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Summary record of the 1776th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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links between the two bodies would be maintained in the coming years.

39. Mr. RAZAFINDRALAMBO, speaking on behalf of the African members of the Commission, referred to the impressive activities carried out by the Asian-African Legal Consultative Committee in the field of international law. The participation of African jurists in that work might not be as extensive as it should be, but it must be borne in mind that they had entered the international arena only recently and were not yet fully informed of the Committee's activities. In the future, however, co-operation between the Committee and African jurists could only increase.

40. Mr. DÍAZ GONZÁLEZ, speaking on behalf of the Latin-American members of the Commission, thanked the Observer for the Asian-African Legal Consultative Committee for all the information he had provided on the activities of the Committee, which was not only engaged in formulation of the law, but also performed consultative functions. It had, for example, advised the Governments of the region on matters relating to the law of the sea. He himself was convinced that close co-operation between the Commission and regional committees concerned with international law benefited the United Nations as much as those committees.

41. Mr. SUCHARITKUL, speaking on behalf of the Asian members of the Commission, thanked Mr. Sen for his excellent statement and expressed the hope that the very close co-operation between the Committee and the Commission would continue in the future. The Commission deeply appreciated the Committee's interest in its work and remained keenly interested in the Committee's views and activities.

42. Mr. USHAKOV, speaking also on behalf of Mr. Flitan, commended Mr. Sen for his brilliant presentation of the Committee's work. Since the Committee's membership had been expanded, its work had assumed greater importance, not only for the countries of the region but also for the codification and development of international law. The Committee was still concerned to give priority to the consideration of items on the Commission's agenda and, conversely, it was not unusual for members of the Commission, including its special rapporteurs, to refer to the Committee's work. It was therefore in the Commission's interest to strengthen its co-operation with the Committee.

43. Mr. QUENTIN-BAXTER said that the ties between the Commission and regional bodies such as those whose representatives were attending the present session as observers were far more than merely formal. The effectiveness of law-making at the international level depended on such collaboration. The excellent work done by the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee was reflected, *inter alia*, in the quality of the work of the Sixth Committee of the General Assembly and of the Commission itself. On behalf of the members of the Commission belonging to the group of Western European and other countries, as well as of his own country, which by its geographical position belonged to the region of the Asian-African Committee, he thanked Mr. Sen for his extremely informative and interesting statement and expressed the continuing interest of those countries in the Committee's activities and the documents emanating from them.

44. Mr. JAGOTA said that he had been closely associated with the Committee since 1966 and had witnessed its gradual development from a consultative role to that of the premier intergovernmental legal group of Asia and Africa. Not only had its membership increased from the original seven or eight to well over 40, but the range of its interests and activities had grown immensely, starting with the substantial contribution it had made to the work of the Commission on diplomatic and consular law, continuing with its contribution to the codification of the law of treaties in 1968 and 1969, and reaching a climax in the work on the law of the sea, to which the Committee had devoted special attention between 1970 and 1982. In the economic sphere, too, especially in matters of economic co-operation, in protecting interests in commodity trade, in preparing model export and import contracts, in providing forums for the settlement of economic disputes and, most recently, in elaborating the legal framework for South–South co-operation, the Committee's contribution had been extremely impressive. Mr. Sen deserved a special tribute for having been instrumental in building up the Committee's activities and its mutually valuable relationship with the Commission.

45. The CHAIRMAN, speaking on behalf of the Commission as well as in his personal capacity, thanked Mr. Sen for his statement, which showed in a most gratifying manner how deeply the Committee was involved in the consideration of issues being examined by the Commission. The Committee also deserved congratulations on the vigorous manner in which it was tackling the legal aspects of economic issues affecting the countries of the Asian-African region, and on its efforts to accelerate the process of accession to, and ratification of, multilateral conventions by its member countries. In conclusion, he reiterated the Commission's regret at having been unable to send one of its members to the Tokyo session of the Committee, which had unfortunately coincided with the Commission's current session.

The meeting rose at 5.45 p.m.

1776th MEETING

Tuesday, 7 June 1983, at 10 a.m.

Chairman: Mr. Edilbert RAZAFINDRALAMBO

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr.

McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (*continued*) (A/CN.4/354 and Add.1 and 2,[1] A/CN.4/362,[2] A/CN.4/366 and Add.1,[3] ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*[4] (continued)**

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. USHAKOV said that he totally disagreed with the report under consideration (A/CN.4/366 and Add.1). In paragraph 32, the Special Rapporteur stated that, in response to the request made by many members of the Commission and by members of the Sixth Committee of the General Assembly, the report sought to concentrate primarily on an outline of the possible contents of parts 2 and 3 of the draft articles on State responsibility and to "discuss the admittedly difficult choices with which the Commission is faced". In actual fact, the Commission was not faced with any such choices; rather it was the Special Rapporteur for whom the choices were "admittedly difficult" and who deemed it necessary to make them. For example, the Special Rapporteur proposed not to deal with aggression and other international crimes in part 2 of the draft, at least until part 3 had been prepared.

2. In paragraph 45 of his report, the Special Rapporteur said that the Commission should give early consideration to the question of the settlement of disputes, since the prospects regarding part 3 would decisively influence the way in which part 2 was to be elaborated. He stated in paragraph 65 that

> there is little chance that States generally will accept a legal rule along the lines of article 19 of part 1 of the draft articles without a legal guarantee that they will not be charged by any or all other States with having committed an international crime, and be faced with demands and countermeasures by any or all other States without an independent and authoritative establishment of the facts and the applicable law. . . .

Clearly, the Special Rapporteur took the view that the legal consequences of the crimes covered by article 19 could not be foreseen without a competent and independent authority to establish the facts and the applicable law. He added, in paragraph 66, that if such an authority reached the conclusion that an international crime had been committed, the international community of States would not agree that the matter of sanctions should be left to the willingness of each individual State to make the sacrifices inevitably involved. That had led the Special Rapporteur to believe that the Commission, having recognized an element of progressive development of international law in provisionally adopting article 19, should carry the development to its logical conclusion by proposing secondary and tertiary rules in that respect.

3. The Special Rapporteur was of the opinion that the secondary rules depended on the existence of a competent and independent authority, and therefore favoured the formulation of tertiary rules, because he appeared to consider that such an authority did not exist and that its role could not be filled either by the United Nations in general or by the Security Council in particular. Was what the Special Rapporteur had in mind a kind of world government vested with executive powers? In the absence of such an institution, any decision taken by an authority, even a competent authority, would not be final because its application would not be guaranteed.

4. The Commission could not base itself on the Special Rapporteur's personal opinion and begin to elaborate part 3 before part 2. It was not realistic to envisage the establishment of an authority that would replace the international community, which recognized the right of States to take measures against acts of aggression and other international crimes. Moreover, it was the international community of States which, through the Sixth Committee and the General Assembly, had requested the Commission to embark on the work of preparing part 2 of the draft. In addition, when the Commission had formulated article 19 of part 1 of the draft relating to a category of particularly grave internationally wrongful acts, namely international crimes, it had taken account of existing international law and had not, as the Special Rapporteur seemed to think, been engaged in progressive development of the law. Indeed, it had been on the basis of contemporary international law that the Commission had listed a number of international crimes in article 19, paragraph 3, and had emphasized that that provision would require the formulation of secondary rules in part 2 of the draft. The position adopted by the Special Rapporteur in his fourth report was thus contrary both to the wishes of States and to the decisions taken by the Commission.

5. In summing up, the Special Rapporteur noted in paragraph 122 of the report that the draft articles should cover the legal consequences of all acts or omissions of States which were not in conformity with what was required of the author State under an international obligation, irrespective of the content and source of the obligation, and suggested that part 2 of the draft must take as its starting-point the normal situation, namely that the internationally wrongful act gave rise to new bilateral legal relationships between the author State and the injured State only. However, such a situation existed only in respect of less serious international offences. It was plain that the Commission must deal first with international crimes and determine their legal consequences; hence it could not take as its point of departure the one

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem*.

[4] 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*.

proposed by the Special Rapporteur, whose method would cause the Commission to move backwards.

