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Summary record of the 1780th meeting

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1780th MEETING

Monday, 13 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, 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 (*concluded*)

1. Mr. MALEK said that he wished first to make some general comments on the Commission's method of examining the topics entrusted to it. The Commission had been studying the topic of State responsibility since 1969, and he thought that a "procedural" reform might be necessary to enable it to do more work, faster and even better. During the eight weeks allotted to it at each session to begin or continue consideration of half a dozen topics, the Commission made every effort to be able eventually to submit to the General Assembly, after a certain number of years, a set of draft articles on each topic which reflected the often widely different views of States. Year after year, despite the difficulties of that task, the Commission went to work firmly intending to make the desired progress in the study of each of the topics before it. Thus it had to change six or seven times from one topic to another in approximately eight weeks, taking up a new report each time.

2. The reports submitted to the Commission were always of the highest scientific standard and some were very voluminous. Each member of the Commission had to study them carefully in order to make his comments. The reports submitted during any particular session differed not only in their purpose, but also in the way they were conceived, written and presented, in the terms used and in the scientific and philosophical approach of their

authors. They also differed as to the language in which they were originally drafted. He thought it might be high time to think seriously about setting clear, specific and even rigorous conditions for the date of distribution and the date of consideration of each report. In spite of the difficulties inherent in the situation, it could certainly be affirmed that the Special Rapporteur system provided for in the Commission's Statute and applied without interruption from the beginning had proved most effective and should not be changed or replaced. The success of the Commission's work was undeniably based on the numerous reports of the Special Rapporteurs.

3. In his opinion, the report under consideration (A/CN.4/366 and Add.1) was certainly of very high quality, even though he had had difficulty in understanding some of the problems it raised. The reason why he was one of the last to speak on that report was that he had thought it necessary to proceed with caution and had preferred first to know the opinions of the other members of the Commission. Even so, the questions raised in the report were too complex for him to be able to take a firm position on them yet. They required personal research by members of the Commission, for which there had not been enough time since the report had been circulated. Most of those questions had been discussed by other members of the Commission, so he would comment only on the problems he thought it essential to solve before the draft articles could be formulated. He would state his views on other important problems when further draft articles had been submitted to the Commission.

4. At the previous session, he had said he did not understand why draft article 6, as proposed in the third report (A/CN.4/354 and Add.1 and 2),⁵ was limited to the consequences it referred to, although it dealt with the legal consequences of a wrongful act characterized as an international crime, and had asked whether the Special Rapporteur planned to take account of other consequences in another provision of the draft.⁶ Those questions had been answered in the report under consideration, in which the Special Rapporteur dealt at length with international crimes, including aggression, and stressed, in paragraph 51, that the *erga omnes* character of international crimes was in no way a decisive factor in the distinction between the legal consequences of that category of crimes and the legal consequences of an international delict. Noting that it was very unlikely that all international crimes would entail the same legal consequences, the Special Rapporteur suggested the establishment of a minimum common element applicable to all crimes and based on the solidarity of all States other than the author State; that was the subject-matter of draft article 6. The Special Rapporteur had pointed out that the legal consequences of aggression were stated in the United Nations Charter, which although it dealt with them in a way that was open to different interpretations, nevertheless clearly established the inherent right of self-defence as one of those consequences.

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.

⁶ *Yearbook* . . . 1982, vol. I, p. 207, 1732nd meeting, para. 9.

5. The Special Rapporteur considered that the existing procedure for the implementation of State responsibility resulting from aggression belonged in part 3 of the draft; but he himself had doubts about the extent to which part 3 could cover that procedure, because the Special Rapporteur appeared to think that part 2 should not refer to the legal consequences of aggression, which were dealt with in the Charter, or for that matter to most other legal consequences not dealt with in the Charter. In paragraph 53 of the report, the Special Rapporteur had drawn on a document of great theoretical importance to identify a number of questions, most of which would not, in his opinion, come within the scope of the draft articles, namely the termination of bilateral treaties concluded between the aggressor State and the victim State, the suspension of other bilateral and multilateral treaties, the sequestration of property of the aggressor State, internment of its nationals, guarantees against repetition of aggression, reparation of all damage, non-recognition of any result of aggression as legal, permanent and universal criminal jurisdiction over persons responsible for the planning or commission of aggression and the duty to extradite such persons on request to the victim State. In the Special Rapporteur's opinion, the topic related not so much to the internationally wrongful act of aggression as to the resulting state of war. Some of the questions mentioned by the Special Rapporteur might be dealt with in the draft Code of Offences against the Peace and Security of Mankind currently under consideration;⁷ part 2 of the draft would cover only the questions of guarantees against repetition of aggression, reparation of damage and non-recognition of the result of an internationally wrongful act as legal, which in his view were not confined to aggression or to international crimes in general.

