

Document:-
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Summary record of the 1929th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

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48. Mr. MAHIU said he agreed with Mr. Calero Rodrigues that the Special Rapporteur should be encouraged to go ahead with his work. The preliminary report which he had submitted was much more than a note on methodology: it represented a reorientation and a closer scrutiny of the problems of the topic. The Special Rapporteur should be invited to specify his intentions and to clarify the subjects for reflection which he proposed to the Commission.

49. Mr. RIPHAGEN said he agreed with Mr. Reuter that the report went deeply into the substance of the topic. Since the Commission did not have time to discuss substantive issues, but could not endorse the report without such discussion, it should simply inform the Special Rapporteur that it looked forward to receiving his second report.

The meeting rose at 5.50 p.m.

1929th MEETING

Thursday, 18 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (concluded)* (A/CN.4/370,¹ A/CN.4/391 and Add.1,² A/CN.4/L.383 and Add.1-3³)

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

TITLE I (Legal personality)⁴ (concluded)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that, before summing up the discussion, he wished to thank the members of the Commission for their indulgence towards him, their useful critical comments on his second report (A/CN.4/391 and Add.1) and their suggestions of sources to consult, in particular the work of the Third United Nations Conference on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea. He also thanked the secretariat for its assistance.

* Resumed from the 1927th meeting.

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

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

³ *Ibid.*

⁴ For the text, see 1925th meeting, para. 27.

2. The comments made confirmed that the topic was not an easy one. To extract from particular rules a set of general rules applicable to all international organizations was obviously very difficult. Not only was there a diversity of international organizations, but each of them had its speciality, its manner of operating, its competence, its own character and its own law. It was from that multiplicity of factors that a minimum of common characteristics had to be derived in order to produce a well-articulated framework for the privileges and immunities of international organizations, which were undoubtedly at the very heart of the topic. It would, however, be difficult, if not impossible, to elaborate general rules on the privileges and immunities of international organizations without defining their personality, from which all else necessarily followed.

3. He noted that the viewpoint from which he had begun his study and from which he proposed to continue it had not provoked any strong opposition in the Commission.

4. As to the specific comments made during the debate, he noted that Mr. Balanda (1926th meeting) had stressed the need to employ precise wording and the danger of using certain terms. Though not believing himself to be infallible, he must point out that in the original Spanish text of his second report he had not used the word *poderes*, the equivalent of the word *pouvoirs* which appeared in the third sentence of paragraph 6 of the French text. The original Spanish text had referred to *funciones*. Besides, paragraph 6, which listed some of the questions raised at the Commission's thirtieth session, was merely descriptive.

5. It had been said that it was necessary to produce a schematic outline and that it would have been preferable to elaborate a complete set of draft articles. But he had chosen to proceed little by little for the same reasons as had led the Commission, on several occasions, to prepare draft articles with prudence, after mature consideration. True, the previous Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses had been able to submit a number of draft articles at once for consideration by the Commission—which, however, had been able to discuss only a few of them at one session—but that was because that topic had been under consideration for about 10 years. In the present case, he had not considered it necessary to submit an outline, because the Commission had approved the outline of the scope of privileges and immunities submitted by the previous Special Rapporteur in his preliminary report⁵ and he had thought that the work would continue on that basis. However, if the Commission thought that a new outline would be useful for the continuation of the work, he would comply with its wishes.

6. The question of responsibility had also been raised during the discussion. Mr. Ushakov (1927th meeting) had said that the Special Rapporteur was not required to deal with responsibility, but he had in fact never mentioned it, either in his report or in his

⁵ *Yearbook ... 1977*, vol. II (Part One), pp. 153-154, document A/CN.4/304, paras. 70-74.

oral introduction. However, Mr. Reuter (1925th meeting) had referred to responsibility in general terms and Mr. Yankov (1926th meeting) had put a question about it. For his part, he had no objection to a study on responsibility being undertaken in the present context; he even thought that such a study should perhaps be made. Mr. Balanda had wondered whether responsibility in the present context came within the general framework of responsibility, or whether it was a special form of responsibility pertaining to international organizations. His own view was that it formed part of the topic of State responsibility. That being said, he would of course take account of all comments made on the question.

