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Summary record of the 2314th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1993, vol. I

ered as the dean of the Committee. His statement had reflected not only the breadth of his own and the Committee's concerns but also the new trends emerging in the Americas.

73. The Committee was composed of States operating under the common law and the civil law systems, something that gave jurists an opportunity to learn about each other's legal systems and to work together to find ways of communicating and to identify commonalities in their institutions. It was a complex task to try and bridge the gap between the dynamic common law system and the civil law system, and Mr. Rubin had played an important role in that connection.

74. The variety of concerns addressed by the Committee demonstrated an interesting trend: North America and Latin America had begun to focus on international economic law as a basis for seeking new ways to define legal relationships. As a result of the Committee's emphasis on international economics, a new approach to the Calvo clause was taking shape in the Americas; that long-standing clause was currently being reviewed in the light of new economic trends. Noteworthy, too, was the fact that the World Bank and related institutions were elaborating mechanisms for settling disputes between States in cases involving foreign investments that gave rise to conflict between public and private interests. Thus, in the field of international economic law, the Committee was making rapid strides.

75. As to the environment, the Committee's emphasis reflected the recent trend to limit consideration to environmental phenomena which were of particular relevance to the American continents; there was even talk of elaborating an American environmental law system. It was not clear whether such a system would actually be realized; in any case, current work was linked not to issues of responsibility, but rather to those relating to the environment *per se*.

76. In the field of human rights, the Committee and its lawyers were playing an expanded role in the allied field of political law. Law and politics had traditionally been associated on the street but not in legal settings. Yet, the jurists of the Committee were discussing the principle of the legitimacy of Governments based on democracy and respect for human rights, thereby recognizing that international criteria prevailed over State sovereignty. That shift of concerns and new emphasis in the Americas was noteworthy.

77. The Inter-American Juridical Committee had two very important functions. The first related to the division between public international law and private international law; in private international law, the emphasis was based not on conflict of laws but on the search for commonalities between the North American and Latin American economic systems. The second was the Committee's extraordinary efforts to disseminate knowledge about international law. Mr. Rubin had been and continued to be instrumental in promoting those efforts.

The meeting rose at 1.10 p.m.

2314th MEETING

Wednesday, 30 June 1993, at 10.05 a.m.

Chairman: Mr. Vaclav MIKULKA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, 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. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,[1] A/CN.4/451,[2] A/CN.4/L.489)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. SZEKELY said that he wished to add to his comments made on the qualification of harm at the preceding meeting and mentioned that some members of the Commission had made comments on it. The Chairman, in particular, had spoken against replacing "appreciable" by "significant" because that would raise the threshold of liability. He himself had stated that the Commission would be making a regrettable mistake if it proceeded in that way. Mr. Robinson, on the other hand, had said that the Commission was not compelled to use the same terms in the draft articles on the law of the non-navigational uses of international watercourses as in the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The Chairman, who was the Special Rapporteur for the latter set of draft articles, had nevertheless explained why "appreciable" had been replaced by "significant" in them: it was because the range of activities was much broader than in the case of watercourses.

2. In any event, opinions were still very divided about the qualification of harm in the case of watercourses. He had himself not yet heard any convincing argument for the replacement of the word "appreciable" by the word "significant". On the previous day in the Drafting Committee, the Chairman of the Commission had said that harm which was not significant was harm which did not have to be taken into consideration. If that was the case, there would appear to be no point in making the proposed change. Or was the intention actually to raise the threshold of liability?

3. Mr. CALERO RODRIGUES said that the issue warranted detailed consideration and he emphasized the im-

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

[2] Ibid.

portance of the comments made by the Chairman at the preceding meeting. It seemed that some members, including Mr. Szekely, agreed that replacing "appreciable" by "significant" might have the effect of raising the threshold of liability. The Chairman had pointed out that the word "significant" had been translated into Spanish by *importante*, but that it would be better to translate it by *sensible*, a word which also existed in French. He himself thought that "appreciable" or "significant" did indeed mean *sensible*. As far as English was concerned, "appreciable" meant that which could be detected and was of some importance without being serious.

4. Mr. SZEKELY thanked Mr. Calero Rodrigues for his explanation and said that it was a pity that a similar explanation was not to be found in the draft articles. Without such an explanation, in fact, the replacement of "appreciable" by "significant" might give the impression that the threshold of liability had been raised and that would create a number of problems.

5. Mr. YANKOV said that it was not just a question of terminology or translation. The issue must be examined in detail and the commentary should reflect the precedents as far as possible, for example, the cases in which "appreciable" had been used to qualify harm. The word could also mean "measurable", which "significant" could not.

6. Mr. ARANGIO-RUIZ said that the French word *sensible* was translated into English by "perceptible" and not by "significant" or "appreciable".

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

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

7. Mr. ARANGIO-RUIZ (Special Rapporteur) said that the richness of the discussion was a good omen for the progressive development of the law of dispute settlement and therefore for the rule of law in the inter-State system. Whatever difficulties might lie ahead, the debate had proved that the overwhelming majority of the members of the Commission took the view that the role of the judge in the inter-State system and, in particular, in the area of State responsibility should be strengthened, and by more than lip-service.

