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Summary record of the 1777th meeting

Topic:
<multiple topics>

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

given particular attention to countermeasures or reprisals. Indeed, the three main elements of the fourth report (A/CN.4/366 and Add.1) could be said to be the categorization of wrongful acts and identification of the injured State; the concept of objective régimes relating thereto; and the question of the legitimacy of reprisals. The Special Rapporteur had pointed out that the more serious internationally wrongful acts were already dealt with by existing law or by other régimes. He recommended that the Commission should deal with such questions only in general terms within the framework of the articles and should not elaborate them in part 2. He suggested that the Commission begin by considering the normal case of new bilateral relationships between the author State and the injured State arising from internationally wrongful acts and the exceptions thereto, as set out in paragraphs 122–130 of the report.

3. The Special Rapporteur had categorized internationally wrongful acts as "international crimes" or *jus cogens* violations; acts defined as internationally wrongful under objective régimes of a universal character—which might or might not be international crimes—or under objective régimes of a regional character; and internationally wrongful acts of a purely bilateral nature.

4. With regard to the identification of the injured party, the Special Rapporteur noted that that party could be an individual State, a group of States or other entities—as in the case of matters involving the violation of human rights or the denial of self-determination—or the international community as a whole.

5. In discussing the legal consequences of internationally wrongful acts, the Special Rapporteur had suggested that the Commission should not consider the more serious categories, such as international crimes, which he divided into crimes of aggression and other crimes, and to which a large part of his fourth report was devoted. He understood the Special Rapporteur to be saying that it would not be desirable for the Commission to become involved in indicating the consequences of acts of aggression, since the question was already dealt with in draft articles 2, 4 and 5 as proposed in his third report (A/CN.4/354 and Add.1 and 2).[6]

6. With regard to international crimes other than acts of aggression, the Special Rapporteur noted that secondary and tertiary rules were either non-existent or less well developed than in the case of acts of aggression. Nevertheless, there were elements common to all international crimes, and a number of those elements were identified in paragraphs 59–62 of the fourth report.

7. In paragraph 67, the Special Rapporteur appeared to be suggesting that it would be desirable for the Commission to elaborate the legal consequences of the crimes other than acts of aggression identified in article 19 of part 1 of the draft. In other words, the Special Rapporteur appeared to take the view that the Commission should begin its elaboration of the legal consequences of internationally wrongful acts by considering the normal, rather than the more serious, cases. That suggestion should be acceptable to the Commission. At the same time, it was not necessarily true to say that all the legal consequences of acts of aggression or other international crimes were well known. Even if that were the case, it would be useful for the Commission to articulate them, in general terms, in part 2 of the draft articles. In so doing, the Commission would not be duplicating the work on the draft Code of Offences against the Peace and Security of Mankind, or become involved in the interpretation or amendment of the Charter of the United Nations, or be elaborating provisions that were not easily acceptable to the world community. Members of the Commission were fully aware of the issues involved and were capable of developing the legal consequences of international crimes, including acts of aggression, in the form of a general legal framework. Indeed, the Commission had a duty to do so. Such an undertaking would involve defining the major obligations of the aggressor State, the rights and obligations of the injured State and the obligations of third States.

8. In that regard, he suggested a list be drawn up specifying the obligation of the aggressor State to stop its aggression, withdraw from the foreign territory, restore normalcy and the *status quo ante*, pay reparation and guarantee non-repetition of its acts; the right of the injured State to individual or collective self-defence and to take legitimate countermeasures pending appropriate measures, including collective security action, by the United Nations; and the obligation of third States not to recognize the effects of the aggression, not to give assistance to the aggressor State and to support the action taken by the United Nations to maintain or restore the peace.

9. It should also be mentioned that one of the legal consequences of aggression would be the attribution of criminal responsibility to specific States. Finally, a reference should be made to the situation, contemplated by the Special Rapporteur in paragraph 130 of the report, in which the whole régime for the maintenance of international peace and security failed and the situation could not be regulated by law.

10. The Commission should also elaborate the legal consequences of violations of objective régimes to the extent that such violations were not covered by those régimes, whether global or otherwise. In that regard, he agreed with the Special Rapporteur that, in developing such régimes, the emphasis was usually placed on primary, rather than secondary or tertiary, rules.

