

Document:-
A/CN.4/SR.2305

Summary record of the 2305th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1993, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

legal regimes concerned with international trade through the sharing of accumulated experience among member States, the Committee had established a data collection unit at its headquarters in New Delhi. When the unit acquired sufficient expertise in collecting and analysing data, an autonomous centre would be established for research and development of legal regimes applicable to economic activities in developing countries. Having acquired the necessary hardware, the unit was in the process of preparing the software and had approached member States and the relevant international organizations for assistance in making data available to it.

42. The Committee's programme included studies and papers on other subjects, such as 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 Indian Ocean as a zone of peace; the legal framework for industrial joint ventures; legal issues involved in the privatization of State-owned enterprises; and international trade law matters. All those items would be considered at the thirty-third session of the Committee, to be held in Tokyo in 1994. On behalf of the Asian-African Legal Consultative Committee, he invited the Chairman of ILC to attend the session. In closing, he noted that, at its thirty-second session, held in Kampala, the Committee had taken a decision on the crucial question of the relocation of its headquarters from New Delhi to Doha, Qatar. He was confident that, in its new headquarters, to which it expected to move in 1994, the Committee would continue to assist the aspirations of its member States and contribute to the common endeavour of the promotion and progressive development of international law.

43. Mr. TOMUSCHAT said that, at the thirty-second session of the Asian-African Legal Consultative Committee, which he had attended as an observer of the Commission, he had been struck by the extraordinary efficiency with which the staff of the Committee's secretariat, under Mr. Njenga's guidance, had provided services for so many meetings, which had often continued late into the night, and by the warm and cordial welcome he had been given by all the participants. Clearly, the contacts between the Commission and the Committee were very enriching. As its resources were infinitely greater than those of the Committee, the Commission was in a position to delve deeper into most of the questions on its agenda, but none the less the Committee had reached remarkable results. Furthermore, it should not be overlooked that the Committee had a much wider scope of activity, not confining itself to general international law, but also dealing with human rights, refugee law, the law of the sea, and so on. The Commission might also profit from a more direct contact with reality. In any event, it would try to take account of the comments made by Mr. Njenga in his complete and very interesting report on the Committee's work.

44. Mr. KOROMA said that the Asian-African Legal Consultative Committee might perhaps add questions of humanitarian law and human rights to the many items on its programme of work and consider the possibility of

closer cooperation with ICRC and the Centre for Human Rights.

45. The CHAIRMAN thanked Mr. Njenga for his statement and the words of encouragement he had addressed to the Commission. He noted with satisfaction that the Committee remained active in the field of the law of the sea. As pointed out by Mr. Tomuschat, the Committee's work was of great value to the Commission, which would certainly continue to benefit from its ties with the Committee. On behalf of the Commission, he accepted with pleasure the invitation to attend the next session of the Committee as an observer and wished the Committee great success in considering the important questions on its programme of work.

The meeting rose at 12.25 p.m.

2305th MEETING

Thursday, 10 June 1993, at 10.05 a.m.

Chairman: Mr. Gudmundur EIRIKSSON
later: Mr. Julio BARBOZA

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. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. de SARAH said that as he saw it, the Special Rapporteur had sought in his ninth report (A/CN.4/450) to be responsive to the Commission's decision in 1992 on the way in which work on the topic should proceed, and also to be sensitive to the different views repeatedly expressed, both in the Commission and in the Sixth Committee. In addition, the Special Rapporteur had recognized that the Commission should keep in mind the progressively developing principles of good-neighbourly relations and cooperation between States in the environmental field. That was particularly important at a time when the fragility of the earth's ecosystem had become a matter of global concern; and where international

¹ Reproduced in *Yearbook... 1993*, vol. II (Part One).

organizations both within and outside the United Nations system should, as the Special Rapporteur had recognized, continue to play a useful functional role.

2. The decisions of the Commission in 1992² dealt with three phases of its work. During the first phase, the Commission would prepare draft articles on preventive measures concerning activities that carried a risk of transboundary harm; during the second, it would prepare draft articles on compensation and other remedial measures for transboundary harm; and, during the third, it would consider what should be the next stage of its work on the topic. The distinction made the previous year between the first phase of the Commission's work (preventive measures) and the second phase (compensation for harm caused) was not apparently as acceptable to some members as to others, something that was understandable in view of the significant relationship between those phases. In that connection, a question has been raised as to the point at which, if a particular activity did not in fact cause any transboundary harm, failure to take a preventive measure, which was a primary obligation, would give rise to a secondary obligation under the rules on State responsibility, and what the content of such a secondary obligation would be.

3. Another matter of concern was the possibility that a view might emerge to the effect that: once the articles on preventive measures—and thus the primary rules on preventive measures—had been fully developed, they might well constitute all the general primary rules the Commission would really need to reach consensus on and formulate, under the present topic; and, thus, as a breach of such primary preventive rules could constitute failure to exercise due diligence (giving rise to secondary obligations under the rules of State responsibility) it would be unnecessary for the Commission to proceed to the second phase of its work, namely, the formulation of primary rules on compensation for transboundary harm. In view of such a possibility, it was necessary that, before the Commission became totally immersed in the first phase, on preventive measures, it should keep in mind the more general perspective and, specifically, that second phase of its work on the formulation of primary rules on compensation for harm.

4. The Commission should not, in fact, encounter any really insurmountable difficulties in its preparation of articles on compensation for transboundary harm since it appeared to agree on some of the basic propositions on which the present topic rests: (a) that the victims of transboundary harm caused by activities not prohibited by international law should, whatever the modalities of compensation, be adequately and expeditiously compensated for the harm they suffered; and (b) that the players in a transboundary harm scenario would generally be (i) the State within whose territory the activity giving rise to such harm was located—also known as the “State of origin”; (ii) the governmental or non-governmental operator of the activity; (iii) the affected State; (iv) those who benefited from the activity (which may not be solely those within the “State of origin” but possibly also within the affected State as well); and (v) the victims of the transboundary harm.

5. Thus, what would remain for the Commission to resolve would be the questions as to what ought to be the fair or equitable relationships that ought to properly obtain, at the primary rule level, between the various players in cases where transboundary harm had in fact been caused.

