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Summary record of the 2309th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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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.

tion/application of any provision of the future convention on State responsibility. If the fifth report had been clearly written in that respect, questions would not have been raised as to the applicability of the proposed procedures to State responsibility. The fact that only one third of the report was about the substantive issues in respect of the proposed procedures might be the reason for the lack of clarity. He was confident that in his future work, the Special Rapporteur would make his arguments more precise.

5. Even after reading the paper of 14 June, a number of questions none the less remained. Article 1 proposed for part 3[6] appeared to suggest that the procedure described in the annex would be set in motion only after the amicable settlement procedures stipulated in part 2, article 12, had been exhausted. If that understanding was correct, it would seem that the envisaged third-party procedures would cover only the interpretation/application of articles on countermeasures. If the paper in question was to be taken as the proper basis, the Drafting Committee should alter article 1 to bring it into line with the Special Rapporteur's real intentions.

6. The Special Rapporteur's approach in making the resort to countermeasures contingent upon exhaustion of all available third-party dispute settlement procedures was an attempt to impose on injured States conditions external to the regime of countermeasures. Such an approach would result in a further obligation limiting resort by injured States to countermeasures, thereby creating new primary rules. It was doubtful whether States would agree to placing such strict limits on countermeasures and the scheme might jeopardize not only the success of dispute settlement procedures but also the very regime of countermeasures itself.

7. As to the proposed three-step dispute settlement system, under current international law the freedom of States to choose the means of dispute settlement was well-established, and there was also the obligation to settle disputes peacefully. The proposed three-step system would be too rigid and would undermine such freedom of choice. The restrictive approach taken by the Special Rapporteur was likely to give rise to strong opposition from States. He did not deny the utility of a compulsory hierarchical three-step settlement regime. Some types of dispute might be suited to a hierarchical procedure, but in the final analysis, such a system was extremely novel, if not revolutionary, as Mr. Pellet (2305th meeting) had put it, given the present state of international society and international law. As such, the system went beyond the progressive development of international law, and sovereign States were not likely to subscribe to it. As he saw it, the Commission was expected to try and strike a balance between the well-established freedom of choice of settlement procedures and a firmly structured compulsory settlement mechanism.

8. It would appear that each step was designed to be compulsory and to be followed in strict sequence. Such a system was attractive in the sense that it could settle disputes in an impartial manner and purely on the basis of facts and law. But the reality was that most disputes between States were not referred for judicial settlement, and that less than one third of the States parties to the Statute had accepted the compulsory jurisdiction of ICJ. The difficulties of the proposed system were a very rigid structure based on a three-step sequence; the extensive power of the conciliation commission; and the fact that ICJ was at least partly qualified as an appeal court for an arbitration award.

9. With regard to the first level of the proposed system, conciliation, the wording of article 1 could be interpreted to mean that the procedure was applicable only in the case of countermeasures and not of State responsibility in general. There seemed to be a clear need for the Drafting Committee to recast the article to make it generally applicable to disputes relating to State responsibility.

10. Furthermore, the proposed conciliation procedure was compulsory for disputes when all amicable settlement procedures had been exhausted and the conciliation commission could order, with binding effect, the suspension of countermeasures or any provisional measures of protection. Those compulsory or binding features of the procedure were not yet established in general international law. Again, the conciliation commission would not be able to settle the entire dispute itself with binding effect, and such partly binding conciliation did not seem to enjoy wide acceptance among States.

11. Article 6 provided for unilateral submission to ICJ of a decision tainted with *excès de pouvoir* or departure from arbitral procedure. It appeared to make ICJ an appeal court of sorts. ICJ's function as a court of appeal could be found in some conventions, such as the Convention on International Civil Aviation, and such a proposal was quite appropriate as part of the progressive development of international law, but a wider appeal jurisdiction not limited to cases of *excès de pouvoir* or violations of procedure would be desirable for ICJ.

12. Regarding the importance of fact-finding in the dispute settlement procedure, the first question that must be answered in a dispute on State responsibility was whether or not an allegedly wrongdoing State had in fact committed a breach of an international obligation. He referred in that context to the examples of the *Dogger Bank* case[7] or Additional Protocol I to the Geneva Conventions. In the Special Rapporteur's draft, the fact-finding function would be performed by the conciliation commission. However, in view of the extensive competence of the conciliation commission, as proposed by the Special Rapporteur, a kind of commission of inquiry with competence limited to fact-finding would be more acceptable to States and thus easier to establish.

13. The present report and the draft articles were an innovative and ambitious proposal. In his view, the Commission should not remain in the realm of codification. It should try to secure progressive development of international law by strengthening the rule of law, while remaining fully aware that, if the results of its work were not accepted by what the Special Rapporteur called the "inter-State system", the untiring efforts of both the

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

[7] *The North Sea or Dogger Bank* case, *The Hague Court Reports*, J. B. Scott, ed. (New York, Oxford University Press, 1916), pp. 403-413.

Commission and the Special Rapporteur would have been wasted. Regrettably, the Special Rapporteur's three-step settlement procedure contained too many difficulties to win the approval of the great majority of States. Such an innovative system was not the only way to bring States to accept a binding third-party settlement procedure. The dispute settlement system would surely be improved, not immediately in the framework of the codification of State responsibility, but through various means of persuasion, such as General Assembly resolutions or multilateral diplomacy. It was therefore essential for the Commission to continue to try to establish the rule of law in international society little by little, even if it seemed to be the long way round. Rome had not been built in a day.

14. Mr. ARANGIO-RUIZ (Special Rapporteur), expressing the hope that completion of the Commission's work on the topic would not take as much time as had been needed to build Rome, said he wished to provide the clarification requested by Mr. Yamada. The term "delicts" had inadvertently been used. He had meant to say that he would deal later with internationally wrongful acts, which in article 19 were qualified as international crimes of States. In keeping with long-standing practice, he employed the term "delinquencies" as a synonym for "internationally wrongful acts".

