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Summary record of the 1895th meeting

Topic:
State responsibility

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cables". In paragraph 2 (*a*), the word "legal", qualifying a situation at the international level, was not justified, since there were no international "laws". The words "as legal" could very well be deleted.

48. While admitting the need to deal with international crimes in a set of draft articles dealing with the "civil responsibility" of States, he feared that paragraph 2 (*a*), (*b*) and (*c*) of article 14 would raise serious application problems. It might well be asked, for example, whether the rule of solidarity, which required States to reject the internationally wrongful act and not to consolidate the situation it had created, might not in practice lead to defections by some States. Moreover, should the international community as a whole resort to a certain category of means only, or could each member State resort to individual means, according to its possibilities?

49. According to paragraph 4 of article 14, the obligations under that article would prevail in the event of conflict between them and rights and obligations under any other rule of international law, subject to Article 103 of the Charter of the United Nations. He endorsed that provision, but was not sure how it could be reconciled with the provisions affirming the residual nature of the draft articles. Again, he wondered whether the beneficiary of reparation, in the case of an international crime, was the international community as a whole or a directly injured State. It appeared utopian to consider that the entire international community was injured, without seeking to determine whether one or more States were not directly injured *in concreto*. True, in paragraph (9) of the commentary to article 14, the Special Rapporteur had recognized that "there may be an injured State or injured States under article 5, subparagraphs (*a*) to (*d*)"; but, in his own opinion, that was not merely an eventuality.

50. Referring to draft article 15, some members of the Commission had questioned whether aggression should be dealt with specifically, since it was in the category of international crimes treated in the draft Code of Offences against the Peace and Security of Mankind. In his opinion, aggression did belong in the draft articles on State responsibility, for it was the crime of States *par excellence*. Was it not precisely because aggression had been committed by States against other States that the League of Nations and the United Nations had come into being?

51. He expressed doubts about the relevance of draft article 16, subparagraph (*b*), concerning the rights of membership of an international organization. He saw no reason to give special attention to that question. As to belligerent reprisals, referred to in subparagraph (*c*), they were indissolubly linked with self-defence, which should be taken into consideration by the Special Rapporteur in his further work.

52. Finally, in regard to the implementation of international responsibility, he believed that the general outline should be set out in the draft, otherwise the building would have no roof. But great caution should be exercised in proposing any mechanism. States were more and more mistrustful of compulsory jurisdiction as such, so that rather than suggest too binding a mechanism, it would be better to suggest a flexible system that would encourage the States parties to a dispute to come together in order to seek a solution. Even at the regional level, States were sometimes reluctant to resort to binding jurisdiction, as illustrated by the fact that the Commission of Arbitration and the Arbitral Tribunal set up for the settlement of disputes within OAU had never functioned.

The meeting rose at 1.05 p.m.

1895th MEETING

Thursday, 6 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf. Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

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

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Sir Ian SINCLAIR said that he wished to raise two points on draft article 5, in addition to those he had already mentioned (1890th meeting). The first, already raised by Mr. McCaffrey (1892nd meeting) and Mr. Francis (1894th meeting) related to para-

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

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

[4] For the texts, see 1890th meeting, para. 3.

graph (10) of the commentary to that article, which stated that subparagraph (*b*) was "meant to cover not only the final award or judgment, but also such orders as the indication of interim measures of protection as may be binding on the parties to the dispute". That passage seemed to imply that an order of the ICJ or another international tribunal indicating provisional measures was binding upon the parties to the dispute. That, however, was highly debatable, particularly where orders of the ICJ were concerned. Indeed, the prevalent view among writers on the subject was that orders of that kind were, strictly speaking, not binding on the parties. The reference to interim measures of protection might perhaps be deleted.