6. As to the relationships that should obtain at the primary rule level in the matter of compensation for transboundary harm, there was a variety of possibilities that the Commission would need to examine before making its final recommendations. A number had already been suggested by previous speakers: (a) the proposal that the criteria to be applied in determining whether or not due diligence had been exercised in a particular case should include consideration of whether or not the operator had been adequately insured against all possible harm; (b) it had also been proposed that, in certain circumstances, there should be a presumption in favour of the affected State; (c) there was also the very interesting proposal made by the Special Rapporteur in draft article 9³ whereby there would be an obligation on the State of origin to provide compensation for the harm caused, but the actual amount of compensation would be the subject of good faith negotiations between the parties: a proposal that had been noted very favourably, as being an interesting example of the combination of hard and soft law, by Professor Oscar Schachter, well-known to a number of members of the Commission and a distinguished authority in writings on the developing law of the environment; and (d) there was the further question, as well, as to what the respective roles of the State of origin and the operator, in the compensatory modalities, should be: in this connection, mention had already been made during the discussion of the difficult position of the developing countries which were desperately trying to industrialize but lacked the necessary infrastructure to administer what might be unduly sophisticated requirements. In the same context, some thought should be given to the role of industry-wide mechanisms for the funding of compensation, which had enjoyed remarkable success in the field of marine oil pollution. There would also, of course, be other possibilities that the Commission would need to consider carefully.

7. As to the specific provisions of the articles proposed, which had already been the subject of observations by earlier speakers, he would not comment, save to raise one particular matter which, it seemed to him, would need to be clarified. For preventive purposes, consultations and other interaction would take place between the State of origin and a State that might possibly be harmed. If a foreseen risk did materialize, would the State which suffered harm or its nationals be deemed to have had knowledge of, and to have acquiesced in, the possibility of the occurrence of transboundary harm? If so, would that in any way diminish their standing as claimants? Presumably that was not the intention, but the point could perhaps be resolved through drafting.

8. The overall scheme for preventive measures, as foreseen by the Special Rapporteur in his ninth report, rested on the requirements that prior authorization

² See *Yearbook ... 1992*, vol. II (Part Two), p. 51, paras. 341-349.

³ For the text, see *Yearbook ... 1990*, vol. II (Part One), p. 106, document A/CN.4/428 and Add.1, annex.

should be obtained from the State within whose jurisdiction the risk-producing activity was to be conducted; that the preconditions for such authorization should be a transboundary impact assessment and, where necessary, notification and consultations with States likely to be affected; and that preventive measures commensurate with the risk foreseen should be taken. Those requirements would, in his own view, provide the necessary foundation for the Commission's further work.

9. Given the uncertainties inherent in the Commission's decision in 1992 about the scope of the draft articles, it was remarkable that the Special Rapporteur had been able to respond as he had done in his ninth report.

10. The CHAIRMAN, speaking as a member of the Commission, said that, at one stage, he had thought the Commission had agreed on an approach that could have resulted in a set of some 20 draft articles, with the main emphasis on transboundary harm, although particularly risky activities would have required special duties of prevention. Had the Commission proposed such articles, it had seemed to him at the time, it would have been responding to the wishes of the overwhelming majority of the international community. In the event, that view had not prevailed and, at the previous session, the Commission had adopted the approach the Special Rapporteur had followed in his ninth report. Accordingly, he merely wished to support the proposal that the new articles should be referred to the Drafting Committee, and that the Committee should consider forming a working group to decide how to deal with the articles already before it, and with the topic in general, and to report back to the Commission later in the session.

11. Mr. VILLAGRÁN KRAMER said he had noted with interest the reference made by Mr. de Saram to the concepts of soft and hard law. Without in any way criticizing those concepts, he was a little concerned about their application to the area of the law with which the Commission was now concerned. It would be preferable not to speak of concepts that might weaken the position the Commission hoped to build up. In particular, it might perhaps be advisable to clarify the concept of soft law in order to ascertain whether or not it had a place in the area of the law under consideration.

12. The CHAIRMAN, noting that there were no further speakers on the item, said that the Special Rapporteur would sum up the debate at a later meeting.

Mr. Barboza took the Chair.

State responsibility (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,⁴ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Rom Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

13. Mr. ARANGIO-RUIZ (Special Rapporteur), introducing his fifth report (A/CN.4/453 and Add.1-3), reminded the Commission that, in 1985 and 1986, the Commission had considered, and subsequently referred

to the Drafting Committee, dispute settlement provisions proposed by Mr. Riphagen, the previous Special Rapporteur.⁵ Under those provisions, if a dispute arose between an injured State and a wrongdoing State, after the latter had resorted to countermeasures, the parties would have to seek a solution "through the means indicated in Article 33 of the Charter of the United Nations". That was, of course, without prejudice to any rights and obligations regarding settlement that might be in force between the parties. Failing a solution under Article 33 of the Charter, three kinds of procedures were contemplated in article 4, subparagraphs (a), (b) and (c), as proposed by Mr. Riphagen.⁶ Subparagraph (a) provided that any dispute arising with regard to the prohibition of countermeasures which involved the violation of a peremptory norm of international law—in other words of *jus cogens*—could be submitted unilaterally by either party to ICJ for a decision. Subparagraph (b) likewise provided for unilateral application to the Court in the case of any dispute concerning the "additional rights and obligations" envisaged as the special consequences of crimes, as distinct from the consequences of delicts. Subparagraph (c) dealt with the more general category of disputes concerning the application or interpretation of the provisions of articles 9 to 13 of part 2, proposed by Mr. Riphagen,⁷ relating to the regime of countermeasures. With regard to those disputes, either party was entitled under subparagraph (c) to resort to a conciliation procedure—provided for in an annex to the articles—by submitting a request to that effect to the Secretary-General of the United Nations. As he was not ready at that stage to make definite suggestions with regard to what subparagraph (b) termed "additional rights and obligations" attaching to the internationally wrongful acts contemplated in article 19 of part 1 of the draft,⁸ he had not, for the time being, concerned himself with the settlement provisions covering crimes, in other words, with subparagraph (b) of article 4 as proposed by Mr. Riphagen. The proposals set forth in the fifth report were therefore mainly concerned with the hypothesis dealt with by his predecessor in article 4, subparagraph (c). The *jus cogens* hypothesis dealt with in subparagraph (a) of that article, was implicitly covered by all those proposals.

14. It was clear from the 1985 and 1986 debates in the Commission and in the Sixth Committee that there was general support for the solution offered by subparagraph (c) and related provisions. That support had been seen in the notion that any settlement provision in part 3 of the draft should be of such a nature as not to affect directly the *faculté* or right of the injured State to resort to countermeasures, as also with regard to the idea that the conciliation procedure introduced in part 3, as proposed by Mr. Riphagen, should come into operation, on a unilateral initiative, only when a countermeasure had been

⁵ For the texts of draft articles 1 to 5 and the annex of part 3 proposed by the previous Special Rapporteur, see *Yearbook...* 1986, vol. II (Part Two), pp. 35-36, footnote 86.