6. It was apparent from the report that proportionality should be the concept underlying all of part 2. Admittedly, the concept did exist in domestic legislation, but as a logical criterion, not a legal one. It was a well-known fact that the most serious offences had the most serious legal consequences. Even in internal law, however, the idea of seriousness was entirely relative and the legal consequences attaching to a particular offence could vary from one period of history to another. The Commission must undoubtedly take proportionality into consideration and, for example, assign more serious legal consequences to international crimes than to international delicts. Yet the Special Rapporteur had a different sort of proportionality in mind, namely that the legal consequences of any internationally wrongful act must be proportional to the material consequences of the act. They must remain within those limits and not go beyond them. In some cases, the consequences could be identical, for instance when compensation provided full reparation for physical damage, but it was inconceivable that an act of aggression which had cost the lives of 1 million human beings should have as a legal consequence the death of the same number of other human beings.

7. As Mr. Reuter had pointed out (1772nd meeting), the very existence of rights created an assumption of coercion. Obviously, however, it had to be decided what kind of coercion was allowed by international law. To that end, the Special Rapporteur had resorted both to the concept of proportionality and to that of objective régimes. The first was manifestly too vague and the second was unnecessary. There was, of course, a general objective régime, that of international law, but there were no particular objective régimes. Armed reprisals were forbidden, not by reference to the concept of proportionality or in keeping with certain objective régimes, but simply because international law did not allow them.

8. In conclusion, the Special Rapporteur's fourth report was entirely unacceptable, primarily because it was the Commission's task at the present time to draft provisions on the legal consequences of international crimes.

9. Mr. JACOVIDES said that, in a complex topic which lay at the very heart of public international law, part 2 of the draft, dealing with the content, forms and degrees of international responsibility, presented the Commission with a serious challenge. Should the Commission allow the admittedly formidable difficulties of the problem to turn it away from the trend which had clearly emerged and was fully consonant with the demands of contemporary international law, or should it go forward, tackling those difficulties as resolutely as it could and thereby discharging its responsibility with regard to the progressive development of international law? To his mind, the latter course should be adopted as a matter of principle, even though it might take longer and involve more controversy.

10. Since the adoption of the Charter of the United Nations, a number of positive developments had lent further substance to the concept of public policy in international law. Those developments included the notion of *jus cogens*, formally accepted in the 1969 Vienna Convention on the Law of Treaties, and the notion of international crimes, one for which the Commission could claim much credit, since it had been embodied in article 19 of part 1 of the draft and was the premise clearly underlying the draft Code of Offences against the Peace and Security of Mankind, a topic recently revived by the General Assembly and referred to the Commission as a matter of urgency.

11. While he shared many of the views expressed by Mr. Reuter (1771st meeting), especially with regard to the method to be followed in connection with parts 2 and 3, the need for a commonly acceptable and precise terminology and the importance of avoiding any decision inconsistent with the equivalent provisions of the Charter, he could not agree that no attempt should be made to go beyond what was already to be found in the Charter. It was, of course, true that the Commission, like the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, the Special Committee on the Question of Defining Aggression, the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, or other bodies, had no competence or authority to change or depart from the Charter. That could only be done by a review carried out under the procedure prescribed in the Charter itself. What those committees had done, just as the Commission itself could and should endeavour to do, had been to strengthen and build upon the provisions of the Charter in the light of experience gained since 1945 and of the requirements of contemporary international law as understood by the present-day international community, the larger part of which now consisted of newly independent States that had not participated in the formulation of the Charter provisions. Their attitudes, as conditioned by their experience and understanding of international law, were relevant and must be taken into account. By recognizing that fact, the Commission would not only perform a service to the international community but also effectively counter occasional criticism to the effect that it was no longer in the mainstream of present-day international law.

12. Again, he could not agree with the view that the Definition of Aggression adopted by the General Assembly by consensus in 1974[5] added nothing new from the legal point of view. The Definition provided a higher and stricter standard which would-be aggressors would have to reckon with, especially when the draft Code of Offences against the Peace and Security of Mankind, including the element of international criminal jurisdiction over States as well as individuals, took concrete form. The fact that the Security Council had discretionary authority, even under the terms of the Definition, to determine whether aggression had occurred in a given case and the fact that, unfortunately, the Security Council

[5] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

not infrequently took its decisions on the basis of political considerations did not detract from the Definition's value from the legal standpoint. What international lawyers could do was to provide a legal standard and to argue the case in terms of legal considerations, hoping that such considerations would carry due weight with political bodies such as the Security Council, if not immediately, then at least in the future. To think otherwise would be to admit the futility of international law and of the Commission's efforts in the area of the maintenance of international peace and security.

