Document:-
A/CN.4/SR.1867

Summary record of the 1867th meeting

Topic:
State responsibility

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

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.

sequences quite different from those proposed by the Special Rapporteur. Some people might question the existence of a universal conscience, but a universal conscience did exist and had emerged more particularly in the world-wide condemnation of the major war criminals prosecuted by the Allies after the Second World War. Nor was there any doubt that a universal conscience had clearly condemned acts of genocide well before the Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948.[6] The Special Rapporteur drew a distinction between agreements creating universal objective régimes and those creating regional objective régimes. If a group concluded an agreement establishing a regional objective régime, a particular act might be considered by the group as an international crime under the agreement, but it would not necessarily be viewed in the same way by the rest of the international community. Hence the *erga omnes* effect which the Special Rapporteur had pin-pointed in international crimes in general, like the obligation to extend co-operation and display solidarity, would not operate. Accordingly, it was essential not to disregard *jus cogens*.

4. In the matter of reprisals, the Special Rapporteur had not established a very clear boundary between reprisals by way of self-defence and reprisals in general. It followed from article 9 that proportionality applied only in the event of reprisals, but it should also apply in the exercise of self-defence. Another question was whether the injured State alone was entitled to resort to reprisals. In that regard, the Special Rapporteur had pointed out that, under an objective régime and as a result of the duty of solidarity, other States could also exercise a number of rights. But was the right to take reprisals a personal right? Did each State participating in an objective régime under a multilateral treaty have an independent right which it alone could exercise, or could the legal entity established by the treaty also exercise the right to take reprisals in the event of an act of aggression against one of the parties? Furthermore, was it not possible to respond to an international crime by resorting to armed reprisals?

6. A number of notions employed by the Special Rapporteur in his various reports called for clarification. In what way were the closely related notions of reprisals, conservatory measures, self-help and reciprocity to be differentiated? In his fourth report (A/CN.4/366 and Add.1, para. 109), the Special Rapporteur had said that, in extreme cases, reciprocity could merge with state of necessity and fundamental change of circumstances. If that was so, it would also be necessary to shed light on the allied notions of reprisals, retortion and self-help. In the same report (*ibid.*, para. 87), the Special Rapporteur had maintained that the use of reprisals always remained under international control. However, it seemed difficult to assert that international control was required in cases other than armed reprisals. As to the protection of human rights in armed conflicts, the Special Rapporteur had averred that, if reprisals were permitted, it was because the State interest involved prevailed over humanitarian considerations (*ibid.*, para. 88); yet the opinion he expressed subsequently (*ibid.*, para. 89) seemed to contradict that affirmation. In discussing the question of the environment, the Special Rapporteur had referred to the notion of a "shared resource" (*ibid.*, para. 90), which was perfectly acceptable; but for his own part he wondered which State was the injured State in the event of a breach of the rules. Could measures be taken only by the immediately neighbouring States or by any State in the international community? The Special Rapporteur had said that specific reprisals could be excluded even where no extra-State interests were involved, a typical example being that of diplomatic immunities (*ibid.*, para. 91). Personally, he considered, as did Mr. Ushakov and Mr. Reuter (1861st meeting), that reprisals could be taken against members of a diplomatic mission, but that their privileges and immunities must be respected.

7. In the fourth report (A/CN.4/366 and Add.1, para. 100), the Special Rapporteur stated that the presence of a collective interest in objective régimes should imply collective decision-making machinery with regard to reprisals constituting a breach of obligations under that régime. Was it to be inferred that the absence of such machinery would remove the possibility of taking reprisals? Similarly, was there not a contradiction between the Special Rapporteur's opinion concerning the inadmissibility of reprisals constituting a breach of an obligation under an objective régime (*ibid.*, para. 99) and the point of view that reprisals should be the outcome of a collective decision (*ibid.*, para. 100)? In principle, he endorsed the rule set forth by the Special Rapporteur (*ibid.*, para. 103), but considered that it was difficult to apply, for reprisals would not be admissible when the State which intended to take them had other means of performance or peaceful settlement of disputes available to it. That State would have to display great perceptiveness in seeking other peaceful means, but it might well find itself in an emergency situation that called for an immediate reaction.

