Document:-
A/CN.4/SR.1892

Summary record of the 1892nd meeting

Topic:
State responsibility

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

The operation of its provisions should not necessarily be limited to one and the same treaty, although that was the usual situation. Sometimes two States concluded at the same time two treaties having a clear link between them. On the other hand, one and the same treaty could contain different international obligations having no connection between them. There was in fact an infinite variety of situations in practice and it would be difficult to devise language to cover all of them.

22. In connection with reciprocity, Mr. Reuter had mentioned commercial treaties. He himself had been involved in the negotiation and drafting of many such treaties and had noticed a tendency on the part of the competent government bodies to adopt a strict *quid pro quo* approach. In that connection, he drew attention to paragraph (4) of the commentary to article 8 and its conclusion: "Even if in actual fact, at a particular moment, the balance between the performance and non-performance of respective obligations is not completely equal, the measure by way of reciprocity could still be justified as such."

23. It had been pointed out that the punishment of a State was not mentioned in the draft articles. Although there was no explicit reference to it, draft article 14 was relevant. The concept of the punishment of a State depended on what the international community as a whole regarded as a crime, and, hence, as an act for which punishment was in order. One form of punishment might be the imposition of a heavy financial burden upon a State; in practice, that type of measure had always proved ineffectual. There was also the possibility of taking away part of the territory of a State. Clearly, those were matters which the Commission could not codify, but article 14 did provide an opening.

24. On the question of proportionality, he wished to stress that the provisions of draft article 9, paragraph 2, did not require complete proportionality. The purpose of that provision was to avoid manifest disproportionality, which was also necessary in regard to punishment.

25. The question of the relationship between the draft articles on State responsibility and the draft Code of Offences against the Peace and Security of Mankind had also been raised. He himself had a slight preference for dealing with the punishment of a State as part of the topic of State responsibility, but it could equally well be dealt with in the draft code.

26. The question of the relationship between the present draft articles and the law of treaties arose at various levels. In the first place, a clear distinction had to be drawn between the question of the validity of treaties and that of the conduct of a State in response to an internationally wrongful act. Draft article 16, subparagraph (*a*), provided that the provisions of the present articles would not prejudge any question that might arise in regard to the "invalidity, termination and suspension of the operation of treaties". That provision was parallel to article 73 of the 1969 Vienna Convention on the Law of Treaties, which he himself found too sweeping: it was perhaps unwise to say that the Vienna Convention "shall not prejudge any question that may arise in regard to a treaty from ... the international responsibility of a State ...". On that point, he wished to stress that draft article 13 did not refer to the validity or to the suspension of the operation of a treaty; it dealt only with the conduct of a State in the performance of a treaty. Hence it did not come into direct conflict with the 1969 Vienna Convention.

27. The question of the relationship of the draft to the law of treaties also arose at another level, namely that of remedial consequences—a matter connected with the maintenance of international peace and security. Mr. Reuter had said that he could accept only the legislative function of the international community as a whole, although there might be some question as to what constituted that community and how it acted. He himself had, of course, no intention of introducing the concept of executive functions of the international community; there could be no question of any concrete decisions in concrete cases. The intention in the draft was to refer to the action of the international community *in abstracto*, in other words the legislative functions of that community. Perhaps Mr. Reuter feared that the concept of "the international community as a whole" might lead to the recognition of a sort of unofficial United Nations outside the United Nations itself. The fact was, however, that the international community existed, just as the United Nations existed, and that both had to be taken into account. He would revert, at the end of the debate, to the various important issues raised in Mr. Reuter's thought-provoking statement.

The meeting rose at 11.30 a.m.

1892nd MEETING

Monday, 3 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, 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. Thiam, 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]

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

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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. McCAFFREY said that the Special Rapporteur's sixth report (A/CN.4/389) on a topic daunting in its complexity was a masterpiece of logic and analysis. It was extremely helpful in that it provided both commentaries to the draft articles submitted at the thirty-sixth session and an outline of part 3 of the draft on the "implementation" of international responsibility. He would, however, encourage the Special Rapporteur to provide stepping-stones by citing cases and authorities in support of the propositions he had adduced.

2. Referring to the draft articles, he noted that the Special Rapporteur had asked whether articles 2 and 3 should include a cross-reference to articles 4 and 12. Concerning article 2, his own view was that a cross-reference to article 12 (*a*) would be particularly useful since the diplomatic privileges and immunities to which the latter provision related did not have the same peremptory force as a norm of *jus cogens*. While there would be no harm in referring also to article 12 (*b*), it was probably not strictly necessary to do so since norms of *jus cogens* had by definition a peremptory force of their own, and a convention on State responsibility, again by definition, could not derogate from them.

