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Summary record of the 2306th meeting

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

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

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

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

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

The meeting rose at 12.55 p.m.

2306th MEETING

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

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

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

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

[Agenda item 5]

NINTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

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

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

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

² See 2300th meeting, footnote 18.

provided that it did not affect the logical structure of the chapter. He was particularly sympathetic to the idea of special treatment for the developing countries—an idea which had been stressed by several speakers—but he noted that his proposal to devote a general article to the matter in the section on principles had been considered insufficient by some. Mention had also been made of the need to ensure that such preferential treatment did not lead to a waiver of the obligation of prevention for the developing countries. In addition, certain practical difficulties might arise as a result of the increasingly wider gap between the newly industrialized countries and the other developing countries, not to mention the least developed. As to the appeals for the strengthening of the assistance of international organizations, it was difficult to see how specific articles on the question could be drafted, since the Commission could not make those organizations, which would not be parties to the Convention, provide assistance in any particular way. It was to be hoped that those members who had made such appeals would be able to find solutions to the problem within the Drafting Committee. In any event, he would bear their remarks in mind when he revised the articles on prevention.

2. It had been said that, inasmuch as different activities required different measures of prevention, it would be advisable to establish groups of activities according to their characteristics. In his view, that would be difficult, if not impossible, if only because with scientific and technical developments new activities were constantly emerging. The definition of the continental shelf contained in article 1 of the 1958 Convention on the Continental Shelf had, for instance, lost its significance as soon as technological advances had made it possible to exploit natural resources at any depth. Nor should it be forgotten that the Commission was supposed to be producing a framework convention, in other words, an instrument setting forth general obligations for any type of activity. He therefore doubted that it would be possible to group activities by category. In support of that proposition, one member of the Commission had stated that the obligation of information had not always applied and that everything depended on the type of activity: for instance, the Principles Relevant to the Use of Nuclear Power Sources in Outer Space, adopted by the General Assembly in 1992,³ imposed an obligation of information on the State which launched a satellite with a nuclear power source on board, whereas the Convention on International Liability for Damage Caused by Space Objects did not impose such an obligation. That difference, however, was to be explained by the fact that the Convention dealt with liability, not prevention, and it was at the prevention stage that information was involved. The 1992 Principles, on the other hand, were mainly concerned with prevention, and the obligation of information naturally had a place there. Furthermore, principle 4 stipulated that that obligation was in conformity with article XI of the Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies. The regime which applied to satellites with nuclear

power sources on board was therefore no different from the general regime under that Treaty.

3. The question of a system of residual State liability had been relegated to a footnote because it was only a possibility and would remain in abeyance until the Commission had taken a decision on the subject of State responsibility. The possibility had indeed prompted fairly strong reactions among the members of the Commission and had even been rejected by those from developing countries. In any event, it was not his own proposal and it might reassure the members of the Commission who had stated their concern to know that none of the proposed articles and none of his reports indicated that the State had an obligation of reparation or compensation for creating a risk: the State was bound to make reparation only in the case of actual harm.

4. Turning to the draft articles themselves, he recognized that, as some members of the Commission had said, prior authorization (art. 11) would depend on the definition of risk—which amounted to saying that such authorization would be mandatory only if the risk associated with the planned activity was significant or substantial.

5. Opinions were divided concerning article 12 (Transboundary impact assessment), with some members believing that it was the State itself which should make the assessment, and others that it was the operator. In his own view, it was the State which should make the assessment or at least check that it had been properly made by the operator, so that the State would be liable only in the event of harm. Some members also felt that assessment would be too heavy a burden for the developing countries, while others thought that it would even be pointless, for States were after all liable for what happened if they did not take the necessary preventive measures.

6. Article 13 (Pre-existing activities) had prompted several reactions. It had been suggested that the last sentence should be amended by the addition of the words “without prejudice to the liability of the State”. It had also been said that the State of origin was required to investigate the pre-existing activities in order to determine whether they involved risks of transboundary impact. The deletion of the article had also been proposed.

7. For many members of the Commission, article 14 (Performance of activities) constituted the core of the prevention chapter. Most members agreed that the article should emphasize that insurance for the operator was compulsory. Some saw no point in mentioning prior authorization in the article and thought it sufficient to say that the State should not authorize an activity involving risks if no preventive measures had been taken. For one member of the Commission in particular, only article 14 counted. Others thought that the article should be placed first in the series of articles on prevention.

