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Summary record of the 1898th meeting

Topic:
State responsibility

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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.*

which had been "injured" by such an act and which were therefore entitled to new rights. Draft article 5 identified the "injured State" and was apparently intended as a "catalogue" listing the different types of injured State according to the customary, legal or conventional origin of the obligation breached. Although the definitions contained in that article were generally acceptable, some of them would have to be further clarified.

8. Article 5, subparagraph (*d*), raised a problem relating to the interpretation of multilateral treaties. Should competence for such interpretation be attributed only to the injured State which was a party to the treaty in question or to all the parties, which would take a collective decision in that regard? Who would, for example, establish that the obligation had been stipulated in favour of the State party concerned, as provided for in subparagraph (*d*) (i)? Subparagraph (*d*) (ii), which stated that "the breach ... necessarily affects the exercise of the rights or the performance of the obligations of all other States parties", involved a problem of proof, whereas subparagraph (*d*) (iii), which related to an obligation stipulated for the protection of collective interests, raised a problem of law to which there was no obvious solution, as the Commission's debates had shown.

9. It was, however, subparagraph (*d*) (iv) that was most in need of further clarification. In paragraph (22) of the commentary to article 5, the Special Rapporteur had explained that that provision referred to obligations to respect fundamental human rights as such. It thus appeared to apply only to individuals, not to private legal persons; but it also covered the case of a State party to a multilateral treaty, such as some of the international labour conventions or the International Covenant on Civil and Political Rights.[6] Would a State party to such instruments be entitled to an additional right not provided for in the ILO Constitution or in the Covenant and the Optional Protocol thereto? The answer to that question was clear in the case of an internationally wrongful act resulting from the breach by another State party of an obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, or, in other words, in the case of an international crime resulting from a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples (article 19, paragraph 3 (*b*), of part 1 of the draft), or for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid* (article 19, paragraph 3 (*c*)). Those crimes were also provided for in the International Covenant on Civil and Political Rights: article 1 referred to the right of peoples to self-determination; article 8 to slavery; article 6 to genocide; and article 26 to non-discrimination. It was under subparagraph (*e*) of draft article 5, which referred to an internationally wrongful act constituting an international crime, that the other States parties to such a multilateral treaty would be entitled to the new rights provided for in part 2 of the draft.

[6] See 1896th meeting, footnote 7.

10. As far as international delicts were concerned, the question of the rights of another State party had still not been answered. Which criteria would be used to identify a State party to a multilateral treaty which considered that it had been injured by the breach of an obligation stipulated for the protection of an individual person, irrespective of his nationality? For example, would State B be entitled to the rights provided for in draft article 6 or even in draft articles 8 and 9, including the right to claim monetary compensation, if State A breached an obligation stipulated in favour of a national of State A? The provision contained in article 5, subparagraph (*d*) (iv), appeared to go further than the provisions of the international human rights conventions in force, or at least further than those of a universal character. The Special Rapporteur would probably be able to provide further clarification on that point and explain the exact meaning of that provision.

11. It had rightly been pointed out that, in article 5, subparagraph (*e*), the words "all other States" did not take account of all the interests, or of the particular situation, of the State directly injured, for example by an act of aggression. In his own view, the use of those words in no way affected the respective rights and obligations of the States parties to a multilateral convention.

12. Since article 6 was the first provision that dealt with the new obligations of the State which had committed an internationally wrongful act, it would have been more logical to stress that point and to draft the article in such a way as to draw attention to the obligations of the author State. Article 6, paragraph 1, might, for example, read: "The State which has committed an internationally wrongful act shall, *inter alia*: (*a*) discontinue the act ...; (*b*) apply such remedies ...; (*c*) re-establish the situation ...; and (*d*) provide appropriate guarantees ...". He had no particular difficulties with the four elements listed in paragraph 1, (*a*) to (*d*), which were based on international practice, arbitral awards and legal decisions. He nevertheless thought that article 6 placed too much emphasis on material injury and that it did not take proper account of cases in which the injury sustained was only of a moral nature and for which international practice merely required reparation in the form of satisfaction or apologies.

