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Summary record of the 1952nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

under the auspices of the United Nations, which were the subject-matter of paragraph 1; and secondly, in respect of bilateral consular or other agreements, which were the subject-matter of paragraph 2.

28. The relationship could also be considered *ratione temporis,* in respect of future international agreements relating to the status of the diplomatic courier and the diplomatic bag: that was the subject-matter of paragraph 3. Mr. Francis, Mr. Jagota, Mr. Tomuschat and Mr. McCaffrey (*ibid.*), as well as several other members, had expressed doubts about the usefulness of that paragraph on the ground that its content was already covered by article 6, paragraph 2 (*b*). But paragraph 2 (*b*) of article 6 covered the general principle of reciprocity, whereas paragraph 3 of draft article 42 related to future agreements in the field of diplomatic law.

29. The purpose of draft article 43 was to introduce a certain flexibility in order to secure wider acceptance of the draft articles. That practical purpose was served by giving States more options, corresponding to the position each State took in regard to the four codification conventions. During the discussion, the provisions of article 43 had been criticized on the ground that they would open the door to a multiplicity of régimes. The fact was that the multiplicity of régimes already existed under the four codification conventions, which, in particular, established two different régimes for the diplomatic bag. All that article 43 did was to take account of the existing situation by giving States an opportunity to choose the field of application of the régime established by the draft articles. Mr. Tomuschat thought that article 43 created a complicated situation, but in fact the situation was complicated already.

30. He would not dwell on the drafting points made during the discussion, except to say that the Drafting Committee would certainly give careful consideration to Mr. Ogiso's suggestion (1949th meeting, para. 38) that the concluding words of article 43, paragraph 1, "to which it wishes the provisions to apply", should be replaced by the negative formulation "to which it does not wish the provisions to apply".

31. He proposed that the draft articles be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

32. Mr. KOROMA said that he wished to clarify a point concerning draft article 36 and the notion of inviolability. Reference had been made to the incident at Stansted Airport in the United Kingdom, where a crate alleged to have been a diplomatic bag had been found to contain a man. One reason why the crate had been opened by the British authorities was that it did not meet the requirements for a diplomatic bag; in particular, it did not bear the visible external marks required under article 24. Thus the true position was that the crate opened by the British authorities had not been a diplomatic bag at all. It was undesirable to perpetuate the myth that there had been an attempt to carry a human being in a diplomatic bag.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer to the Drafting Committee the revised texts of draft articles 36, 37, 39 and 41 to 43 submitted by the Special Rapporteur, for consideration in the light of the comments and suggestions made during the discussion.

It was so agreed.[8]

The meeting rose at 11.25 a.m.

[8] For consideration of the texts proposed by the Drafting Committee (new articles 28 to 33), see 1980th meeting, paras. 52-109.

1952nd MEETING

Monday, 26 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Carero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Yankov.

State responsibility (A/CN.4/389,[1] A/CN.4/397 and Add.1,[2] A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)[3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 5 AND ANNEX

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the topic (A/CN.4/397 and Add.1), as well as the articles of part 3 of the draft, which read as follows:

[1] Reproduced in *Yearbook ... 1985,* vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986,* vol. II (Part One).

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980,* vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibiity), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985,* vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.,* pp. 20-21, footnote 66.

Article 1

A State which wishes to invoke article 6 of part 2 of the present articles must notify the State alleged to have committed the internationally wrongful act of its claim. The notification shall indicate the measures required to be taken and the reasons therefor.

Article 2

1. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification prescribed in article 1, the claimant State wishes to invoke article 8 or article 9 of part 2 of the present articles, it must notify the State alleged to have committed the internationally wrongful act of its intention to suspend the performance of its obligations towards that State. The notification shall indicate the measures intended to be taken.

2. If the obligations the performance of which is to be suspended are stipulated in a multilateral treaty, the notification prescribed in paragraph 1 shall be communicated to all States parties to that multilateral treaty.

3. The fact that a State has not previously made the notification prescribed in article 1 shall not prevent it from making the notification prescribed in the present article in answer to another State claiming performance of the obligations covered by that notification.