8. Article 15 (Notification and information) had not been judged satisfactory. It had been said that the type of information which the State of origin must give to the affected State—for example, concerning legislative and other measures which it was planning—should be spelled out more clearly and that it should include an assessment of the transboundary impact. It had also been proposed that any mention of international organizations

³ General Assembly resolution 47/68.

should be deleted and that a paragraph should be added to the effect that the State of origin could ask for technical assistance from an international organization in connection with prevention. Some members of the Commission had also suggested that subparagraph (d) should be reworded so as to make it clear that it was for the authorities of the affected State to convey the information to the people likely to be affected. According to others, it was sufficient to indicate that the public must be given an opportunity to be heard.

9. Article 16 (Exchange of information) had not prompted any comment. In contrast, article 17 (National security and industrial secrets) had generated a lively reaction. It had been said that the text reflected a certain inequality, that the terms “national security” and “industrial secrets” should be defined and that it was not sufficient to say that the State of origin “should cooperate in good faith”; and some members even believed that the article might lead to the collapse of the rest of the articles.

10. Article 18 (Prior consultation) had also been criticized, in particular because the term “mutually acceptable solutions” might give the impression that the envisaged activity might have harmful consequences. The term was not intended to give a kind of right of veto to the State which was or was presumed to be affected and he was therefore not against amending the sentence in order to make the meaning clear. The basic idea of the article was in fact that consultation was not compulsory and there could therefore be no right of veto.

11. It had been said that, in article 19 (Rights of the State presumed to be affected), it would be preferable for the State presumed to be affected to request the State of origin or an international organization to make a study.

12. Widely differing opinions had been expressed about article 20 (Factors involved in a balance of interests). Some members were ready to accept it, provided that it was placed in an annex. Others had suggested its deletion, and others had asked that some terms should be changed, for example “shared natural resources”.

13. With regard to the settlement of disputes (art. VIII of the annex),⁴ some members had welcomed the idea of a special procedure for the settlement of disputes relating to consultation, while others were in favour of instituting an inquiry procedure. In general terms, the members of the Commission had accepted the idea of including the principle of non-transference of risk or harm and the “polluter pays” principle in the draft articles.

14. He was very well aware that the “precautionary principle” established in principle 15 of the Rio Declaration on Environment and Development⁵ had been included, for example, in the United Nations Framework

⁴ For the text, see *Yearbook . . . 1992*, vol. II (Part One), document A/CN.4/443, chap. II; see also *Yearbook . . . 1992*, vol. I, 2268th meeting, para. 5.

⁵ Principle 15 reads:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

See A/CONF.151/26/Rev.1 (Vol. I) (United Nations publication, Sales No. E.93.I.8 and corrigendum), p. 6.

Convention on Climate Change and the Convention on Biological Diversity, but the principle was still controversial and did not seem to be appropriate in the draft articles: they were designed to regulate the question of liability for the actual harm caused by a given activity and for the risk of harm, whereas, in the two Conventions in question, the principle related to problems which were a source of concern to all of mankind. But it would be for the Commission to decide on the point.

15. In conclusion, he noted that a general agreement seemed to be emerging in the Commission in favour of referring the draft articles back to the Drafting Committee, including article 10 (Non-discrimination).⁶ He thanked all the members of the Commission for their comments.

16. Mr. VERESHCHETIN said that he did not agree with the Special Rapporteur’s interpretation of the Treaty on the Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies: in his own opinion, the Treaty did not require the communication of technical information before the launching of satellites.

17. The CHAIRMAN proposed that, in accordance with the recommendation of the Enlarged Bureau, article 10 (Non-discrimination), which the Commission had considered at its forty-second session, and articles 11 to 20 *bis* should be referred to the Drafting Committee to enable it to concentrate its work on the issue of prevention, as the Commission had decided at its preceding session. With the help of the Special Rapporteur, however, the Drafting Committee could perhaps play a larger role and determine whether the scheme of the new articles which had been submitted was logical and complete and, if not, what other provisions might usefully be included. On that basis, it could then start the actual drafting of the articles. Once it had worked out a satisfactory set of articles on the prevention of risk, it could see how the new articles fitted in with the general provisions contained in articles 1 to 5 and the principles embodied in articles 6 to 9 and in article 10.⁷

18. Mr. KOROMA said that he accepted the Chairman’s proposal, provided that it did not affect the decision taken at the preceding session and that the Commission dealt with the regime of prevention first and with the regime of liability afterwards.

19. He thanked the Special Rapporteur for his instructive summary, but stressed that he did not agree with him on two points. In the first place, the 1958 definition of the continental shelf was still valid, even if there were plans to adapt it to technical advances. Secondly, the concept of “shared resources” had no place in the topic.