⁶ *Ibid.*

⁷ For the texts of draft articles 6 to 16 of part 2, referred to the Drafting Committee, see *Yearbook...* 1985, vol. II (Part Two), pp. 20-21, footnote 66.

⁸ For the texts of articles 1 to 35 of part 1, provisionally adopted on first reading at the thirty-second session, see *Yearbook...* 1980, vol. II (Part Two), pp. 30 *et seq.*

⁴ Reproduced in *Yearbook...* 1993, vol. II (Part One).

adopted and the target State, as it were, had raised objections on that score.

15. Particularly important was the general agreement that the mandate of the conciliation commission should not be confined to any given controversial issue relating to the lawfulness of the countermeasure in question. According to the 1986 proposal, as accepted by the Commission, the conciliation commission should deal with any question, of fact or of law, that might be relevant under the future convention on State responsibility, whether in part 1 or part 2 of the articles.

16. There had also been general agreement in the Commission, though some dissenting voices had been heard, on the possibility of unilateral application for judicial settlement by ICJ of any dispute as to whether or not a particular countermeasure was in conformity with a peremptory norm of international law. That was a limited area, however, and one with which he was not concerned for the time being.

17. With regard to the most frequent hypothesis, namely, one involving any other question arising under the law of State responsibility between the injured State and the wrongdoing State following the adoption of a countermeasure, the Commission had shown itself to be generally satisfied with the proposed conciliation procedure. It had not contemplated either arbitration or judicial settlement—the only procedures that would lead to a legally binding settlement. In practical terms, the only defence against abusive and unjustified countermeasures was, according to the Commission's decision to refer part 3 to the Drafting Committee, a non-binding report by a conciliation commission.

18. Notwithstanding the extent of the agreement in the Commission on those solutions, far more advanced solutions should be considered. Members might recall how the very definite drawbacks of having to rely on unilateral countermeasures to secure compliance with international obligations had been stressed in both the third and the fourth reports⁹ and also in a number of statements made in the Commission in 1991 and 1992. Indeed, at the Commission's previous session, some members had even questioned the desirability of including provisions that would codify a legal regime of unilateral countermeasures. His immediate response had been that the way to remedy the drawbacks of countermeasures was not for the Commission to close its eyes to a practice of customary law which in fact called for express regulation through the codification and progressive development of international law. The remedy was to adopt in part 3 more advanced, more effective dispute settlement provisions so as to ensure that impartial third-party procedures could always be available in the event of unjustified, disproportionate or otherwise non-lawful countermeasures. That point was developed in the fifth report, in chapter I, section B.

19. The correctness of such an approach had been confirmed beyond any doubt by the debate in the Sixth

Committee at the forty-seventh session of the General Assembly, as reflected in the excellent topical summary (A/CN.4/446). Views expressed in the Sixth Committee on the subject were also summarized in chapter I, section B, of his report. In that connection, he wished to stress the positive, beneficial effects that could not fail to derive from the adoption of a set of really effective dispute settlement obligations as an integral part of—and not merely as a protocol to—a convention on State responsibility, effects that were discussed in chapter I, section C, of the report.

20. The title of section D of the report should read "Recommended solutions" and, as explained in section D.1, the reference to settlement procedures in article 12,¹⁰ now before the Drafting Committee, covered only those procedures which might be available to the parties, namely, a given injured State and a given wrongdoer, at the time the injured State wanted cessation and reparation and was considering whether to resort to countermeasures in order to obtain them. The fourth report had been sufficiently explicit on that score and, in particular, on the question of "availability", and the matter had been further clarified in the debate at the previous session. The main point about article 12, paragraph 1 (a), was that it referred, in addition to the vague and usually less than effective general settlement obligations deriving from Article 33 of the Charter of the United Nations or similar provisions, to such more effective obligations as might exist for the injured State and the wrongdoer in each concrete case. The reference was obviously to general treaties and clauses envisaging conciliation, arbitration and judicial settlement—such procedures to be resorted to either by ad hoc agreement or by unilateral application. He did not propose to go further into the matter at the present stage, but wished only to stress that the procedures in question were available to the injured State regardless of a State responsibility convention and should be used before that State resorted to countermeasures, as a precondition of their lawfulness. Article 12, in other words, only referred to such procedures and to the international texts under which they might be made available to any injured State. Article 12, paragraph 1 (a), did not directly create any obligation for the injured State to resort to given dispute settlement means, except, of course, in the sense of making their implementation—if available—a precondition for countermeasures.

21. The problem to be resolved in part 3 was a different one. It concerned, precisely, the settlement obligations to be set forth anew by way of, as it were, a "general arbitration clause" of the draft articles themselves. Such settlement obligations would be created by part 3 of the draft articles and eventually by part 3 of a future convention on State responsibility. The procedures would complement, supersede or tighten any obligations otherwise existing between the injured State and the wrongdoing State in any given case of an alleged breach of international law.

22. With regard to such obligations, two kinds of approaches were theoretically conceivable. One was what

⁹ Third report: *Yearbook...* 1991, vol. II (Part One), document A/CN.4/440 and Add.1; fourth report: *Yearbook...* 1992, vol. II (Part One), document A/CN.4/444 and Add.1-3; these reports were considered by the Commission at its forty-fourth session (see *Yearbook...* 1992, vol. II (Part Two), p. 19, paras. 117 *et seq.*).

¹⁰ For the texts of draft articles 5 bis and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook...* 1992, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

might be described as a maximalist or ideal approach, the other being a minimalist one.

23. The maximalist solution would be to eliminate or reduce the difficulties inherent in relying on any more or less effective dispute settlement arrangements existing between the parties, or which the parties might conclude in a given case. As was explained in detail in the report, the way to attain that objective would be to replace provisions which merely referred to dispute settlement obligations deriving from sources other than a convention on State responsibility, as was the case with article 12, paragraph 1 (a), by provisions directly setting forth the obligation to exhaust given procedures as a condition of resort to countermeasures.