11. He congratulated the Special Rapporteur on his classification of reprisals, in which he identified prohibited reprisals, such as the use of force. But, in that connection, he wondered whether the use of force would be prohibited for all purposes: for example, would a people subject to a colonial régime have the right to use force in order to achieve self-determination? Although, as the Special Rapporteur had pointed out, that question was already considered in the Declaration on Principles of

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

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[7] the Commission should nevertheless give it careful consideration. He also agreed with the Special Rapporteur that the Commission should specify which reprisals were prohibited, which were regulated and which were legitimate. In that connection, the Special Rapporteur referred to the question of the exhaustion of available remedies or the possible implementation of a "phasing" procedure prior to the taking of countermeasures. In his own view, the injured State was fully entitled to take appropriate countermeasures pending the exhaustion of available remedies and provision should be made for that possibility.

12. He had no objection to taking the normal situation as the starting-point for part 2 of the draft articles, as proposed in paragraph 122 of the report, provided that the Commission reverted to the consideration of more serious cases later. It was impossible to ignore the provisions of draft article 19 of part 1 of the draft and the legal consequences of the internationally wrongful acts identified there.

13. Referring to paragraph 124 of the report, he observed that where an objective régime was self-contained and itself provided for enforcement measures, the question arose whether the collective security measures provided for were adequate and whether provision should be made for legal measures of self-protection to be taken pending the implementation of such security measures.

14. With regard to the right of the injured State, referred to in paragraph 126, to suspend a multilateral treaty and to invoke a fundamental change of circumstances or a state of necessity as a ground for non-performance of its obligations, he believed that such measures were not countermeasures as such, but legal consequences of a different nature. Consequently, the draft articles should include a saving clause similar to article 73 of the Vienna Convention on the Law of Treaties. He would reserve his position pending the drafting of that clause. He would also reserve his position with regard to the content of paragraph 127 of the report.

15. Finally, he fully agreed with what was stated in paragraph 129; and, with regard to the situation contemplated in paragraph 130, he wondered whether the injured State would be free to take any measures it deemed necessary, or whether it would still be subject to the rule of proportionality.

16. Mr. KOROMA said that, since the Special Rapporteur had indicated in paragraph 31 of his fourth report (A/CN.4/366 and Add.1) that he would try to adapt the draft articles proposed in his third report (A/CN.4/354 and Add.1 and 2) to meet the suggestions made in the Commission and in the Sixth Committee of the General Assembly, the current discussion should perhaps have been held only after that adaptation had taken place.

17. The Special Rapporteur had nevertheless felt obliged to respond to the request made by the Commission and the Sixth Committee for an outline of the contents of parts 2 and 3 of the draft articles and to concentrate on possible injuries to a State, a group of States or the international community of States as a whole, and on the new rights and obligations arising out of an act or omission not in conformity with a primary rule of international law or not having the consent of the injured State or States. The Special Rapporteur was also seeking guidance on the draft articles to appear in parts 2 and 3. His need for guidance was well founded, since judicial decisions and publicists had, on the whole, not tended to categorize either the occurrence or the consequences of wrongful acts or to relate specific types of legal consequence to specific types of wrongful act.

18. The Special Rapporteur had not only raised the right questions in his report, but had also provided the answers. It was entirely correct that an internationally wrongful act of a State entitled the injured State to reparation and gave rise to the international responsibility of the author State. The aim of part 2 of the draft was to examine the content, forms and degrees of international responsibility, which would vary according to whether the breach committed constituted an international crime or an international delict.

19. In his own view, the legal consequences of an internationally wrongful act should be categorized by reference to the rules which established the rights and obligations of the injured State and the author State. It should then be the object of part 2 to restore the rights of the injured State within the framework of the rule of reasonable proportionality stated in draft article 2 as submitted in the Special Rapporteur's third report.[8] That was the approach which the Commission should adopt in codifying and developing the law relating to part 2 of the draft.

20. The issue was, of course, very complicated and there were many categories of legal consequences. The Special Rapporteur had therefore made a distinction between international crimes, which were considered to be *erga omnes*, and international delicts, and had drawn attention to the complexities involved in that categorization. Although such complexities did exist, he believed that the Special Rapporteur was fully capable of making the categorization along the lines suggested.

