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Summary record of the 1731st meeting

Topic:
State responsibility

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tice. Another was that a doctrine of State immunity did exist and that it was well established in State practice. Naturally, a State could consent to the exercise of jurisdiction by another State, thus providing a basis for the recent tendency to confine immunity to certain categories of activities. Yet another theory was that, from the very outset, immunity had been founded in customary international law and in State practice, but solely in so far as sovereign acts were concerned. It was supported not only by the decisions of the courts of the United Kingdom and the United States of America, but also by the practice and case law of other countries.

27. Nevertheless, the majority in the General Assembly seemed to endorse the view that there was a general rule of immunity, involving certain exceptions. Some countries, in his opinion, placed undue restrictions on immunity. For example, in one case concerning an embassy bank account it had been held that, because the account was a mixed account, the embassy was responsible for separating it and, because it had failed to do so, the account could be attached. He was not criticizing such decisions but considered that they should be taken into account in arriving at a final solution.

28. He agreed that it might be necessary to elaborate on the definition of "trade or commercial activity" contained in article 2, subparagraph 1 (*f*), and the interpretative provision in article 3, paragraph 2. Furthermore, having examined in more detail practice and decisions that had caused hardship, particularly to the developing countries, he believed that the test of the nature of the act, advocated by the Austrian and German courts, should not be an absolute one. For the purpose of a more acceptable compromise, an effort could perhaps be made in the Drafting Committee to spell out the idea that the main purpose of the activity should be to provide relief for the country or to assure its stability, particularly in terms of the developmental effort. He had noted Mr. Balanda's reference to contracts of guarantee and recalled in that regard that, in a sale of Airbuses to Thailand by France, he had himself been instructed to sign such a guarantee and, at the same time, a clause waiving immunity. Such an occurrence was not the first of its kind and was an indication of the way in which matters were developing.

29. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 11 and 12, together with the definitions contained in article 2, subparagraph 1 (*f*), and article 3, paragraph 2 to the Drafting Committee.

It was so decided.

The meeting rose at 1 p.m.

1731st MEETING

Monday, 21 June 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

State responsibility (A/CN.4/342 and Add.1-4,[1] A/CN.4/344,[2] A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 1 to 6

1. The CHAIRMAN invited the Special Rapporteur to introduce the topic of State responsibility.

2. Mr. RIPHAGEN (Special Rapporteur) said he would attempt to do three things: to situate the topic of State responsibility within the entire field of international law; to introduce the topic as a whole; and to make some general comments on the draft articles proposed in his third report (A/CN.4/354 and Add.1 and 2, paras. 145-150), which read as follows:

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

(*a*) not to recognize as legal the situation created by such act; and

(*b*) not to render aid or assistance to the author State in maintaining the situation created by such act; and

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] *Ibid.*

(c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b).

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

3. There were two basic and opposite approaches to international law. One, which could be called the classical approach, started from the sovereign State and tried to draw consequences from the plurality of sovereign States and their obvious equality. That approach presupposed roughly equal State powers. The other, which could be called the modern approach, started from humanity and the human person; from an ideal picture of the world situation, it tried to draw conclusions as to the contributions everyone had to make to the establishment of that situation and the distribution of its benefits. That approach was to be found in various fields, such as the new international economic order, the environmental movement and the quest for arms control and disarmament.

4. The two approaches tended to meet, but not at the same place in all fields, at the present stage of international law. That was why, from the legal point of view, there were different subsystems of international law, coexisting and therefore necessarily interrelated, but separate. Mr. Quentin-Baxter's topic represented the modern approach and his own the classical approach, but they also tended to meet and overlap. Represented graphically, Mr. Quentin-Baxter's topic would be near the centre, and State responsibility more towards the periphery. The Commission used the terms "primary" and "secondary"—and even "tertiary"—rules, but those rules could not define watertight compartments. In essence, the perennial question was how far the law prevailed over the facts or the facts over the law.