3. It would probably be harmless, but, again, not strictly necessary to refer in article 3 to article 4. The reasons were, first, that the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security were so universally accepted that they could be considered to have become norms of customary international law, so that reference to them would be superfluous; and, secondly, that those provisions and procedures were themselves in any event largely of a peremptory character, which made reference to them unnecessary. A reference in article 3 to either article 12 (*b*) or article 12 (*a*) might well also be superfluous since both norms of *jus cogens* and diplomatic immunities could be considered part of the corpus of customary international law.

4. The corner-stone of part 2 of the draft was article 5 and he had four main points to raise in that connection. The first concerned the extent to which the article covered human rights violations against an author State's own citizens where such violations: (i) were not governed by a multilateral treaty under subparagraph (*d*); (ii) did not rise to the level of an international crime under subparagraph (*e*). The question that arose was whether there was a customary international law analogous to subparagraph (*d*) (iv) of article 5. In his view, there was, and provision should be made for it. It could be argued that, if the violations in question were violations of an obligation *erga omnes*, they were covered by subparagraph (*a*) of article 5. In that eventuality, as *inter alia* the dictum of the ICJ in the *Barcelona Traction* case[5] suggested, they would constitute "an infringement of a right appertaining to a State by virtue of a customary rule of international law" (article 5, subparagraph (*a*)) and "the State whose right has been infringed" (*ibid.*) would in fact be all States other than the author State. It could also be argued that such human rights violations were covered by draft article 3, which provided for the residual character of rules of customary international law, of which human rights norms formed a part. In his view, however, it was unnecessarily elliptical to cover such an important area of international law by implication or by an indirect reference. Possibly, therefore, some consideration should be given either to adding a paragraph to article 5 or to recasting subparagraph (*e*) to meet the situation.

5. Furthermore, draft article 5 did not seem to cover either other violations of obligations *erga omnes* that did not rise to the level of international crimes or violations of obligations not imposed by a multilateral treaty. The more he pondered such issues concerning obligations *erga omnes*, the more concerned he became about the uncertain ramifications of the concept of an obligation *erga omnes*. At the very least, it seemed evident that if international law proscribed serious and widespread violations of human rights in respect of a State's own citizens—and he believed it did—the corresponding right must be vested somewhere; and, by definition, the same was true of such other obligations *erga omnes* as might exist.

6. The issue that would have to be faced sooner or later was in favour of whom or of what did such obligations run. They could be viewed as running either in favour of the international community as a whole, which was a collectivity, or in favour of all States, namely towards each State individually. The first approach would imply that, since the obligation ran in favour of the collectivity of States, only the collectivity as a body could respond. The second approach implied that, since the obligation ran in favour of each State individually, it was permissible for each State to respond on its own in an appropriate way. Given the current state of organization of the international community, it was probable that in many cases there would be no response at all if the rights enjoyed by all States could be exercised only collectively. If, however, it was to be permissible for rights enjoyed by all States to be exercised individually, there had to be certain safeguards.

7. Obviously, the use of force was foreclosed by the Charter of the United Nations unless it was under-

[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.

[5] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3.

taken in self-defence, individually or collectively. Also, there would seem to be no essential need for States not directly affected by the breach to be entitled to claim reparation or even to take countermeasures. The right of such States could be vindicated through an entitlement to bring a claim against the author State to comply with the obligation in question and to cease any continuing breach. A more complete catalogue of possible remedies was, of course, provided in paragraph 1 of draft article 6. In some cases of extremely serious breaches, the collective interests of the international community could perhaps be enforced only by allowing States to apply countermeasures with a view to bringing about the cessation of the internationally wrongful act in question and/or to demonstrate displeasure with or objection to the act in question. Such countermeasures could presumably be subject to the extent applicable to the conditions outlined in draft article 10. In other words, they could be applied at least on an interim basis pending the engagement of a procedure for the settlement of international disputes.

8. He therefore considered that some revision of article 5 might be necessary to deal with human rights violations. One possibility would be to recast subparagraph (*e*) to read:

> "(*e*) if the internationally wrongful act constitutes a violation of an obligation *erga omnes*:
>
> "(i) the State directly affected, if any; and
>
> "(ii) [Alternative A] the international community as a whole.
>
> [Alternative B] all other States."

That formulation involved a significant change of wording but not of substance, since it was, if anything, more comprehensive and precise than the existing one. The replacement of the term "international crime" by "violation of an obligation *erga omnes*" would mean that the article would cover not only international crimes, but also other violations of obligations *erga omnes*, including human rights violations. His suggested formulation also made separate provision for, on the one hand, the State that was directly affected and, on the other, other States or the collectivity of the international community as a whole; that could facilitate the drafting of subsequent provisions on ways in which injured States or the collectivity could respond to an internationally wrongful act. Obviously, if there was a State that was directly affected by the breach, that State should be entitled to respond in the manner indicated in draft articles 6 to 9, as qualified by subsequent articles. If, however, there was no such State, as, for example, in the case of human rights violations against a State's own citizens, it was really an interest of the collectivity of humanity that was injured. Alternative A of his suggested formulation referred to that collectivity as "the international community as a whole", but some more suitable expression could perhaps be found. As to Alternative B, there seemed to be a very real issue whether, in the case of a violation *erga omnes*, it was only the additional legal consequences entailed by the most serious internationally wrongful acts (denominated international crimes under article 19 of part 1 of the draft) that were to be determined and applied within the framework of the "organized community of States".

