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Summary record of the 1779th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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basis, but it was mainly paragraphs 75–76, 79, 114 and 122–123 that went to the heart of the problem and would constitute a foundation for the edifice to be built. In that connection, he welcomed the views expressed by Mr. Jagota (1777th meeting) on the consequences of State responsibility, namely reparation, the suspension of relations, the breaking off of relations and armed or unarmed reprisals.

26. He noted that some of the terms used in the report were rather ambiguous and made it difficult to understand the propositions advanced. He was not sure that he had understood the distinguishing differences between countermeasures, reprisals, reciprocity and retaliation. Those terms should be defined more clearly, showing the different situations to which they applied. For example, if the diplomats of a sending State were subjected to unlawful measures, that State could take not only reciprocal measures, but also measures of retaliation; and the more dangerous case of reprisals might also arise.

27. He had no definite ideas on the method of work to be adopted but he thought the main point was to examine, with regard to both crimes and delicts, all the consequences of the relations between the injured State and the author State and of their relations with third States.

28. Mr. REUTER, associating himself with the tributes paid to the Special Rapporteur by members of the Commission, said that Mr. Jagota's analysis (*ibid.*) of the report had been particularly lucid, clear and forceful. He himself would comment only on methods of work and on the substance of the problem, which was the question of aggression.

29. He had always known that the Commission would devote much time and effort to the questions of international crimes and aggression, since at the current session it had before it the reports of Mr. Riphagen and Mr. Thiam, although, for the time being, it knew nothing about Mr. Thiam's future reports. Two considerations made him think that the Commission should begin by studying the general régime of delicts and then consider that of crimes, before going on to the particular case of aggression, which would, of course, have all the legal consequences of the first two categories of wrongful acts, Although its Statute did not require it to reach agreement in every case, it was a fact that the Commission had always reached compromises on the drafts it prepared. In the present case, it would be more difficult to agree on the consequences of aggression than on those of other international crimes, and more difficult to agree on the consequences of crimes than on those of delicts. The Commission should therefore begin with the question on which positions were the least clear-cut. The Sixth Committee would probably forgive the Commission for not agreeing on the question of aggression and, despite the difficulties to which he had just referred, he thought the Commission should begin by considering that question. He hoped that at its next session the Commission would have before it simultaneously reports by Mr. Riphagen and Mr. Thiam and that those reports would be submitted on time. He emphasized the need to co-ordinate the study of those two reports; that was a task which the Commission, a technical body, could not avoid.

30. With regard to aggression, he believed that as things stood at present only the United Nations had the right to establish that an act of aggression had been committed and to determine its legal consequences. Did the States parties to the dispute also have that right, with all the ensuing legal consequences? Some held that they did, and it was a fact that State sovereignty remained one of the pillars of the international order. But he could not help noting that, for the past 25 years, the world had been continually torn by armed conflicts and the United Nations had never established that such acts had been committed. What was even more important was that no State which was a party to a dispute and which had established that an act of aggression had occurred had ever drawn the logical consequences of that act. Ideological differences of opinion might, of course, have prevented the Security Council from finding that an act of aggression had been committed, but it must be recognized that, in many armed conflicts, the legal position was not clear and that a State might, in good faith, consider that another State was the aggressor.

31. What was more important than anything else was not so much the sanctions to be imposed as the restoration of peace. In many cases, it would be disastrous for the United Nations to establish that aggression had occurred. The States concerned had often shown great wisdom and had limited the advantages they could have derived from their military superiority. That being so, he agreed that the United Nations could establish that an act of aggression had occurred, with all the ensuing consequences such as reparation or sanctions, but he could not agree that the same consequences followed from determination of such an act by one of the States parties to a dispute. If the Commission had to provide for strict measures to punish aggressors, it must not treat a finding by the United Nations in the same way as a finding by a State. Did any member of the Commission believe that resort to arms automatically showed which State had been attacked? As to the problem of self-defence, he wondered what the critics of the United Nations proposed as a substitute for that institution.