13. Many members of the Commission had expressed the view that draft article 7 duplicated article 6 and that article 6, paragraph 2, already covered the case of the treatment to be accorded by a State to aliens. In his own view, however, there was a difference between the two provisions, since article 6, paragraph 2, applied only in cases where it was materially impossible for the author State to act in conformity with paragraph 1 (*c*) and to effect *restitutio in integrum stricto sensu*, which was a retroactive measure (*ex tunc*), whereas article 7 provided that the re-establishment of the situation as it had existed before the breach had to be the result of a deliberate decision by the author State.

14. That was probably what the Special Rapporteur had had in mind when he had drawn attention, in paragraph (2) of the commentary to article 7, to

... a marked tendency not to require such *restitutio in integrum stricto sensu* in the case of an internationally wrongful act consisting in the infringement—within the jurisdiction of the author State—of a right (or, more generally, a legal situation) of a natural or juridical person "belonging" to the injured State, or at least to leave to the author State the choice between such *restitutio in integrum stricto sensu* and the substitute performance of compensation and satisfaction (i.e. reparation).

He thus agreed with the statement by the Special Rapporteur in paragraph (3) of the commentary that "on a quite different legal plane, article 22 of part 1 of the draft articles does give legal relevance to the domestic legal system of the author State", and noted that article 22 dealt only with obligations of result, not with obligations of means, which were provided for in article 23. He considered that the proposed article 7 applied to the two situations referred to in articles 22 and 23. Article 7 was thus fully justified and did not duplicate article 6, paragraph 2.

15. In that connection, he said he did not think that the example of nationalization which had been cited to show that, in the case referred to in article 7, the author State did not have to effect *restitutio in integrum* was really relevant, because nationalization was not an internationally wrongful act. It was governed by the principle of permanent sovereignty over natural wealth and resources, which was the corollary of the principle of State sovereignty and one of the rights provided for in the Declaration on the Establishment of a New International Economic Order[7] and in the Charter of Economic Rights and Duties of States.[8] There were specific rules governing compensation in the event of nationalization: it must, in particular, be just and equitable. If the Commission wished to avoid having a separate article, the case covered by article 7 might, if necessary, form the subject of a new paragraph of article 6.

16. Draft articles 8 and 9 dealt with the new rights of the injured State and, specifically, with the countermeasures which the injured State could take in response to a breach of obligations by the author State. The injured State's response was designed to re-establish the balance between the positions of the two States by means of reciprocity, thus implying that their reciprocal obligations corresponded to or were connected with one another. Since a countermeasure by way of reciprocity was justified by the synallagmatic relationship between the author State and the injured State, its application should not give rise to any difficulties, subject to the restrictions provided for in draft articles 11 and 13 in the case of a multilateral treaty, and in draft article 12 in the case of obligations of a receiving State regarding diplomatic and consular immunities and of obligations existing by virtue of a peremptory norm of general international law. As to other possible restrictions, it could, for example, be asked why reciprocity as a legitimate countermeasure should not also be subject to an international procedure for the peaceful settlement of the dispute, on the same basis as reprisals. A countermeasure by way of reciprocity was, of course, quite "moderate" in comparison with a countermeasure by way of reprisal, as referred to in article 9. Its maintenance for an indefinite period, without any prospect of peaceful settlement, might, however, lead to a situation that would be prejudicial to peaceful relations between the States concerned.

17. The control mechanism for the legitimacy of a countermeasure by way of reprisal, as provided for in article 9, was fully justified. Reprisals had, of course, always been regarded as measures of coercion which were contrary to the ordinary rules of international law and they were all the more dangerous in that they had no obvious connection with the internationally wrongful act committed by the author State. In principle, therefore, he agreed with the Special Rapporteur's position that there should be a separate provision relating to countermeasures by way of reprisal, but he did not think that the restrictions which had been proposed in draft article 10, and which were definitely needed, went far enough. It had to be made clear that, in addition to the belligerent reprisals referred to in draft article 16, subparagraph (*c*), reprisals of a violent nature were prohibited in all cases. Article 9, paragraph 2, did, of course, embody a major restriction in that it brought the principle of proportionality into play. It might also be argued that, under article 4, all the provisions of part 2 of the draft were subject to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. The prohibition of the use of force was, however, far too important simply to be referred to in passing and to be watered down by such an abstract principle as that of proportionality. At present, measures of reprisal took various forms that were primarily of an economic nature and they were the weapon that powerful States preferred to use against weaker States, particularly developing States. Article 10, paragraph 2 (*a*), which provided that the injured State could take interim measures of protection within its jurisdiction, therefore gave rise to serious reservations inasmuch as such measures, which could be taken independently of a procedure for peaceful settlement of the dispute, would be difficult to reconcile with the principle of the jurisdictional immunity of States and their property. The Special Rapporteur might try to dispel doubts in that regard.