24. Recognizing that such a solution might not be acceptable to the majority of members, he also proposed: (a) to leave draft article 12, paragraph 1 (a), as it stood, namely as a provision referring to, and not creating, settlement obligations; and (b) to strengthen in part 3 the non-binding conciliation procedure proposed in 1986 by adding arbitration and judicial settlement procedures without, however, directly affecting the injured State's prerogative to take countermeasures. That prerogative would, as it were, exist only in the mind of the injured State, which would know in advance that resort to a countermeasure exposed it to the risk of third party verification of the lawfulness of its reaction. He would none the less welcome suggestions for steps in the direction of the more advanced "maximalist" solution, which, ideally, would be his first choice.

25. As to the solution recommended in the report, namely a three-step third party dispute settlement procedure which would come into play only after a countermeasure had been resorted to by an injured State allegedly in conformity with draft articles 11 and 12 of part 2¹¹ and after a dispute had arisen with regard to its justification and lawfulness, he referred members to the draft articles set out in section F of the report, which read:

PART 3

Article 1. Conciliation

If a dispute which has arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly lawbreaking State has not been settled by one of the means referred to in article 12, paragraph 1 (a), or has not been submitted to a binding third-party settlement procedure within [four] [six] months from the date when the measures have been put into effect, either party [to the dispute] is entitled to submit it to a conciliation commission in conformity with the procedure indicated in the annex to the present articles.

Article 2. Task of the Conciliation Commission

1. In performing the task of bringing the parties to an agreed settlement, the Conciliation Commission shall:

- (a) examine any question of fact or law which may be relevant for the settlement of the dispute under any part of the present articles;
- (b) where appropriate, order, with binding effect:
 - (i) the cessation of any measures taken by either party against the other;
 - (ii) any provisional measures of protection it deems necessary;

(c) resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

2. Failing conciliation of the dispute, the Commission shall submit to the parties a report containing its evaluation of the dispute and its settlement recommendations.

Article 3. Arbitration

Failing the establishment of the Conciliation Commission provided for in article 1 or failing an agreed settlement within six months following the report of the Conciliation Commission, either party is entitled to submit the dispute for decision, without special agreement, to an arbitral tribunal to be constituted in conformity with the provisions of the annex to the present articles.

Article 4. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be of relevance under any of the provisions of the present articles, shall operate under the rules laid down or referred to in the annex to the present articles and shall submit its decision to the parties within [six] [ten] [twelve] months from the date of [completion of the parties' written and oral pleadings and submissions] [its appointment].

2. The Arbitral Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case, including fact-finding in the territory of either party.

Article 5. Judicial settlement

The dispute may be submitted to the International Court of Justice for decision:

- (a) by either party:
 - (i) in case of failure for whatever reason to set up the Arbitral Tribunal provided for in article 4, if the dispute is not settled by negotiation within six months of such failure;
 - (ii) in case of failure of the said Arbitral Tribunal to issue an award within the time-limit set forth in article 4;
- (b) by the party against which any measures have been taken in violation of an arbitral decision.

Article 6. Excès de pouvoir or violation of fundamental principles of arbitral procedure

Either party is entitled to submit to the International Court of Justice any decision of the Arbitral Tribunal tainted with *excès de pouvoir* or departing from fundamental principles of arbitral procedure.

ANNEX

Article 1. Composition of the Conciliation Commission

Unless the parties concerned agree otherwise, the Conciliation Commission shall be constituted as follows:

The Commission shall be composed of five members. The parties shall each nominate one commissioner, who may be chosen from among their respective nationals. The three other commissioners shall be appointed by agreement from among the nationals of third States. These three commissioners must be of different nationalities and must not be habitually resident in the territory nor be in the service of the parties. The parties shall appoint the President of the Commission from among them.

Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

If the appointment of the commissioners to be designated jointly is not made within the period for making the necessary appointments, the appointment shall be entrusted to a third State chosen by agreement between the parties, or on request of the parties, to the President of the General Assembly of the United Nations, or, if the latter is not in session, to the last President.

If no agreement is reached on either of these procedures, each party shall designate a different State, and the appointment shall be made in concert by the States thus chosen.

¹¹ Ibid.

If, within a period of three months, the two States have been unable to reach an agreement, each of them shall submit a number of candidates equal to the number of members to be appointed. It shall then be decided by lot which of the candidates thus designated shall be appointed.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall meet at the seat of the United Nations or at some other place selected by its President.

The Conciliation Commission may in all circumstances request the Secretary-General of the United Nations to afford it his assistance.

The work of the Conciliation Commission shall not be conducted in public unless a decision to that effect is taken by the Commission with the consent of the parties.

In the absence of agreement to the contrary between the parties, the Conciliation Commission shall lay down its own procedure, which in any case must provide for both parties being heard. In regard to inquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907.

In the absence of agreement to the contrary between the parties, the decisions of the Conciliation Commission shall be taken by a majority vote, and the Commission may only take decisions on the substance of the dispute if all members are present.

Article 2. Task of the Conciliation Commission

1. The tasks of the Conciliation Commission shall be to elucidate the question in dispute, to collect with that object all necessary information by means of inquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after the case has been examined, inform the parties of the terms of settlement which seem suitable to it, and lay down the period within which they are to make their decision.

2. At the close of the proceedings, the Commission shall draw up a *procès-verbal* stating, as the case may be, either that the parties have come to an agreement and, if need arises, the terms of the agreement, or that it has been impossible to effect a settlement. No mention shall be made in the *procès-verbal* of whether the Commission's decisions were taken unanimously or by a majority vote.

3. The proceedings of the Commission must, unless the parties otherwise agree, be terminated within six months from the date on which the Commission shall have been given cognizance of the dispute.

4. The Commission's *procès-verbal* shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

Article 3. Composition of the Arbitral Tribunal

1. The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The two other arbitrators and the Chairman shall be chosen by common agreement from among the nationals of third States. They must be of different nationalities and must not be habitually resident in the territory nor in the service of the parties.

2. If the appointment of the members of the Arbitral Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, a third State, chosen by agreement between the parties, shall be requested to make the necessary appointments.

3. If no agreement is reached on this point, each party shall designate a different State, and the appointments shall be made in concert by the States thus chosen.

4. If, within a period of three months, the two States so chosen have been unable to reach an agreement, the necessary appointments shall be made by the President of the International Court of Justice. If the latter is prevented from acting or is a national of one of the parties, the nominations shall be made by the Vice-President. If the latter, is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

5. Vacancies which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner fixed for the nominations.

6. The parties shall draw up a special agreement determining the subject of the dispute and the details of the procedure.

7. In the absence of sufficient particulars in the special agreement regarding the matters referred to in the preceding article, the provisions of the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907 shall apply so far as is necessary.