15. Mr. AL-BAHARNA, commending the Special Rapporteur on a thought-provoking report, said its main thesis was that the inclusion of an adequate and reasonably effective dispute settlement system would be of decisive help in minimizing or eliminating countermeasures and that the need to strengthen existing dispute settlement procedures in connection with the regime of countermeasures had been stressed by many speakers in the course of the Sixth Committee's debate on the Commission's report. It was also argued that there had been perceptible changes in international relations with regard to third-party settlement, and the Commission was therefore encouraged to reverse its tendency to interpret narrowly its competence with respect to dispute settlement procedures and to overemphasize the reluctance on the part of Governments to accept more advanced dispute settlement commitments. Was the Special Rapporteur's thesis correct? What, if any, were the overall implications of the dispute settlement system in State responsibility for the substantive rules regarding countermeasures? What was the empirical basis for the assumption that the time was propitious for a more advanced regime of dispute settlement procedures? Those questions called for a dispassionate inquiry. However desirable the third-party settlement procedures might be, they must be acceptable to the international community of States. The Commission should be aware of what had befallen the Model Rules on Arbitral Procedure, proposed by the Commission in 1958.[8]

16. As to the Special Rapporteur's thesis, he might be right in arguing that the regime of unilateral reaction by the injured State would place powerful and rich countries at an advantage over weaker States. But did the third-party settlement procedure stop the more powerful States from resorting to unilateral countermeasures? Assuming that the countermeasures centred on political questions, would third-party procedures be of any avail in such a case? Did the Special Rapporteur's thesis hold good if the State committing the internationally wrongful act and the State taking the countermeasures were States of more or less equal power? Indeed, there must be a strong check on disproportionate and excessive countermeasures, but the dispute settlement procedure was not a viable means to that end. Rather, a clear and positive statement of the limits of countermeasures was the answer. The Commission should therefore concentrate on the clarification of the substantive law rather than on dispute settlement mechanisms.

17. The topic of State responsibility, in a sense, covered the whole spectrum of international law. Any settlement provision in respect of State responsibility would affect both the primary and secondary obligations, regardless of the subject-matter. For example, the legality of both armed attack and self-defence, assistance to insurgents or to counter-insurgents, or international delicts *vis-à-vis* acts of retortion, such as an economic embargo, suspension of treaties and other similar unilateral measures, would all fall within the purview of the dispute settlement system. If the system was to be binding, those questions, by definition, became justiciable. That would probably be the unintentional effect of the rules on dispute settlement in the articles on State responsibility. But such a result was inevitable. The Special Rapporteur attempted to respond to critics who viewed third-party settlement obligations as an intolerable burden by saying that to allow a general prerogative (*faculté*) of resort to countermeasure without an adequate check would be even more intolerable. Yet the explanation was not convincing. States were not likely to have recourse to compulsory third-party procedures on questions such as the ones he had indicated earlier. Admittedly, ICJ had ruled in the case concerning *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*)[9] that the mining of Nicaraguan ports by the United States had not constituted an act of collective self-defence under customary international law and had also denied that there was an armed attack by Nicaragua to give cause for the plea of collective self-defence by the United States. However that case had dealt with the question of the lawfulness of the United States action after, rather than before, the incidents had happened. At any rate, it was a unique judgment in many respects and did not warrant the conclusion that States were prepared to submit questions of "armed attack", "self-defence", "retortion" or "economic embargo" to compulsory third-party settlements. For that reason, the Commission should focus its attention on the clarification and, indeed, on the development of the substantive rules governing countermeasures. In short, the question called for legislative rather than judicial clarification. The Commission should define the norms and principles governing international delicts and crimes and the corrective countermeasures instead of relegating that task to a compulsory third-party settlement through a lengthy and complicated three-step settlement procedure.

18. The Special Rapporteur had relied on the Manila Declaration on the Peaceful Settlement of International

[8] See *Yearbook... 1958*, vol. II, document A/3859, p. 83, para. 22.

[9] *I.C.J. Reports 1986*, p. 14.

Disputes[10] and the Convention on Conciliation and Arbitration within the CSCE.[11] However those instruments were not a sufficient empirical basis for concluding that the time had come to include compulsory third-party settlement procedures in the draft articles. The cold war suspicions about the impartiality of third-party mechanisms were on the wane and more and more States were having recourse to ICJ, but it was still premature to embark on compulsory dispute settlement procedures. Only about one third of the States Members of the United Nations had become parties to the optional clause system of ICJ, and scores of States had made reservations in respect of arbitration clauses in a multilateral treaty. In the face of such incontrovertible evidence, it could not be held that the time was ripe for a bolder approach to compulsory third-party procedures. It was not what the Special Rapporteur called "theoretically ideal solutions" that the Commission should provide, but solutions that were practical and realistic.

19. As to the suggested three-step settlement system,[12] as far as the conciliation procedure was concerned the Special Rapporteur proposed in article 1 that either party could under certain conditions unilaterally institute conciliation proceedings against the other. Consequently, the conciliation commission would be set up on the initiative of either party, in conformity with the provisions of the annex which meant that the conciliation commission was constituted by a unilateral action. His central objection related to the compulsory aspect of the procedure. Under article 2, the conciliation commission could order provisional measures of protection with "binding effect", and objected to assigning a conciliation commission the task of ordering such measures. The compulsory nature of the procedure and its functions might prove to be counterproductive. In any event, it ran counter to the normal understanding of conciliation. Moreover, if the final report that the conciliation commission was to submit to the parties was merely recommendatory, as stated in article 2, paragraph 2, it stood to reason that the conciliation process should be voluntary.

20. On the other hand, although the report of the conciliation commission was recommendatory in nature, the Special Rapporteur none the less imparted a compulsory element to it by saying that a State could have recourse to compulsory arbitration when no settlement had been reached after submission of the report. It was doubtful whether States would accept the appointment of their candidates to the conciliation commission by lot, as provided in article 1 of the annex, or agree to such complicated conciliation procedures. He concurred with Mr. Bennouna and others that the proposals by Mr. Riphagen, the previous Special Rapporteur, on the conciliation procedure were less complicated. They simply entrusted the task of establishing the conciliation commission to the Secretary-General and, unlike the current articles, Mr. Riphagen's conciliation procedure[13] had not been binding on the parties. The arbitration procedure described in articles 3 and 4 suffered from the same defect as did conciliation: its compulsory aspect. The matter was further complicated by the fact that the functions of the arbitral tribunal were tied in with those of the conciliation commission.