7. Having denied the personality and capacity of international organizations, Mr. Ushakov had proceeded to demonstrate that draft article 1 only stated a truism, namely that international organizations were subjects of international law. It might perhaps be a truism, but even truisms were relative; and, not long before, the socialist countries, in particular the Soviet Union, had not accepted that truism. Today, however, since the studies by Mr. Tunkin and Mr. Morozov, they recognized that international organizations had legal personality. He quite agreed with Mr. Ushakov that every international organization had its own legal personality, but he found it impossible to say that an international organization had legal personality but no legal capacity. Legal capacity derived from legal personality.

8. He did not intend to make a study of the commercial activities of international organizations, but would point out that an international organization—whether its capacity to contract was recognized or not—was compelled by force of circumstances to carry out purchase and sale transactions in various countries, for which it must necessarily have legal capacity to contract. He did not propose to devote himself to formulating rules governing only the commercial activities of international organizations; but the question whether or not international organizations had legal capacity to contract would certainly have to be settled.

9. In regard to the question raised by Sir Ian Sinclair (1926th meeting) concerning the capacity of certain economic, financial or commercial organizations to negotiate loans, for example, in non-member States, he drew attention to the wealth of case-law on the subject. The supplementary study prepared by the Secretariat (A/CN.4/L.383 and Add.1-3) showed that the United Nations, the specialized agencies and IAEA could contract loans. It might be preferable to deal with that question not at the present stage, but when considering the privileges and immunities of international organizations, because it would then be necessary to determine the law which should govern such transactions and to deal with the question of jurisdiction in the event of a dispute. In any case, the transactions of international organizations generally came under internal law unless the contracting parties decided otherwise.

10. As to the capacity of international organizations to conclude treaties, dealt with in alternative A, article 1, paragraph 2, and in alternative B, article 2, he wished to assure Mr. Ushakov that he had no

intention of trying to draft a counter-proposal to the draft articles on the law of treaties between States and international organizations or between international organizations;⁶ he would not presume to measure himself with Mr. Reuter, who had been entrusted with the study of that topic, and he had not lost his sense of proportion. He had merely transposed the content of an article already adopted by the Commission, in the hope that the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, to be held in February/March 1986, would provide a clear idea of the intentions of States.

11. He fully agreed with the members of the Commission that the privileges and immunities of international organizations were at the very heart of the topic, and intended to devote his next reports to that matter.

12. As to the comments made concerning the form of the two alternatives of title I submitted, he had no firm position and would leave it to the Commission itself and the Drafting Committee to decide. It was customary for the Commission to refer draft articles which it had considered to the Drafting Committee, but if it decided otherwise he would have no objection.

13. The CHAIRMAN thanked the Special Rapporteur for his summing-up and asked whether members wished to refer title I to the Drafting Committee at the current session or to wait until the next session to allow time for further discussion.

14. Mr. YANKOV said that his statement (1926th meeting) had apparently been misunderstood. He had in fact suggested that the Special Rapporteur might wish to submit an outline of the proposed structure and content of the draft articles, and that it would be useful if he could submit a group of draft articles on a given issue, which the Commission could then consider as a unit.

15. Sir Ian SINCLAIR said it would be useful if mimeographed copies of materials received by the Secretariat on the status, privileges and immunities of international organizations other than the United Nations, the specialized agencies and IAEA could be made available to members.

16. He was somewhat hesitant about referring title I to the Drafting Committee, because the precise scope of the draft had yet to be determined.

17. Mr. BALANDA said that he had stressed (1926th meeting) the need to employ correct terms because the law governing international organizations had a terminology which could differ from one organization to another. He had drawn attention to the words *pouvoirs réglementaires* (regulatory functions) in paragraph 6 of the French text of the second report (A/CN.4/391 and Add.1), pointing out that the term was used by EEC and that several different forms of such regulation by Community institutions were distinguished, namely regulations, directives and decisions of Community organs. He had simply

⁶ See 1925th meeting, footnote 17.

invited the Special Rapporteur to be very cautious in using terms which could cause misunderstanding before anything had been decided about the international organizations to be covered in the topic under study. However, he noted the explanation which the Special Rapporteur had given at the beginning of his statement.

