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Summary record of the 2308th meeting

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

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

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

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

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

The meeting rose at 12.25 p.m.

2308th MEETING

Wednesday, 16 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

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

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

[16] See footnote 4 above.

[17] See footnote 7 above.

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

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA said that basically the fifth report on State responsibility (A/CN.4/453 and Add.1-3) was devoted exclusively to the question of the lawfulness of countermeasures or, in other words, the reasons for conditions of implementation and modalities of operation of the regime established by article 12, which had been referred to the Drafting Committee in 1992.[2] That showed the importance of the topic and the originality of the report, which described not only the arguments of the discussion on the complementarity of the general regime of countermeasures and a special system for the settlement of disputes, but also the specific recommendations and proposals put forward by the Special Rapporteur.

2. The proposed system reflected the boldness and ingenuity of its author and, with regard to substance, namely, the formula to be devised in order to put an end to the legal void resulting from the mutual violation of the law by two States, it was not unrealistic, whatever might have been said. By putting a premium on impartiality through the impartial intervention of a third party, it skilfully combined the advantages of political settlement and judicial settlement. Unfortunately, the concern to respect sovereignty was not always to be found in the structure proposed by the Special Rapporteur, but the structure's effectiveness depended on it because, in the event of the breach of the legal order by a wrongful act, the problem of returning to normal was above all one of means. It must therefore be asked whether the theoretical formula proposed by the Special Rapporteur was feasible. When the Commission had considered the reports by Georges Scelle on arbitration, it had criticized him for devising a system which was *de lege ferenda*.[3] Was the "Arangio-Ruiz system" open to the same criticism?

3. At a time when a new international order appeared to be taking shape against a background of the right of interference, the settlement of disputes continued to be subject to the sovereignty of States, of which countermeasures were precisely the secular arm. However, the practice of interference—meaning less sovereignty and more solidarity—was international law in the making, but it was not being criticized as being *de lege ferenda.* Accordingly, why would written rules limiting the sovereignty of States in their propensity to manipulate international legality be regarded as *de lege ferenda*? The risks of intransigence pointed out in the fifth report contained the seeds of the risk of war and the Commission, whose duty it was to wage war on war by means of the law, should not hesitate to make States face up to their responsibilities. Whatever criticisms might be levelled against the Special Rapporteur, it had to be recognized that his system was in conformity with the spirit of the times. Drafting work still had to be done and some points had to be clarified.

4. The report raised a substantive problem relating to the operation and effectiveness of the proposed system. A countermeasure in itself did not give rise to a dispute, since it was by definition the exercise of a right: the dispute which existed was, according to article 1 proposed by the Special Rapporteur, the dispute which has arisen following the adoption by the allegedly injured State of any countermeasures. In that case, how could the conciliation commission be entrusted with the task of first determining the existence of the dispute—or, in other words, be empowered to say, if need be, that there was no dispute at all—when the injured State had already resorted to countermeasures? That was the substantive problem, the problem of effectiveness, and it related to the triggering of the proposed system. The characterization of the dispute depended mainly on whether the act in question belonged to a particular legal category. In the first stage of the system, it was thus the parties' difference of opinion about the legal characterization of the factual situation that gave rise to the dispute. The characterization by the conciliation commission could be made only after the dispute had arisen following the conflict of characterizations between the States concerned. In other words, it was States that created the dispute, not the conciliation commission. That misunderstanding had to be dispelled.

5. Turning to the proposed provisions,[4] article 2 also gave rise to a substantive problem as a result of the fact that conciliation was nothing more than a method of political settlement. The conciliator was not a judge. He proposed and States, which were sovereign because they were the original subjects of international law, disposed. The conciliator therefore had to convince without being able to impose anything. That was the price to be paid for the effectiveness of the system. The word "order" should therefore be replaced by the word "propose" in article 2, paragraph 1 (*b*), and the words that followed the words "settlement of the dispute" in paragraph 1 (*a*) should be deleted.

6. Article 3 should also be brought more into line with an orthodox approach to arbitration in order to forestall the objections that were bound to be raised in the name of national sovereignty. The question did not, moreover, appear to have been given enough attention, as shown by the contradiction between the establishment of an arbitral tribunal "without special agreement" (art. 3) and the existence of a "special agreement determining the subject of the dispute and the details of procedure" (annex, art. 3, para. 6); that contradiction was all the more regrettable in that the system made provision for possible recourse to ICJ against an arbitral award vitiated by an abuse of power or by a procedural defect.

7. With regard to the role of ICJ, he recognized the need to reconcile effectiveness with free choice of procedures and to give effect to the distinction between crimes and offences and considered that, since the con-

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

[2] 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.

[3] See *Yearbook... 1953*, vol. II, pp. 201-202, para. 15.

[4] See 2305th meeting, para. 25.

cept of abuse of power was subject to interpretation in the present state of the text, the jurisdiction of ICJ should be more limited. Moreover, bearing in mind the slowness of proceedings in ICJ, its intervention might have serious consequences for the interests at stake, especially those of the injured State.

8. In conclusion, he said that the bases of the "Arangio-Ruiz system" were sound, but the proposed structure was still incomplete and the Commission should therefore take the necessary time to build it on the basis of the materials which it had assembled.