Article 3

1. If objection has been raised against measures taken or intended to be taken under article 8 or article 9 of part 2 of the present articles, by the State alleged to have committed the internationally wrongful act or by another State claiming to be an injured State in respect of the suspension of the performance of the relevant obligations, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

2. Nothing in the foregoing paragraph shall affect the rights and obligations of States under any provisions in force binding those States with regard to the settlement of disputes.

Article 4

If, under paragraph 1 of article 3, no solution has been reached within a period of twelve months following the date on which the objection was raised, the following procedures shall be followed:

(*a*) Any one of the parties to a dispute concerning the application or the interpretation of article 12 (*b*) of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(*b*) Any one of the parties to a dispute concerning the additional rights and obligations referred to in article 14 of part 2 of the present articles may, by a written application, submit it to the International Court of Justice for a decision;

(*c*) Any one of the parties to a dispute concerning the application or the interpretation of articles 9 to 13 of part 2 of the present articles may set in motion the procedure specified in the annex to part 3 of the present articles by submitting a request to that effect to the Secretary-General of the United Nations.

Article 5

No reservations are allowed to the provisions of part 3 of the present articles, except a reservation excluding the application of article 4 (*c*) to disputes concerning measures taken or intended to be taken under article 9 of part 2 of the present articles by an alleged injured State, where the right allegedly infringed by such a measure arises solely from a treaty concluded before the entry into force of the present articles. Such reservation shall not affect the rights and obligations of States under such treaties or under any provisions in force, other than the present articles, binding those States with regard to the settlement of disputes.

Annex

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article 4 (*c*) of part 3 of the present articles, the Secretary-General shall bring the dispute before a Conciliation Commission constituted as follows:

The State or States constituting one of the parties to the dispute shall appoint:

(*a*) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(*b*) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

The four conciliators chosen by the parties to the dispute shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to submit to conciliation shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Conciliation Commission acting under this annex has competence shall be decided by the Commission.

5. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any State to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

6. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

7. The Commission shall hear the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

8. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

9. The fees and expenses of the Commission shall be borne by the parties to the dispute.

2. Mr. RIPHAGEN (Special Rapporteur) said that, at the present stage, the Commission was called upon to consider only section I of his seventh report (A/CN.4/397 and Add.1), relating to part 3 of the draft

articles. Members would note that section II was concerned with the preparation of the second reading of part 1 of the draft articles.

3. Initially, it would be helpful to recall the scope of the task the Commission had taken up in 1963, namely that of codifying the rules of State responsibility as so-called "secondary" rules, irrespective of the source and content of the so-called "primary" rules, in other words the rules of international law governing the conduct of States in their mutual relations. At that time, there had been two underlying assumptions: first, that the source and content of the "primary" rules were in principle irrelevant so far as the legal consequences of failure to observe the primary rules were concerned; and, secondly, that the "secondary" rules, namely the legal consequences of a breach, were in principle independent of the machinery of implementation and actual enforcement thereof.

4. Both those assumptions were in fact untenable. It simply did not make sense to add "secondary" rules to "primary" rules if such "secondary" rules were nothing more than new rules of conduct of States in their mutual relations. Surely such an approach would deprive the "primary" rules of their binding character by making non-observance of those rules a mere condition for other rules of conduct. Similarly, to ignore the content and source of the "primary" rules in the determination of the legal consequences of a breach would be tantamount to neglecting their relative force, both intrinsically and in relation to the actual "primary" rules of conduct.

5. In short, there was an interrelationship between source, conduct, machinery of implementation and the force thereof. Those elements constituted a closed system and the system to be established would depend on a factor of chance, on whether States wished to establish the system bilaterally, regionally or on a world-wide basis. It would also depend on the perceived necessity for the system, in view of the factual interdependence of situations in a particular field. The rules of State responsibility could never be more than residual rules; whatever rules might be enunciated in the draft, States remained free to create "soft law", just as the international community remained free to establish rules of *jus cogens*.

