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Summary record of the 1893rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.

the discussion it had become apparent that there was a need to define what, at the lower end of the scale of measures that one State could take in respect of another, constituted measures by way of reciprocity. In that connection, a distinction was required between measures by way of reciprocity and measures deriving simply from the interpretation of treaties. In his opinion, it was just as important to determine, at the upper end of the scale, the limit beyond which the injured State could not go. That upper limit was in fact recourse to armed reprisals, which should be expressly prohibited in the draft articles.

4. With reference more particularly to article 8, the draft articles in their current form made it quite difficult to draw a precise picture of the concept of a measure of reciprocity. The only statement on that point contained in article 8, namely that obligations whose performance could be suspended by the injured State had to correspond to or be directly connected with the obligation breached, was inadequate. The question whether a measure was one of reciprocity could not be determined in all cases with the help of that definition. As pointed out during the discussion, it was sometimes difficult to establish the dividing line between measures by way of reciprocity and measures by way of reprisal. Indeed, the Special Rapporteur recognized as much in paragraph (3) of the commentary to article 8 by stating that the justification for countermeasures in either category was connected with the effect of the internationally wrongful act, but then going on to say that the ultimate purpose of both types of measures must be a restoration of the "old" primary legal relationship, or, in other words, that elements of proportionality and of interim protection were inherent in measures by way of reciprocity. Perhaps those points made by the Special Rapporteur should be incorporated in the draft in order to shed further light on articles 8 and 9. After all, the draft was not addressed to legal experts alone but was intended to be applied by State authorities.

5. In paragraph (5) of the commentary to article 8, the Special Rapporteur observed that there was no reciprocity in the primary relationship and, therefore, no justification for the suspension of the performance of obligations by way of reciprocity if the latter obligations were obligations by virtue of a peremptory norm of general international law. In that connection, a cross-reference was made to article 12 (*b*), under which 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. As he had already had occasion to point out (1892nd meeting), that provision was not enough to replace a separate article in part 2 of the draft articles on the peremptory norms of general international law.

6. Paragraph (7) of the commentary to article 8 made a point in connection with article 12 (*a*), namely that the obligations of a receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff were not a counterpart of the fulfilment of the obligations of the sending State, its missions and their staffs relating to the proper exercise of their functions. It was then explained that, while declarations of *persona non grata* and the severance of diplomatic and/or consular relations were a legitimate response to breaches of those obligations, the immunities themselves had to be respected. That idea should be incorporated in articles 7 and 8 in order to make them easier to apply.

7. Under draft article 9, the injured State was entitled, by way of reprisal, to suspend the performance of "its other obligations" towards the State which had committed the internationally wrongful act. During the discussion it had been deemed necessary to make an express reference to article 8 in order to clarify the nature of those other obligations. Furthermore, it was apparent that the measures envisaged in articles 8 and 9, respectively, must be ranked in some way. It was true, however, that measures by way of reciprocity did not always precede measures by way of reprisal and that, because of their ultimate purpose, measures by way of reprisal had to be resorted to first. Several members had already remarked that the statement in paragraph 2 of article 9 that the exercise of the right of reprisal by the injured State should not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed was far too vague. For his own part, he thought that to introduce the concept of the seriousness of an internationally wrongful act was to bring in a factor that was extremely difficult to measure.

8. A reading of draft article 10 gave the impression that the scales were being tipped in favour of the author State, an impression that was indeed gained from the whole of part 2 of the draft. Under paragraph 1 of article 10, the injured State could not take any measure in application of article 9 until it had exhausted the international procedures for peaceful settlement of the dispute available to it. Paragraph (5) of the commentary to article 10 implied that an agreed dispute-settlement procedure existed in all cases. Moreover, in paragraph (10) of the commentary the Special Rapporteur said that the fact that a compulsory third-party dispute-settlement procedure did not provide for a final and binding decision by the third party did not take away the compulsory character of the procedure itself, something that did not by any means follow from article 10. The question was, in that instance, why the compulsory character of the procedure itself should be maintained.

9. Draft article 11 also gave the impression of tipping the balance in favour of the author State inasmuch as it imposed conditions and restrictions upon the injured State. Did the rights of the injured State have to be so limited that it could not take the smallest measure of non-performance of its obligations when such non-performance would affect the interests of the other States parties to the multilateral treaty concerned? Was there not a hierarchy, or ranking, of the interests involved, and might not the interests invoked by the other States parties be quite minor compared with those of the injured State? As to article 11, paragraph 1 (*b*), he wished to emphasize, as he had done at the previous meeting in connection with draft article 5, that the phrase "collective interests of the States parties to the multilateral

treaty" was very vague and confusing. It should perhaps be specified that they were the "collective interests of the States parties expressly provided for in the multilateral treaty". He had the same reservations which regard to the phrase "procedure of collective decisions" in paragraph 2 of article 11.

