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Summary record of the 1956th meeting

Topic:
State responsibility

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

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

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

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

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

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

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

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

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

The meeting rose at 1.05 p.m.

1956th MEETING

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

Chairman: Mr. Doudou THIAM

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

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

[Agenda item 2]

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

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

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

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

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

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

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

1. Mr. RAZAFINDRALAMBO said that part 3 of the draft established machinery that would apply to cases in which no other procedure for the peaceful settlement of disputes had been provided for by the parties. It thus contained rules of a residual nature that were simply intended to make up for the absence in conventions concluded by the States concerned of provisions on the settlement of disputes. Hence it should meet the concerns of members of the Commission who had questioned whether the Special Rapporteur had not implicitly ruled out the application, in matters pertaining to State responsibility, of the settlement procedures contained in various international instruments in force.

2. There was a very close link between parts 2 and 3 of the draft and the Special Rapporteur himself (1952nd meeting) had drawn attention to the interrelationship between the substantive and the procedural provisions. Since part 2 dealt with the legal consequences of an internationally wrongful act, it was logical to infer that the three parts of the draft formed a coherent whole. That point had not been brought out clearly in the draft articles of part 3, for none of them referred expressly to any provision of part 1, but it must be borne in mind when the time came to weigh up the facts in a dispute submitted to the settlement procedure.

3. On the basis of the 1969 Vienna Convention on the Law of Treaties, the draft articles attached importance to compulsory conciliation and assigned a major role to judicial settlement. Although States might unanimously agree to submit to compulsory conciliation, the same was not true of the compulsory and exclusive judicial settlement procedure advocated by the Special Rapporteur, particularly since he appeared to rule out arbitration, which had during the elaboration of the Convention on the Law of Treaties none the less been regarded as a reasonable alternative to the compulsory jurisdiction of the ICJ.

4. The importance attached to the ICJ could well give rise to serious problems and prevent many States from ratifying the future convention. Even though the Court's membership, decisions and procedures had changed considerably in the past 10 years, States which had recently gained independence had not forgotten the Court's recantation in the *South West Africa* case. However, some of the Court's recent decisions showed that it was making genuine efforts to promote the progressive development of international law. Nevertheless, precisely because of the provisions on the compulsory jurisdiction of the ICJ contained in the 1969 Vienna Convention, the developing countries had not so far acceded to that Convention in large numbers. Therefore, many States were unlikely to be very enthusiastic about giving the Court exclusive jurisdiction to settle disputes concerning *jus cogens* and international crimes.

5. As to the notifications stipulated in draft articles 1 and 2 of part 3, the second notification was necessary only if the alleged injured State wanted to take measures by way of reciprocity under article 8 of part 2 or measures by way of reprisal under article 9 of part 2. Although the second notification might be desirable before measures of reprisal were taken, since it would allow some time for further thought, it was not so necessary in the case of a countermeasure by way of reciprocity, which must, in order to be effective, be taken forthwith and naturally had to be proportional to the wrongful act committed by the author State. He shared Mr. Ogiso's opinion (1954th meeting) on all those points.

6. With regard to draft article 1, Mr. Reuter (1953rd meeting) had rightly raised the question of prescription. Personally, he did not think that a State could base itself on article 1 in order to make a claim without any time restriction. The stability of international relations would be jeopardized by imprescriptibility. The criminal action provided for in the draft Code of Offences against the Peace and Security of Mankind should not be dissociated from the "civil" action provided for in the draft under consideration. "Civil" action must follow the same course as criminal action. If that analysis was correct, the problem of prescription should be dealt with in the code of offences, which should establish different periods of prescription for international crimes and for international delicts and enunciate the principle of the indivisibility of criminal action and "civil" action. He would be making some comments on the wording of articles 1 and 2 in the Drafting Committee.