6. Draft articles 6 to 15 of part 2 of the draft, which the Commission had referred to the Drafting Committee,[4] enumerated a number of reactions to an internationally wrongful act alleged to have been committed, reactions ranging from a demand for reparation in its broad sense, to measures by way of reciprocity and measures by way of reprisal, to "additional rights and obligations" (arts. 14 and 15). Those reactions could involve an increasing number of States and the justification for them lay in the veracity of the allegation that an internationally wrongful act had been committed and in the degree to which the conduct in question disrupted the system.

7. The reaction could in turn lead to counter-reaction, thereby entailing a danger of escalation, for which the only remedy was some form of organization or extranational power as a substitute for unilateral national power. In establishing a legal system or subsystem between themselves, States sometimes did provide for such an organization, the existence of which reflected on the legitimacy of the unilateral reaction to what was alleged to be an internationally wrongful act. In part 2 of the draft articles, article 10, paragraph 1, article 11, paragraph 2, article 14, paragraph 3, and article 15 mirrored that idea. Article 7, article 9, paragraph 2, article 10, paragraph 2, and articles 12 and 13 endeavoured, by means of substantive provisions or the concept of proportionality, to prevent escalation. The substantive rule of proportionality in its broad sense, however, was open to divergent interpretations and might not strictly apply in cases falling under articles 14 and 15 of part 2. In other words, the substantive rule could not replace the organization.

8. It was for those reasons that part 3 of the draft proposed a minimum of organizational arrangements in connection with the substantive rules of State responsibility. In that regard, he had drawn on the relevant provisions of the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Accordingly, draft articles 1 to 5 and the annex of part 3 adopted the wording of those conventions.

9. Mr. MALEK said that most codification conventions contained provisions concerning the settlement of disputes or had optional protocols in that regard, such as the four Geneva Conventions of 1958 on the law of the sea, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions. In view of the particular subject-matter, the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 1958)[5] also included provisions establishing a procedure for the compulsory settlement of disputes that might arise between the parties in specific cases. Again, provisions of that kind were to be found in the 1969 Vienna Convention on the Law of Treaties, the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the 1978 Vienna Convention on Succession of States in Respect of Treaties and the 1982 United Nations Convention on the Law of the Sea. Admittedly, the procedure for the settlement of disputes established in the latter Convention was compulsory for all the States parties, but the other settlement procedures, including the procedure in the Vienna Convention on the Law of Treaties, could, through the system of reservations and objections thereto, be rendered wholly or partly inapplicable in relations between two or more States parties.

10. It would be useful to have some information on the status of the Vienna Convention on the Law of Treaties, on which the Special Rapporteur had based the draft articles under consideration. It was his own understanding that, as of June 1985, the Convention

[4] See footnote 3 above, *in fine*.

[5] United Nations, *Treaty Series*, vol. 559, p. 285.

had been binding on only 46 States and, apparently, not all of them had agreed to the relevant dispute-settlement procedure. Some 10 States had formulated reservations or objections thereto, thereby making application of the procedure wholly or partly inapplicable in their mutual relations.

11. If the Commission wished to strengthen the means of settling disputes, it would probably have to follow the Special Rapporteur's reasoning and make such means compulsory for each and every State party. In the case of the convention that would emerge from the draft articles, there could be no justification for acceptance of a reservation whereby the State making it would not be bound by some or all of the provisions on the settlement of disputes.

12. The draft articles provided that disputes concerning the application or interpretation of the provisions relating to *jus cogens* and to international crimes could be submitted to the ICJ. Recourse to arbitration did not appear to be envisaged, although the Special Rapporteur had drawn attention in his reports to the obvious relationship between the concept of an international crime and the concept of *jus cogens*, as enunciated in the Vienna Convention on the Law of Treaties, under which the States parties to a dispute concerning that concept could agree by common consent to submit the dispute to arbitration. What was the Special Rapporteur's opinion on that point?

13. In draft article 4, the Special Rapporteur also provided for a specific conciliation procedure in the case of a dispute concerning the application or interpretation of the rules defining the rights of so-called injured States. Such an arrangement seemed necessary in a convention on State responsibility, although the fact of the matter was that, unfortunately, submission of disputes to the ICJ, to arbitration or even to conciliation was not a common means of settlement at the present time. States were very reluctant to submit to the authority of a third party or even to a conciliation commission, which by its very nature was intended not to settle disputes, but simply to make it easier for the parties concerned to do so.

