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Summary record of the 2307th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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/CN4/446, 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 Disputes[2] 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.

countermeasures that gave both the wrongdoer and the injured State the right to set in motion machinery that was binding, and not merely recommendatory. It was that body of opinion the Commission must now seek to reflect: a norm that tied the right to take countermeasures to certain conditions, including a binding third-party dispute settlement system.

6. As to the draft articles and the annex of part 3[3] article 1 would have to be better aligned with article 12 of part 2[4] to ensure consistency in the references to the time-frame for setting the dispute settlement system in motion. He could agree to the Special Rapporteur's compromise solution regarding the timing for activation of the system, but the proposal was unambitious, for it failed to reflect the emerging trend in favour of recourse to a binding third-party dispute settlement system before countermeasures were undertaken. The proposal was therefore less far-reaching than the one made by the previous Special Rapporteur in 1986.[5]

7. It was explained in chapter I, section D, of the report that the triggering mechanism for the dispute settlement system was neither an alleged breach of a primary or secondary rule of customary or treaty law nor a dispute that might arise from a contested allegation of such a breach. It was, rather, a dispute arising from a contested resort to a countermeasure on the part of the allegedly injured State, or resort to a counter-reprisal from the opposite side. Yet while a dispute following the adoption of a countermeasure usually related to that measure, it could also go further and involve the allegation of a breach of a primary or secondary rule, where such a breach might not have given rise to a dispute before the adoption of the countermeasure. Article 1 should be adjusted to make that point more clearly. That purpose might be served by using the words "on account of" or "because of" to replace the word "following", which could have an exclusively temporal connotation rather than a causal one.

8. A legitimate question had been raised as to whether the Commission should design a dispute settlement system to deal with any question that arose about the interpretation or application of the entire set of articles on State responsibility. He believed it should, and that the system should be similar to the one proposed to deal with countermeasures. The question of whether the proposed dispute settlement system for countermeasures could be given a broader application to cover all aspects of implementation of the articles on State responsibility would have to be taken up at a later date. The Commission should submit a clear recommendation on that subject to the General Assembly: it should not leave the decision to the plenipotentiary conference to be convened to adopt a convention on State responsibility. In his view, the conciliation commission to be established as part of the dispute settlement system should be empowered to examine only questions arising in connection with the adoption of countermeasures.

9. With reference to article 2, he could see no reason why the conciliation commission should not be authorized to order the cessation of measures taken by either of the parties or to institute any provisional protective measures it considered necessary. Such powers were not normally given to a conciliation commission, but they were appropriate in order to make sure that certain interests were not prejudiced. Protective measures were also needed, pending the implementation of a non-binding recommendation of a conciliation commission, as were such measures before a binding decision of an arbitral tribunal was implemented. The fact-finding faculty, provided for the conciliation commission in article 2, paragraph 1 (*c*), was most useful.

10. With regard to article 3, on arbitration, and article 5, on judicial settlement by ICJ, both methods of settlement entailed binding decisions and each party should therefore be entitled to submit the dispute directly to the forum of its choice. Article 5, as drafted, allowed only submission to ICJ.

11. Lastly, he wished to congratulate the Special Rapporteur on the courage shown in producing a report with epochal significance and in urging the Commission to grasp the favourable opportunity now within its reach for the progressive development of international law by establishing an advanced dispute settlement system for countermeasures that was responsive to the principles of sovereign equality and justice.

12. Mr. BENNOUNA said that, in reading the Special Rapporteur's fifth report, he had had the feeling of being in a confessional with a very honest individual who had committed a sin that weighed heavily on his conscience. The sin was to have proposed in the second part of his draft articles a number of provisions in connection with countermeasures. The Special Rapporteur found it painful to be reminded by members of the Commission and speakers in the Sixth Committee of the inherent defects of countermeasures, and believed the criticism levelled against him was more intense than that to which his predecessor had been subjected. Let the Special Rapporteur be reassured: if the criticism was stronger now in 1993 than in 1986, it was because a radical change had taken place in international relations since the end of the cold war. The checks and balances of that period had disappeared, and greater vigilance was required today.

