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Summary record of the 1866th meeting

Topic:
State responsibility

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

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

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[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.

presentation (1858th meeting). The definition of the term "injured State" in draft article 5, in his view, presupposed that an internationally wrongful act had been committed by another State. However, it was extremely difficult to establish that an act of a State was wrongful. For example, when an act of aggression was committed by a permanent member of the Security Council, or even by a State which was not a permanent member of the Security Council, it was fairly rare for the Security Council to hold that the act in question was wrongful. Again, in the case of an alleged breach of an obligation under a bilateral treaty, the alleged author State did not normally agree that its act had been wrongful. Assuming, therefore, that his interpretation of draft article 5 was correct, the Commission should provide for cases where, even though manifest injury had been done to a State, it was not possible to establish in law that an internationally wrongful act had been committed and, hence, that the State which had suffered the injury was an injured State within the meaning of draft article 5. Even if draft article 5 offered the only logical definition of an injured State, some formula should still be devised to minimize any adverse effects that might ensue if the injured State could not be identified under the terms of draft article 5.

2. Also, he wondered whether the Special Rapporteur had considered the possibility that the injured State might be entitled, in the event of manifest injury, to exercise, on a provisional basis, some of the rights provided for under subsequent articles. For example, a State could be regarded as an injured State under draft article 5 on a provisional basis if, in connection with a peaceful settlement procedure, the court delivered a decision to that effect; if the court subsequently delivered a decision to the effect that the State should no longer be regarded as an injured State under draft article 5, its provisional status as such would cease. He doubted whether there was any such theory in international law or any such practice in international custom; nevertheless, in view of the practical possibilities, the matter could perhaps be considered within the context of State responsibility. What he had in mind was entirely different from an interim measure, since it was not a measure ordered by an international court or by any other peaceful settlement organ.

3. By the same token, he wondered whether an injured State could require the State which had committed an internationally wrongful act to comply, again on a provisional basis, with the terms of paragraph 1 (*a*) of draft article 6. He raised the point in view of the current political situation and of the historical precedents in the Security Council. The Special Rapporteur might feel that it was a matter that fell outside the scope of his topic but, if it had not already been discussed at some earlier stage, it would be useful to know the Special Rapporteur's reaction. Consideration could also be given to whether the rights provided for under draft articles 8, 9 and 10 could be applied, on a provisional basis, in favour of an injured State.

4. He would like to know why draft article 6, paragraph 1 (*d*), had been formulated in terms of what the injured State could require of the State that had committed an internationally wrongful act, rather than in terms of the obligations of the latter State. Perhaps the Special Rapporteur thought that, unless the injured State requested that something should be done, it might not be necessary for the author State to take action; if that was so, the provision was correctly drafted. None the less, he still wondered whether it sufficed to provide simply for what the injured State might require without specifying that the author State also had certain obligations. Moreover, he did not altogether understand what was meant by "guarantees" in paragraph 1 (*d*), or what the legal consequences of such guarantees would be. If the author State which gave the guarantees repeated the wrongful act, what would be the legal effects of such repetition? If they were the same with or without guarantees, the guarantees had no real significance.

5. The fact that subparagraphs (*a*) to (*d*) of paragraph 1 of draft article 6 were connected by the conjunction "and" meant that the injured State could require the author State to comply with all the requirements set forth in those subparagraphs. He wondered, however, whether there was any case in which compliance by the author State with only one of those requirements would suffice.

6. Draft article 6, paragraph 1 (*c*), was based on the concept of *restitutio in integrum stricto sensu*, which was a traditional principle of international law and, in most countries, a basic rule of municipal law. However, to apply it in negotiations for reparation for injury or for a wrongful act, for instance, could complicate matters. In his view, *restitutio in integrum stricto sensu* should be more of a general objective than a specific criterion whereby the author State was required to remedy a given situation. He would like to know, however, whether the Special Rapporteur had considered the possibility of placing the provision in question in the opening clause of paragraph 1. The same remark applied to draft article 7, which also referred to the re-establishment of a situation.