14. The General Assembly had always been mindful of that fact. Since the early 1960s, it had endeavoured to find a solution by trying to encourage States to submit to the inquiry procedure, a means of settlement that might be more readily acceptable. Thus, in resolution 1967 (XVIII) of 16 December 1963 on the question of methods of fact-finding, the General Assembly had called for a study of such methods. He had then prepared that study,[6] and the conclusions had not been very encouraging. The study had shown that the League of Nations had encouraged States to conclude conciliation treaties *inter se* and that, to that end, it had adopted, on 26 September 1928, the General Act for the pacific settlement of international disputes. A fairly large number of bilateral conciliation treaties had been concluded in the framework of the League, but they had rarely been applied.

15. The United Nations had also fostered the conciliation procedure. In 1949, it had restored the efficacy of the 1928 General Act and, in order to promote the use of inquiry and conciliation procedures, had established the Panel for Inquiry and Conciliation.[7] The panel, however, had never been used. The period since the establishment of the United Nations had been marked by very limited use of inquiry and conciliation bodies set up by the parties themselves. A wide variety of procedures was available to States, which could submit disputes to standing bodies, to *ad hoc* conciliation bodies or to the panel established by the General Assembly in 1949.

16. The failure to submit disputes to bodies set up by the parties themselves indicated that States were not very enthusiastic about inquiry or conciliation procedures that might be instituted in bodies other than those of the United Nations or regional organizations. The above-mentioned study had clearly shown that States had always preferred to submit disputes to the principal organs of world or regional organizations, which could be explained by the fact that, in any dispute, one party always regarded itself as the injured party and therefore, in order to win public support, preferred to submit the dispute to such bodies rather than to local commissions or to some other body, whose conclusions would not carry as much weight in the eyes of the public.

17. A convention on State responsibility must inevitably include provisions on the settlement of disputes and the proposals by the Special Rapporteur were made precisely for that purpose. Since parts 2 and 3 of the draft articles were about to be adopted on first reading, he wished to pay tribute to the Special Rapporteur as the main author of very complex parts of a draft on a topic whose codification would have seemed an impossible undertaking at the beginning of the twentieth century. The Special Rapporteur had always demonstrated authority akin to and indeed rivalling that of Mr. Ago, his predecessor in the study of the topic of State responsibility.

18. Mr. FLITAN said that he wished to comment on three matters of principle. First, draft article 4, subparagraphs (*a*) and (*b*), were intended to make the jurisdiction of the ICJ compulsory, even though it was all too well known that States were divided on that issue, for some considered that the submission of a dispute to the Court had to be agreed to by all the parties concerned, whereas others took the view that any party to a dispute was entitled to submit it to the Court. In that connection, he referred to Article 36, paragraph 3, and Article 92 of the Charter of the United Nations and to Article 36, paragraph 1, of the Statute of the ICJ. During the elaboration of the present draft articles, members had frequently and rightly pointed out that State responsibility was the very essence of international law. In view of the importance of the topic, it would therefore be a serious matter for the draft to set forth the principle of the compulsory jurisdiction of the ICJ. In all likelihood, States which did not accept the com-

[6] *Official Records of the General Assembly, Twentieth Session, Annexes*, agenda items 90 and 94, document A/5694.

[7] See General Assembly resolutions 268 A (III) and 268 D (III) of 28 April 1949.

pulsory jurisdiction of the Court would not become parties to the future convention, while support for the idea of compulsory jurisdiction would, in a way, be tantamount to trying to amend the Statute of the Court and hence the Charter itself. He did not think the Commission would willingly accept the fact that a large number of States would not accede to such an important instrument as the future convention.

19. Secondly, draft article 3, paragraph 1, referred to Article 33 of the Charter, which mentioned various means of settling disputes. At the previous session, when it had discussed the proposals for part 3 of the draft set out by the Special Rapporteur in his sixth report (A/CN.4/389, sect. II), the Commission had been consulted, without any specific text before it, about the principle that was now embodied in article 3, and the idea had been expressed that recourse to Article 33 of the Charter was essential at every stage in a dispute. Having studied the draft articles submitted in part 3, he considered that they must include a general text setting forth the principle that, at the first sign of a dispute, States were required to seek a solution through the means indicated in Article 33 of the Charter.

