateness of the Commission’s effort to draft such a regulation. Whether one liked it or not, the structure of the inter-State system remained essentially inorganic. Consequently, as he had pointed out in a previous reply to Mr. Shi, reprisals were bound to remain for some time the most common and important means by which international law could be implemented whenever an international obligation was violated.

24. He was not sure that he had understood the point made by Mr. Pellet when he had expressed regret that he (the Special Rapporteur) had not developed his ideas further in the fourth report. In any event, his own view was that it was for the Commission as a whole now to explore the matter further.

25. Finally, he wished to state that while preparing his presentation on the draft articles proposed in document A/CN.4/444/Add.1, he had had second thoughts with regard to the wording of article 14 as it appeared in that document. He would therefore perhaps have to submit a third addendum, consisting of one page only, to document A/CN.4/444, in the interest of serving the Commission properly.

The meeting rose at 11.20 a.m.

[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 5 bis and
ARTICLES 11 TO 14 (continued)

1. The CHAIRMAN invited the Special Rapporteur to resume his introduction of the remaining part of the fourth report (A/CN.4/444/Add.1-3) and the proposed draft articles contained therein, reading:

Article 13. Proportionality

Any measure taken by an injured State under articles 11 and 12 shall not be out of proportion to the gravity of the internationally wrongful act and of the effects thereof.

Article 14. Prohibited countermeasures

1. An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force [in contravention of Article 2, paragraph 4, of the Charter of the United Nations];

(b) any conduct which:

(i) is not in conformity with the rules of international law on the protection of fundamental human rights;

(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;

(iii) is contrary to a peremptory norm of general international law;

(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act.

2. The prohibition set forth in paragraph 1 (a) includes not only armed force but also any extreme measures of political or economic coercion that were prohibited, article 14 would serve to eliminate any possible doubts about ordinary economic or political sanctions which were surely legitimate and must remain available to injured States.

4. Paragraph 1 (a) of article 14 prohibited any countermeasure which was in contravention of Article 2, paragraph 4, of the Charter of the United Nations, namely, the prohibition of the threat or use of armed force, a prohibition that should also encompass any extreme measures of political or economic coercion which jeopardized the territorial integrity or political independence of the State against which they were taken. That point was made in paragraph 2 of the article. He was aware that the interpretation of the word “force”, as used in Article 2, paragraph 4, of the Charter, was the subject of controversy. However, after lengthy consideration he had concluded that for all practical and theoretical purposes, prohibition of the use of extreme forms of economic or political pressure formed an integral part of the definition of force under that Article. That view was supported by international practice resulting, in part, from the development of the principle of non-intervention. Even if that opinion of his failed to find support, prohibition of such measures under article 14 would still be appropriate for the purpose of progressive development of the law, in support of the interests of the weaker and smaller States. By specifying that it was only the extreme forms of economic or political coercion that were prohibited, article 14 would serve to eliminate any possible doubts about ordinary economic or political sanctions which were surely legitimate and must remain available to injured States.

5. He also wished to dispel the doubts of those few members who had questioned the usefulness of the part of the fourth report which dealt with the relationship between the prohibition of armed force by way of countermeasure (or reprisal), on the one hand, and those attenuations of the general prohibition of armed force which a part of the doctrine seemed to envisage in the light of a certain State practice, on the other. He referred to the alleged “evolutionary” interpretations of Article 2, paragraph 4, of the Charter of the United Nations discussed in the fourth report. The purpose of that discussion was to make clear that whatever might be the merits of such interpretations, they did not concern—or affect—in the least the prohibition of resort to force by way of countermeasure (reprisal). Of course, that did not need to be stated in the draft article which set forth the prohibition. It had to be stressed in the report, however, for two reasons. First, it was necessary to call the attention of the
members of the Commission to the necessity of avoiding any possible misunderstanding as to the strictness of the prohibition of forcible countermeasures (reprisals). Secondly, the matter would have to be dealt with in the commentary to draft article 14 (a). Hence the necessity to ensure that the point was covered in the report. It would hardly have been appropriate, in his opinion, to confine himself, as one member seemed to suggest, to taking note of the fact that armed reprisals were prohibited according to the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations’ or other non-binding—albeit authoritative—instruments of a similar kind.

6. Three sub-subparagraphs under paragraph 1 (b) of article 14 covered a number of issues. Paragraph 1 (b) (i) provided that an injured State should not resort, by way of countermeasures, to any conduct which was not in conformity with the rules of international law on the protection of fundamental human rights. In that connection, he wondered whether fundamental human rights included the right to own private property. How far should it be protected or left unprotected? Paragraph 1 (b) (ii) prohibited countermeasures which would seriously prejudice the normal operation of bilateral or multilateral diplomacy. Paragraph 1 (b) (iii) prohibited countermeasures which were contrary to a peremptory norm of general international law, in which connection he would point out that jus cogens and erga omnes obligations were not the same thing. An international obligation could well be erga omnes without being a matter of peremptory law.

7. Developments in so-called self-contained regimes were relevant both to the draft articles on countermeasures and to those on the substantive consequences of internationally wrongful acts, a connection that had been clearly understood by the Drafting Committee. There was really no such thing as a regime which was so completely self-contained that it did not leave open the possibility of a “fall-back”, in other words, of invoking the rules of general international law, either with regard to the substantive consequences of internationally wrongful acts or with regard to countermeasures. Thus, no special provisions were needed to cover problems stemming from self-contained regimes: correct interpretation and application of the general rules governing any substantive consequence or unilateral measure should be sufficient to solve such problems.

8. Article 2 of part 2\(^4\) was questionable in regard to both customary rules and special rules governing treaties. The aim pursued by States in embodying in a treaty special rules to govern the consequences of a breach was not to exclude, in the relations between them, the mutual guarantees deriving from the normal operation of the general rules on State responsibility. On the contrary, the aim was to strengthen the normal, inorganic and not always satisfactory guarantees of general law by making them more dependable: but to do so without relinquishing the possibility of “falling back” on less developed, “general” guarantees. A presumption of total abandonment of the “general” guarantees, as contained in article 2, seemed thus to be doubly objectionable: it defeated the purpose of the establishment of special regimes by States by attributing unintended derogative effects to such regimes and, by making the general rules “residual”, it defeated the very purpose of the codification and progressive development of the law of State responsibility.

9. Article 2, if retained, thus stood in need of revision. First, it should specify that the derogation from the general rules set forth in the draft articles derived from contractual instruments, and not from customary rules. Second, the article should indicate that, for a real derogation from the general rules to take effect, the parties to the instrument should not confine themselves to envisaging more or less exhaustively the consequences of the violation of the regime; they should expressly indicate that by entering into the treaty system, they were excluding the application of some or most of the general rules of international law on the consequences of internationally wrongful acts. Third, in the commentary to the article, it should be made clear that a derogation would not prevail in the case of a violation of the system that was of such gravity and magnitude as to justify—as a proportional measure against the law-breaking State—the suspension or termination of the treaty system as a whole.

10. Article 4 of part 2 called for more reflection, and it would be discussed in a further addendum to his fourth report. With regard to the opinions of Hans Kelsen on the relationship between the powers attributed to the Security Council under Chapters VI and VII of the Charter of the United Nations, it would take a great deal of evidence to convince him that those views of Kelsen’s were incorrect or that, for the purposes of legal thinking, they should be set aside ab initio. An article by a German scholar, which had appeared in the Festschrift for Hermann Mosler,\(^5\) had stated in effect that, since the binding resolutions of the Security Council did not refer to the substantive aspects of the dispute, the Court was, in that sense, not under an obligation to respect them, unless and in so far as the parties were bound by such resolutions. The implication was that the texts of resolutions adopted by the Security Council were not necessarily gospel, as far as international law was concerned.

11. As to the question of the so-called “indirectly” injured States, discussed in the report, such States generated a set of problems arising from two distinct possibilities. First, an internationally wrongful act might injure more than one State, possibly many or all States, especially where general or erga plurimum human rights violations were concerned. Second, the States affected might not be injured in the same way (qualitative differences) or in the same measure (quantitative differences).

\(^{4}\) See 2265th meeting, footnote 5.

\(^{5}\) For text, see Yearbook . . . 1989, vol. II (Part Two), pp. 81-82.

The Drafting Committee would benefit from further observations on that question. The only purpose of the proposed new draft article 5 bis was to acknowledge expressly that all the injured States were directly—albeit differently—injured, so that each State derived its own substantive rights or facultés directly from the general rules in part 2. Admittedly, that gave rise to some problems, but those problems had nothing to do with the indirectness or directness of the injury. Any suggestions for more precise solutions in the relevant operative rules would be welcomed, and indeed were urgently needed by the Drafting Committee.

12. Mr. ROSENSTOCK said that, in his opening statement, the Special Rapporteur had said it was not essential to determine whether non-intervention was distinct from the provisions of Article 2, paragraph 4, of the Charter of the United Nations. However, paragraph 2 of article 14, as now formulated, appeared to prejudice the issue by encompassing the terms of that article of the Charter. Since the matter was so controversial, it was likely to produce interminable discussion and detract from the Commission’s examination of acceptable provisions on countermeasures. That was a pity, because of the importance of arriving at a set of provisions on that subject. Another point concerned the existence or otherwise of non-treaty-based obligations erga omnes which were not part of jus cogens. Article 14 appeared to suggest that there were such obligations, but he would be grateful if the Special Rapporteur would give some specific examples.

13. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would reply to the second point raised by Mr. Rosenstock during his summing-up. As to the first question, he had to admit that the issue of non-intervention was frequently raised in one-sided terms. For historical reasons, connected with certain policies pursued by the major power in their hemisphere, Latin American States tended to believe that anyone who criticized the concept of intervention for its vagueness, as he did himself, had “sold out” to the United States of America. However, if the substance of intervention was defined—as he himself defined it—as inclusive of extreme forms of political or economic coercion, the other side was likely to be disappointed, and especially one member of the Commission. He believed, in any event, that certain extreme forms of economic and political coercion did fall within the Charter prohibition of force, regardless of whether they were labelled as non-permissible use of force or as non-permissible intervention. If, as some members seemed to believe, resort to those forms of coercion by way of reprisal was not prohibited de lege lata, it should, in his view, be prohibited by way of progressive development. It would, of course, be another matter in the case of those most serious internationally wrongful acts which were labelled as “crimes”. Those were to be dealt with, whatever they were called, at a later stage.

Cooperation with other bodies

[Agenda item 8]
attaining the objectives of the United Nations Decade of International Law.\(^\text{10}\) Subsequently, the Committee had commissioned an in-depth study on the same subject, setting out the Committee’s view on all the objectives of the Decade, and had submitted it to the Legal Counsel of the United Nations. The secretariat had also forwarded to the Office of Legal Affairs a summary report on those activities of the Committee aimed at contributing to the achievement of the objectives set for the first two years of the Decade. The item would remain on the Committee’s active agenda in years to come, with a view to continuing to make a positive contribution to the tasks of the Decade.

18. The AALCC secretariat also intended to make an in-depth study on wider use of ICJ and the promotion of means and methods for the peaceful settlement of disputes between States, including resort to ICJ, as spelt out in General Assembly resolution 45/40, on the United Nations Decade of International Law. The Registrar of the Court had offered his full cooperation in that study, which would focus chiefly on the Court’s enhanced role in matters relating to protection of the environment. In May 1991 the Secretary-General of the Permanent Court of Arbitration had convened at The Hague a working group of jurists, which had recommended that the Permanent Court of Arbitration should enter into cooperation agreements with other arbitration bodies, including the arbitration centres under the auspices of the Asian-African Legal Consultative Committee in Cairo, Kuala Lumpur and Lagos. The arbitration centres could offer their facilities to the Permanent Court of Arbitration if it was decided to hold proceedings outside The Hague. As a follow-up measure, the Committee’s secretariat intended to approach the Secretary-General of the Permanent Court of Arbitration, as well as the Directors of the regional centres for arbitration, in order to initiate cooperation agreements along those lines.

19. The Committee also attached great importance to the law of the sea, and had made its own contribution to the work of the Third United Nations Conference on the Law of the Sea. At its thirty-first session, the Committee had considered a report on the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. The AALCC secretariat had also urged member States which had not yet done so to ratify the 1982 United Nations Convention on the Law of the Sea. Ratification had now become even more urgent, since the Convention encompassed much of the work programme of Agenda 21 of UNCED. At the same session, the Committee had urged the International Law Commission to consider including in its programme of work an item entitled “Progressive development of the concept of preservation for peaceful purposes with regard to the high seas, the international sea-bed area and marine scientific research”. He hoped the Commission would consider the possibility of including that item in its long-term programme of work.

20. A further area of the secretariat’s work had been its active participation in the meetings of the UNCED Preparatory Committee, the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, and the Intergovernmental Negotiating Committee for a Convention on Biological Diversity. AALCC had held a two-day special meeting at Islamabad on environment and development, resulting in a statement of general principles of international environmental law which had been circulated for UNCED (A/CONF.151/PC/WG.III/5). In March 1992, the Committee had signed a memorandum of understanding with UNEP, with a view to enhancing cooperation between the two bodies on environmental law. Pending the entry into force of the conventions on climate change and biodiversity, the Committee had arranged to hold two workshops with UNEP on national legislation in those fields.

21. The current work programme also included studies on the status and treatment of refugees; the deportation of Palestinians as a violation of international law, particularly the 1949 Geneva Conventions; the criteria for distinguishing between international terrorism and national liberation movements; the extradition of fugitive offenders; the debt burden of developing countries; the concept of a peace zone in international law; the Indian Ocean as a zone of peace; and the legal framework for industrial joint ventures and international trade law matters. Those items would be discussed at the thirty-second session, to be held at Kampala from 1 to 6 February 1993. In view of the importance to economic development of the harmonization of legal regimes on international trade, the Committee had established a data collection unit at its headquarters in New Delhi, to facilitate the sharing of relevant experience among its member States. When the unit had acquired sufficient expertise in collecting and analysing the data, the intention was to set up an autonomous centre for research and development of legal regimes applicable to economic activities in developing countries. Having acquired the necessary hardware, the unit was now preparing the software, and was approaching member States and the appropriate international organizations for assistance in furnishing data.

22. Lastly, on behalf of the Committee, he invited the Chairman of the Commission to attend the Committee’s thirty-second session, at Kampala, where he was assured of a warm welcome.

23. The CHAIRMAN thanked Mr. Njenga for his instructive and lucid account of the work of AALCC. He said that the Commission would certainly give due attention to the Committee’s proposals for the inclusion of new items on its agenda. Lastly, he wished to express his personal pleasure at Mr. Njenga’s presence at the meeting.

24. Mr. BARBOZA, speaking on behalf of members from Latin American States, extended a warm welcome to Mr. Njenga, who, as a former member of the Commission, was in a position to make a particularly useful contribution to its work. On a more personal note, he recalled the interest he shared with Mr. Njenga in the environment, for they had worked together at many important international meetings on that subject. The members of the Commission followed very closely the activities of the Committee, considering in particular their
common interest in strengthening the rule of law in international relations.

25. Mr. RAZAFINDRALAMBO, speaking on behalf of members from African States, thanked Mr. Njenga for an extremely clear and full account of the activities of the Committee, whose very broad-ranging programme of work covered subjects of the utmost importance to the international community, and especially the developing countries, which included many African States. Since Mr. Njenga had been elected Secretary-General of AALCC the cooperation between the Committee and the Commission had gone from strength to strength and it was gratifying that it had taken place under the leadership of an African jurist. Unquestionably, development of the Committee’s activities would help to enhance cooperation with the Commission.

26. Mr. Sreenivasa RAO, speaking on behalf of members from the Asian Group of States, said he had great pleasure in welcoming in Mr. Njenga, a leader among jurists from the developing world. His report on the Committee’s work drew attention to important activities of great interest to the legal community in Asia and Africa, for which the Committee’s annual session was an indispensable forum enabling it to project its common interest throughout the world. He hoped that the Committee should have made an outstanding contribution to the development and codification of international law by negotiating important regimes at conferences held under United Nations auspices. Hence, it was no surprise that the Committee’s work would be of great value to them. It was his hope that the excellent cooperation between the Committee and the Commission would grow even stronger.

27. Mr. EIRIKSSON, speaking on behalf of members from the Group of Western European and Other States, said that he associated himself with the welcome expression of appreciation for his presentation. He himself had most pleasant memories of working with Mr. Njenga in the United Nations, particularly as a colleague on the Commission and also at the Third United Nations Conference on the Law of the Sea. In that regard, he noted with satisfaction the Committee’s continued interest in the law of the sea. The Commission had every reason to be grateful to the Committee for its loyalty to the Commission’s work. That loyalty had been shown once again by the concrete suggestions made for the Commission’s future work, suggestions which would be taken very seriously.

28. Whenever possible, his colleagues of the legal departments of the Nordic States attended the Committee’s meetings and invariably benefited from doing so.

29. Mr. VERESHCHETIN, speaking on behalf of members from Eastern European States, expressed warm appreciation to Mr. Njenga for his interesting presentation of the activities of AALCC. His valuable report was of great importance to the Commission, which did not operate in isolation for its work was of direct interest to experts in international law in the various parts of the world. His own country, the Russian Federation, was in both Europe and Asia, so that Russian international jurists like himself were particularly interested in the Committee. Yet another reason was the emergence of several new Asian States, formerly part of the Union of Soviet Socialist Republics. Those new countries would be very interested in the Committee’s activities, because they did not as yet have many international lawyers; contact with the Committee would hence be of great value to them. It was his hope that the excellent cooperation between the Commission and the Committee would grow even stronger.

The meeting rose at 11.40 a.m.

2276th MEETING

Friday, 19 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennoua, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenfeld, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchétin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 5 bis and

ARTICLES 11 TO 14 (continued)

1. Mr. PELLET said that he would comment on the whole of the fourth report (A/CN.4/444 and Add.1-3),
even though document A/CN.4/444/Add.2 had not yet been issued in French, and on the relevant parts of the third report (A/CN.4/440 and Add.1).

2. At the 2274th meeting, he had explained why he shared the Special Rapporteur’s view on the principle that countermeasures should be included in the draft articles and had expressed sympathy for the concerns of those members of the Commission who had argued that care must be taken to prevent countermeasures from becoming a weapon in the hands of the most powerful and serving to bolster an unjust international order in the name of the law.

3. It was therefore essential that the legal regime for countermeasures taken in response to an unlawful act should be based on the concern not to give the powerful States an unfair advantage, but, rather, to enable all States to make sure that their rights were respected if they had been violated. The point was not to ensure respect for international law in general, but to respond to a breach of international law suffered by the reacting State. That was the direct result of the general outline of the draft articles adopted in 1975, according to which the first part would deal with the circumstances giving rise to responsibility and the second would determine the consequences of responsibility. Those consequences were reparation and, if necessary, countermeasures, which, if he had rightly understood the third report, were defined by the Special Rapporteur as the generality of the measures to which a State might resort in response to a breach of international law by which it had been injured, a definition which ought to be included in the draft articles. Injury or harm played a key role, which was the same as the role played by the breach in part 1 of the draft articles. The breach was what gave rise to responsibility and injury was the basic condition for reacting to the wrongful act. If there was no injury, there could be no reparation and no countermeasures. That idea was suggested in article 30 of part 1 of the draft articles and it seemed to be the basis for draft article 11. If that was not the case, the link between the possibility of resorting to countermeasures and the existence of injury should be brought out more clearly, all the more so because paragraph 2 of the fourth report and the first two paragraphs of chapter II of the third report, which introduced that provision, exclusively placed the emphasis not on injury, but on the internationally wrongful act. However, if the Commission focused only on the internationally wrongful act as a prerequisite for countermeasures, it would be confusing responsibility itself and its consequences and going back to the traditional positivist approach which equated responsibility with reparation. In other words, although both reports were silent on that point, should it be understood that the reference to the injured State in draft article 11 implied that that State, in taking countermeasures, must have suffered an infringement of a right protected by law, as clearly stated in article 5 of the draft articles? whereas draft articles 7 and 8, which had been considered at the forty-first session, referred to injury as a condition for reparation?

4. That was not a purely theoretical question because it had practical effects. If injury in the strict sense, meaning a specific infringement of a subjective right, was left aside and if the idea was accepted that a merely legal injury would be enough, an idea with which he could not agree, it would be recognized that any breach of the law might lead to countermeasures, even if the State which took them had not actually suffered any negative consequences of the breach in question. It would then be all too easy for the strongest States to set themselves up as the righters of wrongs, the policemen of the world, and, on the pretext of putting an end to the wrongful act, to bring about the triumph not of the law, but of what they thought the law should be.

5. He recognized that the Special Rapporteur had been careful to point out that it was not the function of countermeasures to inflict punishment, but he was reluctant to say so expressly in the draft articles and, even though he said that he was referring only to delicts, there were lengthy passages on reactions to violations of obligations erga omnes which were probably not all crimes, but usually were. Although he could agree that crimes could lead to punishment, that was certainly not true of delicts.

6. In that connection, he wished to digress for a moment to say that he found the Special Rapporteur’s third and fourth reports quite paradoxical. The Special Rapporteur said that he was not referring to crimes, which he would deal with later, but, in fact, crimes were extensively discussed. Most of the examples he gave of breaches of international law consisted of the use of armed force, acts of terrorism, the kidnapping of diplomats and intervention on a massive scale in the internal affairs of States and even the list of prohibited countermeasures in draft article 14 clearly showed that he was irresistibly drawn by the idea of “crimes”. The question of the use of force, attacks on basic human rights, the inviolability of diplomats and agents and the other rules of jus cogens would not be relevant if there were anything but crimes. In any case, the rule of proportionality would prohibit such measures if they were intended merely as a response to delicts. The basic ambiguity was that the report and the draft articles seemed to relate both to crimes and to delicts.

7. Coming back to countermeasures, he said that they did not seem to have any punitive function, for, otherwise they would be the preserve of the powerful States; secondly, they were linked exclusively to reparation or, more accurately, to the impossibility of obtaining reparation or the risk that obtaining it would be impossible; and, thirdly, that they could consequently be used only if the State resorting to them had suffered injury. Draft article 11 could, moreover, be interpreted as a principle that way, but, as it stood, it was not entirely reassuring on that score, especially in the light of the commentaries relating to it. Countermeasures must nevertheless be prevented from turning into a widespread means of enforcing interna-
tional law, since, if care was not taken, any State could then take countermeasures, not only to ensure respect for its own rights, but also to ensure respect for the law in general. Machinery already existed for that purpose, namely, the sanctions which could be adopted by certain international bodies, including the Security Council, which were mentioned by the Special Rapporteur in the third report, but of which he had little to say in the fourth. The Special Rapporteur tended to adopt a fairly elastic approach to national countermeasures, which were treated as being akin to sanctions; in that case, they should come within the jurisdiction of an international body. There was a revealing comment in the fourth report which belied that approach: “Unilateral measures are long bound to remain the core of the legal regime of State responsibility.” It showed that the Special Rapporteur seriously underestimated the basic change constituted by the Covenant of the League of Nations, confirmed by the Charter of the United Nations and now being given a new opportunity by the new world situation to become more firmly established.

8. That was why he had a fairly strong reservation about a further omission he had noted in draft article 12, which dealt mainly with dispute settlement and thus referred implicitly to Chapter VI of the Charter. But what about Chapter VII? In the fourth report, the Special Rapporteur discussed only Article 2, paragraphs 3 and 4, and Articles 33 to 38 of the Charter, without saying a word about Chapter VII. In his own opinion, however, recourse to the measures provided for in Chapter VII of the Charter was the first essential limitation on the unilateral use of countermeasures. If the Security Council had decided on sanctions, in accordance with Articles 41 and 42 of the Charter, it was hardly likely that States would take no notice of them and continue to carry out measures of their own, just as individual or collective self-defence was allowed in the event of aggression only, according to Article 51, until the Security Council has taken measures necessary to maintain international peace and security.

If the Security Council had decided on measures within the meaning of Articles 41 and 42, States were no longer free to decide as they wished on countermeasures of their own.

9. He therefore considered that something should be added to draft article 12 in order to make it clear that countermeasures could be applied only as long as sanctions had not been decided by a competent international body. He also thought that that omission had been deliberate on the Special Rapporteur’s part. The principle of the restriction on countermeasures which he himself was proposing was being challenged by the Special Rapporteur, at least in chapter VII of the fourth report, where he said that there was no such thing as a self-contained regime for reacting to a wrongful act. He was not entirely convinced by the Special Rapporteur’s arguments and, in any case, he was not sure that the idea he had in mind was the same as the one in chapter VII of the fourth report. He believed that the Special Rapporteur’s conclusions would not be valid if sanctions had been decided on by an international body which was empowered to adopt them or if a court such as ICJ had ordered interim measures of protection in a dispute that had been brought before it.

10. Draft article 12 gave rise to other, less serious, concerns. With regard to paragraph 1, he was, like Mr. Bowett (2274th meeting), rather sceptical about the need to require the exhaustion of all the amicable settlement procedures available. There was no denying the fact that a State responsible for a breach giving rise to harm had to agree to an amicable settlement procedure, but whether the injured State had to wait until all the available settlement procedures had been exhausted was not only open to question, but also contrary to the clearest precedent in that matter—the 1978 Franco-American arbitration in the Air Service Agreement case. Such a requirement would also penalize States which had agreed to the largest possible number of dispute settlement procedures. If negotiations were the only available procedure, States could rapidly take countermeasures, whereas a State which abided by Article 33 of the Charter of the United Nations and agreed to settle disputes with other States through various kinds of settlement procedures would have to wait indefinitely before it could take countermeasures, and that would be an unacceptable inequality before the law.

11. That objection, which might be somewhat theoretical, could be added to the practical drawbacks of the solution proposed by the Special Rapporteur. It would be both more realistic and more reasonable to say that countermeasures should neither hamper the amicable settlement of the dispute nor make it worse. In that case, it would be more logical to move paragraph 1 (a) of draft article 12, as it stood, to draft article 14. A countermeasure which would prevent the amicable settlement of the dispute or make it more difficult should be and probably was prohibited by international law.

12. Paragraph 3 of draft article 12 should likewise be transferred to draft article 14, since countermeasures which endangered international peace and security were obviously prohibited. That left paragraph 2 of draft article 12 which, together with paragraph 1 (b), would be the only real subject-matter of the draft article. That provision could be simplified: instead of providing for a stream of exceptions, it could simply be stated that the injured State could resort to countermeasures, first, where the State to which the internationally wrongful act could be attributed did not cooperate in good faith in choosing an amicable settlement procedure; secondly, where an international body competent to impose sanctions or interim measures of protection had not intervened previously; thirdly, where the State to which the internationally wrongful act could be attributed failed to respect those sanctions or interim measures of protection; and, fourthly, provided that the intention to take countermeasures had been communicated properly and in a timely fashion.

13. Draft article 13 did not give rise to any problems, unlike the new version of draft article 14. First, as he had already pointed out, part of the present draft article 12 should be incorporated into draft article 14. Secondly, he...
had some doubts about the wording of paragraph (1) (b) (iv). It would be simpler to say that countermeasures which violated the rights of a third party were prohibited. Thirdly, he wondered whether draft article 14 was not redundant in part. Paragraph (1) (b) (iii) rightly provided for the prohibition of any conduct which was contrary to a peremptory norm of general international law, but no one would deny the fact that those norms included at least the prohibition of the use of force, the protection of fundamental human rights and, probably, the basic rules on diplomatic representation. In that case, paragraph 1 (a), (b) (i) and (b) (ii) and paragraph 2 were superfluous. The point was not to rewrite international law as a whole, but to define the general principles applicable in respect of responsibility. The Commission could get bogged down in endless debate if, as part of that exercise, it tried to list the different rules of jus cogens.

14. Instead of simplifying paragraph 1 (a) and (b) as contained in the earlier version, the Special Rapporteur was proposing wording which might complicate the Commission’s task, in particular by splitting the provisions relating to the use of force into two paragraphs. He was one of those who believed, as the Special Rapporteur himself did, moreover, that the prohibition set forth in Article 2, paragraph 4, of the Charter of the United Nations did not relate only to the use of armed force and that, beyond a certain threshold, resort to the use of force, even non-armed force, was prohibited by contemporary international law. He therefore objected not to the substance of the provisions proposed by the Special Rapporteur, but to the excessively analytical method he seemed to have chosen. For reasons which probably differed from those of Mr. Rosenstock (2275th meeting), he agreed with him that it was not appropriate to get involved in a debate that several generations of diplomats and jurists had been unable to conclude. It would be wiser not to list the rules of jus cogens in detail and thus not to refer expressly to the prohibition of the use of force and the basic principles which protected the individual. If the Commission insisted on mentioning the use of force, it should use one of those sufficiently ambiguous formulations that were so often found in international law, such as: “An injured State must not, as a countermeasure, resort to the threat or use of force in contravention of the provisions of the Charter of the United Nations” or “... to the threat or use of force prohibited by international law”.

15. He would not comment on draft article 5 bis because he would then have to express doubts about the soundness of the definitions which were contained in article 5 itself, as adopted on first reading, and which should not be called into question at the current stage of the Commission’s work.

16. Mr. ARANGIO-RUIZ (Special Rapporteur) said he believed, perhaps mistakenly, that the work he was doing in the Commission was scholarly. He did not consider himself either a diplomat or a politician. As a scholar, he did not mind appearing, within limits, to be rather original. So, when any members of the Commission disagreed with him or did not approve of the draft articles or particular parts of his reports, he was glad in a way, since that meant that his work had not been utterly useless. He therefore did not feel in the least offended when a member expressed opinions different from his own, even in a very heated fashion. However, there were some things which were difficult for him to accept. The previous speaker, at the beginning of his statement, had agreed with him that countermeasures should be dealt with. He had dealt with them not because that had been his idea, but because countermeasures were part of the programme of work adopted by the Commission long before. The former Special Rapporteur, Mr. Ripphagen, had already dealt with the subject. The previous speaker had, however, gone on to say that countermeasures must be regulated in such a way as to prevent abuses by strong and rich States of weak and poor States. That was exactly what he himself had written in the opening paragraphs of his third report and what he had repeated in his statements at the preceding and current sessions. He had done his best clearly to explain, both orally and in writing, his views on the difference between strong and weak and on the necessity to take that difference into account in order to eliminate or reduce the advantage of the strong. There was thus no reason to come back to that point as if he had failed to consider it.

17. With regard to substance, it had been said that using the concept of infringement as a means of defining the injured State and determining which State had the right to resort to countermeasures might be to the advantage of stronger States. He would like to know in what sense it could possibly be alleged that by basing himself on the very concept of an injured State embodied in article 5 of the draft as adopted by the Commission—repeat, by the Commission—on first reading, he was favouring strong States to the detriment of the weak.

18. The question of human rights had been raised and it had been said that violations of human rights were crimes. It was true that such violations did sometimes constitute crimes or very serious breaches, but there were others which were not equally grave and against which States had to react, including those States which had not suffered any harm, but had been injured in their right to have human rights respected by all the States which were committed to respect them under international law. The word ‘paradoxical’ had been used to compare his preliminary and second reports to his third and fourth reports. In the first two reports, he had stated that he would deal with crimes separately, at a later stage, while, in his third and fourth reports, he had frequently cited examples or cases of acts which were crimes rather than simple delicts. When he had begun the task entrusted to him, he had stated, in reply to at least one member of the Commission who believed at that time that crimes should be dealt with first, that he was not ready to deal with crimes immediately. He had said quite humbly that he knew nothing about crimes other than what was stated in article 19 of part 1 and that he preferred to perform his task by starting with what he knew or at least with what was the least unfamiliar and then moving gradually towards the unknown.

11 See 2261st meeting, footnote 8.
In fact, he was coming to believe that there was no clear-cut distinction between crimes and delicts; rather, they could be placed on a continuum, with crimes being the most serious among internationally wrongful acts. Thus, in dealing with consequences, it was perhaps more difficult to make a clear distinction between delicts and crimes. In any event, he had not cited only cases of crimes in his third and fourth reports. Moreover, some "simple" violations of human rights were wrongful acts, but not the wrongful acts that those who believed in a clear-cut distinction regarded as crimes. It might also be asked whether a violation against one individual was really much less serious than a violation against thousands.

19. He was fully aware that most members of the Commission and most Governments were not in favour of the idea of the punitive function of countermeasures. It was therefore out of respect for that general sentiment and on the basis of his longstanding belief that draft article 10 might contain a punitive element that he had explained why he had drafted article 11 as he had and had specified that he wished to leave untouched the question whether or not countermeasures had a punitive motive, although it was difficult to deny, in his opinion, that States resorted to countermeasures not just to secure reparation but also to chastise. He had also explained that, after all, even the most discreet forms of reparation performed an implied punitive function. All that notwithstanding, even on the function of countermeasures the same speaker had been able to find grounds for alleging that he (the Special Rapporteur) should be considered a supporter of the strong against the weak and of the rich against the poor. That was quite untrue. In his report, he had given two examples in which two small developing countries had adopted a punitive attitude towards two permanent members of the Security Council.

20. With regard to the omission of any reference to Chapter VII of the Charter of the United Nations, he noted that, in relation to procedures for the peaceful settlement of disputes, he had referred to Article 2, paragraphs 3 and 4, of the Charter, Chapter VI of the Charter and all the relevant instruments. Why should he then have mentioned Chapter VII? In fact, he took issue with the way in which Chapter VII might have given and might still give rise to abuses, precisely by the stronger States. He therefore found it very odd that he had been publicly singled out, by the speaker in question, as someone who favoured the strong over the weak, the rich over the poor. He was doing exactly the opposite, and better than anyone else, except perhaps the weak and the poor themselves.

21. As regarded the same speaker's remark concerning jus cogens, he recalled that he had stated clearly at the preceding meeting that more than one reader might question whether prohibited countermeasures had to be referred to specifically in draft article 14, since some, although not all of them, were or could be considered to be condemned as contrary to jus cogens. He had explained the two reasons for his choice and he considered them to be sound.

22. In conclusion, he noted that there was nothing worse than attributing to someone opinions he had never expressed, for the sole purpose of criticizing them to one's advantage.

23. Mr. VILLAGRAN KRAMER said that the topic under consideration, which brought into play the concepts of war, intervention and unilateral acts which affected third States, was a troublesome one. It nevertheless had to be dealt with. The Special Rapporteur's fourth report (A/CN.4/444 and Add.1-3) and his introduction had therefore been extremely useful, particularly as the topic was very controversial because it touched on sensitive areas that were regarded as the domain of the powerful and areas that were also complex since no country could claim to have the privilege of or a monopoly on intervention and the use of force. There were countries on every continent that disregarded the Charter of the United Nations and international law and resorted to acts of intervention and the use of force, as well as countries which were affected by those acts.

24. The Special Rapporteur had clearly explained his views on the extent of responsibility, the conditions under which reprisals involving the threat or the use of force could give rise to the responsibility of their author and the cases and circumstances in which it might be possible to regulate resort to reprisals.

25. With regard to Mr. de Saram's theory that certain wrongful acts which gave rise to State responsibility ceased to be wrongful under certain conditions, he asked when, under what conditions and in what circumstances that might be the case. In all national legal systems, state of necessity and self-defence precluded criminal responsibility, leaving only civil liability to stand in certain cases. The State had a monopoly on the use of force, but such use was governed by the constitution and the legislation of that State and the treaties to which it was a party. Any abuse was penalized and gave rise to responsibility, including that of the State. That theory could be transposed into international law.

26. In the case of the difficult relations among States, the question of the use of force invariably gave rise to discussion, even though there was a permanent movement against the use of force by way of reprisals. The point was to determine when and in what cases the use of force by way of reprisals might be justified and not give rise to State responsibility. How much tolerance should be allowed?

27. While, in internal law, state of necessity and self-defence allowed the use of force, in international law, there had to be a close link between the concept of the use of force, on the one hand, and state of necessity or self-defence, on the other, so as to prohibit the use of force by way of reprisals. Self-defence could not be equated with, or justify, reprisals.

28. In his view, intervention was wrongful and that was so because there was a rule which made it wrongful: the provisions of Article 2, paragraphs 4 and 7, of the Charter of the United Nations. That rule had been reaffirmed by the General Assembly each year since 1965 in a number of resolutions, including the Declaration on the Inadmissibility of Intervention in the Domestic Affairs
of States and the Protection of Their Independence and Sovereignty, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, the Definition of Aggression, the resolution on non-interference in the internal affairs of States, the Declaration on the Deepening and Consolidation of International Détente and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States. Since Governments had thus declared, at different times, that intervention was contrary to the Charter of the United Nations and international law, the Commission could not disregard the political and legal dimension of that phenomenon. It could, of course, be argued that many General Assembly resolutions were only declaratory and not binding, but he himself did not believe that all General Assembly resolutions were only declaratory. Had not the resolution entitled “Uniting for peace” been invoked even by the permanent members of the Security Council at the end of the Korean war?

29. The question was thus whether such texts which had been duly adopted by a competent body had legal effects. He believed that they did. The reason was that PCIIJ had held that the way in which the parties to a treaty interpreted and executed it was binding on them. That was also true of the resolutions which were adopted by the General Assembly, and which enunciated secondary rules in relation to the primary rules contained in the Charter of the United Nations. General Assembly resolutions thus had great value. At least he personally believed that they did.

30. As to the question whether reprisals should be generally prohibited, he was inclined to agree with Mr. Shi (2267th and 2273rd meetings) that, in theory, such a general prohibition would be fully justified. However, there were no rules prohibiting reprisals when they did not involve the unilateral use of force. Could it then be concluded that something that was not expressly prohibited was permitted and could it be asked to what extent such permissible conduct could give rise to responsibility? It should be noted that, in certain regional systems which were part of self-contained systems, such as the inter-American system, reprisals were expressly prohibited, whether or not they involved the use of force. That was stated, for example, in former article 19 (now article 22) of the Charter of OAS. Other systems, such as GATT, did allow economic reprisals. The United States of America and the European Community even announced the reprisals they were planning to take in order to encourage the start of negotiations and thus obtain satisfaction. It must therefore be decided whether there were any international rules which limited reprisals not involving the use of force. In that connection, he drew the Commission’s attention to General Assembly resolution 36/103, the annex to which contained the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States and, in particular, to section II, paragraph (k), which specifically provided for

... the duty of a State not to ... adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations.

It was true that not all States had voted in favour of that resolution, but it did, in a way, prohibit reprisals and, since that prohibition had been proclaimed by the General Assembly in the exercise of the powers vested in it by the Charter of the United Nations, it had very great political weight which the Commission had to take into account. Since, at the regional level, reprisals were either completely prohibited, as in the case of OAS, or were permitted, as in the case of GATT, a compromise should be reached so that some progress could be made. The Charter was not something static and it was thus on the basis of a dynamic approach that the Special Rapporteur had tried to establish the legal foundation of the limitation of reprisals. He could only support the Special Rapporteur in that effort, but urged him to consider the possibility of restricting the scope of the lawfulness of reprisals still further, in line with the general trend that appeared to be taking shape in today’s world.

31. Mr. FOMBA said that the solutions and draft articles proposed by the Special Rapporteur in his fourth report were based on an in-depth study of practice and legal writings. With regard to countermeasures he generally agreed with the view expressed by the Special Rapporteur and Mr. Pellet (2274th meeting), whose arguments were the exact opposite of Mr. Shi’s (2267th and 2273rd meetings).

32. As to the conditions and functions of countermeasures, it was obvious in both legal and political terms that the application of countermeasures was subordinated to the commission of an internationally wrongful act. That proposition therefore did not call for any particular comment, except perhaps on the question whether the good faith or excusable error of the State which had resorted to countermeasures in the absence of any prior internationally wrongful act was relevant in evaluating the degree of responsibility of that State, as suggested by the Special Rapporteur. It might well be asked to what extent the injured State was entitled to make a mistake. He agreed with the Special Rapporteur’s conclusions on the function of countermeasures. With regard to protest, intimation, sommation and/or demand of cessation and repair, he supported the Special Rapporteur’s proposal for the formulation of a specific rule. As to the substance of the communication required, he would like to know in what way the “less cumbersome” solution put forward by the Special Rapporteur differed from the position taken by Mr. Bowett (2274th meeting), who had contended that what was involved was not a precondition, but, rather, a parallel obligation. He also shared the Special Rapporteur’s views on the time-limit and supported the idea that interim measures of protection should not be exempted from certain minimum prerequisites.
33. As far as the impact of dispute settlement obligations was concerned, he had no difficulty in giving an affirmative answer to the question implied in the third inference drawn in the conclusion of chapter II of the fourth report. Referring to the Special Rapporteur’s discussion on article 10 which followed, he said that account should be taken of the legal impact of Article 33 of the Charter of the United Nations and of other modern-day legal instruments. He also considered that the three elements that the Special Rapporteur went on to propose were relevant and that the law of dispute settlement would have to be developed; to that end, the Commission should be bold in its approach, as well as cautious and realistic.

34. Turning to the proposed draft articles, he asked whether the words ‘... have not met with adequate response ...’ in draft article 11 should be taken to mean ‘have not met with any response at all’. He also noted that countermeasures were defined in that text implicitly as the action by the injured State of not complying with one or more of its obligations towards the wrongdoing State, but that the term ‘countermeasure’ itself was not used. It might be useful to refer at least to a ‘measure’, particularly since that term was used in paragraph 1 of draft article 12. That article was generally satisfactory, but, in paragraph 1(b), the term ‘intention’ was too vague and it should be specified that the reference was to the intention to take countermeasures. Lastly, he had no difficulty in accepting the exceptions to the obligation of prior exhaustion of all available amicable settlement procedures provided for in paragraph 2 of that draft article, as well as the exception to those exceptions set forth in paragraph 3. He would deal later with draft articles 13 and 14.

35. Mr. YANKOV, thanking the Special Rapporteur for his excellent report, said that it contained not only a further elaboration of the problem under consideration, but also a set of draft articles on the constituent elements of countermeasures, as well as on their function and on the requirements for and restrictions on their operation, which was in many respects a substantial improvement on the draft articles on the same subject proposed by the former Special Rapporteur.

36. Draft article 11 laid down a general definition of the concept of countermeasures based on the assumption that the basic condition for any countermeasure was the existence of an internationally wrongful act. While he agreed with the proposed text, as to both substance and drafting, he would like to know why the phrase ‘is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act’, which had appeared in the text the former Special Rapporteur had proposed, for the same article (former article 8) had been replaced by the words ‘is entitled ... not to comply with one or more of its obligations towards the said State’. The first formulation was more flexible and indicated the temporary suspension by the injured State of its obligations, whereas the existing text suggested that there was a definite termination. He would also suggest, though he did not insist on the point, that the Special Rapporteur should consider the possibility of indicating in some way that the obligations the injured State would not perform should have a connection with the obligations breached. That would, of course, restrict the scope of the countermeasures and, consequently, the freedom of action of the injured State, but it would also be a safeguard against any attempt by the stronger party to abuse its options.

37. With regard to draft article 12, he agreed with Mr. Bowett and other speakers that the condition set forth in paragraph 1(a) would be unworkable in practice. The exhaustion of amicable settlement procedures should not be a precondition, but an obligation accompanying the countermeasures taken by the injured State. Furthermore, in his view, paragraph 3 of the draft article was not very clear, since, as worded, it made no distinction between countermeasures and provisional measures, as provided for in Article 41 of the Statute of ICJ.

38. He had no particular difficulty with draft article 13. In his view, proportionality was an essential component of any countermeasure and constituted a safeguard against abuses of the right to take reprisals. He noted, however, that the words ‘manifestly disproportional’ used by the former Special Rapporteur in paragraph 2 of article 9 of the draft articles he had proposed, no longer appeared in the text proposed by the current Special Rapporteur. He would be grateful for clarification on that point.

39. As to draft article 14, on the new text of which the Special Rapporteur was to be commended, he had some doubts about the need for paragraph 2 as worded, as an interpretation of the meaning of Article 2, paragraph 4, of the Charter of the United Nations. It could even weaken the significance of the terms of paragraph 1(a) or give rise to a dispute over an article on the prohibition of the use of force. In addition, the expression ‘normal operation’ in paragraph 1(b) was very general and too vague. What was more, it did not cover diplomats alone. There could also be an infringement of the inviolability of diplomatic missions and their premises and archives. It would therefore be preferable, in his view, to use the wording of the 1961 Vienna Convention on Diplomatic Relations and to replace the expression ‘normal operation’ and the words that followed by the words ‘the efficient performance of the functions of diplomatic missions’.

40. Lastly, he underlined the need not to overlook the importance of ‘self-contained regimes’ and to adopt a more flexible approach, along the lines of certain other existing conventions on the subject. While he commended the Special Rapporteur on his excellent work, he also wished to point out that it was important, in so far as possible, to use the draft articles proposed by the former Special Rapporteur. He proposed that the draft article on countermeasures should be referred to the Drafting Committee.

Closure of the International Law Seminar

41. The CHAIRMAN invited Mr. Blanca, Director-General of the United Nations Office at Geneva, to address the Commission on the occasion of the closing
ceremony of the twenty-eighth session of the International Law Seminar.

42. Mr. BLANCA (Director-General of the United Nations Office at Geneva) recalled that, when he had welcomed the participants to the twenty-eighth session of the International Law Seminar, he had expressed the hope that the session would take place in a constructive and open spirit and would prove to be an enriching experience for all. That wish had been realized and the various lectures given by the eminent members of the Commission and by different officials from the United Nations Secretariat had no doubt provided them with a source of inspiration and reflection.

43. For the first time that year, the participants had been able to compare and apply their ideas in four working groups set up to study one particular problem dealt with by the Commission, namely, the establishment of an international criminal court. That innovative step had been made possible with the cooperation of the Chairman and the support of the members of the Commission. It had been a true practical exercise in which practice had been complemented by theory. The four members of the Commission who had supervised the working groups had listened with great interest to the submission of the ensuing reports. After all, was not practical work the ultimate purpose of university studies? It was that practical knowledge which had in particular enabled the Commission to draft major international legal instruments and to seek viable agreements on all issues that had met with opposition.

