Document:-
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Summary record of the 1732nd meeting

Topic:
State responsibility

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

ARTICLES 1 to 6[4] (*continued*)

1. Mr. McCAFFREY said he agreed that the Commission should not be bound by part 1 of the draft articles, which at that stage merely served as a scaffolding for part 2. Indeed, as the Special Rapporteur had noted in his third report, there was "no escape from a 'categorization' of primary rules for the purpose of determining the legal consequences of their breach, and from formulating different sets of legal consequences for each category of primary rules" (A/CN.4/354 and Add.1 and 2, para. 38). It therefore seemed inevitable, as the Special Rapporteur had predicted, that the Commission would "get ever further away from the unitary concept of 'international obligation' which is the cornerstone of part 1 of the draft articles" (*ibid*).

2. It had already been noted that chapters III, IV and V of part 1 of the draft articles went beyond the articles proposed in the Special Rapporteur's third report in laying the basis for the whole of part 2 of the draft. But for that, he would have had difficulty in proceeding through such a maze without knowing where he was supposed to be going and what obstacles lay in the Commission's path.

3. He fully subscribed to the views expressed by the Special Rapporteur in the first, second and last sentences of paragraph 144 of his third report. As he saw it, draft article 1, as proposed in that report, was a Pandora's box which it was not necessary to open. He had nothing against "linkage" articles, but thought they were better omitted if they appeared likely to state a separate rule and take on a life of their own; and the potential of article 1 for doing so had already been amply demonstrated by several members. If draft article 1 were to be retained, however, he agreed that it should be amended to include the expressions "consequential obligations" and "consequential rights and obligations of other States". He would also favour the addition, at the end of the article, of the words "and other rules of international law", without which it would create the impression that part 2 was intended to contain an exhaustive list of consequences. Even with those changes, however, the article appeared to be doing its best to take on a life of its own, rather than to serve as the umbilical cord between parts 1 and 2, and for that reason he would prefer it to be deleted.

4. Instead, he would suggest that serious consideration be given to the two unnumbered articles set out in the third report (*ibid.*, para. 31). In that connection, he endorsed the suggestion that it would be more logical to place draft article 3 after draft article 1. If that were done, the first unnumbered article would become article 1; the second unnumbered article would become article 2; and the present article 2, on proportionality, would become article 3. The first unnumbered article, which combined draft articles 1 and 3, as proposed in the second report (A/CN.4/344, para. 164), performed certain useful functions. But the question arose whether it promised more than part 2 could achieve; in other words, whether it implied that part 2 would provide exhaustively for the regulation of the consequences of internationally wrongful conduct. Read in isolation, it did perhaps do so, given the phrase "*only* as provided in this part", but read in conjunction with the second unnumbered draft article, it did not. The latter article seemed to make it clear that the provisions of part 2 were residual, since they would apply "except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law ...". Only if it could be argued that the "rights and obligations" referred to in the first unnumbered article were somehow broader than the "legal consequences" referred to in the second, could the saving clause in the second be said not to remove the implication of exhaustive treatment. "Consequences", however, seemed to be the broader term, since it embraced all of the rights and obligations to which the first article referred; consequently, the second article did effectively present the first from making a promise, which could not be fulfilled, of exhaustive coverage. It might perhaps be useful to consider the extent to which the word "*only*" in the first article was necessary; in other words, whether the advantage of the emphasis supplied was outweighed by the disadvantage of seeming to promise exhaustive treatment. If so, that word could perhaps be deleted.

5. The first unnumbered article also achieved economy by combining articles 1 and 3 as proposed in the second report, without sacrificing clarity or coverage. In that connection, he noted that the Special Rapporteur indicated, in his third report, that the Commission might wish the Drafting Committee to consider the two unnumbered articles (A/CN.4/354 and Add.1 and 2, para. 31).

6. Mr. MALEK said he wished to make some general comments on article 2, and on article 6 and certain matters closely related to it which were dealt with in part 1 of the draft.

7. Article 2 was certainly better drafted than the former article 3 (A/CN.4/344, para. 164), which had the same purpose. Article 2 did, to some extent, take account of the view expressed by some members of the Commission at the preceding session, that the rule of proportionality should be clearly and explicitly stated in the draft articles. He himself shared that view and, in particular, the opinion expressed by Mr. Jagota at the Commission's preceding session,[5] that article 3 as it stood applied only to the breach of an original obligation, and not to the breach of an obligation by means of a countermeasure. Any such article should therefore be worded in such a way as to make it quite clear that any response or reaction must be in proportion to the wrongful act if it was not itself to constitute another wrongful act. If the rule of proportionality was, as the Special Rapporteur thought, an existing rule of international law, there was no reason not to state it em-

[4] For the texts, see 1731st meeting, para. 2.