7. Draft article 9 allowed for reprisals, on condition that they were not manifestly disproportional to the seriousness of the internationally wrongful act, and subject to the other conditions stipulated in draft articles 10 and 11. Under draft article 13, if the internationally wrongful act destroyed the object and purpose of a multilateral treaty, draft article 10 and draft article 11, paragraph 1 (*a*) and (*b*) and paragraph 2, did not apply. That could be interpreted as meaning that there was no limitation on the right to take reprisals, save that they must not be manifestly disproportional. If a country belonging to NATO or to the Warsaw Pact declared its neutrality, such an act would be a manifest violation of the treaty in question and could be regarded as destroying its whole object and purpose. In such a case, the declaration of neutrality would become an internationally wrongful act, and the other parties to the treaty could resort to reprisals on condition that such reprisals were not manifestly disproportional. He noted, however, that, under draft article 10, the procedures for peaceful settlement had to be exhausted before reprisals could be taken. If article 10 did not apply to the case he had cited, by virtue of the application of article 13, reprisals could be taken without any move to resort to an international procedure for the

peaceful settlement of disputes. In the circumstances, it would seem preferable to omit the reference to article 10 from article 13 so that, in the examples cited, the obligation to exhaust the international procedures for the peaceful settlement of disputes before reprisals were taken would remain. He had intentionally chosen a rather extreme case as an example to underline the gravity of the matter.

8. Taking another example, he said that, if a State party violated the provisions of a multilateral treaty for environmental protection by contaminating the environment and such an act was deemed to destroy the object and purpose of the treaty as a whole, was it proper that the other parties to the treaty should be allowed to take reprisals in the form of similar action to contaminate the environment, subject only to the condition that the reprisals were not manifestly disproportional? That would be a rather difficult conclusion to draw from the practical, if not the legal, point of view. He therefore considered that, even in such cases, the peaceful settlement procedure should be exhausted before the right to take reprisals was exercised.

9. He noted from the Special Rapporteur's fourth report (A/CN.4/366 and Add.1) that fault on the part of the author State was required before the right to take reprisals could be exercised. He did not altogether understand the legal import of the fault concept, however, since reprisals might be taken in respect of an internationally wrongful act, which could be committed with or without fault.

10. With regard to the question of treaty violations, he noted that, under the Vienna Convention on the Law of Treaties, the other party could terminate the treaty only in the case of a material breach. He therefore wondered why the limitation imposed by the word "material" had been omitted from the draft. He also wondered why the requirement under article 60, paragraph 2, of the Vienna Convention, to the effect that the unamimous agreement of the other parties to a multilateral treaty had to be obtained before the operation of the treaty could be suspended, was not reflected in the draft.

11. Draft article 12 (*b*) raised a rather important point of substance. As formulated, and in the absence of any explanation as to what constituted a peremptory norm of international law, it could create ambiguity in regard to the interpretation of the convention as a whole. It was rather difficult to understand the provision without knowing what exactly was the content of *jus cogens*. For example, was the prohibition of armed reprisals regarded as *jus cogens*? He raised the question in view of the reference to belligerent reprisals in draft article 16 (*c*), and wondered whether draft article 12 could not be improved.

12. Mr. MALEK, noting that, in his fifth report (A/CN.4/380, para. 2), the Special Rapporteur stated that the commentaries to the draft articles contained in the report would be submitted at a later stage, said that it would be easier to understand the draft articles if they were accompanied by the appropriate commentaries, although the information contained in previous reports was useful.

13. Draft article 5 (*e*) was well thought out; it was difficult to see the need to resort to the use of abstract concepts to express what was stated clearly and without ambiguity in that article. The term "international community as a whole" which had been referred to and which derived from draft article 19 of part 1 of the draft, did not appear to have any precise legal meaning. Mr. Reuter (1861st meeting) had raised a number of very pertinent questions in that regard. While it was, of course, important to make it clear in the commentary that the international community as a whole was injured by an internationally wrongful act constituting an international crime, nevertheless, in the text of the provision itself, reference could be made only to entities recognized by international law as representing the international community as a whole, namely States, the immediate subjects of international law. Although, under the terms of draft article 5 (*e*), all States other than the author State or States were considered as injured by an internationally wrongful act regarded as an international crime, they obviously did not have exactly the same rights and obligations as the State or States directly or primarily injured, which was why draft article 14 stipulating the rights and obligations of every State other than the author of an international crime was so important.

