question had already started or damage was becoming apparent. But the right of the potentially affected State to invoke Article 2 seems unhelpful. Instead, the potentially affected State should only be entitled to call for consultations, which would then be carried out as if they had been initiated by the State of origin.

Draft Article 8 addressed to *Settlement of Disputes* was drafted with the view that a speedy resolution of differences between the parties, in respect of matters dealt with in these articles, is essential. Draft Article 8 addresses a situation where the State of origin and the affected States cannot resolve their differences through consultation. Procedures for peaceful settlement of disputes are to be provided for and are to be attached to this part of the draft articles.

Members of the Commission believed that a provision of this nature was useful and indeed necessary. Such a draft article should recall the general obligation of the peaceful settlement of disputes and if necessary, refer to an annex providing for a particularly flexible and speedy means of settlement. This, in turn, might stimulate more serious consultations. But any procedure for the settlement of disputes should specify precisely under which articles a settlement procedures obligation could be involved. If the provisions were not mandatory, it would be difficult to institute that type of procedure.

The main purpose of the draft article on *factors Involved in a Balance of Interests* is to provide a Framework in which the parties can resolve or reconcile their various interests in undertaking activities with a risk of causing or causing transboundary harm. It is hoped that within this framework, the parties can succeed in balancing their various interests. Article 9 introduces factors that could assist the parties themselves or a third party decision-maker in that effort.

Two different views were expressed by the members who addressed themselves to draft article 9.

According to one view, draft article 9 of the Annex, was one of the most attractive features of the draft and the concept embodied was extremely helpful. To improve the provision further, it was suggested that a distinction should be made between those factors relevant to balancing interests in respect of activities involving harm and those in respect of activities posing a risk of causing harm. These two types of activities involve different issues and most likely involve different factors which the parties negotiating should take into account. It was also suggested that the balance of interests test in draft article 9 should not be limited only to consultations among the State, but should also give due consideration to that balance as possibly



constituting an exception to the establishment of prevention regimes, as called for under draft articles 4 and 6.

According to another view, even though it could be important to indicate to States what could serve as the basis for their consultations, it should be made clear that the factors in article 9 were only recommendatory and were provided simply as guidelines for States. Those factors should, therefore, be moved to an annex, to a commentary on one of the articles on consultations, or removed from the draft altogether.

In the last part of his report the Special Rapporteur explained that since draft article 2 on use of terms had been referred to the Drafting Committee, further developments had taken place outside the Commission in formulating instruments dealing with activities involving risk of causing or causing transboundary harm in respect of certain specific activities. Views in the Commission and in the Sixth Committee also indicated a preference for a more precise definition or risk or even a list of activities to be covered by these articles. For these reasons, he had attempted to provide a clearer definition for *risk and for harm* for the benefit of the Drafting Committee, where article 2 was pending. The Special Rapporteur indicated that from a review of the various definitions of risk in the more recent legal instruments, he had concluded that any such definition should take into account three criteria; (i) *magnitude* of the activity undertaken, (ii) *location* of the activity in relation to areas of special sensitivity or importance (such as wetland, national parks, sites of special scientific interest or of archaeological, cultural or historical importance); and (iii) *effect* of a particular activity on human beings or on the potential use of certain important resources or areas. He therefore proposed another definition of risk for draft article 2.

The proposed new definition reads as follows :

> "Risk means the combined effect of the probability of occurrence of an accident and the magnitude of the harm threatened. Activities involving risk, for purposes of the present articles, are activities in which the result of the above combination is significant. This situation may arise when the effects of the activity threatening, as when dangerous technologies, substances, genetically modified organisms or micro-organisms are used, or when major works are undertaken, or when their effects are accentuated by the location of the sites at which they are carried out, or by the conditions, ways or media in which they are conducted".

The Special Rapporteur noted that there had been a number of recent legal instruments where the concept of harm was defined more precisely.

Having taken into account those definitions and the views expressed in the Commission as well as in the Sixth Committee, the Special Rapporteur proposed the new definition for the concept of harm. He also recommended further changes in the definition of terms in draft article 2.

The other changes in draft article 2 proposed by the Special Rapporteur related to the definitions of the terms *'Damage', Restorative Measures and Preventive Measures*. The proposed definitions read as follows :-

A new paragraph will be added to read :

"Damage" means: (a) any loss of life, impairment of health or any personal injury; (b) damage to property; (c) detrimental alteration of the environment, provided that the corresponding compensation would comprise, in addition to loss of profit, the cost of reasonable reinstatment or restorative measures actually taken or to be taken; (d) the cost of preventive measures and additional harm caused by such measures".