8. Failing the conclusion of a special agreement within a period of three months from the date on which the Tribunal was constituted, the dispute may be brought before the Tribunal by an application by either party.

9. If nothing is laid down in the special agreement or no special agreement has been made, the Tribunal shall apply, subject to the present articles, the rules in regard to the substance of the dispute enumerated in article 38 of the Statute of the International Court of Justice. In so far as there exists no such rule applicable to the dispute, the Tribunal shall decide *ex aequo et bono*.

The three steps of the proposed procedure—conciliation, arbitration, and judicial settlement—were described in chapter I, section D.

26. The proposed system had three essential features which should perhaps be emphasized. The main feature was that, failing an agreed settlement between the parties at any stage, the system would—without significantly hampering the parties' choices as to other possible settlement procedures—lead to a binding settlement. The two important limitations which, in his view, ought to be placed on the parties' choice were specified in chapter I, section D. The second essential feature of the proposed solution, and surely the most important in terms of feasibility, was the fact that the settlement procedures to be included in the draft articles would not be of such a nature as to curtail directly, in any significant measure, the injured State's prerogative to resort to countermeasures against a State which it believed had acted in breach of one of its rights. The lawfulness of the resort to countermeasures remained, of course, subject to such basic conditions as the existence of a wrongful act, its attribution to a given State and the other conditions and limitations laid down in draft articles 11 to 14 of part 2.¹² Assessing whether a proposed countermeasure was in keeping with such conditions and limitations would, in principle, remain a prerogative to be exercised unilaterally, although at its own risk, by the injured State itself, subject to any agreement to the contrary between the parties. The proposed procedures would be activated only after the injured State had made such determinations and had acted on them, and the purpose would be to settle, in a timely and effective fashion, any differences between the parties to the responsibility relationship, including, naturally, any relevant questions of fact or law under any of the articles on State responsibility. The third feature was that, although the envisaged procedures would only come into play with regard to a dispute arising subsequent to the adoption of a countermeasure, they would inevitably have to cover not just the lawfulness of the countermeasure in a narrow sense, namely under draft articles 11 to 14 of part 2, but any question of law or fact in dispute between the parties. The envisaged procedures would thus deal not just with questions such as prior de-

¹² Ibid.

mand (art. 11), prior notification and prior exhaustion of available settlement means (art. 12) or proportionality (art. 13), but they would also deal with the existence of a wrongful act, its attribution to the wrongdoing State or any circumstances excluding wrongfulness: matters covered by part 1 of the draft.

27. One further point deserved to be stressed so that there was no possibility of misunderstanding. The “triggering mechanism” of the settlement obligations devolving on the parties under part 3 of the draft proposed in the fifth report was neither an alleged breach of a primary or secondary rule nor a dispute that might arise from the contested allegation of such a breach; it could only be a dispute arising from contested resort to a countermeasure by an allegedly injured State or, possibly, resort to a counter-reprisal by the opposite side. The first-instance evaluation of the existence of such a dispute, and consequently of the triggering conditions, would be made by the proposed conciliation commission.

28. The difference between the “triggering mechanism” represented by a dispute in the present proposal, on the one hand, and that represented by the far more difficult concept of “objection” in the 1986 proposal, on the other, was obvious. The recommended system afforded the advantage that resort to a third-party procedure by an allegedly wrongdoing State which had been the target of a countermeasure would not follow upon a mere objection to an intended and notified countermeasure: it could take place only after the countermeasure had actually been put into effect. Thus, although more advanced in conception and more effective in curbing abuses of countermeasures, the proposed solution would in fact be more respectful of customary practices.

29. Another noteworthy feature would be the role that the proposed dispute settlement mechanism would perform within the framework of the State responsibility relationship. Although, as already stated, the mechanism would not directly preclude resort to countermeasures by an injured State at its own risk, the availability of the system was designed to have a sobering effect on an injured State’s decision to resort to countermeasures. At the same time, it would not be the kind of system for suspending unilateral action that was found in other ILC drafts, such as the draft articles on the law of the non-navigational uses of international watercourses.¹³ Within the framework of the dispute settlement system proposed for the present topic, the countermeasure would not be suspended at all, except by an order of a third-party body after the initiation of a settlement procedure. The only disincentive would be, in the mind of the injured or allegedly injured State, which, it was to be hoped, would be induced to exercise the highest circumspection in weighing up the necessity for, and lawfulness of, any countermeasure envisaged.

30. It was indispensable to stress that although the proposed part 3 of the draft envisaged three steps (conciliation, arbitration and recourse to ICJ), all three steps would not necessarily have to be pursued in every case. Arbitration was only envisaged for the case where the parties failed to agree following a conciliation commis-

sion’s report; and ICJ would only come into the picture in case of failure of arbitration or in case of a challenge to the award for important reasons. The Commission should not be misled into fearing that the envisaged procedures would necessarily be protracted. In most cases a solution would be reached more expeditiously than would otherwise be the case.

31. He had gone to some lengths in explaining the object, meaning and implications of the proposed draft articles because, in view of the somewhat “conservative” positions taken on the matter in the Commission in 1985 and 1986, he deemed it indispensable to be as thorough as possible. He would be pleased to provide any clarification still required. He trusted that the discussion would result in improvements to both the form and the substance of the proposed articles and thus modify the choice, motivated by prudence, that he had made in setting aside—as theoretically ideal but too unrealistic—the alternative “maximalist” solution, namely, the one that would consist in subjecting resort to any countermeasure by an injured State to the existence of an arbitral or judicial announcement and the refusal of the wrongdoing State to comply. That would, without doubt, be the best solution, and he hoped that some members might prefer it.

32. Chapter I, section E, of the report contained a brief review of the policy which had thus far prevailed in the Commission with regard to the dispute settlement provisions of its drafts, a policy which he did not approve. The review was followed by an illustration of some of the new trends which were discernible in the attitudes of States and appeared to be more promising, in terms of the United Nations Decade of International Law,¹⁴ than the attitudes manifested by the same States in the relatively recent past. Section E also stressed the need for the Commission to view the elaboration of part 3 of the draft as a valuable opportunity seriously to advance the cause of the rule of law in the inter-State system. By adopting a suitably effective settlement system, the Commission would serve two vital purposes. The first and immediate purpose was to add a correction to the rudimentary system of unilateral reactions represented by countermeasures, however strictly they were regulated. The Commission should make an indispensable contribution to cutting down the inequalities among the members of the “inter-State system”, which term more accurately reflected the current reality than did the term “international community”.