14. Draft article 14 embodied the three paragraphs of draft article 6 submitted in the third report,[5] together with a new paragraph 1, which was presumably intended as a response to the concerns expressed in the Commission and in the Sixth Committee of the General Assembly, but whose scope and usefulness were not immediately apparent. It suggested that the specific legal consequences of an international crime would be limited to "such rights and obligations as are determined by the applicable rules accepted by the international community as a whole", thereby excluding those provided for in paragraph 2, which would be absurd. A remedy might be to insert the words "by paragraph 2 of this article and" after the word "determined". He wondered why draft article 15, which also dealt with the legal consequences of an international crime, could not be incorporated into draft article 14 and why it was drafted in terms which were different from those of draft article 14, paragraph 1, although it apparently expressed the same idea. After all, the rights and obligations referred to in those two provisions did not appear to have different sources.

15. Draft article 14, pararaph 2, was absolutely essential, as part 2 of the draft on State responsibility must contain provisions which organized international cooperation on a rational basis in the event of an international crime. Although draft article 14 was admittedly not entirely satisfactory, it contained the basic elements for the effective organization of a collective response to a particularly serious international crime. During the consideration of those provisions at the thirty-fourth session, he had wondered why mutual assistance between States in the event of an international crime should be limited to the performance of the obligations listed in

[5] See 1865th meeting, footnote 11.

draft article 6, paragraph 1 (*a*) and (*b*). [6] It would be advisable to draft subparagraph (*c*) so as to include any other obligations not currently covered without mentioning them specifically. He wondered whether draft article 14 provided for the obligation to extend aid and assistance to the injured State. If not, or if it did so only implicitly, it should be amended to stipulate that obligation, or at least to state clearly that it could not be disregarded.

16. In paragraph (6) of the commentary to draft article 6 [7]—which had become draft article 14—it was stated that the notion of international crime appeared to imply that each individual State had at least an obligation —implying a right—not to act in such a way as to condone such crime. In paragraph (1) of that commentary, it was also stated that mutual assistance between States other than the author State was essential when the fundamental interests of the international community as a whole had been violated. In the commentary to draft article 1, adopted at the previous session, [8] the Commission gave an indication of the legal consequences which should be covered, namely new obligations of the author State and new rights of other States and, in certain cases of internationally wrongful acts, the obligation to react to the act in question. In short, regardless of its shortcomings, draft article 14 made it clear that an international crime had consequences for all States and created individual and collective obligations for them. Unfortunately, the draft article contained a paragraph —paragraph 2—which weakened considerably the obligations provided for, given the weakness of the collective security system to which it referred. He wondered, moreover, whether that paragraph did not duplicate draft article 4, in which case it should be deleted.

17. It was well known that the rules concerning the individual and collective performance by States of their peace-keeping and international security obligations were ineffectual. However, there was nothing in the Charter of the United Nations to prevent States from applying other rules to achieve the same end. There was no provision of the Charter which conferred the right or imposed the obligation on States, particularly States which assumed a special responsibility in that regard, to refuse or withhold assistance to a State or group of individuals who were the victims of international crimes threatening them with total and imminent destruction. Nothing in the Charter prohibited the use of elementary intervention procedures to safeguard human life, such as so-called humanitarian intervention whereby States exerted pressure on another State to induce it to discontinue arbitrary practices in respect of individuals under its control. Although the procedure itself was not ideal, it was nevertheless praiseworthy, in view of the disturbing apathy of the international community towards the crimes against the peace and security of mankind committed with impunity in some areas of the world. In the autumn of 1983, the Secretary-General of the United Nations had declared himself to be deeply saddened by the failure of the Security Council to adopt a resolution designed to put an end to a tragedy comprising a series of atrocities. The question of Lebanon constituted a classic example of attempts—futile, of course—in the form of a series of concerted criminal plans, to destroy one of the most developed and democratic of States, as such, without provoking the international co-operation which could resolve the issue. The argument put to the Security Council had been that the situation was one of civil war and therefore did not fall within the competence of the Council. Never had a situation of that type been so misrepresented or been made so deliberately confused in order to conceal the legal consequences which it should entail.

