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Summary record of the 1955th meeting

Topic:
<multiple topics>

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

36. One member of the Commission had pointed out that OAS also had a procedure for the settlement of disputes whereby the States parties to a dispute could submit it to the OAS Permanent Council. The situation was, however, not at all comparable, for no State member of the OAS Permanent Council had the veto.

37. Furthermore, a draft establishing a procedure for compulsory settlement of disputes by the ICJ would be going further than the Charter itself, which took precedence over any other international agreement. Admittedly, Article 33 of the Charter probably raised more problems than it solved, but it expressly stated that the parties to a dispute had to seek a solution by, *inter alia,* negotiation, inquiry or mediation, or other peaceful means of their own choice. In no sense did it make the jurisdiction of the ICJ compulsory. Since many States could not agree to recognize the compulsory jurisdiction of the ICJ, it was to be feared that, if the Commission decided to retain the provisions of part 3 of the draft in their present form, the future convention would be doomed to failure.

38. Presumably the Commission did not want the texts it elaborated to remain a dead letter. It had to be realistic and, accordingly, it should not proceed with part 3 as it was now formulated. Personally, he would have no objection if the provisions of part 3 were referred to the Drafting Committee, but he thought that the Commission would be wiser to wait until the Sixth Committee of the General Assembly had first taken a decision on them.

39. Mr. YANKOV said that, as the Commission was approaching the completion of the initial stage of its work on State responsibility, general considerations regarding the viability of the end-product naturally sprang to mind. He was not casting doubts on the Commission's work, since the issues involved stemmed from such basic principles of international law as the sovereign equality of States, *pacta sunt servanda,* and the peaceful settlement of disputes, all of which were embodied in the Charter of the United Nations. The Commission, as a body of experts, should none the less take into account the end-user of its product. In his view, there could be no valid legal system on State responsibility without a set of appropriate rules for the settlement of disputes. It was therefore very important to ensure that the system of "implementation" (*mise en œuvre*) was at once as comprehensive and as flexible as possible.

40. The 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea had been mentioned on numerous occasions. While those Conventions did supply certain background material, their provisions were quite different from the propositions contained in the draft articles now before the Commission. In particular, reservations were permitted under the 1969 Vienna Convention and its article 66, on which draft article 4 was modelled, contained an express reference to arbitration procedure by providing for the compulsory jurisdiction of the ICJ "unless the parties by common consent agree to submit the dispute to arbitration". The explanation given by the Special Rapporteur in that connection (1952nd meeting) and his commentary had not altogether convinced him of the reasons for the difference between the 1969 Vienna Convention and draft articles 3 and 4. His own view was that arbitration and consent to arbitration were provided as yet another judicial or quasi-judicial means of settlement of disputes, the aim being to secure greater flexibility and thus make the third-party settlement procedure more acceptable to a wider range of States without challenging the procedure available through the ICJ.

41. The differences with regard to the dispute-settlement procedure in the 1982 Convention on the Law of the Sea were far more significant, as was apparent from, for example, its article 287, which allowed a choice of procedure, and articles 297 and 298, concerning limitations on and optional exceptions to compulsory procedures entailing binding decisions. Reference had also been made to the "package deal" approach adopted in the case of the 1982 Convention. The Commission, however, should not be misled by such references, for the package deal had applied solely to political issues, not to the settlement of disputes. Accordingly, he would counsel restraint in considering the possible application, *mutatis mutandis*, of the provisions of the 1982 Convention on the Law of the Sea on settlement of disputes.

42. As to draft articles 1 and 2, a greater degree of flexibility should be introduced to take account of the nature of the matters that could be the subject of a dispute-settlement procedure. He, too, agreed that the words "special urgency" in article 2, paragraph 1, required clarification: he had found no key in the commentary to the legal implications of those words.

43. The scope of the reference in draft article 3 to the application of the optional procedures provided for in Article 33 of the Charter of the United Nations should be expanded, and the compulsory conciliation procedure under draft article 4, subparagraph (*c*), should be extended to cover the application or interpretation of articles 6 and 7 of part 2 as well.

44. Draft article 5 was crucial to the draft as a whole and should perhaps therefore be dealt with by the future diplomatic conference.

45. Lastly, he suggested that the draft articles before the Commission and the commentaries thereto should be expanded.

The meeting rose at 1 p.m.

1955th MEETING

Thursday, 29 May 1986, at 10 a.m

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, 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.

