Document:-
A/CN.4/SR.1858

Summary record of the 1858th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

out, draft article 6 concerned the use of the waters of an international watercourse, rather than the use of the international watercourse itself. Paragraph 1 of that article should begin with the words "An international watercourse riparian State" and not "A watercourse State". Furthermore, the word "reasonable" used in that same provision should be replaced by the word "fair".

41. With regard to the drainage basin concept, account must be taken of the modern concept of human solidarity and priority must be accorded to populations whose survival, rather than simply their economic development, depended on certain uses of the waters of international watercourses.

42. In draft article 7, which also referred to the concepts of what was reasonable and equitable, the word "riparian" should be inserted before the word "States". It also appeared obvious that, in order to be "developed", the waters of an international watercourse must be "used and shared". The mere fact that such waters lay within the territory of a riparian State indicated that they must be shared. Like several other draft articles, article 7 was couched in terms which were out of place in a legal instrument in that they expressed wishes or declarations of intent.

The meeting rose at 5.55 p.m.

1858th MEETING

Tuesday, 10 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Jacovides, 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. Thiam, Mr. Ushakov.

State responsibility (A/CN.4/366 and Add.1,[1] A/CN.4/380,[2] A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf. Room Doc.5)

[Agenda item 2]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

FIFTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4]

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on the content, forms and degrees of international responsibility (A/CN.4/380), as well as draft articles 1 to 16 contained therein, which read:

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

Article 2

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongfnl act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles 4 and 12, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

For the purposes of the present articles, "injured State" means:

(*a*) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(*b*) if the internationally wrongful act constitutes a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(*c*) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(*d*) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(i) the obligation was stipulated in its favour; or

(ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or

(iii) the obligation was stipulated for the protection of collective interests of the States parties; or

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(*e*) if the internationally wrongful act constitutes an international crime, all other States.

---

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

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] 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.*

[4] For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

Article 6

1. The injured State may require the State which has committed an internationally wrongful act to:

(*a*) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(*b*) apply such remedies as are provided for in its internal law; and

(*c*) subject to article 7, re-establish the situation as it existed before the act; and

(*d*) provide appropriate guarantees against repetition of the act.

2. To the extent that it is materially impossible to act in conformity with paragraph 1 (*c*), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Article 7

If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State, within its jurisdiction, to aliens, whether natural or juridical persons, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Article 8

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.

Article 9

1. Subject to articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its other obligations towards the State which has committed the internationally wrongful act.

2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.

Article 10

1. No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

2. Paragraph 1 does not apply to:

(*a*) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;

(*b*) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.

Article 11

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(*a*) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or

(*b*) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or

(*c*) such obligations are stipulated for the protection of individual persons irrespective of their nationality.

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (*a*) and (*b*) do not apply to the extent that such decision so determines.

Article 12

Articles 8 and 9 do not apply to the suspension of obligations:

(*a*) of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff;

(*b*) or any State by virtue of a peremptory norm of general international law.

Article 13

If the internationally wrongful act committed constitutes a manifest violation of obligations arising from a multilateral treaty, which destroys the object and purpose of that treaty as a whole, article 10 and article 11, paragraph 1 (*a*) and (*b*) and paragraph 2, do not apply.

Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entalls an obligation for every other State:

(*a*) not to recognize as legal the situation created by snch crime; and

(*b*) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(*c*) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (*a*) and (*b*).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

Article 15

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.

Article 16

The provisions of the present articles shall not prejudge any question that may arise in regard to;

(*a*) the invalidity, termination and suspension of the operation of treaties;

(*b*) the rights of membership of an international organization;

(*c*) belligerent reprisals.

2. Mr. RIPHAGEN (Special Rapporteur), introducing his fifth report (A/CN.4/380), said that in all previous discussions and decisions of the Commission relating to the topic of State responsibility, it had been taken as an axiom that an internationally wrongful act created new legal relationships between States, i.e. new rights and obligations. Those new rights and obligations constituted the "legal consequences" of an internationally wrongful act, to be set out in part 2 of the draft articles on State responsibility. Draft article 1 of part 2 stated that axiom.