6. Like many other members of the Commission, he had great difficulty in agreeing with the Special Rapporteur's conclusion, in paragraph 55, that there was no place in part 2 of the draft for an article or articles on the legal consequences of acts of aggression. During the discussion it had been said that part 2 of the draft could not deal with the legal consequences of aggression unless the Commission received express instructions from the General Assembly. He did not know whether the Commission had been given instructions to deal with aggression in part 1 or not to deal with it in part 2. In any event, he considered that article 19 of part 1 made no substantive distinction between the international crimes, including aggression, which it was intended to cover. Thus, although the legal consequences of aggression, including the right of self-defence, were dealt with in the United Nations Charter, it was difficult to see why they should not be covered in part 2. Some people seemed to think that the Charter stood in the way of all progress. Although it referred to the right of self-defence, it threw no light on the conditions for the exercise of that right, which had consequently become a means of protection available to the aggressor. Many General Assembly resolutions, adopted by consensus,

dealt with the fundamental principles of international law embodied in the Charter, with a view to defining their meaning and determining their content. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁸ was a significant example.

7. For more than half a century, there had been stubborn opposition to any definition of the notion of aggression, which, like that of self-defence, was dealt with in the Charter. Aggression had been regarded as a concept in itself, as a philosophical idea not susceptible of definition. It had been argued that a definition of aggression would be useless and that it would entail a dangerous interpretation of the Charter. Yet aggression had been given a definition⁹ which, whatever its shortcomings, might one day prove very useful. One of its major defects was precisely the fact that it took account of the right of self-defence only by reference to the relevant provisions of the Charter. In any event, that definition had never been an obstacle to the application of the Charter, in particular the provisions relating to the prohibition of the use of force and to the machinery for the implementation of the system of collective security established by the Charter.

8. Although he proposed to exclude the legal consequences of aggression from part 2 of the draft, the Special Rapporteur was in favour of including the legal consequences of international crimes other than aggression; that category of crimes was covered by draft article 6, as submitted in the third report. In paragraph 57 of the fourth report, the Special Rapporteur had inquired to what extent the Commission should try to determine the legal consequences of those other international crimes and to define the content of the new rights and obligations of States other than the author State. His categorization of international crimes was not based on contemporary international criminal law, which derived as much from the international agreements concluded since the Second World War as from subsequent progress made at the international level in the punishment of serious crimes under international law, namely crimes against peace, war crimes and crimes against humanity; it was based, rather, on article 19 of part 1, which besides covering aggression, in connection with the maintenance of international peace and security, related to a number of fields in which a serious breach of an international obligation of essential importance for any one of those fields was characterized as an international crime. Those fields included the safeguarding of the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. He himself saw no major objection to determining the legal consequences of international crimes which fell within those fields, so long as the

⁷ See 1755th meeting, para. 10.

⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

enumeration was not exhaustive. The common elements of such crimes, which the Special Rapporteur identified in paragraphs 59–62, might serve as a basis for appropriate provisions in part 2.