The meeting rose at 12.55 p.m.

1779th MEETING

Friday, 10 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, 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.

State responsibility (*continued*) (A/CN.4/354 and Add.2 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. OGISO congratulated the Special Rapporteur on a detailed report on a topic that was difficult because it encompassed almost every aspect of international legal relations. The fourth report (A/CN.4/366 and Add.1) would none the less have been easier to understand, and would perhaps have facilitated the Commission's discussion, if it contained draft articles on which members could make their observations.

2. In paragraph 80 of the report, the Special Rapporteur rightly emphasized that reprisals were generally considered as admissible only in limited forms and in limited cases, and that the nature of the internationally wrongful act and the nature of the right of the author State infringed by the reprisals were relevant in that context. While he was in general agreement with that statement, it might have been more satisfactory to define the limitations more clearly, since reprisals were rendered legitimate only in so far as they were intended to uphold the rights of the injured State under international law and were a form of self-help. Clearly, they were open to abuse by virtue of the fact that it was the injured State itself which determined, in the first instance, their admissibility and extent. The Commission should bear that factor in mind and exercise caution in drafting the relevant articles. Indeed, draft articles that were not sufficiently precise could act as an invitation to escalate countermeasures and eventually deprive of all meaning the concept of the international legal order.

3. The Special Rapporteur went on to express doubts as to the existence of any clear-cut rule on armed reprisals, pointing out in paragraph 81 that, inasmuch as armed reprisals were prohibited, the prohibition would be covered by draft articles 4 and 5 as proposed in his third report (A/CN.4/354 and Add.1 and 2).[5] However, the draft articles in question did not seem sufficiently explicit in that regard. Under the United Nations régime, the use of force, except when based on a decision or recommendation by the competent United Nations organs, was admissible only under the provisions of Article 51 of the United Nations Charter, which dealt exclusively with the question of self-defence and reprisals as a form of self-help. If a special draft article on reprisals was to be inserted in part 2 of the draft, as suggested by the Special Rapporteur, it should stipulate clearly that armed reprisals were not admissible. On the matter of belligerent reprisals, the Special Rapporteur had exercised caution and reached the sound conclusion, in paragraph 88, that that particular field should be excluded from the scope of part 2 of the present draft. Clearly, it would be more appropriate to deal with belligerent reprisals under the law relating to armed conflicts.

4. Paragraph 77 of the report discussed the difficulty of identifying the injured State in the event of an alleged breach of an obligation arising from a multilateral convention, the inference being that, in principle, reprisals were an admissible response to a breach of a treaty obligation, including breaches of multilateral conventions, in so far as the consequences of the reprisals did not affect objective régimes. This conclusion was expressed elsewhere in the report, but the Special Rapporteur also submitted that the difficulty of identifying which State was the victim of a breach of a multilateral treaty obligation was a real one, given the intricate network of rights and obligations established by such conventions. Moreover, in reality, States did not first consider whether a treaty established an objective régime before they proceeded to negotiate inter-treaty relationships. Personally, he considered that the introduction of the concept of objective régimes, which had no established content under international law, would simply create confusion in the draft articles and in State practice, inasmuch as the criteria proposed did not seem sufficiently practical. Indeed, the complex legal relationships existing under multilateral treaties could tend to increase the difficulty of ascertaining the proportionality of reprisals and the concept of objective régimes would thus make it even more imperative to provide for a dispute-settlement procedure in part 3 of the draft.

5. With regard to regional objective régimes, it should be noted that some of them, whether or not they were called objective, had close links with universal régimes, as in the case of regional arrangements or agencies for matters relating to the maintenance of international peace and security, as provided for in Article 52 of the Charter. However, it had to be remembered that no collective decision by the States parties to a regional régime could render admissible any reprisals of a type not allowed under the relevant universal régime.

