Document:-
A/CN.4/SR.1865

Summary record of the 1865th meeting

Topic:
State responsibility

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

1865th MEETING

Wednesday, 18 July 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (*continued*)* (A/CN.4/366 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](continued)**

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

ARTICLES 1 to 16[4] (*continued*)

1. Sir Ian SINCLAIR said that the Special Rapporteur was to be congratulated most warmly and sincerely on his fifth report (A/CN.4/380), which represented a major step forward by enabling the Commission to focus the discussion on concrete formulations rather than on abstract notions. The way now seemed to be open for the Commission to make substantial progress on the topic within a measurable time-scale.

2. He was grateful to the Special Rapporteur for the replies to his earlier questions (1860th meeting) and for the moment intended to confine himself largely to certain issues arising in connection with draft articles 5 to 9. He had only one query regarding article 5 (*a*) and that was of a technical nature. Since the Vienna Convention on the Law of Treaties was in a number of respects declaratory of existing customary rules, the reference to "a right arising from a treaty provision for a third State" was perhaps redundant. The Drafting Committee might be requested to look into the matter. He was equally grateful for the explanation of subparagraph (*b*) given by the Special Rapporteur in his oral presentation (1858th meeting); he agreed that, in view of the disclaimer contained in Article 59 of the Statute of the ICJ and the corresponding provisions invariably included in arbitration agreements, it would be difficult to assert the *erga omnes* character of each and every judgment of the ICJ or of an arbitration tribunal.

3. Article 5 (*c*) stated an apparently self-evident proposition. Subparagraph (*d*) presented a number of problems, most of which were technical in nature but none the less difficult to resolve. More particularly, the scope of the case provided for in subparagraph (*d*) (iii) was not entirely clear. If a warship of State A arrested a vessel of State B on the high seas, both States being parties to a multilateral convention explicitly prohibiting such an act, was State C, also a party to the convention, to be considered as an injured State within the meaning of the draft and with all the consequences that followed, including those set out in articles 6, 8 and 9? Much could depend on the seriousness of the internationally wrongful act and the extent to which the breach of the obligation might create an expectation or anxiety on the part of State C that State A might commit further serious breaches of the obligation stipulated. In any case, it seemed clear that State B was the directly injured State and State C only an incidentally injured State. That fact must surely entail some consequences, at least as far as article 6 was concerned. He could not see how States B and C could be placed on the same footing with regard to an eventual claim for reparation. Even if articles 8 and 9 could be invoked by any State party to a multilateral treaty when the obligation breached had been stipulated for the protection of collective interests of the States parties, should it not be the directly injured State alone that was entitled to invoke article 6, paragraph 1, and to pursue a claim for reparation under article 6, paragraph 2? In other words, might it not be necessary to draw a further distinction, at least for the purposes of article 6, between an injured State as defined in article 5 and a directly injured State entitled to invoke article 6?

4. The problems that arose in connection with subparagraph (*d*)(iv) were somewhat similar in nature. The interest which every State party had in the performance by its other treaty partners of obligations stipulated for the protection of individual persons, irrespective of their nationality, was not at issue. The question was whether, in the event of a breach of such an obligation by a State party, every other State party to the treaty was entitled to exercise the rights accorded to the "injured State" under article 6, article 8 and article 9 as qualified by article 11, paragraph 1 (*c*). In that connection, he referred to the explanation of the distinction between "parallel obligations" and "reciprocal obligations", and of the treaty-law consequences to be drawn from that distinction, by Sir Gerald Fitzmaurice.[5] In his fifth report (A/CN.4/380, para. 3), the Special Rapporteur pointed out that he had not addressed such topics as the quantum of damages or the so-called nationality of claims. Yet the rule of nationality of claims clearly became a highly relevant consideration if the "injured State" was defined as in the case dealt with in subparagraph (*d*)(iv) of article 5, since

* Resumed from the 1861st meeting.

