Document:-
A/CN.4/SR.1890

Summary record of the 1890th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

important and really crucial, to the Drafting Committee.

47. Mr. McCAFFREY said that he thought the Special Rapporteur had been wise to suggest that only those draft articles which he regarded as ripe for consideration should be referred to the Drafting Committee. But if the Commission decided not to refer any of the articles to the Drafting Committee, he would have no objection.

48. The CHAIRMAN said that, in the light of the discussion, he would propose referring article 1, article 2 (first alternative) and article 3 (both alternatives) to the Drafting Committee. As to article 4, he would propose that section A (acts of aggression) be referred to the Drafting Committee for consideration, if time permitted, in the light of the Commission's discussion. Any text which the Drafting Committee might recommend could be examined at the current session and be included in the Special Rapporteur's fourth report.

49. Mr. McCAFFREY asked whether that meant that article 4 was to be treated differently from the other draft articles.

50. The CHAIRMAN said that the Drafting Committee would be requested to examine articles 1, 2 and 3 and to prepare drafts in the light of the discussion, for such action as the Commission deemed appropriate. Any text that the Committee might draft for article 4 would certainly help the Commission in its work, but there would be no question of adopting it at the current session.

51. Mr. REUTER said he understood that the Chairman's proposal was that the Drafting Committee be asked to hold an exchange of views on section A of article 4 to help the Special Rapporteur and the Commission in their work, it being understood that that would not affect the Commission's traditional method of work in any way. If that were so, he supported the proposal; otherwise he must oppose it. It was quite clear that the Special Rapporteur's rights remained intact, that the time he had requested for reflection would be granted to him, that he retained his full freedom and that the Commission did not lose any of its rights either. Those were two important legal points; the Special Rapporteur had rights and the Commission had rights, and those rights must be preserved.

52. Mr. THIAM (Special Rapporteur) said that he hoped the Commission would adopt the Chairman's proposal.

53. Mr. REUTER, invited by the CHAIRMAN to state his preference, said that he always gave way to the views of a Special Rapporteur on questions of procedure.

The Chairman's proposal was adopted.

The meeting rose at 6.15 p.m.

1890th MEETING

Wednesday, 29 May 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc. 3)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/389).

2. Mr. RIPHAGEN (Special Rapporteur) said that the sixth report consisted of an introduction and two sections. Section I contained commentaries to draft articles 1 to 16, which constituted part 2 of the draft articles, and section II dealt with the possible content of part 3 of the draft.

3. Draft articles 1 to 16, which had been submitted in his fifth report (A/CN.4/380), read as follows:

Article 1

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

Article 2

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

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

[2] Reproduced in *Yearbook ... 1985*, 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.*

Article 3

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

Article 4

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

Article 5

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

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

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

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

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

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

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

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

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

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

Article 6

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

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

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

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

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

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

Article 7

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

Article 8

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

Article 9

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

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

Article 10

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

2. Paragraph 1 does not apply to:

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

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

Article 11

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

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

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

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

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

Article 12

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

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

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

Article 13

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

Article 14

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

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

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

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

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

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

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

Article 15

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

Article 16

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

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

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

(*c*) belligerent reprisals.

4. At its thirty-fifth session, the Commission had provisionally adopted articles 1, 2, 3 and 5 (article 5 having later become article 4) and the commentaries thereto, but the question whether articles 2 and 3 should contain a reference to *jus cogens* had been left in abeyance.

5. In that connection, he pointed out that, following the basic premise that part 2 of the draft articles would deal with the normal legal consequences of an internationally wrongful act, the phrase "other rules of international law relating specifically to the internationally wrongful act in question" in article 2 stressed the residual nature of the provisions of part 2, in other words the possibility of adding legal consequences to the "normal" ones or removing some of them. Such other rules of international law would normally be conventional rules, particularly those in a treaty which laid down primary rules. For example, when a treaty of that kind contained a provision that, if one State party acted in breach of a primary obligation, another State party would be empowered to occupy its territory in order to ensure performance of the primary obligation breached, such provision would presumably render the treaty void *ab initio* under article 53, and also article 44 (5), of the 1969 Vienna Convention on the Law of Treaties. But did that make a reference to *jus cogens* in article 2 redundant? He was inclined to believe that it did not. Article 73 of the 1969 Vienna Convention stipulated in sweeping fashion: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty ... from the international responsibility of a State ...". In point of fact, part 2 of the draft in its entirety was based on the premise that the question of invalidity, termination or suspension of the operation of a treaty as such was situated on quite a different legal plane from that of the legal consequences—in terms of the allowed or prescribed conduct of States—of an internationally wrongful act.