2. His other comment on article 5 related to the case mentioned in subparagraph (*d*) (iv). In paragraph (22) of the commentary to article 5, the Special Rapporteur indicated that, in the case of a multilateral treaty for the protection of fundamental human rights, the interest was not allocated to an individual State party, so that any State party to the treaty had to be considered an injured State in the event of a breach of the treaty. In one sense, that was, of course, obviously right. However, the case in article 5, subparagraph (*d*) (iv), had also to be considered in relation to that in article 7, which, as currently drafted, appeared to accord lesser rights to a State seeking to exercise diplomatic protection of its nationals in the event of their suffering damage or injury as a result of an internationally wrongful act of another State than to a State claiming to be an injured State only because the obligation breached had been stipulated for the protection of individual persons, irrespective of their nationality. That surely could not be right. He appreciated that the Special Rapporteur had proposed article 7 in an endeavour to qualify the obligation of the author State to provide *restitutio in integrum stricto sensu* in the case of injury to aliens. But presumably article 7 would not be applicable to the case covered by article 5, subparagraph (*d*) (iv), otherwise an absurd situation could arise in which the breach of an obligation stipulated for the protection of individual persons, irrespective of their nationality, gave rise to a greater panoply of rights for any State party to the treaty concerned than would be the case where the obligation breached concerned the treatment to be accorded to aliens and the injured State was the State whose nationals had suffered injury. He therefore had considerable doubt about the definition of an "injured State" contained in article 5, subparagraph (*d*) (iv). If that definition were retained, article 7 might have to be deleted because of the peculiar results which flowed from the combination of the two provisions. Any further explanation the Special Rapporteur could provide on that point would be welcome.

3. As to draft article 6, he accepted the explanation given by the Special Rapporteur (1891st meeting) concerning the relationship between paragraph 1 (*b*) of that article and article 22 of part 1 of the draft. Nevertheless, the relevance of article 22 of part 1 to article 6 would have to be considered if and when part 1 came before the Commission for second reading. Referring to article 6, paragraph 1 (*d*), he noted the statement in paragraph (11) of the commentary that what was "appropriate" depended on the circumstances of the case, as well as the mention, in the footnote to that paragraph of the commentary, of the notion of "satisfaction" resulting from a declaration by an international tribunal that an internationally wrongful act had occurred. Against that background, the phrase "appropriate guarantees against repetition of the act" might be rather too strong, and the Drafting Committee might consider replacing it with an expression such as: "(*d*) provide other forms of satisfaction to prevent repetition of the act."

4. As to paragraph 2 of article 6, he noted that the Special Rapporteur had disclaimed any intention of proposing detailed rules regarding the quantum of damages. While agreeing with that principle, he nevertheless thought that the Drafting Committee should be asked to look carefully at the wording of the paragraph. It would also be helpful if the sources upon which the Special Rapporteur had drawn in proposing the rule were indicated in the commentary. The materials cited might disclose that a slight element of flexibility should be written into the rule in order to provide for exceptional cases in which the amount of compensation to be paid did not exactly coincide with the sum which would result from a rigid application of the rule.

5. He had no comment to make on draft article 7 other than to draw attention once again to its link with article 22 of part 1 and to remark that a final decision on whether article 7 should be retained and, if so, what its content should be, would depend on the decision taken concerning article 22 of part 1 on second reading.

6. Article 8 was the first of the draft articles that required consideration of the relationship between the draft and the 1969 Vienna Convention on the Law of Treaties, more particularly its articles 27, 60 and 73. It could, of course, be argued that the Vienna Convention was concerned only with the treaty-law consequences of material breaches. But the obligations whose performance the injured State was entitled to suspend under draft article 8 could derive from treaty law as well as from customary law. Without overlooking the provisions of draft article 11, or the fact that article 60 of the Vienna Convention was concerned only with material breaches, he thought that the minimum required in order to ensure consistency between the draft articles on State responsibility and article 60 of the Vienna Convention would be a provision stating that articles 8, 11 and, possibly, 13 of the draft were without prejudice to the terms of article 60 of the Vienna Convention. Article 16 of the draft under consideration was, in his view, insufficient for the purpose and should be supplemented by a specific reference to article 60 of the Vienna Convention; if subparagraph (*c*) of article 16 were deleted, the need for such a reference would become still more apparent.

7. The statement in paragraph (7) of the commentary to article 8 that, in the case of diplomatic and consular immunities, the obligations of a receiving State were not a counterpart of the obligations of the sending State was too absolute and seemed to ignore the effects of article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the

1963 Vienna Convention on Consular Relations, which clearly incorporated the principle of reciprocity into the field of diplomatic law. That principle might not be applicable in regard to the fundamental principle of inviolability of the premises of a diplomatic mission, but it was certainly applicable in other contexts. For example, if a receiving State imposed extremely severe restrictions on the freedom of movement of members of a diplomatic mission, and if those restrictions could not be justified by national security considerations, the sending State would clearly be justified in imposing corresponding restrictions on members of the receiving State's diplomatic mission, whether by way of reciprocity or by way of reprisal. True, the example related more to the privileges than to the immunities of members of a diplomatic mission or consular post; but the Special Rapporteur appeared to underestimate the impact and influence of reciprocity in the field of diplomatic law generally. Paragraph (7) of the commentary to article 8 should be reviewed and, for the same reasons, subparagraph (*a*) of article 12 should be deleted or, at the very least, severely attenuated so as to allow for the proper application of the concepts of reciprocity and reprisal in diplomatic law.