18. It was also open to question whether, as Mr. Ushakov (1895th meeting) had proposed, the injured State should be entitled to take a measure by way of reprisal only in cases where the internationally wrongful act was very serious, and whether such a measure should not be discontinued in certain circumstances, namely when an international procedure for the peaceful settlement of the dispute had been instituted and the dispute was thus *sub judice*.

19. Article 10, paragraph 1, embodied a safeguard provision that was absolutely necessary. It was thus appropriate to say that the injured State must have exhausted the international procedures for peaceful settlement of the dispute that were "available to it", because the injured State could then be required to avail itself of procedures before it engaged in reprisals.

20. The comments he had made with regard to article 5, subparagraph (*d*) (iv) and subparagraph (*e*),

[7] General Assembly resolution 3201 (S-VI) of 1 May 1974.

[8] General Assembly resolution 3281 (XXIX) of 12 December 1974.

concerning obligations stipulated for the protection of individual persons also applied to draft article 11, paragraph 1 (*c*).

21. The content of draft article 12 was entirely acceptable. Subparagraph (*b*) rightly referred to *jus cogens*, a concept that continued to give rise to controversy and strong reactions. As the Commission often said in connection with article 19 of part 1 of the draft, the existence and content of peremptory norms of general international law were open to discussion, but the fact was that articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties did exist and, unlike article 19, were in force, since the Convention had entered into force in 1980 and had so far been ratified by 46 States. Article 12 might, however, be placed immediately after article 9 or after article 10.

22. Draft article 13 had not given rise to much discussion. Draft article 14, however, was an essential provision because it was the corollary of recognition of the concept of an international crime. Paragraph 1 referred implicitly to the provisions of the preceding articles and, in addition, to such rights and obligations as were determined by the applicable rules accepted by the international community as a whole. It was closely linked to article 19 of part 1 of the draft and, in particular, to article 19, paragraph 2, on whose wording it was based. That would, of necessity, preclude rules which might be invoked by certain States, such as the concept of "vital interests" or the principles governing a national system of defence. The obligations set forth in article 14, paragraph 2, were mainly of a negative character. Like Mr. Thiam (1893rd meeting), he therefore had doubts about the practical effect of paragraph 2 (*c*), which required States to join other States in affording mutual assistance in carrying out the obligations provided for in paragraph 2 (*a*) and (*b*). The list contained in paragraph 2 was, in any event, only of an indicative nature, and that was what the Special Rapporteur had probably meant to emphasize in paragraph 3, which should, however, probably also be more explicit. It might, for example, be necessary to refer to the exercise of the right to self-defence in bringing about, by what would usually be violent means, the discontinuance of an act or a set of particularly serious wrongful acts committed by another State. Paragraph (9) of the commentary to article 14 referred only to collective self-defence, but in view of its particular importance and in order to establish a link with article 34 of part 1 of the draft, the right to self-defence should be specifically mentioned in article 14. Like other members of the Commission, he was of the opinion that the reference to the rights and obligations provided for in the Charter of the United Nations was not explicit enough and that it applied only to aggression.

23. As to draft article 15, he would, in principle, have no objection if a separate provision was devoted to aggression, which was not an ordinary international crime within the meaning of article 14, but, rather, a serious breach of an international obligation of essential importance for the maintenance of international peace and security or, in other words, an offence against the peace and security of mankind. Aggression was, however, not the only internationally wrongful act which had those characteristics. Article 19 of part 1 of the draft referred to three other categories of offences against the peace and security of mankind whose legal consequences were dealt with in the draft Code of Offences against the Peace and Security of Mankind. If reference was made only to aggression and other crimes were left out, there might be an imbalance between article 19 of part 1, on the one hand, and part 2, on the other. He therefore tended to agree with article 8 of Graefrath and Steiniger's draft convention on State responsibility, which assimilated the "forceful maintenance of a racist régime (such as *apartheid*) or of a colonial régime" to "aggression" and to which reference had been made in the Special Rapporteur's fourth report.[9] Like aggression, those crimes should be dealt with in separate provisions of the draft articles.