6. There were, of course, common considerations underlying both sets of rules, but that did not remove the legal difference between, on the one hand, rules based on the need to uphold the principle of *pacta sunt servanda* by limiting the cases of invalidity of a treaty as such, and, on the other, rules relating to State responsibility for internationally wrongful acts. That legal difference could in a sense be compared to the difference between the level of determination of the legal consequences of internationally wrongful acts in terms of the conduct of States, and the level of the maintenance of international peace and security, which was dealt with in article 4 of part 2. The Commission had rightly decided to include in article 2 a reference to article 4 and similar considerations would seem to apply to a reference to *jus cogens* in article 2.

7. The value of a reference to *jus cogens* in article 3 was governed by somewhat different considerations. The purpose of article 3 was to recall that there might, under customary international law and, indeed, under other rules of international law, be legal consequences of an internationally wrongful act that were of a different kind from those dealt with in part 2, namely consequences not relating directly to new obligations of the "author" State and new rights and, in certain cases, obligations of another State or States in terms of conduct. In his view, it could be argued in connection with article 3 that the reference to articles 4 and 12 might be superfluous, and he would therefore suggest that the matter should be referred to the Drafting Committee.

8. Draft articles 5 and 6 had been discussed at the previous session and referred to the Drafting Committee on the understanding that members who had not had an opportunity to comment on them could do so at the current session.[4] In the new commentaries, to the articles, he had endeavoured to respond to the various questions raised both in the Sixth Committee of the General Assembly and in the Commission.

[4] See *Yearbook ... 1984*, vol. II (Part Two), p. 104, para. 380.

9. So far as article 5 was concerned, he still deemed it essential to provide some indication at the beginning of part 2 of the State or States that would have the status of "injured State" in the event of an internationally wrongful act being committed by another State. If, as had been decided, an internationally wrongful act entailed new legal relationships between States, it was necessary to know which States were parties to such relationships. It did not make sense to distinguish between primary and secondary rules if no attempt was made to determine the States involved in that new legal relationship, which was governed by secondary rules.

10. On the other hand, determination of the "injured State" was clearly a hazardous exercise, given the wide variety of the content and sources of primary international obligations, and that was particularly true since the Commission had decided not to make "damage" an element of an internationally wrongful act. The fundamental difference between international law and domestic law was of interest in that regard. Domestic law was generally based on the "norms" concept, namely on rules of conduct applicable to all members of an integrated society. For instance, under the Netherlands legal system, which had drawn on the French legal system, even contractual rights and obligations were related to norms and the Civil Code had provided for the principle *pacta sunt servanda* by a legislative pronouncement to the effect that a contract was law so far as the parties to it were concerned. On the other hand, torts, in the sense of wrongful acts, had long been considered to be acts or omissions that were either infringements of another's rights, or violations of obligations, or acts that were not consistent with the principle that due care should be taken in societal relations with respect to the interests of other individuals.

11. Jurisprudence had seen fit to develop the notion of the so-called relativity of torts, consisting of acts or omissions contrary to obligations under domestic law; simultaneously, it had developed the notion that a person not a party to certain types of contract might none the less invoke the terms of such contract against a person in violation of his obligations under the contract. The situation was the complete reverse under international law, which was typically bilateral in that its norms created only bilateral relationships as between the State committing an internationally wrongful act and the State legally affected by such an act. It was surely the progressive development of international law that had brought into being real norms of international law, norms that in principle entailed legal consequences beyond the bilateral legal relationship between the author State and the State directly affected by its acts or omissions.

