Document:-
A/CN.4/SR.1954

Summary record of the 1954th meeting

Topic:
State responsibility

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

United Kingdom's acceptance of the optional clause, but nobody would wish to prevent States that were mutually bound by optional clause declarations from invoking such declarations in order to bring a dispute before the ICJ. The placement of paragraph 2 of draft article 3 would therefore require careful consideration.

39. His initial feeling was that paragraph 2 of draft article 3 should perhaps also qualify draft article 4, since there might be circumstances in which the injured State wished to short-circuit the more complicated procedures by immediately invoking the jurisdiction of the ICJ on the basis of a mutually binding optional clause declaration. The Court would then be able to consider whether there had been a breach of a primary obligation. That, in fact, was what was at the root of such disputes, rather than the interpretation or application of the secondary rules. The ultimate aim was to arrive at a system that would provide a means of peaceful settlement of the underlying dispute, which was concerned with whether there had been an initial breach of an international obligation and, if so, what the remedy should be. That, too, would require close examination in relation to the content of both part 2 and part 1 of the draft.

40. He would not oppose referral of the draft articles to the Drafting Committee, but he rather doubted that it would be able to work on them effectively until it had made much more progress on part 2 and had perhaps also taken a further look at part 1 by way of second reading.

41. Mr. KOROMA said that, with regard to the question of dual notification, Mr. Reuter and Sir Ian Sinclair might wish to consider the *Minquiers and Ecrehos* case.[6] In that case, between France and the United Kingdom, the United Kingdom had submitted a primary notification to the French authorities, which had had the desired effect.

The meeting rose at 11.35 a.m.

[6] Judgment of 17 November 1953, *I.C.J. Reports 1953*, p. 47.

1954th MEETING

Wednesday, 28 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, 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. 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] (continued)**

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

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

1. Mr. SUCHARITKUL congratulated the Special Rapporteur on his sixth and seventh reports (A/CN.4/389 and A/CN.4/397 and Add.1), which would enable the Commission not only to complete the first reading of practically the whole set of draft articles, but also to make some preparations for the second reading of the articles of part 1 of the draft. The drafting of part 1 had been likened by Mr. Reuter to the construction of a cathedral and the articles in that part were indeed an impressive structure, one that none the less needed particularly solid foundations. The Special Rapporteur's earlier reports had helped to prepare the way in that regard.

2. The Commission had been working on the topic of State responsibility for many years and it was worth recalling that the first Special Rapporteur, Mr. García Amador, in his first report submitted in 1956, had referred to such matters as diplomatic protection and the treatment of aliens.[5] Those were the days of writers such as Eagleton and Borchard, when the traditional law of State responsibility as then taught in schools of law dealt with such practical questions as the minimum standard of treatment for aliens and the methods of obtaining compensation for property confiscated or expropriated in a foreign country. But it should be remembered what in fact constituted diplomatic protection of aliens. A State, in order to ensure the protection of its nationals in another State, might send in its troops, sometimes even without the knowledge of its ambassador who had been assigned precisely that task of protection. The case was not so much one of countermeasures as one of self-help. War in those days had still been legitimate and countries and resorted to blockades to claim payment of debts. Unfortunately, the countries that now formed the third world had experienced the

[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.

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

[5] *Yearbook ... 1956*, vol. II, p. 199, document A/CN.4/96, chap. VI.

whole problem of diplomatic protection from the opposite side. Happily, international law had changed and the concept of international responsibility had broadened. War had been made illegal and peacetime blockades were unlawful.

3. He supported the Special Rapporteur's general approach in formulating part 3 of the draft. Articles 1 and 2 made provision for a cooling-off period that was intended to prevent the injured State from invoking article 6 of part 2 and from adopting countermeasures without advising the author State. The notification required in draft article 1 constituted a first step in the process of bilateral negotiations between the two States concerned, and it should not be forgotten that most problems in international relations had in fact been settled by negotiation.