10. Draft article 12 (*b*) was inadequate and part 2 of the draft should contain a provision specifically on *jus cogens*. Subparagraph (*a*) should not, perhaps, be confined to the immunities to be accorded to diplomatic and consular missions and staff but should extend to all immunities recognized in all cases covered both by the relevant conventions codifying diplomatic and consular law[5] and by the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

11. In paragraph (4) of the commentary to draft article 13, the Special Rapporteur explained that the complete breakdown of the system established by a multilateral treaty as a consequence of an internationally wrongful act in relation to the obligations imposed by that treaty could not be lightly assumed and that the violation must be at least a "material breach" in the sense of the 1969 Vienna Convention on the Law of Treaties. Accordingly, the words "manifest violation" in the text of article 13 might well be replaced by "material breach".

12. Articles 14 and 15, although subject to improvements and drafting changes, were essential provisions and certainly had their place in the draft. In view of the difficulties of interpretation inherent in the concept of "the international community as a whole", it might be preferable to replace the expression "applicable rules accepted by the international community as a whole" in paragraph 1 of article 14 by the phrase "applicable rules of international law".

13. Under article 14, paragraph 2 (*c*), an international crime committed by a State entailed an obligation for every other State to join other States in affording mutual assistance in carrying out the obligations set out in the two preceding subparagraphs. The current wording of subparagraph (*c*) suggested that the other States must always give each other mutual assistance, but it did not seem that such an obligation existed in every case. In paragraph (9) of the commentary to article 14, the Special Rapporteur introduced the idea of regional action. That concept was ill-defined; it did not seem to be rooted in article 14 and, what was more, the question also arose whether the Commission should really consider cases of regional action. All action should be in conformity with general international law, and there was no call to give special consideration to regional action.

14. Draft article 15 was surprising in that it dealt only with the crime of aggression—undoubtedly the most serious of all international crimes—to the exclusion of the other international crimes referred to in article 19 of part 1 of the draft articles. Furthermore, all the secondary legal consequences of the acts covered by part 1 should be dealt with in part 2. Thus part 2 of the draft should, for example, deal with non-recognition of the acquisition of territory or of a special advantage resulting from an act of aggression.

15. In connection with draft article 16 (*b*), he wondered whether it was really necessary to deal with the rights of membership of an international organization; the draft should perhaps ignore those specific rights. He also wondered whether, if article 16 were maintained, article 3 would not become redundant.

16. With regard to a possible part 3 of the draft on the "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes, he feared, in the light of the comments made by Mr. Reuter (1891st meeting), that such a part 3 might give rise to new difficulties. The success of the draft articles was of extreme importance to the international community and to mankind as a whole and should not be jeopardized by the introduction of the concept of compulsory settlement of disputes. It would be wiser to display moderation with regard to the implementation of international responsibility.

17. Mr. THIAM said that his initial remarks on the Special Rapporteur's concise, abstract, yet extremely well thought out sixth report (A/CN.4/389) would relate chiefly to the scope of the topic of State responsibility, on the one hand, and of the draft Code of Offences against the Peace and Security of Mankind, for which he was the Special Rapporteur, on the other. He believed it necessary to revert to that question because other members had referred to it on several occasions. Moreover, on reading the sixth report, he had realized that some articles dealt with offences which, by their nature, fell more within the purview of the draft code of offences than State responsibility as viewed by the Special Rapporteur.

18. Particular attention would have to be paid, therefore, if not to finding a solution, at least to outlining solutions for defining the two topics. But when all was said and done, the problem of delimitation arose only because part 1 of the draft articles on State responsibility, instead of being confined to the traditional scope of responsibility—in other words, reparation for injury, a study of responsibility in terms of its material consequences, of its patrimonial content, i.e. a search for a balance between the injured State and the author State—introduced in article 19 the new concept, at least as far as State responsibility was concerned, of an international crime. Accordingly, it was necessary to decide which international crimes came under the draft Code of Offences against the Peace and Security of Mankind and then consider the treatment to be given to other international crimes. The Special Rapporteur for the topic of State responsibility was quite aware of that fact and noted, in paragraph (12) of the commentary to draft article 14, that "the commission of an international crime does not necessarily affect the maintenance of international peace and security". The Special Rapporteur was therefore admitting that one domain, namely offences against the peace and security of mankind, should be separated from international crimes as a whole and be given special treatment if duplication was to be avoided.