9. He fully shared the view expressed (1773rd meeting) by Mr. Flitan and Mr. Reuter and supported with certain reservations by Mr. Barboza (1777th meeting) that an attempt to commit an international crime should have the same legal consequences as the crime itself. It should be remembered that the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity¹⁰ assimilated to the crimes to which it applied complicity or participation in, and direct incitement to, their commission. That Convention also applied to the representatives of any State authority who tolerated the commission of any of those crimes. The same was true of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹¹

10. If article 19 of part 1 was taken as a basis for identification of the international crimes whose legal consequences were to be determined in part 2, the scope of part 2 would be considerably reduced, even if it included the legal consequences of aggression. For example, in regard to the safeguarding of the human being, which was mentioned in article 19, part 2 would deal only with the legal consequences of *apartheid*, slavery and genocide. He hoped that *apartheid* would disappear completely in the near future, but did not know how many countries still practised or tolerated slavery; it was gratifying to note that, since the end of the Second World War, the crime of genocide had not been committed. While the many crimes against peace could be counted, crimes against humanity could not: untold numbers of them were committed every day throughout the world. But all the crimes in that category would not be covered by part 2 if it was governed by article 19, which listed only a few of them. The concept of a crime against humanity was well established in contemporary international law; it included *apartheid* and genocide, which were particularly serious cases, as stated in quite a number of relatively recent international instruments. For example, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provided that no statutory limitation applied to crimes against humanity as defined in the Charter of the Nürnberg International Military Tribunal and confirmed by General Assembly resolutions 3(I) and 95(I), to eviction by armed attack or occupation, to inhuman acts resulting from the policy of *apartheid*, or to the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. That definition was, of course, defective because it had been politically influenced, but it clearly showed that *apartheid* and genocide were regarded as falling within the concept of a crime against humanity.

11. He did not see how the draft articles on State responsibility could omit crimes against humanity as a

separate concept when, together with other international crimes of equal gravity, they formed the basis for the draft Code of Offences against the Peace and Security of Mankind which the Commission was considering. By what reasoning could an odious crime be defined differently in legal texts prepared by the same deliberative body? It had been stated, rather enigmatically, that the two drafts did not have the same purpose and that the draft now under consideration related to the responsibility of States, whereas the draft code of offences would deal only with the responsibility of individuals. But he doubted whether the draft code could remain limited to the responsibility of individuals; and he did not see why the definition of a crime should differ according to the subject of law to which it applied. How would the crime of genocide be defined otherwise than in the Convention on the Prevention and Punishment of the Crime of Genocide if that Convention was amended so as to engage only the responsibility of States? In that connection, it should be borne in mind that serious international crimes entailed both national and international responsibility, for States and for individuals. They were mainly "State crimes", but State crimes committed only by individuals. They could not be committed by individuals without orders from or the tolerance of a State, or by a State without the collaboration or assistance of an individual.

12. If it was true, as Mr. Ushakov had said (1776th meeting), that draft article 19 was based on existing international law and in no way involved progressive development, why did that provision deal with the crimes it was intended to cover in such a way that it might be questioned whether there really was a category of war crimes and crimes against humanity, which was the main subject-matter of contemporary punitive international law?

13. Referring to Mr. Reuter's comments (1771st meeting), he observed that article 19 had been formally accepted but not finally adopted by the Commission. He doubted whether it could be said that nothing was yet known about international crimes except that they were not subject to statutory limitations. That exception had been made only because serious international crimes were sufficiently well known, both in technical and in historical terms; it followed from their very nature and had been made law as a result of certain *de facto* situations. The revolt of world public opinion against one country's idea that the statutory limitations provided for in its internal law applied to international crimes committed during the Second World War had been the decisive factor in confirming the principle that such crimes should never go unpunished. The world had suffered enough from international crimes to know their characteristics and how to prevent and punish them. Although the formulation of laws by the international community still involved many more difficulties than legislation at the national level, it did not follow that what was possible at one level was impossible at the other. The international community could not wait until there was a consensus to take action against the substantial increase

¹⁰ United Nations, *Treaty Series*, vol. 754, p. 73.

¹¹ *Ibid.*, vol. 78, p. 277.

in international crime that had occurred since the Second World War. It had been suggested that the Commission should begin by solving the easiest problems and then deal with the others only by stages. He would prefer the two categories of problems to be dealt with simultaneously for fear that, when the time came to solve the major problems, it might be too late to solve anything at all.

14. He agreed with Mr. Reuter (1778th meeting) that the draft articles could deal with acts of aggression provided that identification of such acts was not left to the discretion of States but entrusted to an independent authority. That position was based on distrust of States acting individually and on doubts about the effectiveness of the system of collective security established by the Charter. Perhaps the Special Rapporteur could indicate whether he intended to include guarantees of that kind in part 3 of the draft.