6. In view of the importance of exercising the utmost caution, the Commission might wish to consider whether proportionality should be the sole substantive requirement for reprisals to be made admissible in cases of breaches of obligations arising from bilateral treaties, for example. Perhaps other procedural requirements, such as

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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*.

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

the exhaustion of other dispute-settlement procedures before taking reprisals, or advance notification of such measures, should be considered. Procedural mechanisms of that kind could help to avoid the escalation of countermeasures.

7. He was not sure that the tests of proportionality referred to in paragraph 123 of the report, namely that reprisals should be "not clearly disproportionate" or not "manifestly disproportional", were suitable. They would tend to widen the area of admissibility, since the extent of proportionality was determined in the first instance by the State initiating the act of reprisal. The concept of proportionality traditionally used in international law would be preferable.

8. It should always be borne in mind that the basic difference between the concept of armed reprisals and the concept of self-defence was that self-defence was a lawful act under customary international law and under the Charter of the United Nations, whereas a reprisal was an act which became lawful solely for the purpose of upholding the rights of the injured State.

9. As to the implementation of international responsibilities and the settlement of disputes, the Special Rapporteur had expressed doubts in paragraph 42 of the report regarding the willingness of States to accept that questions relating to the interpretation and application of secondary rules should be isolated from the interpretation and application of the primary rules concerned. If that was so, the Commission would be faced with the problem of harmonizing any dispute-settlement procedures in part 3 of its draft with those already existing under multilateral or bilateral treaties setting out primary rules. One solution to the problem would be to respect the dispute-settlement procedures established by existing bilateral or multilateral treaties and to provide that the arrangements in part 3 would apply only when procedures were not to be found in existing régimes.

10. Lastly, he shared the view expressed in paragraph 65 of the report that it was unlikely that States would accept a legal rule along the lines of article 19 of part 1 of the draft articles in the absence of an independent and authoritative establishment of the facts and the applicable law. That applied equally to cases involving other internationally wrongful acts. The history of the United Nations included many cases in which the Security Council had failed to establish even the facts of a dispute before considering the substantive aspects, for reasons that were all too well known.

11. Mr. RAZAFINDRALAMBO said that, in the opening paragraphs of chapter II of the fourth report (A/CN.4/366 and Add.1), the Special Rapporteur pointed out that parts 2 and 3 of the draft were to be concerned with secondary and tertiary rules. However, the first sentence of paragraph 39, which had already caused other members of the Commission to voice serious reservations, suggested that, for the time being, the Special Rapporteur intended to proceed no further with the study of secondary rules and to concentrate instead on the elaboration of provisions on the implementation of international responsibility, in other words part 3 of the draft. Naturally, no one disputed the special importance of matters relating to the specific implementation of secondary and tertiary rules of State responsibility. Indeed, when a similar problem had arisen in respect of the draft Code of Offences against the Peace and Security of Mankind, virtually every member of the Commission had acknowledged the need to provide for effective implementation measures. Moreover, who would venture to reproach the Special Rapporteur for stressing, in paragraph 37, the importance of a settlement of the original dispute based on fact and law relating to the primary rules? Nor could it be denied that no State would agree to the existence of an internationally wrongful act being established unilaterally by a single State. However, he doubted whether a statement of those obvious truths necessarily led to the conclusion, as submitted by the Special Rapporteur in paragraph 45, that the Commission "should give early consideration to the question of the settlement of disputes". Even from a purely methodological standpoint, there was no obvious reason, at the present stage, for discontinuing the elaboration of part 2 of the draft. Such an attitude could be seen as incompetence on the part of the Commission and would be poorly received by the General Assembly.