[5] *Yearbook ... 1981*, vol. I, p. 130, 1667th meeting, para. 8.

phatically in the draft articles. Article 2 should therefore be further improved.

8. Article 6 was the first article to deal with the specific legal consequences of an internationally wrongful act of a State. It came after five articles, of which the first was a kind of introduction establishing the link between the first two parts of the draft and the other four stated general principles that were to apply to the whole of part 2. While the former articles 4 and 5, proposed by the Special Rapporteur in his second report (*ibid.*) had dealt with the new obligations of the "author" State of an internationally wrongful act, article 6 dealt with the obligations of other States. Although it was impossible, at that stage, to express an opinion on the order in which the consequences of a wrongful act were to be presented, it should be noted at the outset that it might be advisable to begin with the obligations of the author State, rather than with those of the injured or victim State. That was a mere detail, however, and the order of the articles and the consequences they referred to could be decided later, when all the articles in part 2 had been submitted. The Commission might then decide to keep article 6 where it was, since it also dealt with the consequences of a particularly serious wrongful act.

9. Article 6 was extremely important and warranted careful consideration, particularly in regard to paragraph 1, whose content was, in principle, satisfactory. According to that paragraph, an internationally wrongful act of a State such as an act of aggression which constituted an international crime immediately and naturally entailed an obligation for all other States to join in affording mutual assistance in carrying out other obligations, namely, the obligation not to recognize as legal the situation created by the wrongful act and the obligation not to render aid or assistance to the author State in maintaining the situation created by that act. He noted that, in paragraph (13) of the commentary to article 6 (A/CN.4/354 and Add.1 and 2, para. 150), the Special Rapporteur had rightly pointed out that mutual assistance between States, other than the author State of course, was required and justified by solidarity in the face of an infringement of fundamental interests of the community of States as a whole. He himself nevertheless failed to see why mutual assistance between States in the face of an act constituting an international crime should be limited to the performance of the obligations listed in subparagraphs 1 (*a*) and (*b*); he thought it should be possible, and was desirable, to word subparagraph (*c*) in such a way as to cover other obligations without mentioning them specifically. Nor did he understand why article 6 was limited to the consequences it referred to. Were there other consequences of such a wrongful act which the Special Rapporteur planned to take into account in another article or other articles of the draft?

10. He also wondered why article 6 made no mention of the first—and most basic, important and natural—consequence of an international crime such as an act of aggression, namely, the universally recognized natural right of self-defence, which had been dealt with specifically in article 34 in part 1 of the draft. Did the Special Rapporteur intend to deal with that particular consequence later? Paragraph (5) of the commentary to article 6 (*ibid.*) indicated that he did not intend to do so, and that was regrettable. Part 1 of the draft gave little place to the concept of self-defence, which was mentioned only with reference to Article 51 of the Charter of the United Nations, to be included, as it were, in the list of circumstances which had the same specific effect on a wrongful act of a State. He did not see how all the parts of the draft under consideration, which was a draft code of State responsibility, could be complete without appropriate provisions on self-defence.

11. Without having any particular *de facto* situation in mind, he had for many years been pleading in favour of a definition of the right of self-defence, which was of the greatest importance in the system of collective security established by the Charter of the United Nations. Such a definition should not simply be a reference to the Charter or a reminder of its relevant provisions. In paragraph (21) of the commentary to article 34 (Self-defence), as adopted on first reading, it was stated that:

> The Commission's task in regard to the point dealt with in article 34, as in the case of all the other draft articles, is to codify the international law which relates to the international responsibility of States. The Commission would certainly be doing more than it has been asked to do if it tried, over and above that, to settle questions which ultimately only the competent organs of the United Nations are qualified to settle.[6]

But were there not questions which the Commission did settle although, ultimately, only the competent organs of the United Nations were qualified to settle them? The Security Council, which had unlimited power with respect to any question submitted to it, would take any decision it deemed appropriate without reference to any rule of law, including the rules the Commission was drafting.

