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Summary record of the 1897th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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aggression. If the intention was to draw attention to the relevant procedures under the Charter of the United Nations, the article was too narrow.

45. With regard to draft article 16, he questioned the distinction which the Special Rapporteur wished to draw between the termination or suspension of the operation of treaties and the suspension of the performance of treaty obligations. The arguments advanced in the footnotes to paragraph (21) of the commentary to article 5 and to paragraph (3) of the commentary to article 11 had failed to convince him, and he continued to feel that a renewed effort should be made to identify the relationship between the draft articles on State responsibility and the Vienna Convention on the Law of Treaties. Lastly, the reference to the rights of membership of an international organization in subparagraph (*b*) of article 16 was too broad and therefore misleading.

46. Before concluding, he sought the Chairman's leave to address himself to some of the issues arising in connection with articles 2 and 3.

47. The CHAIRMAN said that, since articles 1 to 4 had already been considered and provisionally adopted by the Commission, the appropriate time to comment on articles 2 and 3 would be on the occasion of the second reading of part 2 of the draft.

48. Replying to a point of order raised by Mr. McCaffrey, he said that comments on the minor changes introduced by the Special Rapporteur in articles 2 and 3 since their adoption on first reading were in order and would, in fact, be welcomed by the Drafting Committee. Substantive points, however, should be deferred until the second reading.

49. Mr. TOMUSCHAT said that he would transmit his comments to the Drafting Committee in writing. Reverting to articles 5 to 16, he said that he fully endorsed the Special Rapporteur's proposition that countermeasures taken by States other than the directly affected State should be exercised within the framework of the organized international community. Accordingly, he would wish to see reflected in the draft articles a system which began with the rights of the directly injured State, went on to consider the rights of other States acting collectively, and only in the last resort accorded certain rights to States not directly injured, acting more or less as guardians of the international legal order.

The meeting rose at 1 p.m.

1897th MEETING

Monday, 10 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, 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]

***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. MAHIOU said that the draft articles submitted by the Special Rapporteur in his sixth report (A/CN.4/389) formed a well-constructed whole; each part fitted closely into the next and there were numerous explicit or implicit cross-references. However, the cross-referencing technique required considerable attention on the part of the reader, whom it might cause to see subtleties where there were only drafting errors, or leave wondering whether certain problems of comprehension originated in form or substance. What, for example, was to be made of the cross-reference in paragraph (6) of the commentary to article 11 to "paragraph 1 (i) and (ii)"? It was not only that paragraph 1 of the article contained no subparagraphs (i) and (ii); the reference did not seem to be to the subparagraphs (*a*) and (*b*) which it did have.

2. The commentaries to the articles were unquestionably of high quality, but they were sometimes too concise and elliptical. As some members of the Commission had said, they would be more convincing for the inclusion of more frequent references to State practice, judicial and arbitral decisions, and doctrine. The general structure of the draft was satisfactory and entirely logical.

3. In draft article 5, the Special Rapporteur sought to identify the State injured in each of the cases contemplated in subparagraphs (*a*) to (*e*) by referring to the source of the obligation breached. While his criterion was not the only one that could be employed, it had the advantage of giving the reader a clear view of the various possible situations.

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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.

4. It had been said of subparagraph (*a*) that it concerned two situations—the infringement of a right appertaining to a State by virtue of a customary rule of international law and the infringement of a right arising from a treaty provision for a third State—which, while closely related, were distinct and could be dealt with in separate provisions. The reference to article 38 of the 1969 Vienna Convention on the Law of Treaties in paragraph (5) of the commentary in fact served to highlight the existence of two different situations, depending on whether the right of the third State arose from a treaty provision that had become a customary rule of international law or from a treaty provision that had remained as such.

5. Subparagraph (*e*) had occasioned a number of drafting comments and suggestions worthy of close attention. The subparagraph served as a reminder of the principle that all States were considered to be injured by an international crime. As the Special Rapporteur said in paragraph (26) of the commentary to article 5, that principle did not necessarily entail the same new rights for each of the injured States. The problem was, above all, to determine whether the States were not injured differently. Obviously, certain international crimes, such as the crime of aggression, caused more serious injury to the State that was their direct victim than to the other States. While it was difficult to draw, that distinction between States directly or indirectly injured deserved to be taken into account and warranted at least an explanation in the commentary. There was unquestionably a hierarchy of injurious consequences of internationally wrongful acts. Perhaps that hierarchy could be given legal expression by reference to the distinction between rights and interests that had been established by the ICJ in the *Barcelona Traction* case.[5] The State that was the victim of aggression suffered injury to its vital and essential interests, whereas the other States suffered injury to their legal interests in the broad sense of the term, as members of the international community.

6. It had been suggested that article 5 should be less restrictively worded so as not to exclude situations which it did not mention. It should be noted in that respect that, as paragraph (8) of the commentary to the article showed, it was the Special Rapporteur's deliberate intention to refrain from taking a stand on certain cases, such as those of general principles of law and resolutions of United Nations organs as independent sources of primary rules. Although he approved of the Special Rapporteur's prudence and sagacity, more could be said in the commentary concerning those questions. In that respect, he drew attention to the advisory opinion of the ICJ of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.[6] In that case, the Court had held that the termination of South Africa's Mandate and the declaration of the illegality of that country's presence in Namibia were opposable to all States in the sense of barring *erga omnes* the legality of a situation which was maintained in violation of international law. Another reason for wording article 5 less restrictively was that unilateral acts could create obligations for their authors and that it was open to question whether a State which was the victim of a breach of such an obligation was not an "injured State" within the meaning of the draft articles.

7. In the case of draft article 6, the substance was satisfactory, but the text could be improved. Paragraph 1 (*b*), which it was not certain was useless, could be drafted in more flexible terms so as not to concern merely the remedies provided for in internal law. A State which committed an internationally wrongful act must, of course, apply the remedies provided for in its internal law, but there might be other remedies as well. For example, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[7] adopted under the auspices of the World Bank, provided for remedies that did not derive from internal law. The deletion of paragraph 1 (*b*) would limit the scope of article 6.

8. Since the injured State might, in certain cases, require of the State which had committed the internationally wrongful act less substantial compensation, article 6 might usefully be supplemented by a subparagraph (*e*) providing for the presentation of apologies. Finally, the possible range of solutions might, as Mr. Ogiso (1896th meeting, para. 8) had suggested, be enlarged by the addition of a paragraph 3 providing that the preceding paragraphs would apply without prejudice to any other form of settlement that the injured State might accept.

9. A number of members had said, with regard to paragraph 2 of article 6, that the requirement to pay a "sum of money" was too restrictive. In his view, the term "compensation" would be more acceptable, because it was wider in scope.

10. Since the matter to which draft article 7 referred was already covered in article 5 (*d*) (iv) and in article 6, it might be sufficient, in order to be able to delete article 7, to include in article 6 the additional provision that article 7 contained.

11. He wondered whether it was really useful to make express mention of measures by way of reciprocity and by way of reprisal in draft articles 8 and 9, respectively. On the other hand, while it was true that those expressions might give rise to difficulties, their deletion might occasion problems of interpretation and calculation. Perhaps article 8 could be made less self-evident by going into more detail. It would, however, be a very daunting task to try to enumerate in the article all measures by way of reciprocity. One way of strengthening the article and of indicating better the scope of the countermeasures it concerned would be to emphasize the scalar nature of such measures: they could be taken for a specified period of time, be provisional and depend for their duration on the conduct of the author State, or be irreversible.

12. Articles 8 and 9 alike raised the question of the distinction between measures by way of reciprocity

[5] See 1892nd meeting, footnote 5.

[6] *ICJ Reports 1971*, p. 16.

[7] United Nations, *Treaty Series*, vol. 575, p. 159.

and measures by way of reprisal and the question of proportionality. On the first point, he felt that, while the distinction was well outlined in paragraph (3) of the commentary to article 8, it would be better comprehended if the paragraph contained further information concerning it. Proportionality was important for article 8, but essential for article 9. As such, it should be viewed in parallel with the problem of dispute-settlement procedures. It seemed indispensable, in order to avoid the escalation of countermeasures and to prevent powerful States interpreting the notion of proportionality as authorizing them to coerce weaker States, to provide for third-party settlement of disputes. The notion of proportionality should therefore be carried over into part 3 of the draft.

13. While he approved of the general idea expressed in draft article 10, he wondered whether the obligation upon the injured State to exhaust the international procedures for peaceful settlement before resorting to reprisal might not result in delays beneficial to the author State. It was unfair that the injured State should be unable to threaten reprisals against the author State in order to shorten the period during which the international procedures for peaceful settlement were being exhausted. While it was true that paragraph 2 (*a*) of the article reserved interim measures of protection, it was important to distinguish, in the case of unarmed measures by way of reprisal, between those which expedited the settlement of disputes and those which did not.

14. The same problem arose with regard to paragraph 2 of draft article 11, which provided that the injured State was not entitled to suspend the performance of its obligations towards the author State if the multilateral treaty imposing the obligations provided for collective decision-making. Once again, there would be a waiting period during which damage to the injured State might grow. Other considerations notwithstanding, a means must be found of enabling the injured State to exert pressure on the author State in such a case.

15. Some members of the Commission believed that the reference in draft article 12, subparagraph (*b*), to peremptory norms of general international law was neither justified nor convincing. He could accept that the content of *jus cogens* or the manner in which it arose were open to question, but he considered it beyond dispute that there were imperative rules of international law and that the question whether it was permissible for States to conduct themselves, in response to an internationally wrongful act, in a manner contrary to *jus cogens* must be examined.

16. The problem raised by draft article 13—that of the relations between the draft articles and the Vienna Convention on the Law of Treaties—could be resolved by a drafting change: article 13 should speak not of a "manifest violation of obligations arising from" a multilateral treaty, but, in the terms of article 60, paragraph 3, of the Vienna Convention, of a "material breach of ... a provision essential to the accomplishment of the object or purpose" of a multilateral treaty.

17. Draft article 14, which drew the consequences deriving from article 19 of part 1 of the draft, had its place in part 2. In view of its importance, it should be more precisely worded. It had, in particular, been asked whether the consequences set out in paragraph 2 applied to crimes alone or to all internationally wrongful acts. It would seem reasonable for them to apply to all serious internationally wrongful acts, such as crimes, for an international crime injured all States either directly or indirectly, while an international delict did not. In addition, it was somewhat paradoxical that paragraph 1 of article 14, concerning the obligations of the author State, should have been couched in very general terms, whereas paragraph 2, concerning the obligations of other States, was extremely detailed. The reverse might have been expected.

18. In paragraph 2 of article 14, the list of obligations for States other than the author State might be supplemented by a subparagraph (*d*) concerning the obligation to prosecute the authors of the international crime. Whatever the relationship between the draft code and the topic of State responsibility, the principle, at least, of that obligation should be incorporated in the draft code. According to paragraph (1) of the commentary to article 14, the distinction drawn in article 19 of part 1 of the draft between "international delicts" and "international crimes" made sense only if the legal consequences of the crimes were different from those of the delicts. That statement would be in contradiction to article 14 if the article confirmed both crimes and delicts. After all, if the consequences mentioned in paragraph 2 of the article were considered as applying to delicts, all distinction between crimes and delicts would be removed as far as consequences were concerned.

19. Finally, article 14 should be examined in the light of the work on the draft Code of Offences against the Peace and Security of Mankind. As article 2 of part 2 of the draft under study made clear that that part contained only residual rules, it followed that any specific rules which the draft code might contain on the consequences of international crimes would prevail over the provisions of the draft articles on State responsibility. In any event, there was bound to be a problem of the relationship between the two topics, whether it was a matter of the apportionment of provisions between them or of the consequences attributed by the draft code to international crimes committed by States.

20. Draft article 15, concerning aggression, went at once too far, inasmuch as the question was already the subject of articles 4 and 14, and not far enough, in view of the importance of the crime of aggression. It was justified to the extent that it sought to make clear the legal consequences of aggression, but it must not elude the problems associated with self-defence. The relations between the provisions of the Charter of the United Nations and the draft articles should be examined every time an Article of the Charter was concerned, but self-defence had hardly been mentioned, except in paragraph (24) of the commentary to article 5.

21. He approved of the Special Rapporteur's approach and suggestions concerning part 3 of the draft

articles. It was, however, obvious that, because of States' marked sensitivity, great caution would be required in regard to compulsory procedures for the settlement of disputes. On the other hand, certain problems, such as that of proportionality, could be resolved only through compulsory dispute-settlement machinery. In the absence of such machinery, other provisions of the draft that provided for measures and countermeasures would lead to escalation and the aggravation of the situation. The Special Rapporteur should therefore take steps to submit concrete suggestions to the Commission.

22. Mr. BARBOZA said that the Special Rapporteur was to be congratulated on the richness and logic of his sixth report (A/CN.4/389), although certain passages were so succinct that it was not always easy to understand them.

23. Article 5 sought to define the protagonist in part 2 of the draft, namely the injured State. For that the Special Rapporteur had adopted a case-by-case approach, the result of which was a somewhat restrictive text. Perhaps the words *"inter alia"* should be added at the end of the introductory clause. The various sections of the article concerned the primary rules that could give rise to a right or an obligation. The Special Rapporteur made no mention, however, of the general principles of law, the resolutions of United Nations organs or unilateral declarations as independent sources of primary rules; paragraph (8) of the commentary to article 5 merely stated that the article took no position on their validity as sources of such rules. His own view was that it might be advisable to recognize the validity of those sources.

24. Subparagraph (*d*) of article 5 enlarged the circle of injured States to include the States parties to multilateral treaties. The provisions of the subparagraph that related to the protection of collective interests of States parties and of fundamental human rights were of special importance in that regard. Subparagraph (*e*) was more important still because it set forth the principle that an international crime injured all the States comprising the international community.

25. Draft article 6 raised the problem of the relationships between the four subparagraphs of paragraph 1. The relationship between subparagraph (*a*), which provided that the injured State could require the author State to release and return the persons and objects held, and subparagraph (*c*), which provided that it could require the re-establishment of the previous situation, was one of part to whole. The Special Rapporteur spoke with regard to subparagraph (*a*) of *restitutio in integrum lato sensu* and with regard to subparagraph (*c*) of *restitutio in integrum stricto sensu*. In fact, the application of subparagraph (*c*) overlapped that of subparagraph (*a*), so that there was no real choice between those provisions. It would therefore be sufficient to mention the case referred to in subparagraph (*c*) for an injured State to be able to require, in particular, the release and return of persons and objects held. In addition, he wondered whether an injured State which called for *restitutio in integrum stricto sensu* under subparagraph (*c*) could at the same time require, pursuant to subparagraph (*b*), the application by the author State of the remedies provided for in the latter's internal law. Subparagraph (*b*) seemed at variance with the logic of the article, for remedies were, in the type of case in question, a means of obtaining reparation; it would not be right for an author State to be able to invoke the absence of adequate remedies in its internal law to evade its new obligation. Indeed, article 27 of the 1969 Vienna Convention on the Law of Treaties would prevent it from doing so.

26. The situation was not the same in the case of article 22 of part 1 of the draft, where the exhaustion of local remedies was a condition for the existence of a breach of an international obligation. While article 22 provided for a progression from internal law to international law, draft article 6 provided for the reverse; such a progression would be very complicated. An author State might have to exhaust all the remedies in its internal law in order to discharge an international obligation. That was, indeed, what happened for all international obligations, inasmuch as a State which undertook, for example, to sell a quantity of wheat to another State first entered into relations of internal law with private persons or national co-operatives. Such problems of internal law were not, however, the Commission's concern. In the footnote to paragraph (10) of the commentary to article 6, the Special Rapporteur went so far as to state that "the obligation of *restitutio in integrum stricto sensu* would go beyond the limits of legal relationships between States".

27. The need for draft article 7 was not clear, for it seemed to concern no more than a particular instance of a case covered by article 6. Whatever difference there might be between the case referred to in article 7 and that referred to in article 6, paragraph 1 (*b*) and paragraph 2, the injured State could in each case require the payment of a sum of money corresponding to the value of the re-establishment of the previous situation.

28. The Special Rapporteur stated in paragraph (1) of the commentary to draft article 8 that, while articles 6 and 7 dealt with the new obligations of the author State, articles 8 and 9 concerned the "new rights" of the injured State. In his own view, the latter provisions concerned not so much rights—since there were no corresponding obligations—as actions which an injured State could take in order to obtain reparation. If that was so, it should be noted that, even if it included the performance of the old obligation, reparation *in integrum* did not cover the damage to which failure to discharge the obligation might give rise with time as a result of, for example, the non-possession of an object or a loss of business.

29. The notion of reciprocity, which was the subject of article 8, must be examined in conjunction with the subject of article 9, reprisals. There did not seem to be any fundamental difference between measures by way of reciprocity and measures by way of reprisal. The Special Rapporteur placed two conditions on reciprocity. According to article 8, a measure by way of reciprocity could not consist in more than the suspension of the performance of obligations corresponding to or directly connected with the obligation breached. According to paragraph (2) of the com-

mentary to article 8, the purpose of reciprocity was to restore the balance in the positions of the author State and the injured State, while the purpose of reprisals was to influence the author State to perform its new obligations. The balance that was the aim of reciprocity was not purely aesthetic. A measure by way of reciprocity was for an injured State a means of freeing itself from an obligation whose performance would go unrequited or of influencing the author State to discharge its obligations. As the Special Rapporteur indicated in paragraph (3) of the commentary to article 8, the goal in both cases was to restore the old primary legal relationship. While the Special Rapporteur spoke of balance with regard to reciprocity, he spoke of proportionality with regard to reprisals and did so in the negative, saying, in paragraph 2 of article 9, that the exercise of the right to take reprisals must "not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed". In the final analysis, the notions of balance and proportionality were closely related. Not only did balance and proportionality have the same aim, but both measures by way of reciprocity and measures by way of reprisal would be wrongful unless taken in response to an internationally wrongful act. They were, in short, two forms of the same type of countermeasure and paragraph 2 of article 9 should therefore be recast in the positive.

30. The Special Rapporteur had described the problem of reprisals very well in his fourth report,[8] where he had said that, within the framework of qualitative proportionality, the admissibility of measures of self-help was obviously the most dubious, since such measures necessarily involved an infringement of rights of the author State, and that reprisals were therefore generally considered as allowed only in limited forms and in limited cases. In that regard, the nature of the internationally wrongful act and the nature of the rights of the author State infringed by the reprisals were of the greatest importance. If the strongest States were not to impose their own interpretation of the existence of a breach of an international obligation, the taking of reprisals must be subject to all sorts of safeguards. The Special Rapporteur recognized three sorts of restriction, the first of which related to armed reprisals. According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[9] States must refrain from armed reprisals. In the draft articles, the ban on armed reprisals derived from article 12 (*b*), pursuant to which articles 8 and 9 concerning measures by way of reciprocity or reprisal were inapplicable to the suspension of the performance of obligations resulting from a peremptory norm of general international law. The Special Rapporteur might specify whether that ban extended to reprisals consequent upon an isolated case of the use of force, such as a violation of airspace accompanied by bombing. Some writers considered reprisals to be unlawful in such cases. The other restrictions concerned diplomatic immunities (article 12 (*a*)) and the obligations stipulated in multilateral treaties (article 11), particularly those concerning human rights (article 11, paragraph 1 (*c*)).

31. Finally, the Special Rapporteur stated in his report (A/CN.4/389, para. 26) that the future convention on State responsibility should not allow reservations excluding the application of part 3 of the draft. He did so after specifying (*ibid.*, para. 24) that the procedural rules in part 3 formed an integral part of the legal consequences of an internationally wrongful act. It followed that the injured State would always be able to invoke the machinery provided for in part 3.

32. He subscribed to the idea behind paragraph 1 of draft article 10: reprisals should not be taken until the international procedures for peaceful settlement of disputes had been exhausted. An injured State would always have available to it an international procedure for such settlement, first because such procedures would be set forth in part 3 of the draft, and, secondly, because it might be able to invoke specific procedures provided for in a treaty. If, as the Special Rapporteur proposed (*ibid.*, para. 14), the State which considered itself to be injured and wished to invoke article 8 ("reciprocity") or article 9 ("reprisal") as a justification for suspending the performance of its obligations was obliged to notify the author State of its reasons for doing so, and if the author State was obliged to declare and explain any objection it might have to the injured State, mutual notification would be essential and would at least have the effect of revealing the extent of the dispute. On the other hand, the triggering and exhaustion of the settlement procedures would depend on the co-operation of the author State: the possibility of taking preventive reprisals would apparently always remain open as a means of overcoming reluctance on the part of the author State to act.

33. Paragraph 2 of article 10 exempted certain measures from the rule of the obligatory exhaustion of international procedures for peaceful settlement of a dispute. In his view, paragraph 2 (*a*) concerned interim measures of protection taken by the injured State prior to the initiation of the international procedure for peaceful settlement and paragraph 2 (*b*) concerned the measures that the injured State could take when such a procedure was in progress. He believed that, in either case, the court or tribunal dealing with the affair would have to examine the measure taken by the injured State for legality and say, for example, whether it was disproportional.

34. Draft article 14 concerned a matter that, from the point of view of both State responsibility and the draft Code of Offences against the Peace and Security of Mankind, was more controversial. The Special Rapporteur seemed to consider that there were two main types of consequence of internationally wrongful acts. The first kind was the "civil" consequences, meaning those that did not go beyond the expunging of the effects of the breach of the obligation, or all the consequences common to an internationally wrongful act, including, it seemed, the new collective right referred to in article 5 (*e*). He himself accepted

[8] *Yearbook ... 1983*, vol. II (Part One), p. 15, document A/CN.4/366 and Add.1, para. 80.

[9] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

those consequences, which the Special Rapporteur considered as a minimum. In his view, the consequences referred to in article 14, paragraph 2 (*a*), (*b*) and (*c*), were applicable only to international crimes, since it was such crimes that involved the element of international public order which imposed obligations on all the States in the international community. As to the second kind of consequence, the penalties applicable in the event of an internationally wrongful act, the Special Rapporteur relied on the decisions of the international community as a whole. He himself was not opposed to that position, which seemed attributable to a resolve on the part of the Special Rapporteur not to deal in the draft with the criminal liability of States. The Special Rapporteur might be right in that, because to take a stand at the current stage in the draft articles on State responsibility with regard to the criminal liability of States would be tantamount to opening the major debate which the Commission had decided to postpone until it studied the draft Code of Offences against the Peace and Security of Mankind. Moreover, it would perhaps be unwise to take up the question of the criminal liability of States in the context of the draft articles on State responsibility, which, as the Special Rapporteur wished and the Commission had agreed, were intended to be general and, indeed, residual.

35. He had great difficulty in understanding paragraph 3 of article 14. He could not agree that even the discharge of the minimal obligations set forth in paragraph 2 (*a*), (*b*) and (*c*) of the article should be subject to collective procedures of the type laid down in the Charter of the United Nations for the maintenance of international peace and security. Naturally, if the United Nations had competence, the performance of the obligations would be subject to the procedures provided for in the Charter. But if it did not—and it was not competent in all aspects of international affairs—nothing would prevent the enforcement of the obligations without waiting for a decision of the United Nations. The Special Rapporteur had said that paragraph 7 of Article 2 of the Charter did not apply or, in other words, that intervention in the internal affairs of States was not forbidden. But United Nations competence was only precluded or established by international agreement. When, and only when, it had been established, the rights and obligations in question would be subject, within the framework of the Organization, to a collective procedure laid down in the agreement itself.

36. There was also a need clearly to define the role of the ICJ in relation to that of the United Nations. That was so because, if the Court and the United Nations were each given a role, there would be two different procedures with regard to the consequences of an international crime: a political procedure falling within the competence of the United Nations and a legal procedure falling within that of the Court.

37. Draft article 15 concerned the extremely important question of aggression. The Special Rapporteur had been reluctant to include aggression and self-defence in the draft articles on State responsibility. That was apparent from his summing-up of the Commission's discussion on the topic at its thirty-fifth session, when he had said that

> ... He personally continued to believe that aggression and self-defence were at the extreme frontiers of the topic of State responsibility, if not outside it altogether. Aggression was much more than a mere breach of an international obligation, and self-defence was much more than a mere legal consequence of such a breach.[10]

But, obviously in order to satisfy a strong current of opinion within the Commission, he had decided to include the question of aggression and, indirectly, that of self-defence in the draft articles in the form of a mere reference, without indicating either in article 15 or in the commentary thereto what were the "rights and obligations... provided for in or by virtue of the United Nations Charter" that arose from an act of aggression. The expression clearly meant self-defence and the procedures triggered by aggression, as well as the obligations and rights deriving from those procedures.

38. In his own view, the question of aggression could not be left out of the draft articles, for aggression entailed consequences entirely different from those of other international crimes and it was with the consequences of internationally wrongful acts that the draft was supposed to deal. Furthermore, self-defence was the sole case in which an act contrary to a peremptory norm of international law was opposed to an act that also breached that norm; without the antecedent, the recourse to force by the injured State would constitute an international crime. The Commission must consider whether it should look into the matter of self-defence and mention it *expressis verbis*. It had made room in the draft for another extremely difficult question, that of reprisals, although those reprisals had been made subject to limitations such as that of proportionality. It must, therefore, ask itself whether it should not do the same in the case of self-defence and provide, for example, that such defence must be proportional to the attack and not go beyond what was strictly necessary. There was, admittedly, no shortage of political and legal difficulties in that respect. The Charter of the United Nations did not define self-defence, but mentioned it. Perhaps, too, it would be advisable for the Commission to codify customary law so as to forestall both the introduction of new grounds for self-defence and the crumbling of the principle of the non-use of force that was embodied in the Charter.

39. He had nothing to add to what had already been said concerning draft article 16.

40. As section II of the report showed (A/CN.4/389, paras. 8 and 12), part 3 of the draft articles lay at the very heart of international law. He approved of the approach suggested by the Special Rapporteur with regard to the implementation of international responsibility and the settlement of disputes.

41. Mr. DÍAZ GONZÁLEZ said that he wished first of all to pay tribute to the Special Rapporteur, whose sixth report (A/CN.4/389) constituted a concentrated and profound summary of legal knowledge on a subject at the heart of international law.

42. Article 5 was the keystone of part 2 of the draft, since it defined the concept of the "injured State". He

[10] *Yearbook ... 1983*, vol. I, p. 149, 1780th meeting, para. 26.

did not have much to add to what had already been said concerning the article and wished merely to support Mr. Balanda's proposal (1894th meeting) that the words "for a third State" should be deleted from subparagraph (*a*). He wondered, with regard to the "collective interests of the States parties" mentioned in subparagraph (*d*) (iii), how it would be possible to distinguish between the interests of one of the States parties to a multilateral treaty such as the Charter of the United Nations and the interests of the community or collectivity of States as a whole. Perhaps the Special Rapporteur could clarify the matter in his summing-up.

43. He could accept the provision made in draft article 6 for the payment of a sum of money corresponding to the value of the re-establishment of the situation previous to the breach, but observed that reparation could, in some cases, take another form. The objective was to expunge the effects of the wrongful act and could be achieved by various means, including, of course, pecuniary compensation, but also, in the case of a diplomatic act, the mere granting of satisfaction or the dispatch of a diplomatic note.

44. Draft article 7 reminded him of the régime of capitulations. To what "treatment" for aliens did the article refer. In traditional international law, treatment for aliens was defined subjectively in relation to the "minimum of civilized treatment". But the assertion that States had a "general duty of diligence" was equally subjective, as could be seen from the definition of it given in 1928 by Max Huber, the arbitrator in the *Island of Palmas (or Miangas)* case. According to that definition:

> Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.[11]

Of course, to determine when such a vague rule had been breached was a delicate matter, especially as the "duty of diligence" had to be assessed in the light of the circumstances. That duty was in practice open to abuse by certain States which invoked it. In traditional international law, the Calvo clause, which lay at the origin of article 7, was denied all validity. At most, writers recognized that it was generally equivalent to the confirmation, in relation to a person accepting it, of the principle of the prior exhaustion of local remedies.

45. The question thus arose what was the purpose of article 7 as currently worded. If it was to confirm the principle of the exhaustion of local remedies, he could agree to that, for, in point of fact, the chief internationally unlawful jurisdictional act was the denegation of justice. Provision had, however, already been made for that act in other international instruments. Following the reasoning of Mr. Reuter (1891st meeting), who had linked the article to article 22 of part 1 of the draft, he considered that article 7 did not have a place in the draft. In fact, the article sought to protect investments; that was normal enough, but contemporary international law provided other, more effective means of achieving that aim, without permitting the creditor State or its nationals to resort to reprisals, to retortion and force. For its part, the denegation of justice brought about the application of the remedies recognized by international law, such as the diplomatic protection of the nationals of a State.

46. He approved of draft article 8. His only suggestion concerning it was that the words "by way of reciprocity" should be deleted in order to avoid all problems of interpretation and all risk of confusion between reciprocity, reprisals and retortion.

47. Draft articles 9 and 10 appeared contradictory. According to paragraph 1 of article 9—from which the words "by way of reprisal" should in any event be deleted—the injured State was "entitled" to suspend the performance of its other obligations towards the State which had committed the internationally wrongful act; but according to paragraph 1 of article 10, the injured State could take no measure—not even, therefore, those provided for in article 9—until it had exhausted the international procedures for peaceful settlement of disputes. Clearly, one of the articles was superfluous. In paragraph 1 of article 10, the words "available to it" should be deleted because, of the international procedures for the peaceful settlement of disputes set forth in the Charter of the United Nations or in other treaties or conventions, there would always be one or other that was appropriate. Paragraph 2 (*a*) spoke only of a court or tribunal and made no mention of the Security Council, which was the organ competent to act and to determine whether recourse to reprisals was warranted, whether there had been aggression and whether a measure had been taken in exercise of the right of self-defence.