9. The second point concerning draft article 5 related to the extent to which that article would allow countermeasures by third States in cases of international delicts, which were not offences *erga omnes*. In a recently published study,[6] Elisabeth Zoller had argued that the right of a third State to take countermeasures should not be limited to cases in which there was a treaty link between the third State and the directly injured State, particularly where the third State had been "specially affected by the breach" as contemplated by article 60, paragraph 2 (*b*), of the 1969 Vienna Convention on the Law of Treaties; Professor Zoller had based that argument on the principles of friendship and neighbourliness. The Special Rapporteur might wish to consider whether the issue merited further examination.

10. The third point concerned the notion of collective interests, referred to in subparagraph (*d*) (iii) of draft article 5 and which the Special Rapporteur had contrasted, in paragraph (21) of the commentary to the article, with interests that were merely common or parallel. Under the provision in subparagraph (*d*) (iii), it would appear that a State party to a multilateral treaty not directly or specially affected by a breach of that treaty could apply countermeasures if the obligation breached was intended to protect the collective interests of States parties to the treaty.

11. In the first place, it would not always be clear from the wording of the treaty that a particular obligation was stipulated for the protection of the collective interests of States parties. That underlined the importance of the procedures in part 3 of the draft and also of draft article 11, paragraph 2, where applicable. Secondly, as to the meaning of subparagraph (*d*) (iii) of article 5 and its interrelationship with article 11, paragraph 1 (*b*), he would refer members to a United States statute entitled *Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs*, under which the President could, under certain conditions, direct that the import into the United States of fish or wildlife products from an offending country should be prohibited, where the actions of the latter country "diminish[ed] the effectiveness" of a fishery convention or endangered species programme.[7] Assuming that State A had such a statute and took measures pursuant thereto against State B in response to an alleged breach by State B of a multilateral treaty for the protection of a threatened species, and assuming further that the measures taken by State A would otherwise have violated a bilateral trade agreement between States A and B, then, as he interpreted article 5 (*d*) (iii) and article 11 (1) (*b*), such action would be a permissible response by State A so long as it did not involve the suspension by State A of obligations contained in a multilateral treaty which were "stipulated for the protection of collective interests of the State parties"

[6] *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry (N.Y.), Transnational Publishers, 1984), pp. 113 *et seq.*

[7] *United States Code, 1976 Edition, Supplement V*, p. 128, title 22, sect. 1978.

to that treaty. He would like to know whether his understanding of the Special Rapporteur's approach was correct.

12. His fourth point concerning draft article 5 related to the treatment of an international crime under subparagraph (*e*). As he had already had occasion to state, while he recognized that there were international obligations essential for the protection of the fundamental interests of the international community as a whole, he did not accept the proposition that a breach of such an obligation could properly be termed an international crime. He agreed with the statement in paragraph (24) of the commentary to article 5 to the effect that it was for the international community as a whole to determine and apply the additional special legal consequences of such grave breaches. Not even the United Nations, however, was vested with power under its Charter to punish a Member or, for that matter, a non-member State, at least according to the ordinary definition of punitive measures. Thus the sole purpose of the measures and actions that might be taken by the Security Council pursuant to Articles 41 and 42 of the Charter was to maintain or restore international peace and security. If the United Nations lacked the power to punish States and if additional legal consequences had to be decided upon by the international community as a whole, it seemed highly doubtful that individual States could, on their own initiative, properly take truly punitive measures against an author State.

13. A final point regarding draft article 5 concerned the second sentence of paragraph (10) of the commentary. The question whether interim measures of protection indicated by the ICJ, in particular under Article 41 of its Statute, were binding had been much debated. Indeed, the very language of Article 41, paragraph 1, of the Statute strongly suggested that the framers of the Statute intended that such measures should not be binding. He took it that the second sentence of paragraph (10) of the commentary to draft article 5 did not purport to resolve the controversy regarding Article 41 of the Statute of the ICJ, since it referred to "such orders ... as may be binding on the parties to the dispute".

14. Although it seemed to be far more rigid, the same comments applied to paragraph 2 (*b*) of draft article 10. That provision used the term "ordered", which was at variance with the terminology advisedly employed in Article 41 of the Statute of the ICJ. He was, therefore, uncertain how far paragraph 2 (*b*) of article 10 was intended to apply to provisional measures "indicated" by the ICJ under Article 41; to the extent, however, that it purported to resolve the question whether provisional measures under Article 41 were binding, he would be unable to accept it.