33. Another equally important reason for adopting part 3 was to help bridge a striking legal gap: the absence of real procedural obligations for States in the matter of dispute settlement. At the national level, such problems were covered by the judiciary, but judges were rarely used in the inter-State system.

34. Lastly, the Commission must stop assuming that States would not approve more advanced commitments or make use of procedures for the settlement of disputes. It must tell Governments, which it served *uti universi*, as a whole (and probably with their peoples), but not *uti singuli*, what it considered to be the minimalist require-

¹³ For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 66-70.

¹⁴ Proclaimed by the General Assembly in its resolution 44/23.

ments, and it should let Governments take responsibility for accepting or rejecting them.

35. Mr. PELLET said that in an ideal world, where States were guided by the rule of law not only internally but also internationally, the Special Rapporteur's coherent thesis would appear to be self-evident. As States were bound by law, it would be "normal" that they should accept the judgement of an impartial third party to resolve their disputes. The establishment of an obligatory mechanism in an area of such crucial importance to international law as State responsibility would represent enormous progress.

36. Unfortunately, the international community was not built on the same model as the State, where the judge was the guarantor of the legal order and the State accepted the law as interpreted by the judge. In the international community, on the contrary, each sovereign State assessed the legality of its own conduct and that of its partners. In those conditions, the very principle of State responsibility for internationally wrongful acts, the principle of the prohibition of the use of force and the obligation to seek a peaceful settlement of disputes constituted spectacular advances. He agreed with the Special Rapporteur that such progress was not sufficient, but it was important to distinguish between what was desirable and what was possible.

37. Even if the Special Rapporteur presented his position as being minimalist, he was actually proposing a revolution. States that ratified such an instrument would be bound to accept conciliation, and the conciliation commission would have a number of decision-making powers; if conciliation failed, arbitration would be compulsory, and if the arbitral tribunal in turn failed to issue an award or if the award was not respected, ICJ would then be competent. All that would cause a great upheaval in the international legal order.

38. The idea of binding conciliation was not new, but the proposal to confer extensive decision-making powers on a conciliation commission robbed the distinction between conciliation and arbitration of part of its substance. That would be the case if draft article 2, paragraph 1 (b), of part 3 was adopted, as the result was conciliation that not only would be binding but would also have legally binding results, something that would go against the fundamental principle of the freedom to choose the means of settling a dispute.

39. The Special Rapporteur's proposed mechanism was intended to apply only to the settlement of disputes concerning State responsibility. But as all internationally wrongful acts engaged a State's international responsibility, most legal disputes between States raised the question of responsibility. Therefore, if the Special Rapporteur's proposed mechanism was adopted, notwithstanding his minimalist approach, it would alter the very nature of international law. Every dispute would become justiciable. That again would be a revolution. By seeking to achieve too much at once, even those States that were favourably disposed towards such a mechanism would baulk.

40. Incidentally, in chapter I, section E.3, of the fifth report a term was used that he had not noticed during the Commission's discussions: "counter-reprisals". The mechanism would be applicable to the entire law of State

responsibility, and especially to countermeasures. But in reality, most of the report was devoted to countermeasures, especially—and that was particularly serious—draft article 1, despite what was said concerning legal disputes involving the interpretation or the application of any of the articles on State responsibility. The competence of the tribunal and of ICJ was linked to that starting point. Thus, the whole of part 3, as currently drafted, concerned countermeasures. The Special Rapporteur's oral introduction did not dispel his reservations on that point. He was in favour of a part 3 dealing with the settlement of disputes, but that mechanism should cover the entire draft, and it was even possible to imagine making a distinction between different disputes, according to the problem involved. The Commission was not forced to make one draft applicable to all problems of responsibility: some problems were more ripe for a settlement of disputes than were others. In particular, disputes on international crimes, as defined in article 19 of part 1 of the draft,¹⁵ could be subject to a more binding regime than other subjects. On that point, he had his reservations on the title of chapter II of the fifth report: crimes were not a category of delicts. On the contrary, crimes and delicts were two distinct categories of internationally wrongful acts. He shared what appeared to be the Special Rapporteur's intuition that crimes should be the subject of a regime for the settlement of disputes distinct from the regime applicable to delicts.

41. The same should probably hold true for countermeasures. He liked the idea which emerged from draft article 2 that the body before which the dispute was brought should be able to take provisional measures of protection, it being understood, however, that in that case one could no longer speak of conciliation in the strict sense; yet it could be acceptable for a *sui generis* body to have conciliation power for the substance of the problem and decision-making power for the provisional measures of protection. Even such a regime would have little chance of being adopted by States and could only be envisaged in an additional protocol or in a special article subject to the approval of States by an optional declaration separate from the ratification of the future convention. Therefore, it was best not to rely solely on the settlement of disputes to limit and give shape to countermeasures.

42. It was his impression that the Special Rapporteur wanted to balance the relative vagueness on that point in part 2 by binding provisions on the settlement of disputes. In his view, countermeasures must be accompanied by strict rules making it clear that resort could be had to countermeasures only if no other more orthodox method could be used. Envisaging a more binding special regime for the settlement of disputes relating to countermeasures could not act as an excuse for not specifying the rules applicable to countermeasures and especially for not indicating what was meant by the necessity of countermeasures in part 2, in particular in draft article 11¹⁶. If that was not done, he did not see how conciliators or judges could limit excesses. The legislature was not bound by positive law, but that was not true for judges. If resort to countermeasures was not subject to

¹⁵ See footnote 8 above.

¹⁶ See footnote 10 above.

strict conditions under part 2, it was not apparent how even an advanced regime for the settlement of disputes would enable the arbitrator or ICJ to restrict the use of countermeasures.