8. In referring to draft articles 8 and 9, several speakers had pointed out the difficulty of drawing a clear-cut distinction between countermeasures taken by way of reciprocity and those taken by way of reprisal. Mr. Calero Rodrigues (1892nd meeting) had even suggested that the references to reciprocity and reprisal could be deleted from those articles. While agreeing that a difficulty might arise in special circumstances, he generally supported the broad substantive distinction made by the Special Rapporteur and reflected in articles 8 and 9. Terminological problems arising in that connection could be considered by the Drafting Committee.

9. Draft article 10, on the other hand, did give rise to some doubts, particularly as to the relative importance of the rule set out in paragraph 1 and the exception provided for in paragraph 2 (*a*). The formulation of the article as a whole appeared to be based on the 1978 arbitral award in the *Air Service Agreement* case between the United States of America and France,[5] which, however, seemed to provide authority for the rule stated in paragraph 2 (*a*) rather than for that in paragraph 1. He wondered, therefore, whether the provision in paragraph 2 (*a*) should not be formulated as an integral part of a combined rule and, furthermore, whether the reference to interim measures of protection was appropriate in the context. Those points, too, could no doubt be considered by the Drafting Committee.

10. Draft article 11 raised serious problems other than those he had already mentioned. In the present disorganized state of international society, he had the gravest doubts about the wisdom or viability of paragraph 2, which imposed particularly severe limitations upon the rights of an injured State to take countermeasures by way of reciprocity or reprisal. Some multilateral treaties might well embody a procedure for collective decisions which was ineffective or illusory, either because a unanimous vote of the decision-making body was required or because the State which had committed the internationally wrongful act was able to command a sufficient blocking vote in that body to prevent any effective action being taken. To subject the injured State's right to take countermeasures to the requirement of a collective decision would, in such circumstances, place a very heavy fetter on its response to an internationally wrongful act. The interests or legally protected rights of other States parties to the multilateral treaty had, of course, to be borne in mind; some special provision might be necessary to cover the case in which countermeasures by the injured State would necessarily affect the exercise of the rights or the performance of the obligations of all other States parties to the treaty. That special case apart, he greatly doubted the need for anything corresponding to paragraph 2 of article 11, especially in view of the provisions of article 2 of the draft, which should have the effect of preserving particular treaty régimes already in operation. Although paragraph 2 of article 11, as drafted, appeared to be quite general in its scope and effect, he assumed that it was intended to be limited to the cases mentioned in paragraph 1—an impression which seemed to be confirmed by the concluding phrase. The Special Rapporteur could perhaps elucidate that point.

11. Subparagraph (*b*) of draft article 12 posed the familiar question whether any reference to *jus cogens* should be made in part 2 of the draft. In his opinion there was no hard evidence for the existence of *jus cogens* as a real factor in the functioning of present-day international law. In the context of treaty law, it had a specific role to play in limiting the otherwise absolute freedom of States to determine the content of the treaties they might wish to conclude; but its role, if any, in the law of State responsibility was not clear. The test of "manifest disproportionality" in article 9, paragraph 2, would sufficiently ensure that no State could violate a norm of *jus cogens* by way of reprisal; and if it was the author State which had violated the norm of *jus cogens*, then, in the vast majority of cases, it would have committed an international crime whose legal consequences would be determined by articles 14 or 15. There was no need, as a matter of law, to include a specific reference to *jus cogens* in part 2 of the draft. Such a reference would only add further elements of confusion to an already difficult text. To the extent that norms of *jus cogens* existed and had an impact beyond the law of treaties—both elements of that proposition remaining highly controversial—they would control the operation of all the articles in part 2, not only that of articles 8 and 9. In contrast with the views expressed by Mr. Flitan (1893rd meeting), he therefore urged that subparagraph (*b*) of article 12 should be deleted; and since, for reasons already stated, he considered that subparagraph (*a*) was otiose, he suggested deleting the whole of article 12.