44. On behalf of the United Nations, he thanked the Governments which had made voluntary contributions and had offered fellowships for the Seminar, thereby promoting wider teaching, study, dissemination and understanding of international law. With their assistance, young jurists, mainly from developing countries, had been able to attend meetings of the Commission and to acquire practical experience in the drafting of international legal texts. Thanks to such generosity, 16 fellowships had been awarded for a total of 22 participants, not to mention the 4 UNITAR fellows who traditionally attended the Seminar. He also thanked in particular the Director of the Seminar, Mrs. Noll-Wagenfeld, who had done everything possible to ensure the success of the Seminar's activities.

45. He had no doubt that the lessons learned from the Seminar would help the participants to become the builders and shapers of the world of the future and to promote dialogue, understanding, tolerance and openness. He wished them every success in their future endeavours.

46. The CHAIRMAN said that the Commission attached great importance to the International Law Seminar, which was designed to familiarize young jurists with the work of the Commission and to increase their understanding of the difficulties it had to face. During the session, the participants would have gained awareness of the importance of individual work, but also of the benefits of dialogue and cooperation. A jurist must know how to listen and to take seriously arguments he did not particularly like.

47. The participants had for the first time been asked to play an active role by contributing to the work of the Commission. The results of their reflections on the statute of an international criminal court had been particularly encouraging and their papers would be made available to all members of the Commission, who could then take them into account in their deliberations.

48. Participation in the International Law Seminar was a kind of initiation rite, since it was precisely as participants in the Seminar that a not inconsiderable number of the present members of the Commission had had their first contacts with it. He therefore trusted that some of the participants would one day return to the Commission as members.

49. Mr. NHERERE, speaking on behalf of the participants in the International Law Seminar, thanked the members of the Commission and in particular Mr. Crawford, Mr. Pellet, Mr. Tomuschat, and Mr. Villagran Kramer, the tutors of the four working groups, for their assistance and understanding and for making themselves readily available. He also thanked Mrs. Noll-Wagenfeld, the Director of the Seminar. The feeling of being present at the actual creation of the law during the discussions in which creativity had vied with originality had been a fascinating and rewarding experience for all participants, who would in future look at the Commission's reports with fresh eyes and renewed interest. Their stay in Geneva had also provided many of them with an opportunity to make international contacts for the first time, and that was entirely in keeping with the spirit of the United Nations. He trusted that the Chairman and other members of the Commission would still be present when some of the participants at the Seminar had the chance one day to return to the International Law Commission as members.

The Director-General presented participants with certificates attesting to their participation in the twenty-eighth session of the International Law Seminar.

The meeting rose at 12.15 p.m.

2277th MEETING

Tuesday, 23 June 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodriguez, Mr. Crawford, Mr. de Saram, Mr. Eriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.
Visit a member of the International Court of Justice

1. The CHAIRMAN said he extended a warm welcome to Prince Ajibola, a Judge of the International Court of Justice and a former member of the Commission, and was sure that he spoke on behalf of all members of the Commission in expressing the conviction that Prince Ajibola would make as fruitful a contribution to the work of ICJ as he had done to the work of the Commission.


[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR

(continued)

ARTICLE 5 bis and
ARTICLES 11 TO 14 (continued)

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to make a point of clarification concerning the last paragraph of chapter VII of his fourth report (A/CN.4/444/Add.2) in which he had indicated that draft article 4 of part 2 might require further reflection and would, if necessary, be the subject of a further addendum. The fact that no such addendum had been produced was due not to any change of view on his part about the relevance of the issue but rather because it was of such importance as to require in-depth treatment. He would very much welcome members’ views on the matter, which he had already touched upon on earlier occasions, for example, at the 2267th and 2275th meetings.

3. As he saw it, the effect of article 4 in its present form would be to subordinate the provisions of the draft on State responsibility both to the provisions of, and to the procedures in, the Charter of the United Nations on the maintenance of international peace and security. In particular, that would mean the subordination of the draft articles on State responsibility to any recommendations or decisions adopted by the Security Council in the context of its functions regarding dispute settlement and collective security. As stipulated unambiguously in the Charter, the Security Council’s powers consisted of making non-binding recommendations, under Chapter VI, which dealt with dispute settlement, and also binding decisions under Chapter VII, which dealt with measures of collective security. The main point was that, according to the doctrinal view—which did not appear to be seriously challenged either in the legal literature or in practice—the Security Council would not be empowered, when acting under Chapter VII, to impose settlements under Chapter VI in such a manner as to transform its recommendatory function under Chapter VI into binding settlements of disputes or situations.

4. But what if the Security Council did try to impose binding settlements? Would article 4 as adopted by the Commission, and eventually embodied in a treaty, subordinate the validity, the interpretation and the application of any provisions of a convention of codification of the law of State responsibility to any decision of the Security Council imposing the settlement of a dispute or situation? Although he had not been able to reach a considered opinion on the subject, he could, for the moment, think of two examples. First, if a Security Council decision under Chapter VI of the Charter of the United Nations did affect a dispute or situation between one or more injured States and one or more wrongdoing States in a manner not in conformity with the rules laid down in a convention of State responsibility, of which article 4 formed part, what would be the implications for the relationship in terms of responsibility, whether substantive or instrumental, as between the States concerned? Second, in the event of such a situation, what would be the relationship between the competence of ICJ, on the one hand, and that of the Security Council, on the other, for instance in a case where, on the basis of a valid jurisdictional link, State B unilaterally brought a case against a wrongdoing State A before ICJ and the Court was confronted with a contradiction between one of the provisions of the convention on State responsibility and a decision taken by the Security Council in violation of the limitation of its competence under Chapter VI of the Charter?

5. Although he would be unable, for the time being, to answer such delicate and difficult questions, he thought that they could not be ignored by the Commission. In any case, as regarded the inclusion of article 4 in the draft, he was of the view that for such a provision to be maintained, it would be indispensable for the Commission to study the matter in adequate breadth and depth. He also realized that, for the time being, the Commission’s mandate did not appear to be sufficiently broad to enable it either to interpret the Charter of the United Nations, in particular, Chapters VI and VII, or to determine the relationship between the Security Council and ICJ, or to determine the consequence that Article 103 of the Charter would have on any specific provisions of the law of State responsibility as codified by the Commission and accepted by States in a convention. He felt, therefore, that the best course for the Commission would be to leave article 4 out of the draft. Any question concerning the relationship between an eventual convention on State responsibility and the Charter of the United Nations should be governed by Article 103 of the latter.

6. Mr. BARBOZA, congratulating the Special Rapporteur on his third (A/CN.4/440 and Add.1) and fourth (A/CN.4/444 and Add.1-3) reports, which contained a wealth of information, said that he would underline in particular the importance of the analysis of self-contained regimes and of the question of a plurality of injured States. As to the need to codify, and possibly progressively develop, the law on countermeasures, while he appreciated that reprisals had a bad reputation in the history of international law and international relations, he could not share Mr. Shi’s position (2267th and 2273rd meet-
ings for reprisals had always been, and would continue to be, a fact of international life. Since he was sceptical about the likelihood of abolishing countermeasures, he considered that the Commission should place before the General Assembly a draft that provided for detailed regulation of the conditions under which reprisals could be taken. That was the only safeguard international law could offer to the smaller and weaker States.

7. He agreed with other members that countermeasures should be limited basically to securing cessation and reparation. Even if the object of a countermeasure was to obtain satisfaction, it should not be regarded as punitive in nature. Satisfaction might be the only way in which the injured State could be compensated for the damage suffered as a result of violation of its subjective right. Reprisals, therefore, should not be recognized under modern international law as having a punitive function, irrespective of the subjective motive that prompted the injured State to take them. An article spelling out that fact would provide smaller States with an added safeguard. In that connection, he noted that the Special Rapporteur was not in favour of including such a provision and would prefer to rely on proportionality to temper any excesses so far as the punitive nature of the countermeasure was concerned. The precise meaning of proportionality was not always clear, however, which was why an article on the function of reprisals was necessary. He also agreed that there should be no reference in the draft to sanctions as such. Since retribution had been omitted from the draft and reciprocity, as in former article 8, had been equated with reprisals, as in former article 9—a something he agreed with entirely—countermeasures now signified reprisals alone. The Special Rapporteur had, however, expressed the view that the term "countermeasures" was not a useful and clear concept. Why not, then, use the term "reprisals", notwithstanding its unfortunate connotation?

8. Like Mr. Calero Rodrigues (2274th meeting), he approved of the last phrase, "not to comply with one or more of its obligations towards the said State" in draft article 11, but he wondered why the word "suspend", used in former articles 8 and 9 drafted by the previous Special Rapporteur, Mr. Riphagen, had been omitted. The phrase in question denoted some degree of permanence, whereas reprisals should cease once their purpose had been achieved. There again, he agreed with Mr. Calero Rodrigues that that fact should be spelt out in the draft. Article 11 further provided that, only when the injured State had not received an adequate response to its demand for compliance with articles 6 to 10, could it set in motion the procedure for the settlement of disputes, under article 12. Having regard to paragraph 1 (a) of article 12, and to the fact that the object of a reprisal might well be to bring about the establishment of a settlement procedure, a countermeasure might be acceptable provided that its lawfulness was examined in the context of such a procedure.

9. With regard to article 12, notwithstanding the exception laid down in paragraph 2 (a), he had doubts about the precise meaning of the expression "all the amicable settlement procedures available...", in paragraph 1 (a), and would have preferred the words "all the" to be replaced by "any", for the sake of clarity. Paragraph 2 (b) and (c) as well as paragraph 3 apparently reflected the reasoning behind the paragraphs of the conclusion to chapter II of the fourth report dealing with the nature and objective function of the measure envisaged. Yet, the differences alluded to in the report with respect to the impact of settlement procedures and countermeasures were not reflected in the article.

10. Article 13, on proportionality, was a key provision and, like the Naulila Awards and Air Service Awards, was couched in negative terms. It was an improvement on former article 9 as drafted by Mr. Riphagen, which mentioned only the effects of the reprisal, in that it introduced a qualitative as well as a quantitative element and it also omitted the word "manifestly", which went too far. The Special Rapporteur's comparison, in the report, between two evils, as represented by the breach and the reaction to the breach, called to mind lex talionis, the purpose of which, in primitive law, had been to set a limit on private revenge and to impose a rudimentary civil rather than a penal sanction. There was, however, much to be said in favour of Mr. Bowett's suggestion (2274th meeting) to the effect that the countermeasure must be necessary to bring about, first, cessation of the wrongful act, and second, recourse to peaceful settlement. To apply more compulsion than was necessary was a sure indication of the disproportionate nature of the reprisal.

11. As far as paragraph 1 (a) of draft article 14 was concerned, whether it be the version originally submitted or the reformulation, it would perhaps be preferable to use the expression "in contravention of the Charter of the United Nations and not only of Article 2, paragraph 4, thereof". Subparagraph (b) of the first version was perhaps preferable to paragraph 2 of the second, though it might not be acceptable. The Special Rapporteur's aim with paragraph 2 was to impose some limitation on the effects of reprisals by providing that they should not be allowed if they jeopardized the "territorial integrity or

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5 See 2273rd meeting, footnote 10.
6 Ibid.
7 See 2267th meeting, footnote 7.
8 Ibid., footnote 8.
9 The version originally submitted by the Special Rapporteur, read:

"Article 14. Prohibited countermeasures

"(a) the threat or use of armed force in breach of the Charter of the United Nations;
(b) any other conduct susceptible of endangering the territorial integrity or political independence of the State against which it is taken;
(c) any conduct which:
(i) is not in conformity with the rules of international law on the protection of fundamental human rights;
(ii) is of serious prejudice to the normal operation of bilateral or multilateral diplomacy;
(iii) is contrary to a peremptory norm of general international law;
(iv) consists of a breach of an obligation towards any State other than the State which has committed the internationally wrongful act."

He later reformulated it. See 2275th meeting, para. 1.
political independence of the State against which they were taken". While that idea deserved some reflection, it might first be asked whether proportionality was not in itself sufficient to make a reprisal illegal when it produced such catastrophic results. A second question then arose: if the reaction which produced those catastrophic results was in effect proportional to the breach, did that not indicate that the breach itself might have jeopardized the territorial integrity or political independence of the injured State? Yet application of article 14, paragraph 2, and the proportionality factor signified that the injured State could not go as far in taking reprisals as the offending State had done in committing the wrongful act. Paradoxically, proportionality between the coercion used and the objective aim of the reprisal meant that the reprisal had to end as soon as cessation of the wrongful act or reparation was achieved.

12. The second version of article 14 brought two elements into play: the nature of countermeasures which might jeopardize a State’s territorial integrity or political independence, and the equation of certain countermeasures with the use of force. The article seemed to imply that the prohibitions referred to in paragraph 1 (a) derived from the language of the Charter of the United Nations. He wondered, however, if article 14 might not be introducing new and alien elements into the interpretation of the Charter. He was willing to accept the content of the four subparagraphs contained in paragraph 1 (b). However, as it stood, paragraph 1 (b) (ii) might give rise to abuses in the utilization of countermeasures. He would, therefore, replace the words "is of serious prejudice to" by "may hinder the normal operation of bilateral or multilateral diplomacy".

13. The report also contained valuable material on non-directly injured States. In particular, the logic expounded in the seventh paragraph of chapter VIII C of the fourth report could be usefully applied to help clarify responsibility in the case of pollution of the "global commons", if the obligation not to pollute was considered to be an erga omnes obligation. The Commission should give further consideration to the material on non-directly injured States and to the tentative draft of a possible article 5 bis, proposed by the Special Rapporteur.

14. Mr. BENNOUHA said that he appreciated the comprehensive review of theory provided by the Special Rapporteur in his fourth report; at the same time, he was concerned that such an approach would lead the Commission to engage in interminable controversy, thus hindering it from reaching its goal of producing a set of draft articles.

15. He was, by and large, in agreement with the Special Rapporteur’s observations on proportionality and with the content of draft article 13. However, the criteria by which proportionality was evaluated remained an unresolved issue. Equity, for example, was too vague a criterion and generally depended on the way it was defined in a dispute settlement procedure.

16. Countermeasures could be used as a pretext for a State, or a group of States, to impose its own view of the international order on another State. Hence, the question arose of whether it was acceptable that a regional group, such as the European Community, having determined unilaterally that a State had violated human rights or the right to self-determination, should suspend or terminate its association with that State, thereby jeopardizing its economic and social equilibrium. Or more generally, could the Community use a claim of violation of human rights as a means of no longer honouring certain specific obligations towards another State, when the actual objective was to impose on that State an economic and social system that was more favourable to the Community? Clearly, one of the key elements in considering proportionality and the related question of countermeasures was the real objective of such measures. The matter called for further reflection. The relationship between countermeasures and the prohibition of the use of force was a highly sensitive issue. He feared that the way in which it had been treated by the Special Rapporteur in his fourth report might lead to a widening of the scope of the use of force. In his view, the Commission should take the opposite approach: in dealing with the question of the use of force, it should confine itself to referring to the generally accepted rule of international law, as established under Article 2, paragraph 4, of the Charter of the United Nations. All the justifications for the use of force cited by the Special Rapporteur in the report were, in reality, simply various means of broadening the scope of the only legitimate exception to the prohibition of the use of force, namely self-defence. A number of examples were given in chapter V A, which failed to mention, however, that the claims of self-defence had very often been rationalizations for other, unacknowledged objectives that had prevailed during the epoch of spheres of influence; during that period, the actual aim had been to ensure ideological unity in a particular region.

17. It should be borne in mind that countermeasures were prohibited by international law, even when taken by a group of States, unless they fell within the scope of Chapter VIII of the Charter of the United Nations and had been authorized by the Security Council for the purposes of maintenance of peace. In that connection, he considered unacceptable the statement in chapter V A of the report that:

The lawfulness of armed intervention to protect nationals in danger abroad generally appears to be accepted not so much under Article 51... as on the basis of a plea of self-defence as understood in the practice of common law countries, namely, of self-defence in a broad sense.

It was essential to recognize that the lawfulness of self-defence based on necessity was not generally accepted, either as doctrine or by the States themselves. It had been strongly contested by scholars, including Jiménez de Arechaga and Tanzi. Much of the doctrine espousing a broad interpretation of the concept of self-defence was based on cases which had been adjudicated before the entry into force of the Charter of the United Nations in 1945. Such cases were of purely historical interest and were no longer relevant to modern thinking on the subject of self-defence. One of the key cases in the matter was the Corfu Channel case, which dated from 1949, and in which ICJ, in its Judgment, had rejected the United Kingdom’s defence of “Operation Retail” as a method of self-protection or self-help, and said that:
"between independent States, the respect for territorial sovereignty is an essential foundation of international relations." It was also a fact that many States had refused to accept the claims of those which had invoked self-defence based on necessity. Widespread protest had thus prevented a broad interpretation from becoming part of the generally accepted rules of international law. Members should not be put in the position of subscribing to the highly controversial doctrine of urgent necessity. The Commission was not mandated to deal in detail with the issues of the prohibition of the use of force or the nature of self-defence.

18. Generally speaking, he concurred with the Special Rapporteur's remarks on the use of economic and political measures as forms of coercion. The Commission probably did not need to go into lengthy debate in that regard. The Special Rapporteur had adequately defined the restrictions on such measures in article 13 (Proportionality), and in paragraph 2 of the new version of article 14 (Prohibited countermeasures).

19. He agreed, too, with the sections of the fourth report concerning the relations between countermeasures and human rights and the Special Rapporteur's observations concerning the rules on the inviolability of diplomatic envoys and other protected persons. He objected, however, to the wording of the penultimate sentence of the last paragraph of chapter V D, which indicated that those rules had come into existence long before the rules on the protection of human rights and the rules of jus cogens. Jus cogens did not represent specific rules. The concept related rather to the hierarchy of rules in the judicial system, the place of the rule in that hierarchy determining its character. There appeared to be some confusion between erga omnes obligations and obligations deriving from multilateral treaties, for they were two different concepts and should be distinguished from one another. Erga omnes obligations were applicable to all States.

20. In short, he had no quarrel with the substance of the draft articles, but was concerned about the fact that the articles themselves did not fully reflect the discussion in the fourth report.

21. Mr. BOWETT said he understood the reluctance of some members to see the Commission's draft endorse countermeasures—they looked back, with distaste, at the coercion of weaker States by the major Powers during the nineteenth century. However, one must be realistic: States were not prepared to surrender their right to take countermeasures, and indeed the draft articles afforded an opportunity to use countermeasures as a positive, constructive means of promoting respect for the law. The draft should thus have three aims in view: first, eliminating the punitive aspect of countermeasures; second, utilizing countermeasures as a means of compelling States to return to compliance with the law; and third, subjecting the underlying dispute to impartial, third-party settlement procedures, which would also encompass the legality of any countermeasures undertaken.

22. As to the earlier version of article 14, he had no difficulty with the proposition, in paragraph (a), that countermeasures should not involve the threat or use of force, or with the provision in paragraph (c), with the exception of subparagraph (ii) thereof, which was too broad and too subjective. If countermeasures should not be taken against the staff or premises of diplomatic missions, the draft should say so. Paragraph 2 of the reformulation of draft article 14 raised serious difficulties and he would prefer to see it deleted, because it implied that the prohibition on the use of force in Article 2, paragraph 4, of the Charter of the United Nations extended to political and economic coercion, a view which had been decisively rejected in the resolutions adopted by the General Assembly on the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty11 and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.12 Again, although a separate provision could be included to forbid countermeasures as incompatible with the duty of non-intervention, without reference to Article 2, paragraph 4, of the Charter, that would be equally unacceptable. The Special Rapporteur had clearly shown in his report that the duty of non-intervention was extremely broad; it covered, in the words of paragraph 1 of General Assembly resolution 2131 (XX) of 21 December 1965

... all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements.

With a ban on countermeasures set out in such broad terms as that, virtually all countermeasures would be prohibited. Clearly, the Special Rapporteur had not intended to go as far as that; his intention was that the prohibition should extend only to

... those measures of an economic/political nature the consequences of which are likely to cause very serious or even catastrophic disruption to the State against which they are taken.

But if the only prohibited measures were extreme measures of that kind, surely they would be prohibited in any case, since they would be disproportionate. There was no need to provide separately for them, except by emphasizing the need for proportionality.

23. In his initial statement, the Special Rapporteur had referred to draft article 4 of part 2, provisionally adopted by the Commission, saying that the Commission might need to look at it again. That article read:

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

24. Presumably, what worried the Special Rapporteur was the possibility that countermeasures might be prohibited, not by any express provision of the Charter of the United Nations, but by a decision of the Security Council binding on Member States by virtue of Article 25 of the Charter. The place to address that problem
would be in the commentary and he would suggest including a number of points in it.

25. First, given the purposes and principles of the Charter, it was not to be expected that the Security Council would use its powers to deny any State its legal rights or remedies, including the right to take lawful countermeasures. Second, it was recognized that the Security Council had the primary responsibility for maintaining international peace and security. Third, it was accepted that the Security Council had the power to oversee the use of countermeasures, and to indicate whether, in any given case, it believed them to be disproportionate. Fourth, it might request a State to delay the taking of countermeasures when, in its view, they would tend to aggravate the situation and lead to a threat to international peace and security, and when there was a reasonable prospect of peaceful settlement. Lastly, when the wrongdoing State was recalcitrant, and refused to cease its unlawful conduct, or to accept pacific settlement, beyond asking for a reasonable delay, the Security Council would have no right to demand that a State should not take lawful countermeasures.

26. Mr. CRAWFORD said that he agreed with the Special Rapporteur on many matters: on retortion; the terminology applying to countermeasures; the rejection peril; and the legal irrelevance of a subjective punitive unlawful—which meant that the State acted at its own

27. Article 12 raised the problem of negotiation as a procedure for dispute settlement. Negotiations could afford a ground for delay: a State which had committed an internationally wrongful act could pursue negotiations indefinitely. Some limitation would therefore be required in paragraphs 1 (a) and 2 (a). One option might be to limit the dispute settlement procedure to third-party settlement; another would be to place a qualification on paragraphs 1 (a) and 2 (a) in cases where the injured State had reason to believe that the procedure would not lead to a resolution of the dispute within a reasonable time. A third option, suggested by Mr. Bowett, and the one he preferred, would be to make a satisfactory agreement on dispute resolution a suspensive condition for countermeasures.

28. Article 12, paragraph 2 (b), differed from the provision adumbrated in subparagraph (b) of the first paragraph of chapter II E of the report. The difference related to the period before interim measures of protection could be ordered by a court or a tribunal. The wording of the article was preferable to that of the report. An intermediate solution would be to confer a qualified right to take interim measures, pending the decision of the court or tribunal. Sometimes, for instance where assets were to be seized, the measures were likely to be ineffectual unless they were taken immediately. In that light, the proposal in chapter II E of the report did not seem to be workable.

29. Paragraph 3 of article 12 was unsatisfactory. It was extremely vague, and in any event its apparent object was already covered by the essential obligation of proportionality. He wondered how "justice" was to be defined; justice was in the eye of the beholder. In any case, the maintenance of international peace and security was a matter for the Security Council. States should not be subjected to vague and imprecise restrictions on their right to take countermeasures, provided the measures did not go beyond the requisite limits. Moreover, the duty of States not to aggravate their disputes should not be imposed unilaterally on injured States in the present context.

30. Article 13 dealt with the concept of proportionality by relating the countermeasures to the gravity of the internationally wrongful act and its effects, a principle which he endorsed. Mr. Barboza's idea that the conduct of the injured State should be proportionate to the two legitimate aims of the countermeasures, namely cessation and reparation, was interesting. As to the problem of differently affected States, the option was either to make special provision for them, a course to which the Special Rapporteur was opposed; or to specify that the gravity and the effects of the internationally wrongful act should relate to the State in question. In other words, it would only be possible to take countermeasures where they were warranted by the gravity of the breach vis-à-vis the State taking the countermeasure, and by the damage suffered by it. Otherwise, the ability to take countermeasures would be too broad and would be dissociated from the effects of the wrongful act. There was also the question of collective countermeasures, in cases where the worst affected State(s) sought assistance from others. If such State or States refrained from countermeasures, it might be that third States should not be allowed to take them. The right to take countermeasures should accordingly be made relative to the wrong suffered by the State in question, so that in practice only the most affected State(s) would take them. But the question of countermeasures by other States, taken at the instigation of the most injured State, was unresolved, and called for further reflection.

31. The issue of prohibited countermeasures was dealt with in the reformulated version of article 14.13 He agreed with the prohibition of the threat or use of force in paragraph 1 (a), since the article was not dealing with self-defence. Paragraph 1 (b) (i) was not sufficiently precise—did it refer to all human rights or only some of them, and which ones? No doubt the Drafting Committee would decide. Paragraph 1 (b) (ii), on diplomatic immunities, was far too vague; in particular, it lacked a
definition of 'serious prejudice'. Moreover, it seemed to defeat the purpose of the provisions on countermeasures, which should be to resolve, not to aggravate, disputes. Since the normal channels of diplomacy should be left open, he suggested specifying that countermeasures which breached diplomatic and consular immunity should be subject to a strict regime of reciprocity, that was to say that they could only be in response to a breach of similar or related obligations in the field of diplomatic and consular immunity.

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

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

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

The meeting rose at 11.30 a.m.
2. Draft articles 11 to 14 provided a partial reply to those questions, although their wording was not always felicitous. The various chapters of the fourth report also answered, and supplemented, each other in a balanced way which brought out the Special Rapporteur’s qualities of realism and resolution. Because of his spirit of realism, he started in every case from the basis of existing law, and that served as a reminder that the topic of countermeasures lent itself readily to codification. The rules on countermeasures incorporated elements which were peculiar to the law on responsibility, so far as concerned the definition of the actual concept of countermeasures, as well as elements taken from general international law, so far as concerned the stipulation of the conditions of recourse to countermeasures and of certain cases of prohibition. It was in the latter area that the Special Rapporteur’s resolution became apparent, as shown by the wording of paragraph 2 of the reformulated draft article 14. Some measures of constraint had effects that were more damaging than an armed attack and they should be excluded unequivocally from the scope of countermeasures. In such cases, the rules on countermeasures took the Commission into the realm of the progressive development of international law.

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

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

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

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

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

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

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4 See 2277th meeting, footnote 9.
self-contained regimes, the Special Rapporteur had departed from that general line concerning the limitation of countermeasures by objecting to their characterization as "residual" under the general regime, as opposed to the special regimes under multilateral agreements which regulated the consequences of a breach of those agreements. From that standpoint, there were certain inconsistencies in the Special Rapporteur's approach. Self-contained regimes were described by the Special Rapporteur as a "bien juridique of major importance". Such regimes tended to limit the situations in which a State would set itself up as judge and jury and take the law into its own hands. Of course, not all "treaty" regimes guaranteed adequate remedies or excluded recourse to the means provided for under general international law. But that tended to confirm that the question of the acceptability of unilateral countermeasures could be answered only after an analysis of the relevant multilateral convention.

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

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

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

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

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

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

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

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5 See 2273rd meeting, footnote 10.
6 For text, see Yearbook...1980, vol. II (Part Two), p. 33.
the law into their own hands. It was possible that, in certain circumstances, that might be legally and morally defensible and that countermeasures would serve as a sanction for the rules of international law to compel compliance with the primary obligations which had been breached. It was nevertheless obvious that no system was static and that, by definition, the goal of the system of international law was to establish the rule of law at the international level. That goal would not be achieved if express provision was made in the codification for a decentralized reaction to breaches of rules.

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

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

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

17. The first was that the application of countermeasures was fraught with the likelihood of abuse, largely because of power disparities among States. That was a matter which had received ample attention during the debate. It should be noted, however, that abuse was not the prerogative of rich and powerful States alone; in small and poor States, when the decision-making process was arbitrary and no distinction was drawn between foreign relations and personal relations, countermeasures could lead to an escalation which would endanger the stability of diplomatic relations and trade and cultural agreements and impair the movement of persons and goods across frontiers. It would, of course, be argued that the counter-

measures envisaged in the draft would not have such effects, since safeguards would also be provided against disproportionality and punitive intent. It was the question of the punitive function of countermeasures which brought him to the second reason why he thought that the Commission must exercise caution.

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

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

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

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

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

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

In cases not involving reciprocal measures, proportionality is difficult to determine, especially in the absence of a universally shared value system as parameter and mandatory third-party procedure for determination.\(^\text{10}\)

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

For the protection of essential interests of States, it would seem preferable to enlarge the group of norms which are protected from reprisals and abandon proportionality for the rest instead of relying for protection on a vague concept which is subject to individual judgements.\(^\text{11}\)

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

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

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

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

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\(^{10}\) Encyclopedia of Public International Law, vol. 10, p. 372.

\(^{11}\) Ibid.

\(^{12}\) See 2261st meeting, footnote 5.
different regimes for the various types of responsibility. Such compartmentalization would bring greater precision and clarity into the rules governing instrumental consequences and might also make for a more accurate assessment of proportionality. With regard to the concept of a plurality of unequally injured States, he asked the Special Rapporteur whether the duty of non-recognition contemplated by the former Special Rapporteur under article 14 in the case of crimes should not form part of the instrumental consequences not only in the case of crimes, but also in that of delicts. It seemed that, when there was a plurality of differently injured States, non-recognition and abstaining from rendering aid and assistance were particularly appropriate instrumental consequences. At any rate, he would be grateful for any guidance the Special Rapporteur could provide.

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

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

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

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

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

13 Ibid., footnote 8.
30. He agreed with the Special Rapporteur that countermeasures should not infringe on fundamental human rights, diplomatic relations, the rules of *jus cogens* or the rights of third States. That did not necessarily mean that he accepted the wording of the draft articles, but, if the Commission was in agreement on the substance, drafting questions could be left to the Drafting Committee.

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

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

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

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

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

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

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

\(^{14}\) See 2275th meeting, footnote 5.
The debate had helped to identify several limitations on the use of countermeasures. The most important of all was the reaffirmation of the fundamental principle that the use of armed force was prohibited as a countermeasure in response to any initial wrongful act not involving armed attack or the use of armed force. The principles enunciated in Article 2, paragraph 4, and Article 51 of the Charter of the United Nations had to be fully respected; otherwise, there was a risk of endangering the future of the world order, already delicate and in jeopardy. The legitimate countermeasures in question were not measures taken in the exercise of the right of self-defence, which was governed by the Charter. The countermeasures which could be taken should be in conformity with the rule of law. Since such measures were to be recognized by law, they should not fall outside the realm of law. That principle had been clearly stated in the arbitral award in the Air Service Agreement case between the United States of America and France, which had also clearly stated that countermeasures should not be taken where means forming "...part of an institutional framework ensuring some degree of enforcement of obligations" were available. ICJ had taken a similar position in the Case concerning United States Diplomatic and Consular Staff in Tehran.

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

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

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

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

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

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17 See 2261st meeting, footnote 5.  
18 See footnote 16 above.
ment plans and hence brought about a certain cooling of relations and later of negotiations. In that sense, much of the heated discussion about countermeasures was perhaps a bit misplaced and even unwarranted.

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

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

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

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

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

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

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

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

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

49. He did not, however, agree with Mr. Crawford and other members of the Commission that the test of proportionality could adequately govern extreme measures of coercion. He failed to see how it could be claimed that a State that violated erga omnes obligations or a rule of jus cogens should be retaliated against by the injured State also violating the same obligations in equal or proportional measure. Would it also be the case that, when a State committed aggression, other States could go beyond and restoration of the status quo ante and obliterate the political independence and territorial integrity of the aggressor State? Was there any concept of subjugated State that was valid in contemporary law, bearing in mind the Charter of the United Nations and the various precedents in that regard? He did not think so. Turning to the proposal made by Mr. Bowett (2277th meeting) about limiting the scope of the powers and functions of the Security Council so that it could not prevent States from resorting to lawful countermeasures, he believed that the proposal raised a non-issue and that it was unacceptable and legally justifiable. For example, if most lawful countermeasures were by definition low-intensity measures not involving any threat to international peace and security, the Security Council would generally not concern itself with them and the question of any prohibition of those countermeasures by the Security Council would not arise. On the other hand, where countermeasures did threaten international peace and security, the Security Council would be justified, under the powers and functions conferred on it by the Charter and by virtue of its primary responsibility to maintain international peace and security, in issuing the necessary directions. To limit those powers of the Security Council would be to deny priority to the role it played. Furthermore, Article 25 of the Charter of the United Nations was itself a matter of great legal debate and to limit its scope categorically in the present context of the development of a regime of countermeasures would mean reversing the order of priorities and would be unaccept-
able. In other words, he believed that countermeasures must be made subject to the general principles of international law, the Charter of the United Nations and the primary responsibility of the Security Council to maintain international peace and security. Otherwise, Article 25 would be subject to an inflexible legal interpretation to which no State, however strong its political persuasion, could agree a priori.

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

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

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

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

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

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

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

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

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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. Sreenivas Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchevin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 2]

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1 Reproduced in Yearbook ... 1991, vol. II (Part One).
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 humanitarian law. 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 peacefulness.

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

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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 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". 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. 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.

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4 See 2278th meeting, footnote 20.
6 See 2266th meeting, footnote 11.
of article 34 of part I. 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, 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 remediing the delict.

14. Chapter III of the third report discussed the purposes of countermeasures, which it defined as cessation, reparation and retribution. Reptribution 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 repressive 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." 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; ... 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-
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\textsuperscript{11} proposed by the previous Special Rapporteur, Mr. Riphagen. Equally welcome was the avoidance, in the new article 11, of the term “reprisal”.

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.\textsuperscript{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\textsuperscript{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\textsuperscript{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-

\textsuperscript{11} See 2273rd meeting, footnote 10.

\textsuperscript{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. 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, 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
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. 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 wrong-doer.

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.
2280th MEETING

Thursday, 2 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. Caliero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafinralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereschetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (continued)

ARTICLE 5 bis and
ARTICLES 11 TO 143 (continued)

1. Mr. MIKULKA said that, in view of the rudimentary nature of the centralized machinery for the enforcement of international law, the individual means of constraint or coercion represented by countermeasures were a basic element of that law. The question was undoubtedly highly complex and delicate, but the Commission owed it to itself to discharge its responsibilities in the matter. In formulating draft articles on countermeasures, it had to avoid petrifying the present and largely unsatisfactory state of the law relating to the use of countermeasures in international relations, but should, rather, identify all the progressive elements which emerged from recent practice in order to supplement them so as to arrive at clear and precise rules that would strengthen the safeguards against abuses. If it adopted that approach, the Commission would be doing the international community a great service.

2. Draft article 11 stated the main rule in that regard, namely, that an injured State had the right to resort to countermeasures, while making it quite clear that resort to countermeasures was not a direct and automatic consequence of the commission of an internationally wrongful act, but was allowed only after the demands addressed to the wrongdoing State by the injured State to obtain cessation of, or reparation for, the internationally wrongful act had failed to meet with an adequate response. The purpose of that article was thus to limit possibilities of premature and therefore abusive resort to countermeasures and he could not but support that approach.

3. During the debate, several members had proposed that greater emphasis should be placed on the temporary or reversible nature of countermeasures by replacing the words "not to comply with" in article 11 by the words "suspend the performance of". There was no doubt that countermeasures should be temporary in nature and end as soon as the State which had committed the internationally wrongful act had indicated that it accepted the obligations arising from its responsibility for that act; there was no divergence of views on that point within the Commission. He nevertheless thought that the introduction of the idea of "suspension" would limit unduly the latitude left to the injured State by suggesting that only obligations of means of a continuing nature, as opposed to obligations of result, would come within the scope of countermeasures. He could not support that conclusion and thought that the problem should be considered more thoroughly.

4. Moreover, the order in which the provisions relating to conditions of resort to countermeasures (art. 12), proportionality (art. 13) and prohibited countermeasures (art. 14) followed one another should perhaps be changed. Article 11, which stated the general rule that an injured State was entitled, by way of countermeasure, not to comply with one or more of its obligations towards the wrongdoing State, should immediately be followed by an indication that the non-performance, by way of countermeasure, of certain categories of international obligations was strictly prohibited. The exceptions to the general rule or, in other words, the categories of obligations which could not be the subject of countermeasures as listed in article 14, should be listed immediately after article 11, possibly in a new paragraph 2 to that article. Such an approach would, inter alia, take account of the concerns of the members of the Commission who wanted it first to formulate rules establishing guarantees against possible abuses of resort to countermeasures. If the Commission wanted to move in that direction, it could also adopt an even more radical solution, which would be to list the categories of prohibited countermeasures in a new paragraph 2 to article 30 of part 1 of the draft articles,4 which precluded wrongfulness in the case of countermeasures. In order to do so, it would, of course, have to wait until the second reading of part 1 of the draft articles. That was the approach that had been adopted in drafting the other articles of chapter V of part 1 relating to the other circumstances precluding wrongfulness, namely, consent (art. 29)5 and state of necessity (art. 33)6; in those articles, the main rule was always followed by its exceptions.

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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.
5 Ibid.
6 Ibid.
5. With regard to article 14 and substance, he agreed with the idea expressed in paragraph 1 (b) (iii) of that article, namely, that an injured State must not resort, by way of countermeasure, to any conduct which was contrary to a peremptory norm of general international law. There was no doubt that jus cogens rules included the prohibition of the threat or use of force in contravention of Article 2, paragraph 4, of the Charter of the United Nations, as mentioned in paragraph 1 (a), as well as at least part of the rules of international law on the protection of fundamental human rights mentioned in paragraph 1 (b) (i). However, the way in which the prohibition of the use of force and the violation of rules on human rights and the peremptory norms of general international law was expressed in article 14 could give rise to inadmissible a contrario interpretations. From that point of view, article 14, paragraph 1, had to be re-drafted.

6. Paragraph 1 (b) (ii), which prohibited any conduct which was not in conformity with the rules of diplomatic law, related to a category of rules which could not be placed on the same footing as peremptory norms or the rules on the protection of fundamental human rights: it would be hard to agree that, in that case, the prohibition of countermeasures was equally absolute. In that connection, he shared the view of the members of the Commission who considered that it would not be justified to prohibit resort to reciprocal countermeasures in the framework of diplomatic law. In that area, resort to countermeasures was not forbidden, even if it was considerably limited.

7. Paragraph 1 (b) (iv) offered a useful safeguard against the extensive use of countermeasures.

8. He agreed with the tenor of article 14, paragraph 2, but doubted whether it added anything to the provisions of paragraph 1 (a) and whether it was therefore necessary.

9. Turning to draft article 12, he shared the fear with regard to paragraph 1 (a) expressed by several members of the Commission that an obligation couched in such general terms might place the injured State at a disadvantage. Mr. Bowett’s comments (2277th meeting) on that point had been very convincing.

10. Article 12, paragraph 3, gave rise to some problems which had already been mentioned by Mr. Calero Rodrigues (2278th meeting). That provision, whose purpose was to preclude resort to countermeasures which were not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered, should have a more general function than that assigned to it in the framework of article 12, which limited its scope to the exceptions stated in paragraph 2.

11. Concerning article 13 (Proportionality), he supported the proposal that the criterion of the gravity of the internationally wrongful act and of its effects should be replaced by a different one which would take account of the purpose served by countermeasures, namely, the cessation of the wrongful act and reparation. However, there was much to be said for the arguments put forward by Mr. Al-Khasawneh (2278th meeting) on the highly subjective nature of any assessment of proportionality, regardless of the criterion chosen.

12. Lastly, with regard to draft article 5 bis, he noted that the accompanying commentary constantly referred to the concept of erga omnes obligations, thereby creating the impression that the question of a plurality of injured States could be equated with that of erga omnes obligations, and that was not the case. As Mr. Bennouna had pointed out, erga omnes obligations were part of jus cogens and consequently related to international crimes, which the Commission had still not yet begun to consider. In fact, the problem of a plurality of injured States did not arise only for erga omnes obligations; it arose for any regime of multilateral obligations. It was in that sense that the question also arose in the context of international delicts.

13. Mr. MAHIOU said that, before discussing the substantive aspects of the proposed draft articles, he wished to make a few comments on the concepts and ideas on which the Special Rapporteur had tried to provide some clarifications and explanations in his third report (A/CN.4/440 and Add.1) before proposing draft article 11.

14. As a general rule, the Commission had to refrain from using certain concepts and refuse to make room for them because they were not in conformity with international law and could even pervert its spirit. He was thinking in particular of the concept of “preventive self-defence” which had been invoked to try to justify more or less perniciously the use of force and which was no more than a perversion of the concept of self-defence. It was worth remembering Clemenceau’s remark that a nation which wanted to make war was always in a state of self-defence. The Commission should therefore be careful, as urged by the Special Rapporteur, not to endorse any broad or abusive interpretation of certain concepts deriving from the Charter of the United Nations or other rules that might undermine the foundations of international law.

15. It had also been stated that measures of retortion were not part of countermeasures because, by definition, they were not contrary to international law. That was true, but it might also be asked whether a distinction should not be made according to whether those measures were taken in response to mere unfriendly acts or in response to a wrongful act. In the latter case, being a consequence of the wrongful act, they belonged to the topic under consideration and it might be useful to recall, if not in the draft article on the principle of proportionality, at least in the commentary thereto, that measures of retortion taken under those conditions were subject to that principle, like all other countermeasures.

16. It was understandable that there should be some hesitation about the choice between “reprisals” and “countermeasures”, particularly in the light of the views expressed in the Commission which indicated that, behind the terminology question, there was a substantive problem, and even a conceptual problem of international law. There were two basic reasons for not using the term “reprisals”. The first was the risk of confusion by conflation between armed reprisals and unarmed reprisals and, in that connection, he referred to the historical ex-
amples quoted by the Special Rapporteur. A clear-cut distinction had to be made between unarmed reactions and the use of force and reference should be made to countermeasures only when force was not used in order to show that the two areas were quite different. The second reason for rejecting the term "reprisals" was that behind it lay the idea of the punishment of one State by another or of a hierarchy as between guilty States and States empowered to punish them for the blameworthy acts that they might have committed. In fact, that idea was not only baseless in international law, but was also dangerous in that it could be invoked by a State wishing to play the role of international policeman. Besides, it might well be asked whether referring to "countermeasures" did not amount to presenting in a reassuring light something that was far from reassuring, thereby ignoring the fact that, in the final analysis, countermeasures threatened international law and international order just as much as reprisals. Would it not be better in that case to speak of reprisals because of the risks and threats inherent in all countermeasures, so that the latter would continue to have the suspect nature that was their basic feature? After some hesitation, he had finally opted for the term "countermeasures," which was, moreover, already used in the title of article 30 of part I and in draft article 11 proposed by the Special Rapporteur; he had done so out of optimism and perhaps in the hope that dressing the wolf up in sheep's clothing would make it more docile and easier to control.

17. With regard to article 12, he agreed with paragraph 1, which prohibited an injured State from taking countermeasures before it had exhausted all the amicable settlement procedures available and had communicated its intention of doing so. Those were two minimal conditions, and the first in particular, which was absolutely fundamental, deserved the Commission's attention. It provided the opportunity to place the emphasis on recourse to machinery for the peaceful settlement of disputes and to achieve progress in that area, in which connection he fully endorsed the arguments put forward by the Special Rapporteur in chapter V of his third report. If countermeasures were not to be the starting point for an escalation and for chain reactions between injured States and wrongdoing States, the subjective nature of the assessment of the existence and gravity of a wrongful act should be eliminated or reduced to the minimum and the credibility of procedures for the settlement of disputes, particularly those of a judicial kind, should be strengthened.

18. The relationship between countermeasures and procedures for the peaceful settlement of disputes was, however, complex and it was a matter not only of asking whether countermeasures were possible while a settlement procedure was actually under way, but also of considering the question in terms of complementarity and subsidiarity. Recourse to countermeasures could be justified if it helped to improve the operation of peaceful settlement procedures, for instance, by bringing pressure to bear on the wrongdoing State to make it accept or to facilitate such a procedure; in such a case, countermeasures were perceived to be complementary to the settlement procedure. Countermeasures could also be justified to alleviate the effects of the lack or failure of a recourse to peaceful settlement procedures, in which case reference could be made to subsidiarity. Article 12, paragraph 2, took account of that relationship in seeking to regulate the countermeasures and to make the injured States respect certain conditions, but without favouring or encouraging the wrongdoing States. As some members had pointed out, the time factor should not be disregarded in such a situation and the passage of time should not be allowed to penalize the injured State, thus operating to the benefit of the wrongdoing State.

19. Article 12, paragraph 3, was drafted in somewhat obscure terms, although he believed that he understood the Special Rapporteur's intention, which was to set forth an exception to the exception; however, the use, at least in the French version, of three negatives in four lines made the article difficult to understand. The Drafting Committee should nevertheless be able to overcome the problem. The principle of proportionality, which was the subject of article 13, was probably the least controversial; all that remained was to decide how to express it and, above all, how to characterize proportionality. So far as the actual text was concerned, the Special Rapporteur had considered various possible forms of wording, negative and positive, and had referred in particular to the Air Service award7 and to the proposal of the Institute of International Law.8 For his own part, he tended to favour the positive form of wording, since, in his view, it limited the area of subjective assessment more than the negative form of wording.