4. Draft article 2, paragraph 1, contained a sufficient element of flexibility by imposing a waiting period of at least three months before the claimant State could invoke article 8 or article 9 of part 2, and an exception was made for "cases of special urgency". As to the question of invoking articles 8 or 9, it was important to remember that, under draft article 12 (*a*) of part 2, the provisions of articles 8 and 9 did not apply to the suspension of the performance of the obligations of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff. In that regard, the Special Rapporteur could perhaps examine the question whether there were other primary rules that deserved similar treatment. The underlying reasons for the provision of article 12 (*a*) lay, of course, in the incident at the Embassy of the United States of America in Tehran in 1980.

5. Draft article 3 was fundamental, dealing as it did with the emergence of the real dispute. In principle, he agreed with the formulation and the reference to the means of settlement indicated in Article 33 of the Charter of the United Nations, which was very broad. It spoke specifically of "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements" and also mentioned "other peaceful means" of the choice of the parties to the dispute. The Commission would recall that the 1948 Pact of Bogotá[6] referred to good offices, a means of settlement which, of course, was not precluded by Article 33 of the Charter.

6. The existence of regional subsystems was important. For example, article 13 of the ASEAN Treaty of Amity and Co-operation (1976)[7] required the States parties to refrain from the threat or use of force and to settle disputes among themselves through friendly negotiations. For the purpose of settling disputes through regional processes, the Treaty had set up a High Council comprising a representative at ministerial level from each of the high contracting parties "to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony". Article 15 of the Treaty stated that the High Council could recommend "appropriate means of settlement such as good offices, mediation, inquiry or conciliation" and could "offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation". Article 16 specified that high contracting parties which were not parties to the dispute were not precluded from offering all possible assistance to settle the dispute, adding: "Parties to the dispute should be well disposed towards such offers of assistance".

7. Draft article 4 (*a*) of part 3 provided for the jurisdiction of the ICJ in the event of a dispute concerning the application or interpretation of article 12 (*b*) of part 2, namely the article on *jus cogens*. Article 4 was modelled in that respect on article 66 of the 1969 Vienna Convention on the Law of Treaties and on article 66 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. In his opinion, disputes of that kind should be referred to the ICJ. Naturally, the Court had its limitations, one being the absence of compulsory jurisdiction. Another was that many States had made reservations in accepting its jurisdiction. The most serious problem, however, was the quality of the law. For the parties to a dispute to accept third-party adjudication, they must have confidence in the law to be applied, a consideration that was equally true in the case of arbitration and judicial settlement. Recently, a trend had emerged among African and Mediterranean countries to submit disputes to the Court, and improvements in the quality of international law partly explained such a welcome development. The Commission, for its part, had made an important contribution towards improving the law and its work was likely to bring about wider resort to judicial settlement.

8. Draft article 4 (*b*) provided for the jurisdiction of the ICJ in the event of a dispute concerning the additional rights and obligations referred to in article 14 of part 2, which dealt with international crimes, a very difficult problem on which opinions still varied. In his view, matters pertaining to international crimes should come under the jurisdiction of an international criminal court.

9. Draft article 5 was acceptable, and the best course would to refer the articles of part 3 to the Drafting Committee.

10. Mr. LACLETA MUÑOZ commended the Special Rapporteur on his seventh report (A/CN.4/397 and Add.1), which contained the final articles of a draft which, five years previously, the members of the Commission had thought it would be difficult, if not impossible, to complete before their term of office expired. Draft articles 1 and 2 of part 3 related to the means of enforcing international responsibility, while draft articles 3, 4 and 5 and the annex dealt with the settlement of disputes.

11. He fully endorsed the comments made by the Special Rapporteur in paragraphs (1) to (6) of his general commentary (*ibid.*, sect. I.B). The development of the primary rules of international law since the Second World War had not been paralleled by any

[6] American Treaty on Pacific Settlement (United Nations, *Treaty Series*, vol. 30, p. 55).