18. Legally, the Security Council, and even the General Assembly, were invested with powers which made them responsible in the event of any threat to collective security, wherever it occurred. Any dispute or situation of internal order—in many cases with international repercussions—likely to jeopardize peace indisputably fell within their competence. The prerogatives of the Security Council were unlimited. It could and must preserve peace against all possible threats by taking measures ranging from a simple recommendation to effective action. Any challenge to its competence in such matters was entirely without legal foundation. The Security Council could be involved in any situation regardless of whether it represented a threat to international peace, since the Charter empowered it to be the first and final judge as to its own competence.

19. The situation in Lebanon could in no way be compared to a civil war. The Lebanese Government controlled only 10 to 20 per cent of the national territory, the remainder of which was under the active control of foreign armed forces, whose influence was felt heavily in that portion of that territory not under their political control. In addition, Lebanon, which was a small country, was not privileged as far as resources were concerned. In recent years, it had been the scene of thousands of explosions, the combined force of which was thought to be equal to that of the atomic bomb dropped on Hiroshima in 1945. The war had produced the most formidable concentration of warships off the coast of Lebanon since the Second World War.

20. In any internal conflict, the parties to the conflict all pursued a legitimate end, namely the general interest of the country (whatever their respective conceptions of that interest might be). They never deliberately set out to destroy the country. Lebanon, however, had been under that constant threat for 10 years. Nevertheless, sooner or later it would succeed in extricating itself from its predicament, as the United Kingdom had done in the Nazi era. The situation in Lebanon was distressing and shocking given the gravity of the international crimes perpetrated there, in full view of a frequently indifferent and unconcerned international community; for neither the United Nations, nor States individually or collectively, had reacted or been able to react effectively. Initiatives for collective reaction had simply served to touch off the powder-keg. In addition to that already

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

[7] See 1865th meeting, footnote 11.

[8] See footnote 4 above.

dangerous situation for Lebanon and the region, another situation had developed which was even more dangerous, by virtue of its potentially world-wide implications. Never had the existing collective security system proved to be so ineffectual. The reason was that it was defective. For their part, States reacted, or decided to react, only when prompted by their own interests; hence the importance of clear rules for the organization of solidarity, such as those envisaged in draft article 14.

21. The fact that draft article 14 was devoted to international crime in general and draft article 15 to the crime of aggression could give the impression that different rules applied in each case. There appeared to be only two reasons for adopting that approach. First, the crime of aggression would be at the top of the hierarchy of the most serious international crimes; secondly, it would be governed by the Charter of the United Nations, or by other texts deriving therefrom. But those reasons were not valid, since an international crime other than the crime of aggression—a crime against humanity such as genocide, for example—could assume a much more serious character than an act of aggression, such as the dispatch of an armed group by one State into the territory of another State. Moreover, an international crime other than the crime of aggression could jeopardize international peace and security, thereby bringing the Charter of the United Nations into operation.