21. The disadvantages of the draft articles and annex were that, if States parties to a dispute were to use the three-step system, they would need no less than three years to exhaust the settlement procedures. Meanwhile, any countermeasures imposed by the allegedly injured State would have had time to do immense harm to the economy of the State accused of wrongdoing; if that State had weak economic resources, the results could be catastrophic. Another disadvantage of the three-step process was the exorbitant fees to be borne by the States parties to the dispute. Mr. Fomba (2305th meeting) had even spoken about a special fund to assist economically weaker States in paying such fees.

22. Some members of the Commission had suggested reducing the complicated three-step system to two steps, namely conciliation and adjudication, bypassing arbitration, but it was an unsatisfactory solution, as it would neither cut down on the lengthy conciliation procedures proposed in the draft nor minimize the fees that such procedures would entail.

23. Judicial settlement by ICJ was described in the report as a last resort, yet any State could unilaterally institute proceedings in the Court. Consensual jurisdiction thus became compulsory in respect of a number of questions, some of which might not even qualify as legal matters. Such an approach amounted to a radical revision of the system of adjudication at the international level, particularly that of ICJ.

24. The proposals for dispute settlement procedures went against the letter and spirit of Article 33 of the Charter of the United Nations, which gave Member States the freedom to choose from a number of means of dispute settlement. A great many treaties—both bilateral and multilateral—prescribed modes for the settlement of disputes. The system described by the Special Rapporteur might affect the regime under those treaties, and a problem would arise of reconciling pre-existing treaties with the draft articles on judicial settlement.

25. With a view to developing a simpler system for compulsory third-party dispute settlement than the one proposed in the draft articles and the annex, the Special Rapporteur should seek guidance from the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes, adopted by the United Nations Conference on the Law of the Sea in 1958. The same goal could also be achieved by conferring compulsory jurisdiction on ICJ in respect of the articles on State responsibility and countermeasures.

26. A number of steps should be taken with respect to countermeasures. When a State had allegedly committed an internationally wrongful act which gave rise to a dispute, the allegedly injured State should communicate with that State for the purpose of conducting negotiations for the settlement of the dispute. Settlement by peaceful means should be sought in accordance with the procedure provided for in Article 33, paragraph 1, of the Charter. If no settlement was reached by such means within six to eight months of the date of initiation of

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

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

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

[13] See annex to part 3 of the draft articles, *Yearbook... 1986*, vol. II (Part Two), p. 36, footnote 86.

those procedures, either party to the dispute would be entitled to have recourse, by a unilateral application, to ICJ. Either party could also apply to the Court to adopt interim or provisional measures. Two months should be allowed for parties to refer the dispute to ICJ after expiry of the six to eight month period.

27. The allegedly injured State would be prohibited from taking any countermeasures during the six to eight months provided for amicable settlement of the dispute. It could, however, decide to apply countermeasures any time after the expiry of that period, provided such countermeasures were not taken before ICJ was actually seized of the dispute. If countermeasures were applied, the allegedly wrongdoing State could contest them by a unilateral application to the Court and could request a judicial ruling by the Court on provisional protection measures against the countermeasures.

28. The two States could be given a choice between recourse to compulsory arbitration or to ICJ, especially in cases where a countermeasure was wrongfully taken by the allegedly injured State before the dispute was brought before the Court, provided the arbitration system was made much less cumbersome than the one proposed in the draft articles. In such cases, there would be a two-step system to choose from: arbitration or adjudication by ICJ, both of which would be binding. The system would still allow recourse by either party to the Court concerning implementation of the award of the arbitral tribunal, and the President of the Court might have a role in appointing the members of that tribunal. The Commission could finally qualify countermeasures as meaning lawful ones only, and it could do so simply by adopting article 13, on proportionality, and article 14, on prohibited countermeasures. Both were now before the Drafting Committee.

29. The steps he had outlined represented a much easier, cheaper and speedier procedure, one which did not break any traditional or customary rule of international law. It would also be more acceptable to both the allegedly wrongdoing State and the allegedly injured State. It provided a neutral background for impartial dispute settlement in relation to countermeasures and avoided introducing a system of conciliation as a binding procedure for such settlement. If conciliation was to be used at all, it would be in the context of Article 33, paragraph 1, of the Charter of the United Nations, as was appropriate.

30. Like Mr. Vereshchetin (2307th meeting), he regretted that the Special Rapporteur had not yet seen fit to consider the matter in connection with the consequences of delinquencies qualified as crimes of States under article 19 of part 1 of the draft.[14] That issue, together with countermeasures and the dispute settlement system, formed an organic whole, and all the relevant material should be put before the Drafting Committee for its consideration.

31. Mr. KOROMA said that the topic of State responsibility was central to international law, encompassing as it did every aspect of State activity. It was more than 40 years since it had been identified as suitable for codification by the Commission and, in view of the topic's significance, the gestation period had been understandably long. Breaches of international obligations were the main facet of the topic, and the Special Rapporteur's fifth report was therefore concerned with how to resolve peacefully claims for reparations of such breaches. As far back as the Middle Ages, treaties had laid down duties and specified procedures to be followed in the event of a breach. In more modern times, the prohibition on private reprisals and the development of rules restricting forcible self-help had contributed to a conception of international responsibility from the standpoint of the rule of law. The Special Rapporteur was thus proposing, not a revolution, but a renaissance.

32. The fundamental objectives pursued in the system put forward by the Special Rapporteur were to minimize the adoption of unilateral measures involving harmful consequences, to prevent the violation of international obligations, and to deter future violations and repair unlawful conduct. He was proposing a three-tier system of dispute settlement, involving binding conciliation, arbitration and judicial settlement. His reasons for espousing a third-party settlement system, as well as the imaginative proposals therefor, were cogent and compelling. An adequate dispute settlement mechanism was indispensable if the regime of State responsibility was to be effective. It would not only guard against unilateral measures, but would also provide the allegedly injured State with an opportunity to test its claim before embarking on countermeasures.