Organization of work of the session (*continued*)*

[Agenda item 1]

1. The CHAIRMAN informed members that the General Assembly, by its decision 40/472 of 9 May 1986, had decided to reduce the length of the thirty-eighth session of the International Law Commission to 10 weeks. The session would thus end on 11 July 1986.

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 articles)*[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*)

2. Mr. ARANGIO-RUIZ said he did not think that the provisions of part 3 of the draft formed an organic whole corresponding to the provisions on the settlement of disputes contained in various conventions. Hence they could not be characterized as arbitration clauses in the broad sense.

3. Draft articles 1 to 4 of part 3 contained two types of provision which served different purposes and consequently should not be placed together in the draft. Articles 1 and 2 dealt with the notifications which the allegedly injured State had to make to the State alleged to have committed the internationally wrongful act or, in more general terms, with the exchanges which had to take place between the two parties as a result of the internationally wrongful act, between the time when the injured State learned that a wrongful act had been committed and the time when it had to take measures in response. Articles 1 and 2 thus related to the consequences of an internationally wrongful act, as dealt with in draft articles 6 to 9 of part 2. Only draft articles 3 and 4 really belonged in part 3. The problem was not merely one of drafting. The Commission had to take a decision on a basic aspect of the consequences of a wrongful act and on the requirements for the application of articles 6 to 9 of part 2.

4. As Mr. Reuter had rightly pointed out (1953rd meeting), the injured or allegedly injured State could not simply express wishes; but nor could it simply "invoke" article 6 or articles 8 and 9 of part 2. It had to draw the attention of the alleged author State to the wrongful act which had been or was in the process of being committed, by requiring that State, in accordance with article 6 of part 2, to discontinue the act, to re-establish the situation as it had existed before the act, or to pay compensation, etc.

5. Article 65 of the 1969 Vienna Convention on the Law of Treaties was not an appropriate model for draft articles 1 and 2 of part 3 because, under paragraph 1 of that article, a party would not invoke articles, but facts or situations, and because the aim of the party which made the notification was to bring about a change in the existing legal situation, which would automatically take place if no objection was raised. The same was not true of the draft articles on State responsibility, for, under article 6 of part 2, a State which claimed to be injured could only make a request to the State alleged to have committed the wrongful act. It would not, at that stage, inform the alleged author State of the measures it intended to take. There was thus no reason why it should notify that State of its intention to make what was, in fact, no more than a simple request. The notification provided for in article 1 of part 3 was therefore unnecessary; the Commission need only add to article 6 of part 2 a new paragraph stating that the request referred to in paragraph 1 must be accompanied by an indication of the alleged act and of the primary rules of international law which had not been observed.

6. In order to take a position on draft article 2 of part 3, it was necessary to consider how the State alleged to have committed the wrongful act could react to the request of the injured State. If it stated that it was prepared to comply with that request or at least to hold talks with the injured State, and if it gave the injured State good reason to believe that an amicable settlement could be reached, the injured State would have no need to send the notification referred to in article 2 of part 3 or to consider the possibility of taking the measures provided for in articles 8 and 9 of part 2.

7. But the author State could also either refuse to take cognizance of the injured State's request or reject it with some explanation of the reasons. In the first case, unless the attitude of the author State was justified by a misunderstanding, communication problems or a crisis in the author State, the injured State should be able to notify the author State of its intention to take the measures provided for in article 8 or article 9 of part 2, as appropriate, before the expiry of the period of three months provided for in article 2 of part 3. Moreover, the implementation of such measures should be able to take place quite soon after the notification was received. There again, however, it was not clear why the provision

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* Resumed from the 1941st meeting.

[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.

that the injured State must notify the author State of its intention to suspend the performance of its obligations towards that State, in accordance with article 8 or article 9 of part 2, could not be included in articles 8 and 9 themselves, rather than in article 2 of part 3.

8. In the second case, if the author State responded to the request of the injured State by denying either the facts or the legal grounds invoked, negotiations between the two parties would be initiated. If the negotiations did not proceed satisfactorily and the author State rejected all proposals by the injured State regarding recourse to the means provided for in Article 33 of the Charter of the United Nations to settle their dispute, the injured State should be able to apply the measures referred to in article 8 of part 2, after having so notified the author State. But in that case, that notification would be the first notification to envisage, since the one provided for in article 1 of part 3 would not have been made, and the injured State would not have to wait long before taking action.