20. Thirdly, draft article 2, paragraph 1, referred to a period of 3 months and draft article 4 to a period of 12 months, but no details were given about the periods of time applicable "in cases of special urgency". As a general rule, disputes had to be settled as rapidly as possible, even though some time might be required to shed light on particular aspects of a dispute. He therefore had reservations and doubts about the advisability of establishing a dispute-settlement procedure that could well take as long as two years.

21. Sir Ian SINCLAIR said that part 3 of the draft articles seemed to relate essentially to disputes concerning the interpretation and application of the provisions of part 2. Nevertheless, part 3 should also apply to the provisions of part 1. The essence of any dispute concerning the provisions of part 1 or part 2 would be whether the alleged author State had in fact committed an internationally wrongful act, something which entailed determining whether a wrongful act had been committed and, if so, whether the act was attributable to the alleged author State.

22. Accordingly, he would be grateful if the Special Rapporteur would clarify whether, from the rather narrow construction in part 3 of a series of draft articles predicated on the proposition that a dispute would arise with regard to one of the articles of part 2, doubts might not be cast on the applicability of part 3 to the articles contained in part 1.

23. Mr. RIPHAGEN (Special Rapporteur) said he did not think that the articles of part 3 were constructed as narrowly as Sir Ian Sinclair had suggested. They were intended to provide some sort of machinery to deal with the situation when a State that considered it had been injured took certain steps as a reaction to the alleged wrongful act. The purpose was to avoid the danger of escalation when measures of reciprocity or reprisal or other similar steps were taken. In the absence of such machinery, a very difficult situation would emerge.

24. The three parts of the draft were interdependent. When it was alleged that a State had committed an internationally wrongful act, it was of course necessary to determine whether the act in question was indeed wrongful and then ascertain whether it was attributable to the alleged author State. Only when those questions had been answered would the provisions of part 2 of the draft come into play. Application of the provisions of part 3 would in turn be dependent upon those of part 2 of the draft. Consequently, the articles of part 3 were also intended to apply to disputes in connection with the articles of part 1.

25. Mr. ARANGIO-RUIZ said he fully agreed with Sir Ian Sinclair that the provisions of part 3 of the draft would have to cover not only the articles of part 2 but also those of part 1. Draft article 1 of part 3 began with the words "A State which wishes to invoke article 6 of part 2 ...". The reason for that reference to an article in part 2 was probably that the subject involved was notification, a phase which preceded any third-party settlement procedure and indeed any bilateral negotiations or mediation. In fact, the claimant State's argument would be put forward on the basis of any one of the articles in part 2 or even in part 1, according to the case. For example, there might be an exchange between the two States concerned on the determination of the wrongful nature of the act and on any circumstances precluding responsibility that might be invoked by the alleged author State. However, he would discuss article 1 of part 3 *ex professo* at a later stage.

26. For the time being, he would confine himself to the provisions of part 3 that mentioned the ICJ. As the representative of his country, Italy, he had fought in the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States for recognition of the role of the ICJ in the settlement of disputes. Together with a small group of other States, Italy had submitted a special document on the subject, but the results had been disappointing and only a passing reference to judicial settlement had been included in the Declaration adopted by the General Assembly in 1970.[8] The way in which the ICJ had been treated in 1970 could be explained by the fact that, at the time, a number of countries had considered the Court to be a very conservative body. The Court's composition, however, had now changed considerably and should prove more acceptable to a larger number of Members of the United Nations.

27. In those circumstances, the Commission should always make an effort to promote settlement of legal disputes by the Court. In opposing any idea of compulsory jurisdiction, Mr. Flitan had forgotten that the competence of the Court was also envisaged in the so-called optional clause, that was to say in Article 36, paragraph 2, of the Statute of the Court, and not only in Article 36, paragraph 1, of the Statute and Article 92 of the Charter of the United Nations. Nor would it be appropriate to consider only Article 36, paragraph 3, of

[8] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV) of 24 October 1970, annex).

the Charter, since that provision merely directed the Security Council to "take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice". It was simply a question there of recommending to the parties resort to judicial settlement by agreement.