13. The decision, made by both the current Special Rapporteur and his predecessor, to centre the dispute settlement system on ways of handling countermeasures, was motivated by the fact that such a system itself was closely bound up with countermeasures and unilateral acts. The substantive rules and procedural rules in that area formed an organic whole; one type of rule could not exist without the other. Without an adequate and somewhat restrictive dispute settlement system, the use of countermeasures would result in parties taking the law into their own hands—the very negation of the rule of law—and in elemental power struggles.

14. The draft articles and annex of part 3 proposed by the Special Rapporteur[6] were thus in every sense a pack-

[3] For the text, see 2305th meeting, para. 25.

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

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

[6] For the text, see 2305th meeting, para. 25.

age deal, comprising substantive provisions on countermeasures and procedural rules for the settlement of related disputes. He hoped the Commission would accept the fairly restrictive dispute settlement system proposed; for his part, he could not endorse the use of countermeasures if it was not accompanied by such a system.

15. Countermeasures could not be dealt with in the same way as disputes in general, since the highly conventional field of obligations and procedures for the settlement of disputes was involved: the substantive rule violated might derive from an international instrument which already provided for an appropriate means of settlement, and the debate on the consequences of such a violation could be resolved under the existing means of settlement or under Article 33 of the Charter of the United Nations or under a special agreement between the parties.

16. In the final analysis, all the substantive rules of international law were involved in the law of responsibility and it would be a delicate matter to provide for a specific method of settlement for responsibility in general. A countermeasure, on the other hand, was an exceptional derogation from international law in that it authorized a State to violate the law in reaction to what it deemed to be an unlawful act that had caused it harm. An exceptional situation called for a special settlement procedure. He fully agreed with the Special Rapporteur that the Commission should display a measure of boldness. Audacity could not be acceptable when legalizing countermeasures yet unacceptable when providing for procedures whose purpose was not only to test the good faith of the allegedly injured State but also to dissuade it from acting rashly. Indeed, as rightly indicated in the title of section C.1, an adequate dispute settlement system was "an indispensable complement to a regime governing unilateral reactions".

17. In regard to sections D, E and F, he noted that the Special Rapporteur had said the ideal solution would be to make the lawfulness of countermeasures dependent on a prior binding decision by a third party. In such a case, the subjective assessment of the allegedly injured State would be removed by, as it were, inserting between the unlawful act and the countermeasure a definitive decision by an impartial third party. While that might be an ideal solution, it was also Utopian. It would be tantamount to subjecting the whole of the law of responsibility and, indirectly, the evaluation of compliance with all the substantive rules, to an international arbitral or judicial body. As the Special Rapporteur agreed, that seemed to be wholly out of keeping with the stage of development of modern international society which still consisted of sovereign States and where justice was optional.

18. It was necessary, therefore, to retain the general obligation laid down in Article 33 of the Charter of the United Nations, whereby States had the right to choose from among the available procedures. Should a State take the law into its own hands and resort to unilateral measures, however, it would inevitably have to submit to increasingly restrictive legal controls.

19. As to conciliation, he wondered whether the ordering of cessation of measures or of provisional measures of protection should not be confined to the arbitral or judicial phase, with conciliation retaining its original aim, namely, to propose a report at the end of the proceedings which the parties were free to accept or refuse. Of the two models for a conciliation commission, suggested by Mr. Riphagen, the previous Special Rapporteur, and the present Special Rapporteur respectively, the latter model seemed to be the more complicated, but it could perhaps be simplified in the Drafting Committee. In the case of arbitration, provision should be made for the intervention of a third party—possibly the President of ICJ—to act if one of the States failed to appoint an arbitrator.

20. The various procedures should be shortened somewhat and simplified to prevent extensions being used as a delaying tactic. Such questions could be discussed in the Drafting Committee. However, the Commission, for its part, should decide on the question of principle, namely, whether or not to accept the system proposed by the Special Rapporteur. His own response was unreservedly positive and he was grateful to the Special Rapporteur for his fifth report, which would facilitate the acceptance of a package deal. If that deal was not accepted, however, he would feel bound to enter a reservation to all countermeasures as a whole.