43. The Special Rapporteur's proposal departed so much from existing law that he doubted whether they were realistic or even compatible with the Commission's mandate of progressively developing the law, rather than changing it radically. Therefore, he did not favour sending the draft articles to the Drafting Committee. In his view, there were limits to what was possible. First, the Commission must attach to the articles on State responsibility proposals on the settlement of disputes. Secondly, concerning international crimes (part 1, art. 19), a regime similar to the one proposed by the Special Rapporteur could be envisaged, although probably only in an optional protocol to the future convention. Thirdly, for other disputes, he did not believe it was possible to go beyond the stage of binding conciliation in the manner provided for under article 66 of the Vienna Convention on the Law of Treaties. That would not be a bad outcome at all, since it concerned international responsibility, namely the fundamental mechanism regulating all international law. Even there, success was not assured. To cite an example, a number of States had fought in CSCE against a mechanism for binding conciliation under the Convention on Conciliation and Arbitration within the CSCE¹⁷ which those States had not signed. That was merely an instance of simple binding conciliation in a regional framework, and it showed how far the international community still had to go before a truly binding mechanism for the settlement of disputes could be agreed upon in such a sensitive and fundamental area. Fourthly, the Commission might envisage drafting another additional protocol or clause on binding arbitration, but it would only be realistic if the protocol or clause was optional. Fifthly, concerning disputes on countermeasures, it might be possible to give the competent organ, whether an arbitral tribunal or a conciliation commission, the power to decide binding provisional measures of protection for the parties to the dispute. But again, he did not think that it could be imposed on States. States must be asked to approve it, either by a declaration or by ratifying a separate protocol.

44. The Commission should draw the attention of the Sixth Committee to that point and should ask Governments to express their views, either in the Sixth Committee or, preferably in writing, not so much on the appropriateness of a regime for settling disputes as on the mechanism proposed by the Special Rapporteur or on alternatives that the Commission might envisage.

45. Mr. ARANGIO-RUIZ (Special Rapporteur) said it was unacceptable that Mr. Pellet had attributed to him ideas that he had not proposed. He therefore wished to clear up certain ambiguities that might lead other members astray.

46. The reference in draft article 2, paragraph 1, to the conciliation commission "bringing the parties to an agreed settlement" meant conciliation, and nothing more. It was perfectly clear both in draft article 2, in his

report and in his statement that the conciliation commission did not have the power to decide on the merits of the dispute with binding effect. The conciliation commission's report would be no more than a recommendation of a solution for the parties to accept or refuse. A settlement would only come about by an agreement between the parties—as in the most traditional forms of conciliation. The only points on which he proposed a departure from the usual pattern of a conciliation commission was the possibility of its ordering, where appropriate, with binding effect, the cessation of any measures taken by either party, provisional measures of protection, and fact-finding. Mr. Pellet had clearly misrepresented his views.

47. There might be a slight ambiguity in draft articles 1 and 2 proposed in his fifth report, which the Drafting Committee would certainly have to clear up, in that the phrase in draft article 1 "If a dispute which has arisen following the adoption by the allegedly injured State of any countermeasures ..." might seem to suggest that the competence of the international bodies referred to in the later articles was to be restricted to examination of the narrow issue of whether or not countermeasures were lawful, for example, under draft articles 12 to 14 of part 2,¹⁸ that is to say, proportionality, non-violation of the prohibition of force, *jus cogens* and so on. He had none the less made it very clear in more than one paragraph of his report, which had obviously been misread, assuming it had been read at all, and again during his statement earlier, that once the procedure started, although it had been set into motion after the adoption of the countermeasure, namely following the dispute arising from the fact that a countermeasure had been taken, the conciliation commission was, according to draft article 2, paragraph 1 (a), to "examine any question of fact or law which may be relevant for the settlement of the dispute under any part of the present articles". In the discussion of the previous Special Rapporteur's proposals in chapter I, section A, of the report, he had suggested that his predecessor might have failed to make it clear that he had intended the competence of the conciliation commission to cover the whole range of problems that might arise under the law of State responsibility including any question that might be relevant under any provisions of part 1 or 2 of the draft.

48. He had wished to clarify those points so that other members of the Commission should not be influenced by the superficial statement they had just heard.

49. As for the idea of adding the word "necessity", the Drafting Committee had already dealt with it and he failed to see how such an addition would in any way affect a decision by an injured State to adopt a counter-measure.

50. It was perhaps worth specifying the meaning of the term "counter-reprisal", as it was apparently not known. The notion was widely recognized in the literature on international law and referred to a situation in which a State that was the target of reprisals—in other words, of countermeasures—believed it was entitled, in order to defend itself and maintain its position, to resort to counter-reprisals, or counter-countermeasures.

¹⁷ Adopted by the CSCE Council in Stockholm in December 1992 (see document CSCE/3-C/Dec.1 of 14 December 1992).

¹⁸ See footnote 10 above.

51. There might have been a problem with the translation into French of the terminology used in the introduction to the fifth report, in which he had referred to "delinquencies qualified as 'crimes' of States under article 19". If "delinquencies" had been translated as *délits*, that was surely incorrect. But the previous speaker had not been simply taking issue with terminology: he had been accusing the Special Rapporteur of seeking to cause a *bouleversement* in international law, which he felt was ridiculous.

52. Mr. GÜNEY said that, in the fifth report, the Special Rapporteur posited an intrinsic relationship between the settlement of disputes and the responsibility of States and succeeded in illustrating the complexity of the problem. Even if one of his goals had been to win over the legal and academic milieu, however, he could have avoided devoting over half the report to an analysis of the work done by his predecessor and of the discussion in the Sixth Committee. A simple reference to the relevant documents would have sufficed.

53. The main issue the Commission must now resolve was whether the draft articles should include provisions on the settlement of disputes. A number of factors should be taken into account in making that decision. First, States were reluctant about and fearful of submitting themselves to obligatory settlement by third parties. The Commission must therefore tread very lightly in dealing with the issue. Secondly, whatever the mechanisms envisaged for dispute settlement, they must respect the principle of free choice of means for such settlement. Thirdly, the nature of the procedures to be used had to be determined—in particular, whether they were self-executing or not. Fourthly, flexibility must be shown in respect of reservations.

54. He agreed that a convention on State responsibility would be ineffective without an adequate procedure for dispute settlement. Prospects for dispute settlement had been enhanced following the major changes in world affairs recently, and a balanced solution was therefore within sight. Yet in seeking to strike such a balance, the goal should be to avoid diminishing the purpose and effectiveness of the future convention on State responsibility for want of appropriate procedures for the settlement of disputes, and to prevent an unduly rigorous regime in that area from discouraging accession to and acceptance of the convention. Such a balance must also ensure that priority went to the dispute settlement machinery already in force between the parties and that the link between the dispute settlement as outlined in the draft articles and existing systems for achieving the same goal be carefully defined.