18. As to what should be done with the text of the draft article or articles submitted, he shared Sir Ian Sinclair's perplexity. Since the Special Rapporteur had not outlined the nature of the international organizations he proposed to deal with, it would be difficult for the Commission to draw up any rules as yet. That being so, the proposed texts, especially the provision concerning the capacity of an international organization to conclude treaties, could hardly be referred to the Drafting Committee. The texts could be left in abeyance and the Commission could decide later, in the light of subsequent reports, which elements of legal personality—legal capacity in general and capacity to conclude treaties in particular—should be retained.

19. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) thanked Mr. Balanda for his advice, which he would certainly follow. He repeated that he had not used the word *pouvoirs* in his report, the original version of which was in Spanish; if a mistake had crept into the French translation he could not be held responsible. Moreover, as he had already pointed out, the paragraph in question was purely descriptive.

20. Mr. McCAFFREY said that he, too, thought it might be premature to draft a provision without knowing to what it would apply. It had been his understanding that, given the very limited time available for discussion of the topic, the Commission would engage in only a preliminary consideration of the issues raised in the Special Rapporteur's second report (A/CN.4/391 and Add.1). His own comments had therefore been confined to a few general remarks, as had those of other members. In any event, so far as article 2 in alternative B was concerned, the Special Rapporteur had pointed out that it would be necessary to await the outcome of the United Nations Conference to be held in 1986, and it was doubtful whether that article was ripe for referral to the Drafting Committee.

21. The CHAIRMAN suggested that the Special Rapporteur should be invited to bear member's comments in mind when preparing his third report, and to make specific suggestions on the scope of the draft articles. He also suggested that the draft article or articles should not be referred to the Drafting Committee until the topic had been further discussed at the Commission's thirty-eighth session.

It was so agreed.

22. In reply to a question by the Chairman, Mr. DE SARAM (Deputy Secretary of the Commission) said that the Secretariat would be pleased to provide members with copies of the materials received from organizations outside the United Nations system, before the Commission's thirty-eighth session.

23. Mr. FRANCIS said it might be useful to have some idea of the points that the Commission would take up at its next session. He assumed that it would

confine itself to the question of scope and that any discussion of privileges and immunities would take place in that context.

24. The CHAIRMAN said that the Special Rapporteur would undoubtedly wish to concentrate on the privileges and immunities of international organizations; but several members thought that it would be useful to determine the scope of the draft articles before certain matters were discussed, and the Special Rapporteur had agreed to bear that in mind.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/394⁷)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (concluded)

25. The CHAIRMAN reminded members that the Commission was required to take a procedural decision on item 8 of the agenda. A consensus had been reached in informal consultations on a short text for inclusion in the Commission's report, to the effect that the Commission had taken note of the Special Rapporteur's preliminary report (A/CN.4/394), but had been unable to discuss it at its thirty-seventh session, and that the Commission hoped that the Special Rapporteur would be able to present a new report which it would discuss at its thirty-eighth session, in 1986, along with his preliminary report. If there were no objections, he would take it that the Commission agreed to include that text in its report.

It was so agreed.

**State responsibility (continued)* (A/CN.4/380,⁸
A/CN.4/389,⁹ A/CN.4/L.395, 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)¹⁰ (continued)***

DRAFT ARTICLE PROPOSED BY
THE DRAFTING COMMITTEE

ARTICLE 5

26. The CHAIRMAN invited the Chairman of the Drafting Committee to present article 5 as proposed by the Drafting Committee (A/CN.4/L.395), which read:

⁷ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

* Resumed from the 1902nd meeting.

⁸ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

⁹ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

¹⁰ 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.*
For the texts of articles 1 to 16 of part 2 of the draft as submitted by the Special Rapporteur, see 1890th meeting, para. 3.

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour,

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law, or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 5 was a definitional article, but one of great importance for the articles that would follow in part 2 of the draft. Most members of the Drafting Committee had agreed that it was necessary to include an article defining an "injured State", since the whole of part 2 on the content, forms and degrees of international responsibility would revolve round a clear understanding of which States could claim to be injured by the breach of an international obligation and thus invoke the consequences of State responsibility to be set out in the remaining articles of part 2. The purpose of article 5 was neither to define primary rules of international law, nor to provide an exhaustive list of situations in which a State could claim to be injured. It provided a general rule in paragraph 1, an indicative list in paragraph 2 and dealt with the rather special case of international crimes in paragraph 3.