9. Mr. KABATSI pointed out that, while some found the fifth report somewhat timid, others saw in it the makings of a revolution or, in other words, a description of the ideal rather than what was possible. The Special Rapporteur had clearly stated that the ideal situation would be one in which no State would be authorized legally to take the law into its own hands and in which, in the event of a dispute, the injured State, or rather the allegedly injured State, would request a third party to settle the dispute, while reserving the right to resort to countermeasures, but only for the purpose of leading the wrongdoing State back to the path of legality. Many States—and many past and present members of the Commission—had long been advocating making that ideal a reality and yet, in the 40 years during which the Commission had been considering the question, it had not made any progress. The reason was simple: there were also many States—and many members of the Commission—who preferred that States should remain free to take whatever action they wished when they considered that a unilateral wrongful act had been committed and that procedures for the settlement of disputes should be resorted to only at a later stage if the injured State considered that to be in its interest. There could be no better proof that legal techniques were still in the first stages of their development and that the international legal order was still inadequate. It was not that the dangers of the situation were not clearly understood. Everyone knew that unilateral measures and countermeasures were counter-productive because they encouraged the intransigence of the parties and the escalation of violence, ultimately endangering international peace and security. Quite often, that situation was envisaged only as between strong and weak States, but it could be even more dangerous when the two parties were equal or almost equal in strength. However, as the report clearly showed, the advocates of unilateral remedies, as opposed to the pacific settlement of disputes before resort to countermeasures, had apparently won the day.

10. The report dealt only with a dispute settlement regime that attempted to correct or to ameliorate the negative aspects of what it called the unilateral reaction system. That was the purpose of the three-step dispute settlement system—conciliation, arbitration and judicial settlement—which had been proposed by the Special Rapporteur and did not provide that special conditions would be imposed on the States concerned and, in particular, the injured State, requiring it to refrain from any countermeasure before the exhaustion of available dispute settlement procedures or even those established by the future instrument on State responsibility. Article 12, paragraph 1 (*a*), as originally proposed by the Special Rapporteur[5] would have imposed an obligation of that kind on the injured State, but, as the recent trend in the Drafting Committee had been showing, that idea had had to be abandoned, at least for the time being.

11. He therefore did not believe that much progress could be made on the basis of the fifth report. That was not because the Special Rapporteur lacked ideas on ways of achieving a breakthrough in the development of international law. He had even proposed the theoretically ideal solution, which was to establish the principle that countermeasures were prohibited except in the event of a binding third-party pronouncement, and had said that, if the Commission so wished, he would be prepared to submit the necessary draft articles. Naturally, however, and notwithstanding the trends which he pointed out, the Special Rapporteur indicated that he was all too aware of the Commission's general reluctance to consider bolder provisions in the area of dispute settlement in previous drafts, but stated that the Commission should not miss the opportunity to make a significant contribution to the development of the law of dispute settlement, particularly during the United Nations Decade of International Law.[6]

12. In conclusion, he agreed with the opinion expressed in the last paragraph of chapter I, section E, of the report. He even believed that the time had come for international lawyers to distance themselves from their Governments in order to say what was right and fair, rather than what was acceptable. He thanked the Special Rapporteur for his proposals, which although not revolutionary, were nevertheless bold because of the prospects they held out.

13. Mr. CALERO RODRIGUES expressed his thanks to the Special Rapporteur for his fifth report, which offered much food for thought and would, as the debate had shown, be of great assistance to the Commission in its study of the question of the settlement of disputes.

14. While the Commission had often hesitated to include dispute settlement provisions in its draft articles, it seemed to have had no difficulty in concluding that the draft articles on State responsibility should contain such provisions.

15. In contrast to the usual reasons generally given for not including such provisions, there was one very specific one which led to the opposite conclusion. After defining an internationally wrongful act and its substantive legal consequences—cessation, reparation, guarantees of non-repetition—the draft articles on State responsibility recognized the right of the State which considered itself injured by what it regarded as an internationally wrongful act not to comply with one or more of its obligations towards the State it considered as the wrongdoer or, in other words, to apply countermeasures. However, if it was later determined that the assessment of the situation was wrong, the countermeasures themselves would turn out to be an internationally wrongful act and would trigger the responsibility of the State which had applied them; there was thus an obvious risk of escalation. A solution would have to be found at some stage, but preferably as soon as possible, in order to avoid the perpetu-

[5] See footnote 2 above.

[6] Proclaimed by the General Assembly in its resolution 44/23.

ation of a system of countermeasures and counter-countermeasures and, if that solution was not arrived at by agreement between the States concerned, it would have to be sought through a third-party decision.

16. Moreover, it seemed to be the common view that countermeasures were an ineffective means of solving the problem because they put the injured State, at least temporarily, in the position of being both judge and party, maintaining the application of international law at a primitive stage that had long disappeared from organized systems of national law. Also, countermeasures resulted in the accentuation of inequality among States, in violation of the basic principle that States, like men, were all equal before the law.