20. The CHAIRMAN said that the decision the Commission was about to take would not affect the decisions it had taken at its preceding session.⁸

21. Mr. ROSENSTOCK said that he welcomed that clarification.

22. Mr. de SARAM said he agreed that the Commission should abide by the decision it had taken at its pre-

⁶ See *Yearbook . . . 1990*, vol. II (Part One), p. 105, document A/CN.4/428 and Add.1, annex.

⁷ *Ibid.*

⁸ *Yearbook . . . 1992*, vol. II (Part Two), p. 51, paras. 344-349.

ceding session as to how it should organize its work on this topic. At a later stage in the Commission's work it would, of course, be necessary, as required by decisions of the General Assembly and the decision taken by the Commission at its forty-fourth session, that preparation of primary rules on compensation for harm caused be undertaken. It was in that spirit that he accepted the Chairman's proposal.

23. Mr. CALERO RODRIGUES said he could understand the Commission did not want to go back on the decision it had taken at its preceding session, but thought it was inevitable at the present stage that it should interpret it to some extent. If the draft articles were referred to the Drafting Committee, what would the Commission do in the meantime? Would it suspend the consideration of the topic? Would the Special Rapporteur have to submit new articles or wait for the results of the work of the Drafting Committee?

24. The CHAIRMAN said that the decision taken by the Commission at its forty-fourth session did not prevent the Special Rapporteur from thinking about the next stage of the work to be done and submitting proposals to the Commission.

25. Mr. BARBOZA (Special Rapporteur), referring to paragraph 345 of the Commission's report on the work of its forty-fourth session,⁹ said that he intended to submit articles on remedial measures and then deal with the question of liability proper.

26. The CHAIRMAN said that the Drafting Committee's discussions on the draft articles would help give the Commission a clearer idea of the direction its work should take, without prejudice to the decision adopted at the preceding session.

27. Mr. TOMUSCHAT said that he agreed with the Chairman and noted that, when the Special Rapporteur went on to the question of remedial measures, he should take account of the Drafting Committee's discussions.

28. Mr. VILLAGRÁN KRAMER said that the decision taken by the Commission at its preceding session was correct, but it should not bind the Commission unduly. The Commission and the Drafting Committee had a set of draft articles to work on and had to make as much progress as possible on the topic. Between now and the end of the current session, the Special Rapporteur could perhaps submit an outline dealing with harm and the corresponding measures to be taken.

29. Mr. GÜNEY said that account should be taken of the fact that it had been agreed that the composition of the Drafting Committee would change depending on the topic.

30. The CHAIRMAN, speaking on behalf of the Chairman of the Drafting Committee, said that the new composition of the Drafting Committee would be announced shortly.

31. Mr. YANKOV said that he agreed with the proposal the Chairman had made on the recommendation of the Enlarged Bureau, but pointed out that the topic under consideration was that of international liability. Referring to paragraph 345 of the Commission's report on the

work of its forty-fourth session,¹⁰ he noted that giving priority to prevention was only a *modus operandi*.

32. The Drafting Committee's discussions at the Commission's next session would be facilitated if the Special Rapporteur explained what direction he intended the work to take, since that would explain the place of prevention in the draft as a whole. Otherwise, the draft articles might be no more than a set of disparate provisions.

33. The CHAIRMAN said it was understood that the Commission would ask for the Special Rapporteur's advice before deciding on the next stage of its work, in accordance with the decision adopted at the preceding session.

34. If he heard no objection, he would take it that the Commission accepted the proposal he had made on the recommendation of the Enlarged Bureau with regard to the work to be done on the topic at the current session.

It was so decided.

35. The CHAIRMAN said that the Commission had completed its consideration of agenda item 5.

Mr. Barboza took the Chair.

State responsibility (continued) (A/CN.4/446, sect. C, A/CN.4/453 and Add.1-3,¹¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

36. Mr. MAHIOU expressed congratulations to the Special Rapporteur on his fifth report (A/CN.4/453 and Add.1-3), which was entirely in keeping with his earlier reports. He welcomed the reference to the discussions which had taken place in the Commission and in the Sixth Committee in 1985 and 1986 (*ibid.*, chap. I, sect. A), since it showed that there were already a number of points of agreement on that sensitive issue. Everyone was aware of the past and present hesitations of States to accept procedures for the compulsory settlement of disputes. The world had, however, changed since 1985, it so happened that States were more and more inclined to accept procedures of that kind, including judicial procedures, as demonstrated by the agenda of ICJ in the past 10 years. The Commission must not only go along with such progress, but must also do everything possible to promote it.