15. Part 2 of the draft should have as its basis the internationally wrongful act as contemplated in part 1; it should take account of the most serious international crimes, including aggression. Article 19 should be amended and adapted to contemporary international law, which classed crimes against humanity as serious international crimes. The right of self-defence, which was the basic consequence of aggression, should be the subject of a separate provision in part 2 defining its scope and limitations, if only for guidance. The use of force as a preventive measure in the exercise of the right of self-defence should be regarded as an abuse of that right having the same legal consequences as an act of aggression. Lastly, the principle of proportionality should be formulated as clearly and rigorously as possible. The Special Rapporteur was probably in the best position to propose solutions to all those problems in the form of draft articles.

16. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur's fourth report (A/CN.4/366 and Add.1) testified, like the previous reports, to its author's wide knowledge of the subject. But the abstract nature of much of the document made it difficult to understand and necessitated several readings. Moreover, the Spanish version at least contained many neologisms.

17. The first question that arose was the purpose of the report. As several members had remarked, to go back on the decisions taken when preparing the first six draft articles would be a retrograde step. In its report to the General Assembly on its thirty-second session, the Commission had recognized that in drafting the articles of part 2 it should proceed on the basis of the articles of part 1 adopted in first reading.¹² Of course, as several members of the Commission had emphasized, those articles had only been adopted provisionally and the Commission was free not only to revise and amend them, but even to appoint a new special rapporteur who would go over the work again from the beginning. It was nevertheless perfectly clear that the Commission had

decided, with the General Assembly's approval, that part 2 of the draft, and possibly part 3, should be based exclusively on part 1. The Special Rapporteur, motivated no doubt by excessive intellectual honesty, had endeavoured to show that part 2, dealing with the legal consequences of a wrongful act, was much more difficult than part 1. But it was quite natural to try to determine those consequences, since every breach of an obligation must have a corresponding sanction.

18. On the question of aggression, he wondered whether the Commission could go much further than the definition adopted by the General Assembly in 1974 without a review of the Charter. He did not agree with Mr. Reuter (1778th meeting) that the task of determining when an act of aggression had taken place would be better left to the Security Council than to States. No doubt that would suit the countries which had a right of veto in the Security Council, but it would not satisfy small countries. If the United Nations was no longer to be founded on the legal inequality of States, the Charter must be revised. Great discretion was exercised in speaking of aggression, to which the terms reprisals or countermeasures were often applied. It was stated that reprisals or countermeasures should be proportional to the wrongful act which warranted them. The difficulties began when it was attempted to define the notion of a countermeasure. It was supposed to be a measure taken to counteract action which had injured the interests of whoever took the countermeasure in order to defend themselves or to obtain reparation or satisfaction. The difficulties increased when it had to be determined what "proportionality" was and whether it was the injured State which should assess it. Quite recently a State had considered itself entitled to expel seven officials of another State following the expulsion of only one of its own officials by that State.

19. He therefore stressed the necessity of adapting the Charter to the needs of the international community, rather than to those of the "little entente" which divided the world in two; but that would be a difficult task and was outside the Commission's terms of reference.

20. Some speakers had said that the draft articles related only to individual responsibility resulting from an act of aggression. But it had been clearly established during work on part 1 of the draft that punishment of the leaders of a State which waged a war of aggression or organized genocide did not discharge that State from the responsibility it had incurred by the wrongful act. When determining the sanctions to be applied, the Commission should refer to article 19 of part 1, in which it had categorized international crimes and international delicts. The concept of an international crime presupposed the possibility of applying measures of prevention and reparation simultaneously. Given the structure of contemporary international law, the concept of responsibility was moving more towards reparation than towards sanctions. Not only did sanctions have to be defined, but they had to be proportional to the wrongful acts which gave rise to them.

¹² *Yearbook* . . . 1980, vol. II (Part Two), p. 62, para. 41.

21. Lastly, the Commission should not take up part 3 of the draft before it had dealt with part 2. As to the form of the draft, a recommendation could only be made when the Commission submitted a definitive set of draft articles to the General Assembly.