13. The situation in his own country since 1974 afforded a striking example of the recent increase in the number of acts of international lawlessness and of the manifest ineffectiveness of the United Nations in preventing or remedying such acts. In his report of September 1982 on the work of the Organization, the Secretary-General had expressed the view that resolutions, particularly those adopted by the Security Council, should serve as a springboard for governmental support and determination and should motivate policies outside the United Nations, that being the essence of the treaty obligation which the Charter imposed on Member States.[6]

14. With regard to the second set of draft articles at present before the Drafting Committee,[7] more effort and ingenuity would obviously be required before they could be given a generally acceptable form. The wording of draft article 2, dealing with the principle of proportionality, could bear some improvement, as indeed could that of draft articles 4, 5 and 6. But the principle behind each of those draft articles should be retained and, if possible, strengthened and made more specific. Some members had argued that the Commission should be modest in its objectives, that it should not undertake more than it could perform and that it should avoid duplication, especially with the draft Code of Offences against the Peace and Security of Mankind. Those observations were undoubtedly pertinent and should be accommodated as far as possible, but there should be no compromise on the issue of principle involved.

15. The concept of international crimes set forth in article 19 of part 1 of the draft after a great deal of debate should not be allowed to lose any of its meaning in part 2. Far from duplicating the work yet to be done in connection with the draft code of offences, any additional work on the basis of articles 4, 5 and 6 of part 2 of the draft on State responsibility would actually supplement it. The two Special Rapporteurs could, in fact, benefit from each other's experience. So long as article 19 was maintained in part 1—and it unquestionably should be—it had to be accompanied by provisions in part 2, and later in part 3, that would give it and the other provisions of part 1 additional substance in terms of content, form and degree. As a practical arrangement, formulations on matters such as aggression included in the draft code of offences could eventually be incorporated in the draft under consideration, thus avoiding duplication of effort and the risk of possible discrepancy.

16. The Commission should maintain a steady course. In submitting draft articles 1–6 in his third report (A/CN.4/354 and Add.1 and 2), the Special Rapporteur had adopted the right approach and had received support in the Sixth Committee. While some flexibility could be envisaged with regard to the wording of the articles or even, as Mr. Calero Rodrigues had suggested (1772nd meeting), in terms of the priority given to the consideration of less controversial topics, the principle of State responsibility itself should not be compromised or downgraded. Public policy dictated by the higher common interests of the international community was a concept which had definitely emerged in public international law. It helped small and weak nations against the arrogance of the powerful. It was there to stay, and the Commission, with its new enlarged membership, must not fail to cultivate and safeguard it.

17. Mr. BALANDA said that the report under consideration reflected the profound thinking of the author. Unfortunately, some difficulties arose because the report did not contain any draft articles and the terms employed were not always defined. It was, for example, open to question whether countermeasures included self-defence, state of necessity, reprisals and retortion, which were quite separate concepts, and whether self-help differed from self-defence, reprisals, retortion and reciprocal measures. Moreover, the concept of regional or bilateral objective régimes, one which the Special Rapporteur had recognized as being somewhat vague, was not based on generally accepted criteria. From a reading of paragraph 99, some doubts might also arise about the idea of a rule of international law determining the objectivity of a régime and about the *si omnes* clause. That was also true of the term *quid pro quo* and of parallel obligations and self-enforcement measures.

18. Paragraph 35 of the report pointed out that, compared with primary rules, there were relatively few secondary rules. In that connection, he noted that the Commission had focused primarily on the main obligation to which an internationally wrongful act gave rise, namely the obligation of reparation, which had been stressed by the international decision in the *Corfu Channel* case.[8] In general, the Commission had also confined itself to the consequences for the author State of an internationally wrongful act and had not dealt with the relationships that might arise between that State and other States.

19. In paragraph 37, the Special Rapporteur maintained that, in most cases, a State would deny, on the ground of the facts or of the interpretation of the applicable primary rules, that it had breached a legal rule or committed an internationally wrongful act for which it bore responsibility. Plainly, the draft articles could not remain silent on the procedure for the settlement of disputes, which called for positive rules. The question arose as to whether the settlement of disputes would be optional or compulsory, and whether States would be bound to use

[6] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 1* (A/37/1), p. 3.

[7] See 1771st meeting, para. 2.