17. As an example of the injustice inherent in the system of countermeasures, he would take the case mentioned by Mr. Fomba (2305th meeting). State A expelled a number of nationals of State B, in contravention, according to State B, of a treaty in force between the two States. State B, a weak State, protested, alleging the illegality of the act. State A maintained its position, insisting on the legality of its action. The treaty in question provided only for negotiation as a means of settling disputes. The only recourse left to State B was to apply countermeasures, for instance, by ordering the expulsion of the same number of nationals of State A. State A might then consider that such countermeasures were not lawful and decide to apply counter-countermeasures. The escalation could only further harm State B so that it would be entirely unprotected, perhaps until such time as the aggravation of the dispute led to some more effective means of settlement than that provided for in the treaty, or relations between the two States might suffer to the detriment of the weaker State, namely, State B, which, being unable to resort to countermeasures, would have to give in. One day, perhaps, it might be vindicated. In the meantime, it would be hurt in its pride and its interests simply because it was weak and countermeasures always operated in favour of the strong. The injustice in such a case, as in many others, would be eliminated if an effective system of settlement were applied from the very beginning in disputes involving the international responsibility of States.

18. One central question in matters of responsibility was precisely the relationship to be established between the right to apply countermeasures and the obligation to submit disputes to a system of peaceful settlement. Since the Commission had decided to maintain the resort to countermeasures because it wished, having regard to existing international law, to remain in the realm of what was possible, it should at least give countermeasures a moral content (*moraliser les contremesures*) and, to that end, should, as the Special Rapporteur stated, "make the lawfulness of any resort to countermeasures ... conditional upon the existence of the said, binding, third-party pronouncement". That would not, as had been said, cause an upheaval in international law, but, rather, in the words of the Special Rapporteur, a breakthrough—a modest one, in his own view—in the development of international law and justice and equality would surely be better safeguarded.

19. The Special Rapporteur was not sure that the Commission was ready to accept that concept, but he said that he was ready to submit draft articles along those lines if the Commission so wished. He himself was very much in favour of it and he trusted that the Commission would follow that line.

20. The Special Rapporteur suggested a three-tiered system for the settlement of disputes—a well-conceived though rather conventional scheme—which started with conciliation and moved on, if necessary, to arbitration and then, again if necessary, to judicial settlement. That system might be satisfactory in the case of disputes relating to the application or interpretation of the articles of the future instrument. It would be less so, however, particularly in view of the delays involved, in the case of disputes involving countermeasures which would then be allowed to continue for a long time without any external control. The Special Rapporteur was aware of the problem and had tried to solve it by grafting on to the draft articles on conciliation[7] a provision entitling the conciliation commission to order, where appropriate, the cessation of countermeasures and provisional measures of protection. In so doing, he had of course attributed to the conciliation commission powers usually reserved for arbitral or judicial bodies. It was true that an impartial determination of the lawfulness of countermeasures was necessary and should come at an early stage in the dispute settlement procedure. While he was not as opposed as some to the granting of such powers to the conciliation commission, he wondered whether that departure from traditional rules was indispensable. One could, for instance, conceive of the question of the legality of countermeasures being submitted, from the outset, to arbitration. Admittedly, that would do away with the conciliation stage, which might be regarded as a very useful first step on the road to binding third-party procedures.

21. The matter could perhaps be solved by separating the determination of the lawfulness of countermeasures from the settlement of disputes concerning the application or interpretation of the provisions of the future instrument. As he saw it, such a separation would have a dual advantage. On the one hand, there would be an early and impartial determination of the admissibility of the countermeasures, something that would be to the benefit both of the wrongdoing State, which might be suffering the effects of unjustified countermeasures, and of the injured State, which would thus have the assurance of not being penalized later for having acted *ultra vires*. On the other hand, recourse to procedures for the settlement of disputes concerning the application or interpretation of the articles of the future instrument would be enlarged and would not be made dependent—as was the case under article 1 as proposed by the Special Rapporteur—on the application of countermeasures. Intentionally or not, the whole system proposed was triggered if a dispute had arisen following the adoption by the allegedly injured State of any countermeasures against the allegedly law-breaking State (art. 1). If no countermeasures were applied, the provisions on the settlement of disputes could not be invoked even in the case of a dispute concerning the application or interpretation of the future instrument.

22. Matters would be easier to handle, in his view, if the same provisions did not deal, in the same way, with

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

two different questions, namely, the need for a general system for the settlement of disputes arising out of the application or interpretation of the articles of the future instrument and the need for specific provisions on the settlement of disputes concerning the legitimacy of countermeasures. In the case of the first kind of dispute, it would suffice if a few changes were made to the system proposed by the Special Rapporteur, in particular with a view to guaranteeing greater freedom of choice, though he doubted whether such a broad application of binding third-party procedures was feasible at that stage. So far as the second kind of dispute was concerned, a system along the lines of arbitration could be envisaged. Such provisions should take full account of the fact that a solution to the dispute must be secured without delay. The choice of arbitrators should be simplified, the installation of the arbitral tribunal should be expedited and its rules should be as simple as possible to allow for a speedy conclusion of the task. That task would consist exclusively of determining whether the countermeasures were lawful and whether or not they should cease. Only by express agreement of the parties would the tribunal be empowered to go any further. He even thought that, instead of referring to an arbitral tribunal and to arbitration, just to stay within the framework of existing procedures, it would be preferable simply to speak of a "commission" or a "countermeasures commission". That commission could also be authorized to try to bring the parties to a mutually satisfactory compromise solution before exercising its power to deliver a binding decision. In fact, it could embody elements of arbitration, mediation and, of course, fact-finding. It should not be too difficult to draw up provisions to that effect and he was confident that the Special Rapporteur would be able to do so.