28. He wished to pay tribute to the Special Rapporteur for his perseverance, ingenuity and flexibility in assisting the Drafting Committee to arrive at a text which commanded the general, if not unanimous, support of the Committee. It had not been possible, in the short time available, for the Committee to deal with the other articles on State responsibility referred to it, but he hoped that further progress on the topic would be made at the Commission's next session.

29. Members would recall that the Special Rapporteur had tried, in his original article 5, to indicate which States should be considered to be injured States in different situations, according to the origin of the obligation violated or of the right infringed. Opinions in the Commission had been divided.¹¹ Some members had supported the Special Rapporteur's approach; others had thought it essential for the article to include a general definition of an "injured State". Some had considered that the definition could take the form of an introductory clause, which would introduce the detailed provisions proposed by the Special Rapporteur. Others had believed that a general definition would suffice and had been opposed to specifications based on "sources". The opinion had also been expressed that, strictly speaking, the article was unnecessary.

30. The Drafting Committee had decided to combine a general definition with the detailed proposals of the Special Rapporteur. The general definition of an "injured State" appeared in paragraph 1; paragraphs 2 and 3 followed the original approach of the Special Rapporteur and indicated which State was to be considered the injured State in specific situations.

31. Since under part 1 of the draft one of the elements of an internationally wrongful act was conduct that constituted a breach of an international obligation, and since a breach of an obligation necessarily infringed a right or rights of another State or States, it was proposed that part 2 should lay down that a State whose right was thus infringed should be considered an injured State. That was the meaning of paragraph 1 of article 5, as adopted by the Drafting Committee.

32. That criterion for identifying an injured State as a State which had had one of its rights infringed had been incorporated in all the provisions proposed. The expression "right ... infringed by the act of another State" had been used throughout article 5.

33. Paragraph 2 had six subparagraphs, (a) to (f), and one of them, subparagraph (e), was subdivided into three. The subparagraphs proceeded from the simplest situation—the breach of an obligation imposed by a bilateral treaty, in which it was easy to identify the injured State—to the more complex situations that arose from the breach of an obligation under a multilateral treaty or a rule of customary international law. In between, situations were contemplated in which the obligation violated had its origin in a judgment or other binding dispute-settlement decision, in a binding decision of an international organ, or in a treaty provision in favour of a third State not a party to the treaty.

34. Referring to the provisions of paragraph 2, he drew attention to the opening words "In particular", which made it clear that the paragraph provided a non-exhaustive, indicative list identifying the "injured State" in various circumstances. That list was roughly based on the circumstances proposed by the

¹¹ Article 5 was considered by the Commission at its thirty-sixth session; see *Yearbook ... 1984*, vol. I, pp. 259 *et seq.*, 1858th meeting, 1860th meeting (paras. 33 *et seq.*), and 1861st and 1865th to 1867th meetings.

Special Rapporteur, but they had been rearranged in what was considered a more suitable order, moving from relatively simple inter-State relations to the more complicated.

35. Subparagraph (a) concerned infringement, by the act of a State, of a right arising from a bilateral treaty; in that case, the injured State was the other State party to the treaty. That could be considered the simplest case set out in paragraph 2 and it corresponded to subparagraph (c) of article 5 as submitted by the Special Rapporteur.

36. Subparagraph (b) covered the case in which the right infringed by the act of a State arose from a judgment or other binding dispute-settlement decision of an international court or tribunal. In that case, the injured State was the other State party to the dispute and entitled to the benefit of that right. Though based on subparagraph (b) of the text submitted by the Special Rapporteur, the new subparagraph contained the added proviso that for a State to be considered an injured State, it must be entitled to the benefit of the right arising from the judgment or decision. The purpose was to take into account the fact that not all parties to a dispute, or even all parties to a binding dispute-settlement procedure, were necessarily entitled to the benefit of a judgment or decision made by an international court or tribunal.