8. In the case of international crimes, he wondered, with reference to draft article 5, who would be the beneficiary of reparations and whether equivalent reparation was possible. Simply on realistic grounds, he expressed serious doubts about effective application of the duty of solidarity to be observed by the members of the international community. *Apartheid* had already been declared an international crime, but true solidarity on the part of the whole of the international community, even in the context of the United Nations, was difficult to conceive. Hence the practical utility of the duty of solidarity laid down in the draft was questionable.

9. In draft article 1, the words "committed by" should be replaced by "attributable to", for a State which committed an internationally wrongful act might well have been manipulated; in that case, it was the instigator that should be held responsible, not the State which had seemingly engaged in the wrongful act. Moreover, before trying to specify in draft article 5 which State was the injured State, it would be better to identify the author State, something that did not seem to have been done in the Commission's previous work. Generally speaking, article 5 could be condensed. Rather than consider each

[6] United Nations, *Treaty Series*, vol. 78, p. 277.

and every instance in which a State was deemed to be injured, at the risk of overlooking some possibilities, the Commission could define the injured State as the State which had suffered material or moral prejudice as a result of an internationally wrongful act attributable to another State. As to article 5 (*a*), relating to an infringement of a State's right, it could also be said that an infringement of a State's interest made that State an injured State.

10. Similarly, draft article 6 could be made shorter, the essential point being to ensure the possibility of demanding reparation, which could take various forms. Paragraph 1 (*a*) could be confined to nothing more than "discontinue the act". Paragraph 1 (*b*) did not seem to be particularly justified; and paragraph 1 (*d*) was difficult to apply, since it could well lead to mere declarations of intent. The conditional form had no place in paragraph 2, the latter part of which should read: "to the value of the cost of restoring the earlier situation". Draft article 7 was not warranted and, in that regard, he endorsed the views expressed by Mr. Quentin-Baxter (1865th meeting).

11. The only difference between draft articles 8 and 9 seemed to be that the rule of proportionality applied in the case of reprisals but not in that of reciprocity. Throughout the fourth report, and in article 9 in particular, the rule of proportionality was viewed *post factum*; yet if it was to be effective, and if States were to measure the right amount of reaction on their part, the rule should be applied beforehand, something which would not fail to raise difficulties.

12. Another point was whether the rule laid down in draft article 10, paragraph 1, would apply in all circumstances, even in instances in which a State had been the victim of an international crime and regardless of the nature of the internationally wrongful act. In the case of interim measures of protection, referred to in paragraph 2 (*a*), he wondered whether a State could itself take such measures or whether they should not be left to the competence of an international tribunal. The injured State would then take measures of self-help.

13. Draft article 12 (*a*) seemed too restrictive and the reference to immunities should be replaced by a reference to "protection", a term which covered both the immunities and the privileges enjoyed by diplomatic and consular personnel. Furthermore, the article should be extended to cover the personnel of special missions.

14. In the French text of draft article 14, paragraph 1, the words *ressortant des règles* should be replaced by *ressortissant aux règles*. The main question in connection with draft article 15 was that of assimilating a threat to use armed force to an actual act of aggression. Indeed, the Special Rapporteur appeared to accord special status to aggression. Despite the importance of that crime, it should be regarded as being covered by article 5 (*e*).

15. Mr. LACLETA MUÑOZ, confining his remarks to draft articles 5 and 9, said that the term *delito* ("crime") in the Spanish text of article 5 (*e*) and articles 14 and 15 was not only a problem of translation, but a conceptual problem which had already been resolved by the Commission when it had prepared article 19 of part 1 of the draft. In article 19, the Commission had drawn a distinction between the notions of *delito* ("delict") and *crimen* ("crime"): hence those terms should be used in a consistent fashion. Since Spanish law did not normally distinguish between *crimen* and *delito* but between *delito* and *falta*, the stronger of those terms, namely *delito*, had been used in the Spanish text of the present set of articles. But it was not in keeping with the terminology used by the Commission and should be replaced by *crimen*.