Paragraph 1 would be replaced by :

"Restorative measures" means reasonable measures to reinstate or restore damaged or destroyed components of the environment, or to reintroduce, when reasonable, the equivalent of those components into the environment".

Paragraph (m) would read :

"Preventive measures" means reasonable measures taken by any person following the occurrence of an incident to prevent or minimize the damage referreu to in paragraph... of this article".

The Special Rapporteur, Mr. Julio Barboza, also redefined the concept of a "transboundary harm" to read :

"the harm which arises in the territory or other areas under the jurisdiction or control of a State as a physical consequence of an activity under article 1 which is conducted under the jurisdiction or control of another State".

The proposed amendments to the definitions to be incorporated in draft article 2 were not the subject matter of much debate and only a few members commented on them. They are expected to be debated upon in the course of the next session of the Commission. The Secretariat of the AALCC would comment on these draft articles at that time.



The open-ended Working Group established by the Commission 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 adopted the following recommendations :

(i) With respect to the scope of the topic the Working Group noted that although the Commission, had in the course of several years of its work on this topic, identified the broad area and the parameters of the topic it has not yet taken a final decision on its precise scope. In the view of the Working Group, such a decision at this time might be premature. It recommended, however, that, in order to facilitate progress on the subject, it would be prudent to approach its consideration within that broad area in stages and to establish priorities for issues to be covered.

(ii) The Working Group also recommended that the topic should be understood as comprising both issues of prevention and of remedial measures. It proposed, that priority should be given to prevention and only after having completed its work on that first part of the topic, should the Commission proceed to the question of remedial measures. The Working Group proposed that remedial measures may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

(iii) The Working Group suggested that attention be focused at this stage on drafting articles in respect of activities having a risk of causing transboundary harm. The articles should deal first with preventive measures in respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it could decide during the next stage of the work, whether to continue with a similar exercise in respect of activities causing transboundary harm.

(iv) On the matter of the approach to be taken with regard to the nature of the articles or of the instrument to be drafted the Working Group took the view that it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from the work of the Commission on this topic. The Working Group thought it prudent to defer such a decision, until the completion of the work on the topic. The Commission should examine and adopt the articles proposed for

this topic, in accordance with its usual practice, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area.

(v) On the question of the title of the topic in view the ambiguity in the title of the topic as to whether it includes "activities" or "acts" the Working Group recommended that the Commission adopt as a working hypothesis that the topic deal with "activities". However, any formal change of the title should be deferred, for in the light of the further work on the topic additional changes in the title may be necessary. The Commission should therefore wait until it is prepared to make a final recommendation on the changes in the title.

The Working Group took note of the previous reports of the Special Rapporteur in which the issue of prevention had been examined in respect of both activities having a risk of causing and those causing transboundary harm. It recommended that for the next year, the Special Rapporteur in his report to the Commission, should re-examine the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a complete and a final set of draft articles to that effect.

After due consideration of the recommendations of the Working Group the Commission *inter alia* noted that in the last several years of its work on the topic while it had identified the parameters of the topic it had not taken a final decision on its precise scope. The Commission was of the view that such a decision at this time might be premature. In order to facilitate progress on the subject the Commission agreed that it would be practical to approach its consideration in stages and to establish priorities for issues to be covered.

Further to those general observations regarding the scope of the topic the Commission decided that the topic should be understood as comprising both issues of prevention and of remedial measures. However, prevention should be considered first, only after having completed its work on that first part of the topic, would be Commission proceed to the question of remedial measures. Remedial measures in this context may include those designed for mitigation of harm, restoration of what was harmed and compensation for harm caused.

It took the view that at this stage attention should be focused on drafting articles in respect of activities having a risk of causing transboundary harm and the Commission should not deal, with other activities which in fact cause harm. The articles should deal first with preventives measures in



respect of activities creating a risk of causing transboundary harm and then with articles on the remedial measures when such activities have caused transboundary harm. Once the Commission has completed consideration of the proposed articles on these two aspects of activities having a risk of causing transboundary harm, it will decide on the next stage of the work.