33. The inclusion in the draft of the regime on countermeasures had been deplored by many members of the Commission as being somewhat retrograde, especially if it could be used to legitimize unilateral measures as well as the inequality of States. Yet it had been judged necessary in order to make the text acceptable to the entire international community and to prevent the automatic use of countermeasures when a breach of an obligation was alleged to have taken place. Understandably, therefore, the dispute settlement proposals submitted by the Special Rapporteur had commanded near-unanimous support. By adopting them, the Commission would not be breaking new ground, but merely following current trends in bilateral and multilateral treaties. It had been objected that some of the proposals went too far, exceeding the Commission's mandate and implying that a State accepting the draft articles would be accepting binding conciliation, arbitration and judicial settlement, which would deny it free choice of means.

34. His reading of the proposals was that they were in line with the recommendations made by members of the Sixth Committee that dispute settlement procedures should be expanded to include innovative approaches. In providing that the recommendations of the conciliation commission would be binding, the Special Rapporteur's proposals did break new ground, but they were not unprecedented. In modern times, conciliation had been successfully used in distributing the joint assets of the East African Community comprising Kenya, Uganda and the United Republic of Tanzania, once the Community had been dissolved. Although the original recommendation by the conciliator had not been accepted by the parties, it had formed the basis of negotiations which had eventually led to the settlement of the dispute. Another precedent was the successful intervention of a conciliation

[14] See footnote 2 above.

commission in the Jan Mayen Island dispute,[15] resulting in a recommendation on a joint development agreement for an area with significant prospects of hydrocarbon production. Those cases, though dissimilar, illustrated the flexibility of the conciliation procedure.

35. Conciliation involved aspects of institutionalized negotiation, encouraging dialogue and inquiry and providing information as to the merits of the positions taken by the parties, resulting in a suggested settlement corresponding to what each party deserved, not what it claimed. Though the proposed conciliation procedures were described as binding, they nevertheless retained the distinctive feature of conciliation, namely the development of proposals. The report also seemed to suggest that the regime would be binding only when certain measures had been taken, whereas arbitration and judicial settlement procedures applied to the entire spectrum of State responsibility. In that connection, certain ideas expressed in the report seemed to contradict article 12, now before the Drafting Committee. While he welcomed the explanatory note circulated by the Special Rapporteur, which addressed those contradictions, the circumstances under which it would be possible to resort to third-party dispute settlement procedures should be clearly spelled out in the draft. Such clarification would help to allay the concern that the procedures might result in an escalation of countermeasures or a deterioration of relations among the parties. A clearly drafted provision on third-party dispute settlement would not be a panacea for all evils, but it would at least discourage expensive resort to countermeasures.

36. As to the fears that the incorporation of provisions on third-party dispute settlement might discourage States from adopting the draft on State responsibility, he would point out that a former member of the Commission, Sir Ian Sinclair, had written favourably about the automatic procedures for dispute settlement incorporated in the Vienna Convention on the Law of Treaties.

37. Mr. ROSENSTOCK said the report before the Commission reflected great learning and vision. The Commission should no longer decline, as a matter of general practice, to deal with dispute settlement. As Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses, he intended to press for the inclusion of specific provisions on that subject in the draft articles he was developing.

38. It was one thing to consider dispute settlement in a finite context, however, and quite another to envisage it for the whole of international law. States had demonstrated increased willingness to accept third-party dispute settlement in specific areas, including the environment. Yet even within the relatively homogeneous world of CSCE, States had been less than willing to accept third-party dispute settlement in all cases. Accordingly, a certain modesty of approach seemed to be called for, particularly in view of the relatively small number of States that accepted the jurisdiction of ICJ under Article 36, paragraph 2, of its Statute, and the even smaller number that accepted such jurisdiction without making substantial reservations. An analysis of the acceptance of that provision by States suggested that poor countries were as unenthusiastic as were rich ones. Simultaneously, the Court's increased case-load indicated that States were willing to accept a third-party involvement in specific areas, as distinct from accepting them right across the board. Dispute settlement in the context of State responsibility would be dispute settlement right across the board. The fact that the mechanism was focused on countermeasures did not narrow the potential scope of application, except perhaps in an erratic manner, and a system whereby access to the trigger mechanism for the settlement process was limited to States ready to take countermeasures did not seem entirely rational. Furthermore, the settlement process seemed more complex than necessary, with its combination of arbitration and judicial settlement.

39. Whatever the attitude of States to the procedures, it was questionable whether the Commission should engage in detailed work on part 3 of the draft until the first reading of parts 1 and 2 had been completed. While significant progress had been made, much remained to be done. One of the outstanding issues to be resolved was that of State crimes as described in article 19 of part 1.[16] A serious re-examination of that article should precede the elaboration of other provisions relating to wrongful acts.

40. Mr. Mahiou's suggestion (2306th meeting) of limiting obligations to certain categories was interesting, but identification of the categories might reopen debate on whole portions of parts 1 and 2. It might be advisable for the Commission to allow some time for reflection before referring part 3 to the Drafting Committee. A further report by the Special Rapporteur, dealing in depth with issues raised by Mr. Mahiou and Mr. Tomuschat (2308th meeting), would surely assist the Commission in grappling with the difficult problem before it.

41. The Commission should also consider seeking the views of States on dispute settlement in the context of State responsibility, including their views on whether some or all of the dispute settlement procedures should be subject to some form of opting in or opting out. In its work on a statute for an international criminal court, the Commission had prudently sought guidance from the General Assembly before beginning to draft the articles. Caution seemed to be called for on the present topic as well, lest parts 1 and 2 be tied irrevocably to a part 3 that would not float and would consequently sink the whole project.

42. Mr. AL-KHASAWNEH said that credit for the stimulating debate which had taken place in the Commission on the important question of the settlement of disputes was due above all to the Special Rapporteur and his scholarly fifth report and thought-provoking introductory statement. The discussion had brought into sharp focus some of the most fundamental questions relating to the role of the Commission, and indeed to the role of law, in what the Special Rapporteur aptly described as the unstructured inter-State system.

43. It was a central and undeniable fact that if, in a codification convention, the Commission expressly sanctioned unilateral resort to countermeasures, it would by

[15] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38.