22. Mr. RIPHAGEN (Special Rapporteur) said that the debate had been extremely rich in both instructive and constructive matter. Not all the guidance he had received pointed in the same direction, but the contours of a possible consensus had become a little clearer. Some mild reproaches had been addressed to him for not incorporating any draft articles in his fourth report. There had been two reasons for that omission: first, the practical reason that the Drafting Committee had so far adopted only one of the draft articles submitted in the second and third reports and referred to it by the Commission, and was unlikely to do much more in that direction at the present session; second, the broader reason that the issue appeared to call for general consideration beyond, as Mr. Quentin-Baxter (1778th meeting) had put it, the bare bones of a legislative text. The fact that the fourth report had given rise to such a wealth of response seemed *a posteriori* to justify that approach, but in any event he undertook to include some draft articles in his next report to the Commission.

23. All speakers had agreed that the task before the Commission was a formidable one. The topic of State responsibility, which covered virtually the whole field of international law, presented an awe-inspiring challenge. Most speakers had appeared to believe that the Commission should squarely face that challenge and, for the time being at least, continue to work along the lines of preparing a draft convention. Some speakers, it was true, such as Mr. Reuter, Mr. Calero Rodrigues, Sir Ian Sinclair and Mr. McCaffrey, had been more hesitant than others, but the general opinion seemed to be that the attempt should be made, especially as the General Assembly had expressly asked for draft articles. Whether those articles were eventually embodied in a convention or not, their mere existence would inevitably influence future State practice and they would serve as a reference text for international, judicial and other organs.

24. On the question of the links between parts 1, 2 and 3, he had never suggested that part 3 should be drafted before part 2; indeed, his fourth report already contained some proposals for inclusion in part 2. Most speakers had made some mention of part 3, the attitude towards it adopted by Mr. Ushakov being perhaps the most negative. Mr. Calero Rodrigues, Mr. Al-Qaysi, Mr. Barboza and Mr. Jagota had reserved their positions, and the remaining speakers had, in various degrees, recognized the importance of part 3 for the preparation of some articles in part 2. Mr. Mahiou and Mr. Flitan had suggested that different machinery for implementation might be devised for different cases. He favoured that idea and shared the view expressed by a number of speakers that the Commission should go further than Graefrath and Steiniger had done in articles 11 and

12 of their draft convention on State responsibility.¹³

25. No general tendency had emerged on the question of the sequence to be followed in preparing part 2. Mr. Reuter, Mr. Calero Rodrigues, Mr. Laclata Muñoz and several other members had expressed themselves in favour of starting with the “normal” situation referred to in paragraph 122 of the report and then proceeding to the more difficult questions of reprisals and international crimes. Mr. Ushakov and Mr. Flitan had spoken in favour of starting with international crimes, and several other speakers had been willing to accept any sequence provided that international crimes were not omitted altogether. In his view, the lack of a consensus on that point was not a major obstacle to progress, since it was clear that all aspects would have to be dealt with, whatever the sequence chosen.

26. In the early part of the discussion there had appeared to be a sharp divergence of views on whether an article or articles on the legal consequences of aggression should or should not be included in part 2. In that connection, he rejected the charge of inconsistency between paragraphs 55 and 67 of the report. Paragraph 55 referred *expressis verbis* only to aggression, while paragraph 67 was concerned with other crimes. Half way through the debate, Mr. Jagota had shown a possible way of reconciling the two views by suggesting (1777th meeting, para. 8) that part 2 might deal with the legal consequences of aggression in a general way, without going into detail. Several speakers had warned against any attempt to interfere with the régime of the United Nations Charter, while others had been less hesitant in that respect and had favoured elaborating the scope of self-defence and the circumstances in which it could be invoked. He personally continued to believe that aggression and self-defence were at the extreme frontiers of the topic of State responsibility, if not outside it altogether. Aggression was much more than a mere breach of an international obligation, and self-defence was much more than a mere legal consequence of such a breach. That view did not preclude a reference to those notions being made in part 2, but seemed to militate in favour of treating them differently from other international crimes and their legal consequences.

