up only in relation to the provisions in question. At the present stage, it was essential not to go beyond the limits set by the terms of article 3, as adopted by the Commission. The Commission would thus be taking due heed of the warning given by the Special Rapporteur in his introductory statement concerning the limits of the subject under consideration.

The meeting rose at 12.30 p.m.

1362nd MEETING

Wednesday, 5 May 1976 at 10.20 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

CHAPTER III. PRELIMINARY CONSIDERATIONS (*continued*)

1. Mr. YASSEEN congratulated the Special Rapporteur on his outstanding introductory statement. Like the Special Rapporteur, he was convinced that the Commission should not yield to the temptation of formulating substantive rules by defining the obligations whose breach could engage the responsibility of States. That was an approach which had already been decided. The Commission had chosen the expression "breach of an international obligation" in preference to breach of an "international rule" or "international norm". The choice was justified, for the expression was sanctioned by practice and made it clearer that the reference was to subjective legal situations. On the other hand, he did not agree with the Special Rapporteur that that choice was justifiable because an international obligation could derive, not only from an international rule, but also from a legal instrument, a decision of an international organization, a judgment of a court or an arbitral award. The fact that an obligation might have been created by a decision of an international organization, a judgment or an arbitral award did not mean that the decision, judgment or award was not itself based on a rule of international law. Consequently, the breach of an obligation was, in the last analysis, a breach of the rule from which the decision or judgment derived its binding force. Hence, it was not the decision or judgment as such that was the source of the obligation, but the rule of international law which gave it its mandatory character.

2. Before concluding that there had been a breach of an international obligation, it had to be determined whether the obligation had been in force at the time the act had been committed. He did not think it possible to accept the retroactivity of international obligations as a general rule and to hold that a State had breached an international obligation which had not existed, as such, at the time of its action.

3. A further question was whether the source of an international obligation could affect responsibility. For his part, he believed that, once there was an obligation under international law, the question of its source should not be considered, for whatever that source might be (customary law, treaty law, general principles of law, etc.), the obligation none the less existed. In his view, the source had no effect on the importance of the obligation. It was, after all, impossible to establish a hierarchy of the rules of international law based on their sources: a treaty rule, for example, was not necessarily more important than a customary rule, which might contain elements of *jus cogens.*

4. While the importance of an obligation did not depend on its source, it could, on the other hand, depend on its content. Thus, if an obligation was essential for the international community, it might be thought that its breach would give rise to a heavier responsibility than the breach of an obligation which was not of capital importance for the international legal order. The degree of importance of an international obligation might justify a different régime or a different form of responsibility. International responsibility could therefore vary according to the content of the obligation and probably also according to the seriousness of the breach.

5. With regard to the method of work to be adopted, he thought that, for the formulation of an integrated system of rules on international responsibility, the Commission could not rely solely on the jurisprudence and practice of States, for their solutions had been devised as the chances of international life required and left many points unsettled. It would therefore be necessary to fill the gaps by formulating the rules necessary for a coherent system.

6. Moreover, the Commission must not forget that the international community was in the process of change: it must take account of the evolution of international life. It should take advantage of the contributions of jurisprudence and State practice, but should not hesitate to modify the present rules or to formulate new rules if the reality of contemporary international life so required.

7. Mr. BEDJAOUI congratulated the Special Rapporteur on having identified, in a statement of exceptional clarity and precision, the real problems posed by the adaptation of international law to the new needs of the international community. He reminded the Commission that in 1969, when it had taken up the topic of international responsibility, it had decided, at the request of the Special Rapporteur, to confine the study to State responsibility for internationally wrongful acts.[1] A clear distinction must be made between the task of ascertaining the principles governing such responsibility of States and

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[1] *Yearbook... 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 80.

that of defining the rules imposing on States obligations whose violation could be a source of responsibility. The Special Rapporteur had followed with complete rigour and constancy the course set by the Commission from the beginning of his work. He had accordingly warned the Commission, in regard to chapter III, on the breach of an international obligation, against the temptation to venture on a definition of the rules imposing international obligations on States. For the problem of responsibility presupposed the solution of the problem of determining the rules which were the source of the international obligations of States. Hence, by eliminating that initial difficulty, the Special Rapporteur had correctly delimited the subject.