23. Many references had been made to the need to strike a balance between what was desirable and what was possible, as also to the need not to propose provisions that States would not accept. There was, however, no guarantee whatsoever that States would accept the articles the Commission produced and, unfortunately, it was States, not the Commission, that made international law. In the past, the Commission had prepared articles tailored to what it supposed to be the wish of States, only for the General Assembly to put them aside, even when a majority of the States represented there were not opposed to those articles. He, like other members, was firmly convinced that the Commission had a responsibility of its own and that it could contribute to the progressive development of international law only if it acted, particularly in the area of State responsibility, with that rational audacity which Mr. Mahiou had mentioned earlier.

24. Mr. YANKOV said that, before examining in detail the proposed draft articles on conciliation and arbitration, he had two general remarks to make on the system for the settlement of disputes envisaged by the Special Rapporteur. In the first place, he noted that, apart from some considerations of a general nature in favour of a third-party settlement procedure, the Special Rapporteur placed the emphasis above all on the need for a binding settlement procedure as a counterweight to possible countermeasures and to minimize the negative aspects of unilateral measures. The deterrent, and perhaps preventive, effect which the establishment of a dispute settlement system would, of course, have on the ill-considered adoption of countermeasures was undeniable and the Special Rapporteur's fifth report provided convincing arguments to that effect. But, as the Special Rapporteur himself admitted, effective third-party settlement procedures should be envisaged in part 3 of the draft. Since part 3 was not confined to countermeasures alone, there was the problem of the scope of the dispute settlement system, which, logically, should apply to all the issues dealt with in part 3. As Mr. Bennouna had observed (2307th meeting), the Special Rapporteur might have thought that, in the case of many of those issues, reference could be had to established practice. At all events, it seemed that, at the current stage, he had considered it preferable to concentrate his efforts on the role of third-party dispute settlement in the case of unilateral action. That was apparent from his report, in which he stated that the disputes that would be covered by that procedure were those legal disputes arising as a consequence of countermeasures or counter-reprisals resorted to by parties in an international responsibility relationship.

25. Having regard to the numerous general treaties on the settlement of disputes which were not applied and which were ineffective, the Special Rapporteur was not to be reproached on that score; it should even be recognized that it would be more appropriate to engage in a substantial progressive development of dispute settlement procedures by providing for a more effective arbitration clause. But international developments and the increasing number of international treaties and other instruments which recognized the practical significance of third-party dispute settlement provided favourable grounds for the progressive development of international law in that field. Of course, expectations should not be exaggerated. The end of the cold war did not signify an end to conflicts between States; and environmental, religious and ethnic problems were the source of even more complex discord. The aim was not, of course, to produce texts that would go down in the history of the work of the Commission without ever being put into effect.

26. His second general remark concerned the question of whether the dispute settlement procedures in the case of countermeasures should be brought into operation before or after the adoption of countermeasures. With all due respect, he would have liked the Special Rapporteur to ask himself whether there were not areas in which recourse to binding procedures for the settlement of disputes before the adoption of countermeasures would be useful and conceivable.

27. Turning to the draft articles,[8] he said that he did not altogether agree with the Special Rapporteur when he stated in respect of conciliation, that the non-binding character of the outcome of conciliation made that procedure inadequate for the purpose of correcting the negative aspects of unilateral countermeasures. Everything depended on what was expected of conciliation. It had been generally established—and reference could be had in that connection to the Handbook on the Peaceful

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

Settlement of Disputes between States[9]—that the functions of conciliation were to elucidate the facts in dispute and to bring the parties to an agreement by suggesting to them mutually acceptable solutions.

28. In his view, an attempt should not be made to reform the institution of conciliation by assigning it functions that were more appropriate for arbitration or judicial settlement. It was, however, quite conceivable for conciliation to be made compulsory, subject to an agreement by the parties to the dispute to proceed in the event of failure to arbitration or some other third-party settlement. There were three advantages to such an approach: any confusion between conciliation and arbitration would be avoided; the task of the parties would be simplified by enabling them to proceed directly to arbitration without having to go through the intermediate and hypothetical phase of the conciliation commission; and the progressive development of the law would require less effort, as there would be an institution soundly rooted in State practice.

29. The opinions of the conciliation commission should, moreover, retain their recommendatory nature: if States did not come to an agreement, the other mechanisms for settlement would be set in motion. Indeed, the Special Rapporteur proposed the insertion of the words "where appropriate" before the word "order" in article 2, paragraph 1 (*b*), although the word "order" could perhaps have been replaced by the word "recommend" for the sake of greater clarity. He would also like some wording along the following lines to be added at the end of article 3, which dealt with arbitration: "However, the parties concerned may agree to submit the dispute to arbitration without prior recourse to conciliation". That would pave the way for a speedier method of settlement. Perhaps some qualifying word should also be added to the article to make it clear that the "decision" delivered by the arbitral tribunal would be of a binding nature, even if that was already understood.

30. Notwithstanding those comments, he was in general agreement with the Special Rapporteur's conclusions, which had undoubtedly helped work on the topic to advance.