15. Draft article 6 used the word "require", which, in his view, had an almost coercive connotation. He would prefer some wording to the effect that the injured State had the right under international law to demand that the author State take the action provided for in paragraph 1 (*a*) to (*d*) of article 6.

16. He would suggest that draft article 7 should also cover injuries to citizens of the author State.

17. With regard to draft article 8, it was true that retortion was not a new right of the injured State because it was, by definition, a measure which, though possibly unfriendly, was not otherwise unlawful and could thus legally have been taken even before the commission of the internationally wrongful act. Nevertheless, like a reprisal, it might have "the purpose of influencing a decision of the author State to perform its ... obligations ...", as the Special Rapporteur stated in paragraph (2) of the commentary to article 8. It would therefore be useful, in his view, to distinguish retortion from reprisal in the commentary to the article.

18. It would also be useful to give some all-embracing definition of a reprisal at some point in the commentary to draft article 9. He was thinking, for example, of the definition given in the *Naulilaa* case,[8] although he was not certain, mainly for reasons of terminology, whether that definition, which had been enunciated before the Charter of the United Nations had been drafted, was still valid. It might, however, serve as a useful basis together with, for example, the arbitral award of 9 December 1978 in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*.[9] In that connection he quoted extracts from paragraphs 81, 83 and 90 of the arbitral award. In paragraph 78 of the award, the tribunal had also provided some guidance for the determination of the type of countermeasure involved. Some explanation along those lines in the commentary to article 9 would be helpful, although a more appropriate place might perhaps be in the commentary to article 8.

19. With regard to paragraph 1 of article 9, the word "suspend" might seem too limitative. Could the commission of an act that would otherwise be wrongful always be viewed as a suspension of the performance of obligations? Furthermore, if the expression "other obligations" denoted obligations other than those meant in article 8, it would be useful to make that clear by including a reference to "obligations other than those referred to in article 8".

20. He agreed with the formulation of the rule of proportionality in paragraph 2 of article 9, which had presumably been largely inspired by the *Naulilaa* arbitration award. He was not sure whether, on its facts, that award could still be said to provide a firm basis for such a standard, since the case had been decided at a time when it had not been at all certain that international law required that reprisals should be in approximate proportion to the offence. Perhaps that was mainly why the tribunal had gone no further than to hold that it would be excessive and illegal to take reprisals that were out of all proportion to the acts that motivated them. It would, however, be virtually impossible to apply a rule of strict proportionality. Such a requirement would make it extremely hazardous for the injured State to resort to reprisals and would, in many instances, result in the non-enforcement of international obligations.

[8] *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique*, arbitral award of 31 July 1928 (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1011).

[9] *Ibid.*, vol. XVIII (Sales No. E/F.80.V.7), p. 417.

21. He considered that article 10, relating to the effect of the availability of dispute-settlement procedures, had a place in the draft and agreed with the intent behind that article, namely that a State that claimed to have been injured should not simply proceed in total disregard of the existence of any mechanism for resolving disputes that was available to the parties. Article 10 went much further than that, however—or seemed to—by providing, in paragraph 1, that an injured State could not have recourse to reprisals until it had exhausted the dispute-settlement procedures available to it. Moreover, although that rule was subject to the exceptions in paragraph 2, it seemed to him that the latter paragraph, rather than stating the exceptions, embodied the rule that countermeasures could be taken by the injured State until such time as a competent international tribunal was seized of the dispute and provided that the tribunal's powers ensured some degree of enforcement of the obligations in question.

22. Those propositions were based, *inter alia*, on the arbitral award in the *Air Service Agreement* case between the United States of America and France. In that case, the arbitral tribunal had first considered whether a duty to negotiate affected the right to resort to countermeasures, concluding on that point that it did not believe it possible,

> ... in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.[10]

The tribunal had next considered the specific question raised by draft article 10; the passage set forth in paragraphs 94 and 95 of its award, which he read out, was particularly relevant. The tribunal had concluded that "under present-day international law States have not renounced their right to take countermeasures" where they have in principle agreed to resort to arbitration or judicial settlement.[11] He would therefore ask the Special Rapporteur to consider recasting article 10 so that it more accurately reflected the principles recognized by that tribunal. His fear was that, as drafted, article 10 would be counter-productive, since it could discourage States from agreeing to submit their disputes to third-party settlement.

23. The first question with regard to draft article 11 was who had the burden of establishing the factors mentioned in paragraph 1: the injured State, before taking countermeasures; the other States parties to the multilateral treaty; or the author State? Was it a *post hoc* establishment that was contemplated? It would be helpful if the commentary could shed some light on the matter.