5. State responsibility was a highly abstract topic. Starting from the sovereignty of States, it was recognized that those States could and should be subject to obligations under international law. Taking the obligation as a starting-point, three elements were left aside, or abstracted from. First, the source of the obligation, whether general rules of customary international law, treaties, decisions of international organizations, or judgements of international courts; second, the content of the obligation, for example, non-aggression, respect for human rights, delivery of a certain amount of grain, respect of a foreign State's immunity, rules relating to international watercourses, the law of the sea or of outer space; and third, the object and purpose of the obligation, namely, the situation it was intended to create. The usual "linear" view was then adopted: there were obligations, the breach of which entailed legal consequences. Before determining those legal consequences, however, it must first be determined what constituted a breach. Part 1 of the draft articles was devoted to that question.

6. An analogy could be drawn between part 1 of the draft articles[3] and the Vienna Convention on the Law of Treaties. That Convention stated the principle of *pacta sunt servanda* in article 26, and then proceeded to devote many articles to the circumstances under which *pacta non sunt servanda*, thereby returning to the unilateralism of national sovereignty. Similarly, part 1 of the draft articles on State responsibility was largely devoted to non-responsibility. It covered that matter in three stages. First, in chapter II, it determined and thereby limited the cases in which conduct (action or omission) was attributable to the State. A State, of course, did not have a human personality, but it did have persons purportedly acting on its behalf, regarding whom Shakespeare had spoken of "the insolence of office" as being one of the ills "that flesh is heir to", and more modern writers had coined the phrase "the arrogance of power". In any event, when discussing State responsibility, human conduct had to be related to a State. The articles in part 1 made a distinction between organs of the State and persons not acting on behalf of the State, but because that distinction could not be maintained completely, there were many references to related conduct of a State, and even some articles, such as article 15, in which the dichotomy between organs of the State and persons not acting on behalf of the State was dropped entirely. Secondly, chapters III and IV of part 1 determined the circumstances in which conduct was a breach of an international obligation, including the *tempus delicti* and the implication of a State in the internationally wrongful act of another State. Thirdly, chapter V enumerated a number of circumstances precluding wrongfulness.

7. Thus, in articles 1 to 35, adopted by the Commission on first reading,[4] the stage was set for determining, in parts 2 and 3, the legal consequences of an internationally wrongful act. In musical terms, parts 2 and 3 contained three "movements": the first, the new obligations of the State which had committed an internationally wrongful act (the "author State") or the self-enforcement by the State of its obligations; the second, the new rights of other States or the national enforcement of such obligations; the third, the implementation of State responsibility or the international enforcement of such obligations.

8. It was impossible, however, to remain as abstract as the Commission had in drafting part 1. Source/obligation/breach/consequence/implementation constituted a system, and it had to be admitted that there were several interrelated subsystems of international law in different fields of international relations. He had drawn attention to that fact in his third report (A/CN.4/354 and Add.1 and 2, para. 27) by quoting the following passage from the commentary to article 19 of part 1 of the draft:

[3] For the texts, see *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] See footnote 3 above.

The Commission must nevertheless emphasize here and now that it would be absolutely mistaken to believe that contemporary international law contains only one régime of responsibility applicable universally to every type of internationally wrongful act, whether more serious or less serious and whether injurious to the vital interests of the international community as a whole or simply to the interests of a particular one of its members. Having said that, it must quickly be added that this by no means implies—indeed it is very unlikely—that when the Commission considers the question of forms of responsibility and of the determination of the subject or subjects of international law permitted to implement (*mettre en œuvre*) the various forms concerned, it will conclude that there is one uniform régime of responsibility for the more serious internationally wrongful acts, on the one hand, and another uniform régime for the remaining wrongful acts, on the other. In point of fact, international wrongs assume a multitude of forms and the consequences they should entail in terms of international responsibility are certainly not reducible to one or two uniform provisions.[5]

Clearly, at that time the Commission had been aware that in the transition from part 1 to parts 2 and 3 of the draft articles the difference between international obligations, or subsystems of international law, would come to the fore. Perhaps even more illuminating was another remark in the same commentary, mentioned in his third report (*ibid*): "The idea that there is some kind of least common denominator in the regime of international responsibility must be discarded".[6]

9. The task in drafting parts 2 and 3 of the draft articles was the identification of those subsystems and the determination of their interrelationships. There were three points to keep in mind. First, State responsibility could not realistically be separated from its implementation; second, in creating obligations, it had to be accepted that the legal consequences of a breach could also be determined; and third, the Commission could not hope to produce an exhaustive set of rules—a point which was elaborated by the Special Rapporteur in his third report (*ibid.*, para. 103).