21. Mr. VILLAGRÁN KRAMER said that useful legal material was available to the Commission for its consideration of the present topic. The Vienna Convention on the Law of Treaties, for instance, which had been adopted on the basis of work completed in the Commission in 1969, contained clear and objective provisions with respect to disputes arising in that area of the law. In 1985, the previous Special Rapporteur had introduced a new element in his sixth report, namely, a system of conciliation that could pave the way for a compulsory procedure for the peaceful settlement of disputes arising out of unlawful acts.[7] The current Special Rapporteur, for his part, had referred in his third report,[8] to a resolution of the International Law Institute according to which reprisals could not be taken so long as recourse had not been had to existing procedures for the peaceful settlement of disputes, and in his fourth report, to the position taken by the Swiss Government in 1928 concerning the direct relationship between reprisals, prohibition of reprisals and the duty to settle any problem that arose by arbitration.[9] He had likewise referred to the legal arrangements which had obtained at the time of the League of Nations, and which showed that there had always been a close link between those elements.

22. The Special Rapporteur had perhaps come closest to pinpointing the complexity of the issue when he had stated, in his fourth report, that unilateral measures were bound to remain the core of the legal regime of State responsibility for a long time and that consequences such as cessation and reparation would, in the final analysis, rest on reprisals. The Special Rapporteur had, however, perhaps prejudged the approach the Commission would adopt, which was simply to recognize that, like it or not, reprisals did exist under customary law and the existing

[7] See *Yearbook... 1985*, vol. II (Part One), p. 15, document A/CN.4/389, section II.

[8] See *Yearbook... 1991*, vol. II (Part One), p. 19, document A/CN.4/440 and Add.1, para. 56.

[9] See *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3.

legal regime was imperfect. The Special Rapporteur's dilemma, therefore, was to decide which solution to propose within that imperfect system of regulation: an imperfect solution, or a solution that would represent a step forward. In his own view, the Special Rapporteur's proposal was not revolutionary and would not cause an upheaval in the existing international order; rather, it was pragmatic and deserved recognition for its lucidity and sound legal argument. A problem did arise because the Special Rapporteur had proposed that the reaction to an unlawful act, and not the unlawful act itself, should operate to set in motion the compulsory dispute settlement procedure. In that connection, it was worth noting that, apart from Article 2, paragraph 3, and Article 33, the Charter of the United Nations did not provide an adequate basis on which an unlawful act could be held to operate as a trigger, whereas customary law and international practice did offer a means, by way of reprisals, whereby compulsory machinery for the settlement of disputes could be established and promoted.

23. On balance, he believed that the Special Rapporteur's proposal deserved serious consideration, particularly in the light of the discussion that had taken place in the Drafting Committee on article 12 (Conditions of resort to countermeasures).[10] The Commission could not now act inconsistently with what it had discussed in the context of its consideration of that article. Also, it should not be unduly concerned about the formula proposed by the Special Rapporteur, since it was clear from a manual prepared by the secretariat on dispute settlement procedures that a wide range of options was available, including conciliation, arbitration and other procedures.

24. He congratulated the Special Rapporteur on his work and looked forward to a further chapter of the report dealing with crimes and delicts.

25. Mr. VERESHCHETIN said that the Special Rapporteur was right to note in his fifth report that the Commission had not contributed very significantly to the law of dispute settlement. In its drafts, the Commission did not as a rule go beyond proposing non-binding conciliation procedures that were consigned to optional protocols or annexes. Clearly, however, that had not been due to any lack of either concern or skill on the part of previous members of the Commission. Rather, in considering whether or not to incorporate binding settlement provisions in the body of the text they had been guided first and foremost by the desire not to risk rejection of the draft as a whole because of settlement provisions that were unacceptable to many States.