27. The question of “objective régimes” had been raised by many speakers. That term should probably not appear in the draft articles and, indeed, did not appear in paragraphs 124–125 of the report, where an attempt was made to define such régimes. The history of the term was as Mr. Reuter had described it (1771st meeting), but the context in the present case was altogether different, the point at issue being the admissibility or otherwise of reprisals taken by a party to an objective régime. The fact that the Commission had rejected the concept in the very different context of the law of treaties did not, therefore, appear to be decisive. Some speakers had seemed inclined to accept the concept in the context of identification of the injured State and the admissibility of

¹³ See 1775th meeting, footnote 6.

particular reprisals; others had expressed some doubts about it; and yet others had rejected the concept altogether. Some speakers had said that the special position of such régimes could be covered by article 3 as proposed in the third report (A/CN.4/354 and Add.1 and 2).¹⁴ In his view, the translation of paragraphs 124–125 of the fourth report into draft articles might help to reduce those differences of opinion.

28. With regard to the question of reprisals, from his preliminary report¹⁵ onwards he had distinguished between reprisals, which were internationally wrongful acts, and retortion measures, which were not prohibited by international law. Reprisals were thus synonymous with countermeasures as that term was used in article 30 of part 1; they were measures aimed at forcing another State to fulfil its obligations. Several speakers had quite rightly advocated caution regarding the admissibility of reprisals, and Mr. Reuter doubted whether part 2 should say anything at all about armed reprisals. The problem as a whole was connected with that of part 3 and with the question of objective régimes, and he fully intended to look at it again, taking particular account of the remarks made by Mr. Barboza (1778th meeting) and Mr. McCaffrey (1779th meeting) to the effect that the fourth report omitted to deal with measures of a “conservatory” nature.

29. Referring to individual comments by members, he agreed that the first sentence of paragraph 127 of his fourth report, reading “It would seem advisable also to reserve the special régimes of (a) diplomatic law, and (b) belligerent reprisals”, was not entirely clear. That sentence was not meant to exclude the legal consequences of the violation of every rule of diplomatic law from the scope of part 2 since, as had rightly been said, it was essential to cover reparation and other legal consequences in the draft. Rather, his intention had been to convey the idea of inadmissibility of certain reprisals, in particular those involving violation of diplomatic immunity.

30. Several members had referred to the relationship between the topic of State responsibility and the draft Code of Offences against the Peace and Security of Mankind—a relationship which depended on whether the code would deal with the criminal responsibility of States as such. In his view, irrespective of how such responsibility was qualified, it was essentially a matter of the legal consequences of an internationally wrongful act by a State, and that in turn was essentially a matter between States. He agreed, however, that provided there was co-ordination it was more or less irrelevant under which of the two topics the matter was treated.

31. Proportionality had again been the subject of much comment and he continued to think that something should be said about it in part 2 of the draft. Even the Definition of Aggression¹⁶ left it open to the Security

Council not to treat as aggression acts covered by the Definition if, for instance, they were not of sufficient gravity, which was a matter of proportionality. In any event, the relevant article had been referred to the Drafting Committee and could be discussed there.

32. He agreed with Mr. Ni (1777th meeting) on the need to pay more attention to reparation. As suggested in paragraph 111 of the fourth report, members might wish to refer in that connection to articles 4 and 5 as proposed in the second report,¹⁷ both of which had also been referred to the Drafting Committee.

33. Mr. Balanda had asked (1776th meeting) whether the rule of proportionality should be valid in the case postulated in the second sentence of paragraph 63, which read: “It is of course also conceivable that such countermeasures might then go beyond those mentioned in paragraph 61 above and encompass measures otherwise specifically prohibited by other rules of international law . . .” It had not been his intention to deal with proportionality in that paragraph, the sole purpose of which was to point out that, in the event of an international crime, the international community could conceivably also indicate what measures should be taken. It was also conceivable, in principle, that some element of proportionality would still be present.

34. Mr. Jagota had asked (1777th meeting) whether, in the event of the breakdown of a régime, as envisaged in paragraph 130, the rule of quantitative proportionality would be applicable. The answer to that question was in the affirmative. It should also be noted that the paragraph contained an error: the reference to “the regional objective régime” should be amended to read “the objective régime”.