10. Turning to general comments on the draft articles discussed in his third report (*ibid*, chap. VI), he said he would attempt to link the commentaries to articles 1 to 6 with his oral introduction and some paragraphs of the report. As indicated by the remarks of the Commission to which he had referred, the Commission had always known that it could not hope to draw up an exhaustive set of rules. Both article 1 and, particularly, article 2 reflected that non-exhaustiveness. Article 1 was purely introductory and informed the reader that "legal consequences", that was to say, rights and obligations, entailed by an internationally wrongful act would be mentioned. It promised no more; in fact it promised less than it gave, for article 6 already talked about the obligations of States other than the author State. But why confuse the reader by saying that an internationally wrongful act of one State entailed obligations for another State? Actually, the obligations mentioned in article 6 were rather obligations to exercise the rights created for other States by the internationally wrongful act. They were part of what was called in the report the international enforcement, or third parameter (*ibid.*, para. 87), which the Commission had called "the determination of the subject or subjects of international law permitted to implement (*mettre en œuvre*) the various forms concerned ..." (see para. 8 above).

11. The non-exhaustiveness of the rules in parts 2 and 3 of the draft articles was particularly reflected—or hidden—in draft article 2, which states the principle of proportionality. Proportionality was typically a central idea of justice. It was, in a way, a denial of the maxim *fiat justicia atdum pereat mundus* and an affirmation of the caveat *summum jus, summa injuria*, on which the Commission had leaned heavily in its commentary to article 33 in part 1, dealing with state of necessity as a circumstance precluding wrongfulness.[7] However, proportionality also expressed the idea of *jus in causa positum*, the uniqueness of every set of facts with regard to the dictates of justice. The idea of justice was universal and permanent, but above all concrete; the relationship of abstract rules of law to justice was more or less comparable to the relationship of mathematics to physical reality.

12. Proportionality was a typically quantitative concept. As such, it created some uneasy feeling in lawyers, who would not agree with the statement of one British physicist that "quality is a poor substitute for quantity", but who, on the contrary, attempted to reduce quantity to quality. In that connection, paragraph 83 of the arbitral award of 9 December 1978 in the *Case between the United States of America and France concerning the Air Services Agreement of 27 March 1946*,[8] cited in the preliminary report,[9] was illustrative; though the award dealt with countermeasures, its statements were equally applicable to the first and third parameters.

13. In stating a rule of proportionality in article 2, the Commission seemed to be giving an answer, but was not really giving a direct answer. There was nothing wrong with that. Legal texts often used such hidden quantitative terms as "serious", "important", and "gravity" as was indicated in the third report (A/CN.4/354 and Add.1 and 2, para. 64), and in relation to wrongful acts, lawyers were familiar with the notions of "aggravating" and "extenuating" circumstances. Those two notions came close, respectively, to a special form of imputability of an act to a State and to circumstances precluding wrongfulness. In short, a link between a particular internationally wrongful act and a particular legal consequence could never be automatic (*ibid.*).[10]

[5] *Yearbook ... 1976*, vol. II (Part Two), p. 117, para. (53) of the commentary.

[6] *Ibid.*, para. (54).

[7] *Yearbook ... 1980*, vol. II (Part Two), p. 49, para. (31) of the commentary.

[8] United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 483.

[9] *Yearbook ... 1980*, vol. II (Part One), pp. 127-128, document A/CN.4/330, para. 94.

[10] See also para. (22) of the commentary to article 34 in part 1 of the draft (*Yearbook ... 1980*, vol. II (Part Two), p. 60).

14. Because of the nature of proportionality, care must be taken in stating a rule (*ibid.*, para. 65). He had accordingly suggested that article 2 should use the word "should" instead of "shall" and substitute for "proportionality" the absence of "manifest" disproportionality. That was to avoid stating a rule which seemed to be rigid. Perhaps the result seemed meagre and hardly a rule at all; but even the Vienna Convention on the Law of Treaties did not hesitate, if necessary, to state a legal truth in a rather primitive form. Thus article 44, subparagraph 3 (*c*) of that Convention stated, as the final criterion for the possibility of invalidating, terminating, withdrawing from or suspending particular clauses of a treaty, that "continued performance of the remainder of the treaty would not be unjust".