22. The sole purpose of draft article 15 was undoubtedly to specify the legal consequences of an act of aggression. For the reasons given in his fourth report (A/CN.4/366 and Add.1), the Special Rapporteur had not intended, at the time of drafting the report, to deal with the legal consequences of aggression in the draft articles. As the Special Rapporteur stated in his fifth report (A/CN.4/380, para. 6), it was because "the majority of the Commission apparently is of the opinion that aggression and self-defence are matters falling within the scope of the topic of State responsibility" that draft article 15 had been prepared. In his own view, that article did not meet the concerns expressed in the Commission and served no purpose whatsoever. The victims of an act of aggression would certainly not be better protected by such a text than they currently were by their accession to the Charter. When the Commission had considered draft article 6 as submitted by the Special Rapporteur in his third report, he had wondered why that article made no mention of the

> ... most basic, important and natural ... consequence of an international crime such as an act of aggression, namely the universally recognized natural right of self-defence ... .[9]

He was still puzzled by that question and wondered whether it would not be possible to include, at least in the commentary to article 15, a list of examples of rights and obligations arising out of a crime of aggression in accordance with the Charter of the United Nations and texts deriving therefrom, such as relevant Security Council resolutions.

23. Mr. McCAFFREY said that, as explained by the Special Rapporteur, draft articles 5 to 9 could be divided into four "chapters": article 5 defining the "injured State"; articles 6 and 7 dealing with reparation; article 8 on reciprocity; and article 9 dealing with reprisals. In his fourth report, the Special Rapporteur had outlined the new rights and obligations of the injured State as follows:

> ... (*a*) to claim reparation; (*b*) to suspend the performance of its obligation towards the author State, which corresponds to or is directly connected with the obligation breached; (*c*) after exhaustion of the international legal remedies available, to suspend, by way of reprisal, the performance of its other obligations towards the author State ... . (A/CN.4/366 and Add.1, para. 123.)

The Commission should concentrate its energies on completing the articles relating to those most fundamental and well-accepted principles, which constituted the heart of part 2 of the draft on State responsibility. The more complex the draft became and the more it attempted to create different kinds of responsibility, the more the Commission's work would be delayed by the uncertainties involved. The Commission should focus its attention on its traditional task of distilling, from the practice of States and from generally accepted principles, a set of draft articles which would strengthen the law of State responsibility; the introduction of novel concepts would simply dilute it.

24. Referring to draft article 5, which defined the term "injured State", he noted that, in his fourth report, the Special Rapporteur had stated:

> ... In the long run every State has an interest in the observance of any rule of international law, including the rule of *pacta sunt servanda*. But this by no means authorizes—let alone obliges—every State to demand the performance by every other State of its international obligations, let alone to take countermeasures in case of non-performance of those obligations. ... (*Ibid.*, para. 113.)

The question accordingly arose of how to devise a workable and reasonably restricted definition of the "injured State". In his fourth report, the Special Rapporteur had suggested the following definition:

> The injured State is: (*a*) the State whose right under a customary rule of international law is infringed by the breach; or (*b*) if the breach is a breach of an obligation imposed by a treaty, the State party to that treaty, if it is established that the obligation was stipulated in its favour; or (*c*) if the breach is a breach of an obligation under a judgment or other binding decision in settlement of a dispute by an international institution, the State party to the dispute. ... (*Ibid.*, para. 123.)

The enumeration in draft article 5, however, appeared to go considerably beyond that definition.

25. The significance of the definition of the injured State was that it determined which States were entitled to the remedies set out in articles 6 to 9. In that connection, it was instructive to refer once again to the Special Rapporteur's fourth report, in which it was stated:

> ... The main rule seems to be that only the State whose sovereign right under general international law has been infringed, or which is a party to a treaty stipulating in its favour the obligation breached, is entitled to claim reparation, to invoke reciprocity, to suspend active governmental co-operation or to take reprisals. (*Ibid.*, para. 114, *in fine*.)

The Special Rapporteur had gone on immediately to state:

[9] *Yearbook ... 1982*, vol. I, p. 207, 1732nd meeting, para. 10.

Exceptions to this main rule are implied by the United Nations Charter, by the notion of international crimes and by other objective régimes. Indeed, it is precisely because, within such an objective régime, i.e. in respect of the obligations flowing from that régime, a breach cannot be adequately redressed by the bilateral means just mentioned, that collective measures are required for its enforcement ... . (*Ibid.*, para. 115.)