12. All those points were relevant to article 5 as submitted to the Commission at its previous session. In the final analysis, the interests of the State dictated the formulation of rules of international law and, in particular, the primary rules of the conduct of States in their mutual relations. Whether the underlying interests were legally allocated to particular States in such a way as to give them the status of "injured State" in the event of a breach of an obligation of conduct imposed by the primary rules on another State was a matter which involved the elaboration and, therefore, the interpretation of such rules. Article 5 could do no more than set forth some rebuttable presumptions as to what States, as the creators of the primary rules, intended in that respect.

13. As he had explained at the previous session in his oral introduction to the fifth report (A/CN.4/380),[5] article 6 (reparation), article 8 (reciprocity), article 9, paragraph 1 (reprisals), article 14 (additional legal consequences) and article 15 (additional legal consequences including individual and collective self-defence), were designed as a kind of "sliding scale" of the legal consequences of internationally wrongful acts, while article 7 provided for certain limitations on article 6; articles 11 and 12 for limitations on article 8 and on article 9, paragraph 1; article 9, paragraph 2, and article 10, paragraph 1, for limitations on article 9, paragraph 1; article 10, paragraph 2, for an exception to the limitations in article 10, paragraph 1; and article 13 for an exception to the limitations in article 10 and article 11, paragraph 1 (*a*) and (*b*) and paragraph 2.

14. Some of the provisions of part 2 of the draft overlapped with what could be termed the tertiary rules, namely the procedural provisions governing implementation of the legal consequences of internationally wrongful acts. That overlapping, however, seemed inevitable where more than two States were involved in a situation arising out of an internationally wrongful act, even if a procedure for the settlement of disputes by a third party was available. The question was whether article 10 and article 11, paragraph 2, with the exception provided for in article 13, referred to the procedures required to organize the response in such cases, which transcended the purely bilateral relationship; the same question applied to article 14, paragraph 3, article 15 and, for that matter, article 4. All those provisions were in a sense a prelude to part 3 of the draft.

15. The complexity of the matter was only natural, in view of the interplay between four sets of rules; (1) what he termed pre-primary rules; (2) primary rules of conduct; (3) secondary rules of State responsibility; (4) the tertiary rules governing the implementation of State responsibility. In addition, the topic was meant to cover the whole gamut of the rules of conduct between States and it was also necessary to bear in mind the thin dividing line, particularly in regard to circumstances precluding wrongfulness, that separated it from the topics of international liability for injurious consequences arising out of acts not prohibited by international law and of the draft Code of Offences against the Peace and Security of Mankind. So far as the first of those topics was concerned, he would refer members to the footnote to paragraph 21 of his sixth report (A/CN.4/389). As to the second topic, to the extent that the so-called criminal responsibility of States was legally reflected not in the prosecution and punishment of individuals, but in the imposition of special financial burdens on the so-called criminal State or in special limitations on its sovereignty, there would obviously be room in

[5] *Yearbook ... 1984*, vol. I, pp. 262-263, 1858th meeting, paras. 17 *et seq.*

the draft articles on State responsibility for secondary rules if and when such additional legal consequences were determined by the applicable rules accepted by the international community as a whole. No limitations resulting from what would otherwise be regarded as *jus cogens* would then apply.

16. With reference to section II of the sixth report, the underlying thesis lay in the analogy drawn between the validity of a treaty and the existence of the new legal relationships between States arising out of the commission of an internationally wrongful act. The essence of the proposals put forward was (*a*) that the principle embodied in article 42 of the 1969 Vienna Convention on the Law of Treaties should apply *mutatis mutandis*; (*b*) that the procedures laid down in articles 65 and 67, and also in the annex to the Convention, should apply to the question of the existence and content of the new legal relationships arising out of the internationally wrongful act. So far as the first of those elements was concerned, one initial difference concerned the inseparability of the new obligations of the alleged "author" State under articles 6 and 7 of part 2 of the draft under consideration and its primary obligations. Those two articles dealt with belated or substitute performance of primary obligations and it could be argued that, if the parties to the primary legal relationship had not provided for a means of settling disputes via a third party, it would perhaps be rash to fill the lacuna in a convention on State responsibility. In the case of measures taken either by way of reciprocity or as reprisals, there was a risk of escalation, with the result that the primary rules might ultimately be nullified. To obviate any such likelihood, some procedure for settlement of disputes should be devised to which an alleged author State could, if confronted with countermeasures by an alleged injured State, refer the matter. Naturally, the third party concerned would also have to deal with the breach of the primary obligation, as was the case under the 1969 Vienna Convention.