20. Proportionality should characterize all the reactions of the injured State, including reciprocal measures and measures of retortion. It was in that regard that, behind the abstract equality and superficial symmetry, the de facto inequality between the powerful States and the less powerful manifested itself most patently. The interpretation of the principle of proportionality should be the same whatever the reaction; on that point, he did not share the view of the Special Rapporteur, who had referred, in his third report, albeit with great prudence, to "a more articulate application" in the case of reciprocal measures. Proportionality should operate in the strictest possible way so as to avoid any imbalance between the countermeasures and the wrongful act that had motivated them. A reciprocal measure taken by a coastal State against a land-locked State, for instance, could have frankly disastrous consequences for the latter. In such situations, proportionality was of fundamental importance in preventing powerful States from abusing their position to the detriment of weaker States by making them endure extreme consequences for a wrongful act, regardless of the gravity of that act.

21. With regard to the parameters that governed the definition of proportionality, article 13 stipulated for the gravity of the wrongful act and of the effects thereof. The problem in that connection was to prevent the application of lex talionis. That was no easy matter, particularly if the assessment of the gravity of the wrongful act and of its effects was left to the discretion of the injured State. It was perhaps on that point that the Commission should endeavour to promote recourse to procedures for

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7 See 2267th meeting, footnote 8.
8 Ibid., footnote 10.
the peaceful settlement of disputes, for there was no other way of limiting the discretion of the injured State and the possibilities of abuse than to involve a third party in the assessment of the gravity of the wrongful act, though the problem was how to involve such third party.

22. The Special Rapporteur apparently considered that the criterion of object had no place among the parameters of proportionality. His doubts were, of course, partially justified in the case of objects in general, but the question arose whether some objects, for instance, securing the cessation of the wrongful act or recourse to a peaceful settlement procedure, should not play a part in assessing the proportionality of countermeasures. If those specific objects were taken into consideration, it would help to avoid the application of the lex talionis that might result from the assessment of the gravity of the wrongful act or of its effects.

23. In article 14 (Prohibited countermeasures), paragraph 1 (a) merited special attention owing to its importance. In his view, Article 2, paragraph 4, of the Charter of the United Nations prohibited any use of force other than in the case of self-defence, that term being understood in the narrowest sense—and he repeated that because it was vital—excluding from it in particular the concept of preventive self-defence and other concepts invoked to justify the acts prohibited by the Charter and general international law. He felt bound to express his opposition to a certain line of reasoning which had also been referred to by the Special Rapporteur, which, in the name of logic and realism, invoked the conduct of a small number of States that had used force in order to contend that Article 4, paragraph 2, of the Charter would allow the use of force and which held that it should therefore not be condemned in absolute terms. If that line of reasoning was applied to other areas, it could lead to the conclusion that because certain States, even more numerous than those which had used armed force, engaged in practices condemned by many conventions, such as torture, those practices were lawful. As he saw it, if there was one area where the Commission should absolutely refuse to sanction certain pernicious interpretations of the law, it was certainly that of the use of force, which should be prohibited outright.

24. Article 14, paragraph 2, raised the wide-ranging problem of measures of political or economic coercion and of their prohibition if they jeopardized the territorial integrity or political independence of a State. Such measures could, of course, have consequences that were as serious as, and even more serious than, the use of armed force, but they still had to be defined more carefully to restrict the scope of the prohibition. In the wording proposed by the Special Rapporteur, that scope was made conditional on the “extreme” nature of the measures of coercion, but, in addition to the fact that that word lacked precision, it was not so much the intrinsic nature of the measures that should command attention as their object, which was to jeopardize the territorial integrity or political independence of a State. While it was comparatively easy to recognize or to establish that territorial integrity had been jeopardized, the same did not apply when political independence was jeopardized, something that could, in extreme cases, be regarded as inherent in any countermeasure. The concept of political independence therefore called for further reflection with a view to defining the threshold of gravity beyond which there would be prohibition by identifying the characteristics and dimensions to be protected, particularly with regard to the main aspects of State sovereignty.

25. In chapter VII of his fourth report (A/CN.4/444/Add.2), the Special Rapporteur reverted at length to the question of so-called self-contained regimes and their relationship to draft article 2 of part 2. In his view, the discussion on the article should not be reopened at the present stage. In the first place, the strict interpretation given to it in the fourth report was not the only possible one, since the rules which the Commission was drawing up could also be of a residual nature in the case of so-called self-contained regimes. Furthermore, the Commission should perhaps re-examine draft article 2 of part 2 when it considered the relationship between the convention that was being codified and the other international agreements that governed responsibility in a particular area. As treaty regimes could fall within the scope of the Commission’s draft in the case of a wrongful act, it was also necessary to determine whether there should be a provision to define the relationship between the convention that was being prepared and existing conventions or whether reference should be had to the rules of the 1969 Vienna Convention on the Law of Treaties. The Special Rapporteur had pinpointed and clarified the problem, but it was perhaps too soon to find a solution.

26. In proposing a draft article 5 bis, the Special Rapporteur questioned the approach which had been adopted by his predecessor and had resulted in article 5 adopted on first reading. After a line of reasoning that was rigorous, sound and fairly persuasive, he concluded that the distinction between directly injured States and non-directly injured States was unacceptable because it was inappropriate and, above all, had no basis in law. In drafting and adopting article 5, however, the Commission had apparently not endorsed that distinction, which was basically still one made by the former Special Rapporteur. To that problem of a plurality of equally or uniquely injured States, the Special Rapporteur proposed a solution which he, for his part, tended to find more coherent and more satisfactory in many respects, based as it was not on the direct or indirect character of the injury, but on the nature and degree of the damage suffered. That solution had the advantage, first, of again placing the problem on the firmer and more familiar ground of damage, which concept underpinned the whole of part 2. It was also free of the risks and uncertainties that affected the concepts of directly or indirectly injured States. Finally, it avoided any possible confusion between directly or indirectly injured States and direct or indirect damage. There remained, of course, the question whether it would allow for a clear definition of the position of the various States towards which there were obligations that had been violated, what substantive or instrumental consequences would arise for each State and what countermeasures could be taken according to the nature and degree of the damage suffered. The Special Rapporteur appeared to set the question forth with a view to creating the basis for a new approach which could lead to a new and more persuasive formulation.

9 For text, see Yearbook... 1989, vol. II (Part Two), p. 81.
10 Ibid.
Rapporteur had already clarified some of those questions, but others remained in the dark. In any event, his approach allowed for a more coherent interpretation of article 5, the structure and content of which were not at issue. Should that approach definitely be reflected in an additional article 5 bis as the Special Rapporteur proposed? All things considered, if a question deserved to be raised and clarified, a provision along those lines was justifiable. In any event, the proposed draft articles as a whole could be referred to the Drafting Committee.

27. Mr. RAZAFINDRALAMBO said that he agreed for the most part with the broad options set forth in the third and fourth reports, which did not depart significantly from those laid down by the former Special Rapporteur and already considered by the Commission at its thirty-seventh session. His comments and remarks would therefore relate solely to some problems raised by the Special Rapporteur and to specific points in his proposed draft articles.

28. The question whether it was desirable to deal with measures taken by the injured State in response to an internationally wrongful act was not a gratuitous one, having regard to the fact that the actual occurrence of the injury could be called into question and bearing in mind America). (The 1978 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)).

29. The regime of countermeasures outlined in the third and fourth reports hinged on three main ideas: there must be an internationally wrongful act, which would be the condition, as it were, for the existence of countermeasures; a prior demand for reparation and the exhaustion of amicable settlement procedures; and, lastly, substantive limitations on the use of countermeasures. While he agreed fully with that general approach, the discussion to which it had given rise prompted certain remarks. The first concerned the possible temptation of a State to take countermeasures without itself having suffered damage; that was the "policeman syndrome" found over all, or part, of the world. In fact, the system devised by the Special Rapporteur established a necessary link between the countermeasure and the claim for restitution in kind (art. 7) and for reparation by equivalent (art. 8), a claim which was a preliminary step and whose object was compensation for the damage suffered. Another, allied, problem concerned the need to give countermeasures a function that was strictly confined to compensation and reparation, having regard to the consequences of punitive reprisals to which reference had already been made.

30. The Special Rapporteur questioned the validity of the concept of "self-contained" regimes and, at the same time, raised a question as to the scope of article 2 which the Commission had already provisionally adopted in 1986. In his own view, the retention of the article as worded, for the time being, would have no effect on the study of the provisions on legal consequences dealt with in part 2 of the draft, so that the best solution might be to come back to the problem when States had formulated their observations on the draft as a whole, once it had been adopted on first reading. As to the question of a plurality of equally or unequally injured States, the conclusion reached by the Special Rapporteur seemed well-founded, but, since it did not introduce any fundamental change into the general rule, there seemed no point in giving form to it in an additional article 5 bis.

31. Commenting specifically on the proposed draft articles, he noted that article 11, which was simply an extension of article 30 of part I and was made conditional on the failure of claims pursuant to articles 6 to 10, was designed to cover all kinds of countermeasures and, especially, reprisals and reciprocity, and that explained why the requirement that the obligations breached by the wrongdoing State must correspond to the obligations not performed by the injured State had been dropped. The words "not to comply", however, seemed to indicate that the injured State had no other choice than to put an end definitively to its own obligations. The concept of "suspension of the performance" seemed more compatible with the provisional nature of the measures as provided for in article 12, paragraph 2, particularly when an international body was required to take a decision in the context of a settlement procedure by a third party. Naturally, there were cases in which the obligations could not be effectively suspended, but the Drafting Committee could no doubt find a form of wording which combined suspension and revocation.

32. With regard to article 12, the condition requiring the exhaustion of all the available settlement procedures
might perhaps be considered a latent defect, but why rush? Under Article 33 of the Charter of the United Nations, the parties to any dispute were obliged to seek its solution by using a number of settlement procedures. In terms of the wording of article 12, he believed that those settlement procedures provided for in an instrument to which the injured State was party should be given priority over the other procedures mentioned in paragraph 1 (a). Paragraph 2 did not give rise to any problems, but paragraph 3 was not clear enough and might need to be looked at again by the Special Rapporteur. In respect of article 13, the negative form of wording seemed logical for a rule which constituted a prohibition. That rule was also designed to temper the effects of the right provided for in article 11 and it should therefore be placed, as had been done by the former Special Rapporteur, after the enunciation of that right.

33. He endorsed the principle of the prohibition of certain types of countermeasures stated in article 14. He fully supported the Special Rapporteur’s proposal to define the scope of the prohibition on the threat or use of force by making it applicable not only to armed force, but also to any extreme measures of political or economic coercion. Nevertheless, understood in that way, the threat or use of force was a violation of the provisions of Article 2, paragraph 4, of the Charter of the United Nations. Consequently, by relegating part of the definition to a separate paragraph 2, the new version of article 14 limited the scope of the prohibition and was thus not as good as the first version. The Drafting Committee might be able to find the ideal solution. Paragraph 1 (b) (i) referred to the concept of fundamental human rights, which was mentioned only in the Preamble to the Charter, Article 1 referring to human rights and fundamental freedoms. Article 4, paragraph 2, of the International Covenant on Civil and Political Rights provided that there could be no derogation from the human rights listed in subsequent articles; that was a more precise formulation and one which corresponded to that used in the Vienna Convention on the Law of Treaties to define a peremptory norm of international law (art. 53). It might thus be asked whether fundamental human rights did not simply come under jus cogens and whether paragraph 1 (b) (i) did not serve the same purpose as paragraph 1 (b) (iii). He would nevertheless maintain the prohibition in respect of the protection of fundamental human rights, since that concept might change and might one day encompass certain economic and social rights and even rights such as the right to the environment.

34. The wording of paragraph 1 (b) (ii) was preferable to that of article 12 (a), as proposed by the former Special Rapporteur, since the prohibition related to all forms of bilateral or multilateral diplomacy, although it was less specific in other respects. It made no distinction between diplomatic privileges and immunities and said nothing about the effects of the prohibition on the principle of reciprocity. Paragraph 1 (b) (iii) did not seem indispensable, since jus cogens was by definition peremptory.

35. Paragraph 1 (b) (iv) did, however, give rise to more problems because, behind its innocuous exterior, it dealt with violations of erga omnes obligations. In the view of the Special Rapporteur, the solution proposed by his predecessor in draft article 11, paragraph 1 (a) and (b) and paragraph 2,16 took into consideration only those erga omnes obligations stipulated in multilateral treaties and made no mention of those arising from rules of general customary or unwritten law. That issue had already been raised in connection with article 5 of part 2,17 which, in defining the injured State, referred to customary international law (para. 2 (e) and para. 2 (e) (iii)). To fill the gap to which the Special Rapporteur had rightly drawn attention, it would be enough to add the words “or a rule of customary international law by which they are bound” to article 11, paragraph 1, as proposed by the former Special Rapporteur. The Special Rapporteur might help the Drafting Committee find more comprehensive and acceptable wording which would “clean up” article 11. In any event, he agreed that draft articles 11 to 14 should be referred to the Drafting Committee.

36. Mr. Fomba recalled that he had already commented on chapters IV, V and VI of the fourth report (A/CN.4/444/Add.1) (2278th meeting); he would therefore limit himself to brief remarks on chapters VII and VIII (A/CN.4/444/Add.2).

37. With regard to self-contained regimes, the Special Rapporteur raised the central question whether the rules constituting such regimes affected the rights of States parties to resort to the countermeasures provided for under general international law. He tried to answer that question pragmatically by examining the main cases of so-called self-contained regimes (legal order of the European Community, rules on the protection of human rights, rules on diplomatic relations and the system under the General Agreement on Tariffs and Trade) and concluded that the examples were not convincing. He stated that

...it would be inappropriate, in codifying the law on State responsibility, to contemplate provisions placing “special” restrictions upon measures consisting in the suspension or termination of obligations arising from treaties creating special regimes or international organizations. A correct interpretation and application of the general rules governing any unilateral measure... should, in our view, be sufficient to cover the problems which may arise from treaties establishing international organizations or any allegedly “self-contained” regimes.

Personally, he agreed with that conclusion, for, in legal matters, he was in favour of as much “integration” as possible, meaning complementarity between an overall legal system and any special subsystems. In fact, behind the theoretical concept of self-contained regimes, what seemed to be taking shape was the outline of the old debate on the dialectic between legal macrocosm and legal microcosm in which the Commission did not have to get involved, except perhaps to point out the consistencies and interdependence between the two.

38. The Special Rapporteur’s comments in his fourth report on draft article 2 of part 2, adopted on first reading, and his proposal to return to that article without

14 See 2277th meeting, footnote 9.
15 See 2273rd meeting, footnote 10.
16 Ibid.
17 See 2266th meeting, footnote 11.
waiting for its consideration on second reading because of the link between its content and the self-contained regimes was rather puzzling, but, whatever final position the Commission adopted on the question of "self-contained regimes", it would have to be in harmony with the spirit and the letter of draft article 2. He had no comments to make on draft article 4, which would, according to the Special Rapporteur, also require further consideration.

39. As to the problem of a plurality of equally or unequally injured States, dealt with in chapter VIII of the report, he had taken due note of the reasons why the Special Rapporteur could not accept the concept of non-directly injured States. He was grateful to the Special Rapporteur for recalling the origins of that concept and the debates which had taken place in the Commission and in the Sixth Committee in 1984.

40. In respect of the definition of an injured State in draft article 5, it was important to stress that an internationally wrongful act usually consisted of an infringement of a right, that infringement—with or without harm—constituting the injury. That was another aspect of the principle "no interest, no action".

41. He had read with great interest the Special Rapporteur's theoretical analysis of the possible positions of States with regard to the consequences of erga omnes obligations.

42. The footnote to the penultimate paragraph of chapter VIII B had attracted his attention. It stated that "... the concept of 'indirectly' injured States was the fruit of a misunderstanding which derived from an inadequate absorption of the definition of an internationally wrongful act, as laid down in article 3 of part 1 of the draft." It might be asked who was responsible—the members of the Commission or the members of the Sixth Committee?

43. He endorsed the Special Rapporteur's conclusion that "The only reasonable starting point, for the substantive as well as the instrumental consequences of a violation of erga omnes obligations ... appears to be the characterization of each injured State's position according to the nature and the degree of the injury sustained."

44. In chapter VIII C dealing with the case of a plurality of injured States, the Special Rapporteur noted that: "The fact that the breach of erga omnes obligations results in a plurality of injured States, combined with the fact that such States are not injured in the same way or to the same degree, complicates the responsibility relationship." He then provided a judicious analysis of the way in which the substantive and instrumental consequences of the breach were affected. He pointed out in particular that those problems had been considered solely in connection with wrongful acts labelled "crimes" under article 19 of part 1, but they could also arise with regard to the consequences of more ordinary wrongful acts, commonly referred to as "delicts".

45. He generally agreed with the Special Rapporteur's conclusions at the end of that chapter of the report, and, in particular, his conclusion that the particular problems raised by the violation of erga omnes obligations... call simply for a proper understanding and application of the general rules adopted or proposed so far.

46. Lastly, draft article 5 bis was justified for the following reasons: the concept of the "injured State" did not, ipso facto, imply equal treatment for the injured States; the use in the determination of the injured State or States of a definition stricto sensu of the internationally wrongful act; and the establishment, on the basis of that strict definition alone, of the rights or facultés of each State. While the scope of article 5 bis could easily be deduced from an intelligent reading of draft article 5, it might be necessary to formulate it expressly to eliminate any ambiguity. The rest was a matter of drafting.

47. Mr. VARGAS CARREÑO said that the Commission had a historic opportunity to make rapid progress on the topic under consideration. The fact that ideological confrontation had disappeared with the cold war, that international relations were more propitious for consensus, and that the international community had been strengthened by the many States joining its ranks were all favourable circumstances of which the Commission should take advantage. In his view, priority should be given to the topic of State responsibility in the next five years so that a final draft convention could be adopted during the present United Nations Decade of International Law.

48. The problem the Commission was dealing with at the current session—the instrumental consequences of an internationally wrongful act, or countermeasures—was not an easy one. As pointed out by the Special Rapporteur, it was an issue which had hardly any similarities with the regime of State responsibility recognized in national legal systems. International law also did not provide an appropriate institutional framework and thus it difficult to identify the components of a system governing the conduct of States. While inter-State practice was abundant, elements of lex lata were not enough in themselves to provide a basis for codification. They thus had to be supplemented by progressive development, taking account of contemporary international realities, the different legal systems and the need for wording on which consensus solutions could be based.

49. For a countermeasure to be legitimate, there had to have been an internationally wrongful act which actually infringed the right of the State adopting the countermeasure. It was not enough for the State to believe in good faith that a wrongful act had been committed to its detriment. If it resorted to countermeasures on the basis of a presumption of the wrongfulness of the conduct of the other State, it must assume responsibility for its reaction and, ultimately, it might itself be responsible at the international level if it turned out that none of its rights had, in fact, been violated.

50. The main function of countermeasures was to obtain cessation of the wrongful act, reparation for the harm, a guarantee that the act would not recur or all three. The punitive function of countermeasures was more questionable and, like the Special Rapporteur, he believed that it would not be appropriate to incorporate that function into the draft articles. It should also be emphasized that countermeasures could not be adopted automatically and that, in principle, they should be pre-
51. With regard to draft article 12 (Conditions of resort to countermeasures), he was entirely in favour of paragraph 1 (a), according to which the injured State must, before resorting to countermeasures, exhaust all the amicable settlement procedures available under international law, the Charter of the United Nations or any other dispute settlement instrument to which it was a party. He also considered that, as stated in paragraph 2 (a), that condition did not apply where the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and implementation of amicable settlement procedures.

52. However, he seriously doubted whether it was necessary or desirable to include a provision on interim measures of protection, especially if the draft articles were expressly to authorize resort to them before the peaceful settlement procedure had begun or even, as had been proposed, while it was in progress. Paragraph 2 (b) might give rise to problems or even lead to abuses by States on the basis of that authorization, which weakened the scope of Article 33 of the Charter of the United Nations. Admittedly, in certain circumstances, it might be lawful to take interim measures of protection immediately, without waiting for a peaceful settlement procedure to begin. However, the same caution which had prompted the Special Rapporteur not to take account of the punitive aspect of countermeasures should dissuade him from including a provision on interim measures of protection which would have more drawbacks than advantages.

53. He was in favour of draft articles 11 and 12, but would prefer it if article 12, paragraph 2 (b) and (c), were deleted or redrafted so that those provisions would not undermine the basic rule embodied in Article 33 of the Charter of the United Nations.

54. With regard to draft article 13 (Proportionality), he agreed with the Special Rapporteur's explanations, especially about the need to assess it by taking account not only of the purely quantitative elements of the damage caused, but also of qualitative factors, such as the importance of the interest protected by the rule infringed and the seriousness of the breach.

55. In draft article 14 (Prohibited countermeasures) as reformulated, the Special Rapporteur was proposing that the injured State should be prohibited from resorting, by way of countermeasure, to the threat or use of armed force and to various other forms of conduct listed in paragraph 1 (b) (i) to (iv). He intended to consider those provisions in detail.

56. First, as to the prohibition of the threat or use of armed force, which was more fully defined in the reformulated version of article 14, it seemed that the prohibition embodied in Article 2 of the Charter of the United Nations ranked as a rule of general international law and as part of jus cogens. That was borne out by all the jurisprudence of ICJ and by several of its judgments, as well as by the resolutions of the General Assembly. On the basis of the origins of that Article of the Charter and the interpretation to which it had subsequently given rise, it was clear that what was meant by "force" was only physical or military force, not other kinds of coercion, which, although they were unlawful and contrary to international law, were not covered by Article 2, paragraph 4, of the Charter. Since he was in favour of a restrictive interpretation of that paragraph, he would be just as strict with regard to the wholly exceptional situations in which the use of force might be justified in international relations. He could think of only two: individual or collective self-defence; and intervention by competent United Nations bodies to restore peace.

57. The first exception, self-defence, applied only in the event of an armed attack, namely, when an act of violence had actually been committed. Any other interpretation justifying armed reprisals—apart from humanitarian reasons or the need to protect nationals in foreign territory—could not be regarded as being in conformity with international law.

58. The second exceptional situation, intervention by United Nations bodies, raised various legal problems. The Commission was not the place to discuss them, but the Special Rapporteur had invited the members to think about draft article 4 of part 2\(^\text{18}\) which had been provisionally adopted by the Commission and according to which the legal consequences of a wrongful act were subject to the Charter of the United Nations. As the Special Rapporteur himself said, that article also had more drawbacks than advantages and it gave rise to problems that went beyond the international responsibility of States because they related to the question of dispute settlement, the distinction to be made between legal and political disputes and the powers of the Security Council and its relationship with the other organs of the United Nations, especially ICJ. Did article 4 mean that the Security Council could not use the power conferred on it by Chapter VI of the Charter? What effects did it have on the jurisdiction of ICJ? Was the Court competent to remedy the legal consequences of an internationally wrongful act?

59. Coming back to draft article 14, he said that he preferred the earlier wording to the reformulation. It was important to distinguish between threat or use of force\(^\text{stricto sensu}\) and other situations which would not be covered by a strict application of Article 2, paragraph 4, of the Charter of the United Nations. Thus, if the original wording was retained, the element of political and economic coercion to be included should perhaps be expressed in terms similar to those of articles 18 and 19 of the Charter of OAS, which were reflected in a number of General Assembly resolutions, including resolution 2625 (XXV) of 24 October 1970, which prohibited the use or the encouragement of the use of economic, political or any other type of measures to coerce another State.

60. Referring to the limitations which draft article 14 would place on the right of the injured State to take unilateral countermeasures, he said that the first, as contained in paragraph (c) (i), consisted of countermeasures not in conformity with the rules of international law on the protection of fundamental human rights. Human

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\(^{18}\text{Ibid.}\)
rights law had recently been developing at breakneck speed and the prohibition proposed by the Special Rapporteur appeared to be readily acceptable. The distinction he drew between “fundamental” or “essential” human rights and others was the same as that found in the main human rights instruments, all of which distinguished between rights from which no derogation was possible (for instance, the right to life) and freedoms which could be suspended. By using the expression “‘fundamental human rights’”, the draft article therefore left out, for instance, the property rights of foreign nationals present in the injured State. In recent State practice, moreover, there were cases not only of the expropriation of foreign property by way of countermeasure, but also of the freezing of the assets of foreigners as a reaction to the wrongful conduct of the State to which they belonged.

61. Paragraph (c) (ii) also excluded countermeasures which seriously prejudiced the normal operation of bilateral or multilateral diplomacy. However, the proposed wording seemed too vague and general. If there was one area in which countermeasures were regarded as perfectly lawful, it was precisely in the field of diplomatic law. Many examples came to mind: breaking off or suspending diplomatic relations; refusing to recognize Governments; recalling the Ambassador or the entire diplomatic mission; declaration of persona non grata, and so forth. Such conduct could indeed prejudice the normal operation of bilateral diplomacy. In the field of multilateral diplomacy, especially where regional international organizations were concerned, there were also examples of lawful acts which none the less jeopardized the operation of normal relations. That had been the case in 1976, when the General Assembly of OAS should have been held in Santiago, Chile, but the Mexican Government had refused to take part because a military Government was in power in the host country. It had also been the case in 1978, when the Government of Uruguay had offered to host the General Assembly in Montevideo and the offer had been accepted in principle, but, because the Government had not invited the Inter-American Commission on Human Rights, a number of States had intervened to request that the General Assembly should be held elsewhere. The proposed text would be acceptable if additions were made referring to the immunities of diplomatic and consular agents and to the situation with regard to premises. He therefore proposed that the prohibition should be extended to countermeasures which threatened the inviolability of persons and premises protected by diplomatic law: that would be a more precise and more appropriate provision.

62. Paragraph (c) (iii) prohibited countermeasures which were contrary to a peremptory norm of international law. The prohibition was apt, since those which preceded it did not cover the whole of jus cogens, which was also of a historical nature and could therefore be extended, restricted or changed at different times, without such changes necessarily being reflected in a convention.

63. Another proposed restriction derived from the application of the *erga omnes* effect of certain international legal obligations. An *erga omnes* obligation was characterized not by the importance of the interest to which it related, but by the juridical indivisibility of its content. That was a complex subject, covered to some extent in the Vienna Convention on the Law of Treaties. The Special Rapporteur had rightly treated it cautiously in his report.

64. To sum up, he considered that draft articles 11 to 14 as submitted by the Special Rapporteur were generally to be welcomed. The Drafting Committee would make the necessary changes in them and the Commission could continue to make progress in its work.

65. Mr. KUSUMA-ATMADJA expressed admiration for the enormous amount of work the Special Rapporteur had done. He agreed with him that it was best for the Commission not to be in too much of a hurry to produce draft articles. It could take time for further thought without giving up the idea of achieving concrete results within the next five years.

66. There was an obvious link between the Commission’s work on State responsibility and other topics on its agenda, namely, the establishment of an international criminal court and international liability for injurious consequences arising out of acts not prohibited by international law. Once countermeasures permitted by international law gave rise, in the State to which they were directed, to damage out of proportion to what had been necessary to obtain satisfaction, the State which had taken the countermeasures incurred “strict” liability: In any case of strict liability, compensation was due for the damage caused. That was particularly interesting aspect because the Commission’s task was not only to draft laws and conventions, but also to concern itself with their effects on human beings. In that connection, Mr. Shi (2267th and 2273rd meetings) had quite rightly drawn attention to the danger involved in codifying countermeasures, which could be a statement that might be right. His own conclusion, however, was different: the danger involved was a further reason why the Commission should deal with the problem, for it was best to face up to the realities of the world, which was characterized by a wide variety of situations. The use of force, which was hardly imaginable in some rich developed countries, was still quite common in other parts of the world and nationalism, which might seem an old-fashioned idea, was far from dead, as shown by the present situation in Eastern Europe and in the former Soviet Union.

67. With regard to the draft articles 11 to 14 on the question of countermeasures, he agreed with the Special Rapporteur’s general approach, even though a few minor drafting changes would be necessary. He particularly welcomed the fact that countermeasures had been treated as a very exceptional solution to be used only in extreme situations. He nevertheless agreed with Mr. Razafindralambo that, in draft article 13 on proportionality, the negative form of wording should perhaps have been used to give the prohibition greater weight.

68. He had the same problems as the Special Rapporteur with self-contained regimes, but he thought that article 5 bis was unnecessary and that what it stated could be included in a commentary. In that area, as in the area of countermeasures, the Commission had to use balanced wording. It must not dwell too much on excep-
tional situations so as not to produce some kind of "monsters". The conservation of the earlier draft articles proposed by the former Special Rapporteur had had some good points and, if those earlier versions were combined with the bolder proposals by the present Special Rapporteur, the Commission could probably achieve some very sound results. As to the relationship between self-contained regimes and erga omnes obligations resulting from treaties or conventions, the Commission should be guided by the general rules derived from the Vienna Convention on the Law of Treaties. After all, self-contained regimes were treaties, too.

69. In that connection, the Commission should also not be in too much of a hurry to produce draft articles. There were specific examples to show, for instance, that the member countries of the European Community, both individually and as a community of States, had taken years to adjust to the new regime established by the United Nations Convention on the Law of the Sea. In that field as in the field of countermeasures, the Commission must consider that it was dealing with some very particular aspects of international law and act accordingly. For example, could the articles which the Commission was trying to draft be allowed to diminish or weaken the erga omnes obligations arising out of the 1949 Geneva Conventions? That brought him to the question of the rules of international law relating to the protection of human rights, which the Special Rapporteur quite rightly mentioned in draft article 14. That aspect, which warranted reflection and could be further developed later in the commentary to that article, was of great importance for the topic under consideration. For instance, the sovereign rights of States over their natural resources, which were essential for developing countries, were often violated by transnational corporations whose only concern was to make profits and whose operations were contrary to local regulations. In such a case, if the host country took countermeasures, they would, in his view, be fully justified. Of course, the violations of human rights which gave rise to countermeasures must have been persistent and violent. In that connection, he wondered whether the words "use of force" in article 14, paragraph 1 (a), referred only to physical force or to any kind of force. He could not answer that question himself, but he did want to warn the members of the Commission that there might be a risk of opening Pandora's box. The Commission must continue to be cautious in its approach and aware of just how far it could go.

The meeting rose at 1.05 p.m.

2281st MEETING

Friday, 3 July 1992, at 10.10 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. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivas Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

Cooperation with other bodies (continued)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL COOPERATION

1. The CHAIRMAN extended a warm welcome to Mrs. Margaret Killery, Observer for the European Committee on Legal Cooperation, and invited her to address the Commission.

2. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) said that since July 1991 two more States, Poland and Bulgaria, had joined the Council of Europe and that other Central and Eastern European countries were expected to become members in the near future. The Council now had 27 European Member States. It was continuing its extensive programme of cooperation in the legal field for the Central and Eastern European countries. The "Demo-Droit" programme, which was designed to facilitate the establishment of institutions and legislative frameworks based on the principle of pluralist democracy, human rights and the rule of law, contained multilateral and country-specific programmes that took account of the priorities of the States concerned. CDCJ had been kept regularly informed of the Commission's activities and, at its 56th meeting, in November 1991, had had the pleasure of hearing a statement in that regard by Mr. Eiriksson.

3. At its meeting in June 1992, CDCJ had adopted a draft second Protocol to amend the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality. The draft Protocol permitted dual nationality in certain instances and would enable contracting States to allow second-generation migrants to acquire the nationality of the host country while retaining their nationality of origin. It would also allow a spouse to acquire the nationality of the other spouse without losing the nationality of origin, and the children of such spouses to have both nationalities. The draft Protocol would be examined in the autumn by the Committee of Ministers of the Council of Europe. At the same meeting, CDCJ had invited the Committee of Ministers to adopt two draft recommendations: one on the protection of personal data in the area of telecommunications services, with particular reference to telephone services; and the other on teaching, research and training in the field of law and information technology.

* Resumed from the 2275th meeting.
4. A CDCJ committee of experts had finalized its work on the draft Convention on civil liability for damage resulting from activities dangerous to the environment, the object of which was to ensure adequate compensation for such damage, and to provide means of prevention and reinstatement. It struck a balance between the needs of environmental protection and the needs of industry. It applied strict liability to a wide range of dangerous activities, and operators were liable in civil law for damage caused by their activities even if they were not in breach of the law and had not committed any fault. Activities considered to be dangerous to the environment were those which produced or used dangerous substances, or which made use of genetically modified organisms and those involving waste treatment and waste dumps. The future Convention would be open to all European countries, and also to other countries outside Europe. The text would be considered by CDCJ at its meeting in December 1992.

5. Another CDCJ committee of experts was preparing a draft European Convention on the exercise of rights by persons below the age of 18, taking account of the Convention on the Rights of the Child, and especially of article 4, whereby States were required to take all legislative, administrative and other measures for the implementation of the rights recognized in the Convention. The aim of the European Convention was to ensure that children were given assistance and certain procedural rights in order to implement their rights, including personal and economic rights, persons between the ages of 16 and 18 years being referred to as "young persons". At a later stage, the committee would consider provisions for setting up machinery at a national and at a European level.

6. Other CDCJ committees were working on administrative law, data protection, the efficiency and fairness of civil and commercial justice, protection of and prevention of damage to the environment, multiple nationality and legal data processing.

7. CDCJ was responsible, jointly with the European Committee on Crime Problems, for the preparation of Conferences of European Ministers of Justice. At the 18th Conference, held in Nicosia in June 1992, the Ministers had adopted resolutions on the strengthening of the State based on the rule of law; on criminal law aspects of the market economy; and on the draft Convention on civil liability for damage resulting from activities dangerous to the environment.

8. The Steering Committee on Bioethics had begun to prepare a framework Convention on bioethics, which would include fundamental principles, and protocols on medical research and organ transplants.

9. In the past year, the Committee of Legal Advisers on Public International Law had held three meetings and, at its next meeting, in Paris in September 1992, would consider, inter alia, State succession in Europe relating to treaties, State property, archives and debts; the draft articles prepared by the Commission on jurisdictional immunity of States and their property; the United Nations Decade of International Law; and the conclusions of a group of specialists on publications concerning State practice in the field of public and international law.

10. The Parliamentary Assembly of the Council of Europe had considered a report concerning the establishment of an international court to judge war crimes, prepared by Mrs. Haller of Switzerland, the rapporteur on the subject to the Assembly's Committee on Legal Affairs and Human Rights. The report took account of the Commission's work on the establishment of an international criminal court, and of the draft Code of Crimes against the Peace and Security of Mankind. According to the report, the Committee, unlike the Commission, believed that such a court could come into being irrespective of the adoption of a code of international crimes, which might not be forthcoming for some time. The Committee took the view that a convention instituting a court responsible for judging crimes against peace, war crimes and crimes against humanity seemed altogether feasible, since those three types of crimes had been defined in a treaty. The report favoured the establishment of such a court by means of a multilateral convention, which would not prejudice adoption of the draft Code of Crimes against the Peace and Security of Mankind. At its meeting in Budapest on 1 July 1992, the Permanent Commission of the Parliamentary Assembly had adopted a recommendation on the establishment of such an international court. The text, which was subject to amendment, now read:

1. The Assembly deplores the fact that, despite international détente, conflicts still persist, and is aware of the international community's outrage at the fact that war criminals who committed crimes during recent conflicts remain unpunished.

2. It recalls that, although Second World War criminals were tried by the Nuremberg and Tokyo Tribunals, there is still no permanent international court to try war criminals. Under present international law there is no international court with jurisdiction over war crimes, or over crimes against peace and crimes against humanity, including the crime of genocide, which are just as unacceptable to the conscience of humanity.

3. These three types of crime have been defined in several generally accepted international texts, including the London Charter of 8 August 1945, the United Nations Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions of 1949 and several other United Nations conventions.

4. Various initiatives aimed at setting up an international criminal court have so far failed, particularly because they made the prior codification of these types of crime a precondition.

5. The Assembly does not consider it necessary to draw up a code prior to the establishment of an international court, for which the recent development of international relations seems favourable today.

6. It refers to the resolution adopted by the Inter-Parliamentary Union at its 86th session, in October 1991 (Santiago, Chile), urging the States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide to set up the international criminal court provided for in the Convention.

7. The Assembly recommends establishing an international criminal court by means of a multilateral convention to be drafted by an international diplomatic conference convened under the auspices of the United Nations.

8. The Assembly, therefore, recommends that the Committee of Ministers call upon member States to act through the United Nations to secure the convening of an international diplomatic conference to prepare a convention on the setting up of a criminal court, and support such action.

9. In addition, the Assembly requests the International Law Commission to reach concrete results in this field during the next 12 months.

The recommendation would be considered by the Committee of Legal Advisers on Public International Law at its meeting in September 1992, in the context of questions relating to the United Nations, and the final version
would be sent to the Commission as soon as it was available.

11. The CHAIRMAN thanked the Observer for CDCJ for her valuable report. The information it contained was extremely important. The Commission's work on a draft statute for an international criminal court was still at a preparatory stage and the Commission had yet to receive from the General Assembly a formal mandate on the subject.

12. Mr. BARBOZA, speaking on behalf of the members from the Latin American Group, warmly thanked the Observer for CDCJ for the information on the Committee's rich and varied work. Relations between the Committee and the Commission had always been very fruitful and several topics appeared on the agendas of both bodies. Personally, he was particularly grateful for the cooperation he had received from Mrs. Killerby and the Committee in connection with all the material he had needed on the draft Convention on civil liability for damage resulting from activities dangerous to the environment, material which had been of great help to him as Special Rapporteur on the topic of international liability for injurious consequences arising out of activities not prohibited by international law.

13. Mr. KOROMA said that he would welcome further information in connection with the indication that the draft Convention provided for the operator's liability even when the operator was not in breach of the law.

14. Speaking on behalf of members from the African Group, he thanked the Observer for CDCJ for her comprehensive and lucid presentation. The Committee and the Commission maintained a symbiotic relationship which was reflected in many ways and the Commission benefited considerably from the Committee's work, which was impressive in terms of volume, and covered both private and public international law. The draft on multiple nationality would certainly be of great interest and, now that the Commission was considering placing new items on its agenda, it could suggest work for the future. The work on medical research and organ transplants, two very topical subjects, was also of importance.

15. State succession, especially in Europe, was a subject of immediate interest. The Commission had, of course, done considerable work on that topic that should be of use to European bodies. As to the subject of an international criminal court, the Committee had taken up the matter before the Commission. The recommendation adopted by the Committee of Legal Advisers on Public International Law would be a source of encouragement for the Commission and it was gratifying to note the conclusion that there was no impassable barrier to the establishment of an international criminal jurisdiction.

16. Mr. de SARAM, speaking on behalf of members from the Asian Group, thanked the Observer for CDCJ for her presence at the Commission and for the very carefully prepared and detailed statement she had made on the work presently in progress in the field of public and private international law, under the auspices of the Committee. It was a very helpful and informative statement. There were a number of matters to which reference had been made which were of relevance to the topics under present consideration in the Commission. The statement was also of much interest, he was sure, to the Asian members of the Commission, because it was equally informative about the many processes of cooperation and consultation on matters of public and private international law that were continuing under the auspices of the Council of Europe, in addition to several other bodies in Europe such as ECE, the European Community and OECD. The pooling and sharing of legal knowledge and expertise had clearly reached an advanced stage in Europe. There were the beginnings of such processes of cooperation and consultation in the legal field in Asia which, in time, would, he hoped, be as substantial and advanced. One example was, of course, the Asian-African Legal Consultative Committee. Perhaps the present meeting, having regard also to the rising and very welcome tide of global consciousness in the world, could give rise to fuller and more continuous inter-regional consultation and cooperation in the field of public and private international law, between the European Committee and the Asian region, possibly through the Asian-African Legal Consultative Committee.

17. Mr. YANKOV, speaking on behalf of members from Central and Eastern European States, thanked the Observer for CDCJ for her statement, so rich in ideas and so full of information on achievements. Several Central and Eastern European countries had already become members of the Council of Europe and many others were in the process of applying for admission. The topics on the Committee's active agenda were of crucial significance to those States. Dual nationality was a case in point, especially in regard to the burning issue of second-generation migrants. The draft Convention on civil liability for damage resulting from activities dangerous to the environment was also of particular significance. The problem of State succession in Europe was vital and the work on the subject was bound to reveal that most of the precedents and cases came from Central and Eastern Europe, where the process of democratic transition had been coupled with national problems, boundary issues and the restructuring of pre-existing federal States into individual independent States. He was impressed by the Committee's dynamism in its approach to problems and the way in which its work was closely connected with relevant social, political, humanitarian and environmental issues.

18. Mr. ROSENSTOCK said that he would surely be speaking on behalf of members from those States which had the privilege of being Observers in the Council of Europe by expressing his thanks for an informative statement and his appreciation for the benefit derived from the work of the Council of Europe. On a personal note, he welcomed the information that a publication on State succession was to be prepared.

19. The symbiotic relationship between the Committee and the Commission had been apparent for many years. The Commission derived great help from the activities so well described by the Observer for the Committee. On the question of an international criminal court, however, he would point out that the Commission had not yet been mandated to do what the Council of Europe expected of it. The Commission was none the less preparing a report that was likely to be in harmony with many of the ideas in the European recommendation. As to State succession, and the possibility of further work on it by the
Commission, the activities of CDCJ were bound to be very useful. There were many other subjects, such as the environment and human rights, in which work of great value was being done at the European level. He looked forward to receiving the Committee's documents on the international criminal court and on the subject of liability.

20. Mr. VERESHCHETIN expressed sincere appreciation for a very informative report. He said that all of the aspects touched upon were of vital interest to members of the Commission and he wished to draw particular attention to the Committee's work on an international criminal court.

21. Mrs. KILLERBY (Observer for the European Committee on Legal Cooperation) thanked members for their kind words. She said that the Asian-African Legal Consultative Committee had observer status with CDCJ, and it was with great pleasure that the latter welcomed cooperation with the Asian-African Committee. As to Mr. Koroma's question, under the draft Convention on civil liability for damage resulting from activities dangerous to the environment, operators could be liable although not in breach of the law. If the law stated that they must not exceed certain pollution levels, operators could be liable for damage even if they had not exceeded the level. There was, however, an exception to the rule, under article 8 of the draft an operator would not be liable if he could prove that the harm resulted necessarily from compliance with a specific order or compulsory measure by a public authority. She would be pleased to supply the text of the draft Convention to members on request.

22. Several members had referred to problems of State succession in Europe, problems which European bodies had considered on a number of occasions. In January 1991, a special meeting had been held to study the matter. Moreover, the Council of Europe was always prepared to give technical assistance to European countries on the subject of State succession. With regard to legal problems on State succession that arose for the Commonwealth of Independent States, a meeting was scheduled to be held in Moscow in a few days' time.

23. Lastly, she thanked the Commission for the invitation to attend the meeting and stressed that the Council of Europe would welcome further cooperation with the Commission.

The meeting rose at 10.55 a.m.

2282nd MEETING

Wednesday, 8 July 1992, at 10 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. Sreenivas Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Vereshchétin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 5]

REPORT OF THE WORKING GROUP

1. The CHAIRMAN drew attention to the report of the Working Group set up by the Commission at its 2273rd meeting, on 16 June 1992, to consider general issues relating to the scope, methodology and possible direction of the Commission's future work on the topic, contained in document A/CN.4/L.470. The report summarized the conclusions and recommendations of the Working Group.

2. Mr. BENNOUNA, referring to the French version, said that he would prefer the expression "remedial measures" to be translated by the word remèdes rather than by the words mesures correctives.

3. Mr. IDRIS said that, in his view, the report called for some modification. The second sentence of paragraph 5, starting with the words "However, priority should be ..." did not make it sufficiently clear that what was meant was simply priority in time, not an order of priority in which the issues were to be considered. It would be preferable to state: "However, the issue of prevention should first be considered by the Commission". In paragraph 8, the phrase reading "the Working Group recommends that the Commission adopt as a working hypothesis ..." was inaccurate, since the decision on that point had been taken a long time before. It would be better to say "the Working Group took note with appreciation of the previous reports ...". The recommendation, in the second sentence of the same paragraph, that the Special Rapporteur should "re-examine the issues" went a little too far, since it suggested that he would have to reopen the whole topic. The words "examine further" would be more appropriate. Lastly, he would like the words "a complete and a final set of draft articles", in the last line

* Resumed from the 2273rd meeting.
1 Reproduced in Yearbook ... 1992, vol. II (Part One).
2 The full text of the recommendations, as approved by the Commission, is to be found in Yearbook ... 1992, vol. II (Part Two), chapter IV.
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. VERESCHCHETIN, 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. Bennooma, 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. Pambouthivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindrambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


Third and fourth reports of the Special Rapporteur (continued)

ARTICLE 5 bis and

ARTICLES 11 TO 14 (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

* Resumed from the 2280th meeting.
1 Reproduced in Yearbook... 1991, 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 ICIJ, 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). 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 that related to the peaceful settlement of disputes, and to Principle V, paragraph 5, of the Helsinki Final Act, 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 cloack 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, preventive 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), 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 (227th 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, 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 Man-kind, 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 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. Bownett (227th 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, 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

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8 Conference on Security and Cooperation in Europe, Stage I—Helsinki, Open Sessions, verbatim records, 3-7 July 1973, CSCE/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.


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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10 Ibid.
11 I.C.J. Reports 1971, p. 16.
12 Ibid., p. 58.
2284th MEETING

Tuesday, 14 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabashi, Mr. Koroma, 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.


[Agenda item 3]

REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

1. The CHAIRMAN invited the Chairman of the Working Group on the question of an international criminal jurisdiction, to introduce the Working Group’s report.

2. Mr. KOROMA (Chairman of the Working Group) said that the Working Group, which had been composed of Mr. Thiam (Special Rapporteur, ex-officio), Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Crawford, Mr. de Saram, Mr. Idris, Mr. Jacovides, Mr. Mikulka, Mr. Pellet, Mr. Robinson, Mr. Rosenstock, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagran Kramer and himself, had held a total of 15 meetings. It had endeavoured to discharge the mandate given to it under General Assembly resolution 46/54 of 9 December 1991, which was, “to consider further and analyse the main issues raised in the Commission’s report on the work of its forty-second session concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international court or other international criminal trial mechanism” and to draft concrete recommendations with regard to those issues.