[7] See M. Haas, ed., *Basic Documents of Asian Regional Organizations*, vol. VI (Dobbs Ferry (N.Y.), Oceana Publications, 1979), p. 321.

development of rules of implementation and, above all, rules on the settlement of disputes. In that connection, the Charter of the United Nations and that Organization itself had not produced the results expected of them. The free choice of means of settlement in accordance with the rather vague obligation to settle disputes peacefully, as provided for in Article 33 of the Charter, had not been very effective. Again, States had not, as could and should have been expected, availed themselves of Article 36, paragraph 3, of the Charter. In other words, in terms of form, modern-day international society had not achieved the degree of "organization" mentioned by the Special Rapporteur in paragraph (5) of his general commentary and that explained the need for the chapter of the draft on the settlement of disputes. Admittedly, in one way or another sovereign States, particularly the most powerful, had been able to ensure that their rights were respected and to obtain compensation for injuries caused by wrongful acts, despite the lack of a general and compulsory procedure for the settlement of disputes and the absence of independent authorities for the enforcement of judgments. If a distinction was to be made between international crimes and international delicts, however, such a procedure was necessary in order to maintain international peace and security; otherwise, a further source of conflict would emerge.

12. For that reason, the Commission's task was not simply to engage in codification. International law had no rules imposing obligations on States with regard to the settlement of disputes. In the present instance, the Commission must develop international law. In that connection, however, its main and most effective contribution lay not in elaborating drafts intended primarily to develop international law, but in working out links for insertion in what were essentially codification drafts. He therefore welcomed the fact that the draft articles laid the foundations for compulsory third-party settlement of disputes through the unilateral submission of disputes to the ICJ, a procedure that was indispensable in the case of disputes relating to international crimes and disputes involving rules of *jus cogens*. The draft articles took account of the principle of free choice of means, not only because they expressly provided for a period of 12 months during which States had to try to find a solution to their disputes through means of their own choice, but also because the principle of freedom of choice did not prevent States from deciding, even before a dispute arose, what means of settlement they would use, either under a bilateral convention or a multilateral treaty. Nothing in the principle of freedom of choice was contrary to the principles of the sovereignty or sovereign equality of States.

13. The reference in draft article 1 of part 3 to article 6 of part 2 might appear to restrict the scope of part 3 to disputes concerning secondary rules, but it would not have that effect in practice. In the event of a dispute concerning the rights of the claimant State and the obligations of the alleged author State, the question of the wrongfulness of the act and the attribution of responsibility for it could not fail to arise. The problem was one of drafting, as was the use in draft articles 1 and 2 of the word "wishes", which should be replaced by the word "intends", or quite simply "invokes". The two notifications referred to in articles 1 and 2 would often be made at the same time, and paragraph (2) of the commentary to article 2 also spoke of the possibility of a third notification. There, too another drafting problem had to be solved. Similarly, further consideration would have to be given to article 2, paragraph 3, which did not correspond with the explanations given in the commentary and should go into greater detail, particularly with regard to notifications.

14. Draft articles 3 and 4 might be merged. It first had to be seen exactly what role was played, according to article 3, paragraph 2, by the "provisions in force binding ... States with regard to the settlement of disputes". Nothing should be allowed to prevent disputes from being unilaterally submitted to the ICJ, as provided for in article 4, subparagraphs (*a*) and (*b*). If articles 3 and 4 were merged, the terms of article 3, paragraph 2, would also have to apply to the provisions of article 4.

15. The arguments in support of draft article 5 that were contained in paragraph (2) of the commentary to the article were satisfactory in the light of article 3, paragraph 2, but the Commission might leave it to the future diplomatic conference to settle that question.

16. He had no objection to referring the articles to the Drafting Committee. Indeed, he was very much in favour of doing so, for the fact that the term of office of the current members of the Commission was about to expire must not act as an obstacle to the work on the topic.