12. With regard to the point raised by Mr. Reuter (1891st meeting) concerning draft article 13, he thought the concept of a manifest violation of obligations arising from a multilateral treaty which destroyed the object and purpose of that treaty as a whole was clearly not recognized in the Vienna Con-

[5] See 1892nd meeting, footnote 9.

vention on the Law of Treaties. He agreed with the Special Rapporteur, however, that article 13 was not concerned with the treaty-law consequences of the situation it purported to deal with, but only with the legal consequences of the internationally wrongful act which had brought that situation about. Accordingly, subject to the reservations he had already expressed on the reference to "collective interests" of the States parties in article 5, subparagraph (*d*) (iii), and article 11, paragraph 1 (*b*), and on the content of article 11, paragraph 2, he had no objection to article 13.

13. He had already commented favourably (1890th meeting) on paragraphs (8) to (10) of the commentary to draft article 14. The Special Rapporteur had been reproached for not having laid down specific legal consequences, for both the author State and the injured State, of a so-called international crime. An aggravated degree of State responsibility did, of course, attach to the violation of obligations of the kind illustrated in article 19 of part 1 of the draft, but that aggravated degree of responsibility was not yet capable of being translated into concrete rules which could be applied indiscriminately to the wide variety of situations referred to in that article. To leave it to "the international community as a whole" to determine what additional legal consequences should flow from the commission of a so-called international crime might be unsatisfactory, but no more so than leaving it to the international community as a whole to determine what constituted a so-called international crime in the first place. Elaboration of the additional legal consequences involved might bring down what was already a very flimsy edifice. The Commission was exploring unknown territory and could only rely upon a compass to indicate the general direction, leaving it to succeeding generations to plot the detailed landmarks along the way.

14. As to the relationship between the work on State responsibility and that on the draft Code of Offences against the Peace and Security of Mankind, the former was, in his view, concerned with the material legal consequences of all internationally wrongful acts—a matter to which the Commission's mandate for the draft code did not extend. But, given the confusion that had arisen, he wondered whether the time had not come to begin the second reading of part 1 of the draft articles on State responsibility. Some of the difficulties arising in connection with part 2 stemmed inevitably from the content of part 1, and it might not be possible to resolve them without reconsidering some of the decisions adopted provisionally in respect of part 1. Accordingly, he invited the Special Rapporteur to consider whether it might not be desirable, as the next step, to undertake the difficult but vitally important task of reviewing part 1.

15. In conclusion, referring to section II of the Special Rapporteur's sixth report (A/CN.4/389), he observed that to draw up rules on the "origin of international responsibility" and on the "content, forms and degrees of international responsibility" without proposing mechanisms and procedures for the effective implementation of those rules would be to render a fundamental disservice to the international community and to the process of codification and progressive development of international law. The potentiality of dispute at every stage was in the very nature of the topic and should not be blithely ignored. The absence of suitable implementation machinery would make the draft as a whole unacceptable to many Governments, and the fact that compulsory dispute-settlement machinery applicable to the interpretation and application of the draft articles in parts 1 and 2 would inevitably cover a very wide area should not deter the Commission from attempting to devise such machinery. In his view, the Special Rapporteur had displayed great subtlety and ingenuity in proposing the system outlined in his report (*ibid.*, para. 14). The approach was judicious, since it would enable the third-party instance to determine the basic issues of fact and law as to whether an internationally wrongful act had in fact been committed. He also approved of the dispute-settlement procedure proposed by the Special Rapporteur (*ibid.*, para. 32). The details would, of course, have to be worked out and it would almost certainly be necessary to add some kind of temporal limitation to exclude disputes relating to acts or facts which might have occurred prior to the proposed convention's entry into force. Subject to that reservation, the Special Rapporteur was to be warmly congratulated for having formulated proposals which, although they might encounter objections on political grounds, nevertheless offered some guarantees to States that the substantive provisions in parts 1 and 2 could be effectively applied. He hoped that the outline would soon be presented in the form of draft articles for inclusion in part 3 of the draft.