15. A quite different legal phenomenon from quantitative proportionality was the co-existence of an interrelationship between different subsystems of international law. That phenomenon was dealt with in his third report (*ibid.*, paras. 67, 69-77 and 125-129). In a way, that problem came close to the determination of a breach, in part 1: it involved both the inseparability of legal consequences and implementation, to which he had referred earlier, and the residual character of the rules in parts 2 and 3 of the draft.

16. What was meant by the term "subsystem of international law"? A theoretical answer might be that a system was an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed, inasmuch as it had an interrelationship with other subsystems. A concrete example of a subsystem was provided by the Judgment of the International Court of Justice in the case *United States Diplomatic and Consular Staff in Teheran*.[11] The Court had held that the corpus of rules of diplomatic law constituted a "self-contained regime", and thus that the breach of an obligation in that field by the sending State could be countered only by a partial or total breaking off of diplomatic relations.[12] That was clearly relevant to the question of the legal consequences of an internationally wrongful act. Another example was provided by the Court's decisions relating to the mandate system. In its Judgment of 18 July 1966 in the *South West Africa Second Phase* cases,[13] the Court had decided that Ethiopia and Liberia did not have a "separate self-contained" right to demand performance of the obligations of South Africa in respect of its "sacred trust".[14] Therefore, a regime, or subsystem, in which at least some of the legal consequences of a breach of an obligation could not individually be invoked by each of the States parties to the regime, could very well be imagined. For that matter, it was not difficult to imagine a regime under which a State which was not a party to it could invoke the legal consequences of a breach of an obligation within that regime. The latter phenomenon was typical of "objective regimes", which in themselves were a typical example of a subsystem of international law and were referred to in his third report (*ibid.*, paras. 120 *et seq.*). The draft articles proposed in the report did not yet deal with those regimes.

17. Referring to the draft articles, in particular draft article 3, he pointed out that most subsystems of international law were created by treaty, though other sources of such subsystems could not be excluded. From the point of view of efficiency, it would seem normal for States, in the process of creating obligations in a field of relationships between them, also to give thought to the legal consequences of a breach of such obligations, and to determine those legal consequences and their implementation. In fact that was very often not done fully or not done at all. But to the extent that it was done, the relevant provisions must prevail over the rules to be laid down in parts 2 and 3 of the draft. Those rules were residual rules; they were intended to fill the gap left by the States consenting to create obligations between them. Article 3 was designed to convey that residual character.

18. Obviously, if the State concerned purported to fill the gap themselves, they could not escape from other existing subsystems of a peremptory nature. Articles 4, 5 and 6 referred to such peremptory subsystems. On the other hand, it should not be presumed that States entering into a treaty stipulating obligations between them also intended to deviate from the residual rules to be laid down in parts 2 and 3 of the draft articles. Accordingly, article 3, as proposed, did not contain the words "explicitly or implicitly" found in the somewhat analogous provision of article 33, subparagraph 2 (*b*), in part 1 of the draft articles.

19. Nevertheless, it had to be recognized that the concept of an "international obligation" covered a wide variety of legal phenomena having different sources, contents and objectives, all of which inevitably influenced the legal consequences of a breach of such an obligation. An obligation, therefore, was but one element in a subsystem, and the subsystem to which it belonged still had to be identified. Moreover, an obligation was one thing and the actual conduct of a State was another: the latter could be relevant to different subsystems, in which case the interrelationship between them had to be determined.

20. The Commission had earlier stated, in paragraph (7) of its commentary to article 17, that:

> For it to be actually decided that an act of State which conflicts with a supposed international obligation of that State is not wrongful, it would be necessary to conclude... that the obligation did not exist, or at least that it was not a legal obligation.[15]

The matter did not rest there, however, since even true legal obligations could have different legal consequences. Modern legal literature often used the expression "soft law" to denote obligations that, though legal

[11] *I.C.J. Reports 1980*, p. 3.

[12] *Ibid.*, para. 86.

[13] *I.C.J. Reports 1966*, p. 6.

[14] *Ibid.*, pp. 28-29, para. 33.