[16] See footnote 2 above.

so doing open the door to many probable abuses and would also consecrate a rule capable of widely differing interpretations, even in cases where good faith could safely be assumed. The Commission was, of course, aware of those adverse consequences and had sought to minimize them through absolute prohibitions in certain areas enumerated in article 14 and also through the rule of proportionality proposed in article 13. At the forty-fourth session, he had had occasion to express the view[17] that there was little comfort to be gained from the rule of proportionality, which gave the impression of providing a yardstick against which the lawfulness or otherwise of countermeasures in a given situation could be objectively verified, when in fact no such yardstick existed. He continued to hold that view, and it therefore seemed to him that regarding the applicable law—the very idea on which the whole codification concept was based—required the draft articles to establish effective machinery for compulsory third-party settlement of disputes. In using the term "effective" he meant that the machinery should be both prompt and it should be binding on the States involved in the dispute. Failure to provide for such machinery would result in elastic substantive rules and would leave wronged States without any means of redress; in other words, the present draft, far from realizing the many hopes invested in it, would lead to the unmaking of the law of State responsibility.

44. The problem was indeed extremely delicate, but surely it was no wild flight of fancy to think that States should be required to agree to submit to third-party settlement in matters pertaining to their behaviour with regard to a treaty. Nor could he subscribe to the view that compulsory third-party settlement with regard to a future convention on State responsibility would constitute a revolution or "metamorphosis" in international law, as Mr. Tomuschat had termed it in the 1986 debate.[18] After all, similar obligations had been accepted, although in respect of far smaller areas of dispute, in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The fact that the procedures set out in those instruments had not been resorted to was immaterial for the purpose of establishing whether or not States could accept the concept of third-party settlement of disputes.

45. The Special Rapporteur had in mind a conservative evolutionary process which members of the Commission, as lawyers, were duty-bound to foster as a matter of professional commitment. Like any other system of law, international law was not, and could not, afford to be static. Its ultimate aim, by definition, had to be the establishment of the rule of law in inter-State relations, however inorganically structured those relations might be. The alternative to evolution was not preservation of the status quo but stagnation and decline.

46. The main argument against that approach appeared to be based on the prospects of acceptance by States of the draft as a whole. The argument was a weighty, if often exaggerated, one. Obviously, the Commission should not produce drafts doomed to certain rejection by the majority of States. But there was nothing in the debates in the Sixth Committee from which it might be concluded that such a tragic fate awaited the present draft. As a matter of fact, there was little correlation between the inferences to be drawn from debates in the Sixth Committee and the final acceptance given to treaties in terms of ratification and accession. Why treaty A was more widely ratified than treaty B sometimes depended, at least in part, on whether there was what could be described as a "marketing agency" to promote that treaty. For example, the wide adherence to conventions relating to humanitarian law could largely be ascribed, notwithstanding the inherent merits of those conventions, to the efforts of ICRC. Other treaties, such as the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, were gaining acceptance because an influential State or States had the interest and the means to persuade other States to accept them. As the Special Rapporteur put it, the draft's prospects of acceptability would require a gifted mathematician, if not a magician, to ascertain.

47. That being so, the uppermost consideration in members' minds should be to produce a draft that was morally and logically defensible. The quality and integrity of the Commission's work was the ultimate test. Nor should it be forgotten that the work of successive Special Rapporteurs on the topic of State responsibility had often been cited in the relevant literature and in judicial pronouncements.

48. A second argument against the inclusion of third-party settlement procedures along the lines suggested by the Special Rapporteur was more technical in nature. It was that, by providing for a compulsory settlement procedure, the Commission ran the risk of moving from the general part of the topic, where secondary rules were codified and progressively developed, to the realm of primary rules. That argument was very similar to the one advanced by the representative of France in the Sixth Committee of the General Assembly at its forty-seventh session[19] and referred to by the Special Rapporteur in the fifth report. Although the argument was not without force, he did not think that by providing a set of procedural rules on dispute settlement the Commission would be going beyond its mandate, for the division into primary and secondary obligations was no more than a logical tool designed to make sure the draft was coherent. Adopting such a course would not involve questions of treaty interpretation any more than, say, article 5, paragraph 2 (*f*), of part 2,[20] already adopted by the Commission at an earlier session. In his view, the division of rules into primary and secondary rules should be approached with measured flexibility, allowance being made, in particular, for obligations existing in what might be described as the "twilight zone".

49. In so far as it existed at all, the problem arose in connection with countermeasures as much as with dis-

[17] See *Yearbook... 1992*, vol. I, 2278th meeting, paras. 14-24.

[18] See *Yearbook... 1986*, vol. I, 1955th meeting, para. 23.

[19] *Official Records of the General Assembly, Forty-seventh Session, Sixth Committee*, 26th meeting, para. 5.

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

pute settlement procedures. Claiming a right to resort to countermeasures under the draft, yet objecting to compulsory settlement of disputes on the technical grounds that settlement of disputes could lead to a definition of primary rules or to questions of treaty interpretation in sensitive areas, was untenable because the same logic applied with equal force to countermeasures.

50. A third argument against the development of compulsory third-party settlement procedures was that the procedures would encompass disputes ranging from the mainly technical to the politically sensitive. Unlike some members, he found that feature rather attractive. It meant that no State could be sure in advance that it would always—or, alternatively, never—benefit from the inclusion in the draft of a set of articles on third-party settlement. In that connection too, it should be remembered that States had already accepted obligations on third-party settlement of disputes in the Vienna Conventions he had already mentioned (para. 44).

51. As to the draft articles,[21] although the Special Rapporteur's approach was on the whole balanced and realistic, some improvements might be desirable. First, a role should be found in the draft for the advisory opinions of ICJ, along the lines suggested by the President of the Court, Sir Robert Jennings, in his statement before the General Assembly in 1991.[22] Secondly, the Special Rapporteur might consider, as Mr. de Saram had suggested (2306th meeting), giving a more prominent role to the chambers procedure of ICJ, a procedure which was considerably cheaper than arbitration.