37. Subparagraph (c) was new and reflected certain comments made in the Commission on the importance of rights which might arise from a binding decision of an international organ other than a court or tribunal. In the event of such a right being infringed by the act of a State, the injured State was the State entitled to the benefit of such a right in accordance with the constituent instrument of the international organization concerned. In view of the variety of international organizations and the kind of binding decisions their organs might take, entitlement to the benefit of rights flowing from such decisions depended on the particularities of each organization. Accordingly, the clause "in accordance with the constituent instrument of the international organization concerned" had been included.

38. Subparagraph (d) concerned infringement, by the act of a State, of a right which arose from a treaty provision for a third State. In that case it was the third State which was considered to be the "injured State". The text corresponded to subparagraph (a) as submitted by the Special Rapporteur and was based on the law of treaties.

39. All the situations mentioned in subparagraph (a) to (d) were simple, or relatively simple: the right infringed by the breach of the obligation was easy to identify. A more complex situation resulted from the breach of an obligation created by a multilateral treaty or established by a rule of customary international law. In such a case it was possible, even likely, that not all the States parties to the treaty or bound by the rule had had a right infringed by the breach. Subparagraph (e) therefore distinguished three situations in which a State party to a multilateral treaty or bound by a rule of customary international law was to be considered an injured State:

- (i) if the right infringed had been created by a multilateral treaty or established by a rule of customary international law in its favour;
- (ii) if the infringement of the right necessarily affected the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law,
- (iii) if the right had been created or established for the protection of human rights and fundamental freedoms.

40. The recognition in article 5 that a right for the protection of human rights and fundamental freedoms could be established by a rule of customary international law was held to be of considerable importance by the members of the Drafting Committee and to warrant the inclusion of an appropriate explanation in the commentary.

41. The provisions of subparagraph (e) of paragraph 2 dealt with both rights arising from a rule of customary international law and rights arising from a multilateral treaty. That, however, did not appear appropriate for the situation originally envisaged by the Special Rapporteur in subparagraph (d) (iii), namely that of a right stipulated for the protection of collective interests. Thus subparagraph (f) dealt with infringement, by the act of a State, of a right arising from a multilateral treaty, if it was established that the right had been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto. In such cases, the injured State was any other State party to the treaty. Although it could not be excluded that, in the future, rules of customary international law might establish rights for the protection of collective interests, or might even do so at the present time, it had been thought more prudent to restrict the situation to rights arising from a multilateral treaty, when such rights were expressly stipulated.

42. Lastly, paragraph 3, which dealt specifically with international crimes, stated that, if an internationally wrongful act constituted an international crime, all other States were to be considered as injured States. That seemed to be a necessary consequence of the concept of an international crime set out in article 19 of part 1 of the draft.

43. The Drafting Committee had considered the question whether, in the case of an international crime, all injured States should have the same right of response, or whether the response should be graduated according to the seriousness of the infringement of the right or interest in each case. It had been thought that, if that question was to be dealt with, the proper place to do so would be in the articles defining the legal consequences of international crimes. That was why paragraph 3 referred to articles 14 and 15, indicating that those articles, which established the framework for the responses of injured States, might indicate the distinctions that could be necessary. The reference had been placed in square brackets, because articles 14 and 15 had not yet been discussed and new articles on international crimes might conceivably be added to the draft. After consideration of those articles, the Drafting Committee

might find it necessary to reconsider the appropriateness of the phrase in square brackets.

44. Finally, the adoption of article 5 would necessitate slight adjustments to some of the articles provisionally adopted by the Commission at its thirty-fifth session, in 1983, as proposed by the Special Rapporteur in his fifth report (A/CN.4/380) and sixth report (A/CN.4/389). Accordingly, the Drafting Committee had added the following explanatory note at the end of the text of article 5 (A/CN.4/L.395):

As a result of its adoption of draft article 5, the Drafting Committee recommends the adoption of consequential changes to articles 2, 3 and 5 as provisionally adopted by the Commission at its thirty-fifth session, as proposed by the Special Rapporteur. Those changes are as follows: in articles 2 and 3, the references to "articles [4] and 5" should be amended to "articles 4 and [12]"; article 5 should be renumbered "article 4".