28. The members of the Commission, as independent lawyers acting in their personal capacity, should do all they could to enhance the role of the ICJ. They should not be discouraged by earlier setbacks and should draft provisions on the settlement of disputes which they believed were reasonable; it would then be for the Sixth Committee of the General Assembly and ultimately for individual States to take the final decision.

29. Mr. YANKOV, referring to draft article 4, subparagraph (*a*), asked why the Special Rapporteur had omitted the phrase "unless the parties by common consent agree to submit the dispute to arbitration", particularly since the provision in question was modelled on article 66, subparagraph (*a*), of the 1969 Vienna Convention on the Law of Treaties, which provided that a dispute could be submitted either to the ICJ or to arbitration.

30. Sir Ian SINCLAIR, referring to Mr. Arangio-Ruiz's comments, said that he, too, had been a member of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States when it had drawn up the principle relating to the peaceful settlement of disputes and that he had been very concerned at the limited extent of agreement reached on the content of that principle at the time.

31. In formulating part 3 of the draft articles it was necessary to bear in mind that any dispute as to whether article 6 of part 2 of the draft could properly be invoked would have its roots in an earlier dispute concerning the interpretation or application of part 1 of the draft. A whole series of such disputes could arise, concerning, for example, whether there had been an internationally wrongful act, whether the act was attributable to a State, whether local remedies had been exhausted, or whether there had been any circumstances precluding wrongfulness. In practice, there would first have been a series of diplomatic exchanges, with the alleged injured State drawing the attention of the author State to the fact that it regarded a given act committed by or on behalf of the author State as an internationally wrongful act. That in turn would probably have been denied by the author State on the ground, for instance, that the act was not attributable to it or that there had been circumstances precluding wrongfulness or that, on the facts, no internationally wrongful act had been committed.

32. Consequently, although such underlying disputes would inevitably come within the ambit of the procedure for peaceful settlement set forth in part 3, he was somewhat concerned that it might appear that the whole complex of varying types of disputes was being placed within the strait-jacket of a dispute as to whether an alleged injured State was entitled to invoke article 6 of part 2. The problem might, however, be one of formulation rather than substance.

33. Mr. ARANGIO-RUIZ said it was the reference made in draft article 1 of part 3 to article 6 of part 2 that had apparently given rise to the difference of opinion between Sir Ian Sinclair and the Special Rapporteur. As he himself saw it, part 3 comprised two groups of articles, one constituting part 3 proper, since it dealt with the procedures provided for in Article 33 of the Charter of the United Nations, and the other consisting of articles 1 and 2, which would be better placed in part 2, since they related to the way in which mutual relations changed when one State made a notification to another State.

34. At the Commission's previous session,[9] he had deplored the fact that draft articles 6 *et seq.* of part 2 contained no provisions concerning intermediate procedures that could be used between the time when a State unilaterally found that it had suffered injury as a result of an act contrary to international law committed by another State and the time when it took countermeasures: hence the provisions on prior notification included in part 3. Of course, a State might not have the opportunity to give a notification because the situation might require the adoption of urgent measures. A distinction must nevertheless be made between the two types of provisions contained in part 3, for some of them would be more appropriate in part 2.

35. Mr. RIPHAGEN (Special Rapporteur) said that the Commission's discussion so far had served to pinpoint the interrelationship between the different parts of the draft. It was difficult, indeed unnecessary, to try to make very sharp distinctions inasmuch as the final instrument would, of course, have to be considered as a whole. Some rearrangement was obviously necessary and that could be done in the Drafting Committee. It might also be advisable in that connection to reconsider chapter V of part 1 of the draft (Circumstances precluding wrongfulness).

36. In his oral introduction, he had deliberately referred to articles 6 to 15 of part 2 of the draft because of the obvious link between parts 2 and 3. It was also clear that any dispute covered by the settlement procedure in part 3 would give rise to a host of problems falling under part 1. Obviously, it was not possible at the present stage to establish a comprehensive system for the compulsory settlement of disputes, but it was possible to provide that, once a dispute had reached the point of countermeasures, an attempt should be made to put an end to the escalation.