[8] *I.C.J. Reports 1949*, p. 4.

the machinery provided for in the draft or whether they would have the option of using the settlement procedure they deemed most appropriate. However, in present-day international society, which was characterized by the affirmation of State sovereignty, the consent of States would always be necessary. It was not clear whether the draft would in fact propose new settlement machinery.

20. On the question of whether the draft should take the form of a convention or of an instrument containing only guidelines, it would inevitably be necessary to count on the good will of States and their co-operation and to bear in mind the fact that their conduct was dominated by the idea of sovereignty, which always required their consent. The determination of all States to respect a legal instrument that reflected their will was thus more important than the form of the draft.

21. The Special Rapporteur noted that international crimes had a minimum common element, namely their *erga omnes* character. International crimes required other States to adopt an attitude of solidarity with the injured State against the author State. Was it then necessary to include in the draft a general régime of international responsibility for international crimes and to propose rules to take account of the legal consequences of each international crime, and if so, in which context? Although the Commission had not yet defined the concept of an international crime in the draft on State responsibility or in the draft Code of Offences against the Peace and Security of Mankind, it was tempting to propose an examination of the nature of each international crime and its consequences. In order to avoid any overlapping with the draft code of offences the draft articles on State responsibility, which had enunciated the concept of an international crime in article 19 of part 1, should establish the applicable general régime and leave it to the draft code to deal only with the legal consequences of crimes which might endanger the peace and security of mankind. The draft on State responsibility should therefore set forth at least some basic rules on responsibility for international crimes, for they too could obviously give rise to State responsibility.

22. As the Special Rapporteur had acknowledged, the primary rules necessarily called for secondary, and even tertiary, rules. It seemed possible to establish a general régime of international responsibility for international crimes, since the Special Rapporteur himself had succeeded, provisionally at least, in identifying four of their common elements. Other common features could probably be identified as well. There would then be two separate, but complementary, drafts, namely the draft on State responsibility, which would contain all the primary and secondary rules, including those relating to international crimes, and the draft code of offences, which would establish a regime for offences against the peace and security of mankind.

23. In the system for the punishment of international crimes, in each of the drafts, it would not be appropriate to draw on all the concepts of internal criminal law and go so far as to incorporate the concept of an attempted crime, at least so far as States were concerned. An internal law system was a self-contained unit and made it possible better to assess the precise circumstances in which an act had been committed or which might have prevented a person from committing an act he had intended to commit. At the international level, it would undoubtedly prove necessary to discard the narrow concept of territoriality, which was a feature of internal criminal law, so that the concept of an attempted crime, at least as far as international crimes by States were concerned, could not be retained, for it was difficult in such cases to assess the element of intent. The final outcome, namely the completed act, should be the primary concern to the international community.

24. In part 2 of the draft, the Special Rapporteur intended to leave aside the question of aggression, which he regarded as belonging to the category of international crimes, and suggested that it should be studied as part of the draft code of offences. Aggression, however, was a prime example of an act that incurred the international responsibility of the author. For all that, it did not appear to fit into the category of acts that should be covered by the draft code, which should relate exclusively to serious offences that might endanger the peace and security of mankind. Paragraph 58 of the report drew attention to the difficulty that arose out of the fact that the international community as a whole did not unanimously agree on the punishment to be meted out for international crimes. Surely the reason was that, as far as international crimes were concerned, States had divergent interests. Some might have close relations with the author State and would thus adopt a less severe attitude towards it.

25. Another difficulty involved in the punishment of international crimes was the weakness of existing machinery for the settlement of disputes. Not only was the consent of the State concerned necessary, but the structure of some of the bodies for the settlement of international disputes did not always inspire sufficient confidence in all States. That was true in the case of the Security Council, whose structure was at the origin of the Manila Declaration on the Peaceful Settlement of International Disputes.[9]

26. As to the obligation of States to assist an injured State by taking countermeasures, it was affirmed in paragraph 62 of the report that such support concerned the relationship between those States and presupposed a form of common appreciation of the existence of a right to take countermeasures. In his opinion, a common appreciation of that kind should be founded on international solidarity and on the co-operation that States were duty-bound to extend to the victim of an international crime, rather than on the existence of a right itself. Again, it was open to question whether a State's failure to provide assistance to an injured State constituted a wrongful act that might give rise to the responsibility of the recalcitrant State. In present-day international society, however, such a duty of solidarity could not really be expected to take definite shape.