52. A more general point was whether disputes concerning the interpretation and application of articles involving resort to countermeasures should be regulated by a special, and presumably more rigorous, system of settlement procedures than disputes on the interpretation and application of articles not involving countermeasures, where presumably the traditional system would apply. The suggestion made in that connection by Mr. Calero Rodrigues (2308th meeting) had a great deal of merit. More thought should be given to whether the two systems could be neatly separated. Mr. Yamada's suggestion that appeal against the findings of an arbitral court should not be confined to cases of *excès de pouvoir* was worth considering, and he also agreed that the fact-finding aspect of the procedure should be strengthened.

53. Lastly, he was in favour of referring the draft articles to the Drafting Committee. Mr. Rosenstock's suggestion that the Commission should first seek clearance from the General Assembly was difficult to accept, not only because the matter had already been debated in the Assembly but also because of the point of principle involved. The Commission surely did not have to refer back to the General Assembly each time it completed a small portion of its work. The Commission was, of course, accountable to the General Assembly, but it was a body of independent experts and, as such, ought not to abdicate its responsibilities.

54. Mr. BENNOUNA said that, although he was not a member of the Drafting Committee, he had attended a recent meeting and had noted that the discussion on article 12 was temporarily blocked because the draft articles on the related subject of dispute settlement[23] were not yet before the Committee. Now the Commission was being told that the time was not yet ripe to refer the dispute settlement articles to the Drafting Committee, notwithstanding the Special Rapporteur's explicit recommendation to that effect and notwithstanding the fact that the articles in question were complementary to others already before the Committee. It would be recalled that, at the previous session, not all members had been in agreement with the provisions on countermeasures but had nevertheless agreed to refer those articles to the Drafting Committee. The same approach was needed in the present instance. Progress in the Commission's work on the topic depended on the referral of the articles of part 3 to the Drafting Committee.

55. Mr. ROSENSTOCK said that while some members of the Drafting Committee did, as Mr. Bennouna suggested, see a link between article 12 and the articles of part 3,[24] others, including himself, did not think that it would be prudent to establish such a link. As for the point just raised by Mr. Al-Khasawneh, he wished to make it clear that his suggestion was not to refer the question of part 3 to the General Assembly so as to obtain the Assembly's permission to go ahead but only to ascertain its views. A survey of opinion in the Assembly concerning the proposals made in 1985 and 1986 by the previous Special Rapporteur had revealed a general lack of enthusiasm. He believed that part 3 had long-range implications for the rest of the Commission's work on the topic, and referral back to the Assembly would therefore be warranted.

56. Mr. ARANGIO-RUIZ (Special Rapporteur) said that Mr. Rosenstock ought to make it clear that, of all the members of the Drafting Committee, he was the only one who wanted to eliminate article 12. As for the suggestion that the whole of part 3 should be referred to the General Assembly, it would be appreciated that the whole issue of countermeasures and their *correctifs* had developed considerably since 1985. Lastly, on the subject of State responsibility for crimes, he had already made it clear that his proposals in that respect would be in keeping with article 19 of part 1,[25] with the addition of compulsory recourse to ICJ.

Closure of the International Law Seminar

57. The CHAIRMAN observed that the twenty-ninth session of the International Law Seminar was coming to a close that day. Reviewing the activities of the Seminar, he expressed the hope that the participants would return home greatly enriched by the experience and wished them a safe journey and success in their professional activities.

58. Mrs. NOLL-WAGENFELD (Director of the Seminar), speaking on behalf of the Director-General, who was unfortunately prevented from attending the meeting, expressed the hope that the session which was coming to

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

[22] See *Official Records of the General Assembly, Forty-sixth Session, Plenary Meetings*, 44th meeting.

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

[24] Ibid.

[25] See footnote 2 above.

a close had achieved its twofold aim of enabling the participants to familiarize themselves with the work of the Commission and establishing lasting links and contacts among themselves. The programme for the twenty-ninth session of the Seminar had focused principally on Europe and, more particularly, on the former Yugoslavia. Participants had also attended the annual Gilberto Amado Memorial Lecture and had enjoyed the gracious hospitality of the Permanent Missions of Brazil and the United States of America. She had no doubt that the experience gained at the Seminar would prove useful to the participants in their future careers.

59. Mr. CANCHOLA, speaking on behalf of the participants in the International Law Seminar, said that the opportunity to follow the work of the Commission at the present moment in history had been particularly instructive. Thanking the members of the Commission for their teaching and advice, he said that it was the participants' hope one day to follow in their footsteps.

The Chairman presented participants with certificates attesting to their participation in the twenty-ninth session of the International Law Seminar.

The law of the non-navigational uses of international watercourses (A/CN.4/446, sect. E, A/CN.4/447 and Add.1-3,[26] A/CN.4/451,[27] A/CN.4/L.489)

[Agenda item 4]

First report of the Special Rapporteur

60. The CHAIRMAN invited the Special Rapporteur to introduce his first report on the topic of the law of the non-navigational uses of international watercourses (A/CN.4/451) and in that connection drew attention to articles 1 to 10, as adopted on first reading,[28] which read:

Part I

INTRODUCTION

Article 1. Scope of the present articles[29]

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2. Use of terms[30]

For the purposes of the present articles:

(*a*) "international watercourse" means a watercourse, parts of which are situated in different States;

(*b*) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(*c*) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3. Watercourse agreements[31]

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4. Parties to watercourse agreements[32]

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

Part II

GENERAL PRINCIPLES

Article 5. Equitable and reasonable utilization and participation[33]

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6. Factors relevant to equitable and reasonable utilization[34]

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(*a*) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(*b*) the social and economic needs of the watercourse States concerned;

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

[27] Ibid.

[28] See *Yearbook... 1991*, vol. II (Part Two), pp. 66-67.

[29] Initially adopted as article 2. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 25-26.

[30] Subparagraph (*c*) was initially adopted as article 3. For the commentary, ibid., p. 26. For the commentary to subparagraphs (*a*) and (*b*), see *Yearbook... 1991*, vol. II (Part Two), pp. 70-71.

[31] Initially adopted as article 4. For the commentary, see *Yearbook... 1987*, vol. II (Part Two), pp. 27-30.

[32] Initially adopted as article 5. For the commentary, ibid., pp. 30-31.

[33] Initially adopted as article 6. For the commentary, ibid., pp. 31-36.