16. Mr. USHAKOV said that part 3 of the draft articles, which was broadly outlined by the Special Rapporteur in his remarkable sixth report (A/CN.4/389) and which was to deal with the settlement of disputes, had practically no connection with part 2. According to paragraph 1 of draft article 10, the injured State could not take any measure by way of reprisal in application of article 9 until it had "exhausted the international procedures for peaceful settlement of the dispute". From that provision it would be deduced that any dispute relating to the existence of an internationally wrongful act should have been settled before measures could be taken by way of reprisal. But the author State might deny having committed an internationally wrongful act, in which case the whole of part 2 of the draft articles would be inapplicable because the responsibility of that State had not been engaged. Part 2 was based on the assumption of the existence of an internationally wrongful act established in accordance with part 1. Any dispute relating to the existence of an internationally wrongful act came under part 1, which dealt with the conditions that had to be satisfied for the existence of an internationally wrongful act to be established. Whether the author State claimed that certain conduct could not be attributed to it under international law, or that it had not failed to fulfil one of its international obligations, there was, in either case, a dispute as to the existence of an internationally wrongful act.

17. There was perhaps only one case in which a dispute related to international responsibility proper

and therefore came under part 2 of the draft, namely the case of a dispute concerning the amount of reparation required of a State which had committed an international delict. In that connection, it should be noted that a dispute concerning the existence of an international crime committed by a State was not conceivable. The existence of crimes in that category, especially those constituting a threat to peace, a breach of the peace or an act of aggression, was determined by the organized international community of States or, more precisely, by the Security Council; and a dispute between the Security Council and a State which had committed an international crime was unthinkable. Hence it followed that part 3 of the draft articles would deal mainly with the settlement of disputes relating to the establishment of internationally wrongful acts and, possibly, disputes concerning the amount of reparation.

18. Before reviewing the draft articles under consideration, he wished to make two general comments. Referring to the peremptory norms of general international law mentioned, in particular, in draft article 12, subparagraph (*b*), he questioned whether such norms existed in regard to State responsibility. Some peremptory primary rules did, of course, exist, but they were not involved in part 2 of the draft articles, which dealt with secondary rules. An example of a peremptory secondary rule was the prohibition of the threat or use of force contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[6] Recourse to armed reprisals in response to an internationally wrongful act was prohibited. While such a peremptory secondary norm clearly fell within the scope of part 2 of the draft, the same was not true of primary peremptory rules, such as that which prohibited recourse to the threat or use of force, be it military, political or economic. According to the Charter of the United Nations, however, the Security Council could, when there was an act of aggression, take coercive measures involving the use of armed force. In that case there was no breach of a primary rule, since the issue was one of international responsibility to which secondary rules applied. Similarly, a State could, in accordance with part 1 of the draft, take legitimate countermeasures involving the use of political or economic force against another State. Hence only secondary peremptory rules relating to international responsibility should be referred to in part 2 of the draft.

19. His second general comment concerned what happened to a treaty if its provisions were violated by a State. In his view, that question, which seemed to cause concern to the Special Rapporteur and some members of the Commission, was irrelevant, since it came under the law of treaties, in particular under article 60 of the 1969 Vienna Convention on the Law of Treaties, and had no bearing on State responsibility. In the latter field, what counted was that the treaty should be in force at the time when an obligation deriving from it was breached; that was clear, in particular, from article 18, paragraph 1, of part 1 of the draft articles on State responsibility.

20. Turning to the draft articles before the Commission, he said that he had many doubts about the wording and indeed the appropriateness of articles 5, which was devoted not to stating rules, but to defining the concept of the "injured State". That concept was self-evident. Just as the author State was the State which had committed an internationally wrongful act—whether a delict or a crime—the injured State was the State with respect to which the act had been committed. Nevertheless, it was impossible to determine in any concrete fashion which was the author State and which the injured State: everything depended on the actual circumstances in which the internationally wrongful act occurred. Article 5 contributed nothing. Moreover, inasmuch as it dealt with the origin of a subjective right and a subjective obligation of the State, it was in flagrant contradiction with article 17 of part 1 of the draft articles, which proclaimed a self-evident principle of international law, namely the irrelevance of the origin of the international obligation breached to the international responsibility of the author State. But perhaps it should be provided that, when the internationally wrongful act had been committed in violation of a peremptory norm of general international law, it was the international community of States and the States composing it that were directly or indirectly injured.