19. A problem then arose: the requisite criterion. The Commission had amply discussed the criteria for

[5] See 1904th meeting, footnote 5.

characterizing an offence as one against the peace and security of mankind. It had decided that the criterion of seriousness was not sufficient, and he himself had proposed another more objective one, which was the subject-matter of the obligation breached. Article 19 of part 1 of the draft articles on State responsibility set forth a number of obligations concerning interests whose protection was extremely important to mankind: the obligations to maintain international peace and security, to safeguard the right of self-determination of peoples, to safeguard the human being and to safeguard and preserve the human environment. He had at first taken the view that the crimes resulting from breaches of one of those four basic obligations fell within the purview of the draft Code of Offences against the Peace and Security of Mankind. But what about other international crimes, those which neither the Special Rapporteur for State responsibility nor he himself had considered as falling within his respective topic? They would still have to be dealt with. He would willingly have included them in the framework of the draft code of offences, but did not believe he could do so because of the wording of the topic which he had been assigned. It remained to be seen whether the Special Rapporteur for State responsibility could deal with the matter.

20. In that connection, it was difficult to understand why there was such an imbalance between part 1 and part 2 of the draft articles. Part 1 dealt, in article 19, with international crimes, when it could quite easily have been limited to such aspects of responsibility as reparation—*restitutio in integrum,* indemnification, compensation, and so on—and the draft articles would then have been more consistent. Accordingly, it would have been logical to set out in part 2 all the consequences of those international crimes, at least the international crimes which did not fall within the draft Code of Offences against the Peace and Security of Mankind. Yet it seemed that the Special Rapporteur had been sometimes too timid and sometimes too bold.

21. The consequences specified in draft article 14 were particularly mild. The first part of paragraph 1 was very broad and, at the same time, very vague; the second part was also much too vague and, indeed, difficult to understand: if the rules in question were applicable and accepted by the international community, their source lay not in the articles on State responsibility but in other rules. As to the obligations enumerated in paragraph 2 (*a*), (*b*) and (*c*), they were very little in terms of the international crime which was supposed to have given rise to them. Was it really so much to ask of a State not to recognize as legal the situation created by an international crime? Was it not the least that could be asked of the other members of the international community not to render aid or assistance to the author State in maintaining the situation created by an international crime? What was the point of the mutual assistance referred to in subparagraph (*c*), since the obligation in subparagraph (*a*) not to recognize as legal the situation created by the international crime called for no mutual assistance, and the obligation in subparagraph (*b*) was a negative obligation that did not call for any mutual assistance either? Again, paragraph 3 related to obligations under the Charter of the United Nations and introduced nothing particularly new. In his opinion, an international crime should entail greater and more serious consequences than those of an ordinary wrongful act, consequences which were, moreover, referred to in the commentary to article 19 of part 1 of the draft.[6]

22. On the other hand, some of the consequences went beyond all expectations. Draft article 15 covered aggression, but aggression fell naturally within the scope of the draft Code of Offences against the Peace and Security of Mankind. The fact that article 19 of part 1 cited aggression as an example did not mean that it should be mentioned in part 2; if it was to be mentioned, so should all the other crimes enumerated in article 19, as well as all the offences against the peace and security of mankind. Similarly, draft article 16 was far too bold, since it spoke of belligerent reprisals, which did not form part of the subject-matter.

23. Thus the Special Rapporteur sometimes took one step forwards and sometimes one step backwards, which did not make for an accurate idea of the precise area covered by the topic. He should therefore attempt in part 3 of the draft, which would perhaps embody the special criminal law on the matter, to study a number of international crimes which did not fall within the purview of the draft Code of Offences against the Peace and Security of Mankind, so as to justify the existence of article 19 in part 1.

24. With reference to the settlement of disputes, the Special Rapporteur stressed in his sixth report the fact that the international community should elaborate appropriate procedures for punishing offences against the peace and security of mankind, but did not propose any particular procedure. It was a wise attitude, for at the current stage the Commission did not know whether an international criminal jurisdiction would be created—a possibility that should not be discarded *a priori*—or whether States would be competent to punish international crimes. Yet the Special Rapporteur was proposing that disputes regarding the interpretation or application of article 19 of part 1 of the draft should be referred to the ICJ. Did that not mean that States would be deprived of the power of interpretation—in which case he failed to see, *a priori,* on what basis—and that the international criminal jurisdiction, if it were created, would also be in the same position? If the draft Code of Offences against the Peace and Security of Mankind took the form of a convention, would the terms for the settlement of disputes regarding the convention be subordinated to a provision which established in advance the competence of the ICJ? In his view, that would be going too far.