3. The Working Group’s report was the result of a truly collective effort. It consisted of three parts. Part A contained a summary and concrete recommendations; part B contained the report in extenso; and part C consisted of an appendix containing a summary of the proposals made earlier on an international criminal court concerning the mechanism of prosecution and the bringing of a complaint.

4. That presentation of the report had been adopted exclusively for practical purposes in order to stress from the outset in part A that the Working Group was formulating specific recommendations on the basis of what it perceived to be the minimum common ground on which a consensus could be built in the General Assembly that could lead to further work on the question in the coming years. In part B, the Working Group examined in detail the issues involved in the establishment of an international criminal court or other international criminal trial mechanism and reviewed the possible options available for arriving at specific conclusions. Part A was therefore a distillation of the conclusions and recommendations which had been arrived at in part B after careful study. It should also be noted that, in part A, the Working Group had stressed that the Commission should indicate clearly to the General Assembly that it considered its preliminary work to have been completed and that it would require a new mandate from the General Assembly if it was to carry out further work on the question and to draw up a detailed draft statute.

5. As to the contents of the report itself, as pointed out in the introduction to part B, the Working Group had initially identified five “clusters” of specific issues which had arisen out of the discussion in plenary on the question of an international criminal court, namely, the basic structure of a court or of the other options for an “international criminal trial mechanism”; the system of bringing complaints and of prosecuting alleged offenders; the relationship of the court to the United Nations system and especially to the Security Council; the applicable law and procedure and especially the issue of ensuring due process to the accused; and the process by which to bring defendants before a court, the relationship between that process and extradition, international judicial assistance to proceedings before a court and the implementation of sentences. The Working Group had endeavoured to examine those basic issues sequentially and, in each case, to indicate its preferred approach and the various possible solutions. It had tried to submit as balanced an analysis as possible without going into excessive detail or dealing with particular points that were not essential, its main aim being to provide the Commission with enough information to enable it to form a judgement.

6. In the second section of part B, the Working Group had dealt with arguments for and against the establishment of an international criminal court. Its conclusions were reflected in particular in the penultimate and antepenultimate paragraphs of that section and were summarized in the relevant paragraphs of part A. While it recognized that there was a case for some form of international criminal process beyond what now existed, the Working Group considered that it was necessary to be realistic and to start from a modest base. National systems of criminal justice were expensive and complex and it would be difficult and very costly to replicate such systems at the international level. There was no body of international experience in the matter to call upon as had been available in the field of international arbitration when PCIJ and its successor, ICJ, had been created. It would therefore be better to seek to establish a flexible facility which would be available in case of need and which would be essentially a facility for States parties to its statute. That meant that it would not have compulsory...
jurisdiction in the sense of a jurisdiction which the States parties to its statute would be obliged to accept ipso facto. Nor would it have exclusive jurisdiction in the sense of a jurisdiction which would exclude the concurrent jurisdiction of States in criminal cases. It would not be a full-time body, but an established structure that could be called into operation when required, without the disadvantages of a costly body with a permanent staff who might work only intermittently.

7. The next section of part B dealt with structural and jurisdictional issues. It had been subdivided into seven subsections: the method of establishment of a court; the composition of a court; the ways by which a State might accept the jurisdiction of a court; the subject-matter jurisdiction (ratione materiae) of a court; the personal jurisdiction (ratione personae) of a court; the relationship between a court and the draft Code of Crimes against the Peace and Security of Mankind; and possible arrangements for the administration of a court and, in particular, its relationship to the United Nations system. He would stress only those points which seemed to him to be most important.

8. With regard to the method of establishment of an international criminal court, the Working Group pointed out that any international criminal court or other mechanism should be established by a statute in the form of a treaty agreed to by the States parties, since no other method would provide a guarantee of a sufficient degree of international support to ensure that it worked effectively.

9. As to the composition of the court, the Working Group considered that judges must be independent and impartial and have the appropriate qualifications and experience both in the administration of criminal justice and in respect of knowledge of international criminal law.

10. With regard to jurisdiction ratione materiae, the Working Group proposed that, initially at least, the jurisdiction of the court should be limited to crimes of an international character, as defined in specific international treaties in force, including the Code of Crimes against the Peace and Security of Mankind (once it had been adopted and had entered into force), and that raised the issue of the relationship between the court and the future Code. While it was clear that there was an important link between the two, the essential point, as stressed in the Group’s report, was that, if an international criminal court was to become a reality, it must receive the widest possible support from States. Accordingly, when drafting the statute of the court, the possibility should be left open for a State to become a party to the statute without thereby becoming a party to the Code or for a State to confer jurisdiction on the court in respect of crimes covered by the Code or defined in other conventions or on an ad hoc basis. Maximum flexibility should be the criterion with regard to the jurisdiction ratione materiae of the court and that would most readily be achieved if the Code and the statute were separate instruments, with the statute of the court providing that its jurisdiction ratione materiae extended to the crimes covered in the Code and in other instruments. The Working Group did not, however, wish to prejudge the treatment of the subject in the Commission, bearing in mind the link the General Assembly had made with the draft Code of Crimes against the Peace and Security of Mankind and the proposal on international drug trafficking that had originated with the delegation of Trinidad and Tobago.

11. The question of the jurisdiction ratione personae of an international criminal court could be examined from two angles. First, there was the issue of the kind of subjects of law who could be brought before the court. In that connection, the Working Group had pointed out, in its recommendations, that, in the first phase of its operations, at least, the court or other mechanism should exercise jurisdiction only over private persons and not over States. That was consistent with the approach taken by the Commission in the draft Code of Crimes against the Peace and Security of Mankind and, more particularly, in article 3, as adopted on first reading in 1991. Secondly, there was the issue of which State or States must give their consent before an accused person could be brought before the court. That involved a most difficult technical issue because the bases for the assertion of personal jurisdiction in criminal matters under the different national systems of law varied greatly and could involve, for instance, territoriality and the nationality of the offender. Furthermore, some treaties provided for universal jurisdiction in the case of certain international crimes. Those technical issues were considered in that section of the report dealing with jurisdiction ratione personae. The Working Group had not thought it necessary, at that stage, to set out in detail a regime of personal jurisdiction and had simply concluded that various options could be considered. There could, for instance, be a requirement that both the territorial and the national State should consent. Alternatively, it could be provided that the State of nationality could only prevent the court from exercising jurisdiction if it was prepared to prosecute the accused before its own courts. The Working Group believed that a solution could be found which respected the jurisdictional systems of States in criminal matters and which none the less catered for most of the situations that were likely to arise.

12. Since the General Assembly had requested the Commission to consider proposals for the establishment of an international criminal court or, alternatively, for some other international criminal trial mechanism, the Working Group had examined the various options in detail. It should be noted that it had reaffirmed a basic point, namely, whether at the national or international level, and in relation to serious offences of an international character defined in the various treaties and in the draft Code, the only appropriate criminal trial mechanism was a criminal court, duly constituted, in other words, a body with appropriate guarantees of independence which exercised judicial functions.

13. The Working Group’s last recommendation was that, regardless of the precise structure of the court or other mechanism, it must guarantee due process, independence and impartiality in its procedures. That recommendation, together with many of its related issues, was considered at length in those sections of the report entitled “Applicable law and due process” and “Prosecution and related matters”. The first considered the issues relating to applicable law from the triple perspective of

3 See General Assembly resolution 44/39 of 4 December 1989.
the definition of crimes, the general rules of criminal law and the applicable procedure. After a careful examination of the issues involved, the Working Group had concluded that it was not easy to condense into a brief formula the various aspects involved in the question of applicable law and that, in particular, a general clause, along the lines of Article 38 of the Statute of ICJ, would not do justice to the complexity of the issues. None of the categories of rules listed in Article 38 could be dispensed with, but it might be necessary to add references to other sources such as national law and even to the secondary law enacted by organs of international organizations, in particular the United Nations, in order to supplement the primary rules contained in the treaties which defined the crimes over which the court would have jurisdiction.

14. The Working Group had also devoted separate paragraphs to the questions of the penalties to be imposed and of due process. In the latter connection, its task had been simplified, as it had referred to article 14 of the International Covenant on Civil and Political Rights which article 8 of the draft Code followed more or less word for word and which the statute of an international criminal court should likewise follow.

15. In the section dealing with prosecution and related matters, the Working Group had sketched out some possible solutions to the general question of how proceedings could be initiated before an international criminal court. It had started from the assumption that such a court, in accordance with the provisions of article 14 of the International Covenant on Civil and Political Rights, would not try defendants in absentia, but it had noted also that, in the case of an international criminal court, the requirement that the defendant should be in the custody of the court at the time of the trial was particularly important because, otherwise, such a trial might be completely ineffectual. On that basis, the Working Group had gone on to consider the system of prosecution, the initiation of a case, bringing defendants before a court, international judicial assistance in relation to proceedings, the custody of the court at the time of the trial was particularly important because, otherwise, such a trial might be completely ineffectual. On that basis, the Working Group had gone on to consider the system of prosecution, the initiation of a case, bringing defendants before a court, international judicial assistance in relation to proceedings, the implementation of sentences and the relationship of a court to the existing extradition system. So as not to make the introduction of the report too long, he would refrain from going into detail on those very important technical issues.

16. Having thus completed the substantive part of his statement, he would refer to the possible course of action on the report of the Working Group. That document—not only the recommendations, but also the in extenso report—had enough merits for the Commission seriously to consider incorporating it in full in its report to the General Assembly, with any substantive and drafting amendments it might find necessary, notwithstanding the fact that it had originally been planned that it should be annexed to the Commission’s report. There were precedents for that course of action. In 1990, the entire report of the Working Group on the establishment of an international criminal jurisdiction had, with some amendments, become part of the report of the Commission itself.4 The words “Working Group” throughout the document had simply been replaced by the word “Commission”. The quality of the document under consideration would seem to favour such a solution.

17. Although the report had been primarily a team effort, he wished to express particular thanks to two members whose cooperation had been invaluable: Mr. Thiam, the Special Rapporteur for the draft Code of Crimes against the Peace and Security of Mankind, whose experience and observations had been particularly helpful and whose ninth and tenth reports, when discussed in plenary, had provided the Working Group with the necessary basis to identify the issues which had set the pattern for its future work, and Mr. Crawford, who had not only contributed substantial portions of the report, but had also coordinated and integrated the contributions of other members. He also thanked the secretariat of the Working Group, which had done very important research and compilation work.

18. Mr. RAFAIINDRALAMBO said the report showed that the Working Group took a triply negative approach to the possible establishment of an international criminal court: it said no to compulsory jurisdiction, no to exclusive jurisdiction and no to full-time jurisdiction. In view of the importance of the issues at stake, he wished to make a few comments on the more significant aspects of the question of the functioning and composition of the criminal court which might be established.

19. The Working Group expressed the view that any court should not have compulsory jurisdiction, in the sense of a general jurisdiction, and recommended a separate juridical act, analogous, for example, to the optional recognition of jurisdiction for which provision was made under Article 36, paragraph 2, of the Statute of ICJ. He would be prepared to accept that recommendation, provided that acceptance of the proposed optional clause would make the jurisdiction of the court compulsory for the signatory.

20. As to exclusive jurisdiction, the Working Group stated three conditions which would have to be met for an international criminal court to have jurisdiction over a case. That approach could be thought to exclude the parallel jurisdiction of national courts. As thus construed, the jurisdiction of a court would also not give rise to any insurmountable problems. Since the Commission’s mandate was to study only the jurisdiction of an international criminal court, it should not be necessary to dwell, as the report did, on cases in which national courts would have jurisdiction. In any event, he was in favour of a system of exclusive jurisdiction for certain particularly serious crimes, such as aggression or genocide, along the lines of the suggestion made by the Special Rapporteur in his tenth report (A/CN.4/442). Jurisdiction would be optional only for the other international crimes. The Parliametary Assembly of the Council of Europe appeared to go even further, since it had ruled in favour of the exclusive jurisdiction of the court for crimes against peace, war crimes and crimes against humanity. The Working Group had adopted a much more timid position, which seemed to detract from the Commission’s predominant role in the progressive development of international law.

4 See Yearbook... 1990, vol. II (Part Two), chap. II.
194  Summary records of the meetings of the forty-fourth session

21. With regard to the intermittent operation of the court, it was hard to see how such a body could be satisfied with the occasional and temporary activity typical at the national level of the special courts that brought back so many horrible memories. It was not at all certain that the General Assembly had had in mind a court operating by fits and starts.

22. At all events, the system proposed by the Working Group was neither realistic nor workable. The trial of a State dignitary on the charges brought against him could not be disposed of in a few days, as the Noriega case had shown. Judges who did not work full-time would also have to find, or continue with, another gainful occupation, and that was absolutely contrary to the ethics of the profession and detrimental to the independence of judges. The independence of a sovereign court which ruled without appeal was based on the stability and permanence of the institution, as well as on the irremovability of its judges.

23. According to the report, moreover, each State party would have the right to nominate one judge: the composition of the court would thus change as and when States became parties to its statute and the result would be an increase in membership. Only a few judges would actually take part in proceedings and in building up the case law of the court. How much credit could be lent to a court in which justice would be delegated to a few, on the basis of criteria that were difficult to determine objectively?

24. The Working Group appeared, consciously or otherwise, to have drawn inspiration from the mechanism of institutional arbitration, such as that of the Permanent Court of Arbitration. All possible avenues would have to be explored that could lead to the establishment of an international criminal court acceptable to all. It was necessary, however, that the discussion should be conducted openly, in the framework of the General Assembly’s recommendation. In that connection, he noted that the Working Group had interpreted resolution 46/54 as stressing the term “trial” in the sense of the French term procès, as explained in the report. That allowed it to say that the General Assembly had in mind a trial before a national court. That was not at all convincing, as could be seen by looking at the sentence in question in the English version of the General Assembly resolution. All the points made on national courts in the report might well be totally irrelevant.

25. The words “or other international criminal trial mechanism” in the resolution paved the way for other solutions, such as that of a court of a temporary nature, pending the setting up of a permanent court. The system advocated by the Working Group also belonged to the category of “other trial mechanisms” and it might operate for an interim period without exempting the Commission from getting on with the task of envisaging a genuine permanent international criminal court.

26. In conclusion, he said that he was not opposed to the adoption of the report under consideration and, in particular, the recommendations contained in part A, provided that the reservations he had made were included in the summary record of the meeting. The rest of the document could be reproduced as an annex to the Commission’s report.

27. Mr. CALERO RODRIGUES said that the Working Group’s report was an excellent document. From one standpoint, it was a high quality digest of the issues involved, which had been carefully analysed in all their multiplicity and complexity. It was thus one of the Commission’s best works. From another, and that indeed was a feature of the entire text, it put forward a number of basic propositions which were intended to become recommendations of the Commission.

28. In that connection, he had some doubts about the functions of working groups, which raised the question of how a working group’s conclusions could become Commission decisions or, in other words, how to bring in second-stage inputs. In the present case, the Working Group had held 15 meetings on the matter, whereas the Commission would hold only two and it might well be asked what contribution it could make in so short a time to a discussion which it had taken some 46 pages to summarize. Without a complete debate, which was not possible in the time available, could it really accept the propositions that the court would not be a full-time body, that it would be only a “facility” and that it would not have compulsory jurisdiction?

29. Those propositions were apparently the result of a feeling that States would not be prepared to accept anything more. That unambitious, supposedly pragmatic approach might be the correct one, but it aggravated many of the difficulties inherent in the establishment of the court.

30. While the report under consideration was an outstanding demonstration of the Commission’s ability rapidly to identify and analyse the issues submitted to it by the General Assembly, it raised the following problem: the Working Group was recommending that the Commission should endorse its basic propositions and its “broad approach”. The Commission would then have to ask the General Assembly “... to decide whether the Commission should undertake a new project for an international criminal jurisdiction and on what basis”. The Commission could only accept or reject the recommendations of its Working Group. How could it seriously ask the General Assembly if it decided that the Commission should start on the preparation of a new draft statute, to tell it “on what basis” that should be done? The Sixth Committee itself would have no other choice than to accept or reject the Commission’s recommendations. Since it was unlikely to reject them, it would probably request the Commission to continue its work on the basis of the report under consideration. In the end, once all the usual rituals had been performed, the Commission would be bound in its future work by the Working Group’s recommendations, without their having been given the careful consideration they deserved.

31. In conclusion, he said that the Working Group could have offered alternatives and the Commission could have chosen one or brought them all to the attention of the General Assembly. He could only regret that that road had not been taken. However, he would not oppose the adoption of the recommendations. He hoped that, when the Commission undertook a “new project”,
it would have an opportunity to consider the possibility of a more meaningful court than the one described in the report.

32. Mr. VERESHCHETIN said that the Working Group had fully discharged its mandate and he was sure that the results of its work would be helpful to the Commission. After studying the topic for several decades, the Commission had gone no further than the analysis and exploration of possible options. It was therefore timely for it to make specific recommendations; it had done so through the Working Group and that was to be welcomed. Since the Working Group had been composed of nearly half the members of the Commission, had been open-ended and had worked for some 45 hours, there would be no need for the Commission to consider its report paragraph by paragraph in plenary. He commended the work done in the Working Group by its Chairman, Mr. Koroma, by the Special Rapporteur, and by Mr. Crawford.

33. He endorsed the report as a whole as well as the six basic propositions contained in part A. They clearly showed that, when the Working Group had considered all the possibilities, it had adopted the most realistic approach, namely, that of compromise, and had found the most flexible solution. Although it would not be a standing body and would thus not be expensive, the court would still be ready to function as and when necessary.

34. The report did not conceal the fact that a number of questions were still pending, but they were technical questions and the Commission should be able to settle them if it was given a mandate to complete the formulation of the statute of an international criminal court.

35. He drew attention to what he believed was a drafting error in the English text of part A, which had to be corrected, since it affected one of the propositions by the Working Group. The English text of the third proposition said that the court’s jurisdiction should be limited “to specified international treaties in force defining crimes of an international character”; it would be more correct to say, as in the other language versions, that the court’s jurisdiction should be limited “to crimes of an international character defined in specified international treaties in force”.

36. In conclusion, he proposed that, when the Commission had completed its discussion, it should adopt the basic approach proposed by the Working Group in its report, together with the six propositions and the three recommendations contained in part A.

37. Mr. BENNOUNA expressed his thanks to all those who had taken part in the Working Group. He said that he found the report to be excellent, and not only because the proposed model of an international court was the same as the one he himself had recommended during the general debate on the question. A tribute should be paid to the realism of the members of the Working Group, who had taken account of the international situation in making their proposals. The result they had achieved should help the Commission to carry out the task entrusted to it. The international climate now seemed more favourable and the Commission must set the pace, not lag behind.

38. One point was nevertheless worth emphasizing. With regard to the relationship between the international criminal court and the draft Code of Crimes against the Peace and Security of Mankind, it was proposed in part A that a State “should be able to become a party to the Statute without thereby becoming a party to the Code”. He regretted that nothing had been said about the other aspect of the question and that it had not been made clear whether a State could become a party to the Code without thereby becoming a party to the statute of the court. The Working Group had referred to the question of the relationship between the court and the draft Code, but had simply reviewed existing opinions on the matter, without taking a stance of its own. He personally had no doubt that a State which became a party to the Code of Crimes against the Peace and Security of Mankind must ipso facto become a party to the statute of the court. In that connection, he was thinking of the relationship between the Charter of the United Nations and the Statute of ICJ. Such an approach would guarantee consistency, since there was a definite link between the proposed court and the Code. He therefore suggested that the following words should be added at the end of the third proposition: “, but a State party to the Code would ipso facto become a party to the Statute of the court”.

39. Mr. SHI said that, as he understood it, adoption of the report would not be interpreted as an endorsement of the content of the report as a whole: that was reassuring because he had been afraid of finding that his hands were tied. His position had not changed: he thought that, although an international criminal court should be established, that was hardly possible for the time being. In order to be successful in that undertaking, the Commission had to be modest, cautious and realistic, and not over-ambitious or idealistic. He had always thought that it had to give in-depth consideration to all the issues involved in order to determine whether the establishment of an international criminal court was possible. He therefore agreed to the adoption of the report because it reflected a modest and realistic approach, analysed many issues in detail and made recommendations which were not too ambitious, while proposing a range of solutions for every problem. He thus had no difficulty in accepting the recommendations made in part A, although he thought that in the second part of its recommendation to the General Assembly, it should say that the structure suggested in the report “might be a workable system”, rather than “would be”.

40. There were some other errors to be corrected and drafting changes to be made in some paragraphs. The reference in the second paragraph of part A should be to the “forty-fourth”, not to the “forty-sixth”, session. In the fifth paragraph, the words “could” and “would” in the second and third sentences should be replaced by the word “might”. In part B, the words “in the changing international climate” in the third paragraph of the Introduction should be deleted because they gave the impression that the General Assembly’s request to the Commission was linked to the changing international climate. Although the international situation had changed, the international climate was the same.

41. He thanked the members of the Working Group for the efforts they had made and said that he was in favour
of the adoption of the report of the Working Group by the Commission.

42. Mr. ERIKKSSON expressed his congratulations to the Working Group for its report. He said it was evident that it had dealt in the most professional way with all the important aspects of the topic. In addition, the report was well written and it clearly stated the possible options and the conclusions reached by the Working Group, so that the General Assembly should be able to make observations and issue guidelines for the Commission's future work. He could therefore endorse the recommendations contained in part A of the report, but he did want to make some further comments.

43. In the first place, as he had explained in the past, he thought that the establishment of an international criminal court was feasible in today's international climate.

44. In the second place, he agreed with the Working Group that, at the current stage, the proposed system must start from a modest and realistic base and, in that connection, he was thinking of the concerns expressed earlier in the meeting by Mr. Razafindralambo and Mr. Calero Rodrigues. However, his point of departure had not been the same as theirs. For instance, he had never advocated exclusive jurisdiction or compulsory jurisdiction and he had always been concerned not to contribute to the establishment of a system which would be too costly in relation to its initial work load. He had thus always been ready to accept an interim system, such as the one proposed in the report. At the same time, however, he recognized that, whatever future work the Commission was called upon to do on the subject, it should indicate that the current results were only one stage in a longer process.

45. His third and last point concerned the relationship between the Code of Crimes against the Peace and Security of Mankind and the court. In his view, the establishment of the court did not have to wait until the completion of the work on the draft Code, and once the Code had been completed, all the crimes covered by it should not necessarily come within the jurisdiction of the court. He took that view because he was not entirely satisfied with the way the Code was taking shape. In any event, no final decision could be taken and he hoped that, once the work on the draft Code had been completed, his fears would prove to be unjustified. For the time being, although the point was not exactly the same, he could not support the amendment proposed by Mr. Bennouna.

46. Lastly, he agreed with the Chairman of the Working Group that, when it had been revised, the report of the Working Group should form part of the Commission's report.

47. Mr. BARBOZA said that he too congratulated the members of the Working Group and its Chairman on the very thorough and soundly argued report they had prepared. As to the international climate referred to by the preceding speakers, it was true that the international situation now seemed to be more favourable to the establishment of an international criminal court and the Commission should try to take advantage of the situation by putting forward acceptable and realistic proposals, thereby doing international law and the punishment of international crimes a great service.

48. He personally did not think the Working Group had adopted a timid approach; it would be more accurate to call it a "low-profile" approach. It must also be remembered that the report was a preliminary one and that, since it was not being considered in detail, what mattered most was to accept the basic approach it proposed and the recommendations it contained. The report did, of course, leave aside a number of questions which must be looked into, such as penalties, the connection between the future court and national courts, and the handing over of persons to be tried by the court and their possible extradition. He also disagreed with the report on certain matters: he did not think that it would be wise to appoint national judges to the court because of the political issues which would also arise. He was of the opinion that the Commission should not adopt the report, since it could not endorse it without considering it in detail. It should accept the Working Group's proposals and conclusions provisionally, as a basis for future work. The report should be annexed to the Commission's report because it could be helpful to the members of the Sixth Committee when they came to deal with the question. Finally, the Commission should also ask the General Assembly for a new mandate so that it could continue its work and, perhaps, prepare a draft statute.

49. Mr. CRAWFORD said that, in order to respond adequately to the questions which had now arisen, it was necessary to understand the position the Commission had been in before the Working Group had started its work. His understanding was that the Commission itself had not been able to agree whether it should undertake to draft a statute of an international criminal court. It had been working on the question without any clearly defined idea to guide it and it had not reached any conclusions on the structure and jurisdiction of the future court, even though it had expressed the opinion that it was possible to establish such a court. The General Assembly had not given the Commission any guidelines despite the Commission's repeated requests. The Commission had thus been looking at possible conclusions without any means of reaching those conclusions.

50. Within the Commission itself, moreover, there were diametrically opposed views. One group of members had been in favour of an international court with unlimited and compulsory jurisdiction which would be closely linked to the Code of Crimes against the Peace and Security of Mankind and be the exact counterpart of national systems of criminal law. Another group of members had been totally opposed to that idea, regarding it as completely unrealistic, and had not been in favour of establishing an international criminal court, or had believed, with the greatest reservations, that, at most, a minimal system could be adopted.

51. The first comment to be made on the report of the Working Group was that it provided that any mechanism to be set up at the international level would have to be established in stages. There were a great many problems involved and, in the light of the long experience the international community had gained so far in respect of the establishment of an international criminal court, it would
be better to proceed in that way. It was true that some members of the Commission and of the Working Group, Mr. Robinson being the prime example, would be in favour of much broader jurisdiction than that now proposed. The report expressly reserved that possibility for a later stage, but the idea that the Commission could go that far right away was totally illusory. If the Commission continued working on that basis, any text it might produce would have no chance of obtaining enough support to have specific effects. What was involved was a very expensive trial mechanism and he was thinking not only of the remuneration of the judges, but also of trial and prosecution costs. For instance, proceedings which had been instituted by the United Kingdom of Great Britain and Northern Ireland for crimes against humanity and which were not yet over had already cost US$20 million. The idea that a complete system of international criminal justice could be set up in one go was thus totally unrealistic. It should also be noted that, during the debate on the draft Code at the beginning of the session (2254th-2264th meetings), some members of the Commission had expressed doubts as to whether the undertaking was feasible at all. Yet the same members were now accepting the proposed approach. That change should be taken into account by those who wanted to go ahead immediately.

52. Mr. Calero Rodrigues had raised a very important point concerning the Commission's working methods. It was true that the Commission faced a dilemma in the sense that it might seem that work done by only some of its members tied the hands of all of them. The same problem could arise with the detailed work done by the Drafting Committee. For future reference, it might be useful if working groups which were asked to reach conclusions, as distinct from carrying out mere exploratory work, were required to produce an interim report setting out in broad terms the approach they intended to adopt. In the present case, the Working Group had been asked to submit definitive conclusions; it had done so and that explained why its report was so detailed.

53. One of the conclusions reached by the Working Group had a bearing on the relationship between the court and the Code, and, in the light of what Mr. Bennouna had said, it was worth considering. An essential basis of the report was that the Code and the statute of the court should be distinct legal instruments and that States could become parties to the statute of the court without thereby committing themselves to the Code. If the Commission rejected that basic principle, it might just as well reject the entire report. The Working Group had also taken the view that there could be links between the two drafts, in particular, by providing for the possibility that some crimes contained in the Code could be tried only by an international court, the most obvious example being the crime of aggression. The report thus left open the question of links between the Code and the court for that category of crimes. Within those limits, he personally would not object to the idea of providing in the Code that States which became parties to the Code would thereby be bound by the statute of the court, as long as there was no derogation from the existing jurisdiction of national courts over at least some of the crimes contained in the Code, such as drug trafficking, the hijacking of aircraft, and the like.

54. There were other crimes contained in the Code that had never been the subject of national jurisdiction either because they had never been defined, as in the case of aggression, or because, for various reasons, they had never been tried, as in the case of genocide. For crimes of that kind, the Commission could recognize that the system of universal jurisdiction was, for the time being, entirely illusory and make provision to that effect. To that extent, there were links between the Code and the court, but the essential element was the distinction between the two and, without it, the general support for the court necessary for it to be effective could never be achieved. He thus had no objection if wording was added to leave open that general possibility, as well as more specific possibilities on which the Commission could decide later.

55. How was the report to be handled now? As a member of the Working Group, he would be happy if it became part of the Commission's report, but he could also agree with the Working Group's solution that the Commission would adopt only part A and take note of part B and the general approach. What would not be acceptable was the idea that the Commission might adopt the report and then disregard it or that it might accept the compromise the report represented and then reject the basis on which it had been worked out. That compromise also took account of the views of a number of members, including himself, who were very sceptical about the idea of an international criminal court. If the Commission adopted part A on the basis of the principle that nothing had been decided and the option of a court with universal jurisdiction and full-time judges was still completely open, it would be telling that group of sceptics, which was numerically quite strong, that, once their agreement had been obtained, it could disavow the basis on which they had given it. If that was the case, there had been no point in setting up the Working Group. In that area, more than any other, the only way to make progress was to proceed slowly.

56. He therefore urged the Commission to adopt part A of the report, with any amendments it saw fit to make, including the reformulation of the third proposition, as proposed by Mr. Vereshchetin, and the use of the word "might", as proposed by Mr. Shi. If the Commission also wanted to adopt part B, he would be willing to delete any reference to the international climate. However, if part B was simply annexed to the report, it would still be the report of the Working Group and it should then not be changed.

57. Mr. Pellet said that he wished to make five preliminary comments before referring briefly to the substance of the Working Group's report. First, the Commission could not endorse a document which it had not been able to consider paragraph by paragraph. If it had to "adopt" the document in question, it could adopt it only as the report of the Working Group. Secondly, the problem of what to do with the report was a perfect illustration of how sensible it would be to divide the Commission's session into two parts. If that had already been done, the Working Group could have met during the first half of the session and the Commission could have calmly considered its report during the second half. It was to be feared that the last week of the work in the
Commission would offer other examples of the problems caused by the end-of-session rush. Thirdly, while the expression cour pénale internationale was certainly the most widely used, the Working Group might have suggested other names for the proposed court. No matter what form it took, the chosen mechanism would try only crimes under international law and it would therefore be logical and legitimate to refer to a cour criminelle rather than to a cour pénale, a broader term that did not accurately reflect what was involved.

58. Fourthly, the document under consideration clearly showed that, in some cases, it could be helpful to set up a working group to discuss a difficult problem and try to reconcile opposing views expressed in plenary or in the Drafting Committee. At most, however, it was important to avoid having such a group repeat in small committee what had already been done, sometimes in a better way, by the Commission as a whole. That seemed to have been the case in the section of the report on the applicable law, which did not fully reflect the very full plenary discussion on that point, even though it consisted of only 13 paragraphs of a rich and promising document containing 156 paragraphs in all. Fifthly, he had been afraid that his very strong reservations about a criminal court, which did not fully reflect the very full plenary discussion on that point, even though it consisted of only 13 paragraphs of a rich and promising document containing 156 paragraphs in all. Fifthly, he had been afraid that his very strong reservations about a criminal court, replicating the Nürnberg Tribunal would be more of a hindrance than an intellectual stimulus for the Working Group and he had wanted to conserve his freedom of thought and expression so that he could criticize what he had thought the logical outcome of the Group’s work would be, but he realized that his fears had had by and large been groundless, in the sense that, although the report expressed a preference for a part-time court which he himself did not share, it did not rule out the possibility of other more flexible, less unwieldy and hence more realistic and effective mechanisms.

59. The majority of the members of the Working Group had expressed a preference for a part-time court set up in advance. That was a considerable improvement over the “heavy” mechanism he had been worried about based on earlier discussions. However, that solution did not eliminate all grounds for scepticism. The Working Group indicated more than once that a full-time court would be idle, but why would it be any different for a court such as the one being proposed, the main advantage of which was that it would be less costly? In its report, the Working Group stated, as if inadvertently, that it intended to address the “major concerns which underlie calls for an international criminal jurisdiction” but what about the concerns of the group of people who, rightly or wrongly, were not in favour of the establishment of such a court? The reluctance of the General Assembly and the Sixth Committee to give the Commission any guidance showed that that group was quite large. He fully agreed with the majority view of the Working Group that the establishment of a court, as proposed in the report, was possible, but he did not think that it would be very useful. What separated him from most of the Working Group was his belief that there was no rush to choose a particular solution and no reason to give priority to the one that had been proposed. Still, he was grateful to the Working Group for having, to some extent, taken his views into consideration, in particular in the paragraphs dealing with alternative possibilities and the last eight paragraphs of the section dealing with an international criminal trial mechanism other than a court, although those analyses could have been more thorough and detailed and, in some cases, presented in a more positive way.

60. With regard to the method of establishment of the court, he continued to believe that, while the conclusion of a treaty in due form was certainly a possibility, the most important point was that States and the international community as a whole should have a text at their disposal clearly stating how the court was to operate—and offering options, if necessary. In such a case, it would be enough to draft a text to which States could simply accede if necessary and which could be adopted by a resolution of the United Nations General Assembly. The Working Group did not, moreover, seem to have been entirely consistent in that regard: after asserting that methods other than a treaty would not give the court the assurance of a sufficient degree of international support for it to work effectively, it later accepted that States which were not parties to such a treaty could still accept the jurisdiction of the court, and that was tantamount to saying that the entry into force of a treaty was not essential. What really counted was that a text should exist; whether or not it was a treaty was entirely irrelevant. In addition, the requirement of the ratification of a treaty would probably discourage States from bringing cases before the court, even where it would be very useful to do so. The case of the crime of apartheid was a prime example. He realized that the solution proposed by the Working Group did not rule out the possibility that those responsible for that crime could be brought before the court, but its great inflexibility might well make such action more difficult.

61. The report of the Working Group seemed extremely ambiguous with regard to the relationship between the court and the Code of Crimes against the Peace and Security of Mankind: in the fourth paragraph, it clearly indicated that a State should be able to become a party to the statute of the court without thereby becoming a party to the Code, but immediately added that “... the Code, once it has been finally adopted, would be one of the international instruments defining offences of an international character which would be subject to the competence of the court”. The last paragraph of the section dealing with the definition of crimes was just as ambiguous. In his view, a State should be able to request the court to try a person suspected of an international crime listed in the Code without having to accept the definitions the Code contained. The link the Working Group seemed to be establishing between the statute of the court and the Code could only give rise to reservations on the part of those States which did not accept the Code and would thus refuse to accept it indirectly through the statute of the court. That link was not only debatable, but also unnecessary. Apartheid and genocide, for example, were international crimes, whether or not States had ratified the treaties defining those offences and whether or not they had ratified the Code. There were international rules that prohibited those crimes. Those were customary rules, but, in international law, custom was a source of obligations that was as worthy of consideration as treaties. He thus strongly disagreed with the Working Group on that issue if it was true that the paragraph he had just mentioned and the one preceding it...
could be interpreted to mean that a crime could be tried at the international level only on the basis of a treaty in force for the State concerned. Once again, the Working Group was not entirely consistent, since it recognized in the last paragraph of the section on jurisdiction ratione materiae that the concept of international crimes was evolving. Unfortunately, it might be tempting to say that mankind’s inventive genius knew no bounds.

62. His last comment related to the very specific problem of drug trafficking. While the Working Group was often too ambitious, it was rather reserved on that issue. In particular, it did not seem to take adequate account of the guidelines contained in General Assembly resolution 44/39, which referred in a general and non-restrictive way to persons involved in international drug trafficking. For that crime, and that crime only, the international mechanism envisaged should, by contrast, be available on a full-time basis and, if it was well designed, there was, unfortunately, every reason to believe that it would not be idle. The question then arose whether it was legitimate to propose, as the Working Group was nevertheless doing, only one criminal court. Would it not be better to envisage specialized courts, adapted to different international crimes and operating according to modalities which met the particular needs of each one? In his opinion, such a solution would definitely be preferable in the case of transboundary drug trafficking and, most probably, in the case of aggression. In future, the possibility should thus not be ruled out of considering either a diversity of courts or a diversity of methods of operation of a court, depending on the crimes to be tried.

63. In any event, the Working Group had in general come up with constructive and imaginative solutions and he sincerely hoped that the General Assembly would encourage the Commission to continue along the lines that had been indicated, provided that the other possibilities suggested by the Working Group, particularly in that section of part B of the report dealing with applicable law and due process, were not excluded. He therefore agreed with the idea that the Commission should take note of, and possibly approve, the report of the Working Group, without necessarily adopting it.

The meeting rose at 12.50 p.m.

2285th MEETING

Wednesday, 15 July 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Jacobides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetu, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.


[Agenda item 3]

REPORT OF THE WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION (continued)


2. Mr. YANKOV said that the Working Group’s report would serve as a valuable basis for studying the structural, jurisdictional and other issues related to the question of an international criminal jurisdiction. It was a significant step forward in the Commission’s work on the question, although it would of course be an oversimplification of such a complex and difficult problem to claim that the report provided clear and detailed answers to most of the key questions. He welcomed the approach of splitting the document into two parts: part A, containing general guidelines for the Commission’s immediate future work, and part B, containing an in extenso report which formed a background for comprehensive consideration of the main issues involved. There was a certain lack of practical consistency between the two parts, yet part A should be endorsed by the Commission and incorporated in its own report to the General Assembly.

3. The basic propositions set forth in part A should be regarded not as actual decisions taken by the Commission, but as general guidelines which would be subject to further elaboration and adjustment in the light of detailed discussion and of the views expressed by Governments. Some of the points contained basic propositions which required further study, particularly with regard to jurisdictional and institutional issues, which formed the core of the subject. In endorsing them as general guidelines, the Commission should therefore make it clear that they must be further elucidated, in order to pave the way for general acceptance.

4. As to part B, in view of the many unresolved and controversial issues, and the lack of time available to adopt that part of the report paragraph by paragraph, it should form an annex to the Commission’s report and the wording of the first of the recommendations in part A should be amended accordingly. At the present stage, it would be inadvisable to associate the Commission with suggestions and concrete proposals it had not properly considered and adopted, especially since there was as yet no common approach in the Commission to most

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1 For text of the draft articles provisionally adopted on first reading, see Yearbook... 1991, vol. II (Part Two), chap. IV.
of the key issues. A common understanding could only come about through an in-depth consideration of the proposals. With regard to the court's jurisdiction ratione personae, the question of the court's jurisdiction to try crimes under general international law was too vaguely formulated and the concept must be further explored. As for the relationship between the court and the States parties, discussed in the section dealing with applicable law and due process, it was difficult to imagine that any bona fide party to the statute of the court would fail to accept the jurisdictional implications. The second part of the report should therefore be treated differently from the first.

5. Mr. GÜNELY said he paid a tribute to the painstaking work of the Working Group in producing a pragmatic and realistic report which reflected the complexity of the subject-matter and recognized the reserved attitude of States towards an international court with either exclusive or optional jurisdiction.

6. He did not intend to propose amendments to the report, something that would be inappropriate at the present stage. However, he could not agree with the method of establishing the court, as envisaged by the Working Group. Moreover, the list of crimes for which the court would have exclusive jurisdiction should be revised and supplemented; it should include international terrorism and systematic acts of violence against the territorial integrity and political independence of States, and against the right to life of innocent people, as well as certain specific crimes, such as the seizure of aircraft and the kidnapping of diplomats or internationally protected persons. To be effective, the court itself should be placed on at least a semi-permanent footing. He agreed with Mr. Crawford (2284th meeting) that, in a matter as complex as the establishment of a court or other international jurisdictional mechanism, it was necessary to proceed step by step. The Commission should endorse the specific recommendations of the Working Group and should include the in extenso part of the report in its own report to the General Assembly, either in the chapter dealing with the topic as a whole, or in an annex, specifying that it was a useful basis for future work, and that the text remained fully open to discussion.

7. Mr. YAMADA said he was appreciative of the Group's excellent work and of the informative presentation of the report by the Group's Chairman. It was particularly gratifying that the Working Group had addressed many of the questions he had himself raised (2257th, 2259th, 2261st and 2262nd meetings) during the discussion of the Special Rapporteur's tenth report (A/CN.4/442). The Group's general approach was to start with modest and practical proposals, an approach he wholeheartedly supported. He could also, in principle, endorse several of the basic propositions in part A. However, the proposition that the court or other mechanism would not be a standing full-time body, but one which could be brought into operation when required, called for further thought. He understood the reasoning behind the proposition, but criminal proceedings normally required a well-established court. A proposal for an ad hoc court would not be likely to create confidence among States in international criminal justice.

8. Part B of the report provided an extensive and valuable analysis and the conclusions should be scrutinized by experts in criminal law. The issues relating to prosecution must be further elaborated, since the feasibility of establishing a court would ultimately be determined by practical factors of that kind. As a whole, the report was an adequate response to General Assembly resolution 46/54; it contained excellent proposals for the establishment of an international criminal court and sufficient material on the problems involved. It could serve as a valuable basis for discussion in the Sixth Committee, before the Committee decided whether the Commission should be given a new mandate on the subject.

9. At the present stage, it would be difficult for the Commission to adopt the report as part of its own report, because of the differing views among members with regard to the substantive issues raised, and the fact that members preferred to keep an open mind until a later stage. However, he agreed with Mr. Crawford (2284th meeting) that it would be a hollow decision if the Commission were to adopt the report with reservations and without endorsing its contents. He agreed that it should be accepted as it stood, in other words, as the report of the Working Group. Naturally, the Commission would have to take its own decision on the subject-matter. It could do so on the basis of the recommendations contained in part A. For instance, it could decide to transmit the report by annexing it to its own report, with a recommendation to the General Assembly that it should be used as the basis for the Assembly's discussion of the subject. It could, in addition, request the General Assembly to decide whether, and on what basis, the Commission should undertake a new draft of a statute for an international criminal court.

10. Mr. FOMBA noted that the wording of General Assembly resolution 46/54 was close to that used in connection with dispute settlement machinery, since the word "jurisdiction" referred both to judicial and to arbitral procedures. The resolution envisaged a range of possibilities. The Commission was required to scrutinize them from a legal standpoint, with a view to determining to what extent they might undermine State sovereignty. It was for States alone to decide whether any of them was politically feasible.

11. From a philosophical point of view, he favoured the solution of a permanent international criminal court, with compulsory and exclusive jurisdiction to punish the most serious crimes. That would meet a real need of the international community, and the minor inroads into State sovereignty it would entail were a price well worth paying. However, States would have the last word.

12. As to the report, the question was how far the Working Group had succeeded in identifying the various possibilities and in producing detailed technical studies of each one. Having received the report, the Commission could not now challenge its contents. It must now decide, as a matter of urgency, how to approach the General Assembly with the report. Subject to certain reservations regarding substance, he was prepared to join forces with the Working Group, without necessarily adopting the report as it stood, since that would tie the Commission's hands for its future work. He therefore supported
the proposals made by Mr. Razaﬁndralambo, Mr. Barboza and Mr. Pellet (2284th meeting).

13. Mr. de SARAM said he agreed with the proposal that the Commission should merely take note of the report of the Working Group and should annex it to its own report. However, the Commission’s report should also contain a paragraph expressing appreciation of the work done by the Group and drawing attention to the fact that it was no mean achievement. The members of the Group held markedly divergent views, some preferring a permanent institution similar in structure to ICJ, others preferring no court at all, whether ad hoc or otherwise. Yet the Working Group had done what it was supposed to do; it had heard and considered the various opinions, and had sought to reconcile divergencies. It had succeeded in reaching, by consensus, conclusions on the manner in which the Commission and the Sixth Committee could now proceed, if desired, to establish an international criminal court. Moreover, those conclusions took sufficient account of practical realities to attract the widest possible support. Those realities included the question of funding, at a time when resources for global undertakings within the United Nations system were extremely scarce. To many, that consideration had influenced the preference for an ad hoc court. Certainly, if an international criminal court, in the pragmatic sense recommended by the Working Group, were to be established, it would represent a major achievement of the international community and of the United Nations. He therefore endorsed the Working Group’s conclusions, as expressed in part A of the report. Those conclusions should be incorporated into the body of the Commission’s report. In that form, he believed they would receive wide support, and would eventually be confirmed by the Sixth Committee. On that basis, the Commission would be able to begin preparing a statute for the court at its next session.

14. As part B of the report showed, a number of substantive and procedural issues remained, along with logistical problems and the question of funding. However, in view of the constructive way in which the Working Group had proceeded, and in the light of a review of comparable provisions in other statutes, he did not think the Commission need be unduly delayed in the task of drafting the statute of a court. He therefore hoped that an appropriate paragraph or paragraphs could be incorporated in the Commission’s report, to reflect the basic propositions and recommendations made in part A of the Working Group’s report.

15. Mr. JACOVIDES said that the Working Group’s report was one of the main achievements of the Commission’s present session.

16. He felt sure that some members of the Commission, and indeed of the Working Group itself, would have welcomed a less modest report embodying a proposal for a court with compulsory and exclusive jurisdiction, preferably tied to the draft Code of Crimes against the Peace and Security of Mankind already adopted by the Commission on first reading, yet he was sufficiently pragmatic to accept the idea that international law-making—no less than politics—was the art of the possible. The result achieved by the Working Group presented the greatest common ground, though it was undoubtedly modest in scope. It left the door open, however, for subsequent expansion when the proposed criminal jurisdiction was established and proved its worth. Similarly, he could see why, as a concession to political reality, the court should not necessarily be connected with the Code. At the same time, it should not be forgotten that the idea of the court had grown out of the Code—indeed, was now being discussed under the same item. He was prepared to accept as valid the considerations set out in the report on the relationship between a court and the Code, although he had much sympathy for Mr. Bennouna’s suggestion that, on the analogy of the relationship between the Charter of the United Nations and the Statute of ICJ, a State’s acceptance of the Code should automatically entail acceptance of the court’s statute, although not necessarily acceptance of jurisdiction without special agreement.