17. Mr. OGISO said that the draft articles under discussion were one of the most important parts of the work on State responsibility and in all likelihood the key to whether States would wish to associate themselves with the draft as a whole at any future diplomatic conference.

18. Account must be taken of contemporary State practice and, from a general point of view, it should first be said that the prescribed periods of time to move from the first step, in the form of notification, to the final point of the dispute-settlement procedure were much too long, for they would prevent the claimant State from taking any measures of reprisal for 15 months or more. Admittedly, draft article 2, paragraph 1, made an exception "in cases of special urgency", but an additional procedure should be specified for such cases. Secondly, under article 2, the claimant State could resort to the dispute-settlement procedure only after making the second notification invoking countermeasures provided for in articles 8 or 8 of part 2 of the draft. Nevertheless, the dispute-settlement procedure, and in particular the conciliation procedure, could be set in motion even before the claimant State invoked countermeasures, and indeed even without such measures. Thirdly, he wholeheartedly welcomed the Special Rapporteur's approach with regard to the compulsory third-party dispute-settlement procedure.

19. Draft article 1 indicated from the outset that the claim, in the form of notification, made by the injured State against the author State must act as the starting-point of part 3, an approach that was acceptable because an issue of international responsibility could not be raised unless the injured State made such a claim

at one stage or another. On the other hand, he failed to see why article 1 referred only to article 6 of part 2. Article 7 of part 2, which was concerned with the treatment of aliens, was closely linked with article 6 and therefore the first part of article 1 of part 3 should be amended to read: "A State which wishes to invoke article 6 or article 7 of part 2 of the present articles must notify...".

20. On the matter of notification, the practice of States should not be lost from sight. When a State claimed to have been injured by another State, a whole series of communications, more particularly inquiries as to the facts, would be exchanged and many of the communications would be made before actual notification of the claim. He would like to know whether such communications were precluded and hoped that the commentary would mention the obligation of the alleged author State to co-operate in good faith with inquiries regarding the facts. As to the minimum content of the notification required under article 1, a reference to "the relevant facts" should be inserted at the end of the paragraph, because there would inevitably be a considerable divergence of views between the two States about the alleged wrongful act.

21. Draft article 2 involved two major problems. It stipulated a second notification of the alleged injured State's intention to suspend the performance of its own obligations towards the alleged author State by invoking articles 8 or 9 of part 2. Thus the claimant State would be able to set in motion the procedure for the settlement of disputes only by taking countermeasures. Some States, particularly smaller States, might prefer to resolve a dispute without resort to countermeasures. He wished to know whether, in that instance, the procedure set forth in part 3 could be used. As he saw it, it would be in the interests of smaller States for disputes to come under the conciliation procedure provided for in draft article 4, subparagraph (*c*), without any need to resort to countermeasures.

22. The second problem lay in the phrase "except in cases of special urgency", in article 2, paragraph 1. He would be grateful for an explanation of the meaning of the phrase. From the commentary to article 2, it would seem that the formula applied only in relation to the three-month period which had to elapse between the first and second notifications. Nevertheless, the exception concerning cases of special urgency should also apply to the 12-month period required under article 4 for the completion of a specific settlement procedure under Article 33 of the Charter of the United Nations. With that approach, the 12-month period could, in the interests of the claimant State, be either waived or shortened in the event of an emergency. Perhaps the draft could provide for the injured State to apply to the ICJ for provisional measures in order to decide whether the particular case fell within the category of cases of special urgency.

23. If the claimant State was to be allowed to set in motion the conciliation procedure provided for in article 4, subparagraph (*c*), the same possibility should apply to article 3 as well. He agreed that priority should be given to resorting to mechanisms for the settlement of disputes under regional or bilateral subsystems when all the parties concerned belonged to such subsystems, but article 3 should make that point clear. In addition, where the parties concerned had sought a solution through a bilateral or regional mechanism, the procedural requirement in article 4 of a 12-month period for specific settlement efforts under Article 33 of the Charter should be relaxed somewhat.