26. It had by now become clear that the main rule was going to give rise to fewer problems than the exceptions. Thus he himself had less difficulty with those provisions of draft article 5 which fell within the main rule—namely subparagraphs (*a*), (*b*), (*c*) and (*d*) (i) and (ii)—than with the exceptions to be found in subparagraph (*d*) (iii) and (iv) and subparagraph (*e*).

27. With regard to subparagraph (*a*), he doubted the wisdom of combining the question of the third State with a provision relating to customary rules of international law. If a provision on the third State was to be included at all, it should be combined with those on bilateral and multilateral treaties. Such a provision might not be necessary, however, since the matter was already covered by article 36 (Treaties providing for rights for third States) of the Vienna Convention on the Law of Treaties, which probably reflected a generally accepted rule of customary international law.

28. With regard to subparagraph (*b*) and the suggestion by some writers that the obligation to comply with a judgment of the ICJ constituted an obligation *erga omnes*, he agreed with the Special Rapporteur (1858th meeting) that that proposition was not true of all judgments. Everything depended on the nature and the subject-matter of the dispute and on the form of the judgment. The rule contained in subparagraph (*b*) accordingly represented the only sound position. Any interest of States not parties to the dispute must arise by virtue of some independent principle contained in draft article 5. He had no difficulty with subparagraphs (*c*) or (*d*) (i) and (ii), although he recognized that, as indicated by the Special Rapporteur, it was often difficult in practice to determine whether a given obligation was "stipulated in favour" of a particular State. With respect to subparagraph (*d*) (iii) and (iv), however, he shared the doubts expressed by Sir Ian Sinclair (1865th meeting) as to whether all the parties to a multilateral treaty could really be said to be equally affected by a breach of that treaty. In most instances, that would actually not be the case; accordingly, not all the States parties should have the right to invoke the remedies set forth in draft articles 6, 8 and 9. The difficulty might perhaps be overcome by defining precisely what was meant by the "collective interests of the States parties", so that the operation of the provision in subparagraph (*d*) (iii) would be limited to cases in which all the parties to the multilateral treaty really did suffer direct and identifiable injury because of the breach.

29. An even greater difficulty arose in connection with subparagraph (*e*), probably due to the novelty and vague nature of the concept of an international crime committed by a State. The attempt to engraft on the generally accepted principles of State responsibility the novel concept of the international criminal responsibility of the State was bound to delay progress on the topic, and could ultimately result in its demise.

30. Although he had grave doubts regarding the existence of an international criminal responsibility of States and would reserve his position on the question, he would examine the effect of the relevant provisions in part 1 in conjunction with the articles proposed by the Special Rapporteur for part 2. Under article 19 of part 1 of the draft, an international crime, by definition, affected the interests of the international community as a whole. It would therefore seem to be for the international community to define what constituted international crimes and possibly even to determine whether, in a particular case, such a crime had been committed. As Mr. Ogiso had rightly pointed out, in practice it was difficult to determine whether an internationally wrongful act had been committed, let alone an international crime. Without part 3 of the draft for the determination of crimes, parts 1 and 2 would be of little practical value and might even exacerbate international tensions.

31. The same point could be made with regard to other draft articles, such as article 13; it would be difficult to get States to agree on what acts constituted "manifest" violations of treaty obligations which destroyed the "object and purpose of that treaty as a whole". The provisions of draft article 13 constituted an accurate statement of the law but were of doubtful practical utility, in that they could provide a pretext for bypassing the moderating procedures of draft articles 10 and 11.

32. In his fourth report (A/CN.4/366 and Add.1, para. 59), the Special Rapporteur had drawn attention to a common element of international crimes in that they constituted offences *erga omnes*. It would therefore seem that, under draft article 14, every State individually had the right to demand relief under draft articles 6, 8 and 9. The Special Rapporteur had, however, indicated another common element of those crimes, namely "that the organized international community, i.e. the United Nations, has jurisdiction over the situation" (*ibid.*, para. 60). It was therefore not possible for each individual State to take action, unless specifically authorized to do so by the United Nations. Indeed, the Special Rapporteur had stated:

... As remarked above, it would hardly seem likely that States would accept the international crime régime and the *jus cogens* régime as objective régimes, in the sense used in the present report, without collective machinery for the implementation of those régimes, including machinery for the compulsory settlement of disputes. ... (*Ibid.*, para. 116.)