24. He fully supported the Special Rapporteur's proposals concerning draft article 16. The three cases which were covered by that article and to which the provisions of part 2 did not apply were fully justified. Even if that list was not exhaustive, it was not absolutely necessary to say so in the text.

25. There was an obvious link between part 3 and parts 1 and 2 of the draft articles. Many of the provisions of part 2, such as article 10, and of part 1 would, moreover, require a procedure for the peaceful settlement of disputes. Article 11, paragraph 1, *in fine*, stated, for example, that it was necessary to "establish" the elements listed in subparagraphs (*a*) to (*c*) before any measure could be taken to suspend the performance of obligations. The Special Rapporteur had been right, as indicated in his sixth report (A/CN.4/389, para.9), to draw on the obvious analogy between the Vienna Convention on the Law of Treaties and a possible convention on State responsibility and to state that he was in favour of the addition to the rules on State responsibility of provisions corresponding to articles 65 and 66 of the Vienna Convention. The notification procedure referred to in the report (*ibid.*, para. 14) in connection with the application of articles 8 and 9 was entirely appropriate. On the whole, the possibilities suggested (*ibid.*, paras. 16 *et seq.*) did not appear to be very controversial. The proposal (*ibid.*, para. 32) that a dispute concerning the interpretation or application of article 19 of part 1 should be submitted to the ICJ according to a procedure similar to that provided for in article 66, subparagraph (*a*), of the Vienna Convention on the Law of Treaties would have the effect of broadening the jurisdiction of the Court. In view of the traditional position taken by many third world States with regard to that high Court, that proposal might raise a problem of political options which would give rise to serious objections.

26. In conclusion, he thanked the Special Rapporteur for the valuable work he had done, for it would enable the Commission to make considerable progress in the elaboration of a set of draft articles on State responsibility.

[9] *Yearbook ... 1983*, vol. II (Part One), pp. 10-11, document A/CN.4/366 and Add.1, para. 57.

27. Chief AKINJIDE joined previous speakers in warmly congratulating the Special Rapporteur on his excellent sixth report (A/CN.4/389), which was a reflection of his industry and scholarship.

28. Part 2 of the draft articles on State responsibility was crucial, for, without it, parts 1 and 3 could not stand. It seemed, however, to be based on two erroneous assumptions: first, that the aggressor would always be defeated, and secondly, that the modern world was a normal one. So far as acceptance of part 2 was concerned, it should be borne in mind that a State which signed the future convention would be limiting its sovereignty; accepting international obligations that could give rise to criminal liability; and agreeing to be bound by international judgments and to accept the punishments imposed in such judgments. As lawyers, the members of the Commission tended to view the matter essentially from the legal angle, but Governments, which would be called upon to approve the future convention, would look at it essentially from the political angle. Like the draft Code of Offences against the Peace and Security of Mankind, therefore, it was an issue that was partially legal and partially political and the question was how to combine those two elements in a convention that would be broadly acceptable to the international community. That was by no means an easy task.

29. Account also had to be taken of the consequences that could ensue from the balance of power between two competing ideologies, as well as between the North and the South—the "haves" and the "have nots". Another question concerned the extent to which the nations of the world would be prepared to surrender a sizeable portion of their sovereignty, in compliance with the type of obligation set forth in part 2 of the draft. The trend since the First World War showed that, in any conflict between national and international interests, the preference had always been to protect the former rather than the latter. Had it been otherwise, peace would have reigned in many troubled areas of the world.

30. Again, many wars were waged by proxy and it was sometimes difficult to discern the principles at issue. It seemed to him that the draft articles of part 2 were a development, or elaboration, of various provisions of the Charter of the United Nations and the different resolutions adopted by the Security Council and the General Assembly. There was, however, no certainty that, if the provisions of part 2 were agreed upon and put into effect, they would not be ignored, just as those other provisions and resolutions had been ignored over the years. The relative strength of the parties, in military, economic and political terms, was likewise relevant to part 2 of the draft. That was a matter which concerned not only the great Powers, but also the developing countries, particularly in Africa, where many States had been the victims of intervention or aggression in one form or another. His comments were not to be interpreted as an indication of opposition to part 2 of the draft. He merely wished to indicate the dangers that lay ahead and the difficulties of securing acceptance by States of the provisions of part 2.