12. In paragraph (22) of the same commentary, the Commission had also said:

> Nor does the Commission feel that it should examine in detail issues, discussed in some cases at length in the literature, such as the "necessary" character which the action taken in self-defence should display in relation to the aim of halting and repelling the aggression, or the "proportionality" which should exist between that action and that aim, or the "immediacy" which the reaction to the aggressive action should exhibit. These are questions which in practice logic itself will answer and which should be resolved in the context of each particular case.[7]

But were there not issues, discussed at length in the literature, which the Commission had considered that it should examine in detail? Had it not defined an international crime in the draft articles, or at least provided some useful explanations of what an international crime was? When the clarity of the terms in which a principle or a rule was to be stated required it to do so, the Commission did not hesitate to draft a fairly detailed text. Article 33 (State of necessity), for example, was worded in such a way that it determined precisely the circumstances in which a state of necessity could or could not be invoked.

[6] *Yearbook ... 1980*, vol. II (Part Two), p. 60.

[7] *Ibid.*

13. A definition of the notion of self-defence would be very useful to public opinion, which could be an important factor in checking aggression, since no State, however powerful, liked to be left alone, isolated by the anger of the world community. What was required in part 2 of the draft, however, was not so much a definition of the right of self-defence as an indication of the scope, extent and limits of that right, which was a direct consequence of a particular wrongful act defined as an international crime in article 19, part 1 of the draft. It was, in fact, essentially on article 19 that the rules stated in draft article 6 of part 2 were based. The definition of an international crime given in article 19 thus served to determine, in draft article 6, the legal consequences of such a crime.

14. Because of the close link between those two articles, the question arose whether draft article 6 applied to every wrongful act characterized as an international crime under the terms of article 19. There was nothing in draft article 6 to suggest that the answer should be negative; article 19 was thus of fundamental importance, because it determined the actual scope of article 6. But article 19 took no account of an entire category of international crimes, thus excluding them from the scope of article 6: it merely referred to a few specific cases without mentioning that category. Article 19 established a special regime of responsibility for international crimes, which it attempted to explain by means of a general definition followed by a set of specific examples. In paragraph 2, it enunciated the basic general criterion for defining the wrongful acts falling within the category of crimes to be covered; according to that criterion, a wrongful act constituted an international crime if it resulted from a breach of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole. Paragraph 3 contained examples designed to explain that basic criterion: it mentioned four spheres in which a serious breach of an international obligation of essential importance was an international crime, namely, the maintenance of international peace and security, the safeguarding of the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. With regard to the protection of the human being, only slavery, genocide and *apartheid* were mentioned as examples of international crimes. According to article 19, paragraph 3 (*c*), those international crimes could result from "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being".

15. In the commentary to that provision, the Commission had attempted to explain the meaning of the words "on a widespread scale". In its view, a breach on a widespread scale "must take the form of a large-scale or systematic practice adopted in contempt of the rights and dignity of the human being".[8] He was convinced that the Commission did not intend that explanation to mean that a breach which did not quite take the form described would not be serious enough to be classed as an international crime. Fortunately, however, the Commission had recognized in the same paragraph of the commentary that, in addition to the breaches mentioned as examples, namely, slavery, genocide and *apartheid*, other breaches might be considered as international crimes in that sphere. Those explanations, which had not thrown much light on the text of article 19, would not have been considered necessary if the definition of an international crime in the sphere of obligations to safeguard the human being had been worded to take account of the notion of an international crime in international criminal law, which had emerged, in particular, from the international agreements concluded since the Second World War and from the progress made at the international level in the punishment of international crimes and, in particular, of war crimes and crimes against humanity, not to mention crimes against peace.

16. There was no doubt that slavery, genocide and *apartheid* were odious international crimes, but genocide and *apartheid* were only specific examples of the general category of crimes against humanity which were, by their very nature, particularly serious. In contemporary international law, the concept of the crime against humanity might furnish other examples that were as serious as genocide and *apartheid*, but did not have the same dimensions. He had in mind the purely hypothetical case of a plan devised by a State, or within that State and with its consent, to use various means of moral pressure to compel part of the civilian population of another State to emigrate *en masse* for political reasons. He seriously doubted whether such a plan would be covered by article 19, even though it was a typical crime against humanity and he was convinced that the drafters of article 19 had intended such cases to be covered.