9. If the measures provided for in article 8 of part 2 could not be applied, the injured State would have to notify the author State of its intention to apply article 9 of part 2. Even in that case, that would be the one and only notification that the injured State would have to make to the author State. The injured State might also apply article 8 unsuccessfully. It would then have to inform the author State that it intended to apply the provisions of article 9. That would be the only case in which the injured State would have to make two notifications to the author State: first to inform it of its intention to take the measures provided for in article 8, and secondly to inform it that it intended to apply the provisions of article 9.

10. All the provisions relating to the procedure to be followed in those different cases were in fact an integral part of the system of measures and countermeasures governed by articles 6 to 9 of part 2 and thus had no place in articles 1 and 2 of part 3. The inclusion of those provisions in articles 6 to 9 of part 2 would not only be more logical, it would also make it possible to take account of the fact that a dispute requiring the application of the provisions of Chapter VI of the Charter could arise at a later stage than that envisaged in draft article 3, paragraph 1, of part 3.

11. Draft articles 3 and 4 called for only a few comments. With regard to draft article 3, it could in his view be expressly stated, either in the text of the article or in the commentary thereto, which of the means of settlement referred to in Article 33 of the Charter were the most appropriate.

12. As for draft article 4, and particularly subparagraphs (*a*) and (*b*), which rightly provided for the compulsory jurisdiction of the ICJ, if the Commission did not refer part 3 of the draft to the Drafting Committee at the present session, it would be able to reconsider that article at its next session, after its membership had been renewed, in the light of the comments that would be made in the Sixth Committee at the forty-first session of the General Assembly.

13. Another reason why the Commission should be cautious was that, if it decided to refer part 3 of the draft to the Drafting Committee after less than one week of discussion, the jurists and diplomats who followed the Commission's work might think it had dealt rather too hastily with the very sensitive problems that arose. Moreover, at the Commission's next session, its newly elected members should be able to consider the whole set of draft articles, which still needed much improvement.

14. There were in particular a certain number of gaps in part 2, which had been prematurely referred to the Drafting Committee, as well as in part 1, which, for example, did not attempt to classify primary rules or breaches of those rules. Nor did it deal with aggravating and extenuating circumstances, although that was an important question. Lastly, and most important of all, there was no explanation of how a distinction should be drawn between crimes and delicts. Taken as a whole, the draft was badly balanced, part 1 being much more detailed than parts 2 and 3. The Commission did bear some responsibility for the gaps and shortcomings to be found in the draft; for if it was not entirely satisfactory that was no fault of the Special Rapporteur, who in a relatively short time had carried out a more difficult task than that entrusted to his predecessors.

15. Mr. JAGOTA noted that, as indicated by the Special Rapporteur in paragraph (7) of his general commentary (A/CN.4/397 and Add.1, sect. I.B), the provisions of part 3 of the draft were residual and subject to the overriding provisions of the Charter of the United Nations concerning the maintenance of international peace and security. It was against that background that draft articles 1 to 5 had been formulated.

16. The idea behind draft article 1, with its reference to article 6 of part 2, was relatively new. The only other place where such a reference appeared was in draft article 10 of part 2; and, according to paragraph (2) of the commentary to article 10 (A/CN.4/389, sect. I), it signified that international procedures for the peaceful settlement of disputes had to be exhausted before article 9 of part 2 was applied and reprisals taken. But, as articles 1 to 5 of part 3 were residual, such procedures would in any event have been exhausted before article 9 of part 2 was invoked.

17. Under draft article 2 of part 3, if action was not taken within three months, it could only be taken under articles 8 and 9 of part 2, and required a second notification on the part of the claimant State. There was therefore a gap between the two notifications and that point required examination. He wondered what the position would be if the other party objected when notification was given under article 1 of part 3 and a dispute arose as to the obligations of the author State under article 6 of part 2. The draft was silent on that point, which required further consideration with specific reference to the possible consequences.

18. He presumed that the reference in draft article 3 to articles 8 and 9 of part 2 extended by inference to articles 10, 11, 12 and 13 of part 2, which had a direct bearing on articles 8 and 9. In particular, the reference to Article 33 of the Charter should not be confined to disputes concerning articles 8 and 9. Also, it was not clear why a reference was made in draft article 4, sub-

paragraph (*c*), to articles 9 to 13 of part 2 but not to article 8 of part 2. The exact relationship between draft articles 3 and 4 required clarification.

19. Subparagraphs (*a*), (*b*) and (*c*) of draft article 4 should perhaps be made into separate articles. The words "within a period of twelve months", in the introductory clause, might be replaced by some more flexible formula such as "within a reasonable period of time", to take account of occasions when a first attempt at conciliation failed. He had no difficulty with the concept of compulsory conciliation, or with the annex on that subject.