26. The same problem, unfortunately, still arose today, and he doubted whether the position of States on the question of compulsory arbitration had changed sufficiently to warrant optimism about the likelihood of the Special Rapporteur's proposals being widely accepted. The doubt was all the more legitimate as the draft on State responsibility was not concerned with just one aspect of international relations, like the majority of the Commission's drafts, but touched on all aspects of international relations and international law. The Special Rapporteur acknowledged the existence of all those problems, in the fifth report, but nevertheless advocated greater boldness.

27. Perhaps it was because the Special Rapporteur himself was not entirely convinced of the acceptability of his proposals that he confined himself to outlining a procedure designed not to prevent countermeasures from being taken but only to determine the lawfulness of a countermeasure already taken. While appreciating that such limitation of the scope of the proposed dispute settlement mechanism was motivated by the wish to satisfy the "conservatives", he could not help wondering whether the proposal was really as bold or revolutionary as had been claimed. What was so very bold about a proposal whose acceptance would not affect the *faculté* of States to take countermeasures, or even temporarily delay the application of countermeasures? In his view, the proposal was not "revolutionary" enough to represent a genuine breakthrough in international law; at the same time, it was excessively complicated, as Mr. Bennouna had pointed out earlier.

28. The law of dispute settlement was a separate, major topic for the Commission to consider. It went beyond the scope of the topic of State responsibility and could not be dealt with in passing, as it were. In that connection, he disagreed with the argument advanced by the Special Rapporteur to the effect that, in the light of the numerous ineffective general dispute settlement treaties, there was little point in undertaking any further efforts towards the progressive development of dispute settlement procedures of a general character, and that it would be more appropriate to engage, in the context of the draft on State responsibility, in substantial progressive development of dispute settlement procedures by providing for a more effective arbitration clause. Actually, the two approaches were not mutually exclusive. Furthermore, recent developments in the field of dispute settlement, in particular the Convention on Conciliation and Arbitration within the CSCE,[11] suggested that general dispute settlement treaties did not necessarily have to be ineffective.

29. The foregoing remarks did not mean that the draft on State responsibility should not include provisions on the settlement of disputes. Like some other members, he thought that, in drafting such provisions the Commission should draw very extensively on the Special Rapporteur's proposals. However, the scope of those future provisions should not be confined exclusively to the problem of countermeasures, but should relate to the application and interpretation of the whole of the future convention on State responsibility. If, however, the dispute settlement provisions were to be connected specifically with countermeasures, then they should surely be considered together with the articles on countermeasures already referred to the Drafting Committee.

30. The introduction to the report spoke of a chapter II, dealing with the consequences of delinquencies qualified as "crimes" of States under article 19 of part 1 of the draft,[12] and stated that the chapter—which was not yet

[10] See footnote 3 above.

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

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

before the Commission—did not contain any draft articles. Furthermore, the Special Rapporteur indicated that he was not yet ready to make definite suggestions with regard to the additional rights and obligations attaching to the internationally wrongful acts contemplated in article 19 of part 1. Consequently, in what sequence was the Commission to consider the sections of the draft still outstanding? Should it embark on the consideration of the draft articles of part 3 before considering a most important section of part 2, namely the substantive and instrumental consequences of crimes of States? Would that not be putting the cart before the horse? Again, he wondered why it was that the Special Rapporteur had found it necessary to include a chapter on the consequences of crimes in a report on dispute settlement procedures. Did the Special Rapporteur perhaps not intend to propose any articles at all on the substantive and instrumental consequences of international crimes? The question seemed to be fundamental, for in previous reports the Special Rapporteur had always stressed that he was only dealing with delicts, not crimes, and the Drafting Committee, in considering the draft articles on State responsibility, had proceeded on that assumption. He would appreciate an answer before the Commission in plenary took a decision on the articles of part 3 of the draft.

31. Mr. ARANGIO-RUIZ (Special Rapporteur) remarked that it was not the first time Mr. Vereshchetin had asked about his intentions in connection with the subject of crimes. The preparation of chapter II—which, he assured the Commission, was indeed forthcoming—involved a great number of very difficult problems. He trusted that the debate scheduled for early July would assist him in preparing a satisfactory report on the subject for the Commission's next session.