8. He welcomed the very high degree of support for the notion that the draft articles should include dispute settlement provisions of such a nature as to represent an adequate corrective to the very serious but inevitable problems of unilateral countermeasures. However severely they were regulated—as they were for example in draft articles 11 to 14 proposed in 1992[4]—countermeasures testified to the still rudimentary nature of the inter-State system and inevitably of the law governing it. Since that element of the system did not seem about to disappear—in other words, since countermeasures could not be totally eliminated—it was not sufficient to make them subject to conditions and limitations prescribed for that purpose, since such rules were themselves subject to the exclusively unilateral interpretation of the States which were called upon to apply them. A regime authorizing unilateral measures subject to unilaterally interpreted conditions and limitations seemed unacceptable and some way must be found to eliminate or reduce that "double unilateralism". That seemed to be the view of the overwhelming majority of the members of the Commission, with of course some differences and nuances. He concluded in any case that, for the majority of the Commission, a step should be taken to achieve substantial progress in the area of dispute settlement.

9. With regard to the quality of the settlement obligations, that majority seemed to share his own pessimism about the possibility of attaining what he had called in the first part of his report (A/CN.4/453 and Add.1-3) the "theoretically ideal" solution. That solution was drastically to alter the countermeasures regime in such a way that countermeasures would be permissible only in order to secure compliance by the wrongdoing State with a binding third-party settlement, for example, with an arbitral award or a judgment of ICJ. That was the system which would come into effect if the future convention on State responsibility prescribed a compulsory, automatic and unilaterally triggered arbitration or judicial settlement of any "responsibility dispute", namely, any dispute about the interpretation or application of the convention and if the convention prohibited at the same time any resort to unilateral countermeasures except in the event of refusal by a wrongdoing State to comply with the award or decision. But that solution, as he had expected, had been firmly rejected by the majority of the Commission, despite the solution's theoretical merit, and he had therefore also set it aside.

10. There seemed to be general agreement that lawful resort to a countermeasure should not be subject to prior resort to any settlement procedures other than those to which the allegedly injured State was bound to resort under any general or bilateral treaties or dispute settlement clauses between itself and the wrongdoer. In other words, the Commission seemed to favour what might be called a "soft" solution of the kind which he had proposed in 1992 in article 12,[5] which stipulated as a condition of lawful resort to countermeasures the prior exhaustion of "available" procedures which existed or might exist between the injured State and the wrongdoer, regardless of the instrument on which the Commission was working.

11. However, the fact that the majority of the Commission had rejected the "theoretically ideal" solution was not a totally negative sign. It indicated that the great majority of members who had taken part in the debate were not pipedreamers, any more than he was, and that they had their feet on the ground when they chose to favour, in addition to the general notion of the necessity of a corrective to countermeasures, the adoption of an ad-

* Resumed from the 2310th meeting.

[3] See footnote 1 above.

[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] Ibid.

equate, although less ambitious, set of dispute settlement obligations. He was confident that they had given their opinion after mature deliberation and had not merely paid lip-service to the cause of justice and of the weak against the strong. He hoped that they would maintain their positive position when the draft articles of part 3 came up for discussion the following year in the Drafting Committee. They had thus shown the seriousness of their purpose and of their efforts to control their own aspirations by setting them against the realities of the inter-State system and of international law, without ruling out the need to provide a less ambitious, but adequate corrective to the unfettered regime of unilateral countermeasures. In that connection, he repeated his objection to the incredible statement made by one member that the adoption of the Special Rapporteur's proposals for part 3 would cause a *bouleversement* in international law.

12. With regard to the elements and features of the dispute settlement system which he proposed in his fifth report, they had received considerable support, as a good number of speakers had said that they were generally in favour. Other solutions had, of course, been proposed. Some members had advocated reducing the system to its two main steps, arbitration and/or judicial settlement. Others had suggested greater use of ICJ, in particular the chambers system and advisory opinions. Others had seemed worried by some of the functions which he proposed to assign to the conciliation commission. (He stressed in that regard that he had never questioned the non-binding character of the report and of the main recommendations of the conciliation commission.) Still others had made interesting suggestions concerning the provisions of the annex to part 3,[6] on the procedures for appointment of the members of the conciliation commission or the arbitral tribunal. And still others had suggested setting up a "countermeasures commission" or, like Mr. Mahiou (2306th meeting), had envisaged the possibility of combining compulsory and optional procedures, but had not indicated the scope of the latter.

13. Those and other suggestions nevertheless seemed compatible for the most part with one essential feature of his proposed regime, that is the existence of a post-*countermeasures dispute settlement* system. That emerged clearly from the statements of all the speakers, but it had been put in a particularly effective way by Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Fomba, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Robinson and Mr. Yankov.

14. There seemed to be a very broad consensus on two essential features of the proposed system: the "triggering mechanism" and the area of controversy to be covered by the post-countermeasure procedures.

15. With regard to the triggering mechanism, his suggestion that the existence of a dispute should be made subject to the taking of a countermeasure by the injured State and to the reaction of the State committing the initial act to that countermeasure had apparently not given rise to any difficulties. The reaction of the State against which the countermeasure was directed would take the form of a protest or a request for cessation of the countermeasure or perhaps of a counter-countermeasure. He was surprised in that connection that the use of the term "counter-reprisal" in his report should have prompted an objection from one member of the Commission: the term was in fact widely known among international lawyers.