[9] General Assembly resolution 37/10 of 15 November 1982, annex.

27. The impression gained from reading paragraph 63 of the report was that the rule of quantitative proportionality did not apply in the case of international crimes falling within the jurisdiction of United Nations bodies. The question was, however, whether the specific nature of international crimes was enough to warrant derogation from the principle of proportionality. He certainly agreed with the Special Rapporteur's conclusion in paragraph 67 that, since the Commission had provisionally adopted article 19, it must move forward. Nevertheless, in order to be effective, parts 2 and 3 of the drafts must be realistic. Innovations could of course be introduced, but they must be justified.

28. Paragraphs 72–78 discussed a problem which took on great importance, particularly in the case of compensation, namely identification of the injured State when some States were expected to display international solidarity, for example under a multilateral treaty. In paragraph 73, a distinction appeared to be drawn between three categories of international obligations, but until a more precise definition of each category had been worked out, obligations of prevention could be left aside and only the two generally recognized categories, namely obligations of conduct and obligations of result, should be borne in mind. In the case of a dispute which created new legal relationships between the author State and the injured State, which State or States could be regarded as injured? A distinction had to be made between the source that established the legal link between the various States and the basis for their obligations. It was precisely the injury suffered as a result of a wrongful act that established a legal relationship between the victim and the author. For the other States, the obligation would usually be based on a treaty. In the case of international crimes, the duty to display solidarity would follow from the very nature of those crimes.

29. With regard to identifying the injured State, even if the primary rule was of treaty origin, there would in fact be only one injured State or group of States. However, he did not concur with the view that all the members of the group of injured States should be regarded in equal terms, in other words without differentiating between the nature of the origins of their obligations, for such an approach would be tantamount to saying that, in a case of compensation, for example, each member of the group was entitled to benefit therefrom. According to that view, the author State of an internationally wrongful act would in no way be entitled to take counter-reprisals against third States which had intervened to fulfil their obligation of solidarity. The legal régime of self-defence should also be taken into account in the draft because the principle had already been recognized in part 1. In that connection, too, the Commission should endeavour to develop international law.

30. The Special Rapporteur should specify what was meant by reprisals, particularly as compared with retortion, instead of classing all such concepts under the heading of countermeasures. However, the Commission should be careful about excluding the whole question of reprisals from the draft articles because, if it did so, the text would obviously contain loopholes. Indeed, it seemed impossible not to deal with that question as part of the general régime of State responsibility, for reprisals were a common practice in international relations. Accordingly, it would be of great interest to know what kind of reprisals were authorized, for what kinds of acts, and what their scope was, particularly when a group of States had a common interest. It was plain that a provision on reprisals was essential in order to limit the possible sources of conflict.

31. The value of the idea of phasing measures and of reprisals being inadmissible if other means of enforcement were available, particularly procedures for the peaceful settlement of disputes (para. 102), was conjectural and would depend on each particular case. The fact that procedures always existed for the peaceful settlement of disputes had no effect on the actual conduct of States, which were fully aware that the Charter of the United Nations invited them to settle their disputes peacefully, although they might in practice react differently, depending on the size of the stakes, and would not engage in any kind of phasing. That comment also applied to the concept of proportionality put forward by the Special Rapporteur. He (Mr. Balanda) had not yet been able to determine whether a State measured its reaction precisely in terms of the extent of the wrongful act which had injured it, something which should be borne in mind to avoid proposing rules that were not sufficiently realistic.

32. His conclusion for the time being was that, if the draft was to be of any use, it must not overlook any matter either closely or remotely related to the system of State responsibility, including self-defence and international crimes—which would, however, have to be dealt with separately from aggression as such.

33. Mr. LACLETA MUÑOZ welcomed the Special Rapporteur's fourth report (A/CN.4/366 and Add.1), which not only contained an outline of the possible contents of parts 2 and 3 of the draft articles, but also afforded an overview of the topic, although it would have been preferable if the Special Rapporteur had submitted draft titles and articles accompanied by commentaries. The report none the less went to the heart of international law, which was usually criticized for its lack of effectiveness and its lack of binding force. The oral introduction (1771st meeting) had also enabled members to gain a better grasp of the substance of the report.