12. Moreover, part 3 was not necessarily a sort of *sine qua non* for the viability of part 2. It was hardly necessary to point out that the implementation of State responsibility was already governed by a host of institutional and treaty procedures for the settlement of disputes. The Special Rapporteur himself had referred, in that connection, to the settlement machinery provided for in the Charter of the United Nations. Everyone was aware of the crucial role played by the ICJ in applying and interpreting the principles of international law, and of the remarkable contribution of international arbitration bodies, an apt illustration of which was provided by the Special Rapporteur in paragraph 103 in connection with countermeasures. Would the traditional machinery, which had thus demonstrated its ability to function properly, if not always effectively, be unsuitable in the present instance? The Commission could not avoid that kind of problem indefinitely and it must find a satisfactory solution when the time came.

13. In any event, the Commission should for the time being set about making the choices and providing the guidelines that the Special Rapporteur needed in order to continue his work. Yet it was difficult to see how the Commission could assist the Special Rapporteur, in view of the fact that his fourth report chiefly covered elements relating to part 2 of the draft. He did not recall having heard anything in the course of the discussion that would help to give some idea of the forms and procedures for dispute settlement to be dealt with in the future part 3.

14. In connection with international crimes, the Special Rapporteur implicitly acknowledged, in paragraphs 50–51 of the report, the need for a "categorization" both of internationally wrongful acts and of international crimes, adding at the same time that "one might at least establish a minimum common element . . . applicable to all crimes

and based on the . . . mutual solidarity of all States other than the author State". Hence, it was surprising to see that the Special Rapporteur reached the conclusion, in paragraph 55, that aggression should not be covered by an article in part 2. The act of aggression was particularly odious, but it was cited in article 19 of part 1 merely as one example of a grave violation of an obligation of essential importance for the maintenance of international peace and security. In 1950, the Commission itself had defined it as a "crime against peace", in the same category as war crimes and crimes against humanity.[6] Why then should aggression be singled out from other international crimes? Moreover, in listing the common elements of international crimes in paragraphs 59–62 of the report, the Special Rapporteur did not suggest any exception to the rule, and draft article 6 as proposed in the third report (A/CN.4/354 and Add.1 and 2)[7] implicitly covered acts of aggression. It was perfectly understandable that, at the previous meeting, Mr. Reuter had said that he had no objection to the question of aggression being dealt with in the draft. For his own part, he did not wish to dwell on the question of self-defence, which was simply one aspect of the question of aggression and came under the heading of countermeasures, since he agreed with the members who had already commented in that regard.

15. The report discussed at considerable length the subject of identification of the injured State and, in doing so, introduced the concept of the "objective régime". Indeed, it was difficult to pinpoint the concept of the injured State. The nature of the problem was set out in paragraph 75, but not until paragraph 123 were any answers provided. Nevertheless, he would willingly subscribe to the definition contained in that paragraph and would endorse the enumeration of the rights and obligations attributed to the injured State by the Special Rapporteur. However, in order to maintain a balance, why not at the same time give a definition of the author State, or even of the third State? The Commission knew only too well where the unproductive exercise of establishing definitions which were too precise, yet also necessarily incomplete, could lead. The simplest solution might be to follow the example of the Special Rapporteur, who in draft articles 1, 2 and 6 confined himself to setting out the rights and obligations of the parties to the primary legal relationship and to the new secondary legal relationship. Any clarifications needed could be provided in the form of commentaries.

16. As to paragraph 79, concerning the content of the new legal relationships arising out of international delicts, he experienced doubts regarding the category of internationally wrongful acts to which the three types of relationship contemplated (reparation, suspension or termination of existing relationships, and measures of self-help) applied. The first sentence of paragraph 84 did little to dispel those doubts. In effect, the types of relationship envisaged appeared to be common to all internationally wrongful acts, whether they were regarded as crimes or delicts. As had already been pointed out, the unitary nature of the concept of responsibility should not be forgotten. It was that basic characteristic that accounted for the similarities underlying the three topics assigned to Mr. Riphagen, Mr. Thiam and Mr. Quentin-Baxter as Special Rapporteurs.