8. To determine whether there had been a breach of an international obligation generating the responsibility of the State it was not necessary to seek the origin of the obligation—that was to say, to know whether the obligation had its source in an agreement concluded by the State, in custom, or in the general principles of law. In that connexion, he was also grateful to the Special Rapporteur for having saved the Commission from digressing into a search for the very sources of international law, which might have involved it in vain controversies. The fact was that an obligation did not change, either in nature or in degree according to whether its source was a custom or a convention: for the purposes of responsibility, as for all other purposes, an obligation retained the same binding force and its breach had the same wrongful character. Hence, the responsibility to which the breach gave rise could not depend on the customary or conventional nature of the obligation breached. Chapter III of the draft articles was thus concerned with the problem of establishing the existence of a wrongful act, irrespective of the particular sector of public international law to which the rule broken by the wrongful act belonged, and of the source or origin of the obligation which had been breached.

9. None the less, while there was no logical reason for the Commission to concern itself with either the nature of the obligation—which could derive from the substantive rules of any sector of international law—or its source—which could, for example, be customary or conventional—the Commission could not remain indifferent to the objective content of the obligation. Of course, an obligation was always an obligation and a breach of it was always a breach, but, as in internal criminal law, some violations were more serious than others. Just as larceny was not murder, there were, at the present stage of development of the universal conscience, some derelictions of duty by States which were felt to be more serious than others. In the case of a fundamental obligation, the breach of which was, *ipso facto*, particularly serious, it was therefore necessary to establish the responsibility of the delinquent State not only towards the injured State, but also towards all the States of the international community. In the case of the third-world or non-aligned countries, for example, threats made against the independence, territorial integrity or régime of one of those countries were felt by all the others. Still less could the community of States overlook the breach of an international obligation, the content of which was recognized as fundamental by the whole international community and expressed the contemporary ethic of nations. In such a case, it was not only the question of reparation that arose, but also the question of sanctions. Rules of *jus cogens* were involved, which the International Law Commission and, after it, the United Nations Conference on the Law of Treaties had had the courage to take up in the context of the law of treaties. He hoped that the Special Rapporteur and the Commission would continue courageously to explore that field in the context of State responsibility. For the Commission should not forget that the purpose of the draft articles under consideration was to promote the observance of the international obligations incumbent on States, especially those relating to the maintenance of international peace and security, the sovereignty and independence of States, and the protection of human rights. The Commission should therefore attach capital importance to the process of constant adaptation of international law to the contemporary world, for law was not an end in itself, but should fulfil a modern social function.

10. The new States had brought to international law new centres of interest and new aspirations; and all States, whether they were new or not, aspired to an ever more demanding ethic of international relations. That being so, the progressive development of international law could be seen to be a necessity; for international law must evolve in step with the world's new needs if it was to fulfil its social function, gain acceptance by all countries, and contribute to the maintenance of international peace and security.

11. At its twenty-second session, the Commission had expressed its intention of taking the needs of the international community into account in its long-term programme of work.[2] It now had an opportunity of doing so in chapter III of the draft articles on State responsibility, which lent itself more readily to the progressive development of international law than chapter II, dealing with the attribution of a wrongful act to the State. In 1974, the General Assembly had already asked the Commission to take due account of the seriousness of the internationally wrongful act, in view of the importance which the international community attached to the fulfilment of certain international obligations.[3] If it confined itself to stating that a breach of an international obligation was a wrongful act which engaged the responsibility of the State committing it, the Commission would not be meeting the expectations of the international community. It should go further, and distinguish clearly between the different kinds of breach of international obligations. That distinction was necessary in order to determine the legal consequences which should attach to the wrongful act, for the breach of an international obligation could entail not only reparation, but also sanctions. That should be the case where obligations affected the maintenance of international peace and security or were intended to

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[2] See *Yearbook... 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

[3] *Official Records of the General Assembly, Twenty-ninth Session, Annexes*, agenda item 87, document A/9897, para. 109.

prevent the use of armed force in violation of the Charter of the United Nations. The occupation of the territory of a State by armed force, genocide and acts infringing fundamental human rights, racial discrimination and *apartheid*, and acts committed against dependant peoples, particularly turning their territories into theatres of war or nuclear testing grounds and plundering their natural resources, were, in his opinion, acts which engaged the responsibility of the delinquent State more gravely than others, not only towards the injured State but also towards the international community. It was therefore necessary to determine the degree of seriousness of an internationally wrongful act by comparison with other such acts.