16. Mr. Pambou-Tchivounda had been concerned that the conciliation commission would be entitled to deal with the question of whether or not a dispute existed. He had vested that function in the conciliation commission simply because it would be the first third party to consider the case. In the event that direct recourse was had to an arbitral tribunal, the tribunal would make that decision. He had chosen as a triggering mechanism the concept of a dispute rather than that of an "objection to a countermeasure", which had been used by the former Special Rapporteur, simply because the former was a rather objective criterion and was supported by theory and practice. A dispute arose when, first, the State against which the countermeasure had been taken asserted that such a measure was unlawful and unjustified and, secondly, when the opposing view was taken by the injured State that had taken the countermeasure. It was the conflict between those two opposing positions, constituting the dispute, that triggered the procedures provided for in part 3 of the draft articles.

17. With regard to disputes which would be subject to third-party settlement procedures, he recalled that he had expressly indicated in chapter I of his report that the fact that the settlement procedures envisaged in part 3, unlike those referred to in article 12, paragraph 1 (*a*), could be resorted to only after the adoption of a countermeasure did not mean that those procedures were applicable exclusively to questions relating to the interpretation or application of the few articles of the future convention dealing directly with the regime of countermeasures, namely, articles 11 to 14 of part 2.[7]

18. In order to establish whether a countermeasure was "justified" or "lawful", it might not be sufficient to determine whether it was proportional, if it was in conformity with the obligation of prior resort to settlement procedures by which the parties were bound or with the prohibition against the use of force or the obligation to respect fundamental human rights. There were also "upstream" conditions of "justification" or "lawfulness" such as the existence of an internationally wrongful act—a condition implied in article 11; the attribution of that act to the State against which the countermeasure was taken; the absence of circumstances precluding wrongfulness; or non-compliance by the wrongdoing State with its obligation to make reparations in accordance with the relevant articles.[8] Even if the "triggering mechanism" was the dispute arising from the taking of a countermeasure, the procedures envisaged would have to cover—for the purpose of a non-binding recommendation or a binding decision, according to the case—all disputes between the parties that might come under any one of the articles of the future convention. That was the meaning of the specifications contained in chapter I of

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

[7] See footnote 4 above.

[8] For the texts of draft articles 1, para. 2, 6, 6 *bis*, 7, 8, 10 and 10 *bis* adopted by the Drafting Committee at the forty-fourth session of the Commission, see *Yearbook... 1992*, vol. I, 2288th meeting, para. 5.

the report. That "upstream" extension of the competence of the third parties envisaged in the proposed articles of part 3 had been agreed to in substance during the debate on article 4 (*c*) as proposed by the previous Special Rapporteur.[9]

19. In respect of the role of the conciliation commission, there was, in his opinion, no ambiguity with regard to the non-binding nature of its report and recommendations. He had simply provided it with some ancillary powers which, in his view, would not significantly alter that role.

20. According to Mr. Al-Baharna (2309th meeting), Mr. Pellet (2305th meeting), Mr. Rosenstock (2309th meeting) and Mr. Vereshchetin (2307th meeting), the scope of application of the dispute settlement provisions were too broad. Of course, requiring the intervention and decision of a third party after the unlawful act, but before countermeasures, 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. Obviously, that would have the effect of making all questions relating to State responsibility justiciable by definition. However, in his view, that remark applied very well to what he called the "theoretically ideal solution", which, as he had just stated, seemed to have been discarded by the Commission. That remark did not apply to the solution he was proposing for part 3 of the draft. Since he had set aside the "ideal solution", the only dispute settlement procedures to which the injured State was bound to resort as a precondition for the lawfulness of its countermeasures were those referred to in article 12, paragraph 1 (*a*).[10] However, as he had already explained, those procedures would not be dictated by the future convention on State responsibility: they were imposed by Article 33 of the Charter of the United Nations or arose from treaties, arbitration clauses or declarations of acceptance binding the parties regardless of the future convention.

21. Those considerations also applied to other questions, such as the necessity of providing different settlement procedures for different types of disputes, as mentioned by Mr. Tomuschat (2308th meeting) and Mr. Yamada (2309th meeting). That was perfectly logical and natural for any settlement procedures that existed or that might exist between the parties in the future, regardless of the future convention, and which, under article 12, had to be exhausted before resort to countermeasures. However, post-countermeasure disputes and the procedures he had proposed in part 3 were another matter. The idea of article 12 was to reduce arbitrariness in resort to countermeasures. That objection thus did not concern the proposal he had made, but, rather, the procedures which might already exist between the parties.

22. The same consideration applied to the suggestion that priority should be given to any dispute settlement machinery already existing between the parties. That was precisely what article 12, paragraph 1 (*a*), whatever its other defects, did for the pre-countermeasure phase. To do the same for the post-countermeasure phase would defeat the corrective purpose of the procedures in part 3.