17. He shared Mr. Mahiou's view (1778th meeting) that the topics of State responsibility and the draft Code of Offences against the Peace and Security of Mankind could be regarded as constituting two sides of the same coin and as representing, *mutatis mutandis*, two forms of responsibility leading to civil action and criminal action, respectively. In the first case, the injured State was entitled to demand reparation, whereas the second case called for the imposition of punishment. On the basis of that fundamental distinction, it was possible to define sufficiently clearly the scope of the two forms of responsibility and to reduce the risks of duplication to a reasonable extent, although some degree of overlap seemed inevitable, and even desirable, if only in the matter of establishment of the facts.

18. Lastly, he hoped that the views expressed during the discussion would enable the Special Rapporteur to make headway and to submit, at the following session, a structured and complete set of articles constituting part 2 of the draft.

19. Mr. McCAFFREY congratulated the Special Rapporteur on his penetrating, thoughtful and very useful report (A/CN.4/366 and Add.1), which provided a sound basis for a quantum leap forward in the Commission's work on the consequences of State responsibility.

20. In paragraph 45 of the report, the Special Rapporteur submitted that the Commission should give early consideration to the question of dispute settlement, in other words to the possible content of part 3 of the draft. Indeed, there were a number of reasons for doubting the efficacy of parts 1 and 2 in the absence of some mechanism for determining whether an internationally wrongful act had in fact been committed. The whole enterprise presupposed a breach of a primary rule but, in most cases of any significance, no State would admit to having committed such a breach. A State accused of having committed an internationally wrongful act would not accept the demands and countermeasures of the allegedly injured State on the basis of the latter's unilateral determination that such an act had been committed. Similarly, the allegedly injured State would not agree that it could make demands and take countermeasures solely on condition that the alleged author State acknowledged that it had committed an internationally wrongful act.

21. As the Special Rapporteur had pointed out in paragraph 65, that situation was illustrated by the fact that it had proved necessary to include procedures for the settlement of disputes in the Vienna Convention on the Law of Treaties in connection with the invocation of *jus*

[6] Principle VI of the "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal", adopted by the Commission at its second session (*Yearbook . . . 1950*, vol. II, pp. 376–377, document A/1316, paras. 110–124).

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

cogens as a ground for invalidating a treaty. Consequently, the dispute-settlement procedure to be provided for in part 3 should not focus solely on the legal consequences of an alleged internationally wrongful act, thereby assuming that such an act had occurred. Rather, the procedure would have to begin by determining whether an internationally wrongful act had actually occurred. The elaboration of such provisions in part 3, while it might await the completion of part 2, seemed essential for the efficacy of the draft articles as a whole.

22. As to the ultimate form of the draft articles, the Commission normally envisaged its work as a process of codification and progressive development of law, rather than as an attempt to produce instruments that would be acceptable to States, regardless of whether or not they reflected current or developing international law. Observers also took such a view of its work. Accordingly, it might be futile to opt for nothing more than endorsement of rules on State responsibility as "guidance" for States and international bodies. However, States were more likely to accept parts 1 and 2 of the draft if they knew that the rules contained therein could not be used against them unless they submitted to a dispute-settlement procedure. Therefore, while the first option, namely that of a general convention, would be the normal outcome, it none the less might be worth considering whether the Commission should recommend that the final form of the draft articles should be as rules to be accepted in a convention, the option mentioned in paragraph 44 of the report.

23. It was pointed out in paragraph 46 that neither judicial decisions nor the teachings of publicists went into the details of the legal consequences of internationally wrongful acts. Consequently, it fell largely to the Commission to construct a system into which all the seemingly myriad combinations of wrongful acts and effects that comprised the topic of State responsibility could be fitted. The report represented an admirable effort to achieve that aim. The Special Rapporteur had begun by making a basic distinction between international crimes and international delicts, a distinction which reflected the one originally drawn in article 19 of part 1 of the draft.