25. Sooner or later the Commission would have to decide whether the matter of international crimes as a whole came under the draft Code of Offences against the Peace and Security of Mankind, in which case the draft code would have to be expanded, or under the topic of State responsibility. But it would be unthinkable at the present time to leave aside a number of

[6] *Yearbook ... 1976*, vol. II (Part Two), pp. 96 *et seq.*

international crimes which were not offences against the peace and security of mankind but which were none the less extremely serious.

26. Draft articles 8 and 9 were very important and he endorsed the remarks made about the distinction between reciprocity and reprisals, one that was difficult to establish precisely. Generally speaking, reciprocity entailed two obligations which had some correlation, in other words when they were synallagmatic in character, and reprisals occurred when other obligations intervened which were not directly linked to the obligation breached. Yet in terms of the goal sought, reciprocity sought in theory to ensure a balance, whereas reprisals sought to bring pressure—constraint—to bear on another State which had not fulfilled its obligations. But were there not some measures in the nature of reciprocity which, in fact, had more in common with constraint? For example, under a convention between two States for the supply of gas against the supply of capital goods, the State which was to supply the gas, in the light of short-term and continuous needs, might suspend its supply because it had not received the capital goods, and it was then plain that, even in the case of a synallagmatic convention, the pressure brought to bear by one of the two States was none the less much greater than the pressure exerted by the other. Hence it seemed preferable to indicate, in one single article, that the injured State could take a particular measure, without speaking of measures of reciprocity or measures of reprisal, or simply to delete the words "by way of reciprocity" from article 8 and the words "by way of reprisal" from article 9.

27. He unreservedly endorsed the comments made by Mr Calero Rodrigues (1892nd meeting) regarding the exhaustion of internal remedies. In principle, aliens had access, in the context of the economic and social activities that they normally conducted in a country, to the courts of that country in the event of injury suffered, and it was therefore logical in such cases to require prior exhaustion of internal remedies. Furthermore, he wondered whether the rule on remedies was a substantive or a procedural rule. In part 1 of the draft, it was posited as a substantive rule, because exhaustion of internal remedies in itself was regarded as creating a breach of the obligation. That might be true, but for his part he believed it to be a procedural rule, a question that should be discussed again on second reading of part 1.

28. Article 7 should in his opinion be deleted, for it made no great contribution to the draft. He would await further clarification before commenting on the other articles.

29. Mr. HUANG congratulated the Special Rapporteur on the remarkable progress achieved on the topic of State responsibility, one of the most important and difficult questions in international law. It had long been a virtually uncharted area but, during the previous 20 years, the new concepts of *jus cogens* and of an international crime by a State had emerged and had contributed to the slow but steady process of codification.

30. Part 2 of the draft, which served as a link between part 1 and part 3, dealt with the legal consequences of State responsibility, a little-explored area where codification was particularly difficult. In his six reports to date, the Special Rapporteur had demonstrated the importance he attached to new developments in international law and the stage had now been reached when it was possible to visualize what the edifice of responsibility under construction would ultimately be like. The Commission's fruitful discussions of recent years had further strengthened the basis on which that edifice was to stand. The desirability of early completion of the draft had been emphasized and the views expressed in the Sixth Committee of the General Assembly had revealed how much importance the international community attached to the topic. Given the current favourable climate, the pace of work on it could be expected to quicken.

31. It was important, however, not to lose sight of the difficulties. How, for instance, would a proper balance be struck in the draft between the weight to be given, on the one hand, to the protection of the injured State and the prevention of the commission of an internationally wrongful act, and, on the other, to the need to avoid over-reaction against the author State and escalation of international tension? How would the complex relationship between the present topic, the draft Code of Offences against the Peace and Security of Mankind, the 1982 United Nations Convention on the Law of the Sea,[7] the 1969 Vienna Convention on the Law of Treaties and the United Nations system be handled appropriately? How would the régimes governing international crimes and international delicts be differentiated and established in terms of their legal consequences? There seemed to be no easy solutions to those and other questions. Nevertheless, he trusted that the Commission would be able to complete the first reading of part 2 of the draft articles before the end of members' current term of office.

32. He had to leave Geneva shortly and had not had time to study all the voluminous materials on the topic, so his comments would be of a preliminary nature.

33. It had rightly been said that draft article 5 was a key article. Its purpose was to identify or define "injured States", which could be likened to actors without whom the drama could not be staged. Just as, under part 1 of the draft, the status of "author States" was determined by reference to the international obligation breached, the identity of "injured States" was based on the rights infringed, for, as the Special Rapporteur explained in paragraph (3) of the commentary to article 5, in many cases the obligation of one State was merely the mirror image of the right of another State.