As regards the approach to be taken with regard to the nature of the articles or of the instrument to be drafted the Commission was of the view that it would be premature to decide at this stage on the nature of either the articles to be drafted or the eventual form of the instrument that will emerge from its work on this topic. It deemed to be prudent to defer such a decision, in accordance with the usual practice of the Commission, until the completion of the work on the topic. The Commission will examine and adopt the Articles proposed for this topic, on the basis of the merits of the articles, their clarity and utility for the contemporary and future needs of the international community and their possible contribution to the promotion of the progressive development of international law and its codification in this area.

Apropos the title of the topic the Commission decided to continue with its working hypothesis that the topic deals with "activities" and to defer any formal change of the title, since in the light of the further work on the topic additional changes in the title may be necessary. The Commission will therefore wait until it is prepared to make a final recommendation.

Finally it requested that the Special Rapporteur in his next report to the Commission, should examine further the issues of prevention only in respect of activities having a risk of causing transboundary harm and propose a revised set of draft articles to that effect.

**State Responsibility**

At its Forty-fourth Session the Commission had before it the Third[1] and the Fourth[2] Reports of the Special Rapporteur, Mr. Gaetano Arangio Ruiz. It may be recalled that the Special Rapporteur had presented his third report at the previous session for information, but owing largely due to lack of time the Commission had been unable to consider it. At the current Session the Chairman of the Commission invited the Special Rapporteur to present a summary of that report for the benefit of new members of the Commission. The Secretariat of the Committee had summarized the third report on the State Responsibility as under.

1. A/CN.4/440 and Add. 1
2. A/CN. 4/444 and Add. 1 and 2

The third report of the Special Rapporteur comprised of ten chapters addressed to the kind of measures to be considered (Chapter I); An Internationally wrongful act as Precondition (Chapter II); Functions of Measures and Aims Pursued (Chapter III); The Issue of Prior Claim of Reparation (Chapter IV); the Impact of Dispute Settlement Obligations (Chapter V); the Problem of Proportionality (Chapter VI); The Regime of Suspension and Termination of Treaties as countermeasures (Chapter VII); The Issue of so called self-contained Regimes (Chapter VIII); The Problem of Differently, Injured States (Chapter IX); and Substantive limitations issues (Chapter X).

Introducing the report, the Special Rapporteur stated that the regime of countermeasures which constituted the core of Part Two of State Responsibility was one of the most difficult subjects of the whole topic. The codification of the legal regime of countermeasure, he pointed out, was characterised by two features viz. a "drastic reduction, if not a total disappearance of these similarities with the regime of responsibility within national legal systems which make it relatively easy to transplant into international law, in the area of substantive consequences "of private (domestic) law sources and analogies[3]. The second feature of the study of countermeasures was that in no other area did the lack, in the society of States, of an adequate institutional framework have so much influences on any existing or conceivable regulation of the conduct of States. He referred in this regard to two aspects of the sovereign equality of States "Which consist on the one hand of the tendency of any State, large, medium or small, not to accept as a rule any higher authority above itself and on the other hand of the contrast between the equality to which every state is entitled in law and the factual inequalities which tempt stronger States to impose their economic if not military power despite the principle. The fact that this is obvious to the point of appearing trite does not reduce in any measure the difficulties to be faced at this juncture".[4]

The content of the report, the Special Rapporteur said, had been conceived in the light of the peculiarities of the subject-matter and the complexities and preoccupation that they suggest the main perplexities arose in the area of crimes. The main purpose of the report was to identify problems, opinions and alternatives; and to elicit comment and criticism within the Commission and elsewhere on the basis of which more considered suggestions and proposals could be submitted.

3. *See* the third repon on State Responsibility. A/CN.4/430 para 2.
4. *Ibid* para 3.



In the first chapter of the Third Report, addressed to the 'Kinds of Measure to be considered' the Special Rapporteur, *inter alia*, observed that "international practices indicates a variety of measures to which States could resort in order to secure fulfilment of the obligations deriving from the commission of an internationally wrongful act or otherwise react to the latter". The most widely used of such measures were (a) self-defence; (b) sanction; (c) retorsion or restorsions; (d) Reprisals (e) counter measures; (f) reciprocity; and (g) *Inadimplente non est adiplendum* suspension and termination of treaties.

Alluding to the first of these viz. self-defence, he stated that it has to be understood as a "reaction to a specific kind of internationally wrongful act" viz. as a unilateral armed reaction against an armed attack. Such a reaction would consist in a 'form of armed self-help or protection, exceptionally permitted by the international legal order' which contemplates a "genuine and complete ban on the use of force".