24. However, the utility and accuracy of the term "international crime" in the present topic was questionable. While the term might be appropriate in the context of the draft Code of Offences against the Peace and Security of Mankind, which dealt with crimes against humanity and war crimes, it should be remembered that the purpose of the distinction between international crimes and international delicts was to help determine the consequences of an internationally wrongful act for the author State, the victim State and third States. An international crime, unlike an international delict, was of fundamental importance and therefore had legal consequences not only for the injured State but also for the international community as a whole. Hence, it was that *erga omnes* character which was the main distinguishing feature of international crimes.

25. In a celebrated dictum in its Judgment of 5 February 1970 in the *Barcelona Traction* case,[8] the ICJ had spoken, not of international crimes, but of "obligations of a State towards the international community as a whole", as distinct from "those arising vis-à-vis another State . . .", and had observed that: "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection . . .." Given the fact that part 2 also sought to define for whom the legal consequences of an internationally wrongful act ensued, it might be preferable to draw a distinction between obligations which were *erga omnes* in character and those which were not. That was essentially the approach proposed by the Special Rapporteur in distinguishing, in respect of international delicts, the "normal" bilateral situation from objective régimes. Moreover, since the Commission had rightly decided to avoid the formulation of primary rules, it should not become embroiled in the intractable political issues entailed in determining which norms of international law created obligations *erga omnes*. In his view, even draft article 19 of part 1 had fallen victim to that temptation because it cited examples of situations from which an international crime could result, although the commentary made it clear that the nature of such serious breaches was a matter to be determined by the international community as a whole.[9] Consequently, the Commission should specify, in part 2, the consequences of various categories of internationally wrongful acts, but it should resist any temptation to specify the consequences of breaches of individual primary rules.

26. In paragraphs 59–62 of the report, the Special Rapporteur identified four elements common to all international crimes. The first and most important element, namely the *erga omnes* character of the breach, none the less involved a somewhat blurred concept that should be brought more sharply into focus if the concept itself was to be of any real value for the purposes of part 2. A number of questions remained unanswered. For example, who was to establish whether a given act amounted to an international crime, and how was that to be established? Secondly, did the *erga omnes* character of the breach mean that any State could take unilateral enforcement measures?

27. With regard to the first question, the commentary to article 19 of part 1 of the draft made it plain that the international community as a whole was to determine whether a particular act amounted to an international crime, and that international community consisted, not simply of a majority of States, but of all the essential components of that community. The commentary was also instructive with regard to the method to be adopted for making that determination, since it affirmed that the existence of an international crime should always be established by an international instance, either the Security Council or the ICJ. With regard to the second

[8] *Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 32, para. 33.

[9] *Yearbook . . . 1976*, vol. II (Part Two), p. 119, para. (61) of the commentary to article 19.

question, the organized international community had exclusive jurisdiction over the situation, as stated in paragraph 60 of the report. That was the only practical way of preventing the chaos that would ensue if enforcement powers were left in the hands of individual States. That same idea was expressed in paragraphs 63–64 of the report, although it should be added that the international community as a whole should empower specific organs of the United Nations not only to decide on specific countermeasures in respect of international crimes but also to determine first the existence of the breach of an international obligation.

28. The third common element, namely that the duty not to intervene in the internal affairs of a State did not apply in cases of international crimes, was consistent with the second element, namely that intervention was allowed only after the existence of a grave breach of an international obligation had been established by an international instance, under United Nations auspices and using United Nations machinery. To allow any State to take reprisals or enforcement measures against a perpetrator would be to allow large States to intimidate, and intervene in the affairs of, small ones. That interpretation was substantially borne out in paragraph 61 of the report.

29. A disturbing possibility was that it would be for each individual State to determine whether or not the measures it proposed to take were prohibited by either general rules of customary law or treaties governing relationships between the author State and the other State, or group of States. In any event, to leave such a loophole would be to extend an invitation to States to resort to unilateral enforcement measures on the grounds that such countermeasures were not prohibited by rules of international law other than the inapplicable duty not to intervene in the internal affairs of States. Consequently, he would propose that the principle should be confined to intervention through the United Nations, in accordance with Chapter VII of the Charter.