7. Draft articles 3 and 4 related to the implementation of the procedure for the peaceful settlement of disputes. Unlike article 66, subparagraph (*a*), of the 1969 Vienna Convention, however, draft article 4, subparagraph (*a*), did not provide that a dispute concerning *jus cogens* could be submitted to arbitration. In that connection, the Special Rapporteur (1952nd meeting) had said that paragraph 1 of draft article 3 already allowed resort to arbitration, but that was not a satisfactory explanation. The reference in that paragraph to Article 33 of the Charter of the United Nations, which related to general means of settlement, including judicial settlement, had not prevented draft article 4 from expressly providing for the jurisdiction of the ICJ; yet article 4 said nothing about arbitration. He would be grateful for further details on that point, as well as on the absence of references in article 4, subparagraph (*b*), to article 15 of part 2, concerning aggression, and article 19 of part 1, concerning international crimes. As the Special Rapporteur himself had implied, article 19 should be mentioned in the part relating to the settlement of disputes. Again, draft article 4, subparagraph (*c*), did not refer to article 8 of part 2.

8. Draft article 5 ruled out the possibility of reservations, which was logical in view of the inseparable nature of the provisions dealing with the legal consequences of an internationally wrongful act and the settlement of disputes. Like Mr. Lacleta Muñoz (1954th meeting), he was of the opinion that a general provision on reservations could be included in the final provisions

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

of the draft if the draft was to be submitted to a conference of plenipotentiaries, in which case the Commission should leave it to the conference to decide on the matter.

9. The proposed annex differed from the annex to the 1969 Vienna Convention in that it provided that the conciliation commission would decide on its own competence and that the conciliation fees and expenses would be borne by the parties; those provisions were based on the 1982 United Nations Convention on the Law of the Sea, which, in turn, was based on regulations on conciliation and arbitration in respect of international trade law disputes. There again, the conference of plenipotentiaries would have to decide whether those innovations should be maintained.

10. Since there was, in his view, no reason not to follow the Commission's usual practice, the articles of part 3 could be referred to the Drafting Committee.

11. Mr. ROUKOUNAS said that the adoption of provisions relating to third-party settlement of disputes implied that the body which would be called upon to make a ruling would be empowered not only to establish that a wrongful act had been committed, but also to decide on reparation. It should be remembered, however, that the Commission had not planned to discuss what indications it intended to give to the third party that would deal with a claim for compensation. What weight should it attach to the damage caused by an internationally wrongful act? The absence of provisions on that question in part 1 of the draft was reflected in part 2.

12. According to the 1969 Vienna Convention on the Law of Treaties, an international judicial body to which a dispute was submitted could be requested to consider only one aspect of the dispute. Admittedly, the Commission did not know of any cases in which the relevant provisions of that Convention had been applied, but it could reasonably doubt the practical value of such a solution as far as State responsibility was concerned. At present, it was difficult to envisage any kind of prejudicial application, as was found in internal law and in some particular systems of international relations. In the case of the topic under consideration, could a dividing line be drawn between the possibility of submitting a dispute to the ICJ under article 4 of part 3 of the draft and the possibility of initiating the conciliation procedure provided for in the annex? How were the roles to be assigned?

13. During the discussion, reference had been made to the choice of means of dispute settlement. The list of means given in Article 33 of the Charter of the United Nations was not exhaustive. In choosing one of the appropriate means of settlement, however, the parties were always required to arrive at a peaceful settlement of their dispute. The main obligation in any peaceful dispute-settlement procedure was to arrive at a result, while freedom of choice referred to the means of doing so: freedom of choice was not an end in itself. If the parties could not agree on one of the means of settlement listed in Article 33 of the Charter or in any other international instrument, part 3 of the draft afforded them other options: first, to prevent the dispute from going on indefinitely, and secondly, to avoid the risks of escalation. Problems nevertheless arose with regard to the way in which the third party would proceed and with regard to the assignment of jurisdiction within a coherent system.

14. He agreed with Mr. Ogiso (1954th meeting) that further clarification was needed with regard to the content of article 6 of part 2 of the draft as referred to in draft article 1 of part 3, because article 6, paragraph 1 (*c*), contained a reservation concerning a matter that was dealt with in article 7 of part 2. The purpose of the reservation, however, was not to exclude that matter from the scope of article 6 but to allow article 7 to deal with it in detail. Consequently, the reference to article 6 of part 2 in article 1 of part 3 also applied to article 7 of part 2.