17. The Commission should accept the recommendations in part A of the report and, with regard to the third of those recommendations, say that it had discharged the duty assigned to it by the General Assembly in 1989 and, in order to proceed further, would require a clear mandate for the preparation of a draft statute. Lastly, the summary and recommendations appearing in part A should form an integral part of the Commission’s own report, which should also take note of the Group’s report as a whole. He had an open mind about the suggestion that parts B and C should be annexed to the Commission’s report. It would have the advantage of making the Commission’s report shorter and also indicate that the Group’s report, taken in its entirety, contained some issues that had not been fully considered by the Commission as a whole.

18. Mr. ROSENSTOCK said that the way in which the issue of an international criminal jurisdiction had been shuttled back and forth for so many years between the General Assembly and the Commission put him in mind of a game of ping-pong played with marshmallows. It indicated the unwillingness of the international community to move ahead with setting up a standing full-time court with compulsory and/or exclusive jurisdiction. Another indication was the failure of the Commission’s previous efforts to secure acceptance.

19. The Working Group’s report was an effort to end the deadlock and suggested a modest way of responding affirmatively to the problem. It did not answer all of the questions: not even the ones it raised. Moreover, there were questions raised by the model suggested by the Working Group that would not exist in a full-time court on the pattern of ICJ.

20. Attention had been drawn to the little time available to deal with the Group’s report. The split-session formula would have provided a satisfactory solution in that respect. At least, the report seemed to demonstrate the utility of the innovative technique of establishing working groups. He agreed with Mr. Yamada about the need for certain issues to be considered by experts in criminal law.

21. The report sufficiently illustrated the issues to enable Governments to decide whether to instruct the Commission to draft a statute. Governments were not
being asked to accept either the modest proposal embodied in the Working Group's report or a bolder version. They were being asked to say whether they would have enough interest to authorize the necessary drafting and, if so, for what type of institution. Drafting should not be authorized unless the world community was favourably disposed, so as not to repeat the experience of the 1950s. He believed the Commission should emphasize that the response to the question of an international criminal jurisdiction would be the most important matter before the Sixth Committee at the forthcoming session of the General Assembly and that considered views on the subject were required.

22. With reference to Mr. Benouna's remarks (2284th meeting), he would point out that the court did not imply the Code of Crimes against the Peace and Security of Mankind, but the Code might well imply the court. He did not believe that that point needed to be addressed at the present stage, but was of the view that the interests of both the Code and the court would be served by treating them separately, for any attempt to deal with them as a single topic was unlikely to produce early results on either.

23. Lastly, it was essential for the Commission to endorse the recommendations contained in part A of the report, and for the Group’s full report to be made available to States Members of the United Nations as an annex to, or as part of, the Commission's own report.

24. Mr. THIAM (Special Rapporteur) said that, as Special Rapporteur and ex officio member of the Working Group, he had hesitated to speak but wished to put forward some personal views on the Group's report. There could be no question of expressing views on the substance, but the report was clearly a compromise. Two trends had become apparent on the issue of an international criminal court. One favoured a traditional-type permanent criminal court with well-defined jurisdiction, and the other took a more modest approach, favouring an ad hoc court with optional jurisdiction. The Group's report steered a middle course and put forward a compromise which did not satisfy either trend, yet left the door open to future developments. The Group's proposals took into account what was realistically possible, leaving out what was perhaps desirable but not feasible at the present time.

25. The only question before the Commission now was the way in which the report was to be adopted. Part A, the more important one, contained the conclusions which would state the Commission's position on the problem. There appeared to be general disagreement about adopting them. At the same time, those conclusions should not be treated as being absolutely definitive, since they contained a number of points that were still controversial. For example, only some members believed that the statute of the future court needed to be formulated as an international treaty. Also, some difficulties had arisen in the matter of the relationship between the draft Code and the court. On that point, he did not at all share the views advanced by Mr. Rosenstock. In the course of his statements as Special Rapporteur, he had had occasion to demonstrate the links between the Code and the court. He was therefore obliged to reserve his position on that issue. Again, he had to express reservations about the question of the possible establishment of an international criminal trial mechanism other than a court, for the Group's report did not explain what type of mechanism was envisaged and he would welcome explanations in that regard.

26. Two views had been expressed with regard to part B of the report. One was that it should form part of the Commission's report, and the other was that it should form an annex. His own preference was for the first solution, but that would mean having to consider part B paragraph by paragraph. Since the Commission did not have the time, he was prepared to accept the second solution, but the Commission should be very careful not to give the General Assembly the impression that it had doubts or hesitations on the matter. It should stress its conclusion that the establishment of an international criminal court was feasible at the present stage in its work.

27. Mr. VILLAGRAN KRAMER said that the problem of an international criminal jurisdiction had been before the Commission for no less than 44 years, so that the time had come to say whether it was possible to go ahead with the project or not.

28. The Working Group had made a commendable effort to arrive at common ground. He appealed to those members who had expressed reservations, and drew their attention to three points in General Assembly resolution 46/54 of 9 December 1991, which set out the Commission's mandate in the matter. The first was that the General Assembly, in resolution 46/54, had asked the Commission to consider "... the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court ...". He would emphasize the use of the word, "proposals", in the plural. The Working Group, in its report, had appropriately presented a whole range of proposals, very aptly described as a "cluster of proposals". The report thus offered a number of different possible solutions, thereby suitably answering the General Assembly's request.

29. The second point was that the General Assembly had also mandated the Commission to consider the establishment of an "international criminal trial mechanism" other than an international criminal court. In response to that part of the resolution, the Group's report put forward a number of suggestions, without expressing a preference for any particular mechanism. It thus enabled the Commission to comply with that part of the General Assembly's mandate.

30. The third point was that the Assembly had requested the Commission to consider the issue of international criminal jurisdiction "... in order to enable the General Assembly to provide guidance on the matter". He believed that representatives on the Sixth Committee would find, on that point as well, that the Working Group had complied with the request.

31. On the question of the relationship between the Code and an international criminal court there had been tensions within the Group and the issue was one on which no unanimous view had been reached. A political decision by the General Assembly would be necessary for the work to go ahead in that regard. As to the appli-
cable law, he shared the conclusion in the report that a formula along the lines of Article 38 of the Statute of ICJ would not suffice. It would need to be supplemented by a reference to other sources such as national law, as well as to the secondary law enacted by international organizations, in particular the United Nations.

32. Lastly, the General Assembly should receive a document that would enable it to decide either that work on the statute of an international criminal court should go ahead or that the subject was not yet ripe for codification. The Group's report contained an adequate response to the relevant General Assembly resolution and it should be approved by the Commission. The conclusions to be adopted should not be watered down in any way.

33. Mr. MAHIOU said that the Working Group had produced a sound document which attested to the positive result achieved by its members. However, as there was so little time available, the Commission could not hold a detailed discussion at that stage on such a voluminous report, particularly as it dealt with a highly sensitive issue. All it could do was to adopt, and if necessary amend, part A of the report, which contained the Group's summary and recommendations. The report should none the less be brought to the attention of the General Assembly and, to that end, should be annexed to the Commission's own report to the Assembly. He agreed that the Group's report should be accepted by the Commission without reservation. That did not mean each and every word of it should be accepted, but rather that the Commission wished to make it clear that the report was a move in the right direction. It raised a number of issues and would enable the General Assembly to take a decision in the light of all the facts. Such an approach did not, of course, preclude a general discussion in the Commission, if only to allow the views of members, particularly those who had not participated in the Working Group, to be reflected in the summary records.

34. In the context of those considerations, he wished to make two remarks, the first of which concerned the link between the Code and the court. There were two positions in that connection both of which should be ruled out, in his view. One was that the court and the Code were closely linked and interdependent, while the other was that they were completely independent. Those positions were unrealistic and really more in the nature of an intellectual exercise. That was not what was expected of the Commission, whose task it was to make practical proposals. There were indeed links between the Code and the court, but the whole problem was to determine the nature of those links. The report dealt with that problem and did so in terms he was prepared to accept, although it was somewhat timid. It should, for instance, have listed a number of crimes, such as aggression, apartheid and colonial domination, among others, to indicate that such crimes could really only be tried by an international criminal court and not by national courts. In the case of certain other crimes, the flexibility that the report allowed for would enable States to decide whether they should in fact be referred to an international criminal court.

35. Secondly, on a more general note, he considered that the views of Mr. Razafindralambo (2284th meeting)—who as President of the Supreme Court of his country had had wide experience in matters of criminal law—on the threefold rejection of compulsory jurisdiction, exclusive jurisdiction and permanent jurisdiction for the international criminal court, merited special attention. Obviously, it would be over-ambitious to contemplate at that stage the institution of an international criminal court which had those three characteristics. At the same time, it was important to bear in mind the need for flexibility in the evolution of the court and, when its statute was drafted, care should be taken not to freeze its provisions in such a way as to preclude that flexibility. In short, the approach adopted should bring States to understand, and accept, that an international criminal court must tend towards those three characteristics. On that basis, he could agree entirely that the report of the Working Group should be annexed to the report of the Commission.

36. Mr. AL-KHASAWNEH said that he would like to know whether the possibility of ICJ discharging the functions of an international criminal court had been one of the options discussed by the Working Group.

37. While he endorsed all of the recommendations in part A of the report, he considered that the proposition that "... in the first phase of its operation, at least, a court or other mechanism should exercise jurisdiction only over private persons, as distinct from States," gave the impression that the position might change later on. If that were so, at what point would the second phase commence? He appreciated that the proposition had been drafted in modest terms to encourage acceptance by States, but it would be unwise to be unduly modest. The fifth of the basic propositions raised a more important question. He agreed entirely that the requirement of precision in criminal justice meant that a more permanent kind of institution would be needed. Again, the test applied in that particular case was the test of availability, with which the Commission had become familiar during its discussion on countermeasures under the topic of State responsibility. In the latter case, however, the availability related to dispute settlement procedures, whereas in the case of an international criminal court the main consideration was that justice should not only be done but should also be seen to be done. If there was some mechanism that was not a standing body but could be brought into operation as and when it proved necessary, could it be said that justice was seen to be done? Also, he felt bound to say that some of the Working Group's recommendations were disconcerting.

38. He agreed that the full text of the report should be made available to representatives in the Sixth Committee. There could, however, be no question of the Commission agreeing to all the points of substance raised in the report before it had discussed them. Possibly, therefore, some way could be found of placing the report before representatives in the Sixth Committee, it being understood that, for the perfectly legitimate reason of lack of time, the Commission had been unable to discuss part B. Subject to those observations, he was prepared to endorse part A of the Group's report.

39. The CHAIRMAN said it had been agreed among the members of the Working Group that ICJ would not be a suitable body to hold criminal trials, as its members
were experts in public international law rather than in criminal law. There had been some disagreement among members of the Group about whether criminal jurisdiction over States should be introduced at a later stage. In particular, some believed that the idea of trying States would be revolutionary at the present stage in the development of international law, as well as being very vague. While some controversy remained as to the way in which the court would actually be established, he considered that it was too late to amend the report or to go into further detail on the subject.

40. Mr. THIAM (Special Rapporteur) said that there had never been any question, in his view, of vesting the international criminal court with jurisdiction to try States. Indeed, at the time when he had prepared his report on that aspect of the draft Code, many delegations in the Sixth Committee had entered reservations on that score. For the time being, it would be best to deal only with the court's jurisdiction to try individuals: any other course would simply open the door to endless debate in the Sixth Committee. He therefore agreed that the part of the Group's report dealing with that could be deleted.

41. Mr. KOROMA (Chairman of the Working Group) said he would plead for the report to be left as it stood, apart from any necessary editorial changes. Some of the proposals it contained did not reflect his own position, but, if the Commission started to tamper with the report, the debate might well be reopened. He agreed with the Chairman's remarks to some extent but not entirely: the Working Group had considered whether ICJ should try criminal cases involving States but had decided against that not only on grounds of competence but for a number of other reasons. As for the question of the stage at which the possibility of indicting States should be considered, one school of thought, to which he belonged, believed it was indeed conceivable that States could be indicted at some appropriate point. In a spirit of compromise, however, he and those who shared his views were prepared to leave the matter open.

42. Mr. AL-KHASAWNEH said he was only partly convinced by the Chairman's explanation, for he did not think that the Commission was in a position to comment on the competence of the members of the ICJ in matters of criminal law.

43. The stage at which States could be brought before an international criminal court appeared to be a question of constructive ambiguity and he would not destroy that ambiguity. However, he still entertained very serious doubts about the fifth basic proposition in part A of the report, but, not wishing to reopen the debate on the matter, would be content if his views were reflected in the summary record.

44. Mr. CRAWFORD said that ICJ was structured to hear cases, as a full court, between States; a major amendment to its Statute would be required to empower it to hear criminal trials. Mr. Al-Khasawneh had none the less touched upon a very important point, for there was a marked tendency towards the fragmentation of the international jurisdictional system. That point could perhaps be considered, however, in relation to any appeal structure. The general idea was that the Working Group's recommendations represented a modest first step and that the Commission could, if need be, consider further possibilities in due course.

The meeting rose at 11.40 a.m.
2. He did not think that the consideration of the report paragraph by paragraph would be particularly useful at the current stage, but, as he had not been a member of the Working Group, he wished to make two brief remarks. The first concerned the possibility of establishing the proposed trial mechanism within ICJ. Admittedly, that solution had drawbacks, but it also had significant advantages. The Court existed already, it had facilities and equipment and its judges were fully capable of dealing with crimes which were, after all, a matter of international law. The possibility could also be envisaged of two or three judges sitting in first instance, with the full Court acting as an appeal court. He still believed that that would be the best solution and he trusted that the Commission would revert to the matter in the future. His other point concerned the relationship between the proposed court and the Code of Crimes against the Peace and Security of Mankind. In his view, it would be difficult to envisage a State becoming a party to the statute of the Court, but rejecting the Code when the court was supposed to try precisely those crimes.

3. Mr. MIKULKA said that he fully endorsed the conclusions of the report, in the preparation of which he had participated. That report and the conclusions it contained were the result of a carefully considered compromise based on a detailed analysis and on the need for realism. It would not have been appropriate for the Working Group to usurp the function of the General Assembly and to comment on the political aspect of the problem, namely, on whether an international criminal court should be established. It had concentrated on the technical aspect, taking as the starting point the common denominator of all the views expressed in the Commission. It had identified the problems which had to be solved if the proposed court was to be established and had indicated possible solutions and even certain preferences. In so doing, it had been strengthened in the view that the best way to proceed was to do so in stages.

4. In the initial stage, the Working Group proposed to adopt an approach that was modest as compared to an idealistic vision of things but certainly not as compared to the current state of international law and its application. It had come to the conclusion that there was no insurmountable technical obstacle to the establishment of an international criminal court and that it was a matter of political will on the part of States. With the adoption of the recommendations set forth in part A of the report, amended if necessary in the light of the discussion in plenary, the Commission would be able to complete the analysis of the possibilities for establishing an international criminal court and to seek a new mandate from the General Assembly with a view to preparing a detailed draft statute. As to the in extenso report (part B), he had no doubt that the Commission would find a satisfactory way of submitting it to the General Assembly, possibly as an annex to its report.

5. Mr. Srénivasa RAO said that he endorsed the conclusions set forth in part A of the report even though he, for his part, would have laid more emphasis on some aspects and displayed more caution with respect to others, particularly regarding the manner in which the conclusions were submitted and the way in which the recommendations to the General Assembly were presented.

For instance, the fifth basic proposition in part A seemed very logical and acceptable, but whether or not it was compatible with the sixth proposition was, in his view, somewhat questionable. Under the system provided for in the fifth proposition, in which there would be no standing full-time body, the actual administration of justice would involve so many interlocking processes and stages at which the impartiality, independence and conformity of the proceedings would on each occasion have to be guaranteed, and a degree of consensus reached among the many parties which would inevitably be involved, that considerable problems would arise—problems that would be avoided if a permanent court was established.

6. There was, of course, the problem of cost, but the figure quoted by Mr. Crawford (2284th meeting) clearly showed that that problem was equally acute in the case of an ad hoc system. It would be pointless to try to disregard the cost factor while seeking a genuinely credible system of criminal justice that would enable acts for which States were already demanding that there should be an international court, to be tried. Given the current international climate, in which States were already prepared to refer certain cases to an international criminal court, if such a thing existed, the Working Group’s proposal seemed unduly cautious, even in the context of the modest and gradual approach that found favour with the Working Group.

7. In submitting to the General Assembly the recommendations which appeared in part A of the report, the Commission was in effect saying to the General Assembly: “This is the scheme we have drawn up and we see no other possibilities; it is for you to tell us if we are wrong”.

In the first place, given the way it operated, the Sixth Committee would not have the time to dissect that scheme and, if need be, to suggest others, and, secondly, it seemed strange, to say the least, for the Commission to refer the burden of proof back to an organ that was seeking its advice. The General Assembly looked to the Commission to place before it the various possibilities for dealing with the matter so that it could make a choice in its capacity as a political body. Clearly, the Working Group had wanted to be firm and definite and had therefore perhaps succumbed to the temptation, which was inevitable in such a case, of disregarding other proposals that might be entirely reasonable and realistic.

Admittedly, in the past the Commission had been taken to task for not defining its position and for being too flexible, but, in the present case, could it honestly be said that the construction in question was the only one possible? He very much doubted that it was.

8. Another point he wished to emphasize concerned the links between the court and the draft Code of Crimes against the Peace and Security of Mankind and between the proposed international criminal court and the United Nations system itself, particularly the Security Council, so far as all matters involving the peace and security of mankind and the definition and determination of aggression were concerned. The mechanism devised by the Commission should complement existing structures and should not result in conflicting jurisdictions. For instance, the international criminal court should be guided by the Security Council in the determination of aggres-
sion, while the Security Council could be guided by the court in the case of the prosecution of a particular person charged with an international crime, without either one necessarily encroaching on the jurisdiction of the other.

9. There were also questions such as the relationship between the court and national systems and mechanisms, universal jurisdiction for some crimes of an international character, and the problem of the applicable law. All those issues should be discussed in greater depth by the Commission when it pursued its work on the subject in the future, for it had to be recognized that, notwithstanding the excellence of the Working Group's report, the ideas set forth in it were not as definitive as might have been desirable. That construction was certainly not the only one that could have been arrived at. In particular, even though the recommendations, and especially the basic propositions, reflected very sound work, they were not entirely above criticism. The Commission could therefore hardly submit that report to the General Assembly as the final conclusion of its work on the subject. It should not be categorical. It should display humility, flexibility and an open mind and should be ready to agree to take a second look at its work if the General Assembly so requested. The report was, after all, no more than a set of proposals and the General Assembly would be the sole judge of what action should be taken on it.

10. He thanked the members of the Working Group again for their valuable contributions and in particular the Chairman of the Working Group, the Special Rapporteur, and Mr. Crawford.

11. Mr. IDRIS said that, as a member of the Working Group and co-author of the report, he had not felt it necessary to speak on the question until now. His silence was not, however, to be interpreted negatively, for the report had his full support, as to both form and substance. He understood entirely the points raised by Mr. Shi (2284th meeting) and the analyses made by Mr. Thiam (2285th meeting). He also appreciated the highly judicious remarks made by certain other speakers and, in particular, by Mr. de Saram (2285th meeting). It was clear that the Working Group's report was the result of a global compromise, but that in no way affected the quality of its work, of which the Working Group could be proud.

12. As to the action to be taken on the report, in his view, it would not be sensible at the current stage to enter into detail with the risk of divesting the report of its substance. The least the Commission could do was, first, to adopt part A and incorporate it into its report, and, secondly, to take note of part B and annex it to its report.

13. If part A was not adopted, the whole idea of the court would be called into question and the General Assembly might be reluctant to commit itself further in that connection.

14. He expressed gratitude to all members of the Working Group for their praiseworthy endeavour and thanked in particular the Chairman of the Working Group, Mr. Crawford, Mr. Rosenstock, Mr. de Saram, Mr. Vereshchetin and the Special Rapporteur for their valuable contributions.

15. Mr. SZEKELY said that the quality of the report before the Commission was evidence of the value of the working group method. In the event, that method had enabled the Commission to respond effectively to the request addressed to it by the General Assembly in resolution 46/54.

16. There was no denying that the report represented a compromise effort, but, as Mr. Mikulka had pointed out, the capacity for conciliation displayed by members of the Working Group was a sign of intellectual maturity and they could be proud of placing before the General Assembly an excellent piece of work, which gave a very full account of the problems involved and the possible solutions and showed that there was no insurmountable obstacle to the establishment of an international criminal court.

17. For his own part, he would perhaps have opted for stronger wording in the case of some of the recommendations. In particular, with a view to expediting matters, he would have liked the words "In the first phase of its operations", which appeared at the beginning of the second of the propositions, also to have been added at the beginning of the fourth and fifth propositions, on compulsory jurisdiction and the standing nature of the proposed international criminal court respectively.

18. That would have made it possible to be more ambitious in the future without in any way disturbing the balance of the recommendations.

19. Another point of greater concern to him related to the jurisdiction referred to in the third proposition. The wording used called to mind the need to enhance the worldwide acceptance of international treaties and that indeed should be one of the Commission's main concerns. If the treaties which defined international crimes were not universally applicable, the result might be legal inequality at the international level, in that nationals of States not bound by such treaties would not come within the jurisdiction of the court in the same way as nationals of States parties. That problem should receive due attention in the coming years.

20. Also with regard to the third proposition the wording of the final sentence was not very felicitous, in his view, as it might discourage States from acceding to the Code. He would have preferred some wording which included the word "independently", so that the Spanish text, for instance, would read: Los Estados deben poder adquirir la condición de parte en el estatuto independientemente de la acción que toman respecto al código.

21. Notwithstanding those few remarks, he considered that the Commission should adopt the report as a whole and should transmit it to the General Assembly.

22. Mr. BENNOUNA said that, unlike Mr. Sreenivasa Rao, he considered that, in adopting the report of the Working Group and transmitting it to the General Assembly, the Commission was certainly not trying to impose its view on the General Assembly and was not being "categorical". The mandate entrusted to the Commission by the General Assembly in resolution 46/54 was very clear. The General Assembly had invited the Commission
...to consider further and analyse the issues raised in its [1990] report... concerning the question of an international criminal jurisdiction, including proposals for the establishment of an international criminal court or other international criminal trial mechanism in order to enable the General Assembly to provide guidance on the matter.

It was on the basis of the options the Commission had placed before it in 1990 that the General Assembly had requested the Commission to tell it how it envisaged a future international criminal court. The report of the Working Group described the Commission's basic approach in that connection, which the General Assembly would be free to accept or reject. If the General Assembly considered that a particular point was unacceptable, the Commission could review that point and, if necessary, make another proposal. It should not be forgotten, however, that the Commission's work consisted mainly of formulating draft articles and it should not be invidious in its recommendations to the General Assembly. It should be all the more clear, since one of the main problems with the establishment of an international criminal court was how to reconcile such a court with the sovereignty of States. The proposals before the Commission afforded the best way, in his view, of reconciling the punishment of international crimes and sovereignty and, to that extent, the report had his complete support.

23. Mr. KOROMA (Chairman of the Working Group), thanking the members of the Commission for their very constructive remarks, said that the views of Mr. Sreenivasa Rao and Mr. Razafindralambo (2284th meeting) in particular would be taken into consideration if the Commission's mandate on the topic was renewed by the General Assembly.

24. As to the substance of the report under consideration, he would have preferred the proposed international criminal court to have wider jurisdiction, but it had been necessary to accept the lowest common denominator.

25. The drafting changes suggested by Mr. Shi (2284th meeting) and the amendments proposed by Mr. Vereshchetin (2284th meeting) to the English text could be taken into consideration if the Working Group could be given a quarter of an hour or so to look at them, after which the procedure proposed by one member of the Bureau concerning the action to be taken on the report could be followed, namely, the Commission would first accept as a basis for its future work the basic propositions enumerated in part A of the Working Group's report and the broad approach which it had indicated and, secondly, it would request the General Assembly to authorize the Commission to prepare a draft statute for an international criminal court and, unless the General Assembly decided otherwise, the work would be conducted along the lines suggested by the Working Group.

26. Mr. CRAWDOWN said he too considered that, if the Working Group agreed to make certain minor amendments to its report to satisfy legitimate concerns which had been expressed, that would then enable the Commission to accept the Bureau's proposal, which would in fact involve its endorsing the report. The problem, however, was that, on the one hand, if the Commission was asked to endorse the propositions in part A, as currently expressed, even in a general way, a number of members would have difficulties. On the other hand, it would be difficult to take account of all the concerns expressed, and particularly those of Mr. Pellet (2284th meeting) and Mr. Bennouna, without disturbing the balance of the report. In his view, therefore, it would be a good idea to suspend the plenary meeting to enable the Working Group to amend part A of the report to reflect the comments made, so that the Commission could then follow the procedure proposed by the Chairman of the Working Group.

27. The CHAIRMAN suggested that the meeting should be adjourned to allow the members of the Working Group and other interested members of the Commission to hold informal consultations.

It was so agreed.

The meeting was adjourned at 11.15 a.m. and resumed at 12.25 p.m.

Cooperation with other bodies (concluded)*

[Agenda item 8]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

28. The CHAIRMAN said that Mr. Villagran Kramer, a member of the Commission, would make a statement as the Observer for the Inter-American Judicial Committee.

29. Mr. VILLAGRAN KRAMER (Observer for the Inter-American Judicial Committee) said that the States of the American continent were all members of OAS, which had its own legal machinery, and formed part of the so-called inter-American legal system. The Committee represented belonged both to OAS and to that inter-American system. As such, it had a threefold function: to prepare draft conventions and international treaties which the States applying the inter-American system and the members of OAS could study and, if necessary, approve (that involved a great deal of work for the Committee, which had prepared a large number of private international law and public international law treaties); to prepare on request special studies for the information of the Permanent Council or the Secretary-General of OAS and Governments; to give advisory opinions—somewhat as ICJ did for the United Nations—which did not have binding force, but which clarified certain points of law.

30. The Commission would no doubt be surprised to hear that the Inter-American Judicial Committee had only 11 members—11 jurists chosen by the General Assembly of OAS from the some 30 countries of which it was made up. They thus represented the main legal systems—the common law of the United States of America, Canada and the English-speaking countries of the West Indies, the Roman law of other countries, and a few other legal systems peculiar to the region. They had been studying more or less the same major areas since the Committee had been established at the beginning of

* Resumed from the 2281st meeting.
the twentieth century—public international law, private international law and conflicts of laws, as well as the legal aspects of some new problems, such as, at the present time, environmental law.

31. With regard to public international law, the Committee was dealing for the time being with three main questions. The first was mutual judicial assistance with a view to the prevention of drug trafficking, in which all the Governments in the region had a great interest. The second question, closely connected to the first, was the enforcement of sentences, which, in the case of the prevention of drug trafficking, had effects at civil law. Supposing, for instance, that a certain drug trafficker was sentenced to imprisonment and his property was confiscated, it still had to be decided what action to take with respect to such assets. That was a fairly straightforward matter in the case of a bank account, but what should be done, for example, with an aeroplane? The Committee was therefore trying to disentangle the problems of the consequences at civil law of criminal law decisions. The third question concerned the establishment of a regional criminal court. The Commission should be aware that the States on the American continent were ready to cooperate in the matter in the case of a bank account, but what should be done, for example, with an aeroplane? The Committee was therefore trying to disentangle the problems of the consequences at civil law of criminal law decisions. The third question concerned the establishment of a regional criminal court. The Commission should be aware that the States on the American continent were ready to progress along that path. A conference had recently been held in Cuba under the auspices of the United Nations and, on the basis of its records, the Committee had drawn up a draft statute for such a court. It was clear that its concerns were close to those of the Commission. When the Commission had approved the report of its Working Group on the subject, it might perhaps wish to authorize him to communicate the contents to the Inter-American Juridical Committee, which would certainly derive benefit from it.

32. The Committee's second main area of activity concerned private international law. That area was all the more fertile because it involved three major legal systems for the settlement of conflicts of law: the 1928USTOMANTE Code, \( \text{\textsuperscript{4}} \) which governed conflicts of laws in the commercial and procedural field, but was not applicable in all countries of the continent; the Montevideo Treaties system, which governed conflicts of laws in commercial and civil matters, but was of special interest to the countries in the southern part of South America; and the English system, as applied in the United States of America, Canada and the English-speaking countries of the West Indies. The Committee had long been responsible for seeking an alignment between those three major systems. It was trying to bring about a significant change in the traditional approach in the region according to which it was the State that determined the law applicable and in fact imposed on individuals the system of its choice. Its aim was thus to make way for the trend towards the strengthening of freedom of choice or, in other words, to transpose into the field of law the very principle of free competition. That was a new approach to international contracts which would mean that the area of public law would be restricted and, conversely, that of freedom of contract enlarged.

33. In the same area, the Committee was currently considering the question of joint ventures, a form of enterprise that was very common in the United States of America and Canada. As it was a legal arrangement which derived from United States case law, there was no general frame of reference within which its two alternatives—the corporation, which was the most frequent, and the contractual association—could be defined in formal terms. In that connection, the Committee was trying to develop a set of regulations in the context of the so-called Bush initiative for the establishment of a free-trade area between the United States of America, Canada and Latin America. The aim was to enable groupings of private interests to be formed through the formation of business or joint ventures in North America, Latin America or exclusively in Latin America. The European Economic Community countries had recognized the right of establishment for themselves, but the legal and administrative area of the Community was far more coherent than that of Latin America, where there was a much less formal structure and it was much more difficult to define the right of establishment.

34. Environmental law was an illustration of the third main area with which the Inter-American Juridical Committee was concerned, namely, that relating to new topics of law. The Committee had approved the Declaration on the American Environment \( \text{\textsuperscript{5}} \) whereby States undertook to protect the natural environment of the continent. With a view to UNCED, they had endeavoured to determine whether it was possible to discern an environmental law for their continent. It was to the Juridical Committee that the task had fallen of studying whether the continent's special ecological characteristics—both favourable and unfavourable—made it possible to devise a completely innovative regime.

35. All of that work had to be considered from the standpoint of a regional approach which was somewhat different from what the Commission generally meant by that term. The American continent knew nothing of the concept of an autonomous regional entity, of a "self-contained" system. All legal thinking in the region was situated within the context of the United Nations, under the auspices of the Charter and the resolutions of the General Assembly, which could be invoked and also applied under the inter-American system. What was involved therefore was a somewhat special legal philosophy, which was governed entirely by the principles of the Charter of the United Nations.

36. The CHAIRMAN, speaking as a member from one of the Western European States, thanked the Observer for the Inter-American Juridical Committee for his very clear account of its work. It was obvious that the Committee was discharging a pilot function in many fields and the valuable contribution made by OAS to the development of the principle of non-intervention was a matter of public law.

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\( \text{\textsuperscript{5}} \) See Annual report of the Inter-American Juridical Committee to the General Assembly of the Organization of American States, OAS document CI/RES.11-10/89.
of record. Yet it should be remembered that States were not isolated entities and that they were not only ready to condone intervention by the international community, but also sometimes expected it to act in the face of situations or events which were in principle a matter of national jurisdiction. That subject was more complex than might have been thought and one on which Mr. Villagran Kramer had just carried out a lengthy and profound study.

37. Mr. BARBOZA, speaking on behalf of members from the Latin American Group of States, said that the statement by the Observer for the Inter-American Juridical Committee once again provided him with an opportunity to welcome the fruitful collaboration established between that very long-standing body and the Commission. Mr. Villagran Kramer’s statement had made it possible to form an idea of the extreme diversity of its concerns, some of which were directly linked to the topics the Commission itself was studying. He had in mind, for example, the work being done by the Committee in the field of public international law on the prevention of the international crime of drug trafficking.

38. Mr. RAZAFINDRALAMBO, speaking on behalf of members from the African Group of States, thanked Mr. Villagran Kramer for a clear and detailed account of the activities of the Inter-American Juridical Committee. Africa had always drawn great inspiration from the struggles and successes of the peoples of South America. He had no doubt that the relations between the Committee and the Commission were destined to develop further in the future.

39. Mr. JACOVIDES, speaking on behalf of members from the Asian Group of States, said that the Inter-American Juridical Committee had won the respect of Latin America and had always had a profound influence on the philosophy and development of international law. The evolution in the activities of the Inter-American Juridical Committee was of great interest to the Commission, as also to the countries from which its members came. He had noted with interest, for example, that the Inter-American Juridical Committee had been working on the question of joint ventures between States. His own country would certainly like to be kept abreast of the progress of its work in that field.

The meeting rose at 1.15 p.m.
2. The second paper contained a proposed decision for adoption by the Commission, which read:

"(c) The court's jurisdiction should be limited to crimes of an international character defined in specified international treaties in force. This should include the crimes defined in the Code of Crimes against the Peace and Security of Mankind (upon its adoption and entry into force). But it should not be limited to the Code. A State should be able to become a party to the statute without thereby becoming a party to the Code; 2"

"(d) The court would be essentially a facility for States parties to its statute (and also, on defined terms, other States). In the first phase of its operations, at least, it should not have compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute is obliged to accept ipso facto and without further agreement;"

"(e) In the first phase of its operations, at least, the court would not be a standing full-time body. On the other hand, its constituent instrument should not be a mere draft or proposal, which would have to be agreed on before the institution could operate. Thus the statute should create an available legal mechanism which can be called into operation when and as soon as required;

"(f) Other mechanisms were suggested and considered, as reflected in part B of this report;

"(g) Whatever the precise structure of the court or other mechanism, it must guarantee due process, independence and impartiality in its procedures."

2 This leaves open the question whether any of the offences defined in the Code should be exclusively within the competence of an international criminal jurisdiction. Some members of the Working Group, at least, believe that the Code is inconceivable without an international criminal jurisdiction, and that it would be desirable, if not essential, to provide that a State party to the Code would thereby accept ipso facto the statute of a court."

2. The second paper contained a proposed decision for adoption by the Commission, which read:

"1. The Commission accepts as a basis for its future work the propositions enumerated in paragraph 4 of part A of the Working Group's report and the broad approach which is set out in the report;

"2. The Commission concludes that:

"(a) through the ninth and tenth reports of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind and the debates thereon in plenary, and through the report of the Working Group, it has concluded the task of analysis of the 'question of establishing an international criminal court or other international criminal trial mechanism', entrusted to it by the General Assembly in resolution 44/39 of 4 December 1989;

"(b) that the more detailed study (which will be annexed to the relevant chapter of the report) confirms the view, expressed earlier by the Commission, that a structure along the lines of that suggested in the Working Group’s report could be a workable system;

"(c) that further work on the issue requires a renewed mandate from the Assembly, and needs to take the form not of still further general or exploratory studies, but of a detailed project, in the form of a draft statute; and

"(d) that it is now a matter for the Assembly to decide whether the Commission should undertake a project for an international criminal jurisdiction, and on what basis."

3. Mr. CRAWFORD (Rapporteur of the Working Group), introducing the changes made to the Working Group's report, said that footnote 2 to the revised version of paragraph 4 reflected Mr. Bennouna's point (2284th meeting) that it would be desirable to make it quite clear that parties to the Code would ipso facto be parties to the statute of the court. The fourth and fifth propositions had been revised in the light of Mr. Szekely's suggestion (2286th meeting) and now contained references to the first phase of the operations of the court, the question of further development being left open. A new sixth proposition, dealing with the question of other mechanisms, had been added, and the references to other mechanisms in the first and fifth propositions as originally drafted had been deleted. Thus, the question would in effect be given separate treatment, and the discussion of the issue of other mechanisms contained in the full report would be incorporated by reference. The revised third proposition now referred to "crimes of an international character defined in specified international treaties in force", to reflect Mr. Vereshchetin's concern on that point (2284th meeting).

4. Adoption of the proposed decision would mean that the Commission accepted as a basis for its future work the propositions enumerated in paragraph 4 of part A of the Working Group's report, as amended, and the broad approach set forth in that report. The Commission would also adopt the four conclusions set forth in paragraph 2 of the decision, which was based on paragraph 9 of part A of the Working Group's report. It was now for the Commission to decide whether it wished to adopt that decision as drafted or in an amended form.

5. Mr. AL-KHASAWNEH said that he still entertained doubts about some of the propositions in the revised version of paragraph 4 of the Working Group's report. In particular, it was regrettable that a role for ICJ had not been expressly envisaged, even as a theoretical possibility. Admittedly, that might create a number of problems and would require an amendment to the Statute of the Court, but a reference should none the less have been made to the possibility. He also had reservations with regard to the fifth proposition, since he could not accept the idea of a court that dealt with criminal justice but was not a full-time standing body.

6. Mr. THIAM (Special Rapporteur) pointed out that, in paragraph (d) of the proposed decision, the words "a project" should be replaced by the words "the project", as had in fact been proposed and accepted.

7. Mr. ARANGIO-RUIZ, agreeing with Mr. Al-Khasawneh, said that he, too, saw no reason why ICJ could not be used, perhaps as a temporary measure. As to the trial of persons responsible for criminal acts, it was one thing to have a standing criminal court and another to have an ad hoc criminal tribunal, which was a
very strange notion to incorporate into the proposed decision. Ad hoc tribunals were conceivable in isolated cases, the Nürnberg Tribunal being a case in point, but that Tribunal had been set up in the very special circumstances of the Second World War and it was to be hoped that there would be no repetition of war on that scale ever again.

8. Mr. PELLET, referring to paragraph 2 (d) of the proposed decision, proposed that the words ‘‘undertake a project’’ should be replaced by the words ‘‘undertake consideration of a project’’. Also, in the French version of the seventh proposition as revised, the words ou d’un autre mécanisme, which had appeared in the original provision, should be reinstated.

9. While he agreed with Mr. Al-Khasawneh and Mr. Arangio-Ruiz, he considered that their concern was met in part by the terms of the sixth proposition, which referred to other mechanisms as reflected in the relevant paragraphs of part B of the Group’s report. In that connection he would draw attention in particular to the reference therein to ICJ. In his view, therefore, the Working Group had not ruled out the possibility of having recourse to that organ.

10. Mr. KOROMA (Chairman of the Working Group) said that the Working Group had indeed considered the possibility of using ICJ as a criminal court, but that would involve an amendment of the Statute of the Court, which, it had been felt, would not be feasible at the present stage. He had no doubt, however, that the Commission would revert to the question in the future. As to the precise nature of the international criminal court, the intention was that it should be a permanent, not an ad hoc, court. As he understood the position, the feeling had been that there would not be enough cases at the outset to require judges to sit full-time, and it would therefore be preferable to empanel them as and when they were needed. Subject to those remarks, he would recommend that the amendments to the Working Group’s report now before the Commission should be adopted.

11. Mr. BENNOUNA said that the words ‘‘should undertake a project for an international criminal court’’, in paragraph 2 (d) of the proposed decision, should be replaced by ‘‘should undertake the elaboration of a statute for an international criminal court’’.

12. Mr. THIAMI (Special Rapporteur) supported that proposal.

13. Mr. VERESHCHETIN said he feared that the introduction of a reference to the statute of the court would alter the substance of the provision.

14. Following a brief exchange of views in which Mr. BARBOZA, Mr. IDRIS, Mr. KOROMA and Mr. YANKOV took part, Mr. CALERO RODRIGUES pointed out that, since a reference to a statute was already made in paragraph 2 (c) of the proposed decision, it was immaterial whether or not such a reference was made in paragraph 2 (d).

15. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt the proposed decision and the revised version of paragraph 4 of the Working Group’s report, as amended.

It was so agreed.

16. The CHAIRMAN said that the Commission had thus concluded its consideration of agenda item 3 on the draft Code of Crimes against the Peace and Security of Mankind.

Draft report of the Commission on the work of its forty-fourth session

17. The CHAIRMAN invited the Commission to consider the draft report on the work of its forty-fourth session, starting with chapter IV.

CHAPTER IV. International liability for injurious consequences arising out of acts not prohibited by international law (A/46/476)

18. Mr. RAZAFINDRALAMBO (Rapporteur), introducing chapter IV of the Commission’s report, said that it consisted of two main parts: part A (Introduction), which dealt with the background to the topic, and part B (Consideration of the topic at the present session), which summarized the discussion in the Commission on the Special Rapporteur’s eighth report (A/46/443). That summary reflected the main trends which had emerged in the discussion, individual opinions having been reflected only in so far as they concerned important issues. Paragraphs 65 to 73 incorporated the decisions reached by the Commission on the basis of the discussions in the open-ended Working Group which had been established to consider certain general issues. The Working Group’s report would be incorporated in the body of the Commission’s report to the General Assembly, and the Commission would therefore be deemed to have endorsed its recommendations.

19. The CHAIRMAN invited the Commission to consider chapter IV paragraph by paragraph.

A. Introduction

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

20. Mr. CALERO RODRIGUES suggested that some form of wording should be added to establish a link between the two main parts of the report, entitled ‘‘Consideration of the topic at the present session’’, and ‘‘Decisions by the Commission’’, respectively.

21. Mr. RAZAFINDRALAMBO (Rapporteur), agreeing with Mr. Calero Rodrigues, suggested that a new subsection 1 entitled ‘‘Consideration of the eighth report of the Special Rapporteur’’ should be inserted under sec-

tion B, and that subsection 6 (Decisions by the Commission) should become subsection 2, the rest of the report being restructured accordingly.

22. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to Mr. Calero Rodrigues' suggestion, as further elaborated by the Rapporteur.

It was so agreed.

1. CONSIDERATION OF THE EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

Paragraphs 5 to 8 were adopted.

(a) General comments

Paragraph 9 was adopted.

Paragraph 10

23. Mr. PELLET said that he was troubled by the use of the word fault (faute) in the third sentence, for it would only give rise to controversy in the Commission. It should be replaced by "failure" or "default" (manquement) or "internationally wrongful act".

24. Mr. BARBOZA (Special Rapporteur) said that, while he might agree with Mr. Pellet's observation, the Commission could not alter what had actually been said in the debate. The paragraph would therefore have to remain as it stood.

Paragraph 10 was adopted.

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

25. Mr. PELLET said that the form of language used in paragraph 12 implied that the act of nationalization lay within the realm of State responsibility. That was simply not the case. To clear up any ambiguity, the words "But all these circumstances", in the fifth sentence, should be replaced by wording which made it clear that that sentence referred only to the latter cases.

26. Mr. PAMBOU-TCHIVOUNDA said that the second sentence of paragraph 12 was difficult to follow. Did the sentence mean that it was difficult to conceive of a legal regime where it would be lawful to inflict harm on someone without the possibility of compensation? The words "provided that compensation was paid" should be replaced by "without the possibility of compensation".

27. Mr. BARBOZA (Special Rapporteur) said that, in accordance with the usual procedure, it was for the member who had made the original statement to request a correction, if he considered that his views had not been accurately reflected.

28. Mr. YAMADA said that, in the English version, the second sentence was an accurate reflection of the views he had expressed at the 2270th meeting. He agreed with Mr. Pellet that nationalization did not fall within the realm of State responsibility.

Paragraph 12, as amended by Mr. Pellet, was adopted.

Paragraph 13

29. Mr. VERESHCHETIN proposed that the first and second sentences should be combined to read: "It was also suggested that the concept of 'international liability' should be clarified, both from the theoretical point of view and from the point of view of determining whether liability ensued because of the risk posed or because of the transboundary harm caused." Following the amended sentence, a new sentence should then be added, reading: "In the discussion, reference was also made to the fact that in a number of national legal systems the concept of liability, as opposed to that of responsibility, does not exist and that this creates additional difficulties for the consideration of this topic, even from a terminological viewpoint."

30. Mr. BARBOZA (Special Rapporteur) said he wished to emphasize that any amendments should reflect what had actually been said during the debate.

31. Mr. RAZAFINDRALAMBO (Rapporteur) suggested that Mr. Vereshchetin should submit his amendment in writing to the Special Rapporteur, on the understanding that it would be accepted by the Commission.

Paragraph 13 was adopted on that understanding.

Paragraphs 14 and 15

Paragraphs 14 and 15 were adopted.

(b) The nature of the instrument to be drafted

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

32. Mr. PELLET said that paragraph 17 did not provide a balanced picture of the debate. According to the paragraph, those members who had advocated an early decision by the Commission on the nature of the instrument being drafted had wished to limit the draft articles to recommendations. However, during the debate the opposite view had also been expressed, namely that the articles should form the basis of a treaty. He proposed, therefore, that the following should be added: "The remark was made, on the other hand, that, inasmuch as the preventive obligations of States were well established in international law, it would be preferable to elaborate a treaty on this subject". He had already discussed the proposed amendment with the Special Rapporteur, who agreed to it.

Paragraph 17, as amended, was adopted.
Paragraph 18

Paragraph 18 was adopted.

(c) Prevention

Paragraphs 19 to 26

Paragraphs 19 to 26 were adopted.

(d) Comments on specific articles

Paragraphs 27 to 64

Paragraphs 27 to 64 were adopted.

Section B.1, as amended, was adopted.

33. Mr. EIRIKSSON said that in his opinion, if section B was subdivided as already decided (see paras. 20-22 above) there might be no need for the subheadings (a) to (i) to paragraphs 27 to 57.

34. Mr. RAZAFINDRALAMBO and Mr. CALERO RODRIGUES said that they endorsed Mr. Eiriksson's remark.

2. DECISIONS BY THE COMMISSION

Paragraphs 65 and 66

Paragraphs 65 and 66 were adopted.

Paragraph 67

35. Mr. EIRIKSSON said that the date on which the Commission had taken the decisions referred to in paragraph 67 should be specified.

36. Mr. CALERO RODRIGUES suggested adding the words: "with reservations by some members" at the end of the paragraph.

37. Mr. EIRIKSSON said that, since the reservations of some members had already been recorded in the report of the Working Group, it would be sufficient to mention the meeting at which the Commission had taken its decisions.