17. Account must also be taken of the fact that instances had occurred of the application of the principle of reciprocity which had nothing whatsoever to do with countermeasures; the procedure provided for under part 3 of the draft articles should not apply in such cases. There had also been several instances in State practice of States agreeing in principle to settle any disputes regarding the interpretation and application of a primary rule by means of a third-party procedure which itself involved further voluntary co-operation between the parties in dispute, for example in connection with the appointment of arbitrators or conciliators. In such a case, a real countermeasure taken in order to arrive at such co-operation should not be subject to the procedure provided for under part 3 of the draft. More generally, inasmuch as the procedural rules in part 3 formed an integral part of the legal consequences of an internationally wrongful act, the principle of the residual character of the provisions of part 2 should also apply implicitly to the relevant provisions of part 3. Thus, when States created a primary right or obligation between themselves, they could, at some stage before the primary obligation was breached, determine that part 3 should not apply to alleged breaches of the right or obligation. If such a system were adopted, however, it should be understood that reservations excluding the application of part 3 would not be allowed under any future convention on State responsibility. In his view, the precedent set by the 1982 United Nations Convention on the Law of the Sea,[6] which recognized the inseparability of the substantive and the procedural provisions, should be followed in that respect.

18. There was obviously a connection between the idea of an international crime, as defined in article 19 of part 1 of the draft articles and the concept of *jus cogens*. It should be possible, by analogy, to include in the draft a provision corresponding to article 56 of the 1969 Vienna Convention on the Law of Treaties, in which case it would also be necessary to deal with the relationship between that procedure and the special procedures provided for elsewhere, for example in the Charter of the United Nations. Nevertheless, the new obligations of the author State could not be separated from the original primary obligation, nor was it possible to provide for a dispute-settlement procedure that was applicable to all types of obligations under international law. Accordingly, a provision might be included to reserve the application of part 3 of the draft to obligations assumed after the entry into force of the convention.

19. As to the relationship between parts 2 and 3 of the draft, article 13 was designed to provide an exception to article 10. A question had been raised as to who would judge whether there had been a complete breakdown in the relationship: the answer lay with the dispute-settlement procedure, which, under part 3, would be applicable to article 13. Accordingly, if an alleged injured State invoked article 13, and the alleged author State opposed the application of that article, the dispute could be submitted to the procedure provided for under part 3.

20. He would also suggest that part 3 of the draft should follow the precedent set by the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea and provide for a compulsory conciliation procedure in the cases he had mentioned and for a compulsory judicial procedure in the event of an international crime.

21. As to article 15, which concerned acts of aggression, the primary responsibility for dealing with such situations rested, of course, with the Security Council. Whether that body decided to have recourse to the ICJ, in accordance with the terms of the Charter of the United Nations, was a matter for it alone to decide.

22. The CHAIRMAN thanked the Special Rapporteur for his oral presentation and invited comments on the sixth report (A/CN.4/389).

23. Sir Ian SINCLAIR, speaking on a preliminary basis, said that he had two questions regarding draft article 5, the first of which related to subparagraph (*d*) (iii). He endorsed the very useful explanation, at

[6] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

the beginning of paragraph (14) of the commentary to article 5, about a common feature of the majority of multilateral treaties. He also accepted, in theory, that the explanation in the first sentence of paragraph (21) of the commentary was a possible construct of a particular type of multilateral treaty. An immediate example that sprang to mind was that of a multilateral treaty providing for the creation of a customs union or some other form of economic integration. A matter for concern, however, was that, in article 2 of the draft, the legal consequences determined by the "other rules of international law relating specifically to the internationally wrongful act in question" had been preserved. It seemed to him that States which formulated a multilateral treaty for the purpose of promoting and protecting the collective interests of States parties would insist on including in-built mechanisms with a view to securing its purpose. In other words, the collective interests in question would be promoted and protected by institutional mechanisms the effect of which was preserved by article 2. Basically, therefore, his question was what kind of collective multilateral treaties recognizing or creating collective interests did the Special Rapporteur have in mind when such treaties did not contain in-built mechanisms? Also, he was always somewhat chary about making the kind of assumption contained in the penultimate sentence of paragraph (21) of the commentary to article 5, at any rate without having a clearer understanding as to precisely what types of treaty were involved and precisely what the consequences of such an assumption would be. Again, he was not certain about the type of treaty referred to in the last sentence of the same paragraph of the commentary.