31. Mr. THIAM expressed his congratulations to the Special Rapporteur both on the quality of his report and on his generosity and courage. Having acknowledged in chapter I, section E, of the report the failure of the international community to develop third-party lawmaking comparable to that of the national community, the Special Rapporteur added that international lawyers could not escape their responsibility by resorting to the outdated argument that Governments would not accept more adequate settlement commitments. The Commission might make that statement its motto, for its task was to open up new avenues for the progressive development of international law. The first of the reasons usually cited against a mandatory regime for dispute settlement was a restrictive interpretation of the Commission's terms of reference: that its task was to codify international law and not to develop it. He was not of that opinion. The Commission must develop the law at the same time as codifying it. Moreover, the very fact of codifying topics which thus far had fallen within the scope of customary law already amounted to progressive development.

32. Another argument often advanced was the fear that Governments would not accept the substantial obligations which might result from a dispute settlement system. But it was the Commission's role to convince others and move forward. Everyone agreed that countermeasures were repugnant. However, they could not be combated with timid attempts at codification. The international community must be made to face up to its responsibilities. Countermeasures were dangerous from all standpoints, even regardless of the balance of power, for they ran counter to the principle that no one had the right to dispense his own justice.

33. The draft articles[10] proposed a well-crafted system, with the successive steps of conciliation, arbitration and judicial settlement. However, at present, conciliation was hardly practised in Africa, which had long had recourse to the political settlement of disputes at inter-State conferences. That did not mean that an organized conciliation system was unthinkable, but it would have to be established with a degree of caution. For example, the functions of the conciliation commission might be too hybrid in nature and covered both conciliation and arbitration. He was particularly troubled by the commission being empowered to order the suspension of any countermeasures resorted to by either party. In his view, the conciliation commission should do no more than make recommendations.

34. Nor was it clear why countermeasures had to be taken before the conciliation procedure could be set in motion. That approach seemed too restrictive and, in his view, it ought to be possible to initiate the procedure from the moment that a wrongful act existed which gave rise to a dispute.

35. Nor could he see why the three steps of settlement should necessarily be successive. The parties should be free to choose the means of settlement which suited them. Lastly, the provisions of article 6 concerning the possibility of recourse to ICJ in the case of an *excès de pouvoir* by the arbitral tribunal did not appear to add anything new.

36. He proposed that the draft articles should be referred to the Drafting Committee, if that was the wish of the Special Rapporteur. Even if some members of the Commission disagreed, that stage was part of the normal conduct of the Commission's work. The Drafting Committee dealt with both form and substance, although that did not mean, of course, that the draft articles would be adopted.

37. Mr. TOMUSCHAT said that he did not want to dwell on the ambiguities in the report which had been highlighted by Mr. Pellet (2305th meeting) and Mr. Mahiou (2306th meeting), but he did think that those ambiguities were real and not merely the result of a superficial reading.

38. One thing was for sure: the scope of the draft articles must be crystal clear and there were three ways of achieving that. The first was to draft articles dealing ex-

[9] *Official Records of the General Assembly, Forty-sixth Session, Supplement No. 33* (A/46/33), annex.

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

clusively with the settlement of disputes relating to countermeasures. The Special Rapporteur had made it clear that that was not his wish, and he agreed with him. In addition, article 12, which dealt with the question, was being considered by the Drafting Committee, so that it was useless to conduct a plenary debate on it. It was of course difficult to support the idea of a unitary regime. There were many different situations in international life which must all be dealt with in an adequate fashion. For example, in the case of an armed conflict, the Geneva Conventions of 1949 and the Additional Protocols thereto of 1977 did indeed ban countermeasures in many fields, but not in all. It was inconceivable that, before being entitled to take reprisals in reaction to a breach of the rules of warfare, the victim party must first have to go through a lengthy procedure of dispute settlement. Unfortunately, the Commission was caught in a kind of trap—which might be called the "Ago trap"—for it had accepted that it was incumbent on the Commission to draft articles which were the same for all imaginable disputes between States. Although he was resolutely in favour of establishing a system of third-party settlement in the case of countermeasures, he thought that the Commission should not be afraid to differentiate according to the subject-matter at issue. In that connection, he would like to know why the sophisticated system provided for dispute settlement in the Vienna Convention on the Law of Treaties had never been set in motion during the many years of its existence. In any event, he agreed with many other members of the Commission that the dispute settlement machinery for countermeasures should be separated from the general system of dispute settlement in the field of State responsibility. A special system for countermeasures was particularly necessary when the measures were carried out by third parties that were not directly injured. Despite what several other speakers had said and whatever the Special Rapporteur might think, he himself was of the opinion that a distinction must be made between a directly injured State and a State acting as a kind of agent of the international community. That was what Georges Scelle had described as *dédoublement fonctionnel* (duplication of functions) when speaking of cases in which a measure was taken by a State—and thus constituted an act of national sovereignty—but where in reality the State was acting to assert the interests of the international community. That was an important difference which ought to have a number of consequences with regard to procedural machinery.