[15] *Yearbook ... 1976*, vol. II (Part Two), p. 81.

obligations, did not entail all the legal consequences of obligations under "hard law". Borrowing from that terminology, it could be said that there existed "super hard law" in the form of *jus cogens* and, by the same token, "semi-hard" and "semi-soft" law. At all events, it seemed clear that not all obligations need have the same force or resistance—a point illustrated, in another context, by article 33 in part 1.

21. In the case of treaties—the typical source of obligations—and specifically, the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in respect of Treaties, it would be seen that different types of treaty had different force and resistance against such exogenous circumstances as succession of States. They all created different kinds of obligation with regard to the legal consequences of their breach. The same applied to the decisions of international institutions, which might or might not themselves constitute a source of obligation separate from the treaties that established them.

22. Those remarks went to show that the rules on State responsibility could not be exhaustive, and for that reason alone, draft article 3 was indispensable. That did not, of course, preclude an endeavour to identify some subsystems and to say something about the interrelationship between them. Draft articles 4, 5 and 6, as proposed in his third report, sought to do precisely that (see para. 2 above). The same applied to draft article 5 in conjunction with draft article 4, proposed in the second report (A/CN.4/344, para. 164), which had been withdrawn for the time being. Those articles had been designed to deal with the subsystem concerned with the treatment to be accorded by the State to aliens within its jurisdiction. He still considered that it was an identifiable subsystem, but thought it could be better dealt with at a later stage.

23. Draft article 4, as proposed in his third report, related to the subsystem of *jus cogens*. In that connection, he had to admit to a slip of the pen in stating, in paragraph 105 of his third report, that "one could hardly call it a system or subsystem". Draft articles 5 and 6, as now proposed, referred respectively to the subsystems of the Charter of the United Nations and to international crimes. Lastly, he suggested that the Commission might wish to reconsider some of the articles in part 1 of the draft during the second reading.

24. Mr. MALEK said that the purpose of draft article 1 was not difficult to grasp. It was an introductory article which served as a link between parts 1 and 2 of the draft. But in view of the nature of the constituent elements of the provision and their mutual relationships, it was not easy to find a satisfactory form of words. First, it followed from the present wording of article 1 that an internationally wrongful act of a State had specific legal consequences. That first conclusion was perfectly correct and technically satisfactory; but it was then stated that the legal consequences occurred in conformity with the provisions of part 2 of the draft, which seemed to impose limitations on the general rule which were certainly not intended.

25. As at present drafted, article 1 appeared to recognize only the consequences provided for in part 2. If the legal consequences of an internationally wrongful act of a State were not mentioned in part 2, it must therefore be deduced that the act would not have legal consequences, which was manifestly absurd. But the Special Rapporteur had emphasized that article 1 did not necessarily mean that the other articles in part 2 would give an exhaustive list of the legal consequences of every internationally wrongful act of a State. Consequently, it might be possible to add, at the end of article 1, the saving clause "and the other rules of international law". It was true that the legal consequences of a wrongful act not provided for in the draft would still be governed by the other rules of international law, whether that was stated or not; but it seemed technically advisable to say so in the introductory article to part 2 of the draft. The provisions of article 3 did not appear able to fill the gap left by article 1 as at present drafted.

26. According to article 3, "The provisions of this Part apply to every breach by a State of an international obligation ...". He found it difficult to see how part 2 of the draft, which dealt with the legal consequences of an internationally wrongful act by a State, could apply to every breach by a State of an international obligation when that part could certainly not contain an exhaustive list of all the legal consequences of every internationally wrongful act by a State. In any case, the purpose of article 3 was different from that of article 1, and the two articles could not complement one another. Article 3 was intended to permit, and perhaps even to encourage, the establishment of special regimes; thus it recognized the precedence of such regimes over the rules laid down in part 2 of the draft articles.

27. The fact that article 1 identified the two kinds of consequences produced by an internationally wrongful act of a State, namely, rights and obligations, might raise other difficulties. But that approach seemed inevitable, and there was nothing wrong with it so long as it did not include an exclusive attribution of one kind of consequences to the State committing the internationally wrongful act or to the other States concerned. In fact, however, article 1 exclusively reserved obligations to the State committing the act and rights to the other States, for it provided that an internationally wrongful act of a State entailed obligations for that State and rights for other States. However, it had been established that the author of a wrongful act did not *ipso facto* lose its rights under international law. That was stated in the former article 3 (A/CN.4/344, para. 164), according to which "A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law". Moreover, one of the purposes of the new article 2 was to protect a right of the State committing the wrongful act, namely, the right that the reaction or response of other States to the internationally wrongful act must not be disproportionate to the seriousness of the act. Besides, an internationally

wrongful act of a State did not necessarily produce only rights for other States. It also imposed obligations on them in the most important sectors of international relations. Draft article 6 provided a significant example, since it imposed all kinds of obligations on States other than the State committing an internationally wrongful act which constituted an international crime.