24. Draft article 4 was based on the régime provided for in article 66 of the 1969 Vienna Convention on the Law of Treaties and other corresponding provisions of the 1982 United Nations Convention on the Law of the Sea and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. Actually, the compulsory machinery for the settlement of disputes would become operational only when a particular number of States had accepted the draft, and the Commission had to bear in mind that it must prepare a set of draft articles which could be adopted as a whole at a diplomatic conference. From that point of view, the Special Rapporteur had done well to adopt a régime already embodied in existing multilateral conventions. Accordingly, the language used in article 4 should follow as closely as possible the corresponding provisions in those conventions.

25. Article 66, subparagraph (*a*), of the 1969 Vienna Convention provided for the jurisdiction of the ICJ in respect of disputes concerning *jus cogens* and contained the following proviso: "unless the parties by common consent agree to submit the dispute to arbitration". Article 66, paragraph 3, of the 1986 Vienna Convention contained a similar provision. The Special Rapporteur (1952nd meeting) had affirmed that the possibility of submitting a dispute to arbitration was not precluded, something that should be stated specifically in article 4 itself. In his opinion, it was not advisable to refer to the rules of *jus cogens* in the draft articles, in view of their vague character. If, however, the majority of members preferred to retain article 12, subparagraph (*b*), of part 2, he could agree provided that, as stated in article 4, subparagraph (*a*), of part 3, the decision on the content of *jus cogens* was made by the ICJ.

26. The proposed procedure with regard to international crimes could not be determined until concrete work had been done on the draft Code of Offences against the Peace and Security of Mankind. He merely wished to point out that, if an international criminal court was to be established, that court should also have jurisdiction to decide what would be the additional rights and obligations referred to in article 4, subparagraph (*b*).

27. As for the scope of part 3 of the draft, he saw no reason to confine the reference in article 4, subparagraph (*c*), to "articles 9 to 13 of part 2" and suggested that it be amended to read: "articles 6 to 13 of part 2".

28. Draft article 5 was acceptable in principle, save for the exception to the general prohibition of reservations in respect of part 3. From the text of article 5, it would seem that recourse to measures of reprisal was restricted and that compulsory third-party conciliation would not be set in motion when the parties concerned had made a

reservation concerning article 4, subparagraph (*c*), even if the claimant State had actually taken measures of reprisal. He was inclined to take the opposite view. Measures of reprisal should indeed be subject to very strict rules but, in cases of urgency, such measures should be possible, provided they did not preclude the compulsory conciliation mechanism referred to in article 4, subparagraph (*c*). In that connection, it would be desirable to tighten the condition that reprisals should not be manifestly disproportional to the seriousness of the internationally wrongful act, as stipulated in article 9, paragraph 2, of part 2.

29. Mr. HUANG, emphasizing the importance of part 3 as a component of the draft articles on State responsibility as a whole, said that the notification procedure specified in draft articles 1 and 2 could, of course, be used as a response to an internationally wrongful act. In practice, however, as Sir Ian Sinclair had pointed out (1953rd meeting), in the event of a wrongful act the injured State would first lodge a protest with the author State and reserve all its rights. Only when the injured State took certain measures or embarked on the process of bilateral negotiations with the author State would the issue of dispute-settlement arise. The question was how to reflect that process in the draft.

30. There seemed to be a certain lack of balance in articles 1 and 2 inasmuch as they embodied specific provisions regarding the obligations of the injured State but not the obligations of the author State. The escalation of disputes might be due just as much to the lack of procedures for the injured State to take action, or to its inappropriate reaction, as to the author State's persistent violation of the primary rules. It was therefore essential to lay down secondary or tertiary rules whereby, in the event of the violation of a primary rule of international law, the author State would be under an obligation, for instance, to discontinue its wrongful act forthwith, to make the necessary reparation to the injured State, to settle the matter in a manner appropriate to and at the request of the injured State or, in the event of disagreement, to hold consultations with the injured State with a view to arriving at a solution.