17. Crimes against humanity generally took the form of persecution of a group or members of a group, or of extermination, servitude, deportation or other similar forms, and were directed against some particular section of the civilian population because of its nationality, religion, race, etc. The notion of a crime against humanity thus encompassed both genocide and *apartheid* and, in many resolutions, including resolutions 2184 (XXI) of 12 December 1966 and 2202 (XXI) of 16 December 1966, the General Assembly had expressly condemned the policy of *apartheid* as a crime against humanity. It should be noted that crimes against humanity were international crimes which entailed both national and international responsibility, both for States as such and for individuals. They were "State crimes", since it would be very difficult to see how, in view of their nature, scope and dimensions, they could be committed by individuals without orders from, and the acquiescence of, State authorities.

18. Crimes against humanity had been recognized as such even when committed in time of peace. That concept, which had become part of international law as a

[8] *Yearbook ... 1976*, vol. II (Part Two), p. 121, para. (70) of the commentary to art. 19.

result of the adoption, in 1948, and entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide,[9] had been recognized by the Commission in the draft Code of Offences against the Peace and Security of Mankind, which it had adopted at its sixth session, in 1954.[10]

19. According to article 19, such crimes against humanity were, in all their manifestations, serious breaches of international obligations essential for the protection of fundamental interests of the international community. In that connection, it would be remembered that in 1965 the whole world had risen up in protest at the idea that the war crimes and crimes against humanity committed during the Second World War could go unpunished as a result of prescription under internal law. The revolt by world public opinion had certainly not been directed against genocide only; it had been directed against all serious crimes against humanity and war crimes. The object, at both the national and the international level, had been to prevent the application of national statutes of limitation to serious crimes under international law. At the international level, that movement had led to the adoption by the General Assembly, in 1968, of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[11]

20. At the national level, several States directly interested in the punishment of those crimes had amended their laws on prescription to permit such punishment; and since they had not been deterred by the principle of non-retroactivity, it could be presumed that that principle was not applicable to that particular category of international crimes. The French law of 26 December 1964,[12] for example, went so far as to declare crimes against humanity imprescriptible by their very nature. The French legislators had thus refused to give that law the character of an emergency measure; they had, rather, considered it as simply an application of ordinary law. The imprescriptibility of crimes against humanity was undeniably a rule of *jus cogens*.

21. It was to be hoped that, during the second reading of article 19, the Commission would examine more thoroughly the criteria for defining the international crimes for which it reserved a special regime of responsibility. It should, in particular, give careful consideration to the idea that the non-exhaustive list of international crimes in article 19 should contain an explicit reference to the category of crimes against humanity.

22. Mr. SUCHARITKUL noted that the Special Rapporteur, in his lucid and interesting introduction (1731st meeting), had reminded the Commission of the classical concept of State responsibility, which dated back to the time when a State had been held responsible for improper treatment of aliens; for example, when it failed to pay compensation after expropriating property belonging to an alien. Thirty years earlier, State responsibility had been a central topic of public international law. Since then, the concept had undergone drastic change as the number of developing countries had grown and as the modern developed State had taken measures to protect the interests of its citizens abroad by claiming on their behalf, not only under the international law of State responsibility, but also, by way of subrogation, under investment guarantee agreements. Whereas, formerly, a private person or company suffering injury as a consequence of a breach of international law would, under the classical rule, have had to exhaust all local remedies, the injured State could now proceed direct, by virtue of the relevant treaty or bilateral agreement, against the State responsible and claim damages without first having to exhaust such remedies.

23. The transition from the earlier classical concept of State responsibility to the more modern concept had not been easy, and the task that confronted the Special Rapporteur was formidable. Considerable progress had, however, been made in identifying the content and scope of the legal consequences of the breach of an international obligation. It had, for instance, been established that there were three consequential obligations: the obligation to desist from the wrongdoing; the obligation to abstain from committing any further wrongdoing in the future; and the obligation to compensate for any damage caused. It had been suggested that the sources of international law were not relevant to the responsibility of the State. When it came to the legal consequences of the breach of an obligation, however, the source of that obligation might not be entirely irrelevant.

24. Part 2 of the draft was concerned with the rights of other States but, as he saw it, a right carried with it an inherent duty to mitigate the damage and not cause further injury. There also had to be remedies, without which rights would have no meaning. He saw draft article 1 as the necessary link between the establishment of a breach of an international obligation and the legal consequences flowing from it.

25. The Commission had rightly concluded that damage was not an essential element of responsibility and that the responsibility of the State could be incurred regardless of injury or damage. However, as the Special Rapporteur had also pointed out, the question of injury or damage was highly relevant to the assessment of compensation and of the proportionality of the countermeasures which the other State might take.