28. Article 1 also gave the impression that every internationally wrongful act of a State, whatever its nature or gravity, gave rise to legal consequences for all other States. But in most cases such an act, apart from the State committing it, concerned only the State or States injured and possibly one or more third States. In the light of the comments he had made, he proposed that article 1 should be drafted to read:

> "Every internationally wrongful act of a State entails obligations and rights for that State and for every other State concerned, in conformity with the provisions of the present part 2 and with the other rules of international law."

29. Finally, he reminded the Commission that chapter V of part 1 of the draft articles on State responsibility contained a number of articles dealing with circumstances precluding wrongfulness. The act of a State of which the wrongfulness was precluded by reason of a particular circumstance was not, however, always without legal consequences. Moreover, article 35, at the end of chapter V, contained a saving clause according to which preclusion of the wrongfulness of an act of a State by virtue of the provisions of articles 29 (Consent), 31 (*Force majeure* and fortuitous event), 32 (Distress) or 33 (State of necessity) does not prejudge any question that may arise in regard to compensation for damage caused by that act. Thus it did not appear that part 2 of the draft articles would be confined to the legal consequences of internationally wrongful acts of a State alone; they should perhaps take account of certain obligations, such as the obligation to compensate for damage caused by an act whose wrongfulness was precluded.

30. Mr. CALERO RODRIGUES noted, from paragraph 50 of the second report (A/CN.4/344), that the Special Rapporteur had proposed that, instead of dealing straight away with the definition of the forms, degrees and content of international responsibility, part 2 would start with a number of general principles. The Special Rapporteur had, however, also pointed out that the new draft article 1 was no more than a link between parts 1 and 2 of the draft and therefore could not really be said to state a general principle; the principles were set out in draft articles 2 to 6.

31. He agreed with Mr. Malek that draft article 1 should refer not only to the rights, but also to the obligations which an internationally wrongful act of a State entailed for other States. He also agreed that the addition of the words "and the other rules of international law" might make the article clearer, although he thought that Mr. Malek's point—that draft article 1 seemed to limit the legal consequences of international responsibility to cases falling within the terms of part 2—was covered by the phrase in draft article 3: "... except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law".

32. With regard to the structure of the draft, he thought the principle relating to the residual nature of part 2 should follow after draft article 1, which it completed and qualified. He wondered, however, whether it was really necessary to state the general principle laid down in draft article 6, which related to the position of third States in cases where an internationally wrongful act constituted an international crime. If so, it should, in his view, be framed in more concise terms since, as worded, draft article 6 gave the impression that it touched upon questions relating to the third parameter, and thus created an imbalance in the general principles.

33. Another point raised by Mr. Malek concerned the breach of an obligation and the rights of the author State under general international law, matters which had been dealt with in the previous draft articles 1 and 3 (A/CN.4/344). There had been a suggestion that those two articles should perhaps be combined, but the Special Rapporteur had had some difficulty in doing so. His own view was that it might be useful to retain the two propositions set out in the earlier draft articles.

34. Mr. FRANCIS proposed that draft article 1 be reworded to read:

> "Subject to the provisions of this Part, an internationally wrongful act of a State entails *inter alia* obligations for that State and consequential rights for other States concerned."

35. Sir Ian SINCLAIR said that what was expressed in draft article 1 was, in effect, that an internationally wrongful act of a State gave rise to consequential obligations. Although those obligations were sometimes referred to in the commentary (A/CN.4/354 and Add.1 and 2, para. 145), as "new obligations", it might be better to use the word "consequential", since they arose out of an internationally wrongful act. He was inclined to agree that it was necessary to refer both to consequential rights and to consequential obligations for other States because, again, they arose out of an internationally wrongful act. If draft article 1 was to be retained—and there might be an argument for omitting it, since it only served to link parts 1 and 2—he agreed that the words "other rules of international law" should perhaps be added, especially as part 2 was not intended to list exhaustively the consequences of a breach of an international obligation.