24. His second question related to the concept in subparagraph (*e*) of article 5 whereby, if the internationally wrongful act constituted an international crime, all other States were injured States. A number of essential clarifications were made in that connection in paragraphs (8) to (10) of the commentary to draft article 14, all of which he fully endorsed. Yet those clarifications did not emerge from the text of article 5, and specifically of subparagraph (*e*). One possible way of solving the problem might be to retain the definitions of an injured State as laid down in subparagraphs (*a*) to (*d*) of article 5, and then to have a separate paragraph 2 which could read:

> "2. If the internationally wrongful act constitutes an international crime, the expression 'injured State' shall also be deemed to include, in the context of the rights and obligations of States other than a State that has committed the internationally wrongful act, all other States."

That would confine the use of the expression "injured State" to the specific context of article 14, concerning the rights and obligations of States other than the author State.

25. Mr. RIPHAGEN (Special Rapporteur) said that he recognized the wisdom, in drawing up a multilateral treaty for the protection of collective interests, of providing for the effective protection of such interests. It was a known fact, however, that conferences at which multilateral treaties were adopted were always hampered by lack of time. The possibility that a multilateral treaty might not provide for the requisite machinery therefore had to be envisaged. The only answer was that each State, as a member of the collectivity, would clearly become an injured State. As that might perhaps not be a satisfactory way of dealing with the matter, draft article 14, paragraph 3, provided for a residual rule to apply to a particular type of multilateral treaty.

26. The last sentence of paragraph (21) of the commentary to draft article 5 was really more in the nature of a text-book remark. The intention behind that statement was to signify once again that, when drawing up a multilateral treaty, States would be well advised to provide for collective interests by raising the question of the kind of machinery required in such a case.

27. With regard to Sir Ian Sinclair's second question, there was, of course, a link between subparagraph (*e*) of article 5 and paragraphs (8) to (10) of the commentary to article 14. In his view, the matter could be referred to the Drafting Committee, along with Sir Ian's suggested form of wording.

28. Mr. FLITAN asked how the Special Rapporteur intended to resolve the problem of former draft article 4 on the link between the rules of *jus cogens* and the draft as a whole. That article, submitted by the Special Rapporteur in his third report and considered by the Commission at its thirty-fourth session,[7] had been referred to the Drafting Committee,[8] which had not yet made any specific proposal. Admittedly, draft article 11, paragraph 2, and draft article 12, subparagraph (*b*), also concerned *jus cogens*, as the Special Rapporteur had stressed, yet it seemed that the rules set forth in those two provisions were based on former draft article 4. Furthermore, at the previous session, the Special Rapporteur had pointed out the absence of a provision establishing the relationship between the rules of *jus cogens* and the possibility for the parties to derogate from the provisions of the draft articles by agreement.[9]

29. Mr. RIPHAGEN (Special Rapporteur) said that the question of a reference in article 3 to *jus cogens* had been left in abeyance. In the original draft, there had been a separate article on that subject (article 4),[10] but it had now been left out because the matter was dealt with in draft article 12.

30. The question also arose whether any reference to article 4 should be included in articles 1 and 2. Article 2 dealt with the possibility for States to establish additional primary obligations which, when breached, would entail legal consequences over and above those specified in the draft. Clearly, any such provisions must be subject to the rules of *jus cogens*. If one were to imagine a treaty clause whereby a party was empowered to occupy another's territory in the event of a breach, the clause would obviously render the whole treaty null and void.

31. As to article 3, he had some doubts regarding the reference therein to articles 4 and 12, for the legal

[7] *Yearbook ... 1982*, vol. II (Part Two), p. 80, para. 86.