21. While he agreed that the legal consequences of the international crime of aggression, to which reference was made in the Charter of the United Nations, left room for divergent interpretations, that was generally true of almost every régime. For example, the inherent right to self-defence was recognized in international law, but the circumstances in which it could be invoked had been hotly contested since the drafting of the Charter. With a view to determining the parameters of the right to self-defence as it related to State responsibility, preventing it from being used as a shield rather than as a sword and assisting the international community in taking a decision on it in the

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

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

interests of international peace and security, he had proposed at the Commission's previous session that it should attempt to define in detail the circumstances in which the right to self-defence could be invoked.[9] He still believed that, in the light of article 19 of part 1 of the draft, a rule relating to that right was a prime and useful candidate for elaboration in the context of State responsibility. Account should, of course, be taken of the proportionality limits set in draft article 2: force, when used, must be reasonably proportional to the danger to be averted. The fact that there was no consensus on the right to self-defence should not discourage the Commission from endeavouring to formulate rules relating to it.

22. On the question of whether the Commission should formulate rules on the legal consequences of international crimes, the Special Rapporteur had expressed the view that, while the entire international community might well recognize certain acts as international crimes, there seemed to be less consensus about the penalties to be meted out. In his own view, however, one useful purpose of the fourth report was to focus the attention of States on that important problem and help them to agree on the sanctions for such crimes.

23. The Special Rapporteur had requested the Commission to decide whether it would draw up a convention or guidelines on part 2 of the topic. The answer to that question would be determined by the quality of the draft articles the Commission produced; the existence of common elements in all international crimes would certainly facilitate the process of elaborating those draft articles.

24. He shared the Special Rapporteur's view that one way of making article 19 of part 1 acceptable to States would be to propose secondary and tertiary rules as a concomitant. The primary rules had been stated in part 1: the secondary rules relating to the legal consequences of international crimes should now be set out in part 2 and the tertiary rules on implementation of the secondary rules in part 3. The borderline cases referred to by the Special Rapporteur could be decided during the formulation of those rules, taking account of the fact that the right to self-determination was *jus cogens* and that armed reprisals were prohibited by the Charter of the United Nations.

25. In paragraph 79 of his report, the Special Rapporteur indicated that international delicts could give rise to three types of new legal relationships, namely reparation, suspension or termination of existing relationships at the international level, and measures of self-help to ensure the maintenance of rights—all of which were designed to remove the consequences of the wrongful act and to restore the relationship which had existed before the wrongful act was committed. Since such new relationships were predicated on the legal consequences of internationally wrongful acts, the rules relating to them should be elaborated later. On the whole, he agreed with the conclusions reached by the Special Rapporteur in paragraphs 122–130 of his fourth report.

26. Sir Ian SINCLAIR, after emphasizing the high intellectual quality of the Special Rapporteur's fourth report (A/CN.4/366 and Add.1), said that he proposed to make a number of general comments on the issues it raised, in ascending order of difficulty.

27. The question of the legal consequences of an internationally wrongful act which was not an act of aggression, or otherwise characterized as an international crime in article 19 of part 1 of the draft, was relatively simple. He entirely agreed with the views put forward by the Special Rapporteur in the first four sentences of paragraph 73 of the report; in the broadest of all possible senses, it could be said that every State had an interest in all rules of international law being observed. The real question, however, was whether a State was qualified to present itself as an injured State in respect of damage not inflicted upon itself or any of its nationals.

28. The question of the legal consequences of what were described as international crimes in article 19 of part 1 of the draft was far more difficult and controversial. Whereas, in the development of the concept of *jus cogens*, the consequence of its violation had formed an integral part of the rule proposed by the Commission, the exact opposite was true of article 19. Although that article derived some of its intellectual inspiration from the notion of *jus cogens*, it was singularly and ominously silent about the wider consequences of what were asserted to be international crimes. When formulating part 1 of the draft, the Commission had been able to avoid consideration of the legal consequences of the provision it was preparing, but now the issue could no longer be avoided. The very notion of a separate and distinct category of international crimes, at least as forming part of the law of State responsibility, was of course highly controversial. It was by no means clear to whom the State was responsible, or how the aggravated degree of State responsibility resulting from the breach of certain fundamental obligations was to be defined. As for the related notion of obligations *erga omnes*, the key issue, at least in the context of the law of State responsibility, was which State or group of States, if any, could be considered as injured. The separate opinion of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case[10] was of special interest in that connection. He personally remained unconvinced that the materials at the Commission's disposal were sufficient to justify the confident assertion that the concept of the injured State could be dispensed with in the case of a breach of an obligation *erga omnes* and that every State without exception could be regarded as having an equal legal interest in the matter.