31. He agreed in principle with the reference made in draft article 3 to Article 33 of the Charter of the United Nations. However, while the procedures for dispute-settlement provided for under Article 33 of the Charter could be divided into two broad categories—direct settlement of disputes between the parties and third-party intervention—part 3 of the draft seemed to place the emphasis on third-party settlement of disputes. It was apparent from international practice that, in disputes involving major interests and particularly those concerning State responsibility, the parties tended to engage first in direct negotiations in order to reach a solution. Hence consideration should perhaps be given to requiring the parties to a dispute, under article 3, first to engage in direct negotiations in an endeavour to settle the dispute.

32. The Special Rapporteur had pointed out (1952nd meeting) in connection with draft article 4 that, since the article dealt with novel legal concepts such as *jus cogens* and international crimes, arrangements should be made in part 3, for instance, for the referral of disputes involving those concepts to the ICJ. The idea was a good one, but it posed a number of legal and practical problems. In particular, the proposal in article 4 that the compulsory jurisdiction of the ICJ should be confined to issues concerning the interpretation and application of *jus cogens* would prove difficult to put into practice because part 3 concerned primary as well as secondary rules. That was particularly true of article 4, subparagraph (*b*), which dealt with international crimes. Admittedly, the ICJ did play a more positive role in certain areas and he trusted that it would continue to do so in regard to the peaceful settlement of international disputes, but it had to be recognized that States were generally cautious in agreeing to the compulsory jurisdiction of the Court. Few States had unconditionally accepted its compulsory jurisdiction, and some had done so only subject to reservations on important issues. Consequently, caution was required in regard to a procedure for compulsory jurisdiction on such important matters as *jus cogens* and international crimes.

33. While he understood the intention behind draft article 5, international practice showed that it was not for lack of international procedures for peaceful settlement that disputes occurred and escalated. In his view, compulsory third-party settlement of disputes, though useful, was not always an entirely effective procedure. Furthermore, the compulsory judicial procedure provided for in the 1982 United Nations Convention on the Law of the Sea differed somewhat from the procedure stipulated in the draft articles under consideration, since the former consisted of concrete rules in a specific field, whereas the latter related to all the main areas of international law. The question whether a procedure for compulsory third-party settlement of disputes should be stipulated or whether a measure of flexibility was needed should therefore be the subject of careful consideration.

34. Mr. DÍAZ GONZÁLEZ said that the consideration of parts 2 and 3 of the draft articles had taken considerably less time than the consideration of part 1, which had gone on for more than 20 years. The reason might well be that the Commission had got into the habit of rapidly referring draft articles to the Drafting Committee without discussing them at length in plenary and, when the articles were referred back to it later, the Commission usually did not have time to examine them in detail.

35. The ideal situation was, obviously, that the provisions adopted by the Commission should be applied, and it was apparent from the seventh report (A/CN.4/397 and Add.1) that the Special Rapporteur had, quite logically, tried to establish in part 3 a procedure to guarantee respect for the rules enunciated in parts 1 and 2. Unfortunately, a statement of the principle of the compulsory jurisdiction of the ICJ would in practice make for inequality among States because some States would be compelled to appear before the Court while others would have the means to avoid doing so. Any State that was to be brought before the ICJ could, under the terms of the Charter of the United Nations, refer the dispute to which it was a party to the Security Council and, if that State had the veto, it had only to use it in order to evade the Court's jurisdiction.

36. One member of the Commission had pointed out that OAS also had a procedure for the settlement of disputes whereby the States parties to a dispute could submit it to the OAS Permanent Council. The situation was, however, not at all comparable, for no State member of the OAS Permanent Council had the veto.