15. Again, the injured State should not be required to make several notifications. Draft article 2, paragraph 3, was based on article 65, paragraph 5, of the 1969 Vienna Convention, but in its present form it appeared to refer to a notification that had never existed. Perhaps it was simply a drafting problem, but in his opinion there should be as few notifications as possible.

16. Although article 66 of the 1969 Vienna Convention spoke of a "solution", the formula "If, under paragraph 1 of article 3, no solution ...", in draft article 4, should be improved. In the case of a solution as to substance, the proposed 12-month period would be rather short, but, in the case of a procedural solution, such a period would be too long. It was not enough to use the wording of the relevant article of the Vienna Convention.

17. Draft article 4 gave some space to international crimes, dealt with in article 19 of part 1, but subparagraph (*b*) focused on the additional rights and obligations referred to in article 14 of part 2, which applied to a number of situations and mentioned not only the rights and obligations of the directly injured State, but also those of "every other State". Should not part 3 of the draft explain exactly what was meant by the words "every other State"? It would also be helpful to know why acts of aggression had been excluded from the procedure provided for in draft article 4. In the light of article 15 of part 2, it had to be determined whether an international crime or an aggravating circumstance was the decisive element to be taken into account in deciding whether or not the question of aggression should be included in the draft.

18. Mr. BARBOZA said that, like Mr. Reuter (1953rd meeting), he noted that the draft articles did not refer to such concepts as injury, fault and diplomatic protection and that they thus reflected recent changes in the international community. Mr. Sucharitkul (1954th meeting) had painted a picture of society in the past, when foreign investors had been afforded protection with the help of coercion or even the use of force. Latin America was one of the regions that had been most affected by that problem and it had taken the Drago Doctrine, Carlos Calvo and the operation of the inter-American system to counteract the practices of the investor countries.

19. The fact that account had not been taken of the concept of injury was a good sign, for the draft articles

now focused on breaches of international obligations, not on injuries suffered by private individuals. The inclusion of some new concepts, such as that of international crimes, had none the less given rise to new problems which still had to be solved in dealing both with State responsibility and with the draft Code of Offences against the Peace and Security of Mankind.

20. In his view, part 3 of the draft was necessary, since measures of execution, which had to be subject to a minimum number of procedural rules, would make it possible to break the vicious circle of any reprisals and counter-reprisals that might be taken. The example of the 1969 Vienna Convention on the Law of Treaties showed that, in a similar situation, a solution of the same kind had been sought. An optional protocol would, however, not be appropriate because part 3 of the draft did not establish very onerous obligations for a State that intended to take one of the measures provided for, whereas the same was not true in the case of conventions accompanied by a protocol establishing that any question of interpretation or implementation would be unilaterally submitted to the jurisdiction of the ICJ. In the present instance, the aim was simply to make measures of execution subject to two procedural steps and to a conciliation procedure.

21. The measures of execution in question were measures by way of reciprocity and measures by way of reprisal, and the procedural steps consisted of two notifications. Once the notifications were made, a conciliation procedure would be set in motion in almost every case. It would simply require the parties to meet, and the conciliation commission would merely make recommendations that States were free to follow if they so wished. There was nothing compulsory about the submission of disputes to the means of settlement provided for in Article 33 of the Charter of the United Nations because, according to draft article 4, if none of those means was used within a period of 12 months, the parties could submit their dispute to conciliation, as provided for in the annex. In only two cases could a party unilaterally submit a dispute to the ICJ: in the infrequent case of reprisals consisting of the suspension of the performance of obligations imposed by a peremptory norm of international law, when the procedure would be justified by the fundamental interest of the international community in protecting the obligation violated; and in the case of a dispute concerning the rights and obligations referred to in article 14 of part 2, one that would probably never arise, but one that would be such an affront to the conscience of the international community that the submission of the dispute to the ICJ would not pose any problems.

