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Summary record of the 2267th meeting

Topic:
State responsibility

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

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 view that 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.

The meeting rose at 12.40 p.m.

2267th MEETING

Friday, 29 May 1992, at 10.05 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. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

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

[Agenda item 2]

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

ARTICLE 5 *bis and*

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

1. The CHAIRMAN, speaking as a member of the Commission, said that any countermeasure constituted a measure of self-help designed to safeguard the rights of the injured State. While it would, of course, be much better if the international community had a centralized system of law enforcement at its disposal, no such system existed as yet and any draft provisions on State responsibility must take account of the dangers inherent in authorizing States to take countermeasures at their own discretion. Some kind of preventive control by an authoritative body would thus be welcome. In that respect the Security Council was competent only with regard to issues affecting international peace and security, and many disputes between States Members of the United Nations did not fall within that category. Indeed, even in matters pertaining to international peace and security, the Charter of the United Nations recognized that States would not always be subject to the authority vested in the Security Council, since the Council might take no action even in the event of open and undisputed aggression on the part of a particular State. The international community was a loose grouping which had succeeded in establishing common rules, but had not so far produced a common entity with sole authority to apply sanctions against wrongdoing States. He doubted

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

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

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

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 1 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 *leges 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.[5] 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 a *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 ICJ in, *inter alia,* the case concerning *Nicaragua* v. *United States of America*,[6] 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,[7] the *Air Service Agreement* award[8] 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 retortion, 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.[9] 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 retortion. Again, it was important to be clear about the preconditions for reprisals. Throughout history, international law, in the sphere of State responsibility, had been founded on unilateral measures taken at the expense of the smaller developing countries. Latin American jurists, coming from nations on which arbitral tribunals had imposed sanctions and which had made a major contribution to doctrine, considered that there were two preconditions: first, as the Special Rapporteur had rightly pointed out, there must have been an unlawful act under international law and, secondly, the State which took the countermeasure must have been convinced that the measure was appropriate, both as to substance and as to procedure. Thus there was, on the one hand, a material element in the thinking of the State which took such action inasmuch as it considered that the unlawful act by which it was affected provided the basis for a countermeasure, and there was a psychological element, on the other, in that the extent of the act and the damage caused provided the justification for the action of the State and convinced it that that was the right course to follow.

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

[5] Carin Thinam Jakob, *Sanktionen gegen vertragsbrüchige Mitgliedstaaten der Europäischen Gemeinschaft (EWG), Schriften zum Völkerrecht*, vol. 86 (Berlin, Duncker & Humblot, 1988).

[6] See 2261st meeting, footnote 6.

[7] *Portuguese Colonies case (Naulilaa incident)* United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.I), pp. 1025 *et seq.*

[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.

[9] United Nations, *Treaty Series*, vol. 119, p. 3. Under the Protocol of Amendment to the Charter, signed at Buenos Aires on 27 February 1967, former article 18 became article 21. Ibid., vol. 721, p. 328.

settlement of disputes, there could be no justification for resorting to reprisals.[10] 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[11] 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,[12] 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,[13] 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 licit, 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.

[10] *Annuaire de l'Institut de droit international*, vol. 38, 1934, p. 709.

[11] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[12] Signed at Rio de Janeiro, 2 September 1947. United Nations, *Treaty Series*, vol. 21, p. 77.

[13] See footnote 8 above.

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, *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 compatible with 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 thrown 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 *lex lata* or *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,[16] 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] An act to prohibit the coming of Chinese laborers to the United States, *The Statutes at Large of the United States of America* (December 1887 to March 1889) (Washington, Government Printing Office, 1889), vol. XXV, p. 476.

[15] *Consolidated Treaty Series* (Dobbs Ferry, New York, Oceana Publications, Inc., 1977), vol. 157, p. 185.

[16] 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 *faculté* 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 incompatibility 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-

jured State must not be able to avoid the obligation of resorting to the established procedure, regardless of what the procedure might be, and he referred in that connection to Articles 33 *et seq.* of the Charter of the United Nations.

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. ARANGIO-RUIZ (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[17] 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. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.