26. One crucial question the Commission would have to decide concerned self-help and the extent to which it was permitted under international law, once a breach of an international obligation had been established. The Special Rapporteur had, in his view, adopted the right approach to that question by seeking to make it clear from the outset whether the matter fell to be considered

[9] United Nations, *Treaty Series*, vol. 78, p. 277.

[10] *Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, chap. III, para. 54.

[11] United Nations, *Treaty Series*, vol. 754, p. 73.

[12] Law No. 64-1326 of 26 December 1964 (*Journal officiel de la République française, Lois et décrets* (Paris), vol. 96, No. 303 (28-29 December 1964)).

within the context of the United Nations, or as an international crime, or as part of *jus cogens*. He endorsed the Special Rapporteur's general approach, which had set the Commission on the right course.

27. Mr. USHAKOV thanked the Special Rapporteur for having recast, in the light of the Commission's discussions, the articles which he had proposed at the previous session. It was, however, a matter for regret that, like the two previous reports, the third report (A/CN.4/354 and Add.1-2) did not deal with the substance of the subject. He himself had found much of the Special Rapporteur's long theoretical and abstract expositions difficult to grasp. The main point was not, however, to understand all the aspects of the general theory of responsibility as described by the Special Rapporteur, because that theory did not have to be expounded at the current stage in the Commission's work. When it had begun consideration of the topic of State responsibility, the Commission could have discussed the theory, but it had not wished to do so, and there was therefore no reason to do so now.

28. Chapter IV of the Special Rapporteur's third report, entitled "The catalogue of legal consequences", contained no such catalogue. Since the topic under discussion was the content, forms and degrees of international responsibility, a list of the forms which responsibility could take might well have been expected. But the report was in no way concerned with the forms of international responsibility, whether coercive sanctions, reparations, restitution or other forms.

29. Whenever the Special Rapporteur had referred to part 1 of the draft instead of dealing only with part 2, and had attempted to revise it, he had taken enormous steps backward. Instead of dealing with international responsibility, he had referred to obligations. Contrary to what was provided in part 1 of the draft, he had affirmed that obligations, as such, could derive from various sources of international law and that customary obligations had different legal consequences from conventional obligations. Such a statement was quite unacceptable. In part 1 of the draft articles, the Commission had adopted article 17, entitled "Irrelevance of the origin of the international obligation breached", which provided that an act of a State which constituted a breach of an international obligation was an internationally wrongful act "regardless of the origin, whether customary, conventional or other, of that obligation". Under general international law, an obligation could be of conventional origin for some States and of customary origin for others. For example, a rule codified in one of the 1958 Conventions on the Law of the Sea was of conventional origin for the States parties to that instrument and of customary origin for all other States. The Special Rapporteur could not now maintain that obligations of different origins had different legal consequences. Article 17, paragraph 2, provided that the origin of the international obligation breached by a State did not affect the international responsibility arising from the internationally wrongful act of that State. In the commentary to that provision,[13] the Commission had duly explained why the origin of the obligation did not affect international responsibility. The position adopted by the Special Rapporteur could be defended only if part I of the draft and, in particular, article 17, was revised, and that would be a step backward. Moreover, the topic which the Special Rapporteur had been requested to study related not to international obligations and the arising of international responsibility, but to international responsibility as it derived from part 1 of the draft articles.

30. In regard to obligations of conventional origin, the Special Rapporteur had referred to bilateral and multilateral treaties and even to treaties which entailed no obligations, such as treaties establishing boundaries. In his own view, even boundary treaties entailed obligations: in particular, the obligation to draw boundaries in accordance with those treaties. But all questions relating to treaties had been dealt with in the Vienna Convention on the law of treaties, and there was no need to interpret or comment on that Convention now.

31. The Special Rapporteur had also stated that there were obligations whose breach did not entail legal consequences. Yet the general principles enunciated in articles 1 to 4 of part 1 of the draft applied to the entire topic of State responsibility. Articles 1 and 3 of part 1 provided, respectively, that every internationally wrongful act of a State entailed the international responsibility of that State and that there was an internationally wrongful act when conduct consisting of an action or omission was attributable to the State under international law and that conduct constituted a breach of an international obligation of the State. In paragraph 117 of his third report, the Special Rapporteur had contradicted those principles by stating that, unless otherwise provided, the non-fulfilment of an obligation to co-operate, which was embodied in certain treaties, entailed no legal consequence. That statement was entirely contrary to the provisions of part 1 of the draft, which laid down that any internationally wrongful act of a State resulting from the breach of an international obligation, regardless of its origin, entailed the international responsibility of that State. If that were not true, there would be no basis for international responsibility. In short, article 1 as proposed by the Special Rapporteur totally contradicted the first few articles of part 1 of the draft.