12. In the context of the topic of State responsibility, as it had been delimited by the Special Rapporteur and the Commission, it was not necessary to identify all the different obligations incumbent on a State; it was sufficient to show that some of them were more important than others for the international community. Consequently, with regard to chapter III of the draft articles, he was in favour of the progressive development of international law and the inclusion of an appropriate reference to *jus cogens*.

13. Finally, in view of the new needs of the international community, the Commission should not lose sight of the fact that, after its study on responsibility for internationally wrongful acts, it was expected to make a study of responsibility for activities which lay half-way between the licit and the illicit—activities which were expanding considerably at the present time and exposed mankind to serious risks. At the Caracas and New York Sessions of the Third United Nations Conference on the Law of the Sea, speakers had raised the problem of liability for damage resulting from activities which were not yet prohibited by international law.

14. Mr. HAMBRO said that the Special Rapporteur had once again succeeded in producing, on so difficult a subject as State responsibility, a learned and comprehensive report which was remarkable for its clarity and simplicity—a simplicity which showed that the writer had mastered the difficulties involved.

15. With regard to the preliminary questions put to the Commission by the Special Rapporteur, all the members approved of his inductive method of dealing with the topic. He commended the Special Rapporteur for his remarkable analysis of relevant cases and of the opinions of learned writers, and for his digest of the League of Nations efforts to codify State responsibility. He wished to express his unqualified support for the manner in which the Special Rapporteur had struck a balance between general and special international law. Obviously, the draft under consideration could not deal with all concrete cases of responsibility. He also approved of the Special Rapporteur's approach to the question of the sources of international obligations. Care should be taken to avoid entering into that question in the draft articles, though the Special Rapporteur has been right to comment on it in his report. He also fully concurred with the Special Rapporteur's warning in regard to intertemporal international law (A/CN.4/291 and Add.1-2, para. 8)—a very difficult and complicated question which had been examined two years previously by the Institute of International Law on the basis of a report by Professor Sørensen.[4] Lastly, he fully recognized the need to maintain a proper balance in the draft between progressive development and codification of international law. It was the Commission's duty to look forward and to formulate the rules of international law in the light of the needs of an expanding international society. A draft which failed to meet the needs of the contemporary international community would not be worth preparing.

16. That being said, he wished to dwell on a particular point on which he held strong views. The Special Rapporteur's fifth report contained, in the preliminary considerations on chapter III, the following statement, with which all the members of the Commission would agree:

> The Commission also pointed out the correlation —which admits of no exception under international law—between the breach of a legal obligation by the State perpetrating the internationally wrongful act and the infringement of the international subjective right of one or more other States, caused by that breach (*ibid*., para. 3).

That statement, however, did not mean that the Commission could or should exclude the possibility of international responsibility of a State arising from a multilateral treaty of a general character. The point was perhaps obvious but it should be made clear. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide conferred on all the States parties to it a subjective right to see that it was observed. For that reason, he was entirely opposed to the negative and restrictive judgment of the International Court of Justice in the second *South West Africa* case.[5]

17. Lastly, as to the question of the length of the Commission's report, to which reference had been made at the 1360th meeting he thought that was a matter of balance and judgment. There was no need for the Commission to submit a long report, provided that the Special Rapporteurs' reports were full and detailed. The Commission's report to the General Assembly was a working tool for diplomats and should be sufficiently concise to be used by Foreign Office officials. Scholars who wished to study a topic more deeply could always go back to the reports of the Special Rapporteur concerned, which in the present case constituted a monument to the science of international law.

18. Mr. MARTÍNEZ MORENO said that the Special Rapporteur, faithful to the inductive method he had adopted, had analysed with remarkable legal logic the objective element of the internationally wrongful act. In doing so, he had rightly warned the Commission not to go beyond the boundaries of international responsibility proper.

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[4] "Le problème dit du droit intertemporal dans l'ordre international", provisional and final report by Mr. Max Sørensen, in *Annuaire de l'Institut de droit international, 1973* (Basel), vol. 55, pp. 1-114.

[5] South West Africa, Second Phase, Judgment, *I.C.J. Reports 1966*, p. 6.