Referring to the concept of sanction, the Special Rapporteur said, that it deals with an essentially relative action susceptible of a variety of definitions. In his view a "mere specific, albeit circumscribed, meaning of sanctions seems to prevail in the contemporary doctrine and to find support" *inter alia* in the work of the Commission itself. He pointed out that the Commission seems to have reserved the term sanction to measures adopted by an international body. He accordingly proposed that in conformity with the Commission's choice, the term sanction had better be reserved to designate the measures taken by international bodies and further that in considering the consequences of crimes, and Commission may deem it worthwhile to examine whether the term 'sanction' could be extended to measures which, although emanating from States collectively, would not qualify as measures taken by an international body.

Referring to the concept of restorations he stated that although retorsions are and may be resorted to by way of reaction to an internationally wrongful act they do not give rise to the legal problems which are typical of the other forms of reaction to be considered for the purpose of the draft articles on State Responsibility. Acts of retorsion may nonetheless call for some attention in view of the fact that international practice does not always reflect a clear distinction of measures consisting of violations of international obligations from measures which do not pass the threshold of unlawfulness.

The Special Rapporteur pointed out that reprisal is one of the oldest and most important of traditional concepts and the notion of reprisal had its roots in inter individual systems i.e. the measures used by the aggrieved party as a means of securing direct reprisals.

Most modern authors see a reprisal as a conduct which is "*per se* unlawful in as much as it would entail the violation of the right of another subject, but loses its unlawful character by virtue of being a reaction to a wrongful act committed by that other subject. The term reprisal would thus only cover such reactions to a wrongful act as violate a different norm to that violated by the wrongful act itself. "While reciprocity gives rise to non-performance of an obligation similar (by identity or by equivalence) to the violated obligation, reprisals consist in the non-performance of a different rule".

Apropos "Countermeasures" the Special Rapporteur observed that the term is a newcomer in the terminology of the consequences of an internationally wrongful act. He cited the decisions in the Air Services; *United States Diplomatic and Consular Staff in Tehran and Military and Paramilitary Activities in and Against Nicaragua* cases in this regard. He pointed out that Article 30 of Part One of the draft Articles, adopted on first reading, used the term "measure" in the text and "countermeasures" in the title.

As regards Reciprocity measures, the Special Rapporteur stated that the main issue was whether a distinction may be justified and practically useful between reprisals for the counter measures so qualified; on the one hand and the measures taken, by way of mere reciprocity, on the other hand. According to Roberto Ago "reciprocity meant action consisting of non-performance by the injured state of obligations under the same rule as that breached by the internally wrongful act, on a rule directly connected therewith".

In Chapter Two entitled *An Internationally Wrongful Act as a Precondition*, the Special Rapporteur, Mr. Arangio Ruiz, expressed the view that a lawful resort to countermeasures presupposes an internally unlawful conduct of an instant or continuing character. A few publicists however believed that resort to measures could be justified even in the presence of a good faith conviction, on the part of the acting State, that it has been or is being injured by an internationally wrongful act. Mr. Arangio Ruiz was inclined to think that the prerequisite for a lawful resort to measures is and ought to be of the first kind. He did not think the problem to be of any real relevance for the present purposes.

*The question of Functions of Measures and Aims Pursued* dealt with in Chapter three, reflected a variety of opinions on the subject and is determined in a considerable part by the general concepts of international responsibility. Referring to the divergence between those who believed that it was exclusively compensatory, and those who believed that it was punitive, he



expressed the view that the Commission should not enter into that argument. Under both national and international law, and in the case of both substantive and instrumental consequences, countermeasures and remedies had the dual function of securing compensation and exacting retribution, though obviously, depending on the nature of the wrongful act, one or other of those two functions would predominate in a particular case. More important than the question of the function of countermeasures, perhaps, was the question of the aims pursued by a State in resorting to such measures. These aims were important, because it was one thing if a State resorted to countermeasures to obtain reparation which had been denied and the wrongdoing State pleaded that there was no case to answer, and another if a State attempted to resort to countermeasures, with a view to either establishing a dialogue between the injured State and the wrongdoing State, or to having recourse to a dispute settlement procedure.

In Chapter IV entitled *The Issue of Prior Claim of Reparation* the Special Rapporteur pointed out that the question whether and to what extent lawful resort to reprisals should be preceded by intimations such as protest, demand of cessation and/or reparation, *sommation* or any other form of communication to the offending State on the part of the aggrieved State or States is frequently evoked but rarely dealt with adequately.