29. His attitude to the elements of special legal consequences said to attach to all international crimes, as listed in paragraphs 59–61 of the report, was also one of considerable scepticism. In particular, for reasons already stated, he had strong reservations about the proposition

[9] *Yearbook . . . 1982*, vol. I, p. 234, 1736th meeting, para. 30 and p. 238, 1737th meeting, para. 24.

[10] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 65.

in paragraph 59, and he shared some of Mr. Flitan's doubts (1773rd meeting) about the third alleged "common element" referred to in paragraph 61. His reservations about the statement in paragraph 60 were less serious in nature, though he did not think that it was axiomatic that the United Nations had "jurisdiction" in relation to all the international crimes listed in article 19.

30. With regard to the fourth common element, described in paragraph 62, he was prepared to accept that a legal consequence of an international crime was to create duties of solidarity between all other States. Some of those duties might have to be formulated in negative terms, such as the duty not to lend support to the author State. Whether a positive and unqualified legal duty was imposed on all States to support the legitimate countermeasures of the directly injured State might be rather more questionable and might depend on the nature of the international crime involved. But that other States had a right to take such measures in support of the victim State seemed beyond dispute. That point could perhaps be made more clearly.

31. On the question of reprisals, he agreed with Mr. Reuter (1771st meeting) that the term might be a misnomer, since reference was evidently being made to the more nebulous notion of countermeasures. The Special Rapporteur's submission in the first sentence of paragraph 97 hinged on the interpretation given in that context to the term "objective régime". He had considerable doubts about the definition suggested by the Special Rapporteur in his oral introduction (*ibid.*, para. 12), namely that the distinguishing feature of objective régimes was that they involved parallel obligations for States rather than reciprocal obligations, and that they were designed to protect the collective interests of States or individual persons. The traditional concept of objective régimes as being, essentially, régimes of a territorial or quasi-territorial nature was still relevant in the context of the law of treaties. The distinction which the Special Rapporteur was proposing seemed somewhat akin to that between integral-type treaties and reciprocal treaties, or between so-called *traités-lois* and *traités-contrats*, a distinction which the Commission had discussed at some length in the context of its work on the law of treaties but which had not been embodied in its final set of draft articles, or indeed in the Vienna Convention on the Law of Treaties itself, possibly because the distinction was simply too difficult to draw.

32. If the purpose of the reference to objective régimes was to ensure that whatever secondary and tertiary rules operated within the framework of such a régime should be safeguarded, he would unhesitatingly agree. The rules in part 2 should clearly operate as residual rules, which might be displaced by more specific rules accepted by the parties concerned within the framework of any treaty or other régime by which they might be bound. He was not convinced, however, that it would be in the general interest to do more than merely "reserve" any special secondary or tertiary rules on the consequences of a breach of an international obligation which might form part of a particular regional or universal régime, whether characterized as an objective régime or not. An attempt to embody in part 2 a distinction between objective régimes and other régimes would give rise to serious problems of demarcation. The General Agreement on Tariffs and Trade was a case in point: it would be interesting to know whether the Special Rapporteur regarded it as an objective régime in the sense in which that term was employed in the fourth report.

33. In paragraphs 33–45 and again in paragraphs 65–67, the Special Rapporteur referred to the need for a meaningful mechanism for the settlement of disputes as a pre-condition for the effective application of whatever primary or secondary rules might be embodied in parts 1 and 2 of the draft. He wholeheartedly endorsed that view. Given the scarcity of secondary rules relating to the legal consequences of internationally wrongful acts, a self-contained and viable draft on the general law of State responsibility would necessarily have to contain adequate and satisfactory procedures for the settlement of disputes. However, any dispute-settlement procedure to be written into the draft would have to be without prejudice to existing rules on settlement applicable between the parties to the particular dispute. That being said, he shared the doubt expressed in paragraph 42 as to the willingness of States to accept—having regard to the very broad scope of the draft—the isolation of questions relating to the interpretation and application of secondary rules from those relating to the primary rules concerned.