24. With regard to paragraph 2 of article 11, were all countermeasures, no matter what their purpose, precluded in the circumstances referred to? It would seem that many of the factors referred to in the bilateral context of the *Air Service Agreement* case between the United States and France would also be applicable in the context of a multilateral treaty. For example, it might take some time and some encouragement from other States parties to the treaty before the procedure of collective decisions was engaged, in other words before the tribunal was established and seized of the dispute. It was difficult to accept that contemporary international law precluded States from taking measures designed to restore equality between the parties to a dispute and to encourage the author State to continue negotiations towards an acceptable solution even in the context of a multilateral treaty. It might be that the constraints in paragraph 1 (*a*) and (*b*) of article 11 were, in fact, so narrow as to diminish his concerns considerably. In other words, it might very seldom be the case that the failure to perform obligations necessarily affected the exercise of the rights or the performance of the obligations of all other States parties to the treaty, just as it might very seldom be the case that such obligations were stipulated for the protection of collective interests of the States parties to the multilateral treaty. Even so, the proposition in paragraph (8) of the commentary to article 11 that, even in the absence of a procedure of collective decisions, an injured State party to a multilateral treaty could respond by suspending its obligations under the treaty only if the object and purpose of the treaty as a whole were destroyed seemed somewhat doubtful. He would appreciate some concrete illustrations of how that principle had operated in practice.

25. A question that rose in connection with draft article 14 was whether the requirement in paragraph 3 applied to all the rights referred to in paragraph 1, namely both the normal legal consequences of an internationally wrongful act and the additional legal consequences flowing from what was referred to as an international crime. In other words, did paragraph 3 preclude States not directly affected by the offence in question from taking normal or non-punitive countermeasures? For the reasons stated in connection with draft article 5, he was not sure that States should be so precluded, and he would appreciate the Special Rapporteur's clarification on the point.

26. As to draft article 15, he was not sure whether a separate provision was necessary in regard to aggression. Aggression was, of course, governed by the Charter of the United Nations and that was a point that might be worth recalling. Article 4 of the draft might, however, suffice by itself.

27. Part 3, on implementation of international responsibility, seemed in many respects to be a necessary foundation to the entire draft. While it was possible to ignore the primary rules in the preparation of the articles, States could not do so when applying them. He had no detailed comments to offer at the current stage but could say that, subject to his remarks on the articles in part 2 of the draft, and particularly on article 10, he was in broad agreement with the system envisaged in the outline.

28. Mr. CALERO RODRIGUES complimented the Special Rapporteur on his excellent and comprehensive sixth report (A/CN.4/389). As a first general observation regarding part 2 of the draft, it could be asked whether the articles contained everything necessary to describe the legal consequences of an

[10] Paragraph 91 of the arbitral award, *ibid.*, p. 445.

[11] Paragraph 95 of the arbitral award, *ibid.*

internationally wrongful act. In his view, the issue was one of choice. More articles could be included and more legal consequences defined or preference could be given to the "lean approach" suggested by the Special Rapporteur, whereby only the elements essential for the definition of the legal consequences of State responsibility were presented. The Special Rapporteur's course was perhaps right, since the subject was very difficult, not only from the legal standpoint but also from that of acceptance by States.

29. He was also not sure that the commentaries were full enough. They had presumably been included as a means of condensing the explanations given in earlier reports and would suffice for use at the current stage. Ultimately, however, they should perhaps be expanded.

30. If he understood the general thrust of draft article 5 correctly, the Special Rapporteur regarded the injured State as a State whose primary right had been infringed and had separated international delicts and international crimes, distinguishing in the case of the former between rights under customary rules of international law, rights of a third party to a treaty to which the State was not a party, rights established by a judgment or other binding dispute-settlement procedure, rights under a bilateral treaty, and rights under a multilateral treaty. Those distinctions were clear and the commentary to the article was excellent. That excellence notwithstanding, he was not entirely convinced that the distinction between a common interest of all parties and a collective interest of the parties was necessary.

31. In the case of crimes, the Special Rapporteur suggested that the injured States were all States; that was a clear consequence of article 19 of part 1 of the draft. In the special case of crimes, however, some distinctions should perhaps be drawn as between categories of injured States, a possibility that the Special Rapporteur had apparently recognized in the penultimate sentence of paragraph (23) of the commentary to article 5. Such distinctions would be useful at the current stage if differences were to be established with regard to the legal consequences of international crimes.

32. With regard to draft article 6, he felt, unlike Mr. McCaffrey, that the words "may require" were not strong enough. The first obligation under article 6 was to stop the breach, namely to discontinue the act *ex nunc* and prevent its continuing effects. He wondered, however, whether the phrase "release and return the persons and objects held through such act" was necessary and whether it was not implied in the discontinuance of the act. He also had doubts regarding the need to mention the second obligation, which was to apply the remedies provided for under internal law. The application of existing remedies under internal law was part of the obligation either to stop the breach or to make restitution and, in his view, it was not essential to refer to those remedies in that particular case.