31. The draft articles dealt, *inter alia*, with reciprocity, reprisals, countermeasures and response. Although he had listened to the comments made in that connection and had carefully read the commentaries, he had to confess that he was none the wiser. Unless such notions were defined, they were bound to give rise to many different interpretations by the various competing interests, particularly where criminal or civil liability was involved. He therefore suggested that the draft should include a section on definitions in which those four notions would be defined as precisely as possible, bearing in mind that certainty was an essential element in criminal liability.

32. Part 2 of the draft appeared to provide for two régimes, criminal and civil. It should be made clear which acts amounted to crimes and which acts to torts—to use the English law term for delicts. He fully appreciated that, while every crime could be a wrongful act, not every tort would amount to a crime, and that the consequences of one might differ from, or be more serious than, those of the other.

33. As he had already noted, the aggressor was not always defeated; and if the aggressor in the Second World War had been the victor, and part 2 of the draft had been in force at the time, the history of the world might have been very different. In the atmosphere that prevailed immediately following a war, human beings were not always at their most rational and there was a wish for revenge. The victor could do as he wished with the vanquished. In that connection, he pointed out that, according to archives held at the Record Office in London, General Jodl, on signing the document of unconditional surrender to the Allied Forces in 1945, had expressed the hope that the victors would treat the German people with generosity. Hermann Goering had, moreover, said that, although his trial was a cut and dried political affair, he was prepared for the consequences. It had likewise been interesting to note that the War Cabinet in London, having decided on 12 April 1945 that a full trial by judicial process was out of the question for the principal Nazi leaders, had wanted Parliament to pass a bill of attainder; but United States support had not been forthcoming, since such a bill was illegal under article 1, section 9.3, of the United States Constitution. He mentioned that to show that, if the aggressor won, the consequences could go far beyond the provisions of part 2 of the draft. In his view, therefore, that part should be re-examined, for otherwise it might prove to be a dead letter in the event of a war of aggression which the aggressor won. It was often assumed that the provisions in question were directed at the great Powers in order to ensure that they did not use their stockpile of arms. He knew of no era in history, however, when there had been a stockpile of weapons which had not ultimately been used.

34. With regard to draft article 5, subparagraph (*a*), he agreed with Mr. Balanda (1894th meeting) that the reference to a third State was unnecessary and should be deleted. The definition of the "injured State" as a State whose right arising from a treaty provision had been infringed was acceptable, but he had serious doubts about the part of the definition

referring to a "customary rule of international law". Article 53 of the 1969 Vienna Convention on the Law of Treaties notwithstanding, such a definition could, in an atmosphere of tension, offer fertile ground for dispute. The same held true of the provision contained in article 5, subparagraph (*b*), because of prevailing uncertainty as to the status of judgments of the ICJ. The provisions of subparagraph (*c*) and subparagraph (*d*) (i) were acceptable, but he disagreed with the Special Rapporteur (paragraphs (17) to (19) of the commentary to article 5) that subparagraph (*d*) (ii) and (iii) reflected situations of fact; he was, rather, of the opinion that the statement in subparagraph (*d*) (ii) represented a combination of fact and law and that the statement in subparagraph (*d*) (iii) was entirely a matter of law. As for subparagraph (*d*) (iv), it should be borne in mind that not all countries were democracies where the rights of individual persons were protected. As several other speakers had pointed out, moreover, not every breach of individual rights was necessarily an internationally wrongful act. With regard to article 5, subparagraph (*e*), he recalled that many speakers at both the previous session and the current session of the Commission had argued that the position of "all other States" could not be assimilated to that of the State directly affected by an international crime and had expressed the hope that the Special Rapporteur would take account of that view.

35. The provisions of draft article 6 were no doubt correct in theory, but they would not be easy to apply in practice. In that connection, he cited two examples from his country's experience with a neighbouring State, one involving a border incident in which six of his countrymen had been killed, and the other in which the neighbouring