39. The second way of defining the scope of the draft articles would be to confine the settlement system to disputes concerning the interpretation and application of the future convention, following the usual model of dispute settlement clauses in treaties, which, strictly speaking, applied only to disputes within the framework of the treaty concerned. Nevertheless, it was doubtful whether that was a viable or recommendable solution. If a convention on State responsibility ever did emerge from the Commission's work, it would set forth secondary rules and would constitute, as it were, the general part of the law of State responsibility. That being so, was it possible or advisable to separate the general question of State responsibility from the question of the primary rules at issue, the breach of which gave rise to State responsibility? That was doubtful, for there were many issues regulated by the draft articles which were intimately tied up with the primary rules: for example, separating the obligation of result from the obligation of means. Article 19 of part 1 of the draft,[11] on international crimes was another case in which the so-called secondary rules crossed the artificial boundary between primary and secondary rules, requiring a thorough examination of the substantive rule alleged to have been breached by the alleged wrongdoing State to the detriment of the alleged victim State. The conclusion must be that a settlement system confined to disputes concerning the interpretation and application of the future convention would make little sense: on that point his conclusion differed from that of Mr. Yankov.

40. There remained the third means of defining the scope of the draft articles, which seemed to be the one favoured by the Special Rapporteur, and which amounted to prescribing a compulsory dispute settlement system for all breaches of an international obligation, whatever the subject-matter, in accordance with the "Ago philosophy" set out in part 1, article 1, to the effect that no account was to be taken of the substantive importance of the rule in question. Mr. Pellet (2305th meeting) had said that the utilization of such a design would mean a revolution in international law. The Special Rapporteur, to judge by his response, did not like that proposition. The correctness of Mr. Pellet's observation could hardly be doubted, however, for he did not mean by "revolution" the overthrow of international law, but a great leap forward towards the actual realization of the concept of international community. To date, States had always defended their right to select the dispute settlement mechanism which best suited their needs. But that principle, although enshrined in Article 33 of the Charter of the United Nations, emphasized in the Manila Declaration on the Peaceful Settlement of International Disputes,[12] and still regarded as one of the cornerstones of the international legal order, had serious defects in its application, if only because powerful States invariably preferred negotiations, where they enjoyed a privileged position as a fact of life. The system must therefore be improved. But was it possible to prescribe a rigid mechanism for the settlement of any international dispute, whatever its nature, its importance for the country concerned or its long-term repercussions? At present, the subject-matter concerned played an important role. For example, States were generally more prepared to accept binding dispute settlement in technical areas—and they still carefully examined the possible consequences for their interests before submitting to third-party settlement. That was the reason why the landscape of dispute settlement clauses was an extremely variegated one containing a wide spectrum of formulas. Was it possible to replace that complicated structure by a uniform model? Should negotiation be excluded or invariably reduced to the first stage of a process which in each and every instance would lead to ICJ? Nothing was certain in that regard and he thought that the Commission should deliberate further before making up its mind. If it decided to introduce a legal revolution, then—contrary to the usual practice in revolutions—it should carefully weigh the ar-

[11] 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.*

[12] General Assembly resolution 37/10, annex.

guments for and against and the feasibility and viability of its proposals. It would also, of course, have to give some attention to the question of costs. Negotiation was usually the cheapest mechanism and any other mechanism might entail costs which the developing countries might not be able to bear. In conclusion, he emphasized that, as a question of principle was involved, only a plenary debate could show the Commission which route it should take.

41. Mr. SZEKELY recalled that during the recent work on State responsibility, some members of the Commission had warned that the draft articles should not encourage the use of countermeasures. That balance had been the single factor responsible for closing the gap between the members of the Commission who were reluctant to mention countermeasures in the draft and those who were in favour of doing so. The Special Rapporteur's excellent fifth report contained suggestions for the progressive development of the law which could help advance the work, but the balance in question might be upset by the close link established in the report between countermeasures and dispute settlement. In fact, according to the report, a State that was victim of an internationally wrongful act could make use of the procedures envisaged only if it had resorted to countermeasures, thereby giving the impression that it was the countermeasures that had given rise to the dispute, whereas they were only the result of the original wrongful act. While endorsing the system of successive obligations going from cessation of the wrongful act to reparation, he considered that the procedures envisaged in the draft should be available whether or not countermeasures had been applied. In that case, article 1[13] would have to be amended. Comparing the fifth report with the fourth one,[14] there appeared to be an important contradiction: in the fourth report, States were encouraged not to take countermeasures until they had exhausted the settlement procedures.

42. In view of Article 33 of the Charter of the United Nations, he also thought that the clause dealing with the exhaustion of settlement procedures in article 12 should be deleted.

43. The proposed system should thus operate in stages: first, the injured State would request the cessation of the act in question. If the wrongdoing State did not respond, a second stage would be initiated, during which the injured State had in good faith to exhaust all possibilities of engaging the wrongdoing State in amicable settlement procedures. In case of failure, the injured State would move into the third stage by exercising its right to go before a conciliation commission and then to implement the procedures provided for in articles 3 to 5 of part 3 of the draft. The question was where countermeasures would fit into that system. If the first stage was successful, involving cessation of the wrongful act and reparation granted to the injured State, those measures were hardly appropriate. The same held true if the injured State managed to bring about the application in good faith of an amicable settlement procedure. During those two stages, the injured State should have the right only to take interim measures of protection, including provisional countermeasures, for the sole purpose of protecting its interests and encouraging the wrongdoing State to participate in the first stage or the second. As soon as the injured State had won its cause, any countermeasure had to be suspended.