38. The CHAIRMAN said he agreed that the reference, in the report of the Working Group, to the reservations of some members would suffice.

39. Mr. BARBOZA (Special Rapporteur) said it might be preferable to specify the number of the meeting as well.

Paragraph 67, as amended by Mr. Barboza and Mr. Eiriksson, was adopted.

Paragraph 68

40. Mr. KOROMA suggested the addition, in paragraph 68, of a statement that the Commission had now refocused its approach to the topic, so as to include both preventive and remedial measures.

41. Mr. ARANGIO-RUIZ said that the first sentence of paragraph 68 was puzzling: how could the Commission identify the broad area and the outer limits of the topic without deciding on its precise scope?

Paragraph 68 was adopted.

Paragraph 69

42. Mr. PELLET, supported by Mr. BENNOUNA and Mr. PAMBOU-TCHIVOUNDA said that the term remèdes, which appeared for the first time in paragraph 69 of the French version, was not a standard legal term, and should not be used to render the notion of "remedial measures".

43. Mr. KOROMA said he had fundamental reservations about paragraph 69. He suggested amending the first two sentences to read: "Within the understanding set forth in paragraph 68 above, the Commission confirmed that the topic includes both preventive and remedial measures. However, the preventive measures should be considered first..."

44. Mr. VERESHCHETIN queried whether, under the Commission's rules of procedure, it was possible to amend substantive decisions already taken by the Commission. As for linguistic problems, he thought they were better resolved by the secretariat.

45. The CHAIRMAN explained that, although the paragraphs setting out the Commission's decisions on the scope of the topic had already been adopted, there was nothing to prevent the Commission from reconsidering them. However, it might be wiser not to do so, simply for the sake of expediting its work.

46. Mr. KOROMA said he was willing, in that light, to withdraw his amendment.

Paragraph 69 was adopted.

Paragraphs 70 to 73

Paragraphs 70 to 73 were adopted.

Section B.2, as amended, was adopted.

Chapter IV, as a whole, as amended, was adopted.

Organization of work of the session (concluded)*

[Agenda item 1]

47. The CHAIRMAN said that the articles adopted by the Drafting Committee on the topic of State responsibility were now available (A/CN.4/L.472), and the Chairman of the Drafting Committee would introduce them at the Commission's next meeting. He suggested that the

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* Resumed from the 2257th meeting.
Commission should not discuss or act upon the articles at the present stage. Before taking a decision, it should wait until it had before it all of the chapter of part 2 to be devoted to the legal consequences of an international delict, together with the commentaries. Members were free, however, to speak on the general direction of the work.

48. Mr. EIRIKSSON said he hoped the Chairman of the Drafting Committee would make it clear that the draft articles were not being presented to the Commission for adoption, and that they did not form part of the Commission’s report.

49. Mr. SHI said it was deplorable that the Commission was unable to adopt at its current session any of the draft articles completed by the Drafting Committee.

50. Mr. PELLET said that he endorsed that view. The Commission should review its methods of work, in order to move ahead with the draft articles. Another difficulty was that much of the draft report was not yet available.

51. Mr. KOROMA said he, too, was of the view that the Commission ought to be able to submit to the General Assembly the draft articles adopted by the Drafting Committee.

52. After an exchange of views in which Mr. ROSENSTOCK, Mr. CALERO RODRIGUES, Mr. VERESHCHETIN and Mr. PAMBOU-TCHIVOUNDA took part, the CHAIRMAN suggested that after the Chairman of the Drafting Committee had introduced the Committee’s report, the Commission should consider the report by the Planning Group (A/CN.4/L.473).

It was so agreed.

The meeting rose at 12.20 p.m.

2288th MEETING

Monday, 20 July 1992, at 10 a.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. Giney, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, 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.


DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN recalled that, at the previous meeting, the Commission had decided that the articles adopted by the Drafting Committee at the current session on the subject of State responsibility would be introduced by the Chairman of that Committee but would not be discussed or acted upon in plenary at the present stage. Before taking a decision, the Commission would wait until it had before it the whole of the chapter of part 2 on the legal consequences of an international delict as well as the corresponding commentaries. Naturally, members wishing to speak on the general direction of the work could take the floor. He invited the Chairman of the Drafting Committee to report on the Committee’s work.

2. Mr. YANKOV (Chairman of the Drafting Committee) said that the Drafting Committee had held 27 meetings, from 5 May to 15 July 1992. It had had before it draft articles referred to it by the Commission on: (a) State responsibility (draft articles 6 to 10 bis) and (b) international liability for injurious consequences arising out of acts not prohibited by international law (draft articles 1 to 10).

3. Following the recommendation of the Commission, the Drafting Committee had given priority to the consideration and adoption of draft articles on State responsibility, bearing in mind the limited time available and the fact that the Committee had not had an opportunity to deal with draft articles on that topic since the Commission’s thirty-seventh session, in 1986. Furthermore, it had felt that following the report of the Working Group on international liability, the Commission could put forward recommendations which might affect the scope and conceptual approach to the topic, leading to certain changes regarding the priorities to be accorded to the draft articles already referred to the Drafting Committee. Therefore, the Committee had held only two meetings on international liability and its work had been devoted almost entirely to the articles on State responsibility, which took up 25 meetings altogether.

4. In accordance with the decision taken by the Commission at its previous meeting, he would introduce the report of the Drafting Committee as a whole, covering all the draft articles which it had adopted and which appeared in document A/CN.4/L.472, on the understanding that the articles worked on during the present session would not be discussed or acted upon for the time being. Furthermore, he proposed that those draft articles should be reproduced as an annex to the Commission’s report in

* Resumed from the 2283rd meeting.
1 Reproduced in Yearbook... 1991, vol. II (Part One).
order to enable the Sixth Committee to take cognizance of them.

5. The general structure of the draft articles which had been adopted by the Commission in 1975 was in three parts: part 1, on the origin of international responsibility; part 2, on the content, forms and degrees of international responsibility; and a possible part 3, which the Commission might decide to include and which concerned the question of settlement of disputes and the implementation (mise en œuvre) of international responsibility. At its thirty-second session, in 1980, the Commission had provisionally adopted on first reading part 1 of the draft, consisting of 35 articles. At the conclusion of its thirty-seventh session, in 1985, it had provisionally adopted articles 1 to 5 of part 2. At the present session, the Drafting Committee had dealt with the subsequent articles of part 2 and had adopted articles 6 to 10 bis as well as a new paragraph 2 for article 1, the titles and texts of which read:

Article 1

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 6. Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 6 bis. Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances or guarantees of non-repetition, as provided in articles 7, 8, 10 and 10 bis, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the willful act or omission of:
   (a) the injured State; or
   (b) a national of that State on whose behalf the claim is brought which contributed to the damage.

3. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 7. Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation that existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) is not materially impossible;

(b) would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 8. Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 10. Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:
   (a) an apology;
   (b) nominal damages;
   (c) in cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;
   (d) in cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 10 bis. Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

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4 For texts, see Yearbook ... 1980, vol. II (Part Two), pp. 26 et seq.
5 For text, see Yearbook ... 1989, vol. II (Part Two), pp. 81-82.

He wished to thank the Special Rapporteur, Mr. Arangio-Ruiz, for his scholarly cooperation with the Drafting Committee, as well as all the members of the Committee for their contribution to the intense and sometimes heated debate on very complex issues conducted in a spirit of understanding and mutual respect. He was also grateful to Miss Dauchy, Ms. Arsanjani and other members of the secretariat for their valuable assistance to the Committee.

6. The Drafting Committee had a number of remarks to make, article by article, on the texts it had provisionally adopted.
7. The text of article 6 (Cessation of wrongful conduct) was based on the article proposed by the Special Rapporteur in his preliminary report and referred to the Drafting Committee in 1989, at the Commission's forty-first session. The need for an article on cessation of a wrongful act of a continuing character had been explained in the Special Rapporteur's preliminary report and the debate in the Commission had indicated that the majority of members felt that a provision of that nature was necessary.

8. Article 6 dealt with the special situation in which a State was committing a wrongful act of a continuing character. In that connection, he drew attention to article 25 of part 1 (Moment and duration of the breach of an international obligation by an act of a State extending in time). In that article, three types of wrongful acts extending in time had been identified. The first type—described in paragraph 1 of article 25—consisted of the breach of an international obligation by an act of the State having a continuing character. Article 6 was intended to deal only with that type of wrongful act. Logically, in such circumstances, the first claim of the injured State was that the wrongful act should be discontinued. That was also the first obligation the wrongdoing State had to comply with before consideration could be given to legal consequences such as reparation. The Drafting Committee, responding to the views expressed in plenary, had deemed it desirable to have an article specifically dealing with cessation of that type of wrongful act, while indicating that cessation was an obligation imposed on the wrongdoing State by international law independently of any request to that effect by the injured State. The injured State might not be in a position to request cessation or might be under pressure not to make such a request. It was for that reason that the article provided for an obligation of the wrongdoing State rather than a right of the injured State to request cessation. The article had also been drafted in the light of the distinction the Commission had drawn in the framework of the topic between primary and secondary rules. Article 6 in fact sought to revive the primary rule which had been violated or the operation of which had been suspended by the wrongful act. The "without-prejudice" clause at the end of the article was intended to make it clear that compliance with the obligation of cessation in no way exonerated the wrongdoing State from any responsibility it might have already incurred as a result of its wrongful act. Consequently, a right of the injured State under the preceding articles on the consequences of a wrongful act remained intact.

9. The present text of article 6 did not differ much from that originally proposed by the Special Rapporteur. Some drafting changes had been made for the sake of clarity: for example, the words "action or omission" in the original text had been replaced by the word "conduct", which was the term used in article 3 of part 1 to cover action or omission. The Committee had decided to retain the expression "wrongful act having a continuing character" because it was to be found in part 1, for example in article 25. The word "remains" in the original text had been replaced by "is", which was more appropriate in a legal text. The "without-prejudice" clause now appeared at the end of the article.

10. The title of the article "Cessation of wrongful conduct" was shorter than the one proposed by the Special Rapporteur and used the same terminology as the article itself.

11. Regarding the place of article 6, as the Special Rapporteur had indicated in his preliminary report, cessation of wrongful conduct was not in fact a legal consequence. Factually and logically, it was the first step taken in respect of a wrongful act of a continuing character prior to the imposition of any legal consequence. That was why, in the view of the Drafting Committee, article 6 could be placed in the opening section of part 2 rather than in the section on the substantive consequences of internationally wrongful acts.

12. During the discussion of article 6 in the Drafting Committee, it had become clear that, from the standpoint of international law and the interest of the injured State, three issues arose when a wrongful act was committed: first, the cessation of the wrongful act; second, the resumption of the primary obligation by the State that had committed the wrongful act; and third, the legal consequences arising from the wrongful act, such as reparation.

13. The issue of cessation could only arise, as already explained, in the context of wrongful conduct of a continuing character and that issue was covered by article 6. The second and third issues, however, namely the resumption of the original obligation and the legal consequences, arose in respect of all wrongful acts, whether or not they were of a continuing character. The Drafting Committee had therefore found it desirable to have a general saving clause concerning the second and third issues and to place it at the beginning of part 2, on legal consequences. It had therefore added a paragraph 2 to article 1 of part 2 that applied to all wrongful acts. Its provisions were without prejudice to the various possibilities which could be characterized as exceptions to the general rule, such as the choice open to the injured State of waiving its right to continued performance of the primary obligation.

14. With regard to article 6 bis (Reparation), in examining the substantive legal consequences of an internationally wrongful act, namely the articles on restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, the Drafting Committee had come to the conclusion that it would be more appropriate to have a general chapeau article on the concept of reparation, which would list the various forms of reparation and regroup the substantive legal consequences of a wrongful act and clarify their relationship with one another.

15. Article 6 bis consisted of three paragraphs. Paragraph 1 contained three basic ideas: (a) the injured State was entitled to full reparation; (b) the forms of reparation were restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, as provided in the subsequent articles; and (c) full reparation could be achieved by one, or a combination of several forms of...
reparation. It was perhaps useful to explain those three ideas one by one.

16. The first was the entitlement of the injured State to full reparation. In the Committee’s view, the function of reparation was, as stated by PCIJ in its decision in the Factory at Chorzow case, to "wipe out" as far as possible all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the wrongful act had not been committed. The reference to "full reparation" should therefore be understood in that sense.

17. The second idea in paragraph 1 was to indicate the types of remedies that were available to the injured State in accordance with the provisions setting forth those remedies. That meant that the entitlement of the injured State to receive restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition was governed by the articles in question.

18. The third idea expressed in paragraph 1 was that full reparation could be achieved by one form of reparation only or by a combination of several such forms. The words ‘either singly or in combination’ were intended to convey that idea and to make it clear that sometimes full reparation had to be achieved through a combination of various forms of reparation.

19. Paragraph 2 of article 6 bis corresponded to paragraph 5 of article 8 as originally proposed by the Special Rapporteur, which had dealt with the possibility that the damage might be due to causes other than the internationally wrongful act, and had done so in the sole context of compensation, since it provided that in the event of a plurality of causes the compensation must be reduced accordingly.

20. The Drafting Committee had felt that the approach reflected in the original paragraph had the major drawback of lumping together a series of hypotheses which called for separate treatment. The Committee had identified four such hypotheses: first, contributory negligence, namely the possibility that the damage might be partly due to the negligence or to a deliberate act or omission of the injured State or of one of its nationals; that was the hypothesis covered in paragraph 2 of article 6 bis as now drafted; the second hypothesis concerned the possibility that an independent cause unknown to the wrongdoing State might have aggravated the harm that would have otherwise resulted from the wrongful act. The Drafting Committee had been of the view that, in that case, the wrongdoing State should be liable for all the harm caused, irrespective of the role which external causes might have played in aggravating the harm. In its opinion, that type of situation did not call for a specific provision, particularly in the light of the principle of full reparation set forth in paragraph 1, and should simply be covered in the commentary.

21. The third of the hypotheses identified by the Drafting Committee concerned the concurrent wrongdoing of several States. It raised very complex problems and was furthermore under consideration in ICJ. The Committee had therefore decided to leave it in abeyance.

22. The fourth hypothesis was the possibility that the damage might have been aggravated as a result of the negligence or wilful conduct of one or more of the injured State’s nationals. If, for example, State A had caused a flood in State B and if, in State B, the water had spread into a store of radioactive substances where the safety standards had not been observed and it had become radioactive as a result, should State A be under an obligation to provide reparation for the radioactivity damage? The Committee had agreed that that problem should be given further thought by the Special Rapporteur and should be considered again at a later stage.

23. As to the hypothesis dealt with in paragraph 2 of article 6 bis, namely the case where negligence or a deliberate act or omission had contributed to the damage, the Drafting Committee had dealt with the issue in the context of article 6 bis rather than in the context of article 8 as originally proposed by the Special Rapporteur because, in its opinion, contributory negligence could conceivably come into play in the context of forms of reparation other than compensation.

24. The Committee had furthermore considered that, instead of providing, as did the original paragraph, that in the case concerned “the compensation shall be reduced” — an approach which was inconsistent with the principle of full reparation set forth in paragraph 1 of article 6 bis — it was better to make contributory negligence one of the elements to be taken into account in determining the injured State’s entitlement.

25. The text of the paragraph itself was self-explanatory. The phrase “contributory negligence” which had appeared in the Special Rapporteur’s original text had been replaced by “the negligence or the wilful act or omission . . . which contributed to the damage” — a formulation based on language to be found in article VI, paragraph 1, of the Convention on International Liability for Damage Caused by Space Objects. The Committee had felt that the term “contributory negligence“ had two drawbacks: being borrowed from the common law system, it was not easily understood in other legal systems, and secondly, it lent itself to a restrictive interpretation excluding deliberate acts or omissions.

26. Lastly, the Drafting Committee had deemed it useful to provide in subparagraph (b) for cases where negligence or a wilful act or omission of a national of the injured State on whose behalf the claim was brought had contributed to the damage. Such a circumstance should affect the amount of the reparation to which the injured State was entitled, the underlying idea being that the position of a State which espoused a claim must not be more favourable than would be the position of its national if he could bring the claim himself.

27. Paragraph 3 of article 6 bis dealt with the impact of internal law on the obligation of the State which had committed an internationally wrongful act to make reparation, an issue dealt with in paragraph 3 of the text originally proposed by the Special Rapporteur in his preliminary report for article 7. Examining the matter, the Drafting Committee had reached the conclusion that the

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8 P.C.I.J., Series A, No. 17, judgment of 13 September 1928, p. 47.
question of the relationship between the internal law of the State and its international obligation to provide reparation did not arise only in the context of restitution in kind. In practice it had usually been in connection with restitution in kind that the wrongdoing State had invoked its internal law and that courts had to deal with the question, but the issue could equally arise in connection with other forms of reparation. The Drafting Committee had therefore deemed it preferable to deal with internal law problems in the chapeau article which was of a general nature. As to substance, the paragraph stated the general principle that the State which had committed an internationally wrongful act could not invoke its internal law as justification for failure to provide reparation. The concept of reparation was, of course, to be understood in the light of paragraph 1. The text originally proposed by the Special Rapporteur as paragraph 3 of article 7 had been slightly amended for the sake of clarity and with a view to making the principle applicable to all forms of reparation. The present wording was patterned on that of article 27 of the Vienna Convention on the Law of Treaties.

28. As for the title of the article, the word “Reparation” had appeared to the Drafting Committee to be the most appropriate to cover restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition.

29. Article 7 (Restitution in kind) was the first of the substantive provisions on the legal consequences of a wrongful act. Like article 6, it had been proposed by the Special Rapporteur in his preliminary report and had been referred to the Drafting Committee in 1989, at the Commission’s forty-first session. It would be recalled that, in his preliminary report, the Special Rapporteur had explained that, under customary international law, the function of reparation was to wipe out all the consequences of a wrongful act. As explained in connection with article 6 bis, there were four ways of achieving that result, namely restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. Those various forms of reparation were the subject of articles 7, 8, 10 and 10 bis and represented the substantive legal consequences of a wrongful act.

30. Article 7 dealt with the very basic remedy available to the injured State, namely recovering what had been taken from it or reinstating the right of which it had been deprived. The article as originally proposed by the Special Rapporteur had consisted of four paragraphs, but the Drafting Committee had thought that too many important ideas had been encapsulated in a single article. It was better to focus on the issues exclusively relevant to restitution in kind and to move those which were also relevant to other forms of reparation to the chapeau article, or to a separate article. Consequently, only the first two paragraphs of article 7 as proposed by the Special Rapporteur had been kept in the provision now under consideration.

31. Article 7 as recommended by the Drafting Committee consisted of an opening sentence followed by four subparagraphs. The opening sentence contained two elements: (a) the right of the injured State to obtain restitution in kind; and (b) the definition of restitution in kind. Subparagraphs (a), (b), (c) and (d) dealt with the exceptions to the right of the injured State to obtain restitution in kind. The opening sentence merged paragraphs 1 and 2 of the Special Rapporteur’s original proposal. The Committee had taken into account the views expressed by the members of the Commission in the plenary and other issues had also come up during the drafting exercise.

32. Three substantive issues should be mentioned in regard to the opening clause: first, restitution in kind was a remedy to which an injured State was entitled. The article was formulated accordingly. Instead of providing, as did the original text, for a right to claim restitution it stated that “the injured State is entitled to obtain” restitution in kind; secondly, as proposed by the Special Rapporteur, the opening paragraph had not contained any definition of restitution in kind. Considering the uncertainties surrounding that concept, the Drafting Committee had found it prudent to define it, so that restitution in kind was the “re-establishment of the situation that existed before the wrongful act was committed”; thirdly, there was the question of the time-frame to which restitution in kind should correspond. The Drafting Committee had had the option of providing either for re-establishment of the situation prior to the occurrence of the wrongful act or for re-establishment of the situation that would have existed if the wrongful act had not been committed. In the first case, the point in time to be taken into consideration was the time when the commission of a wrongful act had started, and in the second it was the time of the settlement of the dispute. The Drafting Committee had preferred the first alternative for two reasons: (a) factually it was only the situation that had existed before the wrongful act was committed that could be accurately assessed. What the situation would have been if the wrongful act had not been committed was a matter of speculation; and (b) restitution in kind had often to be supplemented by compensation for all the negative consequences of the wrongful act to be wiped out. In practice, full reparation was usually achieved by combining restitution in kind and compensation. For those reasons, the Drafting Committee had chosen to define restitution in kind as the re-establishment of the situation that had existed before the wrongful act was committed. With that definition, there might be an overlap between article 7 and article 6 (Cessation of wrongful conduct), taken together with paragraph 2 of article 1 of part 2 as introduced earlier. That could occur, for example, in the violation of some treaty obligations where the injured State might have suffered only legal injury with no other damage. In such cases, cessation of the wrongful act and reinstatement of the treaty obligation might suffice to re-establish the situation that had existed before the occurrence of the wrongful act. That overlap, however, would not interfere with the proper operation and the application of those articles.

33. The right of the injured State to obtain restitution in kind was not unlimited: it was subject to the exceptions listed in subparagraphs (a) to (d). In that regard, the last phrase of the chapeau said “provided and to the extent that restitution in kind”, which made it clear that if restitution in kind was only partly excluded under subparagraphs (a), (b), (c) or (d), then that part of it which was not covered by the exceptions was due.
The first exception, contained in subparagraph (a), was that of material impossibility. The qualifying word "material" should be understood in the sense of physical impossibility. "Material impossibility" was a broad formula, but it did not include legal impossibility. It referred to situations in which, for example, the object that was taken from the injured State had been destroyed or damaged or was no longer in the possession of the wrongdoing State and could not be recovered.

Under the second exception, contained in subparagraph (b), the injured State was not entitled to restitution in kind if that form of reparation would involve a breach of an obligation arising from a peremptory norm of general international law. The injured State would therefore have to opt for another form of reparation. The wording adopted by the Drafting Committee was identical to that proposed by the Special Rapporteur.

The third and fourth exceptions dealt with the concept of "excessive onerousness". It would be recalled that, in the Special Rapporteur's proposal, one subparagraph provided for an exception based on onerousness and another subparagraph defined the concept in question. The Drafting Committee had considered that the concept of excessive onerousness was not felicitous, and was presented in a way which tipped the scales in favour of the wrongdoing State. It had therefore opted for the solution reflected in the present text, that was to say, not mentioning the concept of onerousness at all, and instead, covering the point under the exceptions to restitution.

As to the meaning of the expression "excessively onerous", the Drafting Committee agreed with the Special Rapporteur that the concept should be understood as involving a comparison between the situation of the wrongdoing State and that of the injured State. There were two ways of making such a comparison. One way was a comparison between the loss that the State which had committed an internationally wrongful act suffered in making restitution in kind and the benefit that accrued to the injured State in obtaining restitution instead of other forms of reparation. The other way was a comparison between the loss suffered by the wrongdoing State in making restitution and the loss suffered by the injured State in not obtaining restitution. Under subparagraph (c), restitution had to be granted if it did not involve a burden out of all proportion to the benefit that the injured State would gain from obtaining restitution in kind instead of receiving compensation. The phrase "a burden out of all proportion" indicated that there must be a gross disproportion between the burden which restitution in kind would place on the wrongdoing State and the benefit which the injured State would derive from restitution in lieu of compensation. The proposed formula relieved the wrongdoing State of the burden of restitution in kind only if the injured State could obtain sufficient and effective reparation through payment of compensation. It involved a comparison between the benefit the injured State would derive from restitution in kind and the benefit it would derive from compensation. Some members of the Drafting Committee had been concerned that the subparagraph might involve subjective assessments.

Subparagraph (d) provided that a State which had committed an internationally wrongful act was not bound to provide restitution in kind if that would seriously jeopardize its political independence or economic stability, whereas the injured State would not be similarly affected, that was to say that its political independence and economic stability would not be jeopardized to the same degree if it did not obtain restitution in kind. In a situation where restitution in kind would endanger the political independence or economic stability of the wrongdoing State, but the absence thereof would similarly affect the injured State, then, of course, the interest of the latter State would prevail and restitution in kind would be required. It would be noted that the comparison in subparagraph (d) was between restitution in kind on the one hand and other forms of reparation on the other. The determination under that subparagraph would have to be made on the basis of the factual situation, as in the case of subparagraph (c). The Drafting Committee was aware that subparagraph (d) catered for exceptional situations; it was, however, convinced that such a provision met a concern shared by many States and therefore served a useful purpose. The title of the article was the one proposed by the Special Rapporteur.

As far as article 8 (Compensation) was concerned, in paragraph 1 the Drafting Committee had taken as a starting point the first of the two alternatives9 proposed by the Special Rapporteur, which it had viewed as conveying the same idea as the second but in simpler terms.

The phrase "is entitled to obtain" was modelled on the opening phrase of article 7. There again, the word "obtain" made it clear that the provision was intended to secure the substantive right of the injured State to obtain compensation, not the procedural right to claim compensation.

The Drafting Committee had eliminated the word "pecuniary", which, in its view, unduly restricted the form which compensation could take (for instance, in the form of fungible goods such as oil or livestock).

The phrase "caused by that act" indicated that there must be a causal link between the act and the damage. That requirement was expressed in paragraph 4 of the article as originally proposed by the Special Rapporteur. The Drafting Committee had thought that "caused by that act" conveyed the idea much more succinctly and without any loss in precision—since the phrase "an uninterrupted causal link" contained in the original text did not really provide clear guidance as to the nature of the link required. Paragraph 4 had thus been eliminated. The commentary would, however, elaborate on the requirement of a causal link. The last clause, "if and to the extent that the damage which the injured State has suf-

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9 See 2280th meeting, footnote 13.
fered is not made good by restitution in kind”, clarified the relationship between restitution in kind and compensation as forms of reparation. The word “if” catered for the possibility that restitution in kind might be entirely ruled out either on the basis of subparagraphs (a) and (d) of article 7 or because the injured State preferred to have reparation provided entirely in the form of compensation.

43. The words “to the extent that” covered a second set of hypotheses, the first one being that restitution in kind was only partly possible under article 7, and the second, that the injured State had opted for a combination of restitution in kind and compensation. Under all hypotheses, the injured State was entitled to obtain full reparation in accordance with paragraph 1 of article 6 bis.

44. Finally, the Committee had eliminated the last clause of the Special Rapporteur’s text “… in the measure necessary to re-establish the situation that would exist if the wrongful act had not been committed”. The reason was that, as made clear by article 7, re-establishment of the situation prior to the commission of the wrongful act was actually a function of restitution in kind, not of compensation.

45. The Drafting Committee had devoted some time, in its consideration of article 8, to the question dealt with by the Special Rapporteur in paragraph 4 of his article 7 (Restitution in kind), namely the question of the choice open to the injured State between restitution in kind and compensation or a combination of both. Since both articles 7 and 8 were couched in terms of an entitlement of the injured State, the Drafting Committee had not found it necessary, in the case of a bilateral situation, to have a specific provision on the question, particularly in the light of the inclusion in paragraph 1 of article 6 bis of the phrase “either singly or in combination”. The Committee was aware, however, that where there was a plurality of injured States problems might arise if the injured States opted for different forms of remedy. It was of the view that that question was part of a cluster of issues which arose when there were two or more injured States which might be equally or differently injured. That question had implications in the context of both substantive and instrumental consequences and the Committee intended to revert to it when it dealt with instrumental consequences.

46. Paragraph 2 of article 8 combined the ideas contained in paragraphs 2 and 3 of article 8 and in article 9 (Interest), originally proposed by the Special Rapporteur. The Drafting Committee had found that those ideas could be expressed very succinctly by indicating what compensation should cover for the purposes of article 8.

47. The Commission would remember that, in the Special Rapporteur’s approach as reflected in paragraph 2 of his article 8, compensation was to cover the moral damage sustained by the nationals of the injured State. The Drafting Committee had taken the view that the relationship between the injured State and its nationals was a primary rule which had no place in the section under consideration. It had retained the generally accepted concept of “economically assessable damage”. As he had previously explained, the requirement of a causal link between the damage and the internationally wrongful act was provided for in paragraph 1, and had therefore not been repeated in the definition of the term “damage”.

48. The last part of the paragraph, reading “and may include interest and where appropriate, loss of profits”, corresponded to article 8, paragraph 3, and article 9 as originally proposed by the Special Rapporteur. The Committee was aware of the controversies on such issues as the method of assessment of loss of profits, the question whether interest and compensation for loss of profits were mutually exclusive or could be combined and the dates from and until which interest should accrue. The Committee was, however, of the view that it would be extremely difficult to arrive at specific rules on such issues that would command a large measure of support, particularly as practice was extremely varied in all those matters. It had therefore felt it preferable to state a general principle, couched in quite flexible terms, and leave it to the judge or the third party involved in the settlement of the dispute to determine in each case whether interest and/or compensation for loss of profits should be paid. The decisive element in reaching a decision on those points was, of course, the necessity of ensuring “full reparation” of the damage as provided in article 6 bis.

49. In the text before the Commission, interest and compensation for loss of profits were not placed on an equal footing. Although the word “may” indicated that interest would not automatically be paid, the proposed text, by qualifying the reference to loss of profits by the phrase “where appropriate”, recognized that interest was more often applicable than loss of profits. The text also left open the question whether both interest and loss of profits could be covered by the compensation in a given case.

50. The title of the article, which, as proposed by the Special Rapporteur, had read “Reparation by equivalent”, had been replaced by the more generally understood term “Compensation”.

51. Lastly, owing to lack of time the Drafting Committee had been unable to consider in depth whether some of the exceptions listed in article 7, were relevant in the context of article 8. It intended to revert to that question at a later stage.

52. Article 10 (Satisfaction) also formed part of the articles referred to the Drafting Committee at the Commission’s forty-second session, in 1990. The text proposed by the Special Rapporteur had dealt with satisfaction and guarantees of non-repetition. In the Drafting Committee’s opinion, there was a considerable difference between those two notions. Satisfaction was granted for damage caused as a result of the wrongful act, whereas guarantees of non-repetition usually bore no relation to the damage caused and could be granted in certain cases even when reparation had been made for the whole of the damage. The Committee had therefore decided to
deal with satisfaction and with guarantees of non-repetition in separate provisions, namely articles 10 and 10 bis.

53. Article 10 therefore dealt only with satisfaction. There were differences between the draft now proposed by the Committee and the one proposed by the Special Rapporteur, in terms of both structure and content. As to structure, the article proposed by the Special Rapporteur had comprised four paragraphs: paragraph 1, on the types of damage for which satisfaction would be granted and the forms that satisfaction could take; paragraph 2, on the relation between the obligation breached and the forms of satisfaction; paragraph 3, on situations where a declaration on the wrongfulness of the act by a tribunal would be considered an appropriate form of satisfaction, and finally, paragraph 4, indicating that satisfaction could not take a form that was humiliating to the wrongdoing State.

54. Article 10 as proposed by the Drafting Committee consisted of only three paragraphs. Paragraph 1 dealt with the circumstances in which satisfaction could be obtained, paragraph 2 with the various forms of satisfaction, and paragraph 3 with unacceptable demands for satisfaction.

55. As to substance, there were also differences between the present text and the one proposed by the Special Rapporteur. In the Special Rapporteur’s version, article 10 had been drafted in terms of an obligation by the State which had committed an internationally wrongful act to provide satisfaction. It furthermore limited the availability of that form of remedy to cases in which the wrongful act caused “a moral or legal injury not susceptible of remedy by restitution in kind”. The prevailing view in the Drafting Committee had been that there could be circumstances in which a form of satisfaction was more important to an injured State than restitution or compensation if—and it was an important proviso—and to the extent it was necessary to provide full reparation. That view was not, however, held by all members of the Drafting Committee. A few members had felt that satisfaction should be made available only in the case of moral damage. They did not agree with the article as drafted, but did not object to its adoption.

56. The Drafting Committee had formulated article 10 in terms of a right of the injured State to obtain satisfaction. While recognizing that in practice satisfaction was granted in most cases for moral damage, the Drafting Committee had not wished to preclude its application to other forms of damage. That understanding was reflected in paragraph 1, which provided that the injured State was entitled to obtain satisfaction “for the damage, in particular moral damage” caused by the wrongful act. Also, the Committee had not wished to expand the scope of application of satisfaction. In its view, satisfaction, if granted for material injury, replaced restitution in kind or compensation. Therefore, an injured State could not claim satisfaction for damage for which it had already obtained compensation or restitution. The phrase added at the end of the paragraph, “if and to the extent necessary to provide full reparation”, was intended to convey that understanding. The word “if” was meant to indicate that there could be circumstances in which satisfaction might not be granted. The phrase “to the extent necessary to provide full reparation” served to avoid the possibility that the injured State might be given remedy twice for the same damage—in fact to prevent “over-compensating” the injured State. In the view of the Drafting Committee, that was a point which the commentary to the article should explain in greater detail.

57. Paragraph 2 provided an exhaustive list of the forms of satisfaction. Subparagraphs (a) and (b) maintained forms of satisfaction proposed by the Special Rapporteur. Subparagraph (c) dealt with what was known in common law as “exemplary damages”, in other words, damages on an increased scale awarded to the injured party over and above the actual loss, where the wrong done was aggravated by circumstances of violence, oppression, malice, fraud or wicked conduct on the part of the wrongdoing party. The purpose of that type of remedy was to set an example. The Drafting Committee had not used the term “exemplary damages” because the term did not seem to have an equivalent in other languages. It had decided instead to spell out the content of the concept. The commentary would explain that subparagraph (c) was intended to express the meaning of “exemplary damages”. Again, in the Committee’s view, it was a form of satisfaction that was available only in special circumstances. The words “in cases of gross infringement” was intended to convey that idea by setting a high threshold for availability of that type of satisfaction.

58. Subparagraph (d) provided for the punishment of responsible individuals as a form of satisfaction. The Committee had made some changes in the formulation proposed by the Special Rapporteur in order to make it applicable to both persons and groups and also to both State officials and private individuals. Under subparagraph (d), if a wrongful act was committed as a result of the serious misconduct of State officials or the criminal conduct of individuals, the injured State could request the punishment of those persons as a form of satisfaction. The subparagraph was constructed so as to make it clear that criminal conduct was punishable whether it was to be ascribed to State officials or to private individuals, whereas disciplinary action would of course be limited to officials.

59. The Committee was concerned that the application of subparagraph (d) should not be too broad in scope. Because of the special nature of that form of satisfaction it should be available only in very special circumstances. If the scope of application of the subparagraph were not limited, the result would be too much interference in the internal affairs of States. For that reason, the word “serious” had been added to qualify the word “misconduct” of officials. In the Committee’s opinion, the commentary should explain the special nature of that form of satisfaction and indicate that it was available only in rare circumstances.
could be elaborated on in the commentary.

Accordingly, form the subject of a separate provision. It would be noted that the word “humiliating” which had appeared in the Special Rapporteur’s proposal had been replaced by “impairing the dignity”, which the Committee considered more appropriate. The reference to “violation of ... sovereign equality or domestic jurisdiction” in the paragraph proposed by the Special Rapporteur had also been deleted; the Committee had feared that those safeguards might be unreasonably used by the wrongdoing State to refuse to provide satisfaction. The paragraph as drafted provided sufficient protection for the wrongdoing State.

The Drafting Committee had deleted paragraph 2 as contained in the original proposal by the Special Rapporteur. That paragraph had indicated that the choice of the forms of satisfaction should be made taking into account the importance of the obligation breached and the existence of a degree of wilful intent or negligence of the wrongdoing State. In the opinion of the Drafting Committee, the idea contained in the paragraph was already incorporated in the new paragraph 2 of article 10, particularly since the words “full reparation” at the end of paragraph 1 would avoid the possibility of over-compensating the injured State. The commentary to the article was a better place to reflect that idea in greater detail.

The Committee had also deleted paragraph 3 of the Special Rapporteur’s proposal. That paragraph had indicated that a declaration of wrongfulness of the act by a competent international tribunal could in itself constitute an appropriate form of satisfaction. The Committee had considered that, if the States concerned could not solve their dispute, the matter went to a tribunal and it would be up to that tribunal to declare that the wrongdoing State had committed a wrongful act. Such a declaration could not by itself be regarded as a form of satisfaction. For those reasons, the Committee had deleted the paragraph. Of course, the deletion of that paragraph, did not, he wished to emphasize, prevent a tribunal from making such a declaration, or an injured State demanding such a declaration, as a form of satisfaction. Perhaps that point could be elaborated on in the commentary.

The title of the article corresponded to the contents and read “Satisfaction”.

As to article 10 bis (Assurances or guarantees of non-repetition), the Drafting Committee had considered that assurances or guarantees against repetition were not, strictly speaking, a form of reparation and should, accordingly, form the subject of a separate provision. It had also felt that assurances and guarantees of non-repetition were a rather exceptional remedy which should not be made available to every injured State, particularly in the light of the broad meaning of “injured State” under the terms of article 5 of part 2.

The words “where appropriate” were intended to give the article the necessary flexibility in that respect and, in effect, left it to the judge (or other third party called upon to apply the rules) to determine whether, in the particular instance, it was justifiable to allow for assurances or guarantees of non-repetition. The conditions for granting such a remedy should, for instance, be that a real risk of repetition existed and that the claimant State had already suffered a substantial injury. The Drafting Committee had considered that perhaps that point should also be elaborated on in the commentary to be submitted by the Special Rapporteur. The text was otherwise self-explanatory and did not call for further clarification.

He wished to express his general agreement with the guidelines concerning the composition and working methods of the Drafting Committee proposed by the Planning Group (A/CONF.41/473/Rev.1) and also add a few general observations, based on the Drafting Committee’s experience, including at the present session.

First, the Commission should consistently apply the rule, so often mentioned on various occasions, of referring to the Drafting Committee only articles which had been adequately considered and were ripe for drafting, with an indication of the main trends emerging from the discussions on specific draft articles.

Secondly, the Drafting Committee should be given sufficient time to perform its tasks, so that it could complete its work during the first half of the session and present its report as early as possible. Efforts should be made to avoid a situation of scattered meetings of the Drafting Committee right up until the last weeks of the session. The Special Rapporteur, or a working group within the Drafting Committee would thus be able to submit for consideration the commentaries to the draft articles adopted by the Drafting Committee. At the same time, the members of the Commission would also have the opportunity to consider the draft articles and the commentaries properly.

Thirdly, the Commission should make the necessary arrangements to avoid any accumulation of draft articles being passed on from one session to the next thus increasing the Drafting Committee’s workload during the last two sessions of the term of office of the Commission.

Lastly, he recalled his proposal to the effect that the draft articles adopted by the Drafting Committee should be attached as an annex to the Commission’s report.

The CHAIRMAN thanked the Chairman of the Drafting Committee for an excellent statement which gave a detailed account of the Committee’s work. He would remind the Commission that it was not called on to revert in plenary to the substance of the report or to the draft articles since the articles would not be approved at the present session or be referred to the General Assembly. The debate would take place at the next session in the light of the commentaries that would be formulated by the Special Rapporteur before then. Nevertheless, he invited members who had any suggestions about action on the report of the Drafting Committee to take the floor.

Mr. YANKOV (Chairman of the Drafting Committee), reverting to his earlier proposal that the draft ar-
articles on State responsibility should be annexed to the Commission's report, said that he was prepared to withdraw the proposal in view of the explanations just given by the Chairman, if that would facilitate the Commission's task.

73. Mr. ARANGIO-RUIZ (Special Rapporteur) expressed his sincere gratitude to the Chairman of the Drafting Committee for his remarkable statement. He accepted, in the main, the proposals of the Chairman of the Drafting Committee, but none the less considered that, in view of the complexity and difficulty of the subject, he had to reserve his position on the draft articles submitted by the Drafting Committee until he had had time for reflection and had done further personal work on the various points.

74. Mr. KOROMA expressed his congratulations to the Chairman of the Drafting Committee on a very instructive statement and said it was regrettable that the Commission did not have time to discuss his report in detail. He also wished to thank the members of the Drafting Committee, as well as the Special Rapporteur on the topic of State responsibility.

75. By and large, the draft articles formulated by the Drafting Committee were very useful and calculated to advance the Commission's work on the topic, although personally he had reservations both on the interpretation and on the wording of certain articles. He none the less hoped that the reservations could be lifted when the draft articles submitted by the Drafting Committee were considered at the next session.

76. Mr. PELLET said that he congratulated the Drafting Committee and its Chairman on the excellent work done. He said it was regrettable that the Commission did not have the time to consider in plenary the articles submitted by the Drafting Committee. That type of drawback could be avoided with a split session. He would have liked to have said a few words on the link between the Commission and its Chairman on the excellent work done on the topic of State responsibility. For the rest, the Commission had long since accepted the idea that the draft articles on State responsibility should consist of three parts, namely a part 1, containing a definition of an internationally wrongful act, a part 2, on the consequences, and a "possible" part 3, on implementation. Personally, he thought that the word "possible" was unnecessary. Without prejudging the Commission's ultimate decision on that last point, he felt certain that, for the time being, the third part was an integral element of the draft.

77. Mr. VILLAGRAN KRAMER said it was inadmissible that, after all the work done by the Chairman and members of the Drafting Committee, it would be frustrating to have nothing to transmit to the General Assembly. On the other hand, if the Commission transmitted something half-finished it would also be open to criticism. That showed that the Commission's methods of work would have to be reviewed and that the Commission must without fail find ways and means of transmitting articles to the General Assembly on a regular basis.

78. Many newly-elected members had participated for the first time in the discussion on that topic, which was particularly important for the countries of the third world, and it would be regrettable if the Sixth Committee gained the impression that nothing had been done in 12 full weeks of meetings. Even though certain disagreements on the subject of articles 6 to 10 bis remained, a debate had been held on the essential aspects of those articles and he wondered whether, in the circumstances, he should not take up the proposal put forward, and later withdrawn, by the Chairman of the Drafting Committee to the effect that the draft articles on State responsibility should be annexed to the report of the Commission.

79. The CHAIRMAN observed that it was not the Commission's custom to refer to the General Assembly draft articles that were not accompanied by commentaries and had not been adopted by the Commission in plenary. It was preferable to take note of the Drafting Committee's report and simply give the Assembly general indications on the work done, giving it, for example, the titles of the draft articles, but not the text.

80. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, according to the Chairman of the Drafting Committee, the Commission had long since accepted the idea that the draft articles on State responsibility should consist of three parts, namely a part 1, containing a definition of an internationally wrongful act, a part 2, on the consequences, and a "possible" part 3, on implementation. Personally, he thought that the word "possible" was unnecessary. Without prejudging the Commission's ultimate decision on that last point, he felt certain that, for the time being, the third part was an integral element of the draft.

81. Mr. BENNOUNA, speaking on the line of action proposed by the Chairman, said that, if it was actually decided not to transmit the draft articles on State responsibility to the General Assembly, he would add his own protests to those voiced by Mr. Villagran Kramer. It seemed inadmissible that the Commission should have worked a whole session on the topic without submitting to the General Assembly specific proposals which made it possible to maintain a dialogue from one session to the next. In his view, the report of the Chairman of the Drafting Committee should be transmitted to the General Assembly, along with the articles provisionally adopted by the Committee, in order to obtain at least the Assembly's reaction.

82. Mr. SZEKELY said he too believed that, after all the work done by the Chairman and members of the Drafting Committee, it would be frustrating to have nothing to transmit to the General Assembly. On the other hand, if the Commission transmitted something half-finished it would also be open to criticism. That showed that the Commission's methods of work would have to be reviewed and that the Commission must without fail find ways and means of transmitting articles to the General Assembly on a regular basis.

83. Mr. KOROMA said that Mr. Villagran Kramer's remarks were justified. If it did not transmit the report of the Drafting Committee and the draft articles to the General Assembly, the Commission ran the risk of being criticized for not having done enough. On the other hand, it was inconceivable that the Commission should transmit the draft articles to the Assembly before it had itself discussed them. If draft articles were included in the report, it would be an invitation for the members of the Sixth Committee to make comments, a thing that was not perhaps desirable at the present stage. Some middle way would have to be found. He therefore suggested that only the titles of the articles should be mentioned in the Commission's report, articles to which the Chairman of the Commission could also refer in introducing the Commission's report to the General Assembly so as to give an idea of the work done on the topic of State responsibility. For the rest, the Commission had had a very
thorough debate on the question of the so-called instrumental consequences of an internationally wrongful act as well as on the question of the establishment of an international criminal jurisdiction and it had sufficient material to transmit to the General Assembly.

84. Mr. CALERO RODRIGUES said he shared the concern expressed by some members, but since it had not been possible to submit any commentaries to the Commission in plenary, he thought it wiser not to transmit the draft articles to the General Assembly. If the Commission were to invite the General Assembly to comment on articles before the Commission itself had had an opportunity to consider them, the normal procedure would be reversed. Moreover, in paragraph 29 (6) of its report (A/CN.4/L.473/Rev.1), the Planning Group had recommended that, in drafting its report, the Commission should adopt the principle whereby:

When only fragmentary results have been achieved in the consideration of a topic or an issue, and such results can only be properly assessed by the Sixth Committee after further elements have been added, the information contained in the report should be very summary, with the indication that the matter will be more fully presented in a future report.

There was nothing to prevent the General Assembly from commenting on those draft articles after they had been considered by the Commission.

85. For the time being, the indications given on the matter in the draft report of the Commission on the work of its forty-fourth session appeared sufficient, even if the formulation was not entirely satisfactory.

86. Mr. BOWETT said he shared the views of Mr. Villagran Kramer and Mr. Bennouna. He too found it difficult to see the Commission send to the General Assembly a report which failed to do justice to the amount of work done on the topic of State responsibility. Admittedly, the draft articles could not be transmitted to the General Assembly for consideration without having been first discussed and acted on by the Commission itself. Nevertheless, he saw no reason why it should not be possible to annex to the Commission’s report the text of the draft articles as well as a summary of the report of the Chairman of the Drafting Committee, for information purposes and to show the importance of the work that had been done.