34. With regard to the formulation of article 5 he had just one query: was the list of five situations in which a State could be regarded as an injured State exhaustive? In paragraph (7) of the commentary, the Special Rapporteur had linked the right of a State, the infringement of which made the State in question an injured State, to the primary rules or "sources" of such rights. According to Article 38 of the Statute of

[7] See 1890th meeting, footnote 6.

the ICJ, there were two main sources, treaties and international custom, and both were covered in draft article 5. There might, however, be other sources which, though controversial, could engender rights and obligations. He therefore wondered whether it would be possible to establish a criterion for injured States that was wide and flexible enough to cover all the situations likely to produce injured States, in addition to the specific situations referred to in article 5. The Drafting Committee might, for instance, wish to consider inserting, before subparagraph (*a*), some wording such as: "... a State whose rights have been infringed or affected by a breach of an international obligation, including, *inter alia*:".

35. The definition of the injured State in the case of an international crime in subparagraph (*e*) was a logical development of article 19 of part 1 of the draft and correctly embodied the *erga omnes* nature of such a crime. But the problem was rather one of the consequences that might flow from the definition. The definition did not, for instance, answer the question of what difference, if any, existed between the rights and obligations of various injured States. If need be, that question could be dealt with in draft article 14.

36. The basic idea underlying draft article 6 was well conceived and the elements of the new obligations of the author State towards the injured State or States corresponded, broadly speaking, with international practice. There might, however, be certain other elements which should be included in the content of those new obligations. He had some misgivings about the formulation of article 6, which, although it related to the new obligations of the author State, was couched in terms of the rights of the injured State. It did not stipulate whether the author State had an obligation to comply with a request made by the injured State under paragraph 1 of the article. In his view, it would be advisable to refer expressly to the new obligations of the author State. That might be done by specifying that the injured State could require the State which had committed an internationally wrongful act to take the steps listed in paragraph 1 (*a*), (*b*), (*c*) and (*d*) and that the latter State "shall" do so, which would be more in line with the purpose of the article.

37. It had been suggested that there was no justification for draft article 7, since a breach of an obligation regarding the treatment of aliens was a particular type of internationally wrongful act whose consequences were fully covered in article 6. His own attitude was flexible and if the Commission as a whole felt that article 7 should be retained, he could agree.

38. Draft articles 8 and 9 concerned the right of the injured State to take countermeasures by way of reciprocity and by way of reprisal: the Special Rapporteur's very useful analysis had done much to clarify the meaning of those two distinct but closely related concepts. In their current form, both articles were acceptable in principle, though some improvements might be needed.

39. Draft article 10 raised certain doubts. Paragraph 1 provided that the injured State could not take countermeasures by way of reprisal until it had exhausted the international procedures for peaceful settlement of the dispute available to it. The problem lay mainly in the terms "exhausted" and "available". In the case of a treaty régime such as that provided for under the Vienna Convention on the Law of Treaties, or of a bilateral treaty which included a dispute-settlement procedure, the terms of article 10 could perhaps be applied with little difficulty because the availability or otherwise of such procedures could easily be ascertained. In other cases, however, it might not be easy to determine whether such procedures were available or not. It would, of course, always be possible to refer to Article 33 of the Charter of the United Nations and to hold that the procedures for dispute settlement provided for therein were always available. Even so, there remained the problem of the word "exhausted". Did the injured State have to approach the author State and suggest that it apply all the procedures? What if the author State refused to negotiate in good faith? What if one party, but not the other, had accepted the jurisdiction of the ICJ. For that matter, did the injured State have to accept the jurisdiction of the ICJ in order to comply with the requirement of exhaustion of procedures? All those questions required clarification, but, even without them, the provisions of article 10 could still operate as an undue restraint on the injured State. Instances might well occur in which it would be too late for the injured State, after it had followed all the procedures required, to exercise its right of reprisal in any meaningful way, so that it might find itself in an irreversible situation. Article 10 therefore required reconsideration, although he appreciated that, later on, part 3 of the draft might well dispel his doubts.

40. He was in no way opposed to the role to be played by dispute-settlement procedures in the draft articles. Indeed, peaceful settlement of international disputes was a fundamental principle of modern international law and could well prove indispensable in a future convention on State responsibility. The concern with preventing over-reaction against the author State and escalation of tension should not, however, unduly restrict the proper exercise of legal rights by the injured State.

The meeting rose at 1 p.m.

1894th MEETING

Wednesday, 5 June 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

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. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.