[8] *Ibid.*, p. 82, para. 103.

[9] *Yearbook ... 1984*, vol. I, p. 261, 1858th meeting, para. 7.

[10] See footnote 7 above.

consequences envisaged in article 3 were indirect and did not result from the conduct of States. It was true that the inclusion of a reference to article 4 had already been decided on, but the question of the reference to article 12 remained open.

32. The CHAIRMAN said that the scope of draft article 12, subparagraph (*b*) namely of *jus cogens* in relation to former draft article 4 as submitted by the Special Rapporteur at the thirty-fourth session, could be examined when the Commission came to discuss article 12.

33. Mr SUCHARITKUL stressed that the topic of State responsibility had become a very comprehensive one, since it was no longer confined to the narrow field of injury to the person or property of aliens. The first Special Rapporteur on the topic, Mr. García Amador, had started by dealing with State responsibility for injury of that kind and covered such matters as the exhaustion of local remedies and the doctrine of minimum standards of treatment. Under the leadership of the subsequent Special Rapporteur, Mr. Ago, the Commission had completed its first reading of part 1 of the draft, a work that had been likened by Mr. Reuter to a cathedral: it did indeed constitute a splendid roof, but it required a very strong structure to support it. For the past six years, the present Special Rapporteur had been toiling to construct precisely such a structure in the form of parts 2 and 3 of the draft articles.

34. Draft article 5 was in a way a definition, and its purpose was to identify the injured State. It listed the various concrete situations of injured States by classifying internationally wrongful acts according to the origin of the obligation breached. Subparagraph (*d*) went beyond subparagraphs (*a*), (*b*) and (*c*) to deal with the much more complicated situation arising from a breach of multilateral treaty obligations, and subparagraph (*d*) (i) to (iv) set out four possible situations. With regard to subparagraph (*d*) (i), some doubt could arise as to how the obligation had been stipulated in favour of the State concerned. He was satisfied with the Special Rapporteur's explanation in his sixth report (A/CN.4/389) that subparagraph (*d*) (ii) covered a factual situation (commentary to article 5, paras. (18)-(19)), but subparagraph (*d*) (iii) raised the question how the "collective interests" of the States concerned were created. Certain commodity agreements—such as the International Tin Agreement and the International Sugar Agreement—contained provisions on machinery for possible breaches, but they did not cover every eventuality. For example, in the regional area with which he was most familiar, multilateral agreements existed for the creation of food reserves and each member country had to provide a certain quantity of rice, although only one country was a rice exporter. If that country failed in its obligations, all the member countries would be affected by the breach. The international instruments concluded by the member countries certainly did not contain machinery to cope with every situation. The difficulty of the problem of breaches of multilateral treaties was further illustrated by such multilateral instruments as those governing OAS and SEATO, which included provisions on wrongful acts committed by non-member countries. Again, article 5 (*e*), relating to internationally wrongful acts which constituted international crimes, did not include piracy, which was the traditional crime under international law. Another problem was so-called air piracy. If a country allowed an aircraft unlawfully seized in violation of the Tokyo[11] or Hague[12] Conventions to land on its territory, such a breach could be regarded either as an international crime covered by subparagraph (*e*) or as an internationally wrongful act covered by subparagraph (*d*) (iii).

35. Article 6 constituted the core of part 2 of the draft, dealing as it did with reparation in the broadest sense and with the rights and obligations arising from the internationally wrongful act. Paragraph 1 set forth the four remedies to which the injured State was entitled, namely (*a*) discontinuance of the act and return of the persons and objects held through such act; (*b*) application of such remedies as were provided for in the internal law of the author State; (*c*) re-establishment of the pre-existing situation, in other words *restitutio in integrum*; (*d*) the provision of appropriate guarantees against repetition of the act, a situation that was not very common in practice.

36. The essential provision of draft article 6, however, lay in paragraph 2, for it contained a very clear and direct formula about monetary compensation if re-establishment of the pre-existing situation proved impossible. It did, of course, raise the difficult problem of how to assess in practice "the value which a re-establishment of the situation as it existed before the breach would bear". In that regard, he urged the Special Rapporteur to supplement the commentary with suitable references to the relevant State practice. Adequacy of compensation was a crucial matter for the injured State and it called for appropriate elaboration.