32. As he had often said in the past, crimes were wrongful acts of a more serious nature. Whatever suggestions he might advance on the subject of delicts—whether on countermeasures, substantive or instrumental consequences, or dispute settlement—should be viewed as containing some indication of future proposals, *mutatis mutandis*, with regard to crimes. It would be recalled that his predecessor, in article 4, subparagraph (*b*), proposed in 1986,[13] had envisaged the possibility of direct recourse to ICJ. For his own part, he envisaged such recourse only as the third stage of the settlement procedure. It should be recalled that article 19 of part 1, adopted by the Commission on first reading, had met with strong reservations within the Commission and the Sixth Committee, as well as in the literature. The problem was a most difficult one and called for a step-by-step approach. He did not believe that the Drafting Committee was in difficulties because it did not have the whole report before it, and he would enjoin Mr. Vereshchetin to be patient for a little longer. Once again, he deprecated the suggestion that his proposals on dispute settlement were an attempt to "cause an upheaval" in international law.

33. Mr. KOROMA said that he did not subscribe to the view that the Special Rapporteur was trying to "cause an upheaval" in international law. He did, however, very much hope that there was no intention to dismiss, rewrite or water down article 19, on international crimes and international delicts, already adopted by the Commission on first reading and overwhelmingly supported in the Sixth Committee. Presumably, the question of whether to uphold or delete article 19, problematic as the article undeniably was, would be taken by the Commission as a whole and not by the Special Rapporteur alone.

34. Mr. ARANGIO-RUIZ (Special Rapporteur) said Mr. Koroma could rest assured that, notwithstanding the problems and difficulties he had mentioned, it was not his intention to drop article 19. On the contrary, precisely because of that article's importance, he considered it his duty to treat the matter with the seriousness and care it deserved.

35. Mr. RAZAFINDRALAMBO said that the work on State responsibility, well on the way to completion thanks to the untiring and exemplary efforts of the Special Rapporteur, constituted a significant contribution to the progressive development of international law. He joined others in congratulating the Special Rapporteur on his excellent fifth report, his clear proposals and his courageous conclusions, which had set the stage for a particularly fruitful debate.

36. The scope of application of the procedures for the settlement of disputes in part 3 of the draft and the nature of the solution proposed by the Special Rapporteur called for some observations. The scope of application of the procedures discussed in the fifth report had raised questions that were well-founded, particularly with regard to the titles of the draft articles. It had been stressed that the Special Rapporteur, like his predecessor, Mr. Riphagen, had displayed the intention of respecting the approach adopted by the Commission in which a first part, on the origin of the rules of responsibility, called primary rules for simplicity's sake, and a second part, on the legal consequences of a breach of those rules, that is to say, secondary rules, would be followed by specific provisions on implementation and on the settlement of disputes arising out of the application and interpretation of those primary and secondary rules.

37. It would appear that the fifth report, in particular proposed article 1 of part 3, was not fully in keeping with the initial intention and the desire of most members of the Commission. The report focused almost exclusively on arguing the need for procedures for the settlement of disputes in respect of countermeasures. The Special Rapporteur had not evaded the problem, as he himself had made clear in the informal note circulated earlier. In the fifth report, he had pointed to the need to identify the provisions (substantive or instrumental) to which the application or interpretation of the envisaged procedures should apply, and he had recalled that in Mr. Riphagen's view, the two parts of the draft were interdependent. The Special Rapporteur clarified his position in that respect; nevertheless, the six articles of part 3, which formed a coherent and indissociable whole, only dealt with disputes which had arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State and which had not been settled by one of the means referred to in article 12, paragraph 1 (*a*). One had to conclude that part 3 only concerned articles 11 *et seq.* of part 2,[14] and excluded ar-

[13] See footnote 4 above.

[14] See footnote 3 above.

ticles 6 to 10.[15] Hence, the Special Rapporteur had apparently departed from the approach of his predecessor, whose article 1 of part 3[16] had referred to article 6, which corresponded to the current Special Rapporteur's articles 6 to 10. The Special Rapporteur had sought to clarify that lacuna in his note. In his own view, that gap might also be closed later, for example by drafting another article of a general nature on the scope of application.