16. If part 2 was to be consistent with part 1 of the draft, the consequences of the distinction made by the Commission should be observed. However, like other members, particularly Mr. McCaffrey (1866th meeting), he had some reservations regarding the concept of an international crime. The fact that the international community qualified certain international acts as international crimes, that it was seeking to draft a code on some of them and that it was endeavouring to determine the legal consequences of such crimes signified progress only if machinery for collective action was available. It was essential to ensure that it was not the injured State alone that determined whether an international crime had been committed and who was responsible. In that regard, part 3 of the draft would be of the utmost importance. Since the Second World War, the international community had made great headway in codifying and developing international law, but not in applying it, despite Article 33 of the Charter of the United Nations.

17. Draft article 5 (*a*) caused no difficulty, except for the comments regarding "a right arising from a treaty provision for a third State", but the reference to "State party" in subparagraph (*d*) did raise a problem. Did it cover one State party or all the States parties? Subparagraph (*d*) (i) obviously related to one State party, but it might be necessary to specify that the subsequent cases involved a State party directly affected by the breach of an obligation imposed by a multilateral treaty. When the internationally wrongful act affected the collective interests of all the States parties, the response should be collective. Moreover, the article should indicate what those collective interests were.

18. Draft article 6, as a whole, related to the options available to the injured State, but paragraph 1 (*b*), which dealt with the exhaustion of internal remedies, was not entirely satisfactory. That provision should be drafted very precisely, for it had already been maintained on one occasion, as a result of an attack against an embassy, that the requirement of the exhaustion of internal remedies had to be fulfilled. Indeed, paragraph 1 (*b*) would be better placed in article 7. The terms of paragraph 2 of draft article 6 should be more flexible.

19. Draft articles 7 to 9 posed little difficulty. The Special Rapporteur drew a useful distinction between reciprocity and reprisals, but the idea of the injured State suspending the performance of some of its obligations might give rise to erroneous interpretations. The Special Rapporteur had sought to indicate that, where the injured State suspended performance of its obligations by way of reciprocity, it was committing a wrongful act for

which it was responsible, but that the act must be in keeping with the obligation breached; a requirement of that kind was not demanded where the injured State took the same measure by way of reprisals. That distinction should be brought out even further.

20. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, said it had shown that the general structure of the draft was broadly acceptable to the Commission. With regard to the sequence of the articles, some members had suggested that the draft should commence with the provision dealing with the legal consequences of international crimes. Of course, any sequence was technically possible, and the problem was simply one of drafting. His own feeling, however, was that it was preferable to retain the present order once the idea was accepted that an international crime entailed all the consequences of an internationally wrongful act and also certain additional consequences.

21. A number of speakers, including Mr. McCaffrey (1866th meeting) and Mr. Lacleta Muñoz, had suggested that the topic should be confined to the traditional rules of State responsibility, whereas others had been in favour of dealing with the subjects of international crimes and *jus cogens*. In addition, the idea had been advanced of devoting a special chapter to international crimes, together with a "self-contained régime" for such crimes. It seemed more suitable to deal with that matter at a later stage. Moreover, a self-contained régime would be more appropriate in the case of consequences not only additional to, but also lesser than those of the normal régime of State responsibility.

22. At the present stage, he could only say that some reparation was obviously required for the State directly victim of an international crime. Articles 6, 8 and 9 would then apply, as in the case of any other internationally wrongful act, but certainly no one would suggest that damages should be paid to each and every State.

23. If article 19 of part 1 of the draft was taken as the starting-point, then under that article itself the issue involved was the protection of the fundamental interests of the international community as a whole. On that basis, all States were affected by the international crime, but that did not necessarily mean that all States were injured to the same extent. Article 5 had to be taken as a whole and it was necessary to bear in mind that the State whose rights had been infringed was already covered by subparagraph (*a*) as the direct victim State. Subparagraph (*e*) merely said that, by definition, all States were affected by an international crime, and the consequences of the crime were dealt with in articles 14 and 15, both of which made reference to certain collective procedures which had to be followed.