37. Draft article 7 related to internationally wrongful acts in connection with the treatment of aliens. On a different legal plane, it should be noted that article 22 of part 1 of the draft articles referred to the rule of the exhaustion of local remedies. The last part of article 7, on the amount of compensation, repeated the formula used at the end of article 6, paragraph 2. Experience in the matter of claims for injuries to aliens was fairly extensive, for there was a considerable body of cases involving private claims of that nature. The traditional heading in the textbooks was that of "protection of citizens abroad". There again, the main problem was that of determining the adequacy of compensation.

38. As its session at Kathmandu, in February 1985, the Asian-African Legal Consultative Committee had discussed the formulation of a model draft treaty on the protection of foreign investments. A State which was sorely in need of foreign investments would, of course, be prepared to accept more stringent provisions in the matter. Naturally, the question of compensation in the event of nationalization or expropriation was crucial. The relevant United Nations

[11] Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 (United Nations, *Treaty Series*, vol. 704, p. 219).

[12] Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 (*ibid.*, vol. 860, p. 105).

resolutions used the expression "appropriate compensation" and, for drafting purposes, it was worth noting that the adjective "appropriate" was translated in French by *adéquate*.

39. As to draft articles 8 and 9, on suspension by the injured State of performance of its obligations by way of reciprocity or by way of reprisal, a qualification in paragraph 2 of article 9 embodied the rule of proportionality. Reciprocity and reprisal, as well as retaliation and retortion, came under the general heading of countermeasures. He suggested that the Special Rapporteur should supplement his commentaries to articles 8 and 9 by including fuller references to State practice in the matter.

40. With reference to draft article 12, he supported the Special Rapporteur's proposal regarding subparagraph (*b*), on *jus cogens*, but he could not altogether agree with the content of subparagraph (*a*), which contained an exception to articles 8 and 9. Under Italian law, for example, the immunities in question were granted only if the foreign State concerned could prove that its own legislation granted such immunities to other States. Another point was that Italian law did not recognize any legal personality for a diplomatic or consular mission; under that system, it was not the mission as such that was entitled to immunities.

41. Still on the question of reciprocity, it was worth noting that article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, on the diplomatic immunity of foreign States, contained a reciprocity clause specifying:

> Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present Article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or that property of that State.[13]

From the examples of Italian law, Soviet legislation and the law of a number of other States, it was plain that the provisions of draft article 12 (*a*) were not supported by State practice.

42. Draft article 14 dealt with the consequences of an international crime, and draft article 15 with those of the particular crime of aggression. In those situations, as stated in paragraph 2 of article 14, States other than the author State had three sets of obligations: (*a*) not to recognize as legal the situation created by the crime; (*b*) not to render any assistance to the author State; (*c*) to join other States in affording mutual assistance in carrying out the obligations under (*a*) and (*b*). In his view, both of those articles required much more elaboration. In addition, he had some doubts about singling out the act of aggression by making it the subject of an article of its own; such crimes as terrorism and genocide also constituted violations of the provisions of the Charter of the United Nations.

43. Draft article 16 was the prelude to part 3 of the draft and, with regard to the three safeguard clauses set out in the article, he was inclined to agree with the formulations proposed by the Special Rapporteur.

44. Lastly, on the question of settlement of disputes, he thought it might be feasible to use the formula adopted in the 1969 Vienna Convention on the Law of Treaties, adapting it *mutatis mutandis* for the purposes of the present topic.

The meeting rose at 1.05 p.m.

[13] See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 40.

1891st MEETING

Thursday, 30 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

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

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. REUTER said that he would begin with some general comments on the Special Rapporteur's sixth report (A/CN.4/389), which was characterized by its clarity, precision and density and required careful study. As a good grasp of the topic could be acquired from the report, it should be possible for a certain number of important and welcome draft articles, such as articles 5, 8 and 9, to be examined by the Drafting Committee, in spite of the doubts to

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

[2] Reproduced in *Yearbook ... 1985*, 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 1890th meeting, para. 3.