19. The Special Rapporteur had examined the question whether any distinction could be made between breaches of international obligations according to the source of the obligation breached. On that point, he had arrived at the conclusion, expressed in article 16, that there were not several types of international responsibility depending on the source of the obligation concerned: the breach of any international obligation constituted an internationally wrongful act and the international responsibility incurred was the same "regardless of the source of the international obligation breached". He (Mr. Martínez Moreno) fully agreed with that conclusion, but wished to make some comments to assist the Special Rapporteur. The question of the source of the international obligation breached had been explored when the League of Nations had endeavoured to codify the law of international responsibility, and the Conference for the Codification of International Law (The Hague, 1930) had reached the conclusion that there were three sources of international obligations, namely treaties, custom and the general principles of law (A/CN.4/291 and Add.1-2, para. 24). He himself found that list unduly restrictive, since there could be other sources of international obligations. At the same time, he found the Special Rapporteur's formula "regardless of the source ..." much too wide. In that connexion, he drew attention to the formula used by the International Court of Justice in the case concerning the *Barcelona Traction, Light and Power Company Limited:* "the breach of an international obligation arising out of a treaty or a general rule of law".[6] The Special Rapporteur had indicated in his report, however, that the term "general rule of law" as used by the International Court of Justice, referred first and foremost to international customary rules, but could also cover general rules based on general principles of law or on analogy (A/CN.4/291 and Add. 1-2, para. 16, foot-note 22). He (Mr. Martínez Moreno) would be reluctant to accept, in the context of international responsibility, any rule based on analogy. In internal criminal law, it was not permissible to consider an act as punishable by analogy with an existing offence. Similarly, he would not favour considering an act of a State as internationally wrongful, and hence as engaging that State's international responsibility, purely on grounds of analogy.

20. On the other hand, he would agree that a State would be committing an internationally wrongful act if it violated an obligation deriving from an international judgment or award that was no longer open to appeal. There might also be cases in which failure to comply with the decision of an international organization would constitute an internationally wrongful act, but it was necessary to be cautious on that point. Decisions taken by international organizations were based not only on concepts of justice and fairness, but also on political factors; a decision that was manifestly unjust could, in some cases, attract a majority of votes.

21. At the previous meeting, the Special Rapporteur had referred to the sources of international law mentioned in article 38, paragraph 1 of the Statute of the International Court of Justice. He (Mr. Martínez Moreno) had reservations regarding the "subsidiary means for the determination of rules of law" mentioned in paragraph 1 d of the Article, which included not only "judicial decisions", but also "the teachings of the most highly qualified publicists of the various nations". Judicial precedents were, of course, very useful for the purpose of reaching a decision on a specific case, but he did not think they could be considered as a source of international law for purposes of the present discussion on chapter III of the report. As for the opinions of writers, they were not in themselves sufficient to establish the existence of an international obligation incumbent on a State, the breach of which constituted an internationally wrongful act.

22. In conclusion, he stressed that his comments were not intended as a criticism of the position taken by the Special Rapporteur on the insufficiency of the three sources adopted by the 1930 Codification Conference and on the need for recourse to a more general formula. He had merely wished to express his doubts on a number of points and thereby assist the Special Rapporteur in drafting the commentaries.

23. Mr. KEARNEY said that, in general, the preliminary considerations concerning chapter III of the Special Rapporteur's fifth report met with his approval. However, with regard to the correlation between the breach of a legal obligation by the State perpetrating an internationally wrongful act and the infringement of the international subjective right of one or more other States caused by that breach (A/CN.4/291 and Add. 1-2, para. 3), he fully agreed with Mr. Hambro that there were international obligations whose breach could infringe the rights of the whole community of nations. The Convention on the Prevention and Punishment of the Crime of Genocide afforded a most appropriate illustration of the existence of a right of all States to ensure that certain obligations were fulfilled.

24. The Commission was none the less moving on to ground which, through not perhaps *terra incognita*, was not at all easy to explore. In some areas, it was extraordinarily difficult to determine what actually were the particular rights conferred on the community of nations. The Commission had, as yet, no indication of the consequences of formulating rules based on the theory of invasion of the rights of the international community. For example, if a State committed an "international crime", were the leaders of that State international criminals and, if so, what action was the international community to take with regard to them? The Commission might have to investigate all the aspects of that question. If it was to move into an uncharted area, the question arose what directions the Commission proposed to take and whether there were limits on the points it wished to examine. The Commission needed greater knowledge and understanding of what it intended and hoped to accomplish in that area.