22. None of the provisions prohibited measures by way of reciprocity or by way of reprisal once the second notification had been made, unless the States concerned had means of peaceful settlement available to them, as was to be inferred from article 10 of part 2 and the commentary thereto (A/CN.4/389, sect. I). The alleged injured State could thus take the appropriate measure and wait for the results of the procedures instituted, including the recommendations of the conciliation commission, which it would be able to follow if it so wished, while maintaining the measure taken.

23. Those provisions did not establish obligations that States would find it difficult to fulfil and they should be included in the body of the draft rather than in an optional protocol, particularly since States would encounter no obstacle to the adoption of measures by way of reciprocity or by way of reprisal. The provisions would, moreover, help to improve the current situation by regulating a hitherto entirely arbitrary matter. It might nevertheless be possible to find wording that would strike a better balance between all the interests at stake.

24. It was regrettable that the members of the Commission had always been short of time in discussing the draft articles. Indeed, as far as he was concerned, the discussion of part 2 and perhaps even of part 1 was still not complete. The Commission should try to find new working methods so that it could consider such important questions in greater depth. Fortunately, it would probably have an opportunity to revert to certain points on second reading. For the time being, however, in view of the relatively short time devoted to the consideration of parts 2 and 3 of the draft, which the Commission should be able to study in greater detail, it would be better to await the reactions of Governments in the Sixth Committee of the General Assembly before referring the draft articles of part 3 to the Drafting Committee.

25. Mr. ILLUECA said that the question of State responsibility, with its fascinating and complex political and legal implications, was of the utmost importance because it encompassed virtually all aspects of international law, whose unity was demonstrated in the draft articles, for which the Special Rapporteur deserved to be highly commended. Several members of the Commission had none the less drawn attention to problems which might call for the elaboration of further draft articles if they were to be solved. In that connection, the analysis of the difficult situations that the Commission was examining had to be borne in mind and the Commission had to agree on terminology that would be widely understood.

26. The time-limits imposed by the current budget restrictions meant that members had fewer opportunities to state their views and it was increasingly clear that the Commission had to revise its working methods in order to maintain its effectiveness and prestige. His remarks would necessarily be brief, but fortunately the views of the Latin-American and Spanish-speaking members of the Commission had already been made known to some extent.

27. With regard to the implementation of international responsibility, it was essential for the draft articles to provide for the right of the injured State to *restitutio in integrum*, in other words to re-establishment of the situation as it had existed before the wrongful act. Where that was not possible, the draft must provide for the right of the injured State to require the author State to pay not only a sum of money corresponding to the value of re-establishment of the pre-existing situation, but also a sum which would represent compensation for injury and which could in no way be regarded as being covered by *restitutio in integrum* or by the payment of a sum of money as a substitute for re-establishment of the situation.

28. Undoubtedly, the Special Rapporteur had in the draft articles enabled the Commission to benefit from the experience he had gained at the United Nations Conference on the Law of Treaties and in the course of the elaboration of the United Nations Convention on the Law of the Sea. Nevertheless, owing to the complex issues involved, the Commission would have to spend more time on revising the draft articles, co-ordinating all three parts and completing the rules for the smooth functioning of the dispute-settlement machinery, which had to be in keeping with the letter and spirit of the Charter of the United Nations.

29. It would therefore be better not to refer part 3 of the draft to the Drafting Committee at the present time. Member States should be given an opportunity to examine the draft articles and explain their views in the Sixth Committee of the General Assembly. In the mean time, the Commission's membership would be renewed and, with its new members' contributions, it would be able to complete the draft convention, which should in due course be submitted to a conference of plenipotentiaries.

30. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur, who had done an enormous amount of work in record time, had enabled the Commission to begin to see the light at the end of the tunnel it had entered when it had embarked on the topic of State responsibility.

31. As it now stood, part 3 of the draft appeared to restrict the implementation of responsibility to part 2; but part 1 also gave rise to problems concerning implementation, if only because it was necessary to establish the wrongfulness of an act and to decide whether or not there were circumstances precluding wrongfulness and whether a convention that had been violated had been valid to begin with. A State could deny that an act which it had committed was wrongful by invoking a plea of *force majeure* or self-defence, for example. He was therefore somewhat concerned that part 3 made no reference to part 1 and he would like further explanations in that regard.