87. Mr. ROSENSTOCK said that, in fact, two separate questions had arisen: one of them concerned the Commission’s methods of work, which had proved unproductive and ought to be reconsidered; the other question was to determine what should be done with the draft articles and the Drafting Committee’s report. It would serve no purpose to put the report and the draft articles in an addendum or an annex, because the mere fact of submitting a text was an invitation to discuss it, something that did not seem desirable at the present stage. It would be enough for the Commission’s report to contain a sufficiently detailed account of the work done. On that point, he shared the opinion expressed more particularly by Mr. Koroma.

88. Mr. PELLET said it was necessary to avoid giving the impression that the Commission had nothing of substance to submit to the General Assembly, when the Drafting Committee had in fact held 27 meetings. The solution might be to expand the paragraphs of the Commission’s report that gave an account of the work on the articles in question, by including a very full summary of what the Chairman of the Drafting Committee had stated in presenting the draft articles adopted by the Committee. The text of the draft articles would be given in a footnote, something which was indispensable for an understanding of the statement by the Chairman of the Drafting Committee.

89. Mr. MIKULKA protested at the suggestion that the Commission might convey the impression of not having done enough work. That would mean ignoring the progress made on the question of an international criminal court.

90. Very appropriately, Mr. Calero Rodrigues had recalled the guiding principle recommended by the Planning Group for the Commission in drafting its report. It was essential to abide by that principle, but instead of presenting a “very summary” account of the work on State responsibility, the relevant passage of the report could be expanded. In any case, the Commission should refrain from transmitting to the General Assembly drafts which it had not itself discussed. It might be possible to annex to the Chairman’s introduction to the Sixth Committee a text reproducing the statement by the Chairman of the Drafting Committee and the text of the articles in question. That would clearly show that the articles were still a mere draft and make it possible to halt any discussion on the articles, since they would not have been submitted formally.

91. Mr. JACOVIDES suggested that it might be enough to indicate the subject-matter of the articles adopted by the Drafting Committee and to include large extracts from the statement by the Chairman of the Drafting Committee in the Commission’s report.

92. Mr. VILLAGRAN KRAMER said he was concerned that the Commission was facing difficulties connected with its methods of work. It had already had to improvise a solution for the purpose of presenting the results of its work on the establishment of an international criminal court. In the present instance, the idea of including the draft articles in a footnote was not a bad one, for the Commission should always indicate clearly what it had done and what it was doing. Since the membership had changed recently, it would be too easy to criticize it for inadequate results. He could willingly accept being attacked for his ideas, but he did mind being accused of idleness.

93. Mr. CALERO RODRIGUES, speaking on a point of order, pointed out that a discussion was being held on the report of the Commission and not on the report of the Drafting Committee. He suggested that a working group should be set up to draft a new version of the paragraphs of the report in which the Commission gave an account of its work on the draft articles on State responsibility.

94. Mr. SZEKEELY said he shared the opinion of Mr. Villagran Kramer: it was important to inform the General Assembly of the fruit of the Commission’s work. A footnote seemed the best solution. If a working group was set up, it should be assigned the task of studying all possible options, and not one single solution.
95. Mr. SHI said it would be very dangerous to submit to the General Assembly the text of the draft articles in any form. If the representatives in the Sixth Committee began to comment on them, it would tie the hands of the Commission. Members should at all times retain their freedom of thought.

96. Mr. KOROMA and Mr. MAHIOU said they supported the suggestion for the setting up of a small working group.

97. Mr. CRAWFORD said that he fully shared Mr. Mikulka's view. If Mr. Mikulka's proposal was not accepted, he could agree to a small working group being set up.

98. Mr. EIRIKSSON said he had been convinced by Mr. Shi's argument. In a spirit of compromise, however, he would agree to Mr. Mikulka's solution.

99. Mr. PAMBOU-TCHIVOUNDA said that there was no reason to fear the General Assembly's judgement unduly. The Commission's reports varied from one year to the next and were not always very long. That was no reflection on the seriousness of its work. While it was necessary to avoid inserting the actual text of the draft articles in the Commission's report, a summary of the statement by the Chairman of the Drafting Committee could none the less be included.

100. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to set up a small working group, consisting of interested members, to examine the question of the place to be given in the Commission's report to draft articles 6 to 10 bis on State responsibility and to the statement by the Chairman of the Drafting Committee.

It was so agreed.

The meeting rose at 1.15 p.m.

2289th MEETING

Monday, 20 July 1992, at 4.10 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. Giñey, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindrakoto, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer.

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[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)

1. The CHAIRMAN said that the informal working group set up at the previous meeting had arrived at a compromise formula that in place of paragraphs 15 and 16 of chapter III of the Commission's draft report, concerning State responsibility (A/CN.4/L.478), a new subsection would be inserted before subsection 2 to be entitled "The draft articles contained in the preliminary and second reports of the Special Rapporteur", followed by paragraphs 15 and 16, revised to read:

"15. At its 2288th meeting, the Commission heard the presentation by the Chairman of the Drafting Committee of a report of the Committee (A/CN.4/L.472) concerning its work on the draft articles on State responsibility which were contained in the preliminary and second reports of the Special Rapporteur and which had been referred to it at the forty-first and forty-second sessions of the Commission. The Drafting Committee devoted 25 meetings to the consideration of those draft articles and succeeded in completing its work on them. It adopted on first reading a new paragraph 2 to be included in article 1, as well as articles 6 (Cessation), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 bis (Assurances and guarantees of non-repetition).

"16. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time it will have before it the material required to enable it to take a decision on the proposed draft articles."

2. It was understood that the part of the summary record of the 2288th meeting containing both the draft articles adopted by the Drafting Committee and the introductory statement by the Chairman of the Drafting Committee would be attached to the statement which he, as Chairman of the Commission, would deliver to the Sixth Committee in presenting the Commission's report.

3. Mr. de SARAM asked whether the draft articles on State responsibility were being described as provisionally adopted.

4. The CHAIRMAN replied that, since the Commission had not adopted the articles, they would certainly not be described as provisionally adopted.

5. Mr. VERESHCHETIN said that he accepted the proposals of the informal working group, with one ex-
The Chairman said that not all, but only the relevant part, of the summary record of the previous meeting would be attached to his introductory statement to the Sixth Committee. The part in question would cover only the draft articles completed by the Drafting Committee and the statement made at the 2288th meeting by the Chairman of the Drafting Committee. The remainder of the summary record was not relevant for the General Assembly.

Mr. Villagran Kramer said that the solution worked out by the informal working group was fairly satisfactory, although it did not meet all his expectations. Admittedly, some common ground had to be found. If he had understood matters correctly, the Chairman’s introductory statement to the Sixth Committee would be circulated with two attachments: the statement made by the Chairman of the Drafting Committee at the 2288th meeting and the text of the draft articles on State responsibility.

The Chairman said that Mr. Villagran Kramer’s understanding was correct.

Mr. Rosenstock said he objected to attaching even a part of a summary record to the Chairman’s introductory statement to the Sixth Committee. It was undesirable to establish a hierarchy among summary records, thereby seeming to suggest that the Commission attached more importance to one summary record than to another, or to one part of a summary record rather than to the rest. He hoped that everyone would be satisfied with the detailed account to be given by the Chairman to the Sixth Committee without the need to provide the summary record, even in part.

Mr. Mahiou said he agreed with Mr. Rosenstock that it was undesirable to attach the summary record. He had no objection, however, to attaching the statement by the Chairman of the Drafting Committee.

Mr. Gúney said he strongly supported the remarks by Mr. Rosenstock and Mr. Mahiou. It was most undesirable to create a precedent by providing a summary record, as suggested.

Mr. Bennouna observed that the objections concerned the form, not the substance, of the attachments. There was agreement about attaching the statement of the Chairman of the Drafting Committee and the draft articles, but several members objected to them being presented as part of a summary record. The two attachments could be included but without mentioning the fact that they were taken from a summary record.

Mr. Shi said that the statement of the Chairman of the Drafting Committee and the draft articles should not be circulated at the time of the Chairman’s introductory statement to the Sixth Committee. Otherwise, members of the Sixth Committee would be inclined to comment on the draft articles. They should be circulated later on, when the Sixth Committee took up the topic of State responsibility; at that time, there would be less chance of any comments being made on the articles.

Mr. Vereshchetin said that he could accept as a compromise the formula proposed, but felt that the decision was not a very good one. It could have the opposite result to the one desired. Presenting the draft articles and the statement of the Chairman of the Drafting Committee in the form of attachments would draw the attention of the Sixth Committee to the attachments, all the more since they would be the only documents annexed in that way.

Mr. Calero Rodrigues said that the draft articles and the statement by the Chairman of the Drafting Committee would be circulated purely for the information of the General Assembly and should not be understood as a request for comments. He preferred making use of the relevant part of the summary record. Such a presentation would have the advantage of not placing too much importance on the document distributed. It was also more practical and more economical to circulate an extract from the summary record, which was an existing document.

The Chairman pointed out that the summary record existed in all official languages. Would his introductory statement to the Sixth Committee also be circulated in all official languages?

Mr. Kotliar (Secretary to the Commission) said that the introductory statement of the Commission’s Chairman was usually made available to members of the Sixth Committee in the original language only, English in the present instance. The annex would also be in English. The secretariat could try to obtain translations, but that would be a departure from the usual practice.

Mr. Gúney pointed out that the summary record had only limited distribution and was intended for participants only. It would be creating an undesirable precedent to give it any wider circulation.

Mr. Mahiou said that he could accept, although somewhat reluctantly, the idea of the two attachments being presented without any indication that they were taken from the summary record.

Mr. Villagran Kramer said that the draft articles completed by the Drafting Committee were of the utmost importance to jurists in third world countries. They afforded an indication of what was being done on the topic of State responsibility in the Commission. The draft articles in question were the first product reflecting a possible understanding with the countries of the industrialized world and were therefore something of great value. They would not create any major difficulties for the representatives in the Sixth Committee; problems
would arise at a later stage, when draft articles on countermeasures came before the Committee.

22. Mr. KOROMA said that the report to the Sixth Committee was the report of the Chairman of the Commission, not of the Chairman of the Drafting Committee. It was the Chairman of the Commission who would be giving a detailed account of the Commission’s work, in the course of which he would refer to the work of the Drafting Committee.

23. The CHAIRMAN said that he would indeed give a full report to the Sixth Committee on the work of the Commission. Nevertheless, it was part of the compromise reached by the informal working group that the draft articles on State responsibility and the statement by the Chairman of the Drafting Committee should be made available to members of the Sixth Committee.

24. Mr. GÜNEY said that it was essential to say what happened in the Commission itself, not in informal groups. He once again urged the Commission not to create undesirable precedents.

25. Mr. EIRIKSSON said he supported the compromise formula reached by the informal working group.

26. Mr. CALERO RODRIGUES noted that there was no disagreement as to the substance of the two attachments. Some members objected only to their presentation in the form of extracts from the relevant summary record.

27. The CHAIRMAN said that he would suspend the meeting to allow for further informal consultations.

The meeting was suspended at 4.40 p.m. and resumed at 4.55 p.m.

28. The CHAIRMAN announced that, as a result of the informal consultations, a compromise was now proposed. He, as Chairman of the Commission, would make an introductory statement to the Sixth Committee describing the work of the Commission on State responsibility. The description would consist essentially of the revised texts of paragraphs 15 and 16 of document A/CN.4/L.478 that he had read out at the beginning of the meeting. He would inform representatives that the relevant part of the summary record of the 2288th meeting was available in the meeting room. In that way, any representatives interested in the draft articles on State responsibility could obtain them and report to their Governments. Circulation of the articles would not be meant as an encouragement to discuss them at length, since they had not yet been approved by the Commission.

29. Mr. KOROMA said that he could accept that solution as a compromise, but wanted it placed on record that it did not create a precedent.

30. The CHAIRMAN assured Mr. Koroma that the case was an exceptional one, because of the particular interest of some members in the articles on State responsibility. If he heard no objection, he would take it the Commission agreed to adopt the proposed compromise.

It was so agreed.


[Agenda item 7]

REPORT OF THE PLANNING GROUP

31. The CHAIRMAN said the Enlarged Bureau’s intention was that the report of the Planning Group on the programme, procedures and working methods of the Commission (A/CN.4/L.473/Rev.1) should for the most part be incorporated in the last chapter of the Commission’s report to the General Assembly. For that purpose, it would require some editing changes, in particular the replacement of the words “the Planning Group” by “the Commission”. However, several points remained to be clarified. First, the Enlarged Bureau was of the opinion that neither paragraph 16 nor the schedule of work annexed to the report of the Planning Group should be reproduced in the Commission’s report. In view of the tentative nature of the arrangements described in the schedule, which might have to be altered in the light of subsequent events, it would be undesirable to adopt a rigid timetable.

32. Mr. EIRIKSSON observed that, in the previous quinquennium, the Commission had found it very useful to have a timetable for its work. He was not sure, however, whether such a timetable had ever been included in the Commission’s report.

33. Mr. CALERO RODRIGUES (Chairman of the Planning Group) said the Planning Group intended that the schedule for the quinquennium should be for the internal use of the Commission, and should not be included in its report to the General Assembly. Indicative targets for the Commission’s future work on certain topics were already set out in paragraph 15 of the Planning Group’s report.

34. Mr. SZEKELY said that it would be better to retain paragraph 16, together with the schedule for the quinquennium. There was a clear advantage in knowing what the Commission’s goals were and when it intended to reach them. Moreover, the schedule would help the Commission to keep to those goals. If paragraph 16 and the schedule had to be omitted, paragraph 15 should be redrafted to explain the Commission’s timetable in greater detail.

35. Mr. VILLAGRAN KRAMER said that the schedule of work was merely a proposal, not a formal commitment. He agreed with Mr. Szekely that there were advantages in retaining it, while emphasizing its tentative character. It showed which topics the Commission regarded as most urgent. Moreover, for the countries of Central America, which maintained close mutual relations, it was useful to know the order in which the Commission intended to proceed with the topics on its agenda.

36. Mr. EIRIKSSON recalled that, in the first year of the previous quinquennium, the Commission had adopted a paragraph similar to paragraph 15 of the present report, together with a schedule of work for each year of the quinquennium.
37. Mr. SZEKELY emphasized the value of knowing the direction in which the Commission was heading, and what results were expected of it. Of course, the schedule was merely tentative, but he thought it was a very positive feature.

38. Mr. MAHIOU said he was unwilling to include in the report details about the Commission's internal functioning. It was better for such details to remain unofficial, especially since there was no guarantee that the Commission would achieve its targets according to a set timetable.

39. Mr. ERIKKSSON said it would be helpful to include part of paragraph 16 in the Commission's report, to show that the Planning Group had worked hard to draw up the Commission's future programme of work. Attention should be drawn to the tentative nature of the schedule, and the fact that it would change year by year. He suggested omitting the table which appeared in the Group's report and amending the last sentence of paragraph 16 accordingly.

40. Mr. JACOVIDES said that Mr. Eiriksson's proposal was a compromise solution and would respond to the wishes of certain members without tying the hands of the Commission.

41. Mr. SZEKELY said some matters were certainly the internal business of the Commission, but he failed to see the need for what might be termed "privacy" regarding the tentative schedule of work. Indeed, withholding such information from the General Assembly could imply that the Commission was really not committed to its mandate. In a spirit of accommodation, he would endorse Mr. Eiriksson's proposal to redraft paragraph 16. Furthermore, paragraph 15 should be expanded to include all the topics in the Commission's current programme of work.

42. Mr. ROSENSTOCK said that he had no objection to transparency, but the Commission should think twice about overturning a decision that had already been approved by two committees. In his view, paragraph 15 was adequate. Paragraph 16 and the schedule of work should remain the internal business of the Commission. However, he would not oppose a compromise solution.

43. Mr. CALERO RODRIGUES (Chairman of the Planning Group) said that he endorsed the proposal by Mr. Eiriksson. Furthermore, he did not see how paragraph 15 could be expanded.

44. Mr. KOROMA said that he wished to associate himself with the views of Mr. Calero Rodrigues and Mr. Rosenstock.

45. Mr. SZEKELY said that a formulation should be added to paragraph 15 to the effect that the Commission had in principle accepted the Planning Group's recommendations.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the members agreed to redraft paragraph 16 along the lines suggested by Mr. Eiriksson and to exclude the tentative schedule of work from the Commission's report to the General Assembly.

It was so agreed.

47. The CHAIRMAN said that, after lengthy discussion, the Enlarged Bureau had concluded that paragraphs 20 to 23, contained in the section "Long-term programme of work", should not be included in the Commission's report, in order to avoid presenting the General Assembly with a list of topics which were still tentative.

48. Mr. JACOVIDES said that deleting paragraphs 20 to 23 would entail making corresponding amendments to other paragraphs in the Group's report. While the Commission might not wish to submit a list of specific topics at the present time, it certainly would not want to create the impression that it had not devoted much energy to its long-term programme of work. He proposed, therefore, that the list of topics should be included in a footnote to the Commission's report.

49. Mr. CALERO RODRIGUES, speaking as a member of the Commission, said he had initially agreed with Mr. Jacovides that it would be useful to present the list of tentative topics to the General Assembly. However, after further consideration, he thought it better to wait until the Commission had a more concrete idea of how it would deal with those topics. He proposed that the Commission should simply inform the General Assembly that it was examining the topics and that it would submit more complete material the following year. In short, while he did not object to the proposal by Mr. Jacovides, he would prefer to follow the recommendations of the Enlarged Bureau to exclude paragraphs 20 to 23 from the Commission's report.

50. Speaking as Chairman of the Planning Group, he announced, with regard to the explanatory summaries on the short list of topics shown in paragraph 21, that Mr. Bowett would be preparing a summary on ownership and protection of wrecks beyond the limits of national maritime jurisdiction; Mr. Yamada on rights and duties of States for the protection of the human environment; Mr. Tomuschat on the "global commons"; Mr. Pellet on the law and practice relating to reservations to treaties; Mr. Mikulka and Mr. Vereshchegin, working jointly on two topics, namely State succession in respect of membership of international organizations and State succession and its impact on the nationality of natural and legal persons; Mr. Bennouna on the legal conditions of capital investment and agreements pertaining thereto; and Mr. Jacovides on jus cogens. With regard to the list of reserve topics, Mr. Szekely would be preparing a summary on the law of (confined) international groundwaters; Mr. Rosenstock on legal mechanisms necessary for the registration of sales or other transfers of arms, weapons and military equipment between States; Mr. Sreenivasa Rao on extraterritorial application of national legislation; and Mr. Pambou-Tchivounda on the law concerning international migrations.

51. The CHAIRMAN said it was important for the Commission to inform the General Assembly that it had established a procedure for examining those topics.

52. Mr. MAHIOU said that, if there were no strong objections, the proposal by Mr. Jacovides to include the list of topics as a footnote to the Commission's report might be a good solution.
53. The CHAIRMAN said members should bear in mind that the recommendation to delete the paragraph listing those topics had been discussed both by the Planning Group and the Enlarged Bureau.

54. Mr. KOROMA said that he joined with those who wished to include the list of topics in a footnote.

55. He would also point out that the fourth item on the list of reserve topics, namely the law concerning international migrations, did not reflect the proposal he had made earlier in the session. It had been his intention to include a topic entitled "international law on the movement of persons".

56. The CHAIRMAN said that the list of topics was not final and would be reconsidered in 1993. Since it would not be included in the Commission's current report, there was no need to amend it at the present time.

57. Mr. THIAM, drawing attention to the last topic on the short list, *jus cogens*, said he wished to caution the Commission against consideration of pure doctrine. While he had no reservations about the concept *per se*, he had strong doubts about the possibility of codifying *jus cogens*.

58. Mr. ROSENSTOCK said that, as he recalled, it had been agreed during a meeting of the Enlarged Bureau to amend the title of the fourth item on the list of reserve topics, in accordance with Mr. Koroma's intentions. Paragraph 24 recommended to the Commission some valuable and innovative procedures for approaching the list of topics and was much more important than the list of topics itself, which would have to be reduced considerably to be of any practical value. Until those procedures were fully operational, it would be unwise to present the list of topics to the General Assembly.

59. The CHAIRMAN, speaking as a member of the Commission, said he agreed that submitting the list of topics to the General Assembly would be premature. Once it had done some concrete work on those topics, the Commission would be in a better position to assess the advantages and disadvantages of the various approaches.

60. Mr. GÜNEY said he fully endorsed the views expressed by Mr. Thiam. The question of *jus cogens* had always been controversial. The content of that topic was not precise, and it was premature even to hold preliminary discussions on the issue with a view to eventual codification.

61. Mr. JACOVIDES recalled that, earlier in the session he had, at the request of the Chairman of the Working Group, produced a memorandum stating that a tentative decision had been made to include *jus cogens* on the short list of topics. Furthermore, paragraph 24 (d) of the report of the Planning Group showed that the explanatory summary had to indicate for each topic the advantages and disadvantages of preparing a report, a study or a draft convention. After the summary was presented, the Commission would be in a better position to decide whether to proceed with a particular topic and in what way. In his view, *jus cogens* was an important concept in public international law and its exact legal content was not established. The Commission was the body best suited to fill in that gap.

62. Mr. de SARAM said that it would be most unwise for the Commission to get into the habit of submitting to the General Assembly views on matters on which it had not reached a considered conclusion. He agreed entirely with Mr. Rosenstock about the importance of paragraph 24 of the Planning Group's report. The Commission should give weight to the views of its subsidiary bodies. For that reason, while he sympathized with the points made by Mr. Jacovides, he believed it would be premature to refer to the list set forth in paragraph 21 of the Planning Group's report either in the Commission's report or in a footnote.

63. Mr. ARANGIO-RUIZ said he agreed that the Commission should not be rushed by other bodies into hasty choices. It should first examine the papers and then select the subjects, indicating what should be the order of priority.

64. Mr. ERIKSSON expressed support for that view.

65. Mr. VILLAGRAN KRAMER said he agreed with Mr. Jacovides that the point could perhaps best be illustrated, for the purpose of discussion at the General Assembly, by a footnote.

66. Mr. GÜNEY said that he strongly supported the views expressed by Mr. Rosenstock, Mr. de Saram, Mr. Arangio-Ruiz and Mr. Eiriksson.

67. Mr. VERESCHCHETIN said that, for the reasons he had already stated in the Enlarged Bureau, he agreed that the list of topics set out in paragraph 21 should not be included in the Commission's report, since that would simply further complicate the task awaiting the Commission at its next session. At that session, there would be a new list of topics and the Commission would then be able to determine which of them should receive priority.

68. Mr. MAHIOU said that he would not insist on the inclusion of the list of topics set forth in paragraph 21.

69. The CHAIRMAN, noting that the majority of members favoured deletion of paragraphs 20 to 23 of the Planning Group's report, suggested that the Commission should adopt the Enlarged Bureau's recommendation to that effect.

   It was so agreed.

70. The CHAIRMAN said that his third point concerned paragraph 28 of the Planning Group's report. With regard to the second sentence of that paragraph, the Enlarged Bureau had agreed to make the following recommendation concerning the arrangements for the Commission's forty-fifth session. First, on the opening day of the session in early May 1993, there would be a short plenary to open the session, elect the officers and appoint the members of the Drafting Committee. Second, after the formal opening of the session, there would be two weeks of concentrated work in the Drafting Committee, as appropriate. During that time, non-members of the Drafting Committee would have the right to attend the meetings of the Drafting Committee as observers.
71. Mr. GÜNEY said that he would like the Chairman to explain precisely what was meant by the reference to attendance of non-members at the Drafting Committee's meetings as observers. It had been clearly agreed at the beginning of the session that non-members could participate in the Drafting Committee, make proposals and even circulate them in writing. The only thing that non-members could not do was to participate in the decisions. Another point that should be covered, to avoid confusion, was that the Commission agreed in principle that the membership of the Drafting Committee should, if necessary, vary in the light of the topic considered. Provided that the Chairman clarified those two points, and that they were reflected in the summary record, he would have no objection to the Enlarged Bureau's recommendation.

72. The CHAIRMAN pointed out that the position of observers was in fact covered by paragraph 27 (5) of the Planning Group's report. The membership of the Drafting Committee would, of course, vary and the variations would be decided as and when the Committee took up a new topic. The question would not, however, arise during the first two weeks of the Commission's next session, since the only topic before the Drafting Committee would be State responsibility.

73. Mr. AL-KHASAWNEH said that he did not like the approach set out in paragraph 27 (5) and considered that the paragraph should be deleted. Ultimately, the whole question was one of self-restraint. In particular, he saw no need to formulate any such rule in writing. It was not as though there was any need to guard against possible abuse, for the way in which the Drafting Committee had worked in the past had been satisfactory.

74. Mr. de SARAM said he agreed that the Commission's next session should start with a short meeting in plenary, and then move on to other things. There was, however, much that could be done in bodies other than the Drafting Committee—indeed, the very term "Drafting Committee" was something of a misnomer, since the Committee was in many respects more in the nature of a quasi-plenary. It would be better if the Enlarged Bureau's recommendation incorporated the notion that non-members of the Drafting Committee would in fact be able to work on other matters in other groups. Again, nothing should appear in the Commission's report that would in any way diminish the entitlement of those elected to the Commission by the General Assembly to participate fully in the work of the Commission and its subsidiary bodies. As all members were aware, there was a great deal of difference between being a participant and an observer. A bald statement that members who came to Geneva to participate in the work of the Commission and its subsidiary bodies could do so only as observers—and therefore in a restricted manner—for the first two weeks, touched upon the legitimate sensitivities of the members of the Commission.

75. The CHAIRMAN suggested, to meet the points raised, that the words "as observers" should be deleted from the Enlarged Bureau's recommendation.

76. Mr. ROSENSTOCK said that the recommendation with regard to the first two weeks of the Commission's next session had been accepted in an open-ended working group, in which all members of the Commission had been free to participate, as part of a package which also incorporated paragraph 27. If the Commission persisted in reopening such matters, it would serve no useful purpose and would also be indicative of a marked lack of restraint. Furthermore, if the Commission started to tamper first with one paragraph and then with another, the whole package would simply fall apart. As to his own position, he had accepted what he regarded as a sharp deterioration in the terms of paragraph 28 on the understanding that everyone concerned would accept paragraphs 27 and 28 as a package. He was disinclined to accept the revised version of paragraph 28, as opposed to the version which appeared in the Planning Group's report, if that would open up a whole series of other questions. He would urge members to exercise restraint, as he was genuinely concerned that the progress achieved over the past 11 weeks through compromise would be undone in the last few days of the session.

77. Mr. CALERO RODRIGUES (Chairman of the Planning Group) said that he agreed with most of Mr. Rosenstock's observations and also supported the Chairman's suggestion that the words "as observers" should be deleted from the Enlarged Bureau's recommendation. He did not think that, at that late stage in the session, members of the Commission, including those who were members of the Planning Group, should try to obtain what they had been unable to obtain, as they had not been present, in the Planning Group.

78. Mr. AL-KHASAWNEH said that, for once, he found himself in total disagreement with Mr. Calero Rodrigues and Mr. Rosenstock. The fact that he was a member of the Planning Group did not preclude him from raising points that had been agreed in the Planning Group. It was one thing to make a mistake and another thing to persist in that mistake.

79. Mr. GÜNEY said that he agreed entirely with Mr. Al-Khasawneh.

80. Mr. SHI said that, as he had stated in the Enlarged Bureau, he would not object to the adoption of paragraph 28 of the Planning Group's report, particularly as amended, but would reserve his position as to the need to assign two weeks at the beginning of the Commission's next session to the work of the Drafting Committee.

81. Mr. VILLAGRAN KRAMER said that he was unhappy about the last paragraph of the report, which dealt with the possibility of splitting the Commission's sessions. He trusted that the matter would receive further consideration at the next session.

82. The CHAIRMAN said that, in the light of comments made, he would suggest that the Commission should adopt the Enlarged Bureau's recommendation with regard to paragraph 28 of the Planning Group's report.

It was so agreed.
83. The CHAIRMAN further suggested that the Commission should adopt the report of the Planning Group, as amended.

It was so agreed.

The meeting rose at 6.10 p.m.

2290th MEETING

Tuesday, 21 July 1992, at 10.10 a.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. Kabatsi, 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)*

1. The CHAIRMAN invited the Commission to resume consideration of its draft report, paragraph by paragraph, starting with chapter III on State responsibility.


2. Mr. RAZAFINDRALAMBO (Rapporteur), introducing chapter III of the draft report, explained that the corrigendum to document A/CN.4/L.478 reflected the decision taken at the 2289th meeting on the way in which the Commission should report to the General Assembly on the work done by the Drafting Committee on the topic of State responsibility. It also contained a new paragraph, to be inserted immediately before paragraph 16, giving a summary of the Special Rapporteur's introduction to his third report, as contained in chapter VII of the Commission's report on the work of its forty-third session.¹

A. Introduction (A/CN.4/L.478)

Paragraph 1

3. Mr. EIRIKSSON said that it was perhaps time to think about the question of the form of the Commission's reports and, for example, to summarize to a greater extent the part which dealt with the discussions and which, in the present case, was too long.

4. He also noted that the Commission was not asking the General Assembly any questions, although it was due to complete its consideration of the topic of State responsibility by the end of the quinquennium. Since it had decided to discuss the question of the distinction to be made between delicts and crimes, it should perhaps ask for the General Assembly's opinion on that point without further delay.

5. He was puzzled by the reference in the last sentence of paragraph 1 to "a possible part 3, which the Commission might decide to include...". That seemed to imply that the Commission had not yet decided that there would be a part 3.

6. Mr. ARANGIO-RUIZ (Special Rapporteur) said he did not think that it would be wise for the Commission to ask the General Assembly about the distinction between crimes and delicts in too direct a way. That question raised the complex problem of the effects of crimes and delicts in international law.

7. With regard to the uncertainty about part 3 of the topic, paragraph 1 had been written from the 1975 point of view, but, since then, the Commission had taken a number of decisions showing that it definitely intended to start work on part 3.

8. In the course of a discussion in which Mr. MAHIOU, Mr. de SARAM, Mr. BOWETT, Mr. SHI and Mr. JACOVIDES took part, a number of ways were suggested of eliminating the hypothetical slant of the last phrase of paragraph 1, which gave the impression that the Commission had not yet decided to include a part 3, and of making it clear that the situation had changed since 1975.

9. Mr. CALERO RODRIGUES pointed out that, since paragraph 1 related to the situation as it had existed some 15 years previously, it was impossible to go back on it: at that time, part 3 of the topic had indeed been one "which the Commission might decide to include".

10. Mr. ROSENSTOCK, supported by Mr. MAHIOU, Mr. BOWETT and Mr. SHI, said he shared the Special Rapporteur's view that it was not yet time to ask the General Assembly about the distinction between delicts and crimes.

Paragraph 1 was adopted.

Paragraphs 2 and 3

Paragraphs 2 and 3 were adopted.

Paragraph 4

11. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in order to dispel any false impression given by paragraph 1, a sentence should be added after the first sentence, to read: "From that time on, the Commission assumed that a part 3 on implementation and the settlement of disputes would be included in the draft articles".

* Resumed from the 2287th meeting.

¹ Reproduced in Yearbook... 1991, vol. II (Part Two).
12. Mr. MAHIOU proposed that the last part of the sentence should instead read: "... a part 3 on the question of the settlement of disputes and the implementation of international responsibility".

It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraphs 5 and 6

Paragraphs 5 and 6 were adopted.

Paragraph 7

13. The CHAIRMAN proposed that the date should be specified and that the words "in 1991" should be added after the words "At its forty-third session".

It was so agreed.

Paragraph 7, as amended, was adopted.

Section A, as amended, was adopted.

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

1. COMMENTS ON THE TOPIC AS A WHOLE (A/CN.4/L.478)

Paragraph 8

14. Mr. BENNOUNA, supported by Mr. JACOVIDES, proposed that the words "within two or three years" should be replaced by the words "by the end of the quinquennium".

Paragraph 8, as amended, was adopted.

Paragraph 9

15. Mr. ROSENSTOCK said that he would like the opinion he had expressed on the final drafting of a text on State responsibility to be reflected in the report. He therefore proposed that a sentence should be added to paragraph 9, to read: "The Commission should seek to complete a first reading of the topic, including the necessary revisions or deletions in part 1, by the end of the quinquennium".

Paragraph 9, as amended, was adopted.

Paragraph 10

Paragraph 10 was adopted.

Section B.1, as amended, was adopted.


Paragraphs 10 bis and ter

16. The CHAIRMAN drew the Commission's attention to document A/CN.4/L.478/Corr.1, which proposed that a new subsection 2 should be inserted after paragraph 10, to read:

"2. The draft articles contained in the preliminary and second reports of the Special Rapporteur

"10 bis. At its 2288th meeting, the Commission heard the presentation by the Chairman of the Drafting Committee of a report of the Committee (A/CN.4/L.472) concerning its work on the draft articles on State responsibility which were contained in the preliminary and second reports of the Special Rapporteur and which had been referred to the Committee at the forty-first and forty-second sessions of the Commission. The Drafting Committee devoted 25 meetings to the consideration of those draft articles and succeeded in completing its work on them. It adopted on first reading a new paragraph 2 to be included in article 1, as well as articles 6 (Cessation), 6 bis (Reparation), 7 (Restitution in kind), 8 (Compensation), 10 (Satisfaction) and 10 bis (Assurances and guarantees of non-repetition).

"10 ter. In line with its policy of not adopting articles not accompanied by commentaries, the Commission agreed to defer action on the proposed draft articles to its next session. At that time, it will have before it the material required to enable it to take a decision on the proposed draft articles. At this stage, the Commission merely took note of the report of the Drafting Committee."

17. The adoption of that text would involve two consequential amendments: the present section B.2 would become section B.3 and paragraphs 15 and 16, which had become redundant, would be deleted.

Paragraphs 10 bis and ter were adopted.

New section B.2 was adopted.


Paragraphs 11 to 14

Paragraphs 11 to 14 were adopted.

Paragraphs 15 and 16

Paragraphs 15 and 16 were deleted.

Paragraph 16 bis

(a) General approach to the question of countermeasures (A/CN.4/L.478 and Corr.1)

18. The CHAIRMAN said that document A/CN.4/L.478/Corr.1 also contained a new paragraph 16 bis, which was to be inserted under the subheading: "(a) General approach to the question of countermeasures" and which read:

"16 bis. Summarizing the presentation of his third report which he had made at the previous session of the Commission, the Special Rapporteur noted that the legal regime of countermeasures, which constituted the core of part 2 of the draft on State responsibility, was one of the most difficult subjects of the whole topic. He pointed out that whereas, with regard to the substantive consequences of a wrongful act,
one could draw from domestic law analogies to deal with similar problems arising on the international plane, domestic law could not provide much assistance with respect to countermeasures. The other difficulty with the study of countermeasures was the absence, in the international community, of any institutionalized remedies to be put into motion against a State which committed an internationally wrongful act. Consequently, the injured States were bound to rely mainly, in so far as general international law was concerned, upon their own unilateral reactions; and in that respect, the Commission had to take the greatest care, in devising the conditions of lawful resort to such reactions, to ensure that the factual inequalities among States did not unduly operate to the advantage of the strong and rich over the weak and needy.

Paragraph 76 bis was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

Paragraph 19

19. Mr. BOWETT said that the meaning of the first sentence of paragraph 19 was obscure.

20. Mr. ARANGIO-RUIZ (Special Rapporteur) said that paragraph 19 reflected the opinion expressed by one member of the Commission.

21. Mr. SHI said that paragraph 19 was supposed to reflect his opinion, but it was not well drafted and distorted what he had said. He would redraft it with the help of the secretariat.

It was so agreed.

22. Mr. PELLET pointed out that, as a matter of principle, when a paragraph reflected an opinion expressed by one member of the Commission, the other members could not propose any kind of change. He also drew the secretariat’s attention to discrepancies between the English and French texts and requested it to ensure that the French translations were more faithful to the original.

23. Mr. RAZAFINDRALAMBO (Rapporteur) said that the report had been prepared in English on the basis of various documents and that it had not been possible to revise the French translations.

24. He also pointed out that, since the purpose of the report was simply to reflect the discussion which had taken place in the Commission on the reports of the special rapporteurs and to summarize those reports, it was quite obvious that, if a member of the Commission considered that his views had not been reflected accurately, he could submit corrections, preferably in writing, to the secretariat.

Paragraphs 20 to 24

Paragraphs 20 to 24 were adopted.

Paragraph 25

25. Mr. EIRIKSSON proposed that paragraph 25 should be amended in order to make it clear that there were two separate alternatives. In the second sentence, the words “it was considered as dangerous” should be replaced by the words “this alternative was considered dangerous”. The third sentence would be split into two, the first of which would read: “The other alternative was to abolish countermeasures as part of the law relating to the consequences of wrongful acts”. It would be followed by the fourth sentence, which would begin with the words: “This alternative was viewed, on the one hand . . .”.

Paragraph 25, as amended, was adopted.

Paragraph 26

Paragraph 26 was adopted.

Paragraph 27

26. Mr. ROSENSTOCK proposed that, in the first sentence, the words “States which considered themselves injured” should be replaced by the words “injured States”.

Paragraph 27, as amended, was adopted.

Paragraphs 28 and 29

Paragraphs 28 and 29 were adopted.

Paragraph 30

27. Mr. EIRIKSSON said that although all the members of the Commission understood the paragraph it should be worded more clearly for the uninitiated.

28. Mr. PELLET said he thought that the paragraph reflected one of his own statements; it clearly reflected what he had said.

Paragraph 30 was adopted.

Paragraphs 31 and 32

Paragraphs 31 and 32 were adopted.

Paragraph 33

29. Mr. VILLAGRAN KRAMER proposed that, in the penultimate sentence, the words “concepts such as” before the words “jus cogens” should be deleted.

Paragraph 33, as amended, was adopted.

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

(i) The notion of countermeasures: terminological and conceptual aspects (A/CN.4/L.478)

Paragraph 34

30. After an exchange of views on whether the concepts of countermeasures and reprisals were the same, in which Mr. ARANGIO-RUIZ, Mr. KOROMA, Mr. PELLET and Mr. VERESHCHETIN took part, the CHAIRMAN suggested that those four members of the Commission should try to agree on new wording for
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paragraph 34, to which the Commission would come back later.

_It was so agreed._

Paragraphs 35 to 39

_Paragraphs 35 to 39 were adopted._

(ii) The various types of measures to be envisaged in the present context (A/CN.4/L.478)

Paragraph 40

31. Mr. ROSENSTOCK said that he objected to the use of the words “There was general agreement” at the beginning of the paragraph. In his opinion, there had not been any general agreement and it would be more correct to say “A number of members stressed the view that . . .”.

32. Mr. KOROMA said that the wording proposed by Mr. Rosenstock was too restrictive and did not fully reflect the discussion.

33. The CHAIRMAN suggested that, in a spirit of compromise, the words “Most members agreed . . .” might be used. If he heard no objection, he would take it that the Commission accepted that proposal.

_It was so agreed._

_Paragraph 40, as amended, was adopted._

Paragraph 41

34. Mr. ROSENSTOCK suggested that a new sentence should be added at the end of the paragraph, to read: “It was urged that the Commission could and should avoid dealing with questions relating to Article 2, paragraph 4, and Article 51 of the Charter of the United Nations in the current context”.

35. Mr. VILLAGRAN KRAMER said that the words “It was urged . . .” were too impersonal and suggested that they should be replaced by the words “Some members urged . . .”.

_Mr. Rosenstock’s proposal, as amended by Mr. Villagran Kramer, was adopted._

_Paragraph 41, as amended, was adopted._

Paragraphs 42 and 43

_Paragraphs 42 and 43 were adopted._

Paragraph 44

36. Mr. VERESHCHETIN said that he did not agree with the use of the words “One of them remarked” at the beginning of the third sentence. In his view, that remark had been made by several members and the sentence should begin: “Some members remarked”. In the fourth sentence, the words “Another member observed” should also be replaced by the words “Some other members observed”.

_Paragraph 44, as amended, was adopted._

Paragraph 45

37. Mr. CRAWFORD suggested, for the sake of clarity, that a new sentence should be added at the end of the paragraph, to read: “One member, however, argued that the idea of reciprocity could have a useful application if it was confined to issues of diplomatic and consular relations”.

38. Mr. VERESHCHETIN said that he supported that amendment, but proposed that the words “One member” should be replaced by the words “Some members”, since it seemed to him that several members had expressed the opinion in question.

_Paragraph 45, as amended by Mr. Crawford and Mr. Vereshchetin, was adopted._

Paragraph 46

_Paragraph 46 was adopted._

(iii) Functions of countermeasures (A/CN.4/L.478)

Paragraphs 47 to 50

_Paragraphs 47 to 50 were adopted._

(iv) The distinction between crimes and delicts in the context of countermeasures (A/CN.4/L.478)

Paragraphs 51 and 52

_Paragraphs 51 and 52 were adopted._

Paragraph 53

39. The CHAIRMAN said that in the English version of the last sentence the words “concerned crimes alone” should read: “did not concern crimes alone”.

40. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he agreed and that, in the preceding sentence, the French wording _et que Von passait insensiblement de l’un à l’autre_ was more felicitous and better reflected what he had said than the English version; he suggested that the secretariat might wish to bring the English text into line with the French.

_It was so agreed._

_Paragraph 53 was adopted, on that understanding._

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

Paragraph 54

41. Mr. ARANGIO-RUIZ (Special Rapporteur) said that in the first sentence what he had said had been distorted by saying that he “had acknowledged” that “his predecessor’s draft for part 3 on dispute settlement could not be regarded as generally acceptable”. That opinion had, rather, been expressed by one of the members of the Commission. He therefore suggested that the phrase in question should be amended to read: “The view was expressed by one member that, since the previous Special Rapporteur’s 1985 draft for part 3 on dispute settlement
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. Giiney, 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)


B. Consideration of the topic at the present session (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”. 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-
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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, 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.
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".

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 according 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.
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 "prevailing" 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, 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. MAHIIOU 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.

68. Mr. BENNOUNA opposed the adoption of the amended paragraph 161.

Paragraph 162

69. Mr. ROSENSTOCK suggested that paragraph 162 be adopted as amended by Mr. Bennouna.

Paragraph 162, as amended, was adopted.
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.

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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.

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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.

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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.

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


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


   (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

Paragraph 171 was adopted.

Paragraph 172

Paragraph 172 was adopted.

Paragraph 173

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
State might seek assistance from others; and (c) the question of non-recognition". The word "latter", which appeared at the beginning of the next sentence, should be replaced by the word "last".

Paragraph 173, as amended, was adopted.

Paragraph 174

8. Mr. EIRIKSSON said that the statement in the first sentence of the paragraph reading "the Special Rapporteur said that he would give careful consideration to the views expressed in the course of the debate" was self-evident and could be deleted.

9. Mr. ARANGIO-RUIZ (Special Rapporteur) explained that his purpose in making that statement was to indicate that he would take due account of the views expressed and thus to emphasize the respect he had for the advice he had been given. He was most anxious that the statement should remain as drafted.

Paragraph 174 was adopted.

10. The CHAIRMAN said that, before it adopted chapter III of its report on the work of its forty-fourth session as a whole, the Commission should revert to paragraphs 19 and 34 of document A/CN.4/L.478, which had been left in abeyance. A new version of paragraph 19 had been prepared by Mr. Shi and a revised version of paragraph 34 had been drafted by Mr. Pellet in cooperation with Mr. Vereshchetin and the Special Rapporteur.

(a) General approach to the question of countermeasures (concluded)* (A/CN.4/L.478 and Add.1 and 2)

Paragraph 19 (concluded)

11. The CHAIRMAN said that the changes proposed by Mr. Shi were that the first sentence should be amended to read: "According to one view, the question was whether the Commission could view the forms of countermeasures covering well over a century of State practice as rules of general international law and thus suitable for codification".

12. The first part of the third sentence, up to the word "countermeasures", should be amended to read: "Attention was drawn to the Special Rapporteur's remark that the powerful or rich countries could easily enjoy an advantage over the weak or poor in the exercise of the means of redress in the form of reprisals or countermeasures".

13. The fourth sentence should be amended to read: "In fact, according to this view, reprisals or countermeasures were often the prerogative of the more powerful State and the impropriety of the concept of reprisals or countermeasures as part of general international law lay in the fact that it was the outcome of the relationship between powerful States and weak and small States in a period when these latter States were unable to assert their rights under international law".

14. The beginning of the sixth sentence should be simplified, so as to read: "With reference to a strict regime of conditional countermeasures as conceived by the Special Rapporteur, the remark was made that such a regime would be in the interest . . . ."

15. Mr. BOWETT suggested that, in the fourth sentence, the plural should be used, the words "the prerogative of the more powerful State" being replaced by the words "the prerogative of the more powerful States".

16. After an exchange of views in which Mr. SHI, Mr. VERESHCHETIN, Mr. KOROMA and Mr. ARANGIO-RUIZ (Special Rapporteur) took part, the latter said he could accept Mr. Shi's proposals as amended by Mr. Bowett.

Paragraph 19, as amended, was adopted.

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

(i) The notion of countermeasures: terminological and conceptual aspects (concluded)*

Paragraph 34 (concluded) and 34 bis

17. The CHAIRMAN said that Mr. Pellet had proposed that the first sentence of paragraph 34 should be amended to read: "As far as terminology is concerned, there was general agreement with the Special Rapporteur's view that, for the purposes of the draft articles, the notion of countermeasures was identical to that of reprisals".