33. The next obligation was *restitutio in integrum stricto sensu*, namely to re-establish the situation as it had existed before the act. If re-establishment was materially impossible, there was a requirement to make compensation. In that connection, he had already had occasion to voice his doubts regarding the expression "pay ... a sum of money" when used in the context of compensation, and he noted that the Special Rapporteur had himself referred, in paragraph (8) of the commentary to article 6, to "pecuniary compensation—the payment of damages—or compensation in kind". Compensation could not be limited to payment of a sum of money, for in certain cases it would be better for both States, and particularly the injured State, to receive compensation in kind. The Commission should recognize that fact unequivocally.

34. The last obligation under article 6, providing for guarantees against repetition of the act, was somewhat briefly stated, since such guarantees could take several forms, and the commentary was not very clear. It might therefore be useful to give examples of the guarantees that could be required from the author State.

35. When draft article 7 had first been presented, he had voiced strong doubts as to the need for such an article because compensation normally fell due when it was materially impossible to re-establish the situation. Under the terms of article 7, it appeared that there could be compensation even if re-establishment was not materially impossible. Why, when the obligation concerned the treatment to be accorded to aliens, was the author State given the option of not fulfilling it even if fulfilment was materially possible? Legal impossibility under domestic law should not, in his view, provide a State with the justification for paying compensation rather than fulfilling an international obligation which it had breached; the initial situation should be re-established if that was at all possible. Furthermore, once an internationally wrongful act had been committed, the ensuing obligation was no different from any other obligation involving other primary rules.

36. Moreover, he considered that there had been no clear explanation of why it was necessary to include article 7 in the draft. Paragraph (2) of the commentary to that article stated that, while neither the decisions of international courts and tribunals nor the practice of States and the teachings of publicists were uniform, there was "a marked tendency" not to require restitution in the cases in question or at least to leave the author State the choice between restitution and compensation. He found it difficult on logical grounds to accept that exception. He also failed to see any link between the reference in paragraph (4) of the commentary to the question of extraterritorial status and the text of article 7.

37. Draft articles 8 and 9 defined the new rights of the injured State and did so well enough to obviate the need for recourse to the legal concepts of reciprocity and reprisal. The articles would still be clear if those concepts were deleted and there would also be one less possible element of confusion.

38. While he had no objections in general to draft articles 10 to 13, he did have some doubts regarding article 11, paragraph 1 (*c*), which referred to obligations stipulated for the protection of individual persons irrespective of their nationality. If obligations

were stipulated for the protection of individuals in general, they should be maintained, but he wondered whether there might not be cases in which certain obligations were stipulated for the protection of individuals and in which suspension with regard to nationals of the author State should not be authorized. He had pondered the question but had not reached any definite conclusion.

39. Draft article 12 provided for two instances in which suspension of the performance of an obligation would not be allowed. In his view, both exceptions were justified.

40. Turning to draft articles 14 and 15, which dealt with the legal consequences of international crimes, he remarked that of the three kinds of legal consequences listed in paragraph (3) of the commentary to article 14 that were additional to the legal consequences of international delicts, only the third kind was dealt with in article 14. The succeeding paragraphs of the commentary said that the first kind was dealt with in draft article 5 (*e*) and that the second kind could only be determined by the international community as a whole if and when it recognized some internationally wrongful acts as constituting international crimes. Moreover, paragraph (5) of the commentary contained a reference to article 2, the commentary to which explained (paragraph (1)) that that article stipulated the residual character of the provisions of part 2 of the draft, and (paragraph (2)) that the predetermined legal consequences established by States when creating primary rights and obligations between themselves "may deviate" from those to be set out in part 2.

41. While following the logic of the Special Rapporteur's reasoning, he was not satisfied with the results. After going into some detail on the subject of the legal consequences of internationally wrongful acts which constituted delicts, the articles would, in fact, have very little to say about the legal consequences of international crimes. That might be a way out of the difficulty which had apparently arisen when international crimes had been mentioned in part 1 of the draft, thereby implying that their legal consequences had to be developed in part 2. But it was by no means sure that the Convention on the Prevention and Punishment of the Crime of Genocide[12] and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[13] or the future code of offences against the peace and security of mankind contained or would contain a determination by the international community as a whole of the legal consequences of the crimes with which they dealt. To adopt article 14 would be tantamount to accepting that the legal consequences of certain international crimes would be no more than those provided in the articles for international delicts; and that, in turn, would be tantamount to dropping the distinction established in part 1 of the draft between international delicts and international crimes.

42. The problem was, of course, a most difficult one. States were wary of accepting rules which progressive international law recommended but which could only be effective if they were applied by all States. Nevertheless, the Commission should at least attempt to tackle the problem of the legal consequences of international crimes; it should not limit itself to making a general reference to rules which the international community made on an *ad hoc* basis. The matter had to be studied far more carefully before it could be said that the Commission had done its duty with regard to that part of the draft articles.