20. He would like to know why, in article 4, subparagraph (*b*), no reference had been made to article 19 of part 1 (International crimes and international delicts), although the Special Rapporteur had stated in his sixth report (*ibid.*, para. 32) that he proposed to include such a reference. The Special Rapporteur had likewise given no reason for not referring in the same provision to article 15 of part 2, on the act of aggression, in which connection he had made the following statement in his sixth report:

> ... Whether and to what extent the ICJ—one of the principal organs of the United Nations—has a role to play in the process is a matter of interpretation and application of the Charter itself. (*Ibid.*, para. 34.)

In his own view, that was not necessarily so. It was, however, a matter that would require careful consideration and, as already pointed out, one that was directly relevant to the draft Code of Offences against the Peace and Security of Mankind.

21. With regard to draft article 5, he doubted whether the draft articles would have much value if a reservation could be made relating to a treaty concluded before their entry into force. It would perhaps be better to provide simply that reservations would be allowed in the case of disputes arising after their entry into force. Article 5 called for further reflection, however.

22. Mr. TOMUSCHAT said that the Special Rapporteur had pursued an almost revolutionary objective in the new draft articles on State responsibility, since draft article 4, subparagraph (*c*), established a rule whereby, for the first time, any of the parties to a dispute concerning the consequences of an internationally wrongful act could unilaterally set in motion the compulsory conciliation procedure outlined in the annex to the draft. There were, of course, precedents for that, and the Special Rapporteur had referred in particular to the 1969 Vienna Convention on the Law of Treaties. But the relevant rules of that Convention were far more limited and related solely to the invalidity, termination, withdrawal from or suspension of the operation of treaties, whereas the intention in the present draft was to cover all cases relating to the breach of an international obligation.

23. The result would be a metamorphosis in international law; for hitherto the bulk of international transactions had been designed to ensure respect for the obligations incumbent upon States, and enforcement—a major weakness of international law—would now acquire a much more stable foundation. The question was, however, whether the measures envisaged would prove acceptable to States and it was important not to lose sight of the inherent political limitations on what could reasonably be achieved.

24. As to the distinction between primary and secondary rules, there had always been doubt about the viability of the concept and it was particularly apparent in the case of the proposed procedural rules. He wondered whether it was really possible to treat all international obligations alike, placing an obligation to consult another Government on the same footing as a substantive obligation in the field of trade or the duties laid down in Article 2 of the Charter of the United Nations and concretized in the General Assembly Declaration of 24 October 1970.[5] The formalities to be imposed on States were certainly justified when rights and obligations of that importance were at stake; but there were also duties in daily routine, where a swift response in kind would often do more to restore a lawful situation than long-drawn-out legal proceedings.

25. The draft articles under discussion could be simplified considerably and made more precise. Specifically, it should be made clear whether the rights of an injured State listed in draft article 6 of part 2 arose *ipso jure* or whether they required a formal request on the part of the injured State to come into existence. He would also like to know why no reference had been made in part 3 to article 7 of part 2.

26. Draft article 2, paragraph 3, was difficult to understand because of the vague reference to "another State"; but that was perhaps only a question of drafting.

27. He saw a major problem in the parallelism between draft article 3 of part 3 and draft article 10 of part 2. Article 10 imposed an obligation to resort in the first instance to methods of peaceful settlement of disputes, and drew a distinction between reciprocity and reprisals by exempting measures of reciprocity from any procedural requirement. No such distinction was made between measures of reciprocity and reprisal in draft article 3.

28. He had some difficulty in understanding the rule proposed in draft article 4. In his view, the similarities with the Vienna Convention on the Law of Treaties were more apparent than real. Under article 66 (*a*) of that Convention, the ICJ was simply required to determine whether a treaty was void because it conflicted with a peremptory norm of general international law that had existed when the treaty was concluded or had emerged subsequently. Under the present draft articles, however, disputes relating to *jus cogens* or international crimes could be referred to the ICJ in their entirety and with all the legal implications. Thus the scope of the Court's jurisdiction would be wider under the draft than under the Vienna Convention. He had no objection to such an extension of the Court's powers, but the Commission should be fully aware of the steps it was contemplating.