32. Article 1 of part 1 of the draft indicated what the link between that part and part 2 should be. It provided that "Every internationally wrongful act of a State entails the international responsibility of that State", which showed that the legal consequence of such an act was international responsibility. Hence it was with international responsibility and, in particular, its content, forms and degrees, that part 2 should be concerned. It must define what was covered by the notion of international responsibility, which corresponded to the parallel

[13] *Yearbook ... 1976*, vol. II (Part Two), pp. 80 *et seq.*

notions of criminal, civil and administrative liability in internal law.

33. The Commission had decided not to deal with primary rules because it would have had to indicate what those rules were, which would mean codifying the whole of international law. It had, however, pointed out that it could not entirely ignore the content of the primary rules and it had therefore distinguished between rules of fundamental importance for the international community, whose breach constituted crimes, and other rules of lesser importance, whose breach constituted international delicts. There was obviously nothing to prevent the Special Rapporteur from identifying other categories of obligations and rules and attributing different legal consequences to their breach, but he would have to do that according to the content of the obligations or rules, not according to their origin.

34. At the previous session, he (Mr. Ushakov) had already pointed out[14] that, when preparing part 1 of the draft articles, the Commission had preferred, for practical reasons, to deal with the topic from the point of view of obligations rather than from that of rights, but the Commission had explained that it could just as easily have studied rights rather than obligations, since for every right there was a corresponding obligation and vice versa. For practical reasons also, he considered that part 2 of the draft should be approached from the point of view of the rights of injured States, rather than from that of the new obligations of a State committing an internationally wrongful act. In that case, too, the Commission's reasoning was valid. But there was no need to study rights and obligations simultaneously, as the Special Rapporteur had done.

35. Draft article 1 was not only unnecessary, it was also dangerous, since it implied a complete revision of article 1 of part 1. For the latter article provided that "Every internationally wrongful act of a State entails the international responsibility of that State", whereas draft article 1 in part 2 of the draft provided that "An internationally wrongful act of a State entails obligations for that State and rights for other States ...", so that it was no longer every internationally wrongful act that was taken into account, and the act no longer entailed international responsibility, but created unspecified rights and obligations.

36. Draft article 1 also contained the saving clause "in conformity with the provisions of the present part 2". That reference to the provisions of part 2 implied that under some of those provisions an internationally wrongful act of a State might not give rise to obligations for that State and rights for other States, which would be a flagrant contradiction of the principle enunciated in article 1 of part 1. It was inconceivable that the existence or non-existence of international responsibility should depend on the provisions to be contained in part 2, especially as the Special Rapporteur had said that that part would not cover all possible legal consequences. Thus, although it looked quite innocent, draft article 1 seriously derogated from the general principles on which part 1 of the draft was based.

The meeting rose at 1 p.m.

[14] *Yearbook ... 1981*, vol. I, p. 208, 1683rd meeting, para. 12.

1733rd MEETING

Wednesday, 23 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)*[4] (*continued*)**

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

ARTICLES 1 to 6[4] (*continued*)

1. Sir Ian SINCLAIR said that the topic of State responsibility was related to every facet of contemporary international law, whether the source was treaty, custom or general principles of law. International lawyers were accustomed to speaking in terms of the rights and obligations of States. Yet every right and obligation derived its origin from one of the acknowledged sources of international law, unless the source of the principle *pacta sunt servanda* itself was to be traced. The *fons et origo* of that principle was of necessity somewhat metaphysical in nature, since it led to the search for the elusive *Grundnorm* which had taxed the intellects of many generations of international lawyers.

2. In dealing with the topic of State responsibility, then, the Commission was concerned with some of the fundamentals of the international legal order part 1 of the draft was a monument to the intellectual achievement of the previous Special Rapporteur, Mr. Ago, now Judge of the International Court of Justice. He himself had been rather critical, in the Sixth Committee of the General Assembly, of the general principles it reflected and the particular provisions it contained. In particular, doctrinaire rigour had been carried too far in

[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.*

[4] For the texts, see 1731st meeting, para. 2.