23. The same applied to the observations regarding the need for flexibility. In his view, such flexibility was broadly guaranteed by article 12, paragraph 1 (*a*), since that provision certainly did not affect the freedom of choice of the parties. With regard to the rule of freedom of choice, he believed that, whatever decision the Drafting Committee finally took on paragraph 1 (*a*), that rule would be deadly, as Mr. Fomba had clearly explained (2305th meeting). If part 3 referred only to Article 33 of the Charter of the United Nations and nothing more, that would simply negate the binding nature of the settlement procedures.

24. One of the comments made with regard to the three-step system was that it was too complicated, too long and too expensive. He begged to differ on those drawbacks, the reality of which had not, moreover, been demonstrated. Would that system be any longer and more complicated than interminable negotiations? He did not think so. As to the cost, while Mr. Fomba's suggestion seemed reasonable, he did not think that a conciliation or arbitration procedure would cost more than the economic losses resulting from the application of unwarranted or disproportionate coercive measures.

25. The opponents of the system—who were a minority, whether it was the system he had proposed for part 3 or any similar system, were suggesting that matters should be settled by a protocol, by an "opt-in, opt-out" system or simply by diplomatic conferences. Obviously, if the decision was not to try to provide an adequate remedy for unilateral countermeasures taken on the basis of exclusively unilateral interpretations, then that was the best method. But it would be very sad if those solutions prevailed.

26. Questions had also been raised as to the desirability of giving the parties the freedom to submit their disputes directly to arbitration or judicial settlement, since both methods entailed binding decisions. It was true that the judicial settlement envisaged in the report under consideration was only an *extrema ratio*, to be used for limited purposes, for example, in cases of *excès de pouvoir* or violation of fundamental rules.

27. Several speakers had also asked why the "triggering mechanism" for dispute settlement procedures must necessarily be a countermeasure. He thought that he had given sufficient explanations on that matter and would not go over it again.

28. There had also been some speakers who had, in a sense, gone beyond what he himself had thought to be a reasonable solution and had advocated or at least come close to what he called the "theoretically ideal solution". Mr. Idris, for example, had asked (2310th meeting) why binding third-party settlement procedures should begin only after the taking of countermeasures. On that point, he had already explained the difference between pre-countermeasure settlement procedures, as provided for in article 12, paragraph 1 (*a*), and the procedures dealt with in part 3, which applied after countermeasures had been taken.

29. Suggestions had also been made with regard to fact-finding. He was completely in favour of that method and had, furthermore, referred to fact-finding as one of

[9] 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.

[10] See footnote 4 above.

the procedures which could be used by the conciliation commission.

30. In connection with the question of crimes, it had been said that the dispute settlement regime applicable in the case of crimes should be different and more binding than that applicable in the case of delicts. It had been suggested that the Commission should consider the substantive and instrumental consequences of crimes in part 2, before turning to part 3. He did not deny that a special and, if possible, more binding dispute settlement system for crimes should be considered. Moreover, the fifth report contained one paragraph which dealt with the idea put forward by the former Special Rapporteur in article 4 of part 3,[11] which referred to judicial settlement by ICJ.

31. Another important point was negotiation, which had been referred to a number of times, in particular in the Drafting Committee during the consideration of article 12, paragraph 1 (*a*). He nevertheless thought that the problem was sufficiently covered by paragraph 1 (*a*), since it referred to Article 33 of the Charter, which mentioned negotiation as the primary means of dispute settlement. In addition, negotiation was covered by implication in part 3 in more than one way, first of all, in a very clear manner, in article 1,[12] since there must have been negotiations between the parties for them to go on to the conciliation commission stage. Article 2 also presupposed negotiations because the parties would have to negotiate on the basis of the report and recommendations of the conciliation commission in order to bring them to an "agreed settlement" of their dispute. It was only in the event of failure at that stage, that is to say the failure of those negotiations, that the parties should or could resort, if necessary unilaterally, to arbitration.

32. In conclusion, he recalled, as he had done in the fifth report, that, with regard to part 3 of the draft, the Commission was called on to make an important choice: whether, for the want of anything better represented by the "theoretically ideal solution", or not to introduce an adequate corrective element to the hard, rudimentary law of unilateral countermeasures and thereby take a significant step in the progressive development of the law of State responsibility. For that choice, the Commission could draw inspiration from Rousseau's argument that might does not make right and that we were obliged to obey only "legitimate Powers"; "legitimate Powers" being obviously those which operated under the rule of law or at least under legal rules which such "Powers" had accepted by custom or treaty.

33. He was confident that the Commission would not fail to try to persuade the "Powers" to agree at least that, after they had exercised what was now their inevitable prerogative of unilateral reaction, the lawfulness of that reaction could, if challenged or disputed, be impartially ascertained. Unless, of course, the Commission believed, as a member of the Drafting Committee had recently said, that law was solely the product of power: it was subject to power, not above it.

34. That was an idea which was hard for a lawyer to accept and, if the majority of the members of the Commission did so, it would make life for special rapporteurs in general and for him in particular very difficult.

35. The CHAIRMAN said that the Commission would then have to decide whether the articles proposed by the Special Rapporteur should be referred to the Drafting Committee. The majority of the members appeared to be in favour of doing so.