30. The fourth common element of international crimes, the duty of solidarity, which seemed to follow on from the first two common elements, consisted of two aspects: the negative aspect of not lending support to the author State, and the positive aspect of support for legitimate countermeasures by other States. The Special Rapporteur accorded appropriate recognition to the limitations of the positive aspect of that duty by concluding, in paragraph 62 of the report, that the duty to support countermeasures was valid only within the framework of some form of international decision-making machinery.

31. As to acts of aggression, which formed a special category, he agreed with the Special Rapporteur that the legal consequences of aggression lay outside the Commission's competence because they were dealt with in the United Nations Charter. Nevertheless, the case made out by Mr. Jagota (1777th meeting) for spelling out in very simple fashion in part 2 the basic consequences of aggression for the author State, the injured State and third States was worthy of consideration. In the first place, as Mr. Jagota had observed, certain consequences existed quite separately from the Charter; in the second place, as Mr. Reuter had said (1778th meeting), the Security Council was rarely able to agree whether an act of aggression had been committed and, if it did agree, whether any action should be taken. In the meantime, of course, the hostilities continued. Hence, it might be useful to consider drawing up a list of rights and obligations that would in no way encroach on the system and the machinery provided for in the Charter and would be wholly without prejudice to the competence of the Security Council to determine the existence of an act of aggression under Article 39.

32. The author State's duties might include the following: to stop the aggression, to withdraw its forces, to restore the *status quo ante*, to make reparation and to guarantee non-repetition. The rights of the injured State could include the right to individual and collective self-defence, as allowed under Article 51 of the Charter, and the right to take other legitimate countermeasures, short of the use of force. In that connection, he agreed with Mr. Jagota that the Commission should not elaborate upon or attempt to define those rights, particularly in view of the commentary to article 34 of part 1 of the draft,[10] which applied with equal force to part 2. Lastly, the duties of third States would be not to recognize the results of the aggression as legal, not to assist the aggressor State and to support any collective measures taken under the Charter. Many of those rights and duties were also included in the draft convention on State responsibility prepared by Graefrath and Steiniger[11] and were listed in paragraph 53 of the report; the last two measures mentioned in that paragraph, however, should be excluded from the draft articles, as they fell within the scope of another topic under consideration by the Commission.

33. The question of "other international crimes" raised in paragraph 57 of the report, namely whether and to what extent the Commission should try to indicate the legal consequences of such crimes, was relevant because mere qualification of an act as an international crime did not mean that the legal consequences were necessarily the same as for all other international crimes. Graefrath and Steiniger had been correct in largely assimilating other international crimes to aggression, since they declared that Chapter VII of the Charter was applicable to such situations; but the Commission might also consider drawing up a list of legal consequences similar to that proposed by Mr. Jagota in connection with acts of aggression (1777th meeting, para. 8), although many of the "other international crimes" might not involve a "victim" State. As a minimum, it should be clear that the injured State could not do more than take protective measures and that, in the absence of United Nations sanctions, third States should also refrain from taking affirmative steps in respect of the author State. That also

[10] *Yearbook . . . 1980*, vol. II (Part Two), pp. 52 *et seq.*

[11] See 1775th meeting, footnote 6.

applied to what the Special Rapporteur described in paragraph 70 of the report as "borderline" cases of aggression. Lastly, it should be specified that the third common element, mentioned in paragraph 61, would not be applicable in respect of any international crime without the sanction of a United Nations organ.