34. Close attention was paid to the relationship between primary, secondary and tertiary rules, in which connection he shared the views expressed in paragraph 37 of the report, which had then gone on to analyse in paragraphs 38–42 the problem of the settlement of disputes and its limitations. It was indeed desirable to establish machinery for the settlement of disputes, inasmuch as article 19 of part 1 of the draft covered the concept of an international crime. In paragraph 40, the Special Rapporteur had none the less indicated that the settlement of disputes might be limited to the determination of the legal consequences of a wrongful act, in other words to the determination of the applicable

secondary rules. Yet it was difficult to deal separately with those questions and the questions of the existence and unlawful nature of a wrongful act, which required the interpretation and application of the relevant primary rules. What he had in mind in that regard was Article 36, paragraph 2 (*c*) and (*d*), of the Statute of the ICJ. Accordingly, it could well be asked whether the Commission would refrain from dealing with international crimes in its draft. In his opinion, it should certainly not give in to that temptation. The concept of an international crime had been a major step forward in the development of international law and in the institutionalization of the international order. Classical international law was based on sovereignty and autonomy, as internal law had been at an early stage in its development, and the establishment of international organizations of a universal character following the two world wars had reflected the desire to place limitations on that situation.

35. Thus States were clearly forbidden by the Charter of the United Nations to use or threaten to use force to settle their disputes. The tragic thing was, however, that the institutional machinery to prevent and punish the use or threat of use of force had not worked as well as it should have. Did the Commission want to improve on it? In his own view, neither Article 33 nor Article 36 nor Chapter VII of the Charter was satisfactory, since they called for a limitation on sovereignty at inappropriate times. That was nevertheless the only solution for the future. For all that, the Commission should not go so far as to make proposals which might lead it to take a position on a possible revision of the Charter. It must realize what article 19 of part 1 represented and, as Mr. Reuter had suggested (1771st meeting), proceed in stages. It must first try to codify the classical international law of international responsibility, as it had done in part 1, and analyse the rights and obligations arising out of an internationally wrongful act in the shape of draft articles that could serve as a basis for a convention.

36. Paragraphs 46–49 of the report raised the question of whether, by providing for secondary rules, the legal nature of the primary rules which had been breached could be disregarded. In his opinion, it was not possible to do so. The Commission might nevertheless make a relatively simple classification by distinguishing between general rules and conventional rules. In connection with international crimes, between which no distinction should be made in the draft, in view of Mr. Thiam's study on the topic, he supported the ideas expressed in paragraph 60 and drew attention to a translation error in the last sentence of paragraph 58 of the Spanish text, which spoke of *delitos* rather than *crímenes*.

37. Paragraphs 122–126 contained the essential elements on the basis of which the draft articles might be formulated. He endorsed the comments made by the Special Rapporteur in the first sentence of paragraph 126, but the idea expressed in the first sentence of paragraph 127, namely that it would be advisable to "reserve" the special régimes of diplomatic law and belligerent reprisals, raised some doubts in his mind. Parallelism and reciprocity in the case of diplomatic law, in other words the possibility of declaring *persona non grata* a diplomatic agent who abused his privileges, did not make it possible to reserve the special régime of diplomatic law. Indeed, it was precisely in the area of diplomatic relations that classic examples of wrongful acts and reparation were to be found. It was also incorrect to maintain that the possibility of declaring a diplomatic agent *persona non grata* and breaking off diplomatic relations ruled out the need to determine other legal consequences. Those questions could be dealt with in the rules that applied to injury and reparation. Similarly, he experienced some doubts about the statement that the obligation to respect human rights was limited by the requirement of "military necessity". Lastly, he agreed with the substance of paragraph 129, in which the Special Rapporteur had referred to the concept of "fault" and suggested that any obligation of a general nature should not be included in the draft articles.

38. Mr. JAGOTA said that the fourth report (A/CN.4/366 and Add.1) contained a number of conclusions with which he could not agree, but unlike other members of the Commission, he did not believe it was the Special Rapporteur's intention to suggest that difficult cases entailing State responsibility should not be dealt with in part 2 of the draft. A number of elements, such as the concept of an international crime and various types of delicts, had already been dealt with in part 1, but draft article 6 of part 2,[10] an article that also dealt with the question of international crimes, had been referred to the Drafting Committee. At no time had the Special Rapporteur suggested that article 6, or indeed any other draft article, should not be referred to the Drafting Committee or that the question of the legal consequences of international crimes should not be considered.