32. In addition, the machinery for the settlement of disputes applied only to measures or countermeasures taken by the alleged injured State. The fact was that a dispute could arise even if no measure was taken. How would such a dispute then be settled? It was a serious problem and, in order to safeguard the rights of the injured State, every possible aspect of the dispute-settlement procedure had to be taken into account.

33. The provisions (art. 4, subparas. (*a*) and (*b*)) referring to articles 12 and 14 of part 2 gave the ICJ jurisdiction in the case of disputes relating to questions covered by those articles, which was obviously the ideal solution. Nevertheless, had the Commission resolved the problem of jurisdiction in cases of a breach of *jus cogens* and international crimes, which were not always easy to distinguish, since an international crime could be a violation of a rule of *jus cogens*? It was still an open question whether an international crime involved universal jurisdiction and the jurisdiction of an international court. According to the principle of universal jurisdiction, every State was entitled to try the perpetrator of an international crime whom it had arrested on its territory. How, in the light of that principle, could such proceedings be said to come within the jurisdiction of the ICJ? Would the forum State have to suspend the proceedings on the ground that the dispute had been submitted to the ICJ? Even if the forum State agreed to that course of action, what would happen in the ICJ?

34. All those questions should be considered in greater detail. In that connection, Mr. Razafindralambo had spoken of the principle of the indivisibility of criminal and civil action. In the entirely plausible case of a crime committed by an agent of a sending State which entailed the responsibility of that State, the latter would be able to invoke article 14 of part 2 in order to prevent its agent from being tried in the injured State and have the case brought before the ICJ.

35. To take the discussion a step further, another problem to be borne in mind was that of international liability for injurious consequences arising out of acts not prohibited by international law. The consequences of an internationally wrongful act and of activities not prohibited by international law were comparable and the procedure for the implementation of responsibility should therefore be much the same in both cases.

36. He would have no objection to the draft articles of part 3 being referred to the Drafting Committee, but thought the Special Rapporteur should let the Commission know what he intended to do in that regard. There were, however, still many unresolved questions to be discussed and the Commission would have to revert to them later.

37. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, said that to some extent it had duplicated the discussion at the previous session on his outline for part 3 of the draft (A/CN.4/389, sect. II). An appeal had now been issued for realism. No doubt the Commission had to be realistic, yet as a body of independent international lawyers assigned the task not only of codifying, but also of progressively developing international law, it should approach its work with an element of idealism. The Commission was not called upon merely to follow the remarks made in the Sixth Committee of the General Assembly and to abide by the will of States; it had to work towards the progressive development of international law and, to that end, realism should not be taken too far. In any case, Governments had the last word as to the fate of the Commission's drafts.

38. A second general remark was required in connection with the scope of the entire draft. The topic of State responsibility was only a part of a total legal system and the provisions of part 3 thus had to be limited to special problems arising from State responsibility. In any attempt to apply the provisions of part 2, it was impossible to get away from the application of the provisions of part 1. Again, in any attempt to apply the provisions of part 1, it was impossible to get away from the application of primary rules which were not found in the draft articles at all. If the interpretation and application of the primary rules were not subject to a compulsory dispute-settlement procedure, the Commission's draft

on State responsibility could not make them so. It could not bring all cases governed by international law under a compulsory dispute-settlement procedure, desirable as that might be. Hence, the scope of the articles of part 3 must be confined to a specific situation. They served to impose compulsory dispute-settlement procedures precisely for a situation in which there was a danger of escalation, in other words when countermeasures and counter-countermeasures were being taken or threatened and there was a risk of a deterioration in relations.

39. Some analogy could be drawn between that situation and the invalidity of treaties. The relations between States were, of course, based on the assumption that the treaties between them were valid and, in the event of a claim to the contrary, it was necessary to deal first with the issue of validity. The two situations were not identical, but there was some similarity with the problem of countermeasures.