34. In the matter of international delicts, the question of which State or States could be deemed to have been injured was influenced to a considerable extent by the content of the new legal relationships. The distinction drawn by the Special Rapporteur between "normal" situations, covered by what was referred to in paragraph 114 as the "main rule", and situations involving objective régimes, covered by the exceptions to the main rule discussed in paragraph 115, was in his opinion the most outstanding feature of the fourth report and would be very helpful in preparing part 2 of the draft. Regardless of whether the term "objective régime" eventually found its way into the draft articles, the concept was a useful one and could well be employed in the commentary in order to explain the general principles outlined in the Special Rapporteur's summing-up. Such an explanation could usefully be added to the points made in paragraphs 99–100, which the Special Rapporteur should be encouraged to develop further. The system outlined in paragraphs 112–115 for determining the injured State and the circumstances in which other States could be regarded as interested and for establishing that collective measures were justified was equally useful and should be pursued and refined further.

35. Generally speaking, he agreed with the analysis of the content of the new legal relationships and the various limitations on the use of reprisals and concurred with the view that the subject of protection of human rights in armed conflicts should not be dealt with separately in part 2. On the other hand, he was not entirely convinced by the statement in paragraph 89 that reprisals in breach of other objective régimes relating to human rights, although obviously inadmissible, were already covered by draft article 4.[12] Unfortunately, it was by no means clear that all human rights violations were encompassed by article 4, and a separate provision precluding reprisals which violated human rights might serve a useful purpose.

36. In the case of international delicts, two questions arose in connection with a possible "phasing" in the content of the new legal relationships. Could the author State avoid reprisals by offering to submit to a dispute-settlement procedure? Could the injured State engage in reprisals only if it simultaneously offered to submit the dispute to a settlement procedure? He took Mr. Barboza's point (1778th meeting) that the phasing obligation was not always appropriate, since a State might be forced to take conservatory measures, and that the principle needed to be further refined, but tended to agree with the Special Rapporteur that self-help should be disallowed, or at least suspended, if the alleged author State agreed to submit the matter to an impartial body. Such a body could order interim measures to protect the injured State, and the latter could always suspend the operation of a treaty or, where applicable, invoke the doctrine of reciprocity.

37. Lastly, it was to be hoped that the summing-up section of the report (paras. 122–130) would be presented in the form of draft articles. He agreed with most members that the Commission would be well advised to begin with the simplest case, that of the "normal" situation involving a bilateral international delict, and work progressively through international delicts involving objective régimes until it finally reached the question of international crimes, which, as he had suggested at the outset, could most appropriately be dealt with in terms of international obligations *erga omnes*.

38. Mr. KOROMA said that, in the light of Mr. Ogiso's remarks, he wished to point out that the question of *locus standi* under multilateral régimes was an important one and required further elucidation if certain wrongful acts were not to go unpunished. Whether the interests of a State had been injured by an act of another State and whether the act of the author State defeated the primary purpose and object of the multilateral régime were matters of fact which would have to be determined in each particular instance. In the case of a trusteeship agreement, for example, not only the trustees' interests were involved; the international community as a whole had an interest in ensuring the maintenance of the régime. To his mind, the link between the multilateral régime and the wrongful act was not adequately dealt with in the report and should be discussed in greater depth.

39. As to the distinction between armed reprisals and self-defence drawn by Mr. Ogiso, the Commission's report should make it completely clear that armed reprisals were categorically prohibited under modern international law and could not be resorted to even in the name of self-defence.

40. Lastly, the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) enumerated the acts which were qualified as acts of aggression, but left the ultimate decision to the Security Council. If the Security Council was unable to decide, the Definition was hardly to blame. For his part, he considered the Definition to be a good one and deprecated any tendency to belittle or deride it.

41. Mr. CALERO RODRIGUES said that he wished to correct an erroneous impression he might have conveyed earlier (1772nd meeting). He was by no means opposed to the Commission dealing with the question of international crimes and had suggested that the consequences of international delicts should be dealt with first merely to simplify and facilitate the work that lay ahead. Indeed, unlike the Special Rapporteur, he thought that acts of aggression should at least be mentioned in the draft articles.

The meeting rose at 12.45 p.m.

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