38. The Special Rapporteur had undertaken a complete and thorough examination of the structure and nature of the proposed dispute settlement procedure, taking into account the need to restrict resort to countermeasures or at least to curtail their adverse aspects, and had tried to reply to the serious concerns about including countermeasures in the draft. In that regard, he agreed with the perspicacious comments in the report on the need for an adequate dispute settlement system as an indispensable complement to a regime governing unilateral reactions. On the other hand, in the framework of the solution recommended, the explanations about the application of article 12, paragraph 1 (*a*), of part 2, concerning the exhaustion of all the amicable settlement procedures available before resorting to countermeasures, were not always very clear. That provision, in the wording contained in the fourth report,[17] mentioned a whole range of means of such settlement, in sources other than the future convention on State responsibility. In its present form, the provision would appear to be a condition for resort to countermeasures, whereas the procedures in part 3 for the settlement of disputes would only take effect, as stated in article 1 of part 3, following the adoption of countermeasures. It was a simple and feasible system. However, the Special Rapporteur's interpretation of article 12, paragraph 1 (*a*), considerably weakened the scope of the provision, in that, according to him, it only referred to settlement means without directly prescribing them and did not directly set forth the obligation to exhaust given procedures as a condition for resorting to countermeasures. He thus hoped that the Drafting Committee would eventually adopt a wording for article 12, paragraph 1 (*a*), that was more precise and more consistent with that restrictive interpretation.

39. The Special Rapporteur's desire to strengthen the procedures for the settlement of disputes in respect of countermeasures was understandable. In that regard, the Special Rapporteur proposed two solutions: either to make the lawfulness of any resort to countermeasures conditional on the existence of a binding third-party pronouncement, or to strengthen the non-binding procedure by adding arbitration and judicial settlement procedures. The former solution would appear to be more suitable for significantly restricting the use of countermeasures and would have been unthinkable while international relations had been dominated by East-West antagonism. But it did not seem to be the most realistic choice at present, even if it was the only one that really took into account the situation of weak countries. The latter solution was the one recommended by the fifth report and which Mr. Pellet (2305th meeting) had termed revolutionary. That was something of an exaggeration, because the solution had simply been based upon the approach taken in recent conventions, for example, in the United Nations Convention on the Law of the Sea. Furthermore, it did not in any way seek to prejudice the injured State's "prerogative" of taking countermeasures or even suspending countermeasures once they had been taken, unless a settlement procedure had been submitted to a third party and the latter had ordered suspension of the countermeasures.

40. The dispute settlement procedures in part 3 were in many ways reminiscent of similar models in international trade law, except that they had three phases: conciliation, which could only give rise to recommendations and only had binding effect with regard to provisional measures of protection; arbitration, which was binding, if conciliation failed; and, lastly, judicial settlement by ICJ, particularly in the event of failure to set up the arbitral tribunal. Although it might be argued that the system was complicated and unwieldy, he agreed with the Special Rapporteur that it could have a deterrent effect and strengthen guarantees against abuse of unilateral reactions. Making it non-binding would leave the way open for powerful States to take justice into their own hands, as many unfortunate examples in recent history had shown.

41. As to the actual articles, the word "measures", in article 1, was ambiguous and should be replaced by "countermeasures". In the French version of article 3, the word *compromis* (special agreement) should be replaced by *clause compromissoire*, because it was the right to submit the dispute to arbitration that was at issue, not the drafting of a document determining the object of the dispute and the procedure to be followed once the dispute had been submitted for arbitration. That would be more in keeping with the "special agreement" referred to in article 3, paragraphs 6 to 9, of the annex. Lastly, the last part of article 5, subparagraph (*a*) (i), should be altered to read "... within six months of the submission of the report of the Conciliation Commission".

The meeting rose at 12.25 p.m.

2308th MEETING

Wednesday, 16 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. Idris, Mr. Kabatsi, Mr. Koroma, 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.

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

[16] See footnote 4 above.

[17] See footnote 7 above.