40. Another analogy was to be found in the procedures laid down in the 1982 United Nations Convention on the Law of the Sea with regard to the exclusive economic zone when different States had rights in the same area of the sea. The drafters of that Convention had been well aware that the substantive provisions on the subject were liable to lead to conflict and, from the very beginning, they had established a link between the substantive provisions and the dispute-settlement procedures. Also, no reservations had been allowed regarding the dispute-settlement procedures in the 1982 Convention. All those points had formed the subject of a "package deal". It was clear that part 2 of the present draft contained provisions which could give rise to conflict, for example between the duty to perform an international obligation and the right to take action against an internationally wrongful act committed by another State.

41. Admittedly, the 1982 Convention did provide for exceptions to dispute-settlement procedures entailing binding decisions, but in the instances covered by those exceptions arrangements were made for compulsory conciliation instead. The case was not at all comparable to that of the draft articles of part 3, where the jurisdiction of the ICJ related only to a particular legal question. There could be no objection to making a proposal for compulsory settlement procedures on the basis of the freedom of choice open to States in regard to modes of settlement. It was in no sense contrary to the principle of sovereignty for a State to give its consent to such dispute-settlement procedures, and indeed to give it in advance. That point was recognized in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[5] In that Declaration, the second principle, which provided that States must settle their international disputes by peaceful means, listed all the means mentioned in Article 33, paragraph 1, of the Charter and spoke of "... judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice". Application of part 2 of the draft was not possible without part 1 and the primary rules involved. It was for that reason that the rules in part 3 were residual in character, except for those which referred to *jus cogens*, international crimes and the application of the Charter.

42. Another general point made in the course of the discussion concerned the arrangement of the draft articles. Clearly, the various provisions were interrelated and a variety of arrangements was possible. Part 3 was in a sense part of part 2 and chapter V of part 1 was in a sense part of part 2. The question was primarily one of drafting and possibly more a matter to be taken up in second reading, when the Commission would be able to set out the articles in logical order.

43. Reference had also been made to the question of statutory limitation, or "prescription", in other words loss of the right to invoke the new legal relationship established by the rules of international law as a consequence of the internationally wrongful act. In his preliminary report on the content, forms and degrees of international responsibility,[6] he had suggested that the Commission should discuss that question and had put forward the idea of including in part 2 at most an article along the lines of article 45 of the 1969 Vienna Convention on the Law of Treaties. The idea had not met with any response at the time, but the matter could well be examined at a later stage. Indeed, in his preliminary report, he had indicated that the point should be covered in part 3.[7] Another possible solution was to deal with the question as a matter of estoppel in article 9 or perhaps article 8 of part 2. Perhaps a decision could be taken by the Drafting Committee, which already had before it articles 6 to 16 of part 2.[8]

44. As to the relationship between the various procedures, the ideal situation was, of course, that everything should be dealt with in one comprehensive procedure: the facts of the case, the legal issues, including the question of whether or not a breach had been committed, and the consequences of a breach. Such a "wholesale" approach, however, was not possible with regard to State responsibility. A separation of procedures was therefore proposed in part 3, draft article 4 of which had been taken more or less from the Vienna Convention on the Law of Treaties. Under article 4, subparagraph (*a*), the compulsory jurisdiction of the ICJ applied to the legal question of the existence of a rule of *jus cogens*. It would be for the Court to decide whether the alleged rule of *jus cogens* constituted, in the words of article 53 of the Vienna Convention, "a norm accepted and recognized by the international community of States as a whole" as a rule of *jus cogens*. In view of the novel character of *jus cogens*, only a world-wide authority like the ICJ could be assigned the task of determining the existence of such a rule. The Court's role was thus a limited one under article 4, subparagraph (*a*). The position was similar with regard to international crimes, in respect of which article 4, subparagraph (*b*), provided for the jurisdiction of the ICJ; but there again the Court's jurisdiction was of a limited character.

[5] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[6] *Yearbook ... 1980*, vol. II (Part One), p. 129, document A/CN.4/330, para. 101.