29. While States rarely violated peremptory norms of international law in treaties concluded between them, unilateral violations were frequent. There were many

[5] See 1952nd meeting, footnote 8.

examples to show that disputes concerning the interpretation and application of such norms were a part of daily life. It could, of course, be argued that draft article 4, subparagraph (*a*), did not refer to peremptory norms in general, but only in so far as article 12, subparagraph (*b*), of part 2 was concerned. But that was precisely what he had difficulty in accepting. If, for purely political reasons, State A arrested and held in custody a number of citizens of State B, that would be a violation of a rule of *jus cogens*. If State B then arrested an equal number of citizens of State A to secure the release of its own citizens, on his reading of article 4, subparagraph (*a*), State A could bring a complaint before the ICJ on the ground that the arrest of its citizens was in violation of article 12, subparagraph (*b*), of part 2, but State B, the victim of the unlawful act by State A which had started the cycle of wrongful conduct, would not be entitled to submit its case to the Court. Such an imbalance was unwarranted and could, moreover, place the ICJ in a very embarrassing position.

30. Similar objections applied to draft article 4, subparagraph (*b*). There again, the original wrongful act, even if it were an international crime, would fall outside the scope of the proceedings, which would focus exclusively on the additional rights and obligations flowing from the commission of an international crime.

31. While draft article 5 could be dealt with by a diplomatic conference, he agreed that the rule of non-retroactivity was rather too restrictive. The whole draft would have little effect if the rule stated in article 5 were framed in the manner proposed.

32. Mr. KOROMA said that the articles of part 3 of the draft would enhance the international legal order and serve to strengthen the rule of law among nations.

33. Article 1 had a place in the draft inasmuch as it provided for a cooling-off period and would put an alleged author State on notice to desist from acts contrary to international law. He agreed, however, that for the sake of clarity the article should refer not only to part 2 of the draft, but also to part 1, and perhaps to the general principles of international law. Provision should be made in the article for what the common law termed an "anticipatory breach", whereby an alleged author State would also be put on notice if it carried out certain identifiable acts that fell short of wrongfulness, but would, if consummated, eventually lead to a breach of an international obligation. He was not entirely convinced that the notification provided for in draft article 1 should be coupled with an indication of the measures required to be taken and the reasons therefor. His own view was that it would suffice in some cases, at least initially, merely to call the attention of the alleged author State to the act in question. It would also be advisable to tone down the provision.

34. He wondered whether draft article 2, paragraph 2, might not have the opposite of the desired effect. It was possible, for instance, that the parties to a multilateral treaty might decide on such a massive response to a breach of its provisions that they would unwittingly defeat the object and purpose of the treaty. He therefore considered that the paragraph required further examination.

35. With regard to draft article 4, he considered that all cases of an alleged international crime or breach of a rule of *jus cogens* should be referred to the ICJ, which, as the supreme judicial organ, was competent to determine such issues. In regard to the legal consequences of aggression, notwithstanding the provisions of the Charter of the United Nations and of the Definition of Aggression adopted by the General Assembly in 1974,[6] the impression should not be created that the ICJ was not competent to decide whether aggression had been committed. The Commission should therefore make it quite clear that, in certain cases, the Court could determine the legal consequences of such issues.

36. It should also be made quite clear in the commentary or elsewhere that Article 33 of the Charter of the United Nations applied to the whole of part 3 of the draft.

37. Mr. BALANDA said that the inclusion of provisions on the settlement of disputes in the body of the draft articles indicated a change in the Commission's working methods and a development of international law as to substance; for the 1958 Geneva Conventions on the law of the sea, the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had all consigned such provisions to optional protocols. He agreed with Mr. Ogiso (1954th meeting) that the new structure chosen by the Special Rapporteur might discourage States from acceding to the instrument to be adopted or encourage them to formulate reservations.

38. The viability and effectiveness of the draft depended on the sincerity of States. The international community had been a virtually helpless witness to repeated violations of the Charter of the United Nations. The recent bombardment of three front-line States by the South African army was but one example. There was nothing to prevent the international community from adopting resolutions, but such texts were worthless if it was so difficult to implement them. If States could violate the Charter with impunity, was there any certainty that they would be politically committed enough to respect the Commission's work? He was quite sceptical on that point, but such scepticism should not be taken to mean that he thought the Commission had wasted its time in following the course it had adopted. Nevertheless, in view of the nature of the main actors on the international scene, namely States, the viability and effectiveness of the Commission's draft would depend on the realism it reflected.