34. He agreed with the view expressed in paragraphs 54–55 that there was no place in part 2 for an article or articles on the legal consequences of acts of aggression. The reasons advanced by the Special Rapporteur for reaching that conclusion were convincing; the Commission would be exceeding its mandate by venturing into that field more than was necessary in order to articulate the general principles of State responsibility. While he understood the contrary view, as expounded, in particular, by Mr. Al-Qaysi (1775th meeting) and Mr. Koroma, he thought the Commission's work would be unnecessarily prolonged if it were to tackle such highly sensitive topics as the scope of the right of self-defence. Without adopting a definitive position on the matter, he was inclined to agree with the suggestion made by Mr. Jagota (para. 8 above) that a simple list of the consequences of aggression for the aggressor State, the rights of the directly injured State and the duties of third States might be incorporated in part 2. In no circumstances, however, should the Commission attempt to elaborate on the scope of the concept of self-defence.

35. He shared the view expressed by previous speakers that it would be inappropriate for the Commission to take up the proposal outlined in paragraph 64, especially as a committee for the specific purpose of reviewing the Charter had already been set up. Lastly, he had some misgivings about the statement contained in the first sentence of paragraph 125, particularly in connection with the case mentioned under (*b*) in paragraph 124. The condition thus formulated was very general and could be seriously misconstrued unless explained further.

36. Mr. NI said that the Special Rapporteur was to be congratulated on the scholarly and masterly fashion in which he had prepared chapter II of his fourth report (A/CN.4/366 and Add.1). In emphasizing the importance of the relationship between the various parts of the draft for a comprehensive evaluation of his work as a whole, the Special Rapporteur had adopted the right approach.

37. The importance of the topic could not be overemphasized, for the law of State responsibility encompassed virtually all aspects of international law and had great practical significance in present-day international relations. In codifying the legal consequences arising from international responsibility, the Commission should keep in mind the need to prevent internationally wrongful acts and to eliminate and remedy their consequences, though it was not suggested that prevention as a primary rule should be considered a subject for codification at the present stage. If, as the Special Rapporteur suggested in his summing-up in paragraph 122, part 2 of the draft articles should take as its starting-point the normal situation, in which the internationally wrongful act entailed new bilateral legal relationships between the author State and the injured State only, that did not mean that part 2 was to be entirely confined to that situation. As had been pointed out time and again in the Sixth Committee of the General Assembly, it was not to the international community's advantage to be overconsiderate with the author State.

38. Referring to the question of the legal consequences of an international delict and the three aspects listed in paragraph 72, he remarked that the identification of the injured State did not give rise to any difficulty in the case of bilateral relations. But where a delict had effects reaching beyond the bilateral level, as in the case of a multilateral treaty, the question of which State or States were to be considered as injured depended on whose interest had been adversely affected. It was a question of fact, which should be determined in the light of the circumstances of each case.

39. With regard to the content of the new legal relationships, the Special Rapporteur had distinguished three types of relationship in paragraph 79; but that list was not exhaustive and the relationships were not supposed to be parallel. As to self-help measures, the limitations and restrictions were such as to leave the injured State without any effective means of protecting its legitimate interests in time.

40. The adoption of article 19 in part 1 of the draft articles had been considered an important step forward in the development of international law in that area. While the Special Rapporteur was of the opinion, in paragraph 65, that there was little chance that States would accept a legal rule along the lines of article 19 without a legal guarantee of independent and authoritative establishment of the facts and the applicable law, he nevertheless concluded in paragraph 67 that the Commission, having recognized the progressive development of international law in provisionally adopting article 19, should carry that development to its logical conclusion by proposing secondary and tertiary rules. The Special Rapporteur was to be highly commended for reaching that conclusion despite the complexity of the problems involved.

41. With regard to the elements of special legal consequences common to all international crimes mentioned in paragraphs 59–62, he agreed with the Special Rapporteur that, although not all international crimes would entail the same legal consequences, at least a minimum common element applicable to all crimes on the basis of the solidarity of all States other than the author State should be established.