[7] *Ibid.*

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

45. Another general point made during the discussion concerned steps taken prior to the procedures established in part 3. State A might, for instance, warn State B that, if it persisted in a certain line of conduct, it would be committing a breach of an international obligation, whereupon State B might inform State A that, as nothing had actually happened yet, State A was interfering in its internal affairs. There were, however, diplomatic channels through which action could be taken to deal with such matters and prevent the situation from deteriorating. He did not think it necessary to spell that out in the draft: in the first place, to do so might mean entering the field of the application of primary rules, and secondly, such diplomatic exchanges would not have any specific legal effect.

46. It had rightly been pointed out that there might be some overlap between, on the one hand, the topic of State responsibility, and, on the other hand, the draft Code of Offences against the Peace and Security of Mankind and the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The link between the latter topic and the topic of the law of the non-navigational uses of international watercourses was, however, infinitely closer than that between the draft code of offences and the present draft articles. In that connection, members would note that the reference in article 4 of part 3 to the ICJ was solely in relation to the consequences of an international crime in so far as the relationship between States was concerned. Also, the article referred to *jus cogens* solely within the context of article 12, subparagraph (*b*), of part 2, which meant that only when one State considered that another had, by a measure of reciprocity or reprisal, overstepped the bounds set by the rules of *jus cogens* could the procedure before the ICJ be engaged. Although there was a possible link between the topics in question, nothing could be done to avoid an accumulation of procedures until it was known how those topics evolved.

47. It had also been noted that he had not followed the pattern of the Vienna Convention on the Law of Treaties exactly, for the possibility of referring disputes concerning *jus cogens* to arbitration was excluded under the terms of the draft. As he had explained in an earlier report, the reason was that, given its bilateral and *ad hoc* character, arbitration was not a very suitable procedure for *jus cogens* cases which involved *erga omnes* obligations. The phrase "unless the parties by common consent agree to submit the dispute to arbitration", in article 66, subparagraph (*a*), of the Vienna Convention, was to his mind purely a matter of verbal compromise. Under draft article 3, paragraph 1, of part 3, the parties were of course free to make such a submission. It was, however, perhaps unnecessary to remind them of the fact, unless the intention was to pay lip-service to the idea of freedom of the parties.

48. It had been suggested that consideration should be given to the relationship between part 3 and article 14, paragraph 3, of part 2, concerning possible procedures in cases of international crimes. In his view, the question whether a State could legitimately go further than the countermeasures provided for in part 2 of the draft on the ground that the wrongful act involved an international crime was something that could be dealt with by the ICJ. In such a case, the Court would then also consider whether the State in question had taken due account of the provisions of article 14, paragraph 3.

49. Draft articles 1, 3 and 4 of part 3 referred only to certain articles of part 2 not because he considered that other articles of part 2 were irrelevant but because he had not thought it necessary to enumerate them all. Similarly, there was no need to make express mention of article 19 of part 1 in article 4, subparagraph (*b*), which already contained an explicit reference to article 14 of part 2 and thus an implicit reference to article 19.

50. As to drafting matters, he had no strong feelings about the words "wishes to", in draft article 1, which were simply meant to signify intention. The words "another State", which appeared in draft article 2, paragraph 3, and had been mentioned by Mr. Reuter (1953rd meeting), had been inserted to cater for situations that might arise under the terms of article 11 of part 2 and in which a third State could become involved in a countermeasure. Sir Ian Sinclair (*ibid.*) had suggested that the residual character of the rules in articles 1 to 4 should be spelt out more clearly in the articles themselves and that point was perhaps worth examining in the Drafting Committee.

51. The notifications provided for in articles 1 and 2 had found both supporters and critics. The first notification, under article 1, was useful in the sense that the State which had allegedly committed an internationally wrongful act should be asked specifically either to desist, to make reparation, or to take measures to prevent a repetition of the act. The reference to "reasons therefor" indicated that the notification should state the facts and the rules involved. Such a notification would give the alleged author State—which might not even be aware of the situation—at least some time to look into the matter and decide what its reaction should be. The second notification, under article 2, was of an entirely different nature; obviously, the alleged author State was entitled to be notified of any countermeasures the other State intended to take. The two notifications could also be made together, but only in cases of special urgency. To his mind, a simple protest note reserving all rights was not a notification at all.