39. Just as part 1 dealt with identification of the author State, so part 2 must deal with identification of the injured State, the new relationship arising out of the commission of an internationally wrongful act, the rights of the injured State or States or of the international community, and the rights of third States. The report might have been easier to follow, however, if the Special Rapporteur had presented his thoughts in the form of draft articles accompanied by commentaries, based in particular on case-law and State practice. After all, the topic was not an academic one, but one that had a very close bearing on everyday reality.

40. As to the final shape to be given to the work on the topic, the draft articles would be clearer and more effective if they were presented in the form of a draft convention, rather than simply as guidelines. Even if such a convention was not adopted by an international conference, its provisions could none the less be applied. In that regard, the Special Rapporteur had cited the example of the Vienna Convention on the Law of Treaties, which had been invoked by the ICJ itself and had been followed in practice by States which had not yet signed or ratified it.

[10] See 1771st meeting, para. 2.

41. With regard to the relationship between parts 1 and 2, the linkage established in draft article 1 presented in the Special Rapporteur's third report[11] should be maintained and, as far as possible, be made substantive by identifying in part 2 the legal consequences of the various types of internationally wrongful act already defined in part 1. While some rearrangement might be undertaken for the purpose of explaining the new legal relationships that would arise and the variety of possible responses on the part of the injured State, it might not be desirable to rearrange the internationally wrongful acts themselves, or to define new types of internationally wrongful acts which differed qualitatively from those identified in part 1. In any event, questions regarding items which had been omitted from part 1 and items that would be more relevant to part 2 could be considered in the course of the second reading of part 1.

42. In respect of the relationship between part 2 of the draft and part 3, concerning the "implementation" of international responsibility, the Special Rapporteur was of the view that the compulsory dispute-settlement procedure should encompass not only part 2 but also part 1; he also maintained that draft articles on the question of State responsibility, particularly if they were broad in scope, would not be acceptable to the international community as a whole unless provision was made for a procedure whereby a third party would assess whether an allegation that an internationally wrongful act had been committed was correct and whether the response to the act had been proportional. However, it was not clear from the report whether the Special Rapporteur considered that no part of the draft articles would be acceptable without such a provision, or simply the part relating to international crimes or other questions of interest to the international community as a whole. Hence, it was suggested that, in order to permit universal acceptance of the draft articles on State responsibility, it would be better to indicate immediately the kind of dispute-settlement procedure to be provided for in the draft.

43. In that connection, the Special Rapporteur thought that a broad indication by the Commission of the particular type of dispute-settlement procedure would be helpful in refining the content and scope of part 2. His own view was that identification of certain aspects of the dispute-settlement procedure would indeed facilitate consideration of the more difficult concepts, such as those relating to international crimes, or other aspects involving injury to peoples or to the interests of the international community as a whole, but it should not be a pre-condition for developing those concepts and the legal consequences of wrongful acts connected therewith. For example, the concept of the resources of the sea-bed as the common heritage of mankind had emerged during the elaboration of the United Nations Convention on the Law of the Sea. If the Convention did not enter into force, that concept would not disappear simply because no institution existed to reaffirm it. He would suggest that the Commission should concentrate first on the content of part 2 of the draft articles and, when it came to deal with part 3, revert to consideration of the concerns expressed by the Special Rapporteur and determine the aspects that should be linked with part 2.

The meeting rose at 1 p.m.

[11] *Ibid.*

1777th MEETING

Wednesday, 8 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/354 and Add.1 and 2,[1] A/CN.4/362,[2] A/CN.4/366 and Add.1,[3] ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[4] (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. JAGOTA, continuing the statement he had begun at the previous meeting, said that one of the most important contributions made to the topic of State responsibility by the Special Rapporteur in his preliminary report[5] had been the categorization of internationally wrongful acts as a background against which to identify the injured party—be it an individual State, a group of States, or the world community as a whole—and to define the obligations of the injured State and the legal framework within which those obligations were to be identified and performed.

2. In dealing with the question of the content of international obligations, the Special Rapporteur had

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] 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.*

[5] *Yearbook . . . 1980*, vol. II (Part One), p. 107, document A/CN.4/330.