18. At the end of the paragraph or as an additional paragraph (paragraph 34 bis), two sentences should be added, to read: "Some members however stressed that the notion of countermeasures was broader than that of reprisals and encompassed in particular retortion and more generally all the forms of reaction to unlawful conduct. One member accordingly expressed the view that this idea should be duly reflected, at a future stage, either in one of the articles devoted to countermeasures or in a commentary".

19. Mr. VERESHCHETIN thanked Mr. Pellet for drafting the new text, which fully reflected his own viewpoint. He would only ask that the words "reaction to unlawful conduct", in the first of the two sentences it was proposed to add at the end of the paragraph, should be replaced by the words "lawful reaction to unlawful conduct". He also reminded the Commission that the Chairman had envisaged the possibility that the two new sentences added to paragraph 34 should form a new paragraph 34 bis.

Paragraphs 34 and 34 bis, as amended, were adopted.


20. Mr. RAZAFINDRALAMBO (Rapporteur), introducing chapter II of the Commission's draft report (A/CN.4/L.475), said that section B (Consideration of the topic at the present session) was comparatively brief owing to the fact that chapter II reproduced the report of...
the Working Group on the question of an international criminal jurisdiction in extenso. It would perhaps be useful, however, to subdivide that section to make the broad structure clearer. The report of the Working Group could be reproduced either in the body of chapter II or right at the end of the Commission's report, according to the usual practice.

21. Mr. CRAWFORD said he considered that it would in fact be advisable to rearrange the presentation of chapter II, if only because the Commission had not, strictly speaking, adopted the report of the Working Group, but only the decision it contained.

22. Mr. EIRIKSSON said that he would read out a list of the headings of the various subsections which should, in his view, be included in section B.

23. Mr. BENNOUNA, supported by Mr. GÜNEY, said that if the text was to be amended, he would prefer to consider it paragraph by paragraph.

24. Mr. MAHIOU said that he was surprised by the content of paragraph 14, according to which the pages which followed would summarize only the two points not covered by the report of the Working Group. He did not understand why the substance of the Commission's discussions in plenary on the question of an international criminal jurisdiction should be passed over in that way.

25. Mr. RAZAFINDRALAMBO (Rapporteur) said that, given the length of the report of the Working Group which was being reproduced in extenso, there had seemed no point in reflecting all the discussions in plenary, with the risk of duplication.

26. Mr. THIAM (Special Rapporteur) said that, while he considered that Mr. Mahiou's remark was pertinent, he would point out that the General Assembly expected the Commission's reports to be as succinct as possible. If every discussion held in plenary and every remark made by the Working Group were to be reflected, the report would be too voluminous.

27. Mr. CALERO RODRIGUES said that, in his view, it should be possible to provide a summary of the discussions held in plenary under the subheadings Mr. Eiriksson was proposing. The deliberations of the Working Group should also be summarized, but very concisely, since its report would in any event be reproduced as an annex.

28. Mr. ROSENSTOCK said that he always favoured brevity, but the part devoted to the consideration of the topic in plenary was dealt with in somewhat too drastic a fashion: three-quarters of the discussion had been lost. Mr. Mahiou had been right to complain on that score, but his concern could be met by drafting a few additional paragraphs to explain, in particular, that reference should also be had to the report of the Working Group. If brevity was indeed the aim, he could quote several passages in the report which could be summarized more concisely or even deleted.

29. Mr. MAHIOU said that, in his view, concision was not worth the price of misrepresentation of the discussions the Commission had held in plenary. In those discussions, differing views had been expressed, whereas the Working Group's aim had been to arrive at compromise solutions. The Commission had devoted two weeks to consideration of the Special Rapporteur's tenth report yet only a few pages of its own report were devoted to that part of its work. There was, moreover, a question of principle: the conclusions of a working group were not of the same nature as the ideas exchanged in plenary.

30. Mr. BENNOUNA said that he would go even further. The way in which chapter II was presented posed a very serious problem of substance, since the reader could have no idea of what had happened during the session. He or she would realize that the Working Group had proposed a compromise solution, but would not understand on which views a compromise had been reached. The proposed international criminal court had, however, given rise to very divergent views. Some members had not even wanted a court at all. Consequently, if section B of chapter II was to be recast, it was not the technical points, as exemplified by paragraph 12, that should be considered, but the central issue of the session, namely, the difference between the various legal approaches. That was what interested the international community. People should know that the Commission had discussed a number of models for an international criminal court and had considered the place such a court should occupy in the international political and legal order and in the utopian vision of the times. In any event, the comments made in a rather small working group did not carry the same weight as exchanges of views in plenary.

31. Mr. THIAM (Special Rapporteur) suggested that a section might be added to the report to reflect the discussions held in plenary and, in particular, as Mr. Bennouna had just said, to highlight the main trends which had emerged and which were well known.

32. Mr. RAZAFINDRALAMBO (Rapporteur), agreeing with that suggestion, said he would propose that, while the new section was being drafted, the Commission should continue its consideration of the report.

33. The CHAIRMAN suggested, following informal consultations, that the Commission should consider chapter II of the draft report paragraph by paragraph, leaving aside paragraphs 9 to 14, which would be re-drafted and expanded to reflect the discussion that had taken place in plenary on the role and structure of the international criminal court and the main trends that had emerged in that connection.

It was so agreed.

A. Introduction

Paragaphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragaph 4

34. Mr. EIRIKSSON proposed that, at the beginning of paragraph 4, the words "At the conclusion of the work of the Special Committee" or some other wording along the same lines should be added to indicate that the outcome of the Special Committee's work had been the adoption of General Assembly resolution 3314 (XXIX).
It was so agreed.

Paragraph 4, as amended, was adopted.

Paragraph 5

35. Mr. ERIKSSON proposed that the footnote should be reworded to read: “In resolution 42/151 of 7 December 1987, the General Assembly agreed with the recommendation of the Commission and amended the title of the topic in English to read ‘Draft Code of Crimes against the Peace and Security of Mankind’”.

Paragraph 5, as amended, was adopted.

Paragraph 6

Paragraph 6 was adopted.

Paragraph 7

36. Mr. ERIKSSON said that the last sentence of paragraph 7 followed the wording of General Assembly resolution 44/41. Thus, for accuracy’s sake, the expression “international jurisdiction” should read “international criminal jurisdiction”.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session

37. The CHAIRMAN said that, in accordance with the decision taken earlier, the Commission should proceed to consider paragraphs 15 et seq. of the draft report.

38. Mr. PELLET said he did not think that the Commission could go on to consider paragraph 15 and the following paragraphs without having seen the text which would replace paragraphs 9 to 14. There had to be a reasonable balance, in terms of length, between that text and paragraph 15 and the following paragraphs. In that connection, while he agreed with Mr. Bennouna and Mr. Thiam that it was necessary to reflect the discussions which had taken place in plenary on the general approach to the proposed international criminal court, he considered that the more technical aspects developed by the members of the Commission should also be reflected. He himself, for instance, had stated that he objected to the Working Group’s approach with regard to the applicable law and he would like his opinion to be reflected in the report. That was, moreover, a matter of principle: he was strongly opposed to any practice which consisted of not reflecting in the report discussions held in plenary on certain questions on the ground that those self-same questions had been considered by a working group. He therefore insisted that the new paragraphs which were to be submitted to the Commission should give a reasonably detailed picture of the discussion which had taken place in plenary.

39. Mr. JACOVIDES said that the report had been prepared on a solid foundation since the Commission’s decision laid emphasis on the work of the Working Group and the results of that work with a view to facilitating the discussion in the Sixth Committee. None the less, while brevity was desirable, there should not be too great a disproportion between the paragraphs that would replace paragraphs 9 to 14 and paragraphs 15 to 32.

40. Mr. CALERO RODRIGUES, endorsing Mr. Pellet’s remarks, said he doubted whether it would be possible to approve the paragraphs on compensation and the double-hearing principle—namely, paragraphs 15 et seq.—if the other points raised in the discussion held in plenary were dealt with in only a few paragraphs. Another solution would be to shorten paragraph 15 and the following paragraphs. In general, the premise on which the chapter under consideration had been drafted was doubtful; it seemed as though there had been a feeling that the discussion held in plenary on questions considered by the Working Group should not be reflected in the report.

41. Mr. CRAWFORD, agreeing with Mr. Pellet, Mr. Jacovides and Mr. Calero Rodrigues, said that the report on the discussion held in plenary on compensation and the double-hearing principle should be no longer than the report on the discussion that had taken place on the other questions. In that connection, he insisted that the main arguments adduced on the role of a possible international criminal court should be dealt with in one or two paragraphs.

42. Mr. AL-KHASAWNEH said that he supported Crawford’s last remark.

43. The CHAIRMAN said it was his understanding that the Commission wished to suspend its consideration of chapter II of the draft report until the new paragraphs to replace paragraphs 9 to 14 had been made available.

It was so agreed.

The meeting rose at 1 p.m.

2293rd MEETING

Thursday, 23 July 1992, at 3.20 p.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. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razindralambo, 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 (concluded) (A/CN.4/L.478 and Add.1-3)

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


(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 (concluded) (A/CN.4/L.478/Add.3)

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

Paragraph 160 bis [162 bis]

1. The CHAIRMAN said that, at the 2291st meeting, Mr. Mahiou and Mr. Bennouna had requested the inclusion of an additional paragraph, paragraph 160 bis to establish a balance between the differing views in the Commission. The additional paragraph would read:

"160 bis. Many members of the Commission concurred with the Special Rapporteur's position that the power of decision of the Security Council was strictly confined to measures aimed at re-establishing international peace and security under Chapter VII of the Charter and that the Council was not empowered to impose on States settlements or settlement procedures in relation to disputes or situations which are to be dealt with under Chapter VI, by way of recommendation."

2. Mr. ROSENSTOCK said there was an implication, in the proposed text, that the view recorded was the dominant view in the Commission. That was not the case. He proposed, accordingly, that the words "Many members" should be replaced by "Some members".

3. Mr. PELLET said that paragraph 160 bis would not serve as an alternative to the view expressed in paragraph 161; there appeared to be a discrepancy between the two. Moreover, some members had since abandoned the view reflected in the new paragraph.

4. Mr. BENNOUNA said he disagreed. The view expressed in the new text was that of the great majority of members, whereas the view in paragraph 161 had been expressed by only two or three members.

5. Mr. AL-KHASAWNEH said he disagreed with Mr. Rosenstock. A reference to "Many members" did not imply the majority of the Commission.

6. Mr. GÜNŸEY suggested, as an alternative, "A certain number of members".

7. Mr. PELLET said that the new text would be best placed in paragraph 159, so long as it was made clear that other members had disagreed with the view expressed.

8. Mr. ARANGIO-RUIZ (Special Rapporteur) said that paragraphs 159 and 160 both reflected his own views. Hence the opposing view would not fit well into either paragraph; the new text should follow paragraph 161.

9. Mr. EIRIKSSON said that Mr. Pellet's position reflected the amendment already made to paragraph 161.

10. Mr. ROSENSTOCK said that because of the extreme gravity of the issue, which implied an attack on the action of the Security Council the previous year, the Commission must not indicate that the view in the new text was widely held among members unless that was demonstrably the case. The exponents of that view were too few in number to justify the statement now proposed.

11. Mr. CALERO RODRIGUES proposed that the words "Several members" should be used to replace "Many members".

"It was so agreed."

12. Mr. de SARAM pointed out that there was a difference between non-binding recommendations of the Security Council, and binding decisions. The new text should therefore speak of "the power of binding decision of the Security Council".

13. Mr. ARANGIO-RUIZ (Special Rapporteur) urged the Commission to be cautious. The new text went somewhat beyond the view he had expressed, as formulated in paragraph 159. He, certainly, was not attacking any specific actions of the Security Council; rather, he was warning the Commission that article 4 of part 2, if adopted, would raise certain difficulties, both in relation to the Security Council and in relation to the doctrinal view previously mentioned. The statement that the power of decision of the Security Council "was strictly confined to measures aimed at re-establishing international peace and security" was a more emphatic statement than he had intended. However, he could accept the new text with the amendment proposed by Mr. Calero Rodrigues.

14. Mr. PELLET proposed that subparagraph (b) of paragraph 161 should be amended to read "it was recognized that the Security Council had the primary responsibility for maintaining international peace and security, and that in the context of its powers, it could impose a peaceful settlement of disputes".

15. Mr. BENNOUNA said he strongly disagreed with the implication that the Security Council could decide what was lawful, and was not bound by international law. Indeed, if the Security Council were to determine the law, there would be no role for the Commission. The text as proposed faithfully reflected the position of a number of members.

16. Mr. MIKULKA said he wondered whether it was really necessary to refer to "binding" decisions of the Security Council, as proposed by Mr. de Saram. That would confine the reference to the powers of the Security Council under Chapter VII of the Charter of the United Nations, and appeared to be contrary to Article 25.
17. Mr. BENNOUINA proposed that the new text should be amended to begin: "Several members of the Commission concurred with the position expressed by the Special Rapporteur that the power of decision of the Security Council was confined . . .".

18. Mr. PELLET pointed out that he had never said that the Security Council was free to do anything it wanted. Certainly, it was subject to international law, but that did not mean that it had no competence to settle disputes.

19. Mr. ARANGIO-RUIZ (Special Rapporteur) said he shared the view that the Security Council could prevent a State from settling its disputes by resort to force, and that it had powers under Chapter VII to prevent any act which was not peaceful. But it was one thing to compel States not to resort to force to settle disputes and quite another to say that the Security Council had the power to take a decision constituting a binding settlement of a dispute. To include the statement suggested by Mr. Pellet would raise considerable difficulty. Anyway, the debate had arisen in the context of article 4, and therefore belonged in the context of countermeasures. Article 4 carried implications for both the substantive and the instrumental implications of an internationally wrongful act; and that made the article objectionable.

20. The CHAIRMAN reminded the Commission that it had already adopted an amendment to the first sentence of paragraph 161, 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".

21. Mr. PELLET said that that text, as proposed by Mr. Rosenstock, reflected both his own views and those of Mr. Bowett. Accordingly, he was willing to withdraw his own proposed amendment.

22. Mr. AL-KHASAWNEH said that there was still a difficulty about numbers; how many members were "several"? He proposed that "several" should be replaced by "some".

23. Mr. CALERO RODRIGUES suggested that, since fewer members shared the view of Mr. Rosenstock than shared the opposite view, the word "some" should be used for his amendment, and "several" for the new one.

24. Mr. VERESHCHETIN pointed out that the Commission had already adopted the text containing Mr. Rosenstock’s amendment, and could not now re-amend it. The important subject of the competence of the Security Council was not before the Commission, which should not be seeking to take decisions of principle on the matter. If the Commission wished to pursue the issue, it should do so properly at the next session. Certainly, it should not enter into arguments as to whether "several" or "some" members held a particular view.

25. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in raising the difficulties associated with article 4, in the light of the examples mentioned in paragraph 160, he had intended to elicit comments on the issue. As pointed out by Mr. Al-Khasawneh, several members held one view of the matter, and some members held another.

26. The CHAIRMAN suggested that the new text should be inserted as paragraph 162 bis, with the amendments proposed by Mr. Bennouna.

   It was so agreed.

   Paragraph 162 bis, as amended, was adopted.

   Section B.3, as amended, was adopted.

   Chapter III of the draft report, as a whole, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.474 and Add.1)

27. The CHAIRMAN invited the Commission to consider chapter I of the draft report (A/CN.4/L.474 and Add.1) paragraph by paragraph.

   Paragraph 1

   Paragraph 1 was adopted.

   A. Membership

   Paragraph 2

   Paragraph 2 was adopted.

   Section A was adopted.

   B. Officers

   Paragraph 3

C. Drafting Committee

28. The CHAIRMAN said that, in order to correct an omission, the title "B. Officers" should be inserted immediately before paragraph 3.

   It was so agreed.

   Paragraphs 3 to 5

   Paragraphs 3 to 5 were adopted.

   Section B, as amended, and section C were adopted.

D. Working Group established pursuant to the request contained in General Assembly resolution 46/54

Paragraph 6

29. The CHAIRMAN said that the first sentence should read: "At its 2262nd meeting, on 19 May 1992, the Commission established a Working Group on the question of an international criminal jurisdiction pursuant to the invitation contained in General Assembly resolution 46/54 . . . ."

30. Mr. CALERO RODRIGUES said that, in resolution 46/54, the General Assembly had not invited the Commission to set up a working group but had requested it to consider the issue of an international criminal jurisdiction, whereupon the Commission, on its own initiative, had set up the working group. He therefore pro-
posed that some such formulation as "which should be considered" should be inserted after the phrase "on the question of an international criminal jurisdiction".

**Paragraph 6, as amended, was adopted.**

**Paragraph 6 bis**

31. The CHAIRMAN said that a new paragraph, numbered 6 bis, should be inserted between paragraphs 6 and 7 to read:

"6 bis. At its 2273rd meeting, on 16 June 1992, the Commission established a Working Group, open to any member who wished to participate, to consider some of the general issues relating to the scope, the approach to be taken, and the possible direction of the future work on the topic of international liability".

32. Mr. PELLET pointed out that there appeared to be some duplication between paragraph 6 bis and paragraph 12.

33. Mr. RAZAFINDRALAMBO (Rapporteur) said that it would be appropriate for paragraph 12 to include a cross-reference to paragraph 6 bis.

34. The CHAIRMAN suggested that the title of section D should be amended to read: "Working Groups established by the Commission".

_It was so agreed._

35. Following an exchange of views in which Mr. EIRIKSSON and Mr. PELLET took part, the CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt paragraph 6 bis.

_It was so agreed._

**Paragraph 6 bis was adopted.**

**Section D, as amended, was adopted.**

**E. Secretariat**

Paragraph 7

**Paragraph 7 was adopted.**

**Section E was adopted.**

**F. Agenda**

Paragraph 8

**Paragraph 8 was adopted.**

Paragraph 9

36. The CHAIRMAN suggested that the first sentence of paragraph 9 should be replaced by two sentences, to read:

"9. The Commission, in view of its practice of not holding a substantive debate on draft articles adopted on first reading until the comments and observations of Governments thereon are available, did not consider the item 'The law of the non-navigational uses of international watercourses' nor draft articles under the item 'Draft Code of Crimes against the Peace and Security of Mankind' pending receipt of the comments and observations which Governments have been invited to submit by 1 January 1993 on the sets of draft articles provisionally adopted by the Commission at its forty-third session on the two topics in question. As regards the latter item, however, the Commission, in accordance with the invitation contained in paragraph 3 of General Assembly resolution 46/54, considered further and analysed the issues raised in its 1990 report concerning the question of an international criminal jurisdiction'.

A footnote would be attached giving the appropriate reference to the 1990 report.

37. Mr. RAZAFINDRALAMBO (Rapporteur) said that the main change was in the new second sentence, with its reference to paragraph 3 of General Assembly resolution 46/54, which had invited the Commission to consider further the question of an international criminal jurisdiction.

**Paragraph 9, as amended, was adopted.**

**Section F, as amended, was adopted.**

**G. General description of the work of the Commission at its forty-fourth session (A/CN.4/L.474/Add.1)**

Paragraph 10

**Paragraph 10 was adopted with minor editorial changes.**

Paragraph 11

38. Mr. PELLET pointed out that the wording of the second sentence of paragraph 11 did not do justice to the Special Rapporteur on State responsibility, Mr. Arangio-Ruiz, by stating that his third and fourth reports "were both devoted to the question of countermeasures". In fact, they dealt with many other matters as well. He proposed the insertion of the word "mainly" after the word "devoted".

**Paragraph 11, as amended, was adopted.**

Paragraph 12

**Paragraph 12 was adopted with minor editorial changes.**

Paragraph 13

**Paragraph 13 was adopted.**

**Section G, as amended, was adopted.**

**H. Issues on which expressions of views by Governments would be of particular interest for the Commission for the continuation of its work**

39. The CHAIRMAN suggested that, in the light of the guidelines on the preparation of the report which the Commission had adopted earlier, a further section should be added after paragraph 13, to read:
"H. Issues on which expressions of views by Governments would be of particular interest for the Commission for the continuation of its work"

"14. With respect to the topic 'Draft Code of Crimes against the Peace and Security of Mankind' the Commission, as follows from its decision on the topic, expects a clear indication by Governments, whether in the Sixth Committee or in written form, if it should now embark on the elaboration of a draft statute of an international criminal court and, in an affirmative case, whether the Commission's work on the matter should proceed on the basis indicated in paragraph (a) of the said decision."

40. Mr. ARANGIO-RUIZ said that he was strongly opposed to any questions being put to the General Assembly by the Commission. As far as the draft Code of Crimes against the Peace and Security of Mankind was concerned, the Commission had already received a specific mandate and should proceed to carry out that mandate. As for his own topic, State responsibility, it should be possible for the Sixth Committee to make known its views on countermeasures on the basis of the Commission's report to the General Assembly, his reports on the topic, and any other relevant documentation. There was no one specific question that could usefully be put to the General Assembly at the present stage.

41. Mr. EIRIKSSON said that he favoured the inclusion in the Commission's report of a section along the lines read out by the Chairman. In addition to a question concerning the draft Code of Crimes against the Peace and Security of Mankind, two other questions could perhaps be put to the General Assembly, the first being the issue of countermeasures, as it arose within the context of the topic of State responsibility, and the second, the question of risk within the context of the topic of international liability.

42. Mr. BENOUNA said that there was general agreement in the Commission that a question concerning an international criminal jurisdiction should be put to the General Assembly. That question, however, should be dealt with separately. As to the topic of State responsibility, he agreed with Mr. Arangio-Ruiz that it would be premature to put a question to the General Assembly when there was still no clear idea of all the issues involved. He was also opposed to putting any question on the topic of international liability, which was a matter for the Commission, not the General Assembly.

43. Mr. VERESHCHETIN said that he agreed entirely with Mr. Bennouna.

44. Mr. SHI said that, as he had already had occasion to state during the general debate, countermeasures should, in his view, be eliminated altogether. In a spirit of compromise, however, he had not objected to referral of the draft articles on countermeasures to the Drafting Committee, but had reserved his position on the matter. Since the draft articles were now in the hands of the Drafting Committee, which meant that work on them was in fact continuing, it would be pointless to ask the General Assembly whether or not there should be any articles on countermeasures.

45. Mr. PELLET proposed that the words "whether in the Sixth Committee or in written form", should be deleted.

46. Mr. KOROMA, agreeing with Mr. Pellet, said that the wording of the proposed new section was not very felicitous and should be improved. In particular, the word "expects" was too peremptory and should be replaced by "requests"; also, the expression "in an affirmative case" should be replaced by "in the affirmative".

47. Mr. CRAWFORD, also agreeing with Mr. Pellet, said that it would be helpful if an amended text of the proposed section could be submitted in writing for consideration by the Commission in the light of chapter II of the Commission's report.

48. Mr. ROSENSTOCK said that some wording along the lines of the proposed section should be included in the Commission's report to the General Assembly. He could agree to the drafting suggestions made by Mr. Koroma and was also prepared to consider an amended text in writing at the Commission's next meeting.

49. Mr. CALERO RODRIGUES said that the real issue was not one of putting questions to the General Assembly: what the General Assembly wanted from the Commission was an indication of the issues on which the opinions expressed in the General Assembly would be useful for the continuation of the Commission's work. In other words, the Commission was dealing not with the usual case in which it sought the General Assembly's guidance on certain issues but with something more specific relating to the recommendations of a working group which had been approved by the Commission. He trusted that the section would be redrafted to reflect that different situation very clearly.

50. The CHAIRMAN suggested that proposed section H should be redrafted to take account of the comments made in the discussion and submitted to the Commission at its next meeting.

It was so agreed.

CHAPTER V. Other decisions and conclusions of the Commission (A/CN.4/L.477 and Corr.1)

A. The law of the non-navigational uses of international water-courses

B. Draft Code of Crimes against the Peace and Security of Mankind

Paragraphs 1 to 4

Paragraphs 1 to 4 were adopted.

Sections A and B were adopted.
Summary records of the meetings of the forty-fourth session

C. Relations between States and international organizations (second part of the topic)

Paragraph 5

51. Mr. CALERO RODRIGUES proposed that the words "subject to the approval of the General Assembly" should be replaced by "unless the General Assembly decides otherwise".

*Paragraph 5, as amended, was adopted.*

Section C, as amended, was adopted.

D. Programme, procedures and working methods of the Commission, and its documentation

Paragraphs 6 and 7

*Paragraphs 6 and 7 were adopted.*

Paragraphs 8 and 9

52. Mr. EIRIKSSON said that paragraphs 8 and 9 were unnecessary since the membership and nature of the Planning Group was dealt with elsewhere in the Commission's report. He therefore proposed that the two paragraphs should be deleted.

*It was so agreed.*

Paragraph 10

*Paragraph 10 was adopted.*

1. PLANNING OF ACTIVITIES

(a) The topic "Relations between States and international organizations (second part of the topic)"

Paragraphs 11 and 12

*Paragraphs 11 and 12 were adopted.*

Paragraph 13

53. Mr. EIRIKSSON said that the word "Member", in the first sentence, should be deleted.

*Paragraph 13, as amended, was adopted.*

Paragraph 14

54. The CHAIRMAN pointed out that, to make the language of paragraph 14 consistent with that of paragraph 5, the phrase "subject to the approval of the General Assembly" in the last sentence, should be replaced by "unless the General Assembly decides otherwise".

55. Mr. EIRIKSSON proposed that the words "the Commission and the Drafting Committee will be fully occupied", in the first sentence, should be replaced by "the Commission, in plenary and in the Drafting Committee, will be fully occupied", to reflect the fact that the Drafting Committee was part of the Commission.

56. Mr. PELLET said he did not wish to be associated with that formulation because he did not believe that the Drafting Committee would be fully occupied.

*Paragraph 14, as amended, was adopted.*

(b) Planning of the activities for the quinquennium

Paragraph 15

57. Mr. BENNOUNA proposed that, in view of the amendment to paragraph 14, the first part of the first sentence of paragraph 15, ending with the words "(second part of the topic)", should be deleted, so that the paragraph would begin "The current programme of work".

58. The CHAIRMAN said that it would not be appropriate to make that deletion; however, the wording could be amended.

59. Mr. CRAWFORD proposed that the beginning of the paragraph should be amended to read: "Having regard to the conclusion in paragraph 14 above, and subject to any decision of the General Assembly to the contrary in relation to that matter, the current programme of work consists of the following topics".

60. Mr. EIRIKSSON said that the substance of the amendment proposed by Mr. Crawford should appear as a footnote to paragraph 15. He supported Mr. Bennouna's proposal to delete the first part of the first sentence.

*Paragraph 15, as amended, was adopted.*

Paragraphs 16 to 19

*Paragraphs 16 to 19 were adopted.*

Section D.1, as amended, was adopted.

2. LONG-TERM PROGRAMME OF WORK

Paragraph 20

*Paragraph 20 was adopted.*

Paragraph 21

61. The CHAIRMAN noted that paragraph 21 dealt, in general, with the procedure proposed by the Planning Group, on the recommendation of its Working Group established to consider a limited number of topics to be recommended to the General Assembly for inclusion in the Commission's programme of work. Under that procedure, a member of the Commission would prepare a short outline, or explanatory summary, for one of the topics included in a pre-selected list.

62. Mr. BENNOUNA drew attention to the penultimate sentence of the paragraph in which the Commission requested the secretariat, first, to circulate the outlines prepared by members of the Commission, and second, to circulate the revised outlines prior to the next session. That sentence did not specify who would be revising the outlines.

63. Mr. CALERO RODRIGUES said that, as he understood it, on the basis of comments from other members, the member who had drafted the outline would make the appropriate revisions.

64. Mr. BOWETT said that the secretariat would in that case function as a "letter-box": first, it would circulate the outlines on the topics to the members of the
65. Mr. BENNOUMA proposed that the word "revised" in the penultimate sentence, should be deleted and the words "as well as the comments received" should be inserted after the word "outlines".

66. Mr. KOROMA said that the preparation of the outlines on selected topics represented a major assignment and might be a difficult task for some members.

67. Mr. SZEKELY, supported by Mr. BENNOUMA and Mr. BOWETT, said that, first, the outlines, once drafted, would be sent to the secretariat which would distribute them for comments; secondly, comments on the outlines would be submitted to the secretariat which would then distribute them to the authors of the outlines; thirdly, in the light of the comments, the outlines would be revised by the authors, if appropriate; and fourthly, the final outlines would be distributed to all members of the Working Group before June 1993.

68. Mr. CALERO RODRIGUES proposed that the penultimate sentence should be amended to read: "... to circulate the comments as well as any revised outlines to the members of the Working Group prior to the next session".

69. Mr. BOWETT said he agreed with Mr. Calero Rodrigues, but suggested a slight amendment: "... to circulate the comments and thereafter the revised outlines". The only question remaining was to whom the revised outlines should be distributed. The Commission had to decide whether those outlines should be distributed to all its members or whether circulation should be restricted to the members responsible for preparing the outlines.

70. Mr. GÜNÉY said that it would be appropriate to distribute the revised outlines to all members of the Commission, so that they would have time to consider the contents before the next session.

71. Mr. PELLET said there was no reason to circulate either the comments or the revised outlines among all members of the Commission. The revised outlines should be considered by the Working Group and then be sent to the Planning Group. In another connection, he pointed out that, in the French version, the second sentence of paragraph 21 was ambiguous, for it implied that several members would be preparing an outline for each of the designated topics.

72. Mr. CRAWFORD said that, when the report of the Planning Group had been discussed in plenary, it had been agreed to amend paragraph 24 (d), yet the original wording of that paragraph had reappeared in paragraph 21 of the Commission's draft report.

73. Ms. ARSANJANI (Secretariat) said that, for the purpose of clarification, she would recapitulate the proposed amendments to paragraph 21. In the second sentence, after the words "Under that procedure", the words "various members of the Commission will prepare" would be replaced by "one of the members of the Commission will prepare". The wording of subparagraph (d) would be deleted and replaced by the words: "the advantages and disadvantages of preparing a report, a study or a draft convention, in case it is decided to continue consideration of the topic". In the penultimate sentence, the words "the comments and" would be inserted after "(ii) to circulate".

74. Mr. CALERO RODRIGUES said that, in the second sentence, the words "designated members will prepare" should be used instead of "various members of the Commission will prepare".

75. Mr. PELLET, supported by Mr. GÜNÉY, said that members other than those belonging to the Working Group had agreed to prepare the outlines. Thus, paragraph 21 should indicate that all the members involved in drafting the outlines should receive the information indicated.

76. Mr. KOROMA said that, in the third sentence, the words "or explanatory summary" should be inserted after "the outline".

Paragraph 21, as amended, was adopted.

Paragraph 22

77. Mr. THIAM noted that the first sentence of the paragraph stated that the Commission gave "serious consideration" to the question of the long-term programme of work. He wondered if the word "serious" was appropriate, since there was never any instance in which the Commission did not give serious consideration to a matter.

Paragraph 22, as amended, was adopted.

Section D.2, as amended, was adopted.

3. DRAFTING COMMITTEE

Paragraph 23

79. Mr. KOROMA proposed that in subparagraph (e) the words "may occasionally be authorized to speak" should be replaced by "may request to speak".

80. Mr. CALERO RODRIGUES said he did not think the formulation proposed by Mr. Koroma was an improvement; however, if the majority wished to make the change, he would not object.

81. The CHAIRMAN said the matter would be taken up at the next meeting.

Paragraph 24

Paragraph 24 was adopted.

4. REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

Paragraph 25

82. Mr. PELLET said that subparagraphs (c) and (e) were repetitive. He proposed that the last sentence of subparagraph (e) should be deleted.
Paragraph 25, as amended, was adopted.

The meeting rose at 6.15 p.m.

2294th MEETING

Friday, 24 July 1992, at 10 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Giûney, Mr. Idris, Mr. Jacobides, Mr. Kabatsi, 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 (concluded)

CHAPTER I. Organization of the session (concluded) (A/CN.4/L.474 and Add.1)

H. Issues on which expressions of views by Governments would be of particular interest for the Commission for the continuation of its work (concluded)

Paragraph 14

1. The CHAIRMAN introduced a revised version of the text proposed orally at the previous meeting for a new section H, which was to be added to the introduction to the report of the Commission, as paragraph 14, to read:

"14. With respect to the topic 'Draft Code of Crimes against the Peace and Security of Mankind', the Commission, as follows from its decision on the topic, requests a clear indication by Governments if it should now embark on the elaboration of a draft statute of an international criminal court and, in the affirmative, whether the Commission's work on the matter should proceed on the basis indicated in that decision.'"

2. Mr. CRAWFORD proposed that, in paragraph 14 constituting section H, the words "in the affirmative" should be replaced by the words "if so".

Paragraph 14, as amended, was adopted.

Section I, as amended, was adopted.

Chapter I, as a whole, as amended, was adopted.

CHAPTER V. Other decisions and conclusions of the Commission (concluded) (A/CN.4/L.477 and Corr.1)

D. Programme, procedures and working methods of the Commission, and its documentation (concluded)

Paragraph 23 (concluded)

3. The CHAIRMAN recalled that paragraph 23 had been held in abeyance because there had been objections to the amendment Mr. Koroma had proposed to paragraph 23 (e). He therefore suggested that the Commission should adopt the original text.

Paragraph 23 was adopted.

Chapter V, as a whole, as amended, was adopted.

E. Cooperation with other bodies

Paragraphs 31 to 33

5. Mr. KOROMA proposed that, in future, the report of the Commission should reflect the main points of the statements by the representatives of other bodies instead of referring only to the relevant summary record.

Paragraphs 31 to 33 were adopted.

F. Date and place of the forty-fifth session

Paragraph 34

Paragraph 34 was adopted.

G. Representation at the forty-seventh session of the General Assembly

Paragraphs 35 to 38

5. Mr. KOROMA proposed that, in future, the report of the Commission should reflect the main points of the statements by the representatives of other bodies instead of referring only to the relevant summary record.

Paragraphs 35 to 38 were adopted.
Paragraph 35

6. Following an exchange of views in which Mr. CRAWFORD, Mr. EIRIKSSON, Mr. KOROMA and Mr. VERESHCHETIN took part, the CHAIRMAN proposed that the secretariat should be requested to add a footnote to paragraph 35 stating that the Commission had agreed that none of its Special Rapporteurs should take part in the debates in the Sixth Committee at the forthcoming session of the General Assembly but that it might be appropriate at a later stage in the quinquennium to send more than one Special Rapporteur.

Paragraph 35, as amended, was adopted.

H. International Law Seminar

Paragraphs 36 to 38

Paragraphs 36 to 38 were adopted.

Paragraph 39

7. Mr. PELLET proposed that a sentence should be added to indicate that the Commission had found that experiment encouraging and would try to repeat it in future.

Paragraph 39, as amended, was adopted.

Paragraphs 40 to 42

Paragraphs 40 to 42 were adopted.

Paragraph 43

8. Mr. de SARAM proposed that a sentence should be added mentioning the young participant who had made an extremely brilliant statement during the closing ceremony of the International Law Seminar.

Paragraph 43 was adopted on that understanding.

Paragraph 44

9. The CHAIRMAN urged all members of the Commission, particularly those from wealthy countries, to encourage their Governments to make voluntary contributions to help finance the International Law Seminar.

Paragraph 44 was adopted.

Paragraphs 45 and 46

Paragraphs 45 and 46 were adopted.

Chapter V, as a whole, as amended, was adopted.


B. Consideration of the topic at the present session (concluded) (A/CN.4/L.475/Rev.1)

10. The CHAIRMAN said that, pursuant to the decision taken at the 2292nd meeting, section B had been redrafted and the text of the complete revised version of chapter II was to be found in document A/CN.4/475/Rev.1. He invited the Commission to resume its consideration of that chapter, beginning with paragraph 9.

Paragraph 9

Paragraph 9 was adopted.

1. Consideration of the Special Rapporteur's Tenth Report

Paragraph 10

11. Mr. PELLET said that the word "desirability" in paragraph 10 had been rendered in French as opportunité. However, the Special Rapporteur had referred to the feasibility, not the desirability, of establishing the court.

12. Mr. THIAM (Special Rapporteur) said that his general idea had been that the Commission should decide not whether it was desirable, but whether it was technically feasible to establish an international criminal court.

13. Mr. CRAWFORD proposed that the word "desirability" should be replaced by the word "feasibility".

It was so agreed.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 13

Paragraphs 11 to 13 were adopted.

Paragraph 14

14. Mr. BENNOUINA proposed that a new sentence should be added after the third sentence, to read: "Some members stressed that, in certain cases, national courts both in the State where the accused was found and in the injured State could be suspected of being partial".

It was so agreed.

15. Mr. CRAWFORD proposed that, in the second sentence, the words "Most members", which were an exaggeration, should be replaced by the words "Many members".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraph 15

16. Mr. BENNOUINA said that the second sentence was of very great significance in the light of the discussion that had taken place in the Commission. For the sake of clarity, he proposed that it should be followed by a text reading: "In this connection, some members cautioned against the temptation of drawing too much on models from internal criminal codes".

It was so agreed.

17. Mr. PELLET proposed that, in the last sentence, the words "international law" should be replaced by the words "international institution" or "international mechanism". Otherwise, the sentence would not make sense.

It was so agreed.

Paragraph 15, as amended, was adopted.
Paragraph 16

18. Mr. CRAWFORD proposed that the beginning of the first sentence should simply read: "Some members were sceptical".

It was so agreed.

19. Following a discussion in which Mr. PELLET, Mr. CRAWFORD, Mr. BENNOUA, Mr. THIAM (Special Rapporteur), Mr. ARANGIO-RUIZ, Mr. SHI, Mr. CALERO RODRIGUES and Mr. ROSENSTOCK took part as to whether the third sentence accurately expressed the grounds for the scepticism described in the first sentence, Mr. CALERO RODRIGUES proposed that, in order to avoid any ambiguity, the words "Some of them expressed the view that" should be added at the beginning of the third sentence.

It was so agreed.

Paragraph 16, as amended, was adopted.

20. Mr. ARANGIO-RUIZ proposed that a new paragraph 16 bis should be added after paragraph 16, to read:

"16 bis. One member stressed that, whatever the difficulties in establishing an international criminal court and related institutions, those difficulties would not be any greater—and would probably be much less—than the difficulties in the way of the adoption by States of a Code of Crimes against the Peace and Security of Mankind and the implementation of such a Code by a plurality of institutions operating under more than 175 distinct sovereignties."

Paragraph 16 bis was adopted.

Paragraph 17

21. Mr. KOROMA suggested that, in the first sentence, the word "or" should be replaced by the words "in the sense of a".

Paragraph 17, as amended, was adopted.

Paragraph 18

22. Mr. AL-KHASAWNEH suggested that the words "inherent to" should be replaced by "inherent in" and that the word "criminal" should be inserted before the word "court".

23. Mr. CRAWFORD said that, since "permanence" applied not only to a criminal court, but also to a civil court, the words "concept of a criminal court" should be replaced by the words "concept of a court or at least a criminal court".

It was so agreed.

Paragraph 18, as amended, was adopted.

Paragraph 19

24. Mr. EIRIKSSON suggested that, for the sake of clarity, the three issues should be preceded by the letters (a), (b) and (c), respectively.

Paragraph 19, as amended, was adopted.
in the list of instruments to which the jurisdiction of the court would apply. In his opinion, that was not at all obvious, for the draft Code was still very controversial.

34. Mr. THIAM (Special Rapporteur) said that, as it stood, paragraph 30 reflected the opinion expressed by some members and he therefore did not see why it should be changed.

35. Mr. CRAWFORD said that he agreed with the Special Rapporteur that the report should basically reflect the views expressed in plenary, but he nevertheless insisted that paragraph 30 should be amended in accordance with his proposal because paragraph 29 dealt with the general question of the link between the court and the Code and the real question that arose was not whether the Code was a possible basis for jurisdiction, but whether it was a necessary basis for jurisdiction.

_It was agreed to replace the paragraph by the second of the versions proposed by Mr. Crawford._

**Paragraph 30, as amended, was adopted.**

Paragraphs 31 and 32

Para_630graphic 31 and 32 were adopted.

Paragraph 33

36. Following a discussion in which Mr. VERESHCHETIN, Mr. EIRIKSSON, Mr. BENNOUNA, Mr. CRAWFORD, Mr. THIAM (Special Rapporteur) and Mr. RAZAFINDRALAMBO took part on the extent to which opinions were divided on the question of the link between the statute of the court and a Code, Mr. CRAWFORD proposed that the words "some members" in the first sentence should be replaced by the words "many members".

**Paragraph 33, as amended, was adopted.**

Paragraph 34

**Paragraph 34 was adopted.**

Paragraph 35

37. Mr. EIRIKSSON proposed that the first part of the sentence should be replaced by the words: "Two other issues were raised in respect of the jurisdiction of the criminal court;".

**Paragraph 35, as amended, was adopted.**

Paragraphs 36 to 39

**Paragraphs 36 to 39 were adopted.**

Paragraph 40

38. Mr. EIRIKSSON proposed that the word "legitimation", the meaning of which was not clear, should be replaced by the words "the right".

**Paragraph 40, as amended, was adopted.**

Paragraphs 41 to 44

**Paragraphs 41 to 44 were adopted.**

Paragraph 45

39. Mr. KOROMA proposed that, the word "sole" in the second sentence should be replaced by the word "primary", which was the term used in the Charter of the United Nations.

40. Mr. ROSENSTOCK said that, as one of the members whose opinion, whether right or wrong, was expressed in the sentence in question, he could not agree that the word "sole" should be replaced by the word "primary". As a compromise, however, he could agree that the word "sole" should simply be deleted.

_It was so agreed._

**Paragraph 45, as amended, was adopted.**

Paragraph 46

41. Mr. KOROMA said that ICRC had a special status and could not be compared to an ordinary non-governmental organization. In the first sentence, the words "and humanitarian" should therefore be added between the word "non-governmental" and the word "organizations".

**Paragraph 46, as amended, was adopted.**

Paragraph 47

42. Mr. EIRIKSSON, supported by Mr. KOROMA, said that the last sentence of paragraph 47 distorted the opinion it was supposed to reflect. It should therefore be amended to read: "For example, they were not sure that, even if ICRC would be interested in such access, its statute would allow it".

**Paragraph 47, as amended, was adopted.**

Paragraph 48

**Paragraph 48 was adopted.**

Paragraph 49

43. Mr. PELLET said that, in the third sentence, there was no need for the words "could lead", which should be deleted.

**Paragraph 49, as amended, was adopted.**

Paragraph 50

**Paragraph 50 was adopted.**

Paragraph 51

44. Mr. KOROMA said that the distinction in the last sentence between the system of a _denuncia_ and that of a "complaint" was incorrect and he proposed that the sentence should be amended to read: "It was further noted by a member that a system known as a _denuncia_, which is distinct from a complaint, may also be envisaged".

_It was so agreed._

45. Mr. PELLET proposed that the words "in the Commission" should be deleted from the first sentence because they were absolutely unnecessary.
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46. Mr. ERIKSSON proposed that, for the sake of clarity, in addition to the deletion proposed, the beginning of the first sentence should be further amended to read: "With respect to the question of jurisdiction rati-
one persona, it was noted that it was dealt with . . . ."

  Paragraph 51, as amended, was adopted.

Paragraphs 52 to 72

  Paragraphs 52 to 72 were adopted.

Paragraph 73

47. Mr. CRAWFORD proposed the addition of a phrase at the end of the second sentence, to read: "and, in addition, in many cases, large numbers of victims could be involved".

  Paragraph 73, as amended, was adopted.

Paragraph 74

  Paragraph 74 was adopted.

Paragraph 75

48. The CHAIRMAN proposed that, in the penulti-
mate sentence, the term "the complainant party" should be replaced by the words "the applicant party".

  It was so agreed.

  Paragraph 75, as amended, was adopted.

Paragraphs 76 to 78

  Paragraphs 76 to 78 were adopted.

Paragraph 79

49. Mr. ERIKSSON, supported by Mr. CRAWFORD, said that the term "double-hearing principle" in the first line was inappropriate, since the reader might equate it with the non bis in idem principle. It was therefore proposed that the sentence should be amended to include, after those words, an explanation in parentheses using the Special Rapporteur's words, which constituted the second part of the first sentence.

50. Mr. PELLET said that the words "double-hearing principle" should be translated into French as double de-
gré de juridiction.

  Paragraph 79 was adopted without change.

Paragraph 80

51. Mr. CRAWFORD proposed the addition of a new sentence at the end of the paragraph, to read: "It might be possible to envisage a role for the International Court of Justice".

  Paragraph 80, as amended, was adopted.

Paragraph 81

  Paragraph 81 was adopted.

  Section B.1, as amended, was adopted.

2. WORKING GROUP ON THE QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

Paragraphs 82 to 86

  Paragraphs 82 to 86 were adopted.

Paragraph 87

52. Mr. ERIKSSON said that there was no need for the parentheses around the word "sufficiently" in the last line.

  Paragraph 87, as amended, was adopted.

  Section B.2, as amended, was adopted.

3. DECISION OF THE COMMISSION

Paragraph 88

  Paragraph 88 was adopted.

53. Mr. CRAWFORD said that, if the report of the Working Group was to be annexed to the report of the Commission, its paragraphs should be numbered consecutively to avoid any confusion.

  Section B.3 was adopted.

  Chapter II, as a whole, as amended, was adopted.

The draft report of the Commission on the work of its forty-fourth session, as a whole, as amended, was adopted.

  Closure of the session

54. The CHAIRMAN, briefly reviewing the work the Commission had carried out at its forty-fourth session, said that he wished to thank the special rapporteurs and chairmen and members of the drafting and working groups for the excellent work they had done.

55. After the usual exchange of courtesies, he declared the forty-fourth session of the International Law Com-
m  The meeting rose at 1.10 p.m.
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