21. Since draft articles 14 and 15 expressly dealt with international crimes, draft articles 6 to 13 obviously concerned international delicts, although that was not expressly stated. Such a statement should, however, be included, because what was applicable to an international delict could be applicable to an international crime, though the converse was not true. The structure of the set of articles was rather complex: article 6 concerned what the injured State could require of the author State; articles 8 and 9, corresponding to article 30 of part 1 of the draft, on countermeasures, dealt with reciprocity and reprisal, respectively; and articles 10, 11 and 12 listed exceptions to article 9, while article 13 stated an exception to articles 10 and 11. As to draft article 7, it was, as other members of the Commission had already pointed out, superfluous.

22. It was important to specify expressly all the measures which the injured State was entitled to require of the author State, and in that respect article 6 as submitted by the Special Rapporteur was definitely inadequate. The measure provided for in paragraph 1 (*a*) was acceptable; that in paragraph 1 (*b*) was perhaps superfluous and, in any case, should be further explained. The measure provided for in paragraph 1 (*c*) should be more precisely defined: while it was possible to re-establish the legal situation as it had existed before the act, it was not possible to re-establish the previous material situation. The guarantees referred to in paragraph 1 (*d*) seemed inconceivable. Other measures might reasonably be contemplated: at the Commission's thirty-fifth session, in 1983, he had proposed that the international responsibility of the State should consist, *inter alia*, in that the State should: make reparation for the

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

damage caused and, if necessary, restore the previous legal situation and the rights and interests that had been infringed; take the measures and action prescribed by international law, including the applicable international arrangements in force; provide the requisite satisfaction to the injured State or States; and institute criminal proceedings against persons accused of having committed the offences which had given rise to the international responsibility of the State.[7]

23. Draft articles 8 and 9 concerning reciprocity and reprisal—between which he made no distinction—should be consistent with article 30 of part 1, entitled "Countermeasures in respect of an internationally wrongful act". As they stood, those articles implied that the injured State could suspend the performance of all its obligations towards the author State. That was inconceivable if the internationally wrongful act was only an international delict. True, exceptions were provided for in draft articles 10, 11 and 12: but article 10 referred to the settlement of disputes and was not applicable, because the disputes in question could relate only to the existence of an internationally wrongful act; and article 11 dealt with obligations arising from multilateral treaties, but was not sufficiently explicit. He would not revert to the exceptions provided for in article 12, which he had already discussed in connection with the breach of a peremptory norm of general international law.

24. On the basis of article 30 of part 1 of the draft, he proposed that the provisions of articles 7 to 13 should be replaced by the following text:

"1. The injured State shall be entitled to take measures legitimate under international law against a State which has committed an international delict. Such measures shall include (but not be limited to):

"(*a*) the restriction or temporary suspension of the rights and interests of the State which has committed a delict within the sphere of jurisdiction of the injured State;

"(*b*) the temporary suspension of the injured State's economic obligations towards the State which has committed a delict;

"(*c*) the temporary suspension of technological, scientific and cultural relations between the injured State and the State which has committed a delict;

"(*d*) the suspension or severance of diplomatic relations between the injured State and the State which has committed a delict.

"2. The measures referred to in paragraph 1 shall be taken by the injured State in the light of the circumstances of the delict in question and of its seriousness and shall be lifted as soon as the State which has committed the delict has fulfilled its obligations under article 6."

It was to be understood that those measures, the list of which was not exhaustive, applied only to international delicts and not to international crimes.

25. Draft articles 14 and 15 referred to international crimes. No specific legal consequence was stated in paragraph 1 of article 14. But the consequences should be specified, especially if the international crime constituted a threat to peace, a breach of the peace, an act of aggression or a war of aggression. Moreover, the "internationally wrongful act" mentioned in the paragraph should, of course, be taken to cover an international delict as well as an international crime. In the French text, the words *tous droits et obligations* should be replaced by the words *tels droits et obligations*. In paragraph 2, he did not see why the obligation specified in subparagraph (*a*) should result only from an international crime. Did that mean that States were free to recognize an unlawful situation created by an international delict? That was impossible, since every State was required not to recognize as legal the unlawful situation created by an internationally wrongful act, whether it was a delict or a crime. The meaning of the obligation referred to in subparagraph (*b*) was not clear; that text appeared to be a revision of article 27 of part 1 of the draft, which provided that aid or assistance rendered by a State to another State for the commission of an internationally wrongful act itself constituted an internationally wrongful act. He also wondered what "other States" were meant in subparagraph (*c*). What was to be done if there were no other States to join? Besides, the obligation presupposed agreement between States to face together the situations created by an international crime. He simply did not understand paragraph 2 of article 14.