36. Mr. ROSENSTOCK said that he was not part of that majority. He actually thought that the Commission was divided on the fundamental issue of part 3 of the draft and he was not at all convinced that it would be advisable to refer the articles to the Drafting Committee because that would ultimately mean requesting it to fill the many gaps which had become apparent in those texts. He would, however, not go so far as to request a vote in the Commission because he was sure that it would in any case follow its usual practice and decide to refer the question to the Drafting Committee.

37. He nevertheless pointed out that, if the Commission was to make any progress, it had to complete its work on parts 1 and 2 of the draft before trying to reconcile the differing views on part 3.

38. Mr. VERESHCHETIN said that, in his view and from a purely theoretical and methodological standpoint, only part 1 of the draft articles on the origin of international responsibility[13] and the first section of part 2 (which had been called "reparation")[14] really related to the topic of State responsibility. Chapter II on countermeasures and part 3, which dealt with dispute settlement procedures, related not to State responsibility as such, but to enforcement measures. Those two sets of questions were completely independent, so that, by dealing with the problem of countermeasures and dispute settlement, the Commission was entering into a radically different area. A sufficiently broad measure of agreement had already been reached on part 1 and the first section of part 2. It would therefore be useful for the Commission to complete its work on those parts of the draft before beginning to draft articles on a new chapter, which, in the final analysis, did not strictly relate to the topic.

39. In the meantime, work on parts 1 and 2 of the draft and, in particular, on the question of reparation had made hardly any progress. First, the Commission had not yet adopted the commentaries to those articles. Secondly, it had not yet considered the extent to which the article on reparation, on which the Drafting Committee had already worked, required any changes to cover the case of crimes.

40. An assessment of the situation thus showed that the Commission had not only not completed its work on parts 1 and 2, but had also not completed its work at the current session on the articles relating to countermeasures. That was why he did not believe that the Commission was following the right course in not completing the work it had undertaken on one set of questions and in requesting the Drafting Committee to deal with other prob-

[11] See footnote 9 above.

[12] Ibid.

[13] 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.*

[14] For the texts of articles 1 to 5 of part 2 provisionally adopted on first reading at the thirty-eighth session, see *Yearbook... 1986*, vol. II (Part Two), pp. 38-39.

lems, which were, in his view, much more controversial and complex. He feared that that approach would hamper the progress of the Commission's work.

41. However, since the majority of the members of the Commission appeared to be in favour of referring the articles to the Drafting Committee, he would not oppose that decision.

42. It would thus be a good thing if the Drafting Committee could rapidly have the Special Rapporteur's proposals on crimes because, otherwise, it would have only a partial view of the question instead of the whole picture. It was doubtful whether it was worthwhile for the Drafting Committee to look at the articles from the viewpoint of delicts only to discover, after receiving the proposals relating to crimes, that it had to amend all or nearly all of the articles of parts 2 and 3. That would only complicate its task.

43. Mr. SHI said that the Commission was aware of his views on part 3 of the draft and he had already stressed that he did not agree to linking the settlement of disputes with countermeasures. The proposals made by the Special Rapporteur in part 3 would deprive States of all freedom of choice with regard to dispute settlement procedures.

44. If the majority of the members of the Commission wanted part 3 to be referred to the Drafting Committee, however, he would not object, despite all his reservations on that score.

45. Mr. VILLAGRÁN KRAMER said that he did not know whether he preferred the Special Rapporteur's summing-up or his report. The current meeting had brought out new ideas and new points of view which made the question quite a bit clearer.

46. The decision to refer the draft articles to the Drafting Committee was a wise one, because it would mean that the question of dispute settlement could be dealt with pragmatically. The Drafting Committee might run into a problem, however, because it needed a minimum of guidance. The question was whether the Committee should abide by *lex lata* or whether it was empowered to enter the realm of *lex ferenda* and engage in the progressive development of the law. That was a genuine substantive question, since the question of dispute settlement was connected with that of reprisals.

47. In fact, the Drafting Committee, which depended on the Special Rapporteur's guidance, had been waiting two years to find out his views on the question of dispute settlement. Now that it had the reference document it had been waiting for, it would be able to finish its work.

48. The problem the Commission and the Drafting Committee faced was somewhat similar to the one now facing the inter-American system. Reprisals were clearly prohibited by article 18 of the Charter of OAS.[15] However, the Protocol concerning the final and binding settlement of disputes had not entered into force for lack of ratifications, so that there was now a substantive rule prohibiting reprisals, but there was no legal instrument which would lead specifically to the settlement of disputes and ensure that the mechanism was triggered not by countermeasures, but by the wrongful act itself.

49. He believed that the Commission would be able to complete its work on the matters under consideration when it had received the report to be submitted by the Drafting Committee on parts 2 and 3 as a whole. The decision to refer the draft articles to the Drafting Committee therefore warranted the support of the Commission, which should consider the Special Rapporteur's proposals with an open mind.

50. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he would be glad if his draft articles were finally referred to the Drafting Committee, where a great deal of work could be done.

51. He welcomed the statement by Mr. Vereshchetin, which clearly showed that the rules on countermeasures and those contained in part 3 of the draft belonged to the realm of procedure. That was the basis on which he himself had worked. Moreover, that point had already been clearly made by Mr. Bennouna (2307th meeting) and Mr. Calero Rodrigues (2308th meeting).