According to the minority doctrine reprisals are the primary and normal sanction of any internationally wrongful act ¾ reparation being, in a sense, just a possible "secondary" consequence. This doctrine seems to maintain, although not without exception, that lawful resort to reprisal is not subject to any intimation, claim or *sommation* of the kind indicated in the preceding paragraph. No demand of cessation or reparation would need to be addressed as a matter of law to the offending State before reprisals are put into effort.

In dealing with *'The Impact of Dispute Settlement Obligations'* in Chapter V of the Report the Special Rapporteur stated *inter alia*, that a distinction had to be drawn between the general obligation concerning peaceful settlement, on the one hand, and any specific agreement between the alleged wrongdoer and the alleged injured party, on the other. In so far as the latter was concerned, a number of publicists took the view that the commitments deriving from specific agreements between the injured State and the wrongdoer should, under given conditions, have a decisive impact on the lawfulness of measures taken. In other words, in given cases, prior recourse to one or more of the procedures envisaged would be a condition of lawful resort to countermeasures.

Chapter six of the Report entitled *"The Problem of Proportionality* dealt with the crucial question of the requirement of proportionality. In

the1920s, it had been argued that proportionality was not a legal requirement but merely a moral obligation. Contemporary doctrine, however, was decidedly in favour of such a requirement, and the prevailing definitions of proportionality were formulated in negative terms. The International Law Institute, in the 1934 resolution had demanded that the measure should be proportional to the gravity of the offence and the damage suffered. A less strict concept emerged from the *Air Services*[5] award which had referred to "some degree of equivalence" and to the fact that judging the proportionality of countermeasures could at best "be accomplished by approximation", while it had been held in the *Naulilaa*[6] case that reprisals should not be out of all proportion to the unlawful act. The previous Special Rapporteur who had been one of the arbitrators in the *Air Services*[7] award, had seemed to agree that the requirement of proportionality should be formulated in less stringent terms. Mr. Arangio Ruiz was inclined to favour a stricter formulation and considered, (i) that the requirement should be expressed in positive, not negative, terms; and (ii) that proportionality should be a requirement with respect not only to the nature of the act but also to other elements, including the attitude of the wrongdoer and the aim pursued by the reacting State.

In the Seventh Chapter of his report the Special Rapporteur had dealt with the *Regime of Suspension and Termination of Treaties As Countermeasures*. He expressed the view that it was a delicate problem and had not, perhaps, been adequately dealt with so far. The relevant rules of the Law of Treaties covered such matters as the kind of treaty breaches that justified suspension or termination; the conditions in the presence of which a treaty could be suspended or terminated totally or in part; and the requirements with which the injured State had to comply in order lawfully to proceed to suspension or termination. It was for the purposes of codification and progressive development of the rules of general international law that the Vienna Conference on the law of Treaties had adopted article 60 of the 1969 Convention and the auxiliary provisions embodied in articles 65-67, 70 and 72 of that Convention.

The Eighth Chapter of the Special Rapporteur's, Third Report dealt with *'The Issue of So-called Self-contained Regimes*. In the report the Rapporteur had observed, *inter alia*, that the possible "Speciality" of measures consisting in the infringement of treaty rules is the question of the relationship between the general rules on State responsibility on the one

5. International Law Report (ILR), Vol. 54, P. 338.
6. United Nations Reports on International Arbitral Award (UNRIAA), Vol. II P. 1028.
7. ILR, Vol. 54, p. 338 ff.



hand and any *ad hoc* rules that a given treaty or set of treaties may set forth in order to provide for the case of its violation. The problem, he observed, appears to stem in the presence of those conventional system or combination of systems which tend to resolve within their own — contractual and special — context the legal regime of a more or less considerable number of relationships among the participating States, including the consequences of the breaches of obligations of the States participating in the system. Such consequences include — in most cases — special, at times institutionalised, measures against violations. It would follow therefrom that the system in question may affect in a measure, more or less explicitly, "*the faculte* of the participating States to resort to the remedial measures which are open to them under general international law. It appears to be in connection with situations of such a kind and nature that a part of the doctrine of the law of State responsibility speaks of "self-contained" regimes.

The Special Rapporteur was of the view that the most typical example of such regimes is the 'system' set up by the treaties establishing the European Community and the relations resulting thereunder. He pointed out that another example frequently evoked by some is that of the "Conventional" system created by the human rights treaties. A self-contained regime consisting of a particularly obvious combination of both customary as well as treaty rules would be, as per an International Court of Justice *dictum* the law of diplomatic relations".[8]

The question arising with regard to these "regimes" is whether the existence of remedies specifically provided for them — at times more advanced - affect in any measure the legal possibility for the participating States to resort to the measures provided for or otherwise lawful under general international law.