37. What was desirable and possible remained to be seen. That was, moreover, the concern of the Special Rapporteur and the members of the Commission who had spoken on the subject. As to what was desirable, the Special Rapporteur indicated that he preferred what was in a way the ideal solution, stating that he was ready to take the necessary steps in that direction if the Commission so wished, although he had no illusions and recognized that what was desirable was not within reach (*ibid.*, sect. D).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Reproduced in *Yearbook* . . . 1993, vol. II (Part One).

38. There was no alternative but to leave aside what was desirable and fall back on what was possible, namely, the solution recommended in chapter I, section D, of the report. In that connection, he was pleased to note that some areas of agreement had emerged from the discussions held in 1985 and 1986 and probably continued to exist. In his view, there was little or no disagreement on at least two major points. The first related to the need for part 3 of the draft on dispute settlement procedures, which the Commission, if it was not to fail in its task, must not leave in the hands of the future diplomatic conference. The second point was the need to make dispute settlement procedures compulsory. While there was agreement in principle on that point, the exact mechanisms had not been spelled out and that was where the debate stood. The Special Rapporteur was proposing a three-step system, which would become increasingly binding as States moved from conciliation to arbitration and from arbitration to ICJ. The Commission had been invited to discuss that proposal.

39. He noted that the report and the draft articles contained therein¹² were somewhat ambiguous. The Special Rapporteur's analysis was based on disputes relating to the entire set of articles of the future instrument and on those relating to countermeasures in particular. At times, he even seemed to be concentrating exclusively on that second category of disputes. That was particularly apparent in the first paragraph of chapter I, section D.2, which seemed to limit the scope of the topic, and in the next paragraph, which was ambiguous. Fortunately, the subsequent text showed that that was not the case. It was clearly indicated that the Special Rapporteur was considering the issue in its entirety and, even if draft article 1 appeared restrictive, draft article 2, paragraph 1 (a), confirmed that the dispute settlement system covered all questions which might arise from the interpretation or application of the future instrument and that the emphasis had been placed on countermeasures simply because that aspect of the problem was so difficult.

40. It was thus understood that the dispute settlement mechanism had to be comprehensive. It remained to be seen how its application and its acceptance by States could be ensured.

41. In his view, the Commission could come up with rather bold solutions in that respect once it had reached agreement on certain fundamental points. It seemed that consensus had in fact been reached on three points: preventing the escalation of measures and countermeasures; avoiding having the *de facto* inequality of States turn to the legal advantage of the strongest; and establishing a restrictive and binding system for countermeasures, which could unfortunately not be excluded as a means of preventing resort to measures of that kind as far as possible.

42. In his opinion, the appropriate method would be to make the procedure and its conclusions compulsory, while distinguishing between the different steps envisaged. Conciliation would be compulsory in the case of any dispute relating to any provision of the future instrument; however, the conclusions would not be binding, except perhaps in the case of interim measures of protec-

tion, whether directed at the wrongdoing State or the injured State. That was, moreover, what the Special Rapporteur was proposing and which deserved consideration.

43. In the case of arbitration, it was important to avoid two extreme positions: one under which arbitration would be compulsory in the case of any dispute—something that would not be acceptable to all States—and the opposite under which arbitration would be ruled out on the grounds that States must have freedom of choice and of means. In his view, the solution would be to make arbitration contingent on two conditions. First, arbitration would be compulsory in the case of certain disputes. Indeed, parts 1 and 2 of the draft articles took account of many situations where questions of fact or law on which States disagreed could be settled through arbitration, without those States considering that their sovereignty or freedom of choice had been called into question. Secondly, arbitration would be an option open to all States wishing to use it, and that would have the advantage of developing international law on that issue. Arbitration should not be ruled out simply because some States hesitated to resort to it.

44. With regard to judicial settlement, it was best, as with arbitration, to have a flexible mechanism, twofold as it were, corresponding to different situations. Certain disputes might be subject to compulsory jurisdiction by ICJ, for example, when a binding rule of general law was at issue, as suggested by the previous Special Rapporteur, as well as when other rules set forth in the future instrument were at stake, as determined by the Commission. The jurisdiction of ICJ would be optional in the case of disputes relating to other questions. As in the case of arbitration, such jurisdiction should not be ruled out because certain States hesitated to use it. On the contrary, it was appropriate in that situation as well to promote the codification and progressive development of international law.