44. In the event of total failure, the injured State would have to go on to the third stage, which made sense only if the basic structure and foundations of the system proposed by the Special Rapporteur were accepted. If the Commission were to engage in a simple exercise of codification, without progressive development of the law, its work would not be adequate to meet the challenge of establishing an effective mechanism for ordering international relationships.

45. Thus, in case of failure, it was important that the injured State should be able to turn to a conciliation commission and that the wrongdoing State should accept that procedure. If that commission did not have the means proposed by the Special Rapporteur to obtain cessation of the wrongful act and order interim measures of protection, the injured State would not be motivated to seek out that type of settlement.

46. If, after the conciliation procedure, it was necessary, as proposed by the Special Rapporteur, to proceed to arbitration and then to judicial settlement, the proposals contained in the report seemed to provide the elements needed to get the wrongdoing State to cease the wrongful act and to grant reparation; that would encourage the peaceful settlement of disputes and could only strengthen the primacy of law in international relations.

47. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was grateful to the members of the Commission who had spoken on the subject, regardless of their views on his proposals. It was obvious that a special rapporteur's proposals were always provisional and open to criticism, but, on the whole, the impression seemed to be favourable. Before leaving Rome with his draft, he had discussed it with young lawyers and some of them had been rather pessimistic about the way his proposals might be received. He had decided to submit them anyway, in the hope, above all, that they might be supported by some and also because, even if the draft was definitely rejected in the end, it would have none the less served to transmit a message to the next generation of international lawyers who would be considering the issue under conditions more favourable than those now prevailing which were already an improvement on those of 10 years ago or less.

48. He was grateful to Mr. Bennouna, Mr. Calero Rodrigues, Mr. Fomba, Mr. Güney, Mr. Kabatsi, Mr. Mahiou, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Szekely, Mr. Thiam, Mr. Tomuschat and Mr. Yankov for the positive interest they had shown in the topic, even though they had not unanimously endorsed the report.

49. He was sorry to have to omit from his general tribute one member of the Commission, who had spoken first, for the very simple reason that that member had clearly read the report only very partially or very superficially. It was possible in that connection that a misunderstanding had arisen from the paper that he himself had had distributed on 14 June. That brief paper was neither

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

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

a correction to the report nor an addition: it contained literal quotes from the report in order to demonstrate that the report had made it perfectly clear that the measures he was proposing would apply after a countermeasure had been resorted to and after a dispute had arisen as a result of that countermeasure. The same held true for the role of the conciliation commission: nowhere was it contested that the outcome of the commission's work should be strictly in the nature of recommendations, mediation or conciliation, except that the commission should also have the authority to order the suspension of any countermeasures that one of the parties might have taken against the other or to order interim measures and/or fact-finding, also *in loco*.

50. He also wished, on an equally provisional basis, to give a more detailed explanation of certain points in reply to Mr. Tomuschat, who had raised three questions which warranted consideration. First, how was it that the provisions on dispute settlement contained in the Vienna Convention on the Law of Treaties had not been used thus far? The point was well taken and the issue had been raised by a French scholar, who had submitted an article to him on dispute settlement and the Commission's policy in that regard which he had referred to several times in his report. However, as pointed out in particular by Mr. Bennouna and Mr. Calero Rodrigues, the basic idea was to arrive at a balance between, on the one hand, the fact of allowing countermeasures and, on the other, the consequences arising from them, namely, the need to provide in one way or another for a corrective to such unilateral countermeasures. That was the basic idea, even if he had had to add some details so as not to be superficial; the details could be left to the Drafting Committee if the articles were referred to it. With that idea as a starting-point, his impression was that the situation was not the same in the Vienna Convention on the Law of Treaties and the convention on which the Commission was working, assuming, as Mr. Tomuschat had said, that there would one day be a convention on State responsibility. In that respect, he was confident: there would one day be a convention or a treaty on State responsibility, even if he was no longer around to see it adopted. Furthermore, he would prefer not to be around when a good convention was adopted rather than live to see a convention which would not make much sense from the viewpoint of the progressive development of international law.

51. With regard to the *dédoublement fonctionnel* to which Mr. Tomuschat had also referred, he was not a supporter of that concept, but would gladly discuss it with Mr. Tomuschat, at the International Law Seminar round table, for instance.

52. As to negotiation, Mr. Tomuschat had said that, while conciliation, arbitration and judicial settlement were discussed in the report, it did not mention negotiation. As a perceptive lawyer, however, Mr. Tomuschat knew quite well that negotiation would surely come even before resort to the conciliation commission and that it would continue throughout the conciliation process, since the primary role of the commission was to serve as an intermediary between the parties and try to get them to agree—and that was obviously negotiation. Negotiation would then continue in the event that conciliation failed, since it was always possible that an agreement between the two parties might be reached on the basis of the commission's recommendations, even after the establishment of an arbitral tribunal and during the arbitration procedure, and that the agreement would be confirmed in the arbitral award.