36. The CHAIRMAN, speaking as a member of the Commission, said that, before making any general comments on article 1, he wished to remind the Commission that, contrary to the frequently expressed opinion that damage was an element of responsibility, the Commission, convinced by the arguments of the former Special Rapporteur, Mr. Ago, had decided that damage was not an element of responsibility, so that it had not been

taken into account. The Commission was probably right, but it now had before it part of a draft of articles, part 2, which the problem of damage constantly underlay. The Special Rapporteur himself mentioned it as little as possible, because of the very general form of his work. He (Mr. Reuter) had some difficulties, and if the Commission was going to adopt an amended article 1, he suggested that a certain number of concrete cases should be mentioned in the commentary.

37. In that connection, he fully agreed with the opinion expressed by Mr. Malek (and endorsed by Mr. Calero Rodrigues), that in article 1 the expression "*pour les autres Etats*" ("for other States") was too general, especially in the French text. There were, indeed, cases in which rights arose for all the other States, but there were also cases in which rights arose only for certain other States. The first category could include the case, never fully clarified, of the breach of a rule sufficiently general for all other States to have an interest in reacting. It was true that there were States which, even acting outside the framework of the United Nations, adopted countermeasures against another State which they accused of an international offence that had not been committed directly against them. It might really be doubted, and it was doubted, whether such a reaction was legitimate. It could thus be accepted that there were rules which gave other States a right, that of having a direct interest and of considering that they had suffered moral damage on the basis of which they claimed certain legal consequences relating to their rights and obligations.

38. But it was possible to imagine other cases in the second category: for instance, the case of a State suffering material damage as the result of an offence, even though that offence was not committed against it. One example would be hostilities breaking out without any declaration of a state of war. It might be supposed that the territory of a State A was bombarded by a State B. In the territory of State A, there were nationals, property and interests of a third State C, which were injured by the bombardments of State B. Supposing that a breach of international law had been committed, was it State A alone which had the right to claim compensation from State B, even though it might have to pass on some of the compensation to State C? Or had State C a direct right to claim against State B? That question had been the subject of numerous analyses in classical works on international law and had even arisen recently. If he understood it correctly, article 1 stated the answer to a question of that kind.

39. Another example, also in the second category, was that in which a State became involved in an offence by reason of the action of another State. For example, if a State had conceded a military base to another State, which committed a wrongful act from that base against yet another State, was not the conceding State in danger—even though it had committed no offence by conceding the base—of being a co-author or accomplice in the wrongful act, or at least jointly responsible? Could not the State which had been the victim of the wrongful act claim directly against it as having some degree of responsibility? There were States which had protested against the use of conceded bases for carrying out actions whose lawfulness might be in doubt.

40. It therefore seemed to him that if the Commission was going to draft an article like article 1 and if it introduced the "explosive" cases he had described, it should reply in the following articles to questions such as those which had just been raised.

41. Mr. RIPHAGEN (Special Rapporteur) said that some misunderstanding might have arisen over draft article 1 because the rendering of the words "for other States" in the French version was not strictly correct. Moreover, in as much as draft article 1 was no more than an elaborate title, it could never be perfect and, if viewed as a rule that gave rise to consequences, would inevitably cause difficulty. Nevertheless, the text, which had been suggested by a former member of the Commission,[16] had found much support in the Commission, and he had therefore adopted it. At the same time, he had tried, in the commentary (A/CN.4/354 and Add.1 and 2, para. 145), to avoid creating the impression that draft article 1 stated a rule from which legal consequences flowed. In some ways he would be inclined to follow the advice that the article should be dispensed with. Possibly that problem could be solved by the Drafting Committee.

The meeting rose at 5.55 p.m.

[16] *Yearbook ... 1981*, vol. I, p. 136, 1669th meeting, para. 5 (Mr. Aldrich).

1732nd MEETING

Tuesday, 22 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (*continued*) (A/CN.4/342 and Add.1-4,[1] A/CN.4/344,[2] A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*[3] (continued)**

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

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] *Ibid.*

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