45. Mr. ARANGIO-RUIZ observed that the words "In addition" at the beginning of paragraph 3 of article 5 had a slightly restrictive character. They might be deleted and the paragraph amended to read:

"If the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], 'injured State' means all other States."

46. Mr. USHAKOV said that he wished once again to explain his position on article 5, which he regarded as a minor provision, since it stated no rule, but merely a definition. In the Drafting Committee, he had participated in the drafting of paragraph 1, which he considered acceptable, although he had proposed different wording.

47. He could not, however, accept paragraph 3, according to which the expression "injured State", if the internationally wrongful act constituted an international crime, meant all other States. He found that provision strange and even ridiculous. It was impossible to maintain, for example, that when a State perpetrated an act of aggression, all other States were its victims and could claim reparation. Rights and obligations *erga omnes* certainly existed in general international law, but relations between States were, in the last analysis, always of a bilateral nature. Each act of aggression injured only one State. If several States were victims of an aggression, it split into as many acts of aggression as there were States. Those considerations had nothing to do with the fact that the organized international community could take measures, including coercive measures, against a State which committed a crime constituting a threat to the peace, a breach of the peace or an act of aggression. In such cases, States Members of the United Nations were clearly required to take the measures decided on by the Security Council against the aggressor State, but it did not follow that they could claim reparation from that State, since they were not States injured by the act of aggression. Hence paragraph 3 of article 5 was in flagrant contradiction with paragraph 1, which gave a general definition of "injured State" as meaning any State a right of which was infringed by the internationally wrongful act of another State.

48. He had not taken part in the drafting of paragraph 2 in the Drafting Committee, because he considered it unnecessary to illustrate the general definition given in paragraph 1. Furthermore, most of the examples given in paragraph 2 were inadequate or even absurd. Thus even the simple case referred to in subparagraph (a) was drafted in ambiguous terms. For the assertion that, if the right infringed by the act of a State arose from a bilateral treaty, "injured State" meant the other State party to the treaty implied that an act by any State could infringe the bilateral relations of other States, whereas those relations could be infringed only by one of the two States parties to the bilateral treaty.

49. Subparagraph (c) provided that, if the right infringed by the act of a State arose from a binding decision of an international organ other than an international court or tribunal, "injured State" meant the State or States which, in accordance with the constituent instrument of the international organization concerned, were entitled to the benefit of that right. To what kind of right did the provision refer? It did not refer to the rights and obligations which the constituent instrument of an organization might create for the organization and its members, but to a right to the benefit of which they were entitled and which arose from a binding decision of a non-judicial international organ. Was it to be concluded that, if a member State of an international organization failed to pay its contribution in violation of a binding decision of an organ of that organization, all the other Member States were injured States because they were entitled to the benefit of a right? And if the Security Council decided that economic sanctions should be taken against a Member State, but some States refused to take such sanctions, did a right arise for the other Member States? Were all those States injured States, and to the benefit of what right were they entitled?

50. Subparagraph (d) referred to the case in which the act of "a State" infringed the right of a third State arising from a treaty provision for that third State. But the right of such a third State could not be infringed by just any State; the State infringing the right must be a party to the treaty containing the provision in question, which must create an obligation for it towards the third State.

51. Under subparagraph (e) (i), if the right infringed by the act of a State arose from a multilateral treaty or from a rule of customary international law, the injured State was any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it was established that the right had been created or was established in its favour. He wondered how a rule of customary international law or general international law could create or establish a right in favour of one or more particular States. With regard to the case covered in subparagraph (e) (iii), in which the right had been created or was established for the protection of human rights and fundamental freedoms, he wondered what right that could be. Under the International Covenants on human rights, for example, each party to those instruments undertook to intro-

duce into its national legislation provisions for the protection of its citizens, but no right for the other parties arose from that undertaking.

52. Mr. OGISO said that he had some observations to make on paragraph 2, subparagraph (e) (ii), of article 5. That provision referred to the infringement of a right arising from a multilateral treaty and stated that “the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty ...”.