24. Again, with regard to the structure of the draft, some members had stressed the importance of taking into account the contents of part 3 before arriving at a decision on part 2. Mr. Ogiso (*ibid.*) had pointed out that part 3 would indicate how to establish legally what constituted an internationally wrongful act, an international crime and an injured State. In his own fourth report (A/CN.4/366 and Add.1, para. 45) he had suggested that the Commission should give consideration to part 3 in order to ascertain the consequences not only of part 2 but also of part 1. However, the majority view had been that the Commission should refrain from embarking on a consideration of part 3 until it had dealt with part 2. If part 2 remained in its present form, it would be left to the injured State, at least in the first instance, to establish whether an internationally wrongful act had been committed. The Commission could, of course, deal with part 2 without part 3, yet it was clear that many States would be reluctant to accept part 2 by itself.

25. Attention should be drawn to the provisions of article 10 on the need to exhaust international procedures for peaceful settlement. That requirement was laid down only with respect to reprisals, which were governed by article 9, but it presupposed that such procedures were available. In that case, except in the situations governed by article 10, paragraph 2, the injured State could not proceed to take reprisals until it had exhausted the international procedures for peaceful settlement of the dispute.

26. Numerous comments, many of a drafting nature, had been made on article 5. Mr. Balanda and Mr. Ushakov (1861st meeting) had suggested that the concept of "injured State" should be replaced by a more flexible formula, such as: "The State against which the internationally wrongful act has been committed". A general formula of that kind would be unsuitable because it was too vague and, in view of the great variety of primary rules involved, it would allow too much latitude. The determination of what constituted an "injured State" was essential in order to determine the legal consequences of the international wrongful act. Article 5 was therefore a key article. Most of the criticism had been of subparagraph (*e*), which related to international crimes but did not preclude application of some of the other subparagraphs. Furthermore, it had to be read in conjunction with articles 14 and 15.

27. Recognition that the fundamental interests of the international community as a whole were at stake, and a desire to act against an international crime, pointed to a clear need for some organization. Hence the reference in articles 14 and 15 to United Nations procedures. Doubts had been expressed about the existence of an international community as a whole, at least as an effective instrument for taking collective action. There was some validity in that point, but it had to be realized that, at the present time, the world must make do with the existing structures, namely the United Nations. The provisions of article 14 did not preclude more effective organization of the international community to deal with international crimes at some time in the future.

28. Article 5 (*e*), by referring to "all other States" as being injured States in connection with international crimes, did not mean that all those States were injured to the same degree or that each of them could take any action it saw fit. On the contrary, certain collective procedures had to be followed. For that reason, article 15 specifically referred to the rights and obligations arising from the United Nations Charter, a reference that obviously included Article 51 of the Charter, which spoke

of "the inherent right of individual or collective self-defence if an armed attack occurs". Article 51 of the Charter recognized, in the case of an armed attack by one State against another, not only the right of individual self-defence, but also that of collective self-defence—without specifying how the collective right was to be exercised. Perhaps at some stage thought would have to be given to the possibility of establishing distinctions between all those "other States" according to their relations *inter se*. On the basis of article 19 of part 1 of the draft, however, it was not yet possible to draw any such distinctions. Article 19 classified the degrees of internationally wrongful acts by speaking of "serious breaches" and "essential obligations", something that would have to be taken into account in dealing with the consequences of internationally wrongful acts within the meaning of article 19.

29. Criticism had been levelled at the reference in article 5 (*a*) to a right arising from a treaty provision for a third State. He had no strong feelings in that regard; the right in question did not, of course, necessarily arise for the third State from a customary rule of international law. Mr. Reuter (1861st meeting) had mentioned article 36 of the Vienna Convention on the Law of Treaties, which referred to a right for a third State arising from a provision of a treaty which accorded that right either to the third State itself or "to a group of States to which it belongs". In the latter case, however, the provision would still give rise to a right for the individual third State, and not for the group of States as such. Mr. Balanda had suggested that reference should be made in article 5 (*a*) not only to the rights, but also to the interests of the injured State. For his own part, he would question the wisdom of adding the expression "interests", which was an extremely vague term.