[34] Initially adopted as article 7. For the commentary, ibid., vol. II (Part Two), pp. 36-38.

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7. Obligation not to cause appreciable harm[35]

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

Article 8. General obligation to cooperate[36]

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9. Regular exchange of data and information[37]

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10. Relationship between uses[38]

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

61. Mr. ROSENSTOCK (Special Rapporteur) said that, as the Commission had wanted to complete the second reading of the draft articles on the topic by 1994, he had therefore submitted 10 articles, most of which were identical to those elaborated on first reading. None of the changes he was suggesting would fundamentally alter the thrust of the draft adopted on first reading; for the most part, the changes were made in response to comments by Governments (A/CN.4/447 and Add.1-3).

62. One question raised in some comments received concerned the form the Commission's work should take: model rules or a framework convention. Whatever decision the Commission might ultimately take in that respect, the very least it should do in response to those comments was to consider the matter in its debate on the topic.

63. He suggested that the words "flowing into a common terminus", in article 2, should be deleted, for two reasons. In the first place, it was not easy to see the *raison d'être* for that somewhat artificial limitation in something intended as model rules or a framework convention. Secondly, deletion of the words in question was one of the simpler ways of starting to deal with the problem of "unrelated" confined groundwaters. While he would not insist on his suggestion if there was no broad support for it, he would point out that it had received the endorsement of ILA's prestigious Committee on Water Resources, which also took the view that the exclusion of unrelated confined groundwaters was not based on sound hydrogeology. The same Committee also agreed with his recommendation that, in article 3, paragraph 2, the word "appreciable" should be replaced by the word "significant", for the reasons stated in paragraph 12 of his report.

64. On a point of drafting, he proposed to move the definition of pollution from article 21[39] to article 2.

65. For the reasons stated in paragraphs 21 to 23 of the report, he strongly recommended that article 7 should be revised as proposed in paragraph 27. Although some Governments and experts had urged that article 7 should be deleted in its entirety, on the ground that it was either inconsistent with article 5 or redundant, that would, in his view, be going too far. His proposed text was therefore a compromise designed to give full meaning both to optimal utilization and to sustainable development while recognizing the dangers of certain kinds of irreparable injury. A move away from the essentially simple text adopted in 1991 to a more complex approach would none the less create greater potential for disagreement and disputes. Accordingly, acceptance of his proposed changes to article 7 implied reconsideration of the decision—an unwise decision, in his opinion—not to include material on dispute settlement. In that connection, his predecessor, Mr. McCaffrey, had proposed that there should be a conciliation procedure followed by arbitration, but the problem would be that States would then, in effect, be required to consider arbitration rather than be placed under a clear obligation to go to arbitration. He trusted that it would be possible for any dispute settlement process to have a binding component, but at the very least, a reasonably developed third-party process seemed to him to be essential.

66. It was also his intention to give consideration to strengthening the institutional relations between watercourse States and to draw on what he had learned with regard to the situation between the United States of America and Canada and between the United States and Mexico. Many potential disputes were resolved, long before they developed into full-blown ones, at the technical level.

67. He hoped that as many members of the Commission as possible would take another look at his predeces-

[35] Initially adopted as article 8. For the commentary, see *Yearbook... 1988*, vol. II (Part Two), pp. 35-41.

[36] Initially adopted as article 9. For the commentary, ibid., vol. II (Part Two), pp. 41-43.

[37] Initially adopted as article 10. For the commentary, ibid., vol. II (Part Two), pp. 43-45.

[38] For the commentary, see *Yearbook... 1991*, vol. II (Part Two), pp. 72-73.

[39] See footnote 23 above.

sor's last two reports[40] which had not been considered as carefully as they might have been.

68. Mr. AL-BAHARNA, congratulating the Special Rapporteur on his first report, said that the general thrust of the draft articles was acceptable, though they could benefit from some "fine tuning".

69. As rightly stated by the Special Rapporteur in paragraph 6 of his report, the Commission would be well advised to expedite its work with a view to resolving the question of the form the draft articles should take at the earliest practicable stage. For his own part, he would be inclined to favour a convention rather than rules, for in an era of growing environmental awareness the importance of the matter warranted the conclusion of a multilateral treaty; model rules were more in the nature of guidelines.

70. As to issues concerning part I of the draft, article 2 could be improved, but he did not favour the proposal that the words "flowing into a common terminus" should be deleted. Failure to refer to a common terminus, would be a failure to identify a central element in a river system that would almost certainly comprise a number of tributaries flowing in from different States. A common terminus criterion would, moreover, help to distinguish between two watercourses flowing alongside each other. If any change was to be made to article 2, it should be with respect to groundwater, which made little or no significant contribution to surface waters and should therefore be excluded from the concept of watercourse systems. It would thus be preferable to limit the scope of the draft articles to underground waters that were central to the system as a whole. He agreed, however, that the definition of pollution set forth in article 21, paragraph 1, should be transferred to article 2.

71. The paragraphs concerning article 3 deserved close examination. In particular, the word "appreciable" as used in article 7 was not as broad in effect as the word "appreciable" used in article 3, paragraph 2. Since there was little reason why different formulas should be used for harm, in the draft articles, in similar sets of circumstances, the Special Rapporteur's proposed alternative B to article 3, paragraph 2, whereby the words "adversely affect, to an appreciable extent" would be replaced by "cause significant harm" was clearly an improvement over article 3, paragraph 2, as now drafted. Furthermore, he agreed that a similar formula might well have to be used in article 4, paragraph 2, articles 7 and 12, article 18, paragraph 1, article 21, paragraph 2, article 22 and article 28, paragraph 2.

72. The Special Rapporteur referred, in paragraph 15 of his report, to a suggestion by some Governments that the future instrument should contain a provision to the effect that, if a State became a party to the convention, that in itself would not affect existing watercourse agreements. The Special Rapporteur considered that such a provision would not be without problems and had therefore attempted to resolve the matter by referring to the concept of *lex posterior* and to the principle of successive treaties. It was none the less a principle that raised intricate questions of law, and the Commission would have to apply it in connection with its consideration of the status of earlier watercourse treaties and of principles relating to the degree of modification, termination and suspension of those treaties. The Commission would also have to look into the question of preserving the rights and obligations acquired by States under earlier treaties as well as the Special Rapporteur's suggestions with regard to individual declarations made by States at the time of signature and ratification. In particular, it would have to determine the legal implications of such declarations and decide whether rights acquired in a bilateral or multilateral diplomatic process could be unilaterally altered by declarations. All those issues would have to be thoroughly examined by the Commission before firm answers could be given.