53. As to the question of revolution, Mr. Calero Rodrigues had kindly confirmed that there was, in fact, nothing of the sort in the draft. In contrast, Mr. Tomuschat, while agreeing that what was involved was not an upheaval, as it had been called by one speaker, whose viewpoint—as expressed in his statement—he himself (the Special Rapporteur) did not endorse, considered that there was nevertheless such a great leap forward that, for all practical purposes, it meant a change. His proposals would nevertheless not give rise to any change whatever in the structure of the inter-State system. States would continue to be the "makers" of international law and each State individually would be the first to decide whether a wrongful act had been committed. The only applicable systems of third-party settlement would be conciliation, with non-binding results, except for procedural questions, arbitration, which had been used for centuries, and judicial settlement, which was nothing new, since ICJ had been in existence for about 75 years.

54. It was true, as Mr. Tomuschat had said, that, in some areas, particularly technical ones, there were more extensive dispute settlement obligations. But, outside those areas, there were non-technical fields which were covered by a great many General Assembly resolutions, including the Manila Declaration,[15] and all of which, without exception, involved general obligations to seek out an agreement in the event of a dispute. That was the basic point and that was why he had stressed the need to consider arbitration clauses as a possible way of making progress, in particular in the convention on State responsibility which might one day be concluded, in order to go beyond resolutions, declarations, treaties—general, bilateral or multilateral—and other agreements relating to arbitration or judicial settlement which had obvious limitations. He had thought it appropriate to make those comments and stress once again the need to grasp properly the contents of the paper distributed on 14 June, which was not a correction, but simply an explanation of his ideas; whoever failed to realize that could not claim to have read his report.

55. Mr. GÜNEY noted that, in replying to Mr. Tomuschat, the Special Rapporteur had tried to convince the members of the Commission that since negotiation was an integral part of the conciliation procedure which he was advocating, there was no need to include it in the draft as an independent means of dispute settlement. Negotiation had a major role no matter what system was envisaged, as stated in Article 33 of the Charter of the United Nations which established negotiation as the first means of dispute settlement. If the parties had not exhausted the most effective method, namely, negotiation in good faith, what were the chances that they would decide or agree to move on to other dispute settlement procedures?

[15] See footnote 12 above.

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

[Agenda item 1]

56. The CHAIRMAN recalled that, in accordance with the principles adopted at the preceding session, the membership of the Drafting Committee would vary according to the topic under consideration. In respect of international liability for injurious consequences arising out of acts not prohibited by international law, Mr. Güney, Mr. Sreenivasa Rao, Mr. Razafindralambo and Mr. Tomuschat had been appointed to replace the outgoing members. The Drafting Committee was thus composed of Mr. Al-Baharna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Güney, Mr. Kabatsi, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Tomuschat, Mr. Vereshchetin and Mr. Villagrán Kramer.

57. He himself would serve as Special Rapporteur and Mr. de Saram as Rapporteur of the Commission.

58. Mr. EIRIKSSON said that Mr. Yamada should be added to the list of the members of the Planning Group.

The meeting rose at 1.05 p.m.

* Resumed from the 2298th meeting.

2309th MEETING

Friday, 18 June 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

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

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

[Agenda item 2]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. YAMADA said that, whereas the fifth report (A/CN.4/453 and Add.1-3) might have been expected to cover dispute settlement procedures of a broad general nature, it was instead confined primarily to dispute settlement procedures relating to the regime of countermeasures, and it also considered dispute settlement procedures relating to "crimes" of States under article 19 of part 1.[2] As to the latter, until the relevant draft articles had been presented, he would reserve his comments. He would, however, request clarification, or perhaps modification, of the expression "international delicts qualified as crimes of State" used in the title of chapter II of the fifth report,[3] inasmuch as the Commission had already decided to distinguish between "crimes" and "delicts" in part 1 of the draft.

2. The Special Rapporteur devoted a significant part of his carefully conceived report to arguing the importance of making effective dispute settlement procedures available in the framework of State responsibility in general, and focused in particular on the need to ensure that unilateral measures and reactions by States were appropriately controlled. Despite laudable intentions, the report did not necessarily present a convincing argument for the proposed procedures. The Special Rapporteur seemed to be trying to create two parallel restrictions for the control, under international law, of unilateral reactions: by defining a legal regime if the injured State resorted to countermeasures (part 2, arts. 11-14)[4] and by establishing the obligation of an injured State to exhaust all effective dispute settlement procedures before resorting to countermeasures.

3. It was certainly desirable to create effective dispute settlement procedures, in particular compulsory procedures, as one of the measures for controlling unilateral reactions to wrongful acts. In that sense, he saw significant value in the Special Rapporteur's devoting such a large portion of his report to describing why such procedures were important. Furthermore, as the Special Rapporteur himself had reiterated, it was appropriate for the Commission to foster third-party dispute settlement procedures on the occasion of the United Nations Decade of International Law.[5]

4. Nevertheless, the fundamental problem in regard to the report was the overall structure of such procedures. First of all, the sense of the fifth report was not sufficiently clear, especially as to whether the proposed procedures related to State responsibility in general or to countermeasures alone. That ambiguity had given rise to criticism now found to be based on an inaccurate understanding of the Special Rapporteur's intention, for the Special Rapporteur's paper of 14 June 1993, which had been circulated among members of the Commission, pointed out that the envisaged third-party procedures would cover not just the interpretation/application of the articles on countermeasures but the interpreta-

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

[2] 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.*

[3] Original title of chapter II as it appeared in document A/CN.4/453 (mimeographed) and which had subsequently been changed.

[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] Proclaimed by the General Assembly in its resolution 44/23.