30. Greater difficulties had been raised in regard to article 5 (*d*), but most of them could be dealt with by the Drafting Committee. Mr. Lacleta Muñoz had asked whether the term "a State party", in subparagraph (*d*), in fact meant "any" State party. In that context, the term "a State party" should be retained if subparagraph (*d*) (i) to (iv) were retained, because the distinction between a particular State party and all the States parties to the multilateral treaty was significant. Subparagraph (*d*) (i) had been criticized as being somewhat vague. Subparagraph (*d*) (ii) had been taken from the Vienna Convention on the Law of Treaties; it referred to a factual situation, namely the fact that a breach of an obligation by one State necessarily affected the exercise of the rights and obligations of the other States parties. In the matter of "collective interests", referred to in subparagraph (*d*) (iii), it was difficult to determine whether a particular State was injured by the breach. Accordingly, all the States parties were mentioned as injured States. With regard to subparagraph (*d*) (iv), dealing with the protection of individual persons, it had been suggested that specific mention should be made of human rights. However, human rights were not all alike, for some were of such a fundamental character that they could in no circumstances be violated, whereas others could sometimes be placed under restrictions. If the point at issue involved a fundamental human right for everybody regardless of nationality, the injured State could not be determined on the basis of nationality. All other States parties to the treaty therefore had to deal with the matter. Sir Ian Sinclair (1865th meeting) had referred to the special régimes on human rights, but that question was covered by the saving clause in article 2.

31. Article 6, dealing with reparation, had been said to be too detailed, but it was useful to enumerate the matters covered by the notion of reparation. With regard to paragraph 1, he stressed that discontinuance of the wrongful act, referred to in subparagraph (*a*), was not the same as the re-establishment of the pre-existing situation, mentioned in subparagraph (*c*). Paragraph 1 (*b*) had given rise to much comment, more particularly on its alleged relationship with article 22 of part 1 of the draft, dealing with the exhaustion of local remedies by an alien. In actual fact, there was no connection whatsoever between the two provisions and he suggested that it might be better to alter the wording of subparagraph (*b*) so as to speak of the application of "measures", instead of "remedies", of internal law that the injured State could demand. For example, if an embassy was attacked, the injured State could ask the receiving State to apprehend and try the culprits. Paragraph 1 (*d*) had led to discussion of what constituted "appropriate guarantees" against repetition of the wrongful act. Mr. Reuter (1861st meeting) had given a good example: if a country had enacted legislation which gave rise to an internationally wrongful act, an injured State would request modification of that legislation, so as to rule out the possibility of recurrence of the act.

32. Regarding article 7, some members might take the view that there was no difference between an internationally wrongful act in the treatment of aliens and other internationally wrongful acts, and that in both cases there should be *restitutio in integrum*. For his part, he did not believe that was the present state of international law. Mr. Quentin-Baxter (1865th meeting) had also suggested deletion of the article because it was too specialized. Personally, he would like to see the matter discussed further.

33. In connection with articles 8 and 9, the question had been raised of the difference between reciprocity and reprisals. He had formulated article 8 on reciprocity in terms that were as narrow as possible, precisely because it did not have the same safeguards as reprisals. Reciprocity meant action consisting of non-performance by the injured State of obligations under the same rule as that breached by the internationally wrongful act, or a rule directly connected therewith. Reciprocity could be invoked at any time and without any limitation. Article 9 related to reprisals, taken in the narrow sense of a measure intended to bring pressure to bear on the other State in order to make it fulfil its obligations. Reprisals had to be applied subject to the rule of proportionality. Mr. Balanda had asked why the rule of proportionality should not apply to reciprocity as well. Actually, the element of proportionality was implicit in the concept of reciprocity and there was no need for a provision against manifest disproportionality in article 8. Mr. Ni (*ibid.*) had inquired whether article 9 excluded article 8. As Spe-

cial Rapporteur, he had endeavoured to draw a distinction between reciprocity and reprisal. Measures of reciprocity were subject to exceptions, but article 9 dealt with obligations other than reciprocal obligations and provided for a special régime.

34. He agreed that the term "interim measures of protection", in article 10, paragraph 2 (*a*), could give rise to misunderstanding. Some other term could, however, easily be found. The point was that, in the circumstances envisaged, a State could not wait until a judgment or order had been delivered under the relevant international procedure for peaceful settlement of the dispute and it therefore had to take what was, literally, an interim measure of protection. The intent of the provision was clear from the proviso, which read "until a competent international court or tribunal ... has decided on the admissibility of such interim measures of protection". It had also been suggested that article 10 should not apply in the case of reciprocity. If reciprocity and reprisal were sharply differentiated, it seemed that reciprocity could be applied even in the absence of a decision by an international court or tribunal. Reciprocity was an immediate reaction of a limited kind, whereas reprisal sought to influence the attitude of the State that had committed the internationally wrongful act by means of a measure that would otherwise itself be an internationally wrongful act.