35. Although Sir Ian Sinclair (*ibid.*) had expressed doubts about the duty to support countermeasures, he would presumably not disagree with the last sentence of paragraph 62, which read: “In short, the duty to support countermeasures is valid only within the framework of some form of international decision-making machinery.” Sir Ian had also disagreed with the first sentence of paragraph 125, reading: “In the case mentioned in paragraph 124, all other States parties to the multilateral treaty are considered to be injured States in respect of the breach of those obligations by one of them.” It should be borne in mind, however, that that paragraph referred solely to the three cases of objective régimes referred to in paragraph 124.

36. He fully agreed with Mr. Mahiou (1778th meeting) that there was no analogy between the topic of State responsibility and the internal law of torts; that, indeed, was the point which paragraph 113 of the report sought to make. Referring to paragraph 39 of the report, and in particular to the passage reading:

. . . No State can accept demands and countermeasures of another State based on the establishment by the other State alone of the existence of an internationally wrongful act of the first-mentioned State. No State can accept either that its demands and countermeasures in

¹⁴ See 1771st meeting, para. 2.

¹⁵ *Yearbook* . . . 1980, vol. II (Part One), pp. 123 *et seq.*, document A/CN.4/330, paras. 79–96.

¹⁶ See footnote 9 above.

¹⁷ *Yearbook* . . . 1981, vol. II (Part One), p. 101, document A/CN.4/344, para. 164. See also 1771st meeting, para. 2.

relation to another State should be based only on the agreement of the other State as to the existence of an internationally wrongful act of that other State.

Mr. Mahiou had asked whether the agreement of the other State would be invalid. That, however, was not really the point, which was that it was difficult to accept a unilateral determination of a breach by another State, or to accept that nothing could happen unless States agreed that there had been an internationally wrongful act. That was why the whole question of settlement of disputes as relating to the breach of a primary obligation was of fundamental importance.

37. He agreed with Sir Ian Sinclair and Mr. McCaffrey that the terms “breach *erga omnes*” and “obligation *erga omnes*” were in fact misnomers and that further elaboration of the notion of *erga omnes* was required.

38. Mr. Malek had referred to certain shortcomings in article 19 of part 1, particularly in regard to crimes against humanity. That point could be reconsidered when the Commission came to the second reading of part 1 of the draft.

39. Mr. Díaz González had suggested that the Security Council was not well suited to the task of determining effects and legal consequences. There again, members might wish to discuss the point when the Commission came to consider the relevant draft articles.

40. The CHAIRMAN, noting that the Commission had concluded consideration of item 1 of its agenda, said that the Special Rapporteur and the Drafting Committee would take due note of the views expressed during the debate.

*It was so agreed.*¹⁸

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)* (A/CN.4/359 and Add.1,¹⁹ A/CN.4/372 and Add.1 and 2,²⁰ A/CN.4/374 and Add.1-4,²¹ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR²² (continued)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

¹⁸ For consideration of the texts proposed by the Drafting Committee, see 1805th meeting, paras. 26-56, and 1806th meeting, paras. 29-61.

* Resumed from the 1774th meeting.

¹⁹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

²⁰ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

²¹ *Idem*.

²² For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)²³ (continued)

41. The CHAIRMAN reminded members that the Special Rapporteur had introduced his fourth report (A/CN.4/374 and Add.1-4) at the 1774th meeting. He invited comments on articles 15 to 19 as contained in section II.A of the report.

42. Mr. FLITAN warmly congratulated the Special Rapporteur on his fourth report (A/CN.4/374 and Add.1-4) and on his excellent introductory statement. He himself did not think that the topic entrusted to Mr. Yankov was any less important than the topics considered earlier; his four reports made a substantial contribution to the codification and progressive development of international law, and the draft articles under consideration could do much to promote co-operation between States.

43. Since he had been unable to take part in the Commission's discussions on the topic at the previous session, he intended to make a number of comments. He did not share the view expressed by several representatives in the Sixth Committee of the General Assembly that the topic under consideration was “one of the areas of international law least in need of immediate attention or codification” (A/CN.4/L.352, para. 188). Most representatives had welcomed the Commission's work on the topic and wished to see it continue that work on a priority basis (*ibid.*, para. 189). It was the Commission's duty to comply with the Sixth Committee's wishes. There was no basis for the view that the draft articles were “excessively detailed in places” (*ibid.*, para. 190), because the topic warranted thorough study and the Special Rapporteur had to deal with all the questions that arose in connection with his work.