[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 texts, see 1858th meeting, para. 1. 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.

[5] G. Fitzmaurice, "The general principles of international law considered from the standpoint of the rule of law", *Recueil des cours de l'Académie de droit international de La Haye, 1957-II* (Leyden, Sijthoff, 1958), vol. 92, pp. 125-126.

the phrase "irrespective of their nationality" would seem to deny any such rule in the case of a breach of an obligation stipulated in a multilateral treaty for the protection of individual persons. The matter seemed to call for further explanation.

5. His reservations regarding article 5 (*e*) were much greater. In the debate on the same topic at the previous session, he had expressed serious doubts about the proposition that all other States could be regarded as "injured States" when the internationally wrongful act constituted an international crime.[6] Article 6, as he understood it, set forth the legal consequences of an internationally wrongful act in the context of the *bilateral* relationship between the author State and the State which was the direct victim of the injury. Indeed, article 6 made sense in that context, but very little sense in any other. For example, if State A, bordering on the Mediterranean, was the author of an international crime in the sense of article 19 of part 1 of the draft by committing a serious breach of a binding international obligation prohibiting massive pollution of the seas, and if Mediterranean States B and C suffered enormous damage to their coastlines and to their tourist industries as a result, was it seriously to be supposed that, in those circumstances, State D, a land-locked State on another continent, had the same entitlement to pursue a claim for reparation under article 6, paragraph 2, as had States B and C? If that was the combined effect of article 5 (*e*) and article 6, paragraph 2, it was one he simply could not accept. His doubts related essentially to the concept that all other States could be said to be "injured States" for the purposes of the application of article 6, paragraph 2, in the case of the commission of an international crime. The question whether, in such circumstances, all other States could be considered to be "injured States" for the purposes of the application of article 6, paragraph 1, and articles 8 and 9 was a much more open one. In general —and there he shared to some extent the views expressed earlier by Mr. Ushakov (1861st meeting)—it would be desirable to institute a self-contained régime for international crimes, with perhaps a distinction between the legal consequences for the victims of such crimes and the legal consequences for other States.

6. As to article 6, he accepted the Special Rapporteur's answer (1860th meeting) to an earlier question about the relationship between article 6, paragraph 1 (*b*), and article 22 of part 1 of the draft, but remained somewhat uneasy about the unqualified and apparently inflexible rule proposed in article 6, paragraph 2. In some instances, the monetary value of re-establishing the situation as it had existed before the breach might exceed the injury suffered by the victim State. In other instances, it might fall short of the injury suffered, and in yet other instances the monetary value might be more or less unquantifiable. The Drafting Committee might consider the matter and see whether a more flexible wording could be found.

7. By and large he agreed with the Special Rapporteur's proposals so far as articles 8 and 9 were concerned and, in particular, favoured the formulation of the manifest disproportionality test in article 9, paragraph 2; a negative test of that nature was more easily applicable than a positive one.

8. The expression "interim measures of protection" at the beginning of article 10, paragraph 2 (*a*), was perhaps somewhat infelicitous, since international lawyers normally used it to describe measures indicated by the ICJ or an arbitration tribunal; an alternative formula might perhaps be found by the Drafting Committee. While he experienced no particular difficulties regarding the substance of article 11, the formulation would have to be carefully considered to avoid any inconsistency between that article and article 60 of the Vienna Convention on the Law of Treaties. As Mr. Reuter had indicated (1861st meeting), article 13 also had to be considered in that context.

9. He still had reservations (1858th meeting) about the need for article 12 as it was now formulated. Subparagraph (*a*) appeared at first sight to be too broad, given the operation of the principle of reciprocity in diplomatic law acknowledged to some extent in article 47 of the 1961 Vienna Convention on Diplomatic Relations and in the corresponding articles of the other conventions codifying diplomatic law. He remained unconvinced that what was said in paragraphs 84-87 of the judgment by the ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*[7] warranted so wide an exclusion as that formulated in article 12 (*a*). For reasons similar to those already stated by Mr. Reuter (1861st meeting), he also had hesitations about article 12 (*b*) and, pending a more detailed explanation by the Special Rapporteur, wished to reserve his position on the necessity for a provision of that kind. He would comment on articles 14 to 16 at a later stage.