3. Draft article 2 stipulated the residual character of the provisions in part 2. Although the draft articles on State responsibility were intended to cover the legal consequences of any and every internationally wrongful act, whatever the source of the obligation breached and whatever the seriousness of its effects, due regard should be had for the possibility that States, when creating primary rights and obligations between themselves, might at the same time—or at some later moment before the breach occurred—determine the legal consequences, as between them, of the internationally wrongful act involved.

4. That possibility to deviate, however, was not without its limitations. While, in general, States could strengthen or weaken their rights and obligations as between themselves by providing for more or fewer legal consequences in respect of a breach of a primary obligation than what was set out in part 2, their freedom to do so was not unrestricted. Thus they could not, for example, deviate by agreement from the rule laid down in draft article 4 that the "legal consequences of an internationally wrongful act... are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security". States could not, in relations between themselves, create an obligation so strong as to entail—in disregard of the Charter of the United Nations—a legal consequence which endangered the maintenance of international peace and security.

5. On the other hand, States could, in relations *inter se* and when creating rights and obligations between themselves, determine beforehand that they would not invoke some or all of the normal legal consequences of the breach of such obligations. That point could be illustrated by supposing that a convention had been concluded along the lines of the schematic outline prepared by the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/373, annex.) Provisions like those proposed in section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline, to the effect that

> Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action

would be perfectly valid as a deviation from the normal legal consequences.

6. It had to be noted, however, that even the weakening *inter se* of primary rights and obligations between States had its limitations. There existed, in his view, rules of *jus cogens* which obliged a State to react in a certain way to an internationally wrongful act of another State, notwithstanding any arrangement between those States *inter se*, just as there were rules of *jus cogens* which obliged a State to refrain from acting in a certain way, notwithstanding the fact that an internationally wrongful act had been committed by another State.

7. At the previous session, the Commission had not reached any conclusion as to the desirability of including in the draft articles of part 2 a reference to the rules of *jus cogens* as limiting the entitlement of an injured State to react, by way of reciprocity or by way of reprisal, to an internationally wrongful act of another State, and as limiting the ability of States when creating primary rights and obligations as between themselves, to strengthen or weaken the normal legal consequences of a breach of such primary obligations.

8. As to the first point, he himself still felt that it was useful—although perhaps not absolutely essential—to refer to the limitation arising from a rule of *jus cogens*. It was reasonable to assume that a peremptory norm of general international law prohibiting certain conduct was peremptory to the extent of prohibiting such conduct even in response to an internationally wrongful act of another State—in particular an internationally wrongful act consisting of a breach of that same peremptory norm by another State. A peremptory norm of general international law would normally purport to safeguard the collective interest of the community of States or to ensure the protection of individual human beings as such, irrespective of their nationality. He drew attention in that regard to the provisions of draft article 11, paragraph 1. Specific reference to the rules of *jus cogens* was made in draft article 12, subparagraph (*b*), which specified that articles 8 and 9 (dealing with reciprocity and reprisals, respectively) did not apply to the suspension of obligations of any State by virtue of a peremptory norm of general international law.

9. The situation was somewhat different with regard to the second point, namely the deviation from the normal legal consequences by "other rules of international law relating specifically to the internationally wrongful act in question", as referred to in draft article 2. Such "other rules" would normally—though not perhaps exclusively—be of a conventional nature, in which case it would be already clear from the provisions of the 1969 Vienna Convention on the Law of Treaties that a conventional rule of that kind could not derogate from a norm of *jus cogens*. However that might be, he had considered it appropriate to introduce into the opening proviso of draft article 2 a reference to article 12, subparagraph (*b*) of which dealt with *jus cogens*.

10. Draft article 3, which, like draft articles 1 and 2, had already been adopted provisionally by the Commission, dealt with "legal consequences" which did not constitute new rights and obligations of States. In that connection, it was necessary to refer to the commentary to draft article 3. [5] Two problems arose in respect of that article. The first was whether there was any need to include therein a saving clause as to the effects of article 4 concerning the provisions and procedures of the Charter

[5] See footnote 4 above.

of the United Nations relating to the maintenance of international peace and security, and also as to the effects of the possible article 12 concerning *jus cogens*. Actually, the Commission had already provisionally answered the first part of that question in the affirmative but had left the answer to the second part in abeyance. In view of that situation, he had kept the reference to both articles 4 and 12 in the opening proviso of draft article 3. Of course, it could be argued that, since the article dealt with the application of rules of customary international law, the whole proviso was redundant.