53. First, the provision seemed unduly to widen the scope of the term “injured State”. As he understood it, the provision meant that a State A could become an injured State if its enjoyment of its rights under a multilateral treaty was affected as a result of the infringement of the right of another State B, a party to the same multilateral treaty, by an internationally wrongful act of a State C.

54. Secondly, it was not easy in practice to establish that the enjoyment of a right of State A was affected; the term “affects” was so vague that the question whether the enjoyment of a certain right had been affected could well become the subject of a further dispute.

55. Thirdly, even assuming that such a fact could be established, he doubted whether it was appropriate to give to State A, whose enjoyment of a right had been affected, the status of an injured State to the same extent as to State B, whose right had actually been infringed. That seemed all the more inappropriate because an injured State was entitled, under draft article 6, paragraph 1, to require the State which had committed an internationally wrongful act to take the action specified in paragraph 1 (a) to (d) and paragraph 2 of that article. The injured State was further entitled to take countermeasures under draft article 8 and measures of reprisal under draft article 9, although they must not be manifestly disproportional to the seriousness of the internationally wrongful act. If a State which became an injured State only because its enjoyment of a right under a multilateral treaty had been affected was entitled to take such countermeasures and reprisals—which were somewhat loosely delimited in article 9—that might cause escalation of disputes.

56. He therefore urged that the definition of an “injured State” in article 5, paragraph 2 (e) (ii), be reviewed after the Commission had taken decisions on draft articles 6, 8 and 9. In order to make the situation clear, he suggested that subparagraph (e) (ii) should be placed in square brackets, with a footnote explaining the reason.

57. Mr. McCaffrey said that, on the whole, he found paragraphs 1 and 2 of article 5 acceptable. He was opposed to paragraph 3, however, because he could not agree to the concept of a crime of a State, for the reasons he had given during the discussion. He did not believe that the proposed provision could make any constructive contribution to the Commission’s work on State responsibility. Besides, it was his belief that any acts referred to as “international crimes” in article 19 of part 1 of the draft would in any case be covered by the examples given in para-

graph 2 (e) (i) and (iii). Paragraph 3 was not only dangerous and far-reaching, but also unnecessary.

58. Sir Ian SINCLAIR said that article 5 as proposed by the Drafting Committee was not, in his view, entirely satisfactory, although he found the substance of paragraphs 1 and 2 broadly acceptable.

59. With regard to paragraph 1, however, and even more to paragraph 2, he was concerned about the fact that the Special Rapporteur’s original language, defining an “injured State” in terms of the breach of an obligation by the author State, had been replaced by a less satisfactory formulation in terms of the infringement of a right. In normal circumstances, the breach of an obligation by one State involved an infringement of the right of another State, but that was not always the case. He therefore urged that, on second reading, the precise formulation of paragraphs 1 and 2 should be re-examined in the light of those remarks.

60. Unlike Mr. Ushakov, he believed that paragraph 2 was necessary. It served to particularize the definition of the term “injured State” in certain specific contexts and provided a non-exhaustive list of cases, from which the injured State could be identified more clearly than from the simple proposition stated in paragraph 1.

61. His main concern, however, related to paragraph 3, on which he entered a reservation. In the context of a situation in which an internationally wrongful act constituted an international crime—and the Commission would have to review the basis of that concept on its second reading of part 1—it was essential that the Commission should first formulate articles 14 and 15 before it could determine whether a definition of an “injured State” was necessary and, if so, what its precise content should be. In the case of an international crime, there would of course be a directly injured State and other States which would be, in a way, indirectly injured States, but the rights and obligations of those two categories of States were not, and could never be, identical.

62. It was precisely for that reason that the Drafting Committee had very properly placed the phrase “and in the context of the rights and obligations of States under articles 14 and 15” in square brackets for the time being. An indication was thus given that it was only when articles 14 and 15 were settled that the Commission would be able to establish the precise extent of the rights and obligations of other States as members of the international community and not as individual States.

63. For those reasons, he wished to place on record his strong reservation regarding the content of paragraph 3, which might well not be necessary at all, but which in any case could not be finalized until the Commission had adopted articles 14 and 15 and possibly other articles relating to the rather special case of international crimes. At that stage, the Commission would have to revert to paragraph 3 and might well decide to delete it.

The meeting rose at 1.05 p.m.