10. In conclusion, he emphasized that the points he had raised should in no way be interpreted as criticism of the Special Rapporteur. Indeed, he believed that the submission of the draft articles contained in the fifth report marked a truly significant advance in the Commission's work on the difficult and challenging topic of State responsibility.

11. Mr. QUENTIN-BAXTER said that the submission of the draft articles under consideration was a major event in the life of the Commission. It would be unfortunate indeed if the late stage in the session at which the topic was being considered and the pressure of other work were to prevent the Commission as a body from acknowledging such a breakthrough. He did not feel sufficiently well prepared to contribute to the debate at a technical level, but proposed to make some comments of a more general nature and, first of all, quickly to trace the topic's antecedents.

12. The topic of State responsibility had been with the Commission almost throughout its 35 years of existence. The history of post-war developments in the codification and progressive development of the law would be incomplete without a record of the advances and checks

[6] *Yearbook ... 1983*, vol. I, p. 130, 1777th meeting, para. 28.

[7] See 1858th meeting, footnote 10.

which had occurred in the treatment of such a vast subject. In his view, the difficulties involved in the codification and progressive development of international law stemmed from two main causes. The first was insufficiently rigorous thinking and the second was cerebral insensitivity to demands so deeply felt that to ignore them was foolish. The development of international law depended on achieving a balance between those factors. Undoubtedly, because of the failure to strike such a balance, the Commission had in its early days suffered a major check in the topic of State responsibility in relation to the treatment of aliens. The resulting disruption had led to a redefinition of the topic of State responsibility and the decision to treat it as a set of secondary rules, leaving aside the question of primary rules so far as was possible. That decision, in turn, had in due course led to the Commission's treatment of part 1 of the topic of State responsibility under the guidance of the then Special Rapporteur, Mr. Ago.

13. In 1976, the adoption on first reading of article 19 of part 1 of the draft had caused another shock—a shock not strong enough to prevent the completion of the first reading of the draft, but sufficient to delay the second reading and to leave the present Special Rapporteur with a serious problem on his hands. The difficulty regarding article 19 of part 1 had hardly come a surprise, for the Commission had said again and again that there would be different régimes of responsibility and different grades of obligations. The very use of the term "international crime", however, was enough to create a certain sense of unease. Both the Special Rapporteur and the other members of the Commission still suffered from the fact that the precise meaning of that term was not known. The States which had been most disturbed by the unanimous adoption of article 19 had been the first to suppose that it carried implications of penal responsibility that would affect not only individuals, but States as well. That interpretation by representatives of the States most opposed to article 19 seemed to have contributed towards making their prediction come true in the long term. The prolonged uncertainty regarding part 1 of the draft on State responsibility was surely an element in the problems now arising in connection with the draft Code of Offences against the Peace and Security of Mankind. For the developing States, the issue had assumed an almost symbolic significance. Whether or not the historical reconstruction he had attempted was accurate, he felt that the Special Rapporteur's proposals could not be wholly dissociated from the very grave questions which had arisen in connection with the topic of State responsibility over a period of more than 30 years.

14. The Special Rapporteur, loyal to his task, the Commission and the international community, as well as to the provisions of part 1 adopted on first reading, had presented in his fifth report (A/CN.4/380) a most interesting construction of the meaning of an "injured State". The way in which the Commission decided to deal with that definition, and more particularly with draft article 5 (*e*), might have enormous implications for various other aspects of its work, as well as for the general climate of its deliberations. Like other members, he wondered whether the subparagraph in question was subtle and flexible enough to avoid the unprofitable impasses into which the Commission had drifted over the years. In spite of the guidance given in article 19 of part 1 of the draft, it was still not altogether clear what constituted an international crime. For example, it would hardly be correct to say that every massive disaster occurring in consequence of an activity by a State was an international crime. If it were recognized that the action must contain an element of deliberate, callous defiance of the international community's rules, the concept that an internationally wrongful act might constitute a crime would be a little easier to accept.