42. The Special Rapporteur's conclusion, in paragraph 55, that there was no place in part 2 for an article or articles on the special legal consequences of the category of internationally wrongful acts called "acts of aggression" did not seem acceptable. The crime of aggression, being a serious breach of an international obligation of essential importance for the maintenance of international peace and security, as provided in article 19 of part 1 of the draft, should have a corresponding provision in part 2 relating to its legal consequences. The fact that provisions applicable to international crimes which could also apply to aggression were already in existence was no valid reason for failing to allocate a special place to the legal consequences of the crime of aggression in the draft articles on State responsibility. And if aggression—which was considered one of the most heinous crimes—was excluded from part 2 simply because the matter was closely connected with another topic, namely the draft Code of Offences against the Peace and Security of Mankind, then other international crimes, such as those envisaged in article 19, paragraph 3, which might have their counterparts in the draft code of offences, might suffer the same fate. If aggression was to be distinguished from other international crimes because of its *erga omnes* character, other international crimes, such as the establishment or maintenance by force of colonial domination, slavery, genocide or *apartheid*, might be excluded for the same reason. Nor was the fact that the same offence might be made accountable in two or more international instruments a reason for excluding it from any of the instruments concerned. It was not a question of avoiding duplication, but of achieving co-ordination. The Special Rapporteur's conclusion, albeit limited to the legal consequences of acts of aggression, was inconsistent with his view, stated in paragraph 67, that the progressive development embodied in the adoption of article 19 should be carried to its logical conclusion.

43. As to the principle of proportionality applicable to countermeasures, he assumed that its object was to ensure that action taken in response to an internationally wrongful act did not have consequences more serious than the wrongful act itself, and which were not justified by the circumstances of the case. The matter could be considered more closely during the process of drafting.

44. The abundance of detail and diffuseness of the outline made it rather difficult to grasp. Not enough emphasis appeared to have been placed on the important question of reparation. In the case concerning the *Factory at Chorzów* (Merits), the PCIJ had said that "reparation must, as far as possible, wipe out all the consequences of

the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[11] Means of reparation applied in practice and suggested by publicists included restitution, compensation, declaration of the true legal position, injunction, interim measures of protection, imposition of punitive damages, affirmation of rights, and satisfaction, which might include apology or guarantee against repetition. Some of those means were commonly applied, while others, such as assessment of punitive damages, were not considered legitimate. A discussion of the problem would not be out of order.

45. The terminology used in the report in discussing countermeasures was somewhat confusing: the terms "reprisal", "self-help" and "countermeasure" seemed to be employed interchangeably. All in all, it would be helpful if the material were arranged more systematically and treated in less abstract terms.

46. Mr. BARBOZA noted that the Special Rapporteur's fourth report (A/CN.4/366 and Add.1) contained a wealth of material and provided much food for thought; but before any definite opinions could be arrived at, it would be necessary to wait until the ideas set forth had been put into concrete form in draft articles. Since other members had analysed the report in detail, he would comment only on the points that had particularly engaged his attention.

47. With regard to the advisability of dealing with international crimes in part 2 of the draft, he did not altogether share the concern expressed by some members of the Commission. The inclusion of article 19 in part 1 of the draft militated in favour of provisions on the legal consequences of international crimes. That was the view taken by the Special Rapporteur, although he would leave aside the case of aggression. In that connection, he (Mr. Barboza) referred to the draft Code of Offences against the Peace and Security of Mankind,[12] to the Definition of Aggression adopted by the General Assembly[13] and to two provisions in the second set of draft articles submitted by the Special Rapporteur in his third report (A/CN.4/354 and Add.1 and 2):[14] article 5 and paragraph 2 of article 6. Furthermore, Article 41 of the Charter of the United Nations determined what measures could be taken by the Security Council following an act of aggression. The solution suggested by Mr. Jagota, which was to include a list of the legal consequences of international crimes, including aggression, in part 2 of the draft, thus seemed to merit consideration. Those legal consequences would constitute the general legal framework for all international crimes. It should be noted that some members considered that the draft Code of Offences against the Peace and Security of Mankind, in its new version, should not contain secondary rules. Consequently, it was indeed in part 2 of the draft articles on State responsibility that the legal consequences of crimes such as aggression and crimes against the peace and security of mankind should be dealt with.

48. In his fourth report, the Special Rapporteur had laid much emphasis on part 3 of the draft articles. He considered it was hardly worth while talking about secondary rules unless one knew the contents of the applicable tertiary rules. On the one hand, he emphasized the special importance of establishing the facts: it was the facts, not the consent of States, that would determine the new rights and the new obligations. On the other hand, he maintained that if States knew the rules of application, they would know the extent to which they could accept the consequences identified in part 2. On the first point, he thought the Special Rapporteur was partly right, though the problem of the settlement of international disputes, and in particular their compulsory settlement, was practically insoluble in international law. Whenever any multilateral treaty was drawn up, that question always gave rise to difficulties. Consequently, the Commission could not make the wording of part 2 of the draft depend on how the problem of implementation was solved. On the second point, he observed that States would probably accept certain legal consequences more readily if they knew the content of the tertiary rules, but that the converse was equally true: they would more readily accept certain forms of compulsory settlement of disputes if they knew exactly what they were committing themselves to. All things considered, it would be better for the Commission to take up the drafting of part 2 at once.