73. He agreed only partly with the Special Rapporteur about re-ordering articles 8 and 26. The provision in article 8 should indeed come before article 3, but there was no need to move article 26. What was more, a duty to cooperate might not always be realistic for watercourse States, many of which were bedevilled by disputes. For that reason, the words "endeavour to" should be added before the word "cooperate" in article 8 to underline the importance of cooperation, but without making it obligatory for States to cooperate.

74. Both paragraphs 1 and 2 of article 4 should be retained, since they dealt with two different aspects of participation in watercourse agreements. Paragraph 1 created a general right of participation in agreements relating to the entire watercourse, whereas paragraph 2 was concerned with participation arising under an agreement that dealt with part of an entire watercourse or a particular project.

75. While he agreed that articles 5 and 7 provided a key element of the entire draft, he failed to see any convincing reason why they should be reformulated. It was essential to recognize that, although they embodied related concepts, each had its own particular scope. Article 5 related to the equitable and reasonable utilization of a watercourse in both the domestic and the international context, while article 7 imposed an obligation on a State not to cause appreciable harm to other watercourse States in its utilization of the watercourse. Admittedly, the concept of equitable and reasonable utilization of a watercourse could overlap the concept of appreciable, or significant, harm, but the different circumstances of particular cases would justify separating the two. It might be more reasonable, from the standpoint of availability of resources, for two riparian States to undertake a joint watercourse utilization programme rather than for either of them to attempt such a project alone. The proposal to make "equitable and reasonable use" the determining criterion, except in cases of pollution, would require careful re-examination. There was little justification for creating rules when neither the norms nor the circumstances reflected any need to do so. Indeed, in paragraph 23 of the report, the Special Rapporteur noted the difficulty of providing detailed guidance on the matter: many bilateral agreements reflected facts that were specific to a particular problem and could not be reduced to general principles.

[40] These reports are reproduced as follows:

Sixth report: *Yearbook... 1990*, vol. II (Part One), p. 41, document A/CN.4/427 and Add.1.

Seventh report: *Yearbook... 1991*, vol. II (Part One), p.45, document A/CN.4/436.

76. If equitable and reasonable use was made the predominant criterion, however, any significant harm caused to a watercourse State would be excusable as long as it was also equitable and reasonable. It was that fact which constituted the major difficulty in the Special Rapporteur's proposed new article 7. For similar reasons, he found it difficult to accept the new formulation on pollution, which would radically alter the balance in regard to pollution and would disturb the whole equilibrium of the draft articles themselves. The Special Rapporteur's formulation would appear to provide a useful handle whereby polluting States could seek to continue their activities by invoking the terms of subparagraphs (*a*) and (*b*) of the proposed new article 7. The simplicity of the former article 7 was far more preferable.

77. He would hesitate to endorse any attempt to revise article 8, in regard to which the Special Rapporteur stated, in paragraph 28 of the report, that a general formulation would be more appropriate. Greater precision could perhaps be achieved, but it might be at the cost of sacrificing the general nature of the provision. He none the less agreed that the concepts of good faith and good neighbourliness, although salutary in themselves, had no place in the draft articles.

78. Mr. EIRIKSSON said that the Commission's main task should be to stick to the goal of completing the second reading of the draft articles by the end of the next session, in 1994. Any suggestions in the next report about the elaboration of provisions on management and the introduction of a system of dispute settlement should take that into account.

79. He was concerned about the proposal to replace the word "appreciable" by the word "significant", which could be interpreted as a substantive change and as raising the threshold of the draft articles. If the word "appreciable" was ambiguous in English, that point could perhaps be covered in the commentary. The same problem had in fact arisen in the Drafting Committee in connection with the draft articles on the topic of international liability. The Special Rapporteur might therefore wish to seek advice from other sources before the matter was taken up in the Drafting Committee.

80. Mr. KOROMA, congratulating the Special Rapporteur on an excellent report, noted that the Special Rapporteur had resisted the temptation to "tinker", to use his own word, with the draft articles, except where absolutely necessary. That was a sure sign of a good rapporteur.

81. He would be loath, at the present stage in international relations, to choose between model rules or a framework convention, but the ultimate decision would, he believed, depend on the quality of the Commission's work. If the draft articles were balanced and authoritative, they would inevitably recommend themselves to the international community.

82. The word "significant", as opposed to "appreciable", perhaps posed a problem for those not conversant with the common law, but it would make the text clearer. As the Special Rapporteur explained in his report, the word "appreciable" had two distinct meanings, whereas the word "significant" pinpointed the issues involved. He agreed with the recommendation that the definition of pollution should be brought forward to article 2, on the use of terms. The sooner that was done the better.

The meeting rose at 1 p.m.

2310th MEETING

Tuesday, 22 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. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, 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. de SARAM said that the Commission, in plenary and in the Drafting Committee, was addressing at the same time two closely related matters: the first was the situation in which a countermeasure had not as yet been taken (the "pre-countermeasure" stage considered in the fourth report of the Special Rapporteur,[2] currently being discussed in the Drafting Committee); and the second was the situation in which a countermeasure had already been taken (the post-countermeasure stage considered in the fifth report of the Special Rapporteur, currently before the Commission in plenary).

2. The overall approach advocated by the Special Rapporteur in his fourth and fifth reports was the following: any State which intended to take a countermeasure should notify, in advance, its intention to the State against which that countermeasure was to be taken, requesting that recourse should be had promptly to a dispute settlement procedure which did not necessarily need to be a binding third-party one. However, whatever the settlement procedure might be, if the dispute was not resolved and if a countermeasure was taken, it was essential that there should be a prompt and binding third-party settlement—at least as a matter of final recourse, should negotiation or conciliation fail—whereby the legitimacy of the countermeasure would be determined.

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

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