15. He was inclined to agree with Sir Ian Sinclair that a distinction might have to be drawn between the régime concerning injured States and that of third States; indeed, the Commission might go even further and consider the question of obligations *erga omnes* separately from the notion of crime. In principle, he believed that it was best to begin with simple matters and then move on to larger and more difficult issues, but that would hardly be a viable course in the present context. The Special Rapporteur was right to present in article 5 the whole spectrum of obligations for the purposes of identifying the injured State, and the Commission should at least begin to think about all the unstated possibilities implicit in the article. He hoped that everything possible would be done to ensure a thorough discussion of the topic at the Commission's next session.

16. Lastly, with reference to draft article 7, he recalled that, when the Commission had considered article 22 of part 1, also relating to the treatment of aliens, there had never been complete agreement as to whether a provision of that kind had a proper place in a general code dealing with secondary rules. He was uncertain about the relationship between draft article 7 of part 2 and article 22 of part 1, but tended to carry his doubts about the advisability of article 22 over to draft article 7. The construction of draft article 7, which, as it were, began from the point at which article 22 of part 1 had failed, was also open to doubt. There was a case for considering whether the Commission wanted to include in its draft on State responsibility a specific article dealing with only one particular branch—and one of the oldest branches—of international law on a subject which, unhappily, had caused a good deal of dissatisfaction to the newer members of the international community.

17. Mr. NI noted that the Special Rapporteur, in admirably thorough and precise work that was a great contribution to a gigantic scheme envisioned but hitherto seldom ventured on, had now decided to include in the set of draft articles the legal consequences of international crimes, including the crime of aggression. It was a significant step forward in consonance with a general trend of thought in the Commission that sought to give concrete expression in a legal instrument to the condemnation of international crimes, particularly aggression, which was the most heinous crime against international peace and security. There was no contradiction with the Charter of the United Nations or with the prohibition of the crime of aggression in other international instruments or codification endeavours, including

the drafting of a code of offences against the peace and security of mankind, currently under way in the Commission. It had been said during earlier debates that the Charter and international law would be strengthened rather than weakened by codification of the present topic. On the other hand, care should be taken to avoid discrepancies with other international instruments in terms of scope and content. In the case of aggression, the draft articles should take into account the relevant provisions of the Charter relating to the institutionalization of a system of collective restraints as well as its other provisions. Care must also be exercised in dealing with the delicate question of reprisals as a response to internationally wrongful acts, so as to avoid any escalation of conflict.

18. The draft articles were skilfully framed in a logical sequence, but every article must be given an appropriate title at an early stage for the coherence of the whole. Another point was the positioning of articles 14 and 15, on international crimes and the crime of aggression. Indeed, the act of aggression ranked first in the 1954 draft Code of Offences against the Peace and Security of Mankind, [8] and also appeared in the first principle of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. [9] Similarly, in draft article 19 of part 1 of the draft, international crimes preceded international delicts. It had been said that, for practical reasons, the Special Rapporteur should start with the legal consequences of international delicts, which would be easier to define. However, the Special Rapporteur had stated in his fifth report (A/CN.4/380, para. 7) that another order might well be envisaged, and it could thus be hoped that articles on the most serious question would precede those on the simpler question of international delicts in bilateral relations. Such an order might well have a useful political impact. In addition, the articles on the legal consequences of internationally wrongful acts should not serve as guidelines or model rules. He firmly believed that the three parts of the draft should together form a law-making convention.