26. Article 15, which dealt with acts of aggression, should certainly be retained in principle, but needed to be more appropriately drafted.

27. Besides drafting problems, some points of substance remained to be settled. It was the Special Rapporteur's arduous task to formulate general rules concerning international delicts, which were manifold, and international crimes, which were no less so. He was convinced that the Special Rapporteur would do his best to perform that task and that the Commission would assist him in it.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

28. Mr. OGISO joined previous speakers in congratulating the Special Rapporteur on another masterly report (A/CN.4/389) on the complex topic of State responsibility. The quality of his work would greatly assist the Commission in its understanding of such a wide-ranging topic.

29. It seemed to him that the basic presumption on which the Special Rapporteur had constructed part 2 of the draft articles was that, once an internationally wrongful act had been committed by a State, there arose, as an inevitable consequence of that act, a new legal relationship between the author State, the injured State and third States. In that connection, he noted the Special Rapporteur's statement in his report that:

> There seems to be general agreement that an internationally wrongful act of a State entails: (*a*) new obligations of the "author" State (A); (*b*) new rights of other States, in particular of the

[7] *Yearbook ... 1983*, vol. I, p. 296, 1806th meeting, para. 30.

"injured" State(s) (B); (*c*) in some cases, new obligations of "third" States (C) *vis-à-vis* the (other) "injured" State or States. (*Ibid.*, para. 3.)

In other words, according to the Special Rapporteur, all those new legal consequences or new legal relationships between States resulted from the commission of an internationally wrongful act by a State.

30. Because of that presumption, the definition of an injured State in draft article 5 was very important, as had been noted in the commentary to the article. The existence of an internationally wrongful act or of an injury might be disputed by the alleged author State. That was a very real possibility in practice, as the Special Rapporteur himself had pointed out (*ibid.*, para. 5). Presumably, therefore, the articles in part 3 of the draft might deal, *inter alia*, with the settlement of that kind of dispute. At the point at which the dispute related to the existence of the injury itself, the parties concerned were neither an author State nor an injured State, but rather an alleged author State and an alleged injured State. The new legal relationship to which he had referred had not yet been created, since, from a strictly legal standpoint, the rights and obligations provided for in draft article 6 and subsequent articles came into being only when the existence of an author State and an injured State had been legally established, which was either on the admission by the author State that an internationally wrongful act had been committed, or by a decision taken in accordance with an international procedure, or, again, by the application of the procedure for the settlement of disputes to be laid down in part 3 of the draft.

31. In practice, however, the sequence of stages in that process was not necessarily so clear-cut. It was usually when the alleged injured State had made the request provided for in article 6 and the alleged author State had admitted that an internationally wrongful act had been committed, by responding to the request in one way or another, that a new legal relationship between the newly identified author State and injured State was established. In other words, agreement on remedies such as *restitutio in integrum stricto sensu* or on payment of reparation should usually be concluded simultaneously with the establishment of the new legal relationship. Thus, although, as a theoretical abstraction, a decision on the status of author State and injured State came first and the new legal relationship came next, a decision as to status could in practice often be made at the time when the solution of the major problems arising from a particular internationally wrongful act had been agreed between the parties concerned. It was in no way his intention to criticize the Special Rapporteur's report, but he had wished to make a general comment to assist members in their understanding of the points he hoped to raise on specific draft articles at the next meeting.

The meeting rose at 1 p.m.

1896th MEETING

Friday, 7 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

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

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. OGISO said that, as he had explained at the previous meeting, he could accept in general the Special Rapporteur's theoretical presumption that, as a result of an internationally wrongful act, a new legal relationship would be established between the author State, the injured State and a third State. In practice, however, the establishment of that new legal relationship would not necessarily follow the same sequence; often, it was established at the same time as the solution of major problems arising out of the internationally wrongful act, since the objection by the author State might make it difficult to establish the status of the injured State and the author State. As a result, the latter might not accept the new legal relationship until a final solution had been reached regarding the result of such wrongful act.

2. Referring to the draft articles, he said that he would like to have some clarification of the wording of subparagraph (*a*) and (*d*) of article 5 and of the commentary to the latter subparagraph. Whereas subparagraph (*a*) referred to an "infringement of a right" and to "the State whose right has been infringed", subparagraph (*d*) and the commentary to

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

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

[4] For the texts, see 1890th meeting, para. 3.