11. The second problem in relation to draft article 3 was of a more technical kind and arose in connection with a possible final article such as draft article 16, which would exclude a number of legal consequences from the ambit of the draft articles in part 2. Should such a final article be included, article 3 might become unnecessary.

12. Turning to the normal legal consequences, namely the new legal relationships between States, it seemed logical to state, from the outset, between which States the new legal relationships would arise—in other words, to determine the "injured State" which was entitled to require from the State in breach certain conduct (reparation). It was for that purpose that the new article 5 was now proposed. When thus defining the "injured State", it was inevitable to refer to the character of the primary obligation which had been breached. Thus the first part of subparagraph (*a*) of draft article 5 dealt with the breach of a right arising from a customary rule of international law, such as the right to territorial integrity, in the context of the prohibition of the threat or use of force, or the right to respect of a State's control of its internal affairs, in the context of the prohibition of intervention. There the injured State was the "State whose right has been infringed". The second part of subparagraph (*a*) dealt with the case of "a right arising from a treaty provision for a third State". The third State in question would be the injured State if that right was infringed. That provision was useful, in view of the divergence of views regarding the status of the third State.

13. Subparagraph (*b*) of draft article 5 dealt with a more controversial matter, namely "a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal", in which case the injured State or States would be "the other State party or States parties to the dispute". Some writers claimed that compliance with some judgments, at least those of the ICJ, constituted an obligation *erga omnes*, notwithstanding the usual rule that judgments were binding only on the parties to the dispute. Actually, Article 94 of the United Nations Charter seemed to suggest that all States Members of the United Nations had an interest in compliance with the decisions of the ICJ. On that point, he believed that everything depended on the subject-matter of the dispute, and he cited as an example the decision rendered by the ICJ in a very minor frontier dispute between Belgium and the Netherlands. [6] In the hypothetical case of such a decision not being fulfilled, it was difficult to imagine any legal interest on the part of a third State in the execution of the decision. The rule set forth in subparagraph (*b*) thus appeared to be a sound one.

14. Subparagraph (*c*) related to bilateral treaties; in the event of breach by a State of an obligation arising from a bilateral treaty, the other State was clearly the injured State. Subparagraph (*d*) dealt with the more difficult case of multilateral treaties. In the event of breach by a State of an obligation arising from a multilateral treaty, every State party would not invariably be an injured State. Very often, a multilateral treaty was in the nature of a uniform rule for bilateral relations between specific States, such as the relationship between the coastal State and the flag-State in the law of the sea. There were, however, many kinds of multilateral treaties and it was necessary to determine which State was the injured State in each case. Subparagraph (*d*) (i)-(iv) set forth the various situations in which a State constituted the "injured State" in the event of the breach of a multilateral treaty. The second of those cases was taken from the provisions of the Vienna Convention on the Law of Treaties.

15. It was sometimes difficult to ascertain from the text of a multilateral treaty in favour of which State an obligation had been stipulated. That was the case, for example, with the rule in the conventions on the law of the sea which limited the right of the coastal State with regard to the drawing of straight baselines. The obligation not to draw baselines so as to cut off another State from the high seas—or from an economic zone—clearly affected not only another coastal State, but also third States, and flag-States in particular. The same would be true in regard to obligations arising from the rule governing straits which connected two parts of the high seas, or from treaty régimes governing inter-oceanic canals.

16. Subparagraph (*e*) related to international crimes; in that case, in the event of a breach by one State, all other States were injured States. The obligations in the matter were *erga omnes* and the provisions of subparagraph (*e*) were in conformity with the Commission's decisions in part 1 of the draft.

17. With regard to draft article 6 and the following articles of the draft, he would not attempt a detailed introduction but would explain the general scheme of the provisions contained in them. The first point was that there was what he would call a "sliding scale" of responses to an internationally wrongful act, starting with reparation (draft articles 6 and 7) and going on to reciprocity (draft article 8) and reprisals (draft article 9). The specific question of self-defence was dealt with in draft article 15.

18. Draft article 7 dealt with the breach of an international obligation concerning the treatment of aliens. The provision had met with some criticism when proposed at an earlier stage, [7] but since no conclusion had been reached, he had kept it in the present draft. It provided

[6] *Sovereignty over Certain Frontier Land*, Judgment of 20 June 1959, *I.C.J. Reports 1959*, p. 209.