45. He did not believe that it was possible to have a simple dispute settlement system in the area of State responsibility. It would probably be necessary to set up a rather complex mechanism in order to reconcile moral issues and effectiveness, flexibility and State sovereignty. Yet the Commission should not fail to be bold so that it might overcome its past weaknesses and respond to the criticisms levelled against it. In that regard, the draft articles submitted by the current Special Rapporteur and those which had been submitted by the previous Special Rapporteur and which were before the Drafting Committee would be a good starting point.

46. Mr. de SARAM, introducing the statement he intended to make later, referred to the importance of the fifth report on a topic which was fundamental to the primacy of law and respect for the principles of law in relations between States. The Special Rapporteur had tried to commit the Commission to fulfilling its responsibility with regard to the progressive development of the law, a responsibility which derived directly from the Charter of the United Nations and from which the Commission must not be diverted. The question of the degree of progressive development which the system of relations between States was ready to accept would be for each member of the Commission to decide—until such time as the Commission could request the views of States on

¹² For the text of the draft articles, see 2305th meeting, para. 25.

the issue. Until then, the Commission should not limit itself strictly to its task of codification of the law, but should, as it had done in other areas, such as that of the international criminal court, assume its responsibility, bearing in mind the rules it had to establish on the law applicable to the conduct of States. As Mr. Mahiou had said, it was necessary to throw off the constraints of an earlier time and avoid limiting the issue of dispute settlement procedures to a previously established framework of precedents. In view of some of the statements that had been made immediately following the Special Rapporteur's introduction of the fifth report, he hoped that the Commission would be able to move forward in that area of the progressive development of the law, while being as realistic as necessary.

The meeting rose at 11.30 a.m.

2307th MEETING

Tuesday, 15 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

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

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

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRMAN noted that an informal paper had been circulated to all members of the Commission by the Special Rapporteur in order to clarify some points that had arisen during the debate.

2. Mr. ROBINSON said the Special Rapporteur's fifth report (A/CN.4/453 and Add.1-3) was a passionate and unambiguous plea for the Commission to seize the opportunity offered by its work on State responsibility to propose to the General Assembly an advanced dispute settlement system applicable to countermeasures. It was astonishing that such a plea had to be made in the first place. The Commission was called on to look beyond the existing malaise in international relations and to chart a course guided by the principles of justice and sovereign equality. While not ignoring existing political realities

which in essence sanctioned the rule of the strong over the weak, the Commission must envision its mission in such a way that a system for settling disputes relating to unilateral measures, one that paid due regard to the interests of all States, both weak and powerful, would by no means be inconceivable. The reaction elicited in some quarters by the Special Rapporteur's proposed dispute settlement system was also astonishing, since a reasonable appraisal showed that, while in most respects it represented an advance over previous systems, in some respects it was fairly unambitious.

3. The Special Rapporteur clearly believed that the international climate was now conducive to the creation of a binding third-party dispute settlement system for dealing with countermeasures, and had correctly identified the factors underlying that favourable climate. First, the Manila Declaration on the Peaceful Settlement of International Disputes² had been influential in promoting recognition of the need for effective dispute settlement systems. Secondly, the Eastern European States were taking a new approach to the question of dispute settlement following the end of the cold war. Thirdly, the opinions expressed at the Commission's previous session and in the Sixth Committee showed majority support for a highly developed dispute settlement system to counteract the injustices that could result from unilateral measures, which, in the current disorganized and decentralized state of international relations, had not, regrettably, been outlawed. The Commission was summoned to a leadership role in the codification and progressive development of international law. Therefore, it should not hesitate to make a proposal, even if it felt there might be opposition from Governments. When it believed the proposal would serve the interests of the world community, it should lay the proposal before the General Assembly, where Governments could give their response.

4. The essence of countermeasures was raw power, wielded more often than not to the detriment of the principles of equality and justice. Since the exercise of power was inevitable in present-day international relations, the goal should be to create systems that tested the legitimacy of such power, preferably before it was exercised. Without such systems, countermeasures would always give stronger States an advantage over weaker ones. It was small comfort indeed that, since armed reprisals were outlawed, countermeasures would be mainly economic in nature, for such measures could cripple a country as surely as could the use of force.

5. How, then, could a dispute settlement system be created that would truly assist weaker States, if the system could be called into play only after a countermeasure had been applied? A system that an injured State must necessarily resort to before using a countermeasure, one that would enable the legitimacy of the countermeasure to be determined and other matters resolved, would be preferable. Yet the existence of a binding third-party dispute settlement system that could examine any countermeasure adopted would act as a deterrent to the use of countermeasures. A strong body of opinion was now emerging, both in the Commission and in the General Assembly, in favour of a dispute settlement system for

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

² General Assembly resolution 37/10, annex.