37. Furthermore, a draft establishing a procedure for compulsory settlement of disputes by the ICJ would be going further than the Charter itself, which took precedence over any other international agreement. Admittedly, Article 33 of the Charter probably raised more problems than it solved, but it expressly stated that the parties to a dispute had to seek a solution by, *inter alia,* negotiation, inquiry or mediation, or other peaceful means of their own choice. In no sense did it make the jurisdiction of the ICJ compulsory. Since many States could not agree to recognize the compulsory jurisdiction of the ICJ, it was to be feared that, if the Commission decided to retain the provisions of part 3 of the draft in their present form, the future convention would be doomed to failure.

38. Presumably the Commission did not want the texts it elaborated to remain a dead letter. It had to be realistic and, accordingly, it should not proceed with part 3 as it was now formulated. Personally, he would have no objection if the provisions of part 3 were referred to the Drafting Committee, but he thought that the Commission would be wiser to wait until the Sixth Committee of the General Assembly had first taken a decision on them.

39. Mr. YANKOV said that, as the Commission was approaching the completion of the initial stage of its work on State responsibility, general considerations regarding the viability of the end-product naturally sprang to mind. He was not casting doubts on the Commission's work, since the issues involved stemmed from such basic principles of international law as the sovereign equality of States, *pacta sunt servanda,* and the peaceful settlement of disputes, all of which were embodied in the Charter of the United Nations. The Commission, as a body of experts, should none the less take into account the end-user of its product. In his view, there could be no valid legal system on State responsibility without a set of appropriate rules for the settlement of disputes. It was therefore very important to ensure that the system of "implementation" (*mise en œuvre*) was at once as comprehensive and as flexible as possible.

40. The 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea had been mentioned on numerous occasions. While those Conventions did supply certain background material, their provisions were quite different from the propositions contained in the draft articles now before the Commission. In particular, reservations were permitted under the 1969 Vienna Convention and its article 66, on which draft article 4 was modelled, contained an express reference to arbitration procedure by providing for the compulsory jurisdiction of the ICJ "unless the parties by common consent agree to submit the dispute to arbitration". The explanation given by the Special Rapporteur in that connection (1952nd meeting) and his commentary had not altogether convinced him of the reasons for the difference between the 1969 Vienna Convention and draft articles 3 and 4. His own view was that arbitration and consent to arbitration were provided as yet another judicial or quasi-judicial means of settlement of disputes, the aim being to secure greater flexibility and thus make the third-party settlement procedure more acceptable to a wider range of States without challenging the procedure available through the ICJ.

41. The differences with regard to the dispute-settlement procedure in the 1982 Convention on the Law of the Sea were far more significant, as was apparent from, for example, its article 287, which allowed a choice of procedure, and articles 297 and 298, concerning limitations on and optional exceptions to compulsory procedures entailing binding decisions. Reference had also been made to the "package deal" approach adopted in the case of the 1982 Convention. The Commission, however, should not be misled by such references, for the package deal had applied solely to political issues, not to the settlement of disputes. Accordingly, he would counsel restraint in considering the possible application, *mutatis mutandis*, of the provisions of the 1982 Convention on the Law of the Sea on settlement of disputes.

42. As to draft articles 1 and 2, a greater degree of flexibility should be introduced to take account of the nature of the matters that could be the subject of a dispute-settlement procedure. He, too, agreed that the words "special urgency" in article 2, paragraph 1, required clarification: he had found no key in the commentary to the legal implications of those words.

43. The scope of the reference in draft article 3 to the application of the optional procedures provided for in Article 33 of the Charter of the United Nations should be expanded, and the compulsory conciliation procedure under draft article 4, subparagraph (*c*), should be extended to cover the application or interpretation of articles 6 and 7 of part 2 as well.

44. Draft article 5 was crucial to the draft as a whole and should perhaps therefore be dealt with by the future diplomatic conference.

45. Lastly, he suggested that the draft articles before the Commission and the commentaries thereto should be expanded.

The meeting rose at 1 p.m.

1955th MEETING

Thursday, 29 May 1986, at 10 a.m

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek,