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Summary record of the 1894th meeting

Topic:
State responsibility

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

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

[Agenda item 3]

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

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

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

1. Mr. HUANG, continuing the statement he had begun at the previous meeting, said that the purpose of draft article 12 was to place limitations on the application of articles 8 and 9. With regard to subparagraph (*a*) of article 12, his response to the Special Rapporteur's proposition in the second sentence of paragraph (7) of the commentary to draft article 8 would be that declarations of *persona non grata* and the severance of diplomatic relations were not appropriate remedies. The former often prompted similar reactions on the part of the author State, while the latter affected both States equally, so that the injured State remained in a less advantageous position. As a diplomat, he sympathized with those who might be the victims of violations, but it was necessary to be realistic and to be satisfied with what had been accorded.

2. Article 14 was the most difficult and important article in part 2 of the draft. He accepted the basic idea embodied in it and agreed that it was a logical corollary of the recognition of the concept of an international crime. As the Special Rapporteur had pointed out in paragraph (1) of the commentary, the distinction drawn in article 19 of part 1 of the draft articles between "international delicts" and "international crimes" made sense only if the legal consequences of the latter differed from those of the former. The Special Rapporteur had accordingly identified three kinds of additional legal consequences (paragraphs (3) to (6) of the commentary), which he himself accepted.

3. There was, however, room for improvement in the formulation of article 14. As he had already pointed out, the definition in subparagraph (*e*) of article 5 could cause a problem: for the status of an "injured State", which that definition conferred on all States other than the author State, would entitle them to invoke the rights provided for in draft articles 6 to 9. Common sense dictated that that could not be right. Although such States might all be termed "injured States", the degree of injury and the extent to which their rights and interests were affected could well differ, as had been recognized by the Special Rapporteur in paragraph (8) of the commentary to article 14. The footnote to paragraph (2) of the commentary also seemed to distinguish between two types of injured State in terms of the right to request compensation. A distinction between injured States was implicit in the formulation of article 14 inasmuch as paragraph 1 referred to States that were direct victims of an international crime and paragraph 2 to States that were not. It would be preferable, in his view, to make the distinction and provide expressly for the rights and obligations of the two types of injured State. Paragraph 1 should apply only to States that had suffered direct damage from, or were most affected by, an international crime, and the rights resulting from an international crime should be accorded to other injured States or third States only to the extent consistent with the damage they had suffered or the degree to which they had been affected. The unity of the definition in article 5, subparagraph (*e*) would thus be preserved and the desired result concerning the rights of injured States achieved. Difficulties might, of course, arise because it was not always easy to determine which were the most affected, or directly affected, States; but in many cases those States would be readily identifiable.

4. While paragraph 2 of draft article 14 was acceptable to him in general, consideration should be given to the possibility of adding some further obligations of a positive nature, particularly in view of the comments made in the Sixth Committee of the General Assembly (A/CN.4/L.382, para. 551) to the effect that the obligations not to act, provided for in paragraph 2 (*a*) and (*b*), should be supplemented by an obligation to act. The utmost caution was, however, required; a hastily drafted provision, divorced from reality, would be of no practical use.

5. As to draft article 15, he agreed entirely that there should be a separate provision on the legal consequences of aggression; he also agreed in general with the substance of the existing formulation, for the reasons stated in the commentary. It had been suggested that provision should be made for the non-recognition of any advantages accruing to an aggressor as a result of aggression and for certain specific rights of the injured State, such as self-defence and collective sanctions. There would be no harm in such additions if the sole purpose was to emphasize the importance and relevance of those principles. On the whole, the provisions of articles 14 and 15 were inadequate and some further expansion might be necessary.

6. Draft article 16 was a safeguard clause; he was not certain whether the enumeration was exhaustive and would suggest that the words "*inter alia*" be added after the words "in regard to" in the opening phrase.

7. He agreed that part 3 of the draft articles should deal with the implementation of international responsibility and the settlement of disputes. The three parts of the future convention should constitute a whole, each part being closely related to the others. Violations of the primary rules in part 1 would trigger off

[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 implementation of the legal consequences provided for in part 2, while any disputes arising out of the implementation process would bring into play the procedure to be elaborated in part 3.

8. He also agreed that the central purpose of part 3 of the draft should be the elaboration of an appropriate international régime for the peaceful settlement of disputes concerning the interpretation and application of the future convention on State responsibility. The aim of the dispute-settlement régime should be to make use of existing codification instruments such as the 1982 United Nations Convention on the Law of the Sea[5] and the 1969 Vienna Convention on the Law of Treaties. While due account should be taken of special merits, no particular model should be adopted to the exclusion of others. It was necessary to bear constantly in mind that the future régime, unlike that under other conventions, was likely to be of a rather general nature. As the Special Rapporteur had pointed out in his sixth report (A/CN.4/389, para. 8), it could involve the creation of a multilateral compulsory dispute-settlement procedure, whereas the régimes under other conventions were usually confined to the specific areas they covered. Such factors should influence the elaboration of part 3 of the draft. One essential element of the future dispute-settlement régime should be a well-structured equilibrium. For it was necessary, on the one hand, to prevent nullification or diminution of the purpose and effectiveness of the future convention through lack of effective procedures for dispute settlement, and, on the other hand, to avoid reducing the acceptability of the future convention by making the dispute-settlement régime too rigid.

9. With the presentation of the articles in part 2 of the draft and the submission of an outline of part 3, some light had appeared through the uncertainty to which Mr. Reuter had alluded (1891st meeting). Despite the difficulties that lay ahead, he was optimistic about the future prospects.

10. Mr. FRANCIS joined previous speakers in thanking the Special Rapporteur for his sixth report (A/CN.4/389), the excellent quality of which was due to his undoubted expertise and to the fact that he had followed the Commission's guidelines. Part 2 of the draft derived its raison d'être from part 1, so that its content naturally reflected the codification element of that part. All members of the Commission would therefore be familiar with the basic concepts of reprisals, countermeasures and proportionality introduced in part 2. It was the task of the Commission to organize those concepts to meet the requirements of an acceptable draft convention, and the Special Rapporteur's sixth report provided a sound basis on which to proceed.

11. Expressing his support for the main thrust of the draft articles, he first noted that, with regard to article 5, subparagraph (*b*), and paragraph (10) of the commentary to that article, Mr. McCaffrey (1892nd meeting) had raised a question concerning the binding nature of Article 41 of the Statute of the ICJ relating to provisional measures of protection. Without going into the substance of Mr. McCaffrey's point, he wished to express a reservation on his apparent position in the matter, bearing in mind the impact of Article 59 of the Statute of the ICJ and the fact that provisional measures were also dealt with by the Security Council.

12. He also wished to echo Mr. Huang's query (1893rd meeting) concerning the general scope of draft article 5, which had reminded him of the judgment of the ICJ of 21 December 1962 in *South West Africa Cases, Preliminary Objections*,[6] a judgment that had been severely criticized and was, in his humble submission, wrong. Specifically, he would ask whether subparagraph (*b*) of article 5, as drafted, would cover the situation that had obtained in those cases. Leaving aside any question of *apartheid* or self-defence, which would in any event be covered by subparagraph (*e*) of article 5, would any former State party to the Covenant of the League of Nations, of which the Mandate for South-West Africa formed an integral part, be able to initiate proceedings, on the basis of article 5, and to submit either that the arming of the indigenous inhabitants of Namibia constituted a breach of the Covenant and of the Mandate, or that there had been failure to maintain the minimum standard of treatment which any nation was required to guarantee its citizens? His own view was that it would not be able to do so. He therefore agreed on the need to consider carefully whether all categories of injured States would be covered. The Drafting Committee might wish to consider some formulation whereby, if the obligation breached would defeat any of the objects of the treaty, the State party affected would be an injured State.

13. Mr. Flitan, who had raised a point on *erga omnes* obligations (1892nd meeting), would no doubt agree that there were other multilateral situations covered by a treaty, besides *erga omnes* situations, in which the directly affected State was in quite a different position from the other States parties to the treaty. The Special Rapporteur had recognized that point in his fourth report[7] and presumably, therefore, intended to deal with the question of the rights of the directly affected party *vis-à-vis* the other parties to the treaty at an appropriate point in the commentary.

14. In regard to draft article 6, he fully supported the suggestion that the opening clause should be more positive about the rights of the injured State. He would also suggest that a fact implicit in the content of the article, namely that the author State had obligations concerning the elements enumerated in the article, should be re-emphasized. He also agreed that paragraph 1 (*a*) of article 6 should be couched in general terms.

15. As to paragraph 1 (*b*), he recognized that there was room for it in the draft because, as the Special Rapporteur had pointed out, it was much wider in scope than article 22 of part 1, on the exhaustion of local remedies. In his view, however, it was too rigid in its reference to internal law, since there might not

[5] See 1890th meeting, footnote 6.

[6] *ICJ Reports 1962*, p. 319.

[7] *Yearbook ... 1983*, vol. II (Part One), p. 11, document A/CN.4/366 and Add.1, para. 56.

in fact be any specific provisions in internal law. In some countries, certain treaties were ratified before legislation was promulgated, even where internal legislation was required to implement them. In any event, even if the treaty had been ratified, the State concerned might sometimes have to use means other than its own legislative provisions to comply with its international obligations. Consequently, while he supported paragraph 1 (*b*), he considered that it, too, should be couched in more flexible terms, with a view to ensuring that the remedies could be applied *proprio motu*, whether they were available under internal law or otherwise. Indeed, the Special Rapporteur had recognized that need by his reference to administrative "remedies" in paragraph (4) of the commentary to article 6. The Drafting Committee might therefore wish to examine article 6, paragraph 1 (*b*), with a view to introducing an element of flexibility.

16. Since the author State might be unwilling to give guarantees, he wondered whether paragraph 1 (*d*) of article 6 should perhaps be redrafted to provide that the injured State had a right to call for the establishment of safeguards or for measures to prevent a recurrence of an internationally wrongful act.

17. Unlike some members, he considered that article 7 did have a place in the draft, because article 22 of part 1 made it quite clear that, for the international responsibility of the author State to be engaged, local remedies must have been exhausted. Unless there were good reasons for omitting the article, therefore, he would prefer to include it.

18. He supported draft article 8 and also draft article 9, which was of a more serious nature so far as countermeasures were concerned. Regarding the interplay of draft articles 9 and 10, it had been asked whether countermeasures would be appropriate in certain circumstances where the case was *sub judice*. The Special Rapporteur had referred, in his fourth report, to the possibility of excluding the maintenance of reprisals from the moment a dispute was *sub judice*,[8] and he would presumably be mentioning that point in the commentary in due course.

19. The expression "belligerent reprisals", used in draft article 16, was a term of art and must not be confused with the wording of article 9. The Drafting Committee might wish to consider including some explanation in the commentary or elsewhere.

20. As to the difficult draft articles 14 and 15, Mr. Reuter (1891st meeting) had rightly said that matters on which consensus could more easily be reached should be dealt with first. It was necessary to be selective at the current stage and not to hinder progress by spending too much time on the most difficult areas. Mr. Thiam (1893rd meeting) had suggested that the draft should go further than it did in regard to the legal consequences of the breach of an obligation *erga omnes*. He was right in principle, but not entirely so. Had there been no draft Code of Offences against the Peace and Security of Mankind, but only article 19 of part 1 of the draft on State responsibility, the Special Rapporteur would certainly have had to provide for the full range of consequences flowing from the article. But as there was a direct overlap with the draft code, and as the General Assembly had agreed that the question of the attribution of criminal responsibility to States under the draft code should be postponed for the time being, it was not possible to go much further than the Special Rapporteur had done. In any event, there was enough material in articles 14 and 15 to provide the Commission with plenty of work on the delimitation of the boundaries between State responsibility and the draft code. Furthermore, he noted that the Special Rapporteur had referred to the international community's readiness to acknowledge that there were crimes and delicts so far as State responsibility was concerned and had rightly stated in his sixth report that such recognition entailed "certain deviations from the general rules concerning the legal consequences of internationally wrongful acts" (A/CN.4/389, para. 30). The Special Rapporteur had also indicated that the international community was cautious about taking a further step in regard to legal consequences. It would therefore be difficult for the Commission to proceed further until the question of the application of the draft code to State entities had been settled.

21. Another question to be decided if States were to be covered by the draft code, and bearing in mind that crimes of aggression were dealt with by the Security Council, was whether all offences other than aggression would be dealt with under the code. Again, he considered that it would not be possible at the current stage to do more than consider some aspects of *erga omnes* obligations pending a decision on the draft code. The rate at which the Special Rapporteur was progressing and the link between the two topics made it imperative for the Commission to expedite the elaboration of the draft Code of Offences against the Peace and Security of Mankind.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

22. Mr. BALANDA associated himself with the members of the Commission who had praised the sixth report of the Special Rapporteur (A/CN.4/389), which was extremely dense and offered much food for thought. He only regretted that the Special Rapporteur had not illustrated his remarks with specific examples. They were not lacking, either in doctrine or in case-law, and would undoubtedly have made it easier to follow his reasoning and to understand a text which was somewhat hermetic and might perhaps have been improved by clearer presentation.

23. The subject was highly important, for it affected the very life and functioning of States, which, like individuals, were always in contact with each other. Unfortunately, however, those contacts were not always peaceful and sometimes brought about clashes which engaged the responsibility of those involved. The Commission was fully aware of that, and should do everything possible to make its draft articles realistic and provide a set of rules acceptable to all States, whatever their political, economic and social systems.

[8] *Ibid.*, p. 20, para. 106.

24. Commenting on the draft articles submitted, he suggested that, in article 1, the words "committed by that State" should be replaced by the words "attributable to that State" in order to stress the fact that a State had international responsibility when an internationally wrongful act was attributable to it. Referring to the expression "legal consequences", he pointed out that the consequences referred to in the article were, of course, to be understood as consequences produced in the sphere of law. He therefore doubted whether it was appropriate to retain the adjective "legal", since the consequences of an internationally wrongful act did not constitute a legal act as such, in the technical sense of the term, but were sometimes purely material acts. Such was the case, for example, when the authorities of a State decided, as a countermeasure, to expel a diplomatic agent of another State: that was a material act, not a legal act as such. It was also the case when States were invited to collaborate in the measures taken to prevent consolidation of the effects of an international crime. That comment was valid for all of the draft articles and commentaries.

25. With regard to the commentary to article 1, he wished to make another remark, following that made by Mr. Flitan (1893rd meeting). Paragraph (2) of the commentary referred to "new *obligations*" and "new *rights*"; but he doubted that it was permissible to speak of "new obligations" and "new rights" in all cases in which the international responsibility of a State was engaged. In fact the obligation to make reparation, referred to in paragraph (2), was not a new obligation: once responsibility was established, the consequence of the internationally wrongful act must lead to reparation. The same was true of reciprocity, referred to in draft article 8. He was not sure that the implementation of a measure of reciprocity was a new obligation, since the Special Rapporteur himself explained (paragraph (2) of the commentary to article 8) that there was reciprocity when the measure taken by way of reciprocity sought to restore a balance—in other words, when the injured party abstained from performing the obligation binding it: that was the *exceptio non adimpleti contractus*. Reprisals, on the other hand, did involve "new obligations" and "new rights", for they were precisely measures which the injured State could be led to take, but which went beyond mere re-establishment of the existing relationship between it and the author State. Those comments dealt perhaps more with theory than with substance, but the Commission should not neglect the theoretical aspect of its work.

26. According to paragraph (3) of the commentary to article 1, certain internationally wrongful acts could have the legal consequence that every State, other than the author State, was "under an *obligation* to respond to the act". But according to draft article 6, which specified what the injured State could require of the State which had committed an internationally wrongful act, that was not an obligation, but merely a faculty: the injured State might not respond to the act.

27. In paragraph (4) of the commentary to article 1, the Special Rapporteur stated that an internationally wrongful act could produce legal consequences in the relations between States and "*other* 'subjects' of international law"—an expression probably intended to refer to international organizations. The advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*[9] showed that an international organization could be a passive subject of international law. Given the principle of specialization which governed the activities of international organizations, was it conceivable that, in certain cases, the international responsibility of an organization could be engaged, as the general terms used by the Special Rapporteur implied?

28. Draft article 2 qualified the consequences as "legal", which, as he had already pointed out, could suggest that legal acts were involved, whereas they might be only material acts. In addition, the words "and to the extent that" were unnecessary and could be deleted. The principle laid down in article 2 would allow States to envisage, in their respective relations, other consequences of an internationally wrongful act than those provided for in the draft. Given the residual nature of the draft, the same internationally wrongful acts could be subject to different régimes as to their legal consequences. Was that really desirable, or would it not be better for a single treatment to be applicable?

29. Referring to paragraph (2) of the commentary to article 2, he stressed that it was difficult to determine whether a norm of general international law had acquired a peremptory character and which authorities were empowered to establish the existence of such a norm. Would it not unduly restrict the scope of article 2 to reserve the peaceful settlement of all disputes, especially those affecting international peace and security, to the competent organs of the United Nations? It should be pointed out that Article 52 of the Charter of the United Nations attached great importance, in the context of international co-operation, to regional arrangements and agencies for dealing with matters relating to the maintenance of international peace and security. In his opinion, a local conflict could more easily be settled in a regional framework than in the existing United Nations system. Hence it would be desirable to state, if not in article 2, at least in the commentary to that article, the idea expressed by the Special Rapporteur in paragraph (11) of the commentary to draft article 5, namely that, in addition to the ICJ, other international institutions dealing with disputes or situations might be empowered to pronounce decisions. Article 2, paragraph 7, of the Charter of the United Nations, which excluded from the competence of United Nations organs all matters which were within the domestic jurisdiction of a State, confirmed his doubts. He feared that two States in conflict would characterize their dispute as local, in which case it was difficult to see how it could be referred to the competent organs of the United Nations.

30. In draft article 3, a concept established in article 2, that of the residual nature of the draft, should be introduced, for example by adding the words "or the law of the régime applicable to the legal consequences" after the words "the rules of customary law".

[9] *ICJ Reports 1949*, p. 174.

31. Draft article 4 called for the same comments as article 2 regarding the exclusive competence of United Nations organs for the settlement of disputes when responsibility was engaged. It did not seem that the Special Rapporteur intended to adopt such a restrictive approach.

32. Draft article 5, which was intended to define the concept of an injured State, was the counterpart of the provisions of part 1 of the draft defining the author State. It provided a means of determining the State to which reparation was due and the State entitled to take countermeasures. Subparagraph (*a*) covered two possibilities: that of a right appertaining to a State by virtue of a customary rule of international law and that of a right arising from a treaty provision for a third State. It did not seem necessary to refer specifically to the case of a third State; it would be sufficient to refer to the right of a State in general, since a State could hold its right either from general customary law, or from general international law, that was to say treaty law. The second part of subparagraph (*a*) could therefore be redrafted to read: "by virtue of a customary rule of international law or of a treaty provision, the State whose right has been infringed;".

33. In subparagraph (*b*) of article 5, the word "imposed" could be replaced by "established", for it was rather too strong to qualify an obligation arising from a judgment. Furthermore, it might be doubted whether it was advisable to try to define an injured State by reference to a State whose right derived from a judicial decision; for the effect of any judicial decision was necessarily relative: it bound only the parties to the dispute. The Special Rapporteur seemed to have had in mind the judgments of the European Court of Justice which, of course, bound only the parties to a dispute, but which could have a mandatory effect for all the members of the European Communities in regard to the interpretation of treaty rules. In his opinion, to refer to States enjoying rights deriving from judicial decisions might make for misunderstanding concerning the essentially relative nature of such decisions.

34. In both subparagraphs (*c*) and (*d*) of article 5, the expression "obligation imposed" should be replaced by the words "obligation established", for the reason already mentioned. With regard to the "collective interests of the States parties" to a multilateral treaty, referred to in subparagraph (*d*) (iii), he doubted that the interests of a legal entity such as an international organization could always be easily distinguished from those of its member States. Taking the case of an integrated international organization such as the Economic Community of Central African States, he stressed that both the organization as such and each of its members had an interest in the rules laid down being respected by all the member States. In principle, if one of them broke a rule relating to the common customs tariff, that breach caused harm both to the other member States and to the organization as a legal entity. That being so, it did not seem appropriate to attempt to define an injured State by contrasting obligations under a bilateral treaty with the much more complex obligations deriving from a multilateral treaty. Moreover, in analysing the legal relationships between States parties to a multilateral treaty, the Special Rapporteur stated that they remained bilateral relationships as between each pair of States parties (paragraph (14) of the commentary to article 5).

35. Subparagraph (*d*) (iv) of article 5 referred to an obligation stipulated for the protection of "individual persons"—a term which could be applied to both natural and legal persons. While he saw no objection to the term being applied to natural persons in that context, subject to some reservations, he doubted whether it could be extended to legal persons. Must it be considered that the international community as a whole was injured by the violation of an obligation stipulated in a multilateral treaty for the protection of a multinational company? Would it not be advisable for the Commission to confine itself to human rights—an area which already raised many difficulties? Under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[10] any State could request the jurisdictional organ to verify a violation of that instrument with respect to an individual. But it did not seem possible to apply the reasoning which had led to that solution, in particular for fear of abuses. Furthermore, even in the area of human rights, principles such as those of the sovereign equality of States and non-interference could raise difficulties. In his opinion, it would be going too far to maintain that any State member of the international community could claim to be an injured State as soon as there was a violation of a right intended to protect individuals. In that respect it seemed difficult to pass from the sphere of human rights to that of the international responsibility of States. As to the concept of "the international community as a whole", it was doubtful that it coincided with the United Nations and that the United Nations really represented the melting-pot of universal conscience.

36. Because of the way it was presented, draft article 6 could give the impression that the cases referred to in paragraph 1, subparagraphs (*a*) to (*d*), were cumulative, whereas that was not the case. It might therefore be preferable to confine the article to the essential cases. The case referred to in paragraph 1 (*b*), in which the State that had committed the internationally wrongful act was required to "apply such remedies as are provided for in its internal law", could be deleted; that wording suggested legal remedies, whereas it referred to all measures calculated to put a stop to the internationally wrongful act. The case referred to in paragraph 1 (*d*), in which appropriate guarantees were required against repetition of the act, could also be deleted, in view of the difficulties of application which were sure to arise. Besides the question of the form in which those guarantees were to be given, there was the problem of their effectiveness.

37. Paragraph 2 of article 6 should not go into too much detail, in order not to limit States' freedom of action. That provision, which concerned the payment of a sum of money corresponding to the cost of re-establishing the situation as it had existed before

[10] United Nations, *Treaty Series*, vol. 213, p. 221.

the breach, seemed to exclude reparation in kind. But such reparation was not inconceivable. A case in point would be the rebuilding by a receiving State of an embassy plundered in riots which had engaged its international responsibility. Moreover, paragraph 2, by its use of the word "corresponding", established a strict equivalence between the damage suffered and the sum of money paid, which amounted to ignoring some modes of reparation recognized in international law, such as apology or symbolic reparation. It would therefore be preferable to lay down the principle of reparation, which was essential, without going into detail.

38. Like other members of the Commission, he thought that draft article 7 could be deleted, since its underlying principle was already expressed in article 6. Perhaps article 7 merely reflected some nostalgia for the capitulations régime. In fact those were private-law relationships, and, in case of difficulties, there were appropriate mechanisms by which the author State could repair the injury without the problem being moved into the area of international responsibility.

39. Article 8 certainly belonged in the draft articles, but it would be advisable to avoid the interpretation problems that might be raised by the use of the term "reciprocity", the meaning of which had gradually been more precisely defined for the Commission by the Special Rapporteur, but was not yet established in doctrine. It would therefore be better to delete the words "by way of reciprocity", which would not change the substance of article 8 in any way. Article 8 also raised the question whether a State could take measures of reciprocity and measures of reprisal simultaneously, or whether it could resort to reprisals only after having awaited the result of a prior measure of reciprocity for a period which remained to be determined. But when what was judged to be a higher interest of a State was involved, it acted without waiting, for then it was the result that counted.

40. Draft article 9 presented hardly any difficulties, but in the commentary the Special Rapporteur should distinguish the concepts of reprisals and countermeasures very clearly from that of reciprocity, which was at the level of *exceptio non adimpleti contractus*. Furthermore, with regard to paragraph 2, several members of the Commission had stressed that it would not be easy in practice to determine whether the exercise of the right of reprisal was not "manifestly disproportional" in its effects to the seriousness of the internationally wrongful act. The concept of proportionality had a quantitative and a qualitative aspect, and an outside authority capable of determining whether or not there was proportionality would have to intervene in each particular case.

41. Draft article 10 was similar to Article 33 of the Charter of the United Nations, which imposed on States the obligation to settle their disputes by peaceful means—a provision which remained a dead letter in many cases. The Special Rapporteur was, in a way, inviting States to show such wisdom, but it was doubtful whether they were wise enough to begin by exhausting procedures for peaceful settlement before resorting to countermeasures. Moreover, the implementation of paragraph 1 of article 10 could be particularly difficult when the application of a peaceful means of settlement required the co-operation of the States concerned, since any kind of co-operation between the States parties to a dispute was necessarily difficult.

42. According to paragraph 2 (*a*) of article 10, the injured State could take interim measures of protection, the admissibility of which would then be decided on by a competent international court or tribunal. He thought it would be more logical either to authorize the injured State to take such measures, which in any case served to prevent aggravation of the injury, or to make the taking of such measures subject to prior judicial determination, which would be a more realistic solution than that provided by article 10. After a reading of paragraph 2 (*b*) of article 10, which assumed that measures of protection had been judicially authorized, it might be asked, in the light of subparagraph (*a*), whether there were, on the one hand, measures of protection that could be taken without any judicial authorization and, on the other, measures of protection requiring such authorization in advance.

43. In its French version at least, the introductory sentence of draft article 11, paragraph 1, could be improved, in particular so as to avoid giving the impression that it set out two cumulative conditions. For the rest, in view of the symmetry between articles 10 and 11, he would refer the Commission to the comments he had made about the collective interests of States parties to a multilateral treaty and of individuals.

44. In draft article 12, subparagraph (*a*) should be retained because it recalled the protection to be given to a certain class of persons, but that protection could be extended to other persons, in particular those referred to in the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. Subparagraph (*b*) raised difficulties by its use of the expression "peremptory norm of general international law".

45. To determine whether a violation was "manifest", within the meaning of draft article 13, a competent body would have to intervene. But it was doubtful that, even in the system to be proposed by the Special Rapporteur, a judicial body would always be able to make such a determination. He therefore proposed that the word "manifest" should be deleted, which could be done without harming the substance of the text. He also suggested that, for the sake of precision, the words "the commission of fine" should be inserted before the words "a violation".

46. Draft article 14, which was on the borderline between two topics, raised the question whether the Commission should elaborate the consequences of international crimes in the draft articles under consideration, which seemed desirable, or merely refer to the consequences to be enumerated in the draft Code of Offences against the Peace and Security of Mankind. In any case, the two sets of draft articles would have to be harmonized.

47. In the French text of article 14, paragraph 1, the words "ressortant des règles applicables" should be replaced by the words "ressortissant aux règles appli-

cables". In paragraph 2 (*a*), the word "legal", qualifying a situation at the international level, was not justified, since there were no international "laws". The words "as legal" could very well be deleted.

48. While admitting the need to deal with international crimes in a set of draft articles dealing with the "civil responsibility" of States, he feared that paragraph 2 (*a*), (*b*) and (*c*) of article 14 would raise serious application problems. It might well be asked, for example, whether the rule of solidarity, which required States to reject the internationally wrongful act and not to consolidate the situation it had created, might not in practice lead to defections by some States. Moreover, should the international community as a whole resort to a certain category of means only, or could each member State resort to individual means, according to its possibilities?

49. According to paragraph 4 of article 14, the obligations under that article would prevail in the event of conflict between them and rights and obligations under any other rule of international law, subject to Article 103 of the Charter of the United Nations. He endorsed that provision, but was not sure how it could be reconciled with the provisions affirming the residual nature of the draft articles. Again, he wondered whether the beneficiary of reparation, in the case of an international crime, was the international community as a whole or a directly injured State. It appeared utopian to consider that the entire international community was injured, without seeking to determine whether one or more States were not directly injured *in concreto*. True, in paragraph (9) of the commentary to article 14, the Special Rapporteur had recognized that "there may be an injured State or injured States under article 5, subparagraphs (*a*) to (*d*)"; but, in his own opinion, that was not merely an eventuality.

50. Referring to draft article 15, some members of the Commission had questioned whether aggression should be dealt with specifically, since it was in the category of international crimes treated in the draft Code of Offences against the Peace and Security of Mankind. In his opinion, aggression did belong in the draft articles on State responsibility, for it was the crime of States *par excellence*. Was it not precisely because aggression had been committed by States against other States that the League of Nations and the United Nations had come into being?

51. He expressed doubts about the relevance of draft article 16, subparagraph (*b*), concerning the rights of membership of an international organization. He saw no reason to give special attention to that question. As to belligerent reprisals, referred to in subparagraph (*c*), they were indissolubly linked with self-defence, which should be taken into consideration by the Special Rapporteur in his further work.

52. Finally, in regard to the implementation of international responsibility, he believed that the general outline should be set out in the draft, otherwise the building would have no roof. But great caution should be exercised in proposing any mechanism. States were more and more mistrustful of compulsory jurisdiction as such, so that rather than suggest too binding a mechanism, it would be better to suggest a flexible system that would encourage the States parties to a dispute to come together in order to seek a solution. Even at the regional level, States were sometimes reluctant to resort to binding jurisdiction, as illustrated by the fact that the Commission of Arbitration and the Arbitral Tribunal set up for the settlement of disputes within OAU had never functioned.

The meeting rose at 1.05 p.m.

1895th MEETING

Thursday, 6 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

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

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

[Agenda item 3]

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

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

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

1. Sir Ian SINCLAIR said that he wished to raise two points on draft article 5, in addition to those he had already mentioned (1890th meeting). The first, already raised by Mr. McCaffrey (1892nd meeting) and Mr. Francis (1894th meeting) related to para-

[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.