52. Mr Shi's objection to linking countermeasures with dispute settlement was based on his view that countermeasures were not admissible. However, the discussions in the Drafting Committee on article 12 had clearly shown that there was a link between countermeasures, on the one hand, and the dispute settlement procedures of part 3 on the other.

53. With regard to the question of crimes, to which Mr. Vereshchetin had referred, and if the Commission was able to continue its work on that aspect of the topic, he was certain that it would have to provide for dispute settlement machinery that was at least as effective as that proposed by the previous Special Rapporteur, who had suggested in article 4, subparagraph (*b*), of part 3[16] that disputes of that kind should be submitted to ICJ. In that connection, he referred the members of the Commission to chapter II of his fifth report in which that possibility of recourse to ICJ appeared to be inevitable. However, the Drafting Committee already had enough to do with the existing articles without having to deal with the question of crimes and he did not see how the fact of not having any proposals on that question would prevent it from continuing its work. He was, moreover, not at all certain that he would be able to make proposals on crimes in his next report and would be very grateful for any help the members could give him in that regard. To sum up, he proposed that the Commission should continue the work on parts 2 and 3 without dealing with crimes and recalled that its practice had always been to proceed step by step.

54. Mr. ROSENSTOCK said that he did not altogether understand why it was not possible to conclude consideration of article 12, as originally framed in very clear terms by the Special Rapporteur. In his view, the Commission should not take up part 3 before it had finished with that article.

55. The Drafting Committee could work on part 3 of the draft in a more rational manner if the Commission made a genuine effort to conclude its consideration of ar-

[15] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the "Buenos Aires Protocol" of 27 February 1967 (ibid., vol. 721, p. 324).

[16] See footnote 9 above.

ticle 12 and, at the same time, its work on part 2, leaving aside the question of crimes. If it failed in that task, the Commission would constantly come up against the problem of article 12 without any hope of general agreement on the article.

56. With regard to crimes, assuming that concept was wanted and the wish was to keep it, it was not certain that recourse to ICJ would be desirable, given the constitutional division of powers for which the Charter of the United Nations, and Article 39 in particular, provided. In that respect, the Commission was venturing into an area that was even more dangerous than the tactics in which some members of the Commission were engaging to hold back a portion of part 2 instead of concluding the consideration of that part of the draft before taking up part 3, which would appear to be the logical and reasonable course.

57. Mr. VERESHCHETIN said that he was disappointed by the Special Rapporteur's comments on the question of crimes. If the Special Rapporteur's position, when finally formulated, amounted to saying that it was not possible to submit an article on crimes, there would be no other solution for the Commission but to propose to the General Assembly an amendment to the topic on which it was working, which would then become "State responsibility in the matter of delicts". The question was not actually before the current session, but logic and honesty required that the Commission should recognize the need for such a change. That was the conclusion to be drawn from the Special Rapporteur's report and comments.

58. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to refer the draft articles proposed by the Special Rapporteur in his fifth report,[17] to the Drafting Committee for consideration in the light of the discussion in plenary.

It was so decided.

CONSIDERATION OF DRAFT ARTICLE 1, PARAGRAPH 2, AND OF DRAFT ARTICLES 6, 6 *bis*, 7, 8, 10 AND 10 *bis* OF PART 2, AS ADOPTED BY THE DRAFTING COMMITTEE AT THE FORTY-FOURTH SESSION[18]

59. The CHAIRMAN invited the Commission to consider the draft articles of part 2 as adopted by the Drafting Committee at the forty-fourth session.

ARTICLE 1, PARAGRAPH 2

Article 1, paragraph 2, was adopted.

ARTICLE 6 (Cessation of wrongful conduct)

Article 6 was adopted.

ARTICLE 6 *bis* (Reparation)

60. Mr. VERESHCHETIN said that the word "national", which appeared in the English version of paragraph 2 (*b*), was generally translated into Russian by an equivalent of the word "citizen", which signified a natural person. The question was therefore, whether the word "national" applied only to natural persons, in which case the Russian translation would be correct, or whether it applied to natural persons and to legal persons, which seemed to be more in keeping with the context of the draft articles. Perhaps the English version could be amended to refer expressly to natural and legal persons or an explanation could be included in the commentary.

61. Mr. ARANGIO-RUIZ (Special Rapporteur) said he did not think that the question should be settled by an explanation in the commentary, which would disappear. There were two possibilities: either the Commission could agree that the word "national" should be translated by several words in Russian or—but it was hard to imagine—the word "national" could be replaced by the words "physical or juridical person". The best thing would be to amend the Russian translation.

62. Mr. VILLAGRÁN KRAMER drew attention to a mistake in the Spanish version of article 6 *bis*, paragraph 2. When the Drafting Committee had concluded its work, the reference had been to "negligence or the wilful act or omission". In the new version, however, the word "negligence" had been replaced by the word *imprudencia*, which was different.