39. He agreed that the scope of draft article 1 should be expanded and that it should not refer only to article 6 of part 2 of the draft. The words "must notify" required the addition of a time element, and further details should be provided on means of notification, since in the absence of diplomatic relations the customary diplomatic channels could not be used.

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

40. Mr. Reuter (1953rd meeting) had suggested that it might be necessary to set a time-limit for notification of an internationally wrongful act. He did not think that idea should be adopted, since a State might, for tactical reasons, refrain from taking any measure at all following an internationally wrongful act and wait until just the right time to assert its rights. That applied particularly to the interests of developing countries.

41. Paragraph (2) of the commentary to draft article 1 did not quite correspond with the second sentence of the article. In that connection, Mr. Koroma had asked whether a State must always indicate in its notification its reasons for requiring that a particular measure be taken. What would happen if the State did not give reasons for the measures it was requiring? That was a point on which the Commission should be realistic, for what counted was not so much the reasons invoked as the notification itself. The reasons were only secondary. Moreover, the second sentence of article 1, which stated that "The notification shall indicate the measures required to be taken and the reasons therefor", should be brought into line with the second sentence of draft article 2, paragraph 1, which read: "The notification shall indicate the measures intended to be taken."

42. The Commission had already adopted the principle of *restitutio in integrum,* but the words "establish a situation which comes as close as possible ..." in paragraph (1) of the commentary to article 1 did not take sufficient account of the obligation to make full reparation.

43. He agreed with Mr. Ogiso and Mr. Yankov (1954th meeting) that it would be better to explain the meaning of the words "special urgency" in draft article 2, paragraph 1, than to leave it to the State concerned to decide unilaterally whether a case was urgent. The period of three months prescribed in that paragraph raised the problem of proof. How could it be established that a State had in fact received a notification sent to it? Either the commentary would have to refer to the internal law of States or the relevant provisions would have to contain further particulars.

44. Had the Special Rapporteur meant to create an interval between the application of article 1 and that of article 2? In other words, when a State claimed to have been injured, did it have to require measures of reparation from the author State before it could take countermeasures, or did it have to take countermeasures and then require measures of reparation? In his own view, those were two quite separate things and there was no chronological link between them. Moreover, the Special Rapporteur appeared to have answered that question in paragraphs (1) and (2) of the commentary to article 2.

45. The scope of draft article 3 should not be limited to the case in which objection had been raised against measures taken or intended to be taken under article 8 or article 9 of part 2. The process of negotiation should start, in accordance with Article 33 of the Charter of the United Nations, as soon as a State raised an objection.

46. In draft article 4, the words "a period of twelve months" should be replaced by "a reasonable period". Subparagraphs (*a*) and (*b*) provided only for the submission of a dispute to the ICJ. But he did not think that cases involving a breach of a peremptory norm of general international law could automatically be referred to the Court: first because it was not yet known exactly what was meant by a "peremptory norm of general international law", and secondly because a very heavy responsibility would be placed upon the Court, and States did not seem prepared to leave it to the Court to rule, in each case, on whether a peremptory norm had been breached before it ruled on the merits of the case.

47. He approved of the idea of submitting disputes involving international crimes to the ICJ, particularly in the light of the comments made during the consideration of article 19 of part 1 of the draft. The Court was in a good position to hear such cases: nevertheless he had some doubts about extending its jurisdiction under draft article 4, subparagraph (*c*). Further consideration should be given to the procedures provided for in Article 33 of the Charter and in the 1969 Vienna Convention on the Law of Treaties, which gave States a choice of means for the peaceful settlement of disputes, without forcing them, as did the present draft articles—or at least article 12, subparagraph (*b*), of part 2—to submit disputes to the ICJ. Greater flexibility should be allowed, as the Special Rapporteur himself had indicated in paragraph (7) of his general commentary (A/CN.4/397 and Add.1, sect. I.B). As an introduction to the provisions of part 3, a separate article should state the basic principle of it being left to States themselves to seek the most appropriate means of settling their disputes. Only when they had not been able to find appropriate means would the provisions of part 3 come into play.

48. In draft article 4, subparagraph (*c*), the Special Rapporteur had proposed two parallel régimes: a conciliation procedure for the interpretation of articles 9 to 13 of part 2 and compulsory submission of disputes to the ICJ in the cases referred to in article 12, subparagraph (*b*), of part 2. A dispute might, however, concern both matters of substance and matters of interpretation. Would States, in such a case, be bound to submit both to conciliation and to the Court? That was a difficult question to answer. The Court was, of course, a prestigious and competent body, but in proposing recourse to it, the difficulty of enforcing its judgments must not be overlooked. There might be a temptation to invoke Article 94 of the Charter, but in view of the division of the international community's interests, as reflected in the Security Council, he did not think that, even by using Article 94, a judgment of the Court could be given any effect whatever. The draft articles, as they stood, did not make it possible to force the parties to a dispute to be bound by a judgment of the Court.