19. Draft article 5 classified injured States in five subparagraphs. Subparagraph (*a*) appeared to contain two distinct types of rights for the injured State, the first being based on a customary rule of international law and the second on a treaty provision. For the sake of clarity, it would perhaps be desirable to split the subparagraph into two. Subparagraphs (*b*) and (*c*) seemed quite clear, but subparagraph (*d*) was complex, categorizing several types of injured States under a multilateral treaty. In subparagraph (*d*) (i), the language did not seem precise, since the term "in its favour" might be open to different interpretations. The expression "a party specially affected by the breach", used in article 60, paragraph 2 (*b*), of the Vienna Convention on the Law of Treaties, was open to the same objection. Hence the wording should be considered further. Again, the shade of difference between subparagraph (*d*) (ii) and (iii) needed clarification. When the collective interests of the States parties were affected, it followed that exercise of their rights or performance of their obligations would also be affected thereby. But when the breach affected the exercise of the rights or the performance of the obligations of all other States parties, was there necessarily a collective interest or interests? It might be asked whether the term "collective interest" indicated that it was an indivisible whole. In view of the *erga omnes* character of an international crime, the present formulation of subparagraph (*e*) was perhaps appropriate, but it should be clearly stated whether the words "all other States" referred to all other States of the international community or all other States parties to a multilateral convention or to the constituent instrument of an international organization.

20. Draft article 6, dealing with reparation, created new obligations for the State committing an internationally wrongful act and new rights for the injured State. The requirement in paragraph 1 (*a*) to "discontinue the act" was appropriate, but the remainder of the text merely conveyed the idea of *restitutio in integrum*, which was covered by the provision in paragraph 1 (*c*). As had been said in the case concerning the *Factory at Chorzów (Merits)*, [10] such restitution, as the basic form of reparation, would necessarily wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. When restitution in kind was not possible, the injured State might require payment of a sum of money corresponding to the value of a re-establishment of the situation, and provision for monetary compensation was therefore made in paragraph 2. Besides restitution and compensation, a third requirement, that of satisfaction, was sometimes attached. There were a number of means of satisfaction, such as the presentation of official regrets, punishment of guilty officials, and even a salute of the flag of the injured State by a mission of expiation. Some means were particularly humiliating to the State which had committed the internationally wrongful act and therefore harmful to future relations between States. Hence the Special Rapporteur had rightly chosen the one which figured in paragraph 1 (*d*), namely to "provide appropriate guarantees against repetition of the act". Draft article 7 dealt with a question which could be covered by some drafting changes in article 6 and hence a separate provision was not required.

21. Draft articles 8 and 9 provided for the injured party's entitlement to react by suspending the performance of its obligations towards the author State. In the case of article 8, non-performance of the obligation by the injured State by way of reciprocity was limited to those obligations which corresponded to or were directly connected with the obligation breached, while in article 9, non-performance by way of reprisal could extend to, but apparently was not limited to, the injured State's other obligations towards the author State. If that interpretation of the Special Rapporteur's intention was correct, then the word "other" in article 9, paragraph 1, might well be deleted. The difference between non-performance by

[8] See 1816th meeting, para. 1.

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

[10] *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

way of reciprocity and non-performance by way of reprisal was that, in the latter case, the injured State must first exhaust the available remedies, described in draft article 10 as the international procedures for peaceful settlement of the dispute, and furthermore the exercise of the right of reprisal should not be manifestly disproportional to the seriousness of the internationally wrongful act committed. Such distinctions were well conceived, but the cross-reference at the end of article 10, paragraph 1, should perhaps read: "in order to exercise its right mentioned in article 6".