35. Reference had been made to the relationship between article 11 and the Vienna Convention on the Law of Treaties. In fact, two different points were involved. Whereas the Vienna Convention dealt with the life of the treaty as such and with treaty obligations proper, the draft dealt with the performance of such obligations. That was why it was not possible to follow exactly the same formula as that contained in the Vienna Convention. Also, as Mr. Ogiso (1866th meeting) had rightly pointed out in connection with article 11, paragraph 2, the Vienna Convention provided for a special procedure. Accordingly, where there was a procedure of collective decisions for the purpose of enforcement of the obligations, as provided for under article 11, that procedure should be followed first. In the same context, it should not be forgotten that the Vienna Convention, when dealing with *exceptio non adimpleti contractus*, referred to a material breach, which had been defined very narrowly. It was indeed for that reason that the draft mentioned the legal consequences of an internationally wrongful act. Thus a State had to react to an internationally wrongful act, including non-fulfilment of an obligation under a treaty, even if a material breach, in the very narrow sense of the Vienna Convention, was not involved. It was necessary to be quite clear that, no matter how article 11 was formulated, the two situations were not the same.

36. Article 12 (*a*) had been the subject of some criticism, and some members took the view that, in the field of diplomatic law as well, measures of reciprocity and even reprisals were possible, provided some matters were left intact. That was why the article spoke of the "immunities to be accorded", signifying the minimum immunities that could not be infringed even by way of reciprocity. That, at any rate, was how he interpreted the relevant judgment of the ICJ. It was also why he had not mentioned facilities, which were, after all, the support that the receiving State gave to the sending State. Nevertheless, the exact wording of subparagraph (*a*) could be reconsidered by the Drafting Committee.

37. He agreed that the term "a peremptory norm of general international law", in article 12 (*b*), was a little vague. It had been introduced in the Vienna Convention on the Law of Treaties and the same kind of definition as the one contained in the Vienna Convention could perhaps be incorporated in the draft. It was not possible, however, simply to disregard peremptory norms of general international law.

38. Article 13, again, was not formulated in the same way as the relevant provisions of the Vienna Convention on the Law of Treaties. What he had in mind were cases of manifest violation of a treaty which were not just contrary to the treaty but destroyed its whole object and purpose. In the event of such a grave occurrence, the whole system provided for under the treaty would collapse and it would not be possible to adopt the limitations provided for under earlier articles. Once again, fundamental human rights had to be taken into account in much the same way as in the Vienna Convention, although the Convention did so by means of a formula which had in mind the norms of law more than fundamental human rights themselves. In that context, it must be realized that real fundamental rights could not be infringed even as a measure of reprisal and even in the case of a manifest violation of a treaty.

39. The question of who would decide whether a manifest violation had occurred would be dealt with in part 3 of the draft. It had been suggested that, in the event of a manifest violation within the meaning of article 13, the available international procedure for peaceful settlement of the dispute should none the less be followed. He wondered, however, whether the victim State or States could wait for the lengthy procedures that international settlement of disputes inevitably entailed.

40. One question had been about the necessity for two separate articles, namely articles 14 and 15, on international crime and acts of aggression. In the first place, an international crime, which included an act of aggression, was in itself an internationally wrongful act and, as such, had been dealt with in existing treaties, and in particular in the Charter of the United Nations. Whether or not the system of the Charter was considered to be efficient, the draft was bound to make reference to it. Secondly, in the case of aggression, a right of self-defence existed and was recognized by all. As pointed out in the commentary to part 1 of the draft, in the case of self-defence against aggression, the question of proportionality should not be unduly emphasized.[7] It would be difficult, for instance, to apply the principle of proportionality in a grave case of aggression against the territorial integrity of another State. When it came to the other international crimes, however, self-defence, in the strict sense of the term, would not generally seem to be applicable. In his view,

[7] *Yearbook ... 1980*, vol. II (Part One), p. 69, document A/CN.4/318/Add.5-7, para. 121.

therefore, there was every reason to treat international crimes and acts of aggression in separate articles. Mr. Balanda had suggested that the provision in regard to aggression should be amplified, in particular by a reference to a threat of the use of force or to preparatory acts. That, however, would be entering further into the realm of primary rules than was strictly necessary for the topic. Moreover, the Definition of Aggression was fairly explicit and he did not think that the Commission could go much beyond that.