49. He was in favour of the annex, but, although it was based on the relevant provisions of existing conventions, he was not sure that, after a list of conciliators had been drawn up, the Secretary-General of the United Nations should be able to appoint conciliators who were not on that list.

50. Since it was customary to refer draft articles considered in plenary to the Drafting Committee, he would

agree to that course of action; but he thought that, before doing so, it would be wise to wait until comments had been made by the Sixth Committee of the General Assembly.

51. Mr. FRANCIS said that he had three preliminary observations to make. First, he agreed with Sir Ian Sinclair (1953rd meeting) and Mr. Jagota on the residuary nature of the draft articles in part 3. Secondly, he wished to draw attention to an important point made by the Special Rapporteur in earlier reports, namely that, when a breach of an international obligation took place, there arose a new legal relationship between the two States concerned with respect to the breach itself. Lastly, it should be borne in mind that the breach did not necessarily destroy the original legal relationship, because the subject-matter of that relationship might subsist or the obligation remain possible of fulfilment.

52. Draft article 1 called for a notification by the State which invoked article 6 of part 2. Article 6 constituted the first link in the chain of the new legal relationship to which he had just referred. It contained the essential ingredients of that relationship, in particular the need to discontinue the internationally wrongful act, to re-establish the pre-existing situation and, if that was not possible, to pay compensation. The stipulations of article 6 of part 2 rendered absolutely necessary the requirement of notification specified in article 1 of part 3.

53. Draft article 1 related to a bilateral situation, but he believed that it should be adjusted so as to impose upon the claimant State the requirement to notify not only the alleged author State, but also the other States parties in the case of a multilateral relationship, even where suspension of the performance of obligations was not contemplated. The fact that all the parties to a multilateral treaty would be notified of the allegation that an internationally wrongful act had been committed could create a climate favourable to peaceful settlement.

54. As observed by Mr. Huang (1954th meeting), article 1 emphasized the obligations of the claimant State. But the rights of the claimant State had their counterpart in corresponding obligations of the author State, and he therefore suggested that an additional paragraph should be introduced into article 1, setting out the obligations of the author State.

55. He was in general agreement with the main thrust of draft article 2 and welcomed the remarks of other members on the time factor. It had been suggested that a definition or explanation should be given, perhaps in the commentary to the article, of the exception provided for in paragraph 1 for "cases of special urgency". The formula "except in cases of special urgency" was used in article 65, paragraph 2, of the 1969 Vienna Convention on the Law of Treaties, but was not defined in that Convention. It would therefore seem inadvisable to attempt any explanation of that formula in the commentary to draft article 2; besides, it would not in any case be possible to cover all the situations that might arise.

56. He had no comments on draft article 3, which seemed ready for referral to the Drafting Committee.

57. On draft article 4, he agreed with those members who thought that the Commission should play its part in the progressive development of international law and promote recourse to the ICJ. The subjects of dispute mentioned in subparagraphs (*a*) and (*b*) offered scope for fruitful use of the jurisdiction of the Court. The rules of *jus cogens*, referred to in subparagraph (*a*), now constituted a living juridical reality which had to be taken into account, especially as there were conflicting views on the scope of *jus cogens*.

58. Of the various means of settlement of disputes by third-party procedures, arbitration did not appear to him to be the best to deal with the issue of *jus cogens* and its jurisprudential development. The Special Rapporteur had been well advised to give a role to the ICJ, the principal judicial organ of the United Nations, in the matters dealt with in subparagraphs (*a*) and (*b*) of article 4. Moreover, adjudication by the ICJ would produce a more consistent development of the law on the controversial topic of *jus cogens*.

59. Reference had been made during the discussion to the conflicting views in the international community on compulsory jurisdiction of the ICJ. There were encouraging signs of increasing interest in the Court on the part of States which had previously not submitted cases to it. His own view was that the subject should be dealt with by leaving entirely open the question of reservations, dealt with in draft article 5 of part 3.

60. Mr. Reuter (1953rd meeting) had drawn attention to certain gaps in part 3, in particular on the question of damage. He himself would like to know whether the Special Rapporteur would consider including in part 3 a provision relating to article 35 of part 1 (Reservation as to compensation for damage), particularly regarding the settlement of disputes arising out of claims for damage.