48. The aim of draft article 11 was to protect the collective interests of the States parties to a multilateral treaty. Who, however, was to determine when those collective interests had been injured? What was meant by the injured collectivity and a "procedure of collective decisions"? There was a United Nations organ, namely the Security Council, which decided what collective measures should be taken and the Charter made it quite clear that States could not, either individually or collectively, take any other than the collective measures decided upon by the Security Council, measures which were, furthermore, subject to the procedures of the Charter, which provided for the application of regional arrangements.

49. The two subparagraphs of draft article 12 seemed to have already been included, and could at all events usefully be included, in article 8. Of the two types of obligation concerned, the obligations of a receiving State with regard to the immunities to be accorded to diplomatic and consular missions and their staff derived from other conventions and could not, in any event, be suspended, while the obligations falling to a State by virtue of a peremptory norm of general international law could not be suspended either.

[11] United Nations, *Reports of International Arbitral Awards*, vol. II, (Sales No. 1949.V.1), p. 839.

50. He found it hard to understand the wording of draft article 13. Perhaps, in the Spanish text, the word *que* should be replaced by the words *la cual* in order to make it perfectly clear that it was the manifest violation of obligations arising from a multilateral treaty that destroyed the object and purpose of that treaty as a whole.

The meeting rose at 6 p.m.

1898th MEETING

Tuesday, 11 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, 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. DÍAZ GONZÁLEZ, continuing the statement he had begun at the previous meeting, said that draft articles 14, 15 and 16 dealt with internationally wrongful acts constituting international crimes. They corresponded to article 19 of part 1 of the draft, which the Commission had provisionally adopted after a lengthy and difficult debate and which drew a distinction between "international delicts" and "international crimes". However, those articles did not seem to distinguish between internationally wrongful acts on the basis of the subject-matter of the international obligation breached and, more particularly, of the importance attached by the international community as a whole to the fulfilment of certain obligations. They thus made no distinction between "international delicts" and "international crimes", as the Commission did in adopting article 19. In that regard, it was relevant to refer not only to the text of article 19, but also to the commentary thereto approved by the Commission at its twenty-eighth session,[5] particularly paragraphs (6) and (59) thereof.

2. Article 14, paragraph 1, rightly referred to the concept of *jus cogens*, which had not been specifically and precisely defined, but had been explained in article 53 of the 1969 Vienna Convention on the Law of Treaties. Paragraph 2 (*a*) concerned the obligation not to recognize "as legal" the situation created by an international crime, but, as Mr. Balanda had pointed out (1894th meeting), it should, rather, concern the obligation "not to recognize the situation created by such a crime". A breach resulting from an internationally wrongful act produced legal effects, but it was not legal.

3. He saw no reason why the draft articles should not contain a provision relating to aggression, which was, according to article 19 of part 1 of the draft, an international crime. In order to maintain the link with article 19, however, the text of draft article 15 would have to be amended to include a reference to the four international obligations listed in article 19, paragraph 3 (*a*), (*b*), (*c*) and (*d*), which were of essential importance for the maintenance of international peace and security; safeguarding the right of self-determination of peoples; safeguarding the human being; and safeguarding and preserving the human environment. In that way, the Commission would not give the impression that it was placing the crime of aggression at the top of the list of international crimes. He personally would not make any distinction, in terms of degree, between international crimes.

4. He would reserve his position on part 3 of the draft articles until the Special Rapporteur had submitted some specific proposals.

5. He expressed the hope that, when the Special Rapporteur summed up the debate, he would try to dispel doubts and answer the many questions that had been raised, so that members of the Commission might have a clearer idea of the substance of the draft articles before a decision was taken to refer them to the Drafting Committee.

6. Mr. RAZAFINDRALAMBO commended the Special Rapporteur on having successfully completed the difficult task of submitting a set of clear, precise and coherent draft articles that fit in perfectly with those of part 1 of the draft.

7. Since part 1 of the draft had defined the concept of a State which had committed an internationally wrongful act or, to use the Commission's terminology, the concept of an "author" State, part 2 had to contain provisions identifying the State or States

[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.

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