22. The Special Rapporteur had been cautious in providing in articles 9 and 10 for restraints on the taking of measures of reprisal, and similarly prudent in formulating draft articles 11 and 12. Article 11 set out the conditions under which the injured State was not entitled to suspend the performance of its obligations to the author State when such obligations were stipulated in a multilateral treaty, and article 12 precluded the right to suspend performance of obligations such as diplomatic and consular immunities and obligations incumbent upon any State by virtue of a peremptory norm of general international law. In his fourth report (A/CN.4/366 and Add.1, para. 127), the Special Rapporteur had pointed out that the State injured by the abuse of diplomatic privileges and immunities had at all times available to it the measures of a declaration of *persona non grata* and the severance of diplomatic relations, which removed the need for determining other legal consequences. In article 12 (*b*), the Special Rapporteur seemed to have in mind the parallel obligations to respect human rights in the case of armed conflict, perhaps on the assumption that, if violations of diplomatic laws and laws of war could result in the suspension by the other party of performance of any obligations, the consequences would be uncontrollable. The intention was to avoid any escalation of the conflict.

23. Draft article 13 stated the extreme case in which the internationally wrongful act in violation of treaty obligations destroyed the object and purpose of the treaty as a whole. In that event, the restraining requirements in article 10, paragraph 1, and article 11, paragraph 1 (*a*) and (*b*), did not apply. In his fourth report (*ibid.*, para. 109), the Special Rapporteur had said that, in such a case, the matter lay beyond reprisals and dispute settlement as a means to obtain a return to legitimacy. Such gross violation should permit immediate action, but one question still remained: who was to determine on the spot whether the act in question destroyed the object and purpose of the treaty and how pressing was the need to take action? Article 13 did not provide a procedure for taking immediate action under such circumstances nor did it state whether a collective decision, as envisaged in article 11, paragraph 2, was necessary where such a procedure had been established in a multilateral treaty. That matter would require further reflection.

24. Draft article 14 was the crux of the present set of articles, but its importance was rivalled by the difficulty in formulating appropriate provisions, for extreme caution should be exercised in order not to tamper with the Charter of the United Nations and other rules of international law. The provisions should complement and strengthen them in a way that conformed to the requirements of the contemporary situation. The Special Rapporteur had structured article 14 in accordance with the four elements of special legal consequences common to all international crimes: [11] paragraph 1 was framed to make the commission of an international crime the concerned of the whole of the international community, while paragraph 2 embodied a formula of collective sanctions in three subparagraphs. Paragraph 2 (*a*) set forth an obligation not to recognize as legal the situation created by the crime. That principle was at least 50 years old and was an effective means of preventing the worsening of the existing situation, but mere non-recognition in abstract terms was sometimes not sufficient. For example, in the ICJ advisory opinion of 21 June 1971 in the case of the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, [12] which had not been treated as a case of international crime, it was pointed out that certain categories of actions, which were listed in the opinion, might imply a recognition that South Africa's presence in Namibia was legal. For other States Members of the United Nations it was said that the obligation was to refrain from lending any support or any form of assistance to South Africa concerning its occupation of Namibia. Paragraph 2 (*b*) went on to stipulate that no aid or assistance should be rendered to the State which had committed the crime, and paragraph 2 (*c*) brought in the element of solidarity under the United Nations system, as envisaged in Article 41 of the Charter, by requiring joint action.

25. After the legal consequences of an international crime had been defined, the text of article 15, on the legal consequences of the crime of aggression, would be easier to formulate. The present wording already contained two elements: all the legal consequences of an international crime, as provided in article 14, and the Charter of the United Nations, mainly Chapter VII. Article 5, paragraph 3, of the Definition of Aggression [13] specified that no territorial acquisition or special advantage resulting from aggression should be recognized as lawful. A similar provision was to be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. [14] There was no specific provision in the Charter concerning non-recognition of territorial acquisition resulting from aggression, although such was the natural consequence of its Article 2, paragraph 4. In the draft under consideration, article 14, paragraph 2 (*a*), merely provided for the non-recognition as legal of the "situation" created by the international crime, something which was too general. Accordingly, article 15, which dealt specifically with the act of

[11] See in that connection the Special Rapporteur's commentary to draft article 6 as submitted in his third report (*Yearbook ... 1982*, vol. II (Part One), pp. 48-50, document A/CN.4/354 and Add.1 and 2, para. 150).