[7] See draft article 5 as submitted in the Special Rapporteur's second report and considered by the Commission at its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), p. 144, footnote 627).

for *restitutio in integrum* for such breaches, but neither case-law nor legal writings afforded any decisive guidance on the subject.

19. Responses by way of reciprocity to internationally wrongful acts were subject to restrictions set forth in draft articles 11 and 12. A safety-valve was provided in draft article 13 in respect of the provisions of article 11.

20. As to reprisals, the first limitation was set forth in draft article 9, paragraph 2, upon the possibility of resorting to reprisals. It took the form of a rule of proportionality, or rather of the prohibition of manifest disproportionality. Another limitation upon the taking of reprisals arose from the existence of international procedures for peaceful settlement of disputes (draft article 10, paragraph 1). Draft articles 11 and 12 also set limitations upon the right of the injured State to react to an internationally wrongful act.

21. With regard to the seriousness of the internationally wrongful act, there was also a "sliding scale". Articles 6, 8 and 9 of the draft applied to all cases of internationally wrongful acts. Draft article 14 dealt with international crimes, in respect of which all the consequences of internationally wrongful acts applied; in addition, certain other consequences applied, which resulted from the rules accepted in the matter by the international community as a whole. Many different acts came under the heading of international crimes, but aggression should be singled out for special mention. The matter was governed by the relevant provisions of the Charter of the United Nations. Draft article 15 accordingly provided that an act of aggression entailed all the legal consequences of an international crime and, in addition, those arising from the Charter.

22. There were a number of unsettled points—both in State practice and in legal writings—with regard to particular internationally wrongful acts. He was inclined to view the rights and obligations under international law as forming three concentric régimes: first, the régime of aggression and self-defence, forming an outer circle; secondly, régimes relating to other internationally wrongful acts and the responses to them; thirdly, a régime of prevention and compensation in respect of acts not prohibited by international law. In between those régimes, it was possible to observe certain "twilight zones".

23. There was a relationship between part 2 of the draft and article 30 (Countermeasures in respect of an internationally wrongful act), article 34 (Self-defence) and possibly article 33 (State of necessity) of part 1 of the draft. All those articles were relevant to the question of reprisals—in particular those which might involve a limited use of armed force by a State in the territory of another State in protecting or rescuing its nationals held as a result of an internationally wrongful act. States had tried to justify such measures by invoking one or other of the following arguments: (*a*) the inherent right of self-defence; (*b*) the right of reprisal in response to an internationally wrongful act; or (*c*) something akin to a state of necessity, as a circumstance ruling out the wrongfulness of the injured State's reaction.

24. Learned writers had analysed the Security Council's practice in the matter and one of them had concluded that

> ... there is evidence to suggest that reprisals satisfying certain criteria of reasonableness may avoid condemnation by the Security Council even though the Council will maintain the general proposition that *all* armed reprisals are illegal. [8]

That conclusion, however, was far from being universally accepted. Incidentally, it should be noted that the judgment of the ICJ in the *Corfu Channel* case [9] had been cited both for and against the admissibility of armed reprisals in exceptional cases.

25. However that might be, the Commission could not be expected to solve that issue now. It had indeed abstained from doing so in connection with articles 30, 34 and 33 of part 1 of the draft. In any case, under the present draft article 12, subparagraph (*b*), there could be no suspension of the performance of an obligation by way of reprisal if the obligation resulted from a peremptory norm of general international law. If it was agreed that the prohibition of all forms of armed reprisals in all circumstances constituted such a norm, the point would be covered by the rule in subparagraph (*b*). But even if such a general prohibition was not admitted in all cases, reprisals still remained subject to the rule of proportionality set forth in draft article 9, paragraph 2: "... shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed."

26. The CHAIRMAN thanked the Special Rapporteur for his able introduction of the draft articles contained in his fifth report.

27. Sir Ian SINCLAIR said that he would like to know what specific reason had led the Special Rapporteur to propose subparagraph (*a*) of draft article 12. He was aware of the judgment of the ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran* [10] but, even in that judgment, the Court had been careful not to categorize diplomatic immunities as being *jus cogens*.