55. There remained some doubt about the advisability of envisaging a legal regime of countermeasures within the draft articles. It was still open to question whether countermeasures were the appropriate way of forcing a State that was allegedly guilty of an internationally wrongful act to engage in dispute settlement or to acknowledge and provide compensation for the damage it had done. After all, recourse to countermeasures by an injured State could result in an escalation of countermeasures, and the way to erase the consequences of a wrongful act surely did not lie in the commission of yet another wrongful act. The difficulty was in the international community's failure to establish a system to en-

sure scrupulous respect for the law. Despite the obstacles involved, the Commission should focus on safeguards against abuse of unilateral measures and try to find means of strengthening such safeguards.

56. As for dispute settlement as an essential aspect of any regime governing unilateral actions the subject deserved serious examination by the Commission. The purpose of promoting recourse to dispute settlement as a means of making the use of countermeasures more compatible with the rule of law in relations between States and of minimizing the adverse aspects of their use was to ensure that any unilateral actions were lawful to an acceptable and necessary extent. According to the proposal by the Special Rapporteur, exhaustion of recourse procedures would be a parallel obligation rather than a precondition for resorting to countermeasures. Hence, everything would hinge on the dispute settlement arrangements between the State having committed the internationally wrongful act and the State claiming to have been injured. In that respect, he agreed with Mr. Pellet that a distinction should be drawn between what was desirable and what was possible.

57. It would certainly be realistic to resolve the issue, not within the framework of an innovative system that broke with existing international law, but through a simple and flexible mechanism encouraging States to settle their disputes rapidly. Within such a mechanism, settlement through legal channels would be envisaged only as a last resort, to be used with many restrictions and great prudence. To avoid any negative impact on acceptance of and adherence to the future convention on State responsibility, the mechanism must incorporate an "opt in, opt out" clause.

58. Though it was up to Governments to decide whether to accept or reject obligations for dispute settlement, at the present stage of development of the law in that area, it would be wise to provide guidelines, and leave the task of working out appropriate mechanisms to the plenipotentiary conference at which a convention on State responsibility would one day be adopted.

59. Mr. FOMBA said the report raised a number of fundamental questions, the first being how to justify the common practice of taking countermeasures. The Special Rapporteur suggested two possible routes to follow, both of which were sensible and of great interest: to envelop countermeasures in a sort of strait-jacket by clearly defining the terms and limitations of their use, and to minimize their adverse effects by establishing a system for compulsory peaceful settlement of disputes.

60. The second fundamental question was how far the Commission could and should go in its treatment of the issue. The Special Rapporteur thought a major step forward should be taken in the progressive development of the law on dispute settlement and accordingly proposed two solutions, which were set out in chapter I, section D, of the report. The solution taking the "legislative path" seemed preferable, for the reasons advanced by the Special Rapporteur.

61. A third question was how to protect weak countries from abuses on the part of powerful ones. A clear, rigorous system for dispute settlement—and above all, one that would be accessible for the poorer countries—would have to be developed. The need for such a system was

underscored by a consistent pattern of violation by powerful States of the rights of weaker ones. France's summary expulsion in 1986 of 101 Malians, many of whom had been in possession of valid residence permits, was a case in point. Another case had been that of the Malian workers seeking decent accommodation in Paris, many of whom, including women and children, had recently been subjected to brutal treatment, in flagrant disregard for the most elementary human rights. Such situations would provoke unilateral outcries, were it not for the economic dependence of countries, such as Mali's dependence on France.

62. It was therefore important to provide for a compulsory and effective dispute settlement mechanism under the legal regime for State responsibility. However, hard and fast obligations amounted to nothing if the great majority of States, namely the poorer ones, were unable to apply them for lack of financial resources, among other things. It was no exaggeration to say that lack of funds could result in the denial of justice. So it had been with the problems faced by Mali and Burkina Faso during the settlement of their frontier dispute.¹⁹ The two parties had requested ICJ to appoint three experts to help in mapping out the border between them following the compromise reached through the Court's ruling in 1986. Subsequently, both countries, though accepting the substance of the ruling, had admitted to being unable to meet the expenditure occasioned by the mapping work. A benefactor was finally found in the Swiss Government, which also assisted in the search for hidden deposits in banks in Switzerland of Malian public funds following the fall of the Malian dictator, General Moussa Traoré, in 1991.

63. So, there was clearly an urgent need to give adequate and effective legal aid to developing countries. As far as access to ICJ was concerned, there was a precedent in the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice. The Fund could be used to finance the drafting of legal documents, the payment of fees, the funding of legal research and many other aspects of legal procedure. The only restriction was a major one: the Fund could be used solely in connection with a case brought before ICJ by common agreement between the parties. That meant it could not be used in cases of arbitration or conciliation. And a wealthy State had only to reject such a preliminary agreement in order to prevent a poorer State from preparing its case in the best possible manner. That aspect of the Fund's operations should be revised. It was also necessary for a resolution to be adopted by the General Assembly taking note of the establishment of the Fund and encouraging States to contribute to it.

64. Lastly, draft article 5, on judicial settlement, should be worded in such a way that the right of access of poor countries to the Fund was preserved. Financial assistance to such countries should cover conciliation and arbitration, as well as settlement by mutual agreement. A specific provision should be incorporated concerning aid to developing countries regarding access to and application of dispute settlement procedures. A

number of sources could be taken as references, including the Vienna Convention on the Law of Treaties.

The meeting rose at 12.55 p.m.

2306th MEETING

Friday, 11 June 1993, at 10.10 a.m.

Chairman: Mr. Gudmundur EIRIKSSON
later: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (continued) (A/CN.4/446, sect. D, A/CN.4/450,¹ A/CN.4/L.487)

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. BARBOZA (Special Rapporteur) said that he had taken note of all the observations made by members of the Commission on the draft articles which appeared in his ninth report (A/CN.4/450). He agreed that it would have been useful to incorporate in the chapter on prevention some of the principles and concepts set forth in article 3, paragraph 1, and articles 6 and 8 and also that the concept of prevention should be linked to that of responsibility in article 8, but, since those articles had been referred to the Drafting Committee,² that task now devolved upon the Committee. It had also been said that the procedures provided for should not be too detailed and that States wanted only a general framework of reference. One member of the Commission had even taken the view that the chapter on prevention could be reduced to article 14. Furthermore, several members had said that the question of prevention *ex post facto* should be the subject of different and separate articles, since prevention *ex post facto* went further than prevention proper and consisted of limiting or containing the harm. He had simply followed the terminology used in most conventions on civil liability, in which the word "prevention" in fact signified prevention *ex post facto*. He was, however, ready to accept the principle of separate articles,

¹ Reproduced in *Yearbook . . . 1993*, vol. II (Part One).

² See 2300th meeting, footnote 18.

¹⁹ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554.