44. The Special Rapporteur and the members of the Commission should give careful consideration to the question of the scope of the draft articles, which was discussed in paragraphs 11 and 12 of the fourth report. He himself shared a view expressed in the Sixth Committee that interest in the draft articles would be heightened if they covered couriers and bags used for official purposes by international organizations. Although he was not proposing that the status of couriers and bags used by international organizations should be assimilated to that of couriers and bags used by States, he did not think that they should be excluded from the draft articles. That was not a question to be decided by the Drafting Committee, but by the Commission itself.

45. Although he fully agreed with the explanations concerning the term “diplomatic courier” which the Special Rapporteur had given at the beginning of paragraph 18 of his report, he thought it might be necessary to include a special provision specifying the meaning of that term. The Special Rapporteur's suggestion, in paragraph 19, that the commentary to the draft articles should indicate when the diplomatic

²³ For the texts, see 1774th meeting, para. 1.

courier's functions ended, was not satisfactory. That point should be made clear in the text of the draft articles. He observed that it was because of a drafting problem that one representative in the Sixth Committee had expressed doubts about the need for article 14, paragraph 2 (*ibid.*, para. 209). The wording of that provision should be amended to make it clear that the sending State had an option, not an obligation, to replace a diplomatic courier declared *persona non grata*.

46. Draft article 9 had already been referred to the Drafting Committee, but it should be more carefully considered by the Commission. His own country had no experience of the practice of two or more States appointing the same person as a diplomatic courier. In his opinion, that possibility was in conflict with the importance attaching to the inviolability of the diplomatic courier and, for the few States which engaged in the practice, it represented a kind of abandonment of their sovereignty. The article should therefore be deleted. At its previous session, moreover, the Commission had agreed not to include in its draft articles provisions which would not be generally applicable.

47. The other draft articles were useful, but draft article 18 could give the impression that it overlapped with draft article 4. The Commission should therefore examine that provision more closely to see whether it was really necessary. Another question that arose in regard to article 18 was that of who decided whether it was necessary to facilitate the communications of the diplomatic courier. The words "when necessary" called for some clarification. He proposed that they should be replaced by the words "if the diplomatic courier so requests". In the French text of draft article 19, the word *aident* should be replaced by the words *doivent aider*; a more satisfactory formulation than the words "in connection with the performance of his official functions" should also be found. Finally, he suggested that the last phrase of draft article 17, "or when returning to the sending State", should be deleted. He reserved the right to speak again when the addenda to the fourth report had been circulated in French.

The meeting rose at 6.05 p.m.

1781st MEETING

Tuesday, 14 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1-4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*continued*)

1. Mr. CALERO RODRIGUES said that he agreed in principle with the course adopted by the Special Rapporteur and considered it very useful to set forth in draft article 15 the principle that the receiving State and the transit State should accord general facilities to the diplomatic courier. In regard to draft article 17, however, he wondered whether it would not be advisable to set some limitation on the freedom of movement. As it was now worded, the article accorded virtually the same freedom of movement as that accorded to diplomats under article 26 of the Vienna Convention on Diplomatic Relations; but diplomats generally had a wider mission and should thus have wider freedom of movement than the courier.

2. As to draft article 18, he saw no reason to confine the missions with which the courier could communicate to those situated in the territory of the receiving or transit States. There might be cases in which, for practical reasons, the courier should be in communication with one of his country's missions in a country other than the receiving or transit States. That possibility could be provided for by ending with the words "and its missions" and deleting the last part of the article. He did not agree with Mr. Flitan (1780th meeting) that article 18 duplicated the terms of article 4.

3. Lastly, he noted that whereas article 18 provided that facilities for communication should be accorded "when necessary", article 19 provided that facilities for accommodation should be granted by the receiving State and the transit State "when requested". As the intent was the same in both cases, the terms in question should be aligned.

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

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

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁵ For the texts, see 1774th meeting, para. 1.