63. The CHAIRMAN said that the Spanish version would be brought into line with the English.

64. Mr. RAZAFINDRALAMBO said that he wondered whether a comma should be added after the word "brought", in paragraph 2 (*b*). As drafted, the text could imply that the words "which contributed to the damage" referred to "a national of that State on whose behalf the claim is brought"; it should, of course, refer back to "the wilful act or omission".

65. The CHAIRMAN said that point was well taken. The words in question should be separated, both in English and in French, from the text of paragraph 2 (*b*) to make it clear that they referred both to paragraph 2 (*a*) and to paragraph 2 (*b*).

66. Mr. VERESHCHETIN said that, as the Special Rapporteur felt that it would be difficult to deal in the commentary with the inconsistency to which he had drawn attention, he would prefer that the word "national" should be retained in the English version of paragraph 2 (*b*) and would ask the English-speaking members of the Commission if that word could denote both a natural person and a legal person. If so, the problem was simply a matter of translation into the various languages. If, however, the word "national" applied only to natural persons, some other word should be used or an explanation should be given in the commentary.

67. Mr. ROSENSTOCK said that, normally, the word "national" referred both to legal persons and to natural persons. However, there was no reason why it should not be made clear that both categories of person were covered, if that would make the provision easier to understand, but it would be in line with practice to keep the word "national".

68. Mr. KABATSI, agreeing with Mr. Rosenstock, said that, unlike the word "person", which applied equally to natural and to legal persons, very often the word "national" referred in particular to citizenship. It

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

[18] Document A/CN.4/L.472.

would therefore be advisable to make it clear that the word "national" referred to both legal and natural persons.

69. Mr. Sreenivasa RAO said that he too agreed with what Mr. Rosenstock had said.

70. Mr. ROBINSON said that, given the context, it was essential that the word "national" should refer expressly to both categories of person. In the case of the right of diplomatic intervention, for example, most interventions were made on behalf of a legal person. He therefore proposed that the provision should be amended by adding a comma after the word "national", followed by the words "whether natural or juridical" or the words "whether physical or legal". In any event, it would be preferable for the explanation to be incorporated in the article itself rather than in the commentary.

71. The CHAIRMAN, noting that the Commission intended to cover both categories of person, said that the precise manner in which that intent should be reflected in paragraph 2 still had to be decided.

72. Mr. KUSUMA-ATMADJA said he doubted whether it would be advisable to make the English version more cumbersome to solve a problem which, if the word "national" signified natural and legal persons, arose only in Russian and, apparently, Spanish. Moreover, any additional explanatory word would inevitably have to be repeated wherever it appeared throughout the draft.

73. Mr. ARANGIO-RUIZ (Special Rapporteur), agreeing with that view, said that, if further clarification had to be introduced, it would be better, in the interests of style, for it to come after the word "State".

74. Mr. VERESHCHETIN said he noted that the English-speaking members of the Commission were not absolutely sure that the word "national" was free of ambiguity. In the IMF Articles of Agreement for example, that word referred solely to natural persons.

75. Mr. THIAM, referring to the French text, said it should perhaps be made clear, not in the article itself but in the commentary, that the word *ressortissant* referred both to natural persons and to legal persons.

76. Mr. ROBINSON said that, after careful reflection, he felt that it would perhaps be best to include an appropriate clarification in the commentary.

77. The CHAIRMAN said the solution the Commission apparently preferred was to leave the English and French versions as drafted and to deal with the problem raised by Mr. Vereshchetin in the commentary, at the point where the word "national" first appeared.

78. Mr. Sreenivasa RAO said that assurances and guarantees of non-repetition were more in the nature of "satisfaction" than a form of reparation as such. Also, insistence on full reparation could be fraught with consequences for developing countries. For the sake of justice and equity, that aspect of the matter must not be lost sight of when it came to the commentary.

79. Mr. MAHIOU, agreeing with Mr. Sreenivasa Rao, said that, when the Commission had considered the cases in which reparation could be adjusted downwards, the Drafting Committee had noted that there were circumstances other than negligence or wilful act or omission that could have an effect on reparation. He himself had dwelled at some length on the case in which several States were involved and on the complex problems that posed. Those various circumstances should be kept in mind and they must be reflected in the commentary.

80. Mr. ROSENSTOCK said the presumption should be that the fundamental principle of equality before the law and equality of obligations applied at all times and that the only criterion was the commission of a wrongful act and the obligation of reparation.

81. The CHAIRMAN said that the Special Rapporteur would take account of all the comments made by the members of the Commission in the final version of the commentary to be submitted on the articles.

82. Mr. VERESHCHETIN said that some of the provisions in article 7 (Restitution in kind) would have been more appropriately placed in article 6 *bis*. The Drafting Committee had grouped together in article 7 four exceptions to restitution in kind which in fact were very different in their effects and scope. Material impossibility, the subject of subparagraph (*a*), obviously applied to only one form of reparation, restitution in kind, and therefore naturally appeared in article 7. Subparagraph (*b*), on the other hand, should apply to every form of reparation in that, if a particular form of reparation involved "a breach of an obligation arising from a peremptory norm of general international law", recourse should then be had to another form of reparation. Accordingly, subparagraph (*b*) would be more appropriately placed in article 6 *bis*, which dealt with reparation in general.