41. Mr. Balanda had also mentioned the possibility of regional systems of *jus cogens* or regional law on international crimes. Special régimes would be allowed under article 2, but he did not think such a course would be possible in the case of international crimes, within the meaning of article 19 of part 1 of the draft, which would appear to refer only to universal régimes.

42. The possibility of fuller, or alternative, wording for article 14, paragraph 3, had been suggested and it was, of course, a matter for discussion. However, reference by analogy was being made to the United Nations Charter procedures. It was perhaps going too far at the current stage in international relations, but he would point out that article 14, paragraph 1, which spoke of the "applicable rules accepted by the international community as a whole", was to be viewed as a window on the future development of the international community as a whole.

43. It had been affirmed that article 16 was not exhaustive but, in his view, it could not be anything but exhaustive; otherwise, the other articles would make no sense. The intention was that article 16 should exclude from the draft a number of questions not directly related to the rights and obligations of States *inter se*, as well as some questions which it would be better to leave to other bodies to develop.

44. Mr. Balanda's remark regarding article 1 should be dealt with on second reading, since that article had already been provisionally adopted by the Commission. The same was true of articles 27 and 28 of part 1 of the draft. He had not perhaps responded to all the questions raised, but assured members that he would endeavour to reflect in the relevant part of the Commission's report all the views expressed during the debate.

45. Mr. REUTER said he would like to know whether the Special Rapporteur wished to refer the draft articles to the Drafting Committee and would also like to learn the views of other members of the Commission in that regard.

46. Mr. USHAKOV said that, in principle, he was not opposed to referral to the Drafting Committee of the articles which had been discussed. In the present instance, however, not all members had spoken on the draft articles, or some members, like himself, had commented on only some of them because of lack of time. Moreover, the Special Rapporteur might like to modify the articles in his next report so as to take account of the views expressed during the debate. For that reason, it might be useful to revert to consideration of the draft articles at the following session, before referring them to the Drafting Committee.

47. Mr. LACLETA MUÑOZ, supported by Mr. McCAFFREY, suggested that the Commission should refer to the Drafting Committee only articles 5 to 9, for they were the ones on which most of the comments had been made.

48. Mr. THIAM said that the discussion had obviously not come to an end, since a number of members, in a spirit of co-operation, had not spoken on the topic. He would have some reservations about referring the draft articles to the Drafting Committee, for he wished to express his views on some of them.

49. Mr. MAHIOU said he shared the view of Mr. Thiam, since he too had not taken part in the discussion, first because he had not wished to delay the Commission's work still more, and secondly because his duties in the Drafting Committee had prevented him from examining them in detail. If the articles were to be referred to the Drafting Committee, he would reserve the right to comment on them at the following session.

50. Mr. FRANCIS, supported by Sir Ian SINCLAIR and Mr. OGISO, suggested that articles 5 and 6, at least, should be referred to the Drafting Committee.

51. Mr. QUENTIN-BAXTER said that he could agree to that suggestion, on the understanding that the topic of State responsibility would be the first item taken up at the next session.

52. Mr. RIPHAGEN (Special Rapporteur) said he believed the correct course would be to refer articles 5 and 6 to the Drafting Committee, but any member who had not had an opportunity to speak on them would be able to do so at the next session.

53. The CHAIRMAN suggested, in the light of the comments made, that the Commission should refer articles 5 and 6 to the Drafting Committee, on the understanding that at its thirty-seventh session the topic of State responsibility would be taken up at an early stage and that comments on articles 5 and 6 would be allowed.

It was so agreed.

The meeting rose at 1.05 p.m.

1868th MEETING

Friday, 20 July 1984, at 3.30 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.