43. He had no objection to the formulation of draft article 16.

44. With regard to section II of the report, dealing with part 3 of the draft articles, there was no doubt that, in legal logic, in order for the secondary rules of State responsibility to come into operation it had to be determined that a primary rule establishing an obligation had been infringed. Thus, if the States involved disagreed that there had been an infringement, their dispute had to be settled. If a system of settlement—either general or peculiar to the dispute in question—already existed between them, there was no problem. The question was whether the draft articles should provide for a separate system which would come into play if no other system was applicable.

45. In his report (A/CN.4/389, para. 8), the Special Rapporteur said that the establishment of a new dispute-settlement procedure of that kind could be said to amount to the creation of a multilateral compulsory dispute-settlement procedure relating to all (primary) obligations, present and future, under international law of States becoming parties to the convention on State responsibility. A settlement procedure of very wide scope concerning invalidity, termination, withdrawal from or suspension of the operation of a treaty was, of course, provided in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties. If a procedure were established in respect of State responsibility, its scope would be even wider, and it was by no means certain that States would be prepared to accept such a procedure. A convention which did not include such a system of settlement would no doubt be incomplete and ineffective; but then the same could be said of all international law. On the other hand, the inclusion of a procedure of that kind might actually prevent the convention from being accepted.

46. The Special Rapporteur was in effect proposing that the Commission should try to follow a median course between those two risks. For his own part, he entirely approved of that approach. Awareness of the difficulties involved should not deter the Commission from preparing part 3 of the draft articles. The system proposed by the Special Rapporteur was highly ingenious in that it placed the author State in the position of having to take the initiative of applying the compulsory conciliation procedure. If the author State failed to react, it would, in effect, be accepting the injured State's contention that a breach of international law had been committed. The suggested procedure had a good parallel in the 1969 Vienna Convention. The Special Rapporteur should proceed on that basis.

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

[13] *Ibid.*, vol. 1015, p. 243.

47. Mr. FLITAN said that the commentaries to draft articles 1 to 16 in the Special Rapporteur's excellent sixth report (A/CN.4/389) had the purpose not only of defining the the content of those articles, but also of responding to any objections which might have been made concerning them. In his next report, the Special Rapporteur could amend those articles as required and, if he deemed it necessary, expand part 2 of the draft: several members of the Commission had already wondered whether part 2, which appeared somewhat out of proportion with part 1 as provisionally adopted in first reading, would contain only the 16 articles submitted so far. He himself believed that part 2 as a whole should be re-examined and aligned with part 1.

48. As he had already pointed out (1890th meeting), he believed that the draft articles should contain a special provision on *jus cogens*, as did the 1969 Vienna Convention on the Law of Treaties. While that would not be without difficulties, especially as the content of *jus cogens* was not well known, it remained the case that the provision of draft article 12 (*b*) to the effect that articles 8 and 9 did not apply to the suspension of the performance of the obligations of any State by virtue of a peremptory norm of general international law was insufficient. A provision was needed which would prohibit States parties to the convention which the draft articles might one day become from weakening or strengthening peremptory norms of international law. Article 12 (*b*) was of limited application and did not seem to be directed at possible agreements between two States to modify the provisions of the draft articles.

49. It appeared to be time for the Special Rapporteur to come to an agreement with the Special Rapporteur for the topic of the draft Code of Offences against the Peace and Security of Mankind on the exact scope of each of their topics. For example, part 2 of the draft articles under examination contained an article 15 on the act of aggression, whereas part 1 contained article 19 which concerned not only the act of aggression but also other international crimes. Did the fact that the Special Rapporteur did not deal with the specific consequences of those crimes in part 2 of the draft mean that he was leaving that problem to the Special Rapporteur for the draft code of offences? Since that did not seem to be the case, why was article 15 not more developed? Why did the articles under consideration not apply to the international crimes mentioned in article 19, paragraph 3 (*b*), (*c*) and (*d*), of part 1, such as the establishment or maintenance by force of colonial domination; slavery, genocide and *apartheid*; or massive pollution? Part 2 of the draft should therefore be re-examined in the light of part 1.

50. Among the provisions in part 2, draft article 5 was extremely important since it provided, in a way, a definition of the injured State and was therefore the counterpart to the provisions of part 1 which defined the author State. As the Special Rapporteur had indicated (A/CN.4/389, para. 37), part 2 could be considered an example of operational research or systems analysis. The text of article 5 would benefit greatly from a distinction between the directly injured State and the indirectly injured State, a distinction raised by several members of the Commission. It seemed to be generally accepted that a breach of an international obligation could have different legal consequences for different States and so justify different claims. Account must therefore be taken of the seriousness of the injury which a particular internationally wrongful act caused to each State. For example, when a State was the victim of aggression, the interests of the international community as a whole were injured, but it was obvious that the State against which the aggression was directed was particularly injured and should enjoy more rights.

51. Referring to Mr. McCaffrey's proposal concerning human rights, he said that the purpose of part 2 of the draft was not to define the primary rules and indicate which situations should be added to those covered in article 19 of part 1 or other articles, but merely to define the secondary consequences. The proposal in question concerned part 1 of the draft and could be submitted again when that part was examined in second reading. It might, however, give rise to difficulties in that States might invoke certain prerogatives or pretexts in order to commit a breach of international law.