83. Article 7, subparagraphs (*c*) and (*d*), gave rise to an even more complex problem. According to the Special Rapporteur's original interpretation, the problem of excessive burden arose in two kinds of case: where the burden imposed was out of all proportion to the damage caused by the wrongful act and where it gravely imperilled the political, economic and social system of the State that committed the internationally wrongful act. In other words, it was a matter of comparing the burden imposed and the benefit obtained with respect to one and the same form of reparation, not different forms of reparation. According to that interpretation, which was perfectly admissible and in fact quite widespread, the exceptions provided for in the two subparagraphs related both to reparation and to restitution, and even somewhat more to the former than to the latter. They too therefore had a place in article 6 *bis*. The Drafting Committee had, however, now adopted a different interpretation whereby the burden imposed and the benefit obtained were compared according to the form of reparation. But, there again, the exceptions should be formulated so as to relate both to restitution in kind and to compensation and their place would therefore be in article 6 *bis*. If the Commission accepted that analysis, he was prepared to submit an amendment to article 6 *bis* with a view to incorporating subparagraphs (*b*) to (*d*) of article 7 therein.

84. Mr. MAHIOU said that Mr. Vereshchetin's comments elaborated on those made by Mr. Sreenivasa Rao on the question of full reparation. There were indeed exceptions that were not peculiar to restitution in kind. If the Commission agreed that an attempt should be made to clarify the wording of the articles, it would be advis-

able for it to examine the proposals made for that purpose.

85. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, as he—and the Drafting Committee, too—had seen matters at the outset, the intent of the subparagraphs in question had merely been to compare restitution in kind and compensation. None of those provisions really affected the general problem of reparation or the particular problem of compensation. Article 6 *bis*, subparagraph 2 (*b*), for example, covered the case where a State would be satisfied to accept a form of reparation instead of demanding that the right of a part of its population to self-determination should be observed. The problem of full reparation raised by Mr. Mahiou was an entirely different matter, in which connection it should be noted that article 8 (Compensation), for example, spoke of compensation, not of full compensation. It was therefore difficult to see how compensation, within the meaning of paragraph 1 of that article, could pose a serious threat to the political independence and economic stability of a State. In his view, article 7 should therefore stand and its provisions should not be slanted towards either the general (art. 6 *bis*) or the particular (art. 8).

The meeting rose at 1 p.m.

2315th MEETING

Thursday, 1 July 1993, at 10.10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, 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 (*concluded*)

1. Mr. ARANGIO-RUIZ (Special Rapporteur) said that chapter II, section A, of the fifth report (A/CN.4/453 and Add.1-3) could be considered as a historical survey of the question of the consequences of international crimes of States, summarizing the discussions which had taken place in 1976 in the Commission[2] and in the Sixth Committee of the General Assembly, as well as the relevant literature, which was not always readily available to the Commission members. Section A was also essential because the 1976 debates and that doctrine were the starting points for identifying the issues discussed in chapter II, sections B and C.

2. According to article 19 of part 1 of the draft,[3] crimes consisted of serious breaches of *erga omnes* obligations designed to safeguard the fundamental interests of the international community as a whole. That did not imply, however, that all breaches of *erga omnes* obligations were to be considered as crimes. The basic problem was, therefore, to assess to what extent the fact that the breach seriously prejudiced an interest common to all States affected the complex responsibility relationship which arose even in the presence of "ordinary" *erga omnes* breaches.

3. The best approach was to distinguish between the objective and subjective aspects of the issue. From an objective viewpoint, the question was whether and in what way the severity of the breaches in question aggravated the content and reduced the limits of the consequences—substantive and instrumental—that characterized an "ordinary" *erga omnes* breach, namely a delict. From a subjective viewpoint, the question was whether or not the fundamental importance of the rule breached gave rise to any changes in the otherwise inorganic and not "institutionally" coordinated multilateral relations that normally arose in the presence of an ordinary breach of an *erga omnes* obligation under general law, either between the wrongdoing State and all other States or among the multiplicity of injured States themselves.

4. He would deal first with the substantive consequences of crimes, namely cessation and reparation. With regard to cessation, it did not seem that crimes presented any special character in comparison with "ordinary" wrongful acts, whether or not *erga omnes*. That was understandable, considering that, first, the obligation of cessation did not allow for a "qualitative" aggravation, attenuation or modification, and secondly, what was involved, even in the case of delicts, was an obligation incumbent on the State responsible even in the absence of any demand on the part of the injured State or States; chapter II, section B, of the fifth report presented some examples from the relevant State practice. An extended analysis of practice in that area would be appropriate at a later stage, after comments had been heard from the Commission and others.

5. The issue of reparation *lato sensu*, which encompassed *restitutio*, compensation, satisfaction and guarantees of non-repetition, was more complex than the issue of cessation. From an objective standpoint, some of the forms of reparation, especially *restitutio* and satisfaction, were subject in the case of delicts to certain limits. Thus it had to be determined whether, in consequence of a crime, such limits were subject to derogation and, if so, to what extent; in other words, whether, in the case of crimes, the "substantive" obligations were more bur-

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

[2] See *Yearbook... 1976*, vol. II (Part Two), pp. 69-122.

[3] 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.*