28. Mr. RIPHAGEN (Special Rapporteur) said that he had included the provision in question because the ICJ had made it clear in that case that the way to react to an abuse of diplomatic or consular immunities was to break off diplomatic or consular relations or to declare a given person *persona non grata*. The judgment of the Court seemed to preclude the possibility of reacting to an abuse of diplomatic privileges by a breach of those privileges. Possibly, however, since subparagraphs (*a*) and (*b*) of draft article 12 dealt with different matters, it would be preferable to have two separate articles.

29. Mr. REUTER asked whether the Commission intended to follow its usual working method of considering the draft articles one by one and then deciding whether to refer them to the Drafting Committee.

---

[8] D. Bowett, "Reprisals involving recourse to armed force", *American Journal of International Law* (Washington, D.C.), vol. 66 (1972), p. 26.

[9] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

[10] Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

30. Referring to Sir Ian Sinclair's comments, he noted that, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, Iran had sought to justify the taking of hostages by claiming prior interference in its internal affairs. It was also possible to envisage a case in which a State suddenly decided substantially to curtail the privileges and immunities of a foreign embassy by suspending certain relations between that embassy and the sending State, but without going so far as to endanger the freedom and lives of members of the embassy. Could the sending State then react by taking similar measures? The ICJ had not had to deal with that question in the case in point, but the rules relating to privileges and immunities could certainly not be regarded as absolute peremptory norms. The Court had perhaps been unwise to refer, in that connection, to a "self-contained régime", [11] an expression which had been interpreted by some as meaning that, in response to the violation by a State of rules concerning privileges and immunities, the injured State could only break off diplomatic relations or declare certain persons *non grata*. He was of the view that, in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges and immunities. For instance, in the event of the violation of a unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the régime of privileges and immunities did not seem to be particularly self-contained.

31. He also wondered where was the borderline between the concepts of reciprocity and reprisal to which the Special Rapporteur referred. There might exist a grey area between those two concepts if the principle of *exceptio non adimpleti contractus* had been adopted by the Special Rapporteur; however, that principle had been eliminated, and rightly so, if only because of its highly conventional connotations. The Commission had decided that the rules to be drawn up would not be attached to the source of responsibility. With regard to the distinction between reciprocity and reprisals, it seemed that, in general, any reaction to the breach of a rule should, in the interests of international relations, deviate from that rule as little as possible. When a State failed to apply a particular rule to another State, the latter could simply refrain from applying the rule to the former. However, such strict reciprocity was not possible when the positions of the two States were not symmetrical, such as when a bilateral treaty on customs tariffs concerning unilateral imports of particular products was violated. A State could also react to the breach of an obligation by violating rules affiliated to the rule violated. That could be a natural affiliation which depended on the subject of those rules, or a legal affiliation. Some writers considered that reciprocity could apply only within the framework of an individual treaty or a number of treaties relating to the same subject. A reaction which related to obligations in another field constituted a reprisal.

32. Mr. RIPHAGEN (Special Rapporteur) said that, if he had understood correctly, Mr. Reuter had raised the question whether a limitation of immunity by way of reciprocity would be admissible. While it was possible that, on the basis of reciprocity, the content of immunities might in certain cases be less than absolute, he did not think that that would apply under draft article 12, subparagraph (*a*), since the immunities to be accorded to diplomatic and consular missions and staff were the absolute minimum and a State could refuse to grant them only by breaking off diplomatic relations or by declaring somebody *persona non grata*.

33. With regard to the more difficult problem of the borderline between reciprocity and reprisals, what he had tried to reflect in draft article 8 was that reciprocity existed when the obligation involved was the same as, or a counterpart of, the obligation breached. There were many treaties, particularly bilateral ones, where performance by one party was very different from performance by the other but where both obligations were counterparts.

34. As for *exceptio non adimpleti contractus*, legally there was a difference between suspension of a treaty and non-performance of a treaty: in his view, State responsibility and the law of treaties could be distinguished by a reciprocal saving clause of the type incorporated in the Vienna Convention on the Law of Treaties and as proposed in draft article 16, subparagraph (*a*).

The meeting rose at 11.45 a.m.

1859th MEETING

Wednesday, 11 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, 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. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (*continued*)* (A/CN.4/367, [1] A/CN.4/381, [2] A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)

[Agenda item 6]

[11] *Ibid.*, p. 40, para. 86.

* Resumed from the 1857th meeting.

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

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).