[12] *I.C.J. Reports 1971*, p. 16.

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

[14] See footnote 9 above.

aggression, should contain a special provision on the non-recognition of territorial acquisition or special advantage resulting from aggression.

26. Draft article 16 was in the nature of a safeguard clause. Presumably, it was not intended to be exhaustive, as there might be other matters which were not to be prejudged by the provisions of the present articles on State responsibility. In that case, he suggested that the words "*inter alia*" or "among others" should be inserted after the word "prejudge" in the opening clause of that article.

27. Mr. JACOVIDES said that State responsibility was a complex and difficult topic, full of potential pitfalls but also full of opportunities. He believed that, with the Special Rapporteur's excellent fifth report (A/CN.4/380), the Commission could rightly choose to remain in the mainstream of public international law, which attached great importance to international public order and obligations *erga omnes*. The Special Rapporteur had given due weight to the concept of *jus cogens*, the notion of an international crime, for which the Commission could take considerable credit by having adopted article 19 of part 1 of the draft, and particularly to the legal consequences of aggression. Proper attention was also paid to the more conventional and traditional aspects of State responsibility.

28. There might be room for improvement in the drafting and arrangement of the articles. For example, he agreed with Mr. Ni that each subject dealt with in the set of draft articles should have an appellation. Moreover, in the case of article 5 (*c*) and (*d*), the term "an obligation under" a treaty would be preferable to "an obligation imposed by" a treaty. He also agreed with the suggestion that article 5 (*e*) should be recast, so long as it retained the principle that an international crime constituted a wrongful act against all members of the international community.

29. Both as a member of the Commission and as a representative of his country in the Sixth Committee of the General Assembly, he would object to any attempt to delete or drastically alter draft article 14. Paragraph 1 was a logical corollary to recognition of the concept of international crimes, among which aggression was indisputably the prime example. Paragraph 2 lay at the core of the draft articles, for it stipulated that an international crime committed by a State entailed an obligation for *every other* State; paragraphs 3 and 4 were equally logical and necessary.

30. He fully concurred with the tenor of draft article 15, but Mr. Ni's suggestion that it should include a provision on non-recognition of territorial acquisition or special advantage resulting from aggression deserved careful consideration. In brief, although flexibility in terms of wording or other matters of debate was possible in order to reach general agreement, the principle of recognizing in the draft articles the effect of the United Nations Charter, *jus cogens* and an international crime could not be compromised, downgraded or eliminated. International public policy and legal order were concepts which had fully emerged in public international law. They helped small and weak States against the arrogance of power. The Commission, in its new and enlarged form, could do no less than safeguard them.

31. It was not his custom to waste the Commission's time on subjects which lent themselves to more political forums, but he asked its indulgence to refer to his country's tragic situation on the tenth anniversary of its invasion and occupation by Turkey. Fundamental rules of international customary and conventional law had been grossly violated with impunity, and legally binding United Nations resolutions had been ignored by the occupying power. All members of the Commission were well aware of the limitations of a forum such as theirs, yet they should not shirk their responsibility to make a contribution, through the topic of State responsibility, to remedying internationally wrongful acts and punishing international crimes for the sake, not only of Cyprus, but of other small countries suffering as a result of foreign aggression and interference.

The meeting rose at 5.55 p.m.

1866th MEETING

Thursday, 19 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, 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.

State responsibility (*continued*) (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] (continued)**

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

ARTICLES 1 to 16[4] (*continued*)

1. Mr. OGISO expressed appreciation to the Special Rapporteur for his fifth report (A/CN.4/380) and oral

---

[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 texts, see 1858th meeting, para. 1. 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.