That proposition was unassailable. It suggested that international crimes constituted internationally wrongful acts to which States could react collectively, but not individually. Accordingly, in draft article 14, paragraph 2, the words "every other State" should be replaced by "all other States".

33. The main problem, however, was that the proposed draft articles did not make sufficiently clear provision for collective machinery for the implementation of the provisions relating to international crimes. Draft article

14, and especially its paragraph 3, made the right of the injured State—as well as the rights of all other States—subject only to the provisions of the United Nations Charter relating to the maintenance of international peace and security. Nothing was said as to whether the procedures set forth in part 3 had to be utilized to determine whether the act amounted to an international crime. All those critical issues had to be clarified with great precision if the provisions on international crimes were to have any meaning and were to contribute to the maintenance of a minimum world order, instead of providing further excuses for endangering that order.

34. Turning to draft articles 6 to 9, he urged that greater flexibility should be introduced into the provisions of draft article 6, paragraph 2, and draft article 7, relating to the formula for determining the appropriate amount of monetary compensation. He reserved his position with regard to paragraph 1 (*b*) of draft article 6. Also, he would appreciate further clarification by the Special Rapporteur regarding the authority for that provision and the situations to which it would apply. The same was true with regard to paragraph 1 (*d*); would the guarantee to be given consist solely of a written commitment or perhaps also of action?

35. He broadly agreed with the principles contained in draft articles 7 to 9, including the negative formulation of the principle of proportionality, for which there was support in case-law, for example the decisions in the *Case concerning the Air Service Agreement* and the *Naulilaa* case, mentioned by the Special Rapporteur in his fourth report (*ibid.*, footnotes 61 and 68).

36. He would revert to the responses permitted by draft articles 6 to 9 when considering the limitations imposed on those responses by draft articles 11 and 12. Lastly, he did not share the Special Rapporteur's conceptual approach to part 2 and did not believe that, with regard to aggression, States other than the aggressor and the victim State had the right to invoke the remedies provided under draft articles 6, 8 and 9.

The meeting rose at 1.10 p.m.

1867th MEETING

Friday, 20 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 (*concluded*) (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] (concluded)**

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

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

1. Mr. BALANDA said that the Special Rapporteur's presentation of a set of draft articles afforded a better grasp of the matters discussed at previous sessions of the Commission. The fifth report (A/CN.4/380) was not always easy to read, not only because the subject-matter was abstract, but also because the articles were not accompanied by commentaries, thus requiring the reader to refer to other texts. Moreover, the articles should be numbered in sequence throughout the draft.

2. In part 2 of the draft, the Special Rapporteur intended to deal first with internationally wrongful acts in general and then move on to international crimes. While it might appear logical to move from the general to the particular, it was none the less essential to consider international crimes in depth. The matter was not only a delicate one but called for clarification of a number of related issues, such as threats to use force, and more particularly threats to resort to aggression. In the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954,[5] any threat to resort to an act of aggression was deemed an international crime. Indeed, under that draft code, some preparatory acts such as the preparation of the employment of armed force were considered as actual offences committed against the peace and security of mankind. Again, in the case of self-defence as a response to an act of aggression, it could well be asked whether the use of armed force was absolutely prohibited.

3. The consequences of the various categories of international crimes must be clearly determined. For example, the legal consequences of aggression were not quite the same as those of *apartheid* or genocide, and the Special Rapporteur would not be able to ignore such issues when he came to examine international crimes from the standpoint of article 19 of part 1 of the draft.

4. If an agreement was required for certain acts to be regarded as international crimes, as some members appeared to believe, such crimes could possibly entail con-

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[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] See 1816th meeting, para. 1.