37. With regard to the compulsory jurisdiction of the ICJ, it was important to remember that novel concepts such as *jus cogens* and international crimes also called for a progressive attitude in the matter of settlement of disputes. Furthermore, under the present draft, the compulsory jurisdiction of the Court was confined to questions of *jus cogens*: the Court would be required only to decide whether there was a rule of *jus cogens* applicable to the breach in question, not to award a sum of money to one State or another.

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[9] *Yearbook ... 1985*, vol. I, pp. 150-151, 1900th meeting, paras. 25-28.

38. As to Mr. Yankov's question, the parties to a dispute were always free to submit the dispute to arbitration if they wished. In that connection, he drew attention to paragraph 1 of draft article 3 of part 3, which provided that, in the event of a dispute concerning the application of countermeasures, "the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations". Again, draft article 4 provided for further procedures if, "under paragraph 1 of article 3, no solution has been reached within a period of 12 months following the date on which the objection was raised ...". A variety of possible procedures for the settlement of disputes, including negotiation, conciliation and arbitration, was therefore available to States.

The meeting rose at 11.40 a.m.

1953rd MEETING

Tuesday, 27 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, M. Arangio-Ruiz, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/389,[1] A/CN.4/397 and Add.1,[2] A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

***"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft article)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 5 AND ANNEX[4] (*continued*)

1. Mr. McCAFFREY said that, although the draft articles in part 3 were inspired by the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties, the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, they were intended to serve a different purpose. That purpose was to prevent or retard the escalation of disputes in international relations.

2. The provisions of part 3 seemed satisfactory; they were a necessary component of the draft articles on State responsibility and formed a logical and integral part thereof. They dealt with methods of breaking the vicious circle of action and reaction, a very vivid account of which was given by the Special Rapporteur in paragraph (4) of his general commentary (A/CN.4/397 and Add.1, sect. I.B). It remained to be seen whether States would, in practice, accept the restrictions on their freedom of action that would result from the provisions of part 3, and he understood the concern expressed by Mr. Flitan (1952nd meeting), particularly with regard to the compulsory jurisdiction of the ICJ.

3. It should be remembered, however, that the draft articles provided for recourse to the ICJ in respect of two specific issues only: rules of *jus cogens* and international crimes, which were dealt with in draft articles 12 and 14 of part 2, respectively. The provision on compulsory jurisdiction of the ICJ in respect of rules of *jus cogens* (draft article 4 (*a*)) had, of course, been modelled on the corresponding provision of the 1969 Vienna Convention (art. 66 (*a*)). As to international crimes, he remained doubtful about the concept itself, but if a reference to it were to be retained in the draft articles, it must clearly be accompanied by a provision on the settlement of disputes.

4. The ICJ was undoubtedly a proper forum for deciding matters relating to international crimes, but they could equally well be dealt with under Chapter VII of the Charter of the United Nations. Article 36, paragraph 3, of the Charter had been mentioned during the discussion, but that provision was intended to safeguard the possibility of "legal disputes" being referred by the parties to the ICJ. Of course, it was difficult to draw a clear line of demarcation between legal and political disputes, and some disputes were of a mixed legal and political character.

5. Consideration should be given to defining more clearly the questions to be decided by the ICJ; perhaps its jurisdiction should be limited to determining whether a rule of *jus cogens* or an international crime was involved in a dispute. In any case, he was not entirely clear about the relationship between subparagraphs (*a*) and (*b*) of draft article 4 of part 3 and paragraph 3 of draft article 14 of part 2. He would appreciate an explanation from the Special Rapporteur on that point.

6. It was to be hoped that the articles in part 3 could be formulated in a way that would prove acceptable to States. The difficulty of achieving that result was illustrated by GATT. Under that Agreement, panels could be constituted to settle certain types of trade disputes; but even in that area, where extremely flexible

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[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibility), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985*, vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.*, pp. 20-21, footnote 66.

[4] For the texts, see 1952nd meeting, para. 1.