25. Mr. SETTE CÂMARA said that the Commission was once again indebted to the Special Rapporteur for his masterly work. The draft articles and the learned commentaries thereto displayed an impeccable, logical

[6] *I.C.J. Reports 1970*, p. 46.

consistency and harmony which placed them well above any earlier fragmentary and perfunctory attempt to codify such a rich and complex field as State responsibility.

26. He had no difficulties with the general guidelines indicated by the Special Rapporteur. The Commission should proceed by the inductive method and should carefully avoid being diverted into any matters that constituted something more or something less than State responsibility; in particular, it should not engage in a study of the primary substantive rules of international law or try to define the sources of international obligations. Similarly, it should be very cautious in dealing with the question whether or not an international obligation could be considered to be retroactive. In his view, the Commission could not do better than follow the guidance given by the Special Rapporteur.

The meeting rose at 12.30 p.m.

1363rd MEETING

Thursday, 6 May 1976 at 10.25 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*) (A/C.4/291 and Add.1-2)

[Item 2 of the agenda]

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

CHAPTER III. PRELIMINARY CONSIDERATIONS (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission, said that he wished to join in the praise bestowed on the Special Rapporteur's fifth report on State responsibility (A/CN.4/291 and Add.1-2) and that he approved the approach he suggested in his brilliant introduction.

2. In stating in paragraph 5 of the report that "an obligation does not necessarily and in all cases flow from a rule; it may very well have been created by a legal instrument or by a decision of a judicial or arbitral tribunal", the Special Rapporteur presumably had in mind Article 38, paragraph 1 d, of the Statute of the International Court of Justice, which stated that the Court would apply "judicial decisions ... as subsidiary means for the determination of rules of law". It would be remembered, however, that that provision represented a compromise formula between common-law countries, which considered such decisions as sources of law that constituted the law, and civil-law countries, which considered them as interpretations of the law and not as rules of law. Again, he wondered whether the English term "legal instrument" was the exact equivalent of "*acte juridique*", the term employed by the Special Rapporteur, but that point could be discussed at a later stage.

3. With regard to the question of the subjective element, raised at an earlier meeting, he fully agreed with Mr. Hambro's view of the judgment of the International Court of Justice in the *South West Africa* cases,[1] when the Court had ruled that Ethiopia and Liberia did not have any legal right or interest in the subject-matter of their claims.[2] As former Members of the League of Nations, however, they had, in his opinion, an over-all interest in the application of the strict obligations undertaken by the international community, represented by the League of Nations, towards the inhabitants of a mandated territory.

4. On the question of an "international crime" and the machinery to be applied, it was true, as Mr. Kearney had pointed out, that the Commission should not plunge into matters without knowledge of the full implications. However, some precedents did exist—for example, the draft Code of Offences against the Peace and Security of Mankind. The Commission could establish a concept and consider it in principle, leaving the problem of appropriate machinery to be determined by other organs. That same type of problem had been encountered in *jus cogens*; although the relevant modalities had not been fully defined the Commission had not shied from committing itself to the notion of *jus cogens*.

5. More generally, he considered that the notion of the breach of an international obligation should include recent developments in international law relating to the maintenance of peace, the self-determination of peoples and human rights.

6. Lastly, the Commission should not be inhibited by adverse criticism of the length of its reports. Indeed, the final report to the General Assembly should be as comprehensive as possible and contain a wealth of commentary, which would be extremely useful to the representatives of States, since they would then be able to ascertain whether or not their ideas had been discussed by the Commission.

7. Mr. USTOR said that the Commission could not but admire the remarkable patience and the logical approach of the Special Rapporteur. Paragraph 1 of his fifth report stated: "the rules relating to the international responsibility of the State are, by their very nature, complementary to other substantive rules of international law; they are complementary to those which give rise to the legal obligations which States may be led to breach". It was entirely true that the rules pertaining to State responsibility were rules which presupposed the existence of other substantive rules not only primary,

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[1] See 1362nd meeting, para. 16.

[2] South West Africa case, second phase, *I.C.J. Reports 1966*, p. 51.