52. With regard to draft article 5, subparagraph (*a*), he felt that rights appertaining to a State by virtue of a customary rule of international law and rights arising from a treaty provision for a third State could better be mentioned in separate provisions. In paragraph (5) of the commentary to article 5, it was recalled that article 38 of the Vienna Convention on the Law of Treaties envisaged the possibility that a rule set forth in a treaty might become binding upon a third State as a customary rule of international law, recognized as such. Did the Special Rapporteur intend to limit himself to mentioning that question in the commentary or did he wish to see it reflected in article 5? Whatever the case, the eventuality mentioned in paragraph (5) of the commentary did not seem to follow from article 5, subparagraph (*a*). Furthermore, it was hard to tell how far the reference to a right arising from a treaty provision for a "third State" meant one State or a group of States. It would be helpful if the Special Rapporteur could provide some clarification on that point, which had long exercised learned writers. There were also a number of drafting problems which required attention, such as the reference in subparagraph (*a*) to "an infringement of a right" and the reference in subparagraph (*b*) to "the breach of an obligation". With regard to subparagraph (*b*), he found it hard to accept the apparent assertion that judgments or other binding decisions of international courts or tribunals were opposable *erga omnes*.

53. Subparagraph (*d*) (i), (ii) and (iii) seemed to overlap and all to settle the same question. Furthermore, subparagraph (*d*) (iii) concerned a notion—that of "collective interests of the States parties"—which required clarification. The Special Rapporteur was certainly right in saying, in paragraph (21) of the commentary to article 5, that multilateral treaties could recognize or create a collective, as distinct from a merely common or parallel, interest, but that interest must be provided for *expressis verbis*.

54. The situation envisaged in subparagraph (*e*), in which the internationally wrongful act constituted an international crime, should be dealt with in more detail. While the possibilities covered in the preceding subparagraphs of the article were all based on the source of the obligations, it was based on the seriousness of the internationally wrongful act.

55. With regard to draft article 6, he agreed with Mr. Calero Rodrigues that the introduction to paragraph 1 could be more cogently drafted: perhaps it could mention the "rights" available to the injured State. Paragraph 1 (*a*) concerned the very special case of the release of persons and return of objects held and appeared to be based on recent events which, despite their seriousness, should be considered with a certain detachment. Perhaps it was not absolutely necessary. Paragraph 1 (*d*) was unacceptable in its current form, for its effect would be to require guarantees in the event of the slightest offence by one State against another. Perhaps the provision should be limited to crimes or to certain crimes and certain offences.

56. Finally, he was inclined to agree with Mr. Calero Rodrigues that draft article 7 was completely unnecessary. It seemed to have been prompted by the recent events to which he had already alluded and concerned a situation covered by article 6, paragraph 2. While it was normal that the Commission should have in mind, in approaching the topic under consideration, the serious events to which article 7 referred, those events did not warrant the drafting of a special article.

The meeting rose at 6.05 p.m.

1893rd MEETING

Tuesday, 4 June 1985, at 10.25 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Welcome to the participants in the International Law Seminar

1. The CHAIRMAN welcomed the participants in the twenty-first session of the International Law Seminar and expressed the hope that attendance at the Commission's meetings would prove interesting and useful to them and would enhance their own future contribution to the dissemination and development of international law.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 10]

Membership of the Planning Group of the Enlarged Bureau

2. The CHAIRMAN said that the Enlarged Bureau had met that morning and had recommended that the Planning Group should be composed of the following members: Mr. El Rasheed Mohamed Ahmed (Chairman), Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Koroma, Mr. Malek, Mr. Njenga, Mr. Reuter, Mr. Roukounas, Mr. Thiam, Mr. Tomuschat and Mr. Ushakov. The Group would be open-ended and any member of the Commission interested in some aspect of its work would be welcome to participate. It was particularly hoped that the special rapporteurs would make themselves available when the Group considered matters relating to their topics. The first meeting of the Planning Group would be held in the afternoon of 6 June 1985. If there were no objections, he would take it that the Commission agreed to the Enlarged Bureau's recommendation.

It was so agreed.

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*)

3. Mr. FLITAN, continuing the statement he had begun at the previous meeting, said that the subject-matter of draft articles 8 and 9 relating to the new rights of the injured State lay somewhat outside that of reparation strictly speaking, which was dealt with in draft articles 6 and 7. Unlike those two articles, which were of a "fixed" character, articles 8 and 9 constituted, as it were, an adjustable scale. Each was concerned with a category of measures that could be taken by the injured State against the State which had committed the internationally wrongful act: article 8 with measures by way of reciprocity and article 9 with measures by way of reprisal. In the course of

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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.*

[4] For the texts, see 1890th meeting, para. 3.