49. In speaking of international crimes, both Mr. Flitan and Mr. Reuter (1773rd meeting) had referred to the concept of "attempt". The idea of making the attempt to commit an international crime an offence was an interesting one, which was associated with prevention but which involved recourse to the mechanisms of responsibility. If the Commission adopted that course, however, it should confine itself to particularly serious crimes.

50. With regard to reprisals, and more particularly armed reprisals, the Special Rapporteur referred, in paragraph 81 of the report, to the prohibition contained in the 1970 Declaration on Principles of International Law[15] and in draft articles 4 and 5 as proposed in his third report. He added, however, that in the case of most internationally wrongful acts, armed reprisals would be manifestly disproportional in the sense of article 2 as proposed in that report. He probably had in mind the case in which a State carried out armed reprisals in response to a wrongful act not involving recourse to force. But despite certain doctrine according to which use of force was permissible in response to use of force, it should be emphasized that armed reprisals were absolutely pro-

[11] Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17*, p. 47.

[12] See 1755th meeting, para. 10.

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

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

[15] See footnote 7 above.

hibited by contemporary international law, whether they were disproportional or not.

51. In paragraph 83, the Special Rapporteur also referred to draft article 3 as proposed in his third report, under which the legal consequences of a breach could be prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law. He concluded that a provision more detailed than that article should be devoted to reprisals. What he had to say about objective régimes seemed to be correct, but it would be necessary to know the wording of the relevant articles before forming any definite opinion on the matter.

52. In paragraph 90, the Special Rapporteur mentioned the case of reprisals constituting a breach of rules relating to the environment. He stated that reprisals consisting in a breach of such rules seemed to be inadmissible even in response to a similar breach by another State. In the Special Rapporteur's view, the case was covered by draft article 4, as proposed in his third report. He also suggested that certain special régimes, particularly those relating to diplomatic law and armed reprisals, should be reserved. So far as armed reprisals were concerned, he (Mr. Barboza) reserved his position. With regard to diplomatic law, he could not agree with the Special Rapporteur that it constituted an exception, since there were parallel obligations. While it was true that a State A could declare *persona non grata* the diplomatic agent of a State B which had declared *persona non grata* a diplomatic agent of State A, no State could resort to a reciprocal measure in the case of a serious breach of diplomatic immunity.

Organization of work (*continued*)*

53. The CHAIRMAN reminded the Commission that, at its 1755th meeting, it had approved the tentative programme for the organization of work (ILC(XXXV)/Conf.Room Doc.3), on the understanding that it would be applied with the necessary flexibility. He suggested that, after completing consideration of item 1 of the agenda, the Commission should take up item 3: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". Item 5 of the agenda would be taken up after that, some time after 20 June.

It was so agreed.

The meeting rose at 1.05 p.m.

* Resumed from the 1760th meeting.

1778th MEETING

Thursday, 9 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS
later: Mr. Edilbert RAZAFINDRALAMBO

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, 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, 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. BARBOZA, continuing the statement he had begun at the previous meeting, said that in the case of the United States embassy staff held hostage in Tehran, the United States could not, by way of reprisal, have taken the same kind of action as that to which it had been subjected. He stressed the need to take account of the purpose of reprisals, which were sometimes only a means of exerting pressure to induce the State which had committed the wrongful act to adopt certain conduct, for example to agree to arbitration. In that connection, he mentioned one of the few relevant legal precedents, namely the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*,[5] which was mentioned in paragraph 103 of the fourth report (A/CN.4/366 and Add.1). In that case, the United States had confined itself to threatening France with the suspension of an Air France flight to California, thus taking reprisals whose purpose was to persuade France to agree to arbitration.

2. Reprisals could also be of a preventive nature, for example when, as a guarantee of payment of compensation, a Government froze the funds of another Government located in its own territory. Finally, the purpose of reprisals could be to punish and discourage any repetition of a wrongful act. Any case could involve a

[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] See 1771st meeting, footnote 12.