The penultimate chapter of the Third Report of the Special Rapporteur had dealt with the *'Problem of Differently injured States'*. The problem of differently injured States was as perplexing as that of self-contained regimes. In the case of a breach of an international obligation, considerable differences could exist between injured States, as the concept of "injured State" was defined in draft article 5 of part Two : Some States might be affected directly, others might be affected indirectly, while others might fall between those two extremes. The Special Rapporteur did not believe that there was a need for a special article dealing with the case of the indirectly injured State. In his view, the distinction between indirectly and directly injured States was merely a matter of the degree to which a State was affected by a wrongful act and the position of each injured State should be left to

8. See ICJ Reports 1980 p. 38

depend simply on the normal application to that State, based on the circumstances of the specific case, of the general rules governing the substantive and instrumental consequences of internationally wrongful acts.

The last Chapter of the third report was addressed to the *Substantive Limitations Issues*, and included the unlawfulness of resort to force; respect for human rights and other humanitarian values; the inviolability of diplomatic and consular envoys; and compliance with imperative rules and *erga omnes* obligations. In the case of use of force, Mr. Arangio Ruiz extended the scope to include the question of whether all forms of armed reprisals or countermeasures were prohibited, as provided for under the Declaration on Friendly Relations and under Article 2, paragraph 4, of the Charter of the United Nations. Mr. Arangio Ruiz was of the view that the Commission was duty-bound to take that position in view of the fact that the prohibition under the Charter was sacrosanct and did not admit of any exception.

Concerning Inviolability of Specially Protected Persons he expressed reservations about the substantive limitations on resort to countermeasures. In his view the issue had given rise to a certain amount of exaggeration. A distinction needed to be made between the case of the inviolability of the person or the premises of a diplomatic envoy and that of the privileges and immunities of diplomatic envoys, where reprisals might be justified.

Lastly, Mr. Arangio Ruiz expressed his inability to propose a solution to each of the matters dealt with in the report. It was clear, however, that it was unlikely, particularly with respect to delicts, that there would be in the short or even the medium-term, an adequate degree of institutionalization, at least at the international level, of remedies available to injured States. While there were examples of regional institutionalization, those cases were rare. For the time being, the only area in which some modest developments might be expected was that of political and military security. With the exception of infrequent cases or regional or special instituionalization, remedies against "ordinary" internationally wrongful acts were limited to inorganic inter-State measures, a system which could be euphemistrically termed "decentralized".

In view of those considerations, he suggested that the Commission was duty-bound to pursue two objectives i.e. (i) it should be much more generous in its formulation of all the articles relating to countermeasures; and (ii) it should make greater efforts towards progressive development in that area. In pursuing the aforementioned objectives, the Commission had to fulfil two requirements which might not be fully compatible viz. (i) to ensure that countermeasures were not abused by allegedly injured States and (ii) to



define countermeasures which were effective enough to guarantee cessation and reparation.

The introduction to the Fourth Report stated that its object is to submit solutions and draft articles on the various aspects of the legal regimes of countermeasures as identified and illustrated in the third report. The solutions in the draft articles, are based on the study of practice and doctrine. The fourth report accordingly addresses itself to such issues as (i) the conditions and functions of countermeasures; (ii) the Impact of Dispute Settlement Obligations; (iii) Proportionality of Countermeasures; (iv) Prohibited Countermeasures; (v) The so-called Self-Contained Regimes; and (vi) the Problem of a Plurality of Equality or Unequally Injured States.

In the Chapter entitled *Conditions and functions of Countermeasures* the Special Rapporteur had surveyed the doctrine and practice relating to three main issues namely (a) the existences of an internationally wrongful act as a basic condition; (b) the function of countermeasures; and (c) protests, intimation, sommation and/or demand of cessation and reparation. The survey of literature and practice on these matters had inspired the text of draft article 11 entitled '*Countermeasures By An Injured State*'. In his oral presentation the Special Rapporteur stated, *inter alia*, that draft article 11 proposed in the Report comprised of six essential elements. 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.

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 underscored 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.

The third element was an additional negative requirement introduced by the reference in the text to the absence of an "adequate response: from the law-breaking State. He, therefore, tentatively proposed 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.

The fourth element in the article was the distinct reference to"conditions" and "restrictions". The conditions for the legality of counter-measures are