61. He agreed that the draft articles of part 3 should be referred to the Drafting Committee. The Commission had been dealing with the topic of State responsibility for more than 20 years and it should have the views of the Sixth Committee of the General Assembly on all the articles considered so far. Those views would be of great assistance to the Commission with its new membership at the next session.

62. Mr. JACOVIDES said that State responsibility was a difficult topic, both in its scope and in its content, and full of pitfalls. That was the main reason why the Commission had taken so long to reach the present advanced stage in its work. At the same time, it was too important a topic to be left unfinished, and with the admirable seventh report submitted by the Special Rapporteur (A/CN.4/397 and Add.1) the end of the road was in sight. While much work still remained to be done before a comprehensive draft convention could be submitted to an international law-making conference, the basic structure had now been built. Many elements of progressive development had been introduced and the scope of the topic had been appropriately widened from the narrow area of State responsibility for injury to aliens to its present much broader dimensions, in keeping with the requirements of present-day international law.

63. He found the Special Rapporteur's approach judiciously balanced, and was in general agreement with it. Both the Special Rapporteur and the Drafting Committee, however, would undoubtedly profit from the useful suggestions made during the debate. For instance, in draft article 1, the formula "A State which wishes to invoke" should be amended to read: "A State which intends [or proposes] to invoke". On a more substantive point, careful consideration should be given to the comments made by Sir Ian Sinclair (1953rd meeting) and Mr. Ogiso (1954th meeting) on draft articles 1 and 2 concerning the steps that preceded formal notification and the time factor involved.

64. He saw no objection to the general reference in draft article 3 to the means of dispute settlement indicated in Article 33 of the Charter of the United Nations. Although that provision of the Charter was very general, in the absence of any realistic alternative it was appropriate to rely on it in the present instance.

65. An important distinction was made in draft article 4 between, on the one hand, issues involving *jus cogens* and international crimes, dealt with respectively in articles 12 and 14 of part 2 of the draft, for which recourse to the ICJ was prescribed, and, on the other hand, disputes concerning the interpretation or application of articles 9 to 13 of part 2, for which the compulsory conciliation procedure set out in the annex was applicable. That distinction raised a broad issue of legal philosophy and approach. As a matter of principle, he would prefer all disputes arising out of the future convention on State responsibility to be settled by an effective, comprehensive, expeditious and viable procedure entailing a binding decision. The disputes could be submitted to the ICJ itself or to another such body, such as an international criminal court for disputes involving international crimes. He was, of course, fully aware of the practical limitations of such a position of principle in the present state of development of the international community.

66. It was right that the ICJ, being the main judicial organ of the United Nations, should be entrusted with the settlement of disputes concerning breaching of *jus cogens* and international crimes. That would serve to enhance the authority and jurisdiction of the Court and would be a response to the appeal by the President of the Court on 29 April 1986, on the occasion of its fortieth anniversary, that States should "explore and exploit all the possibilities afforded ... for ... judicial settlement", in the hope that the Court would become "the habitual forum where Governments, as a matter of course, solved international disputes". It would also serve the important purpose of authoritatively giving some concrete form, in specific cases, to the concepts of *jus cogens* and international crime.

67. As pointed out by the Special Rapporteur in paragraph (3) of the commentary to draft article 4, disputes concerning the additional legal consequences of aggression, dealt with in draft article 15 of part 2, should be resolved in the first instance in accordance with the relevant provisions of the Charter of the United Nations. But there was nothing to prevent the appropriate organ of the United Nations—primarily the Security Council or the General Assembly—from referring the legal aspects of the alleged aggression to the ICJ for a ruling, in the form of an advisory opinion or otherwise. He could think of at least one current situation in which that procedure would be most appropriate and he was glad to note that the same point had been made by Mr. Koroma.

68. On the question of reservations, he was inclined to accept the provisions of draft article 5, but he saw some merit in the suggestion made by other members that the key provision on reservations should be left to the future diplomatic conference.

69. As to the annex, he noted that its content had been adapted from the corresponding provisions of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. He had participated in the elaboration of those two Conventions and found the model eminently suitable.

70. In conclusion, he supported the suggestion that the draft articles of part 3 be referred to the Drafting Committee.

The meeting rose at 1.05 p.m.

1956th MEETING

Friday, 30 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, 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 articles)*[3] (concluded)**

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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.