52. The term "special urgency", in article 2, paragraph 1, had also been the subject of criticism. It was extremely difficult to define the term, but an example was afforded by article 10 of part 2, since unilateral interim measures of protection taken by a State were usually very urgent. Furthermore, under the procedure envisaged, it would be possible to control the application of article 2 and to ensure that a State was not unduly hasty in resorting to measures of reciprocity or reprisal.

53. Mr. Calero Rodrigues (*ibid.*) had correctly pointed out that the obligations under Article 33 of the Charter of the United Nations existed before any dispute arose; it was certainly not the intention in draft article 3, paragraph 1, to allow an *a contrario* reasoning whereby, if no countermeasure was intended, there was no need to settle the dispute. Whether or not that should be spelt out expressly was again a question of drafting.

54. A number of members took the view that the 12-month period before which the procedures laid down in draft article 4 would take effect was too long. Nevertheless, the effect of article 4, read in conjunction with article 2, paragraph 1, was that, even if countermeasures were taken, the possibilities for a peaceful solution to the dispute as provided for in Article 33 of the Charter should be explored. That, of course, would require a considerable amount of time and, in his view, article 4 was sufficiently flexible to permit a practical solution. The compulsory jurisdiction of the ICJ, as provided for in article 4, subparagraphs (*a*) and (*b*), had also been criticized, but the Court would exercise jurisdiction over a very limited field. It was also important to remember that *jus cogens* was an important element in all treaty relations; as such it was relevant to the international community as a whole and should therefore be dealt with by the judicial organ of that community.

55. As Mr. Reuter had noted, the annex to part 3 differed somewhat from the annex to the Vienna Convention on the Law of Treaties. In the first place, paragraphs 3 and 4 of the former did not figure in the annex to the Vienna Convention. It was not, however, a substantive point and could be discussed in the Drafting Committee. The second difference lay in the cost of the conciliation proceedings. It was clear that the parties, not the United Nations, would have to meet those costs. That point, too, could be examined later.

56. Mr. Sucharitkul (1954th meeting) had referred to article 12 of part 2, which dealt with *jus cogens* and the position in regard to diplomatic immunities, and had asked whether other similar rules existed. For his own part, he had been unable to find any, but possibly other instances might be found and made known to the Drafting Committee. Mr. Sucharitkul had also pointed out that Article 33 of the Charter mentioned resort to regional agencies or arrangements, such as ASEAN, as a means of settling a dispute. That point was covered by the reference in draft article 3, paragraph 1, to Article 33 of the Charter.

57. Mr. Ogiso (*ibid.*) would like part 3 to be far more comprehensive; but it was not possible to establish a system for compulsory settlement of disputes that would cover each and every case. In particular, he had understood Mr. Ogiso to say in connection with draft article 5 that, in the event of reprisals, the dispute must always be submitted to conciliation. There again, it was extremely doubtful that States would be willing to accept such an idea.

58. He believed he had covered most of the main issues raised during the discussion and apologized for not having been able to deal with the more detailed points, owing to lack of time. The Commission might wish, as an expression of its overall agreement with the approach adopted, to refer draft articles 1 to 5 of part 3 to the Drafting Committee, although there would not, of course, be time for it to deal with them at the present session.

59. After an exchange of views in which Mr. FRANCIS, Mr. BARBOZA, Mr. DÍAZ GONZÁLEZ, Sir Ian SINCLAIR and Mr. JACOVIDES took part, the CHAIRMAN suggested that the Commission should refer part 3 of the draft articles on State responsibility to the Drafting Committee.

It was so agreed.

The meeting rose at 1.10 p.m.

1957th MEETING

Monday, 2 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

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

Draft Code of Offences against the Peace and Security of Mankind[1] (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his fourth report (A/CN.4/398) containing a set of draft articles which read:

CHAPTER I. INTRODUCTION

PART 1. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes under international law defined in the present Code constitute offences against the peace and security of mankind.

Article 2. Characterization

The characterization of an act as an offence against the peace and security of mankind, under international law, is independent of the internal order. The fact that an act or omission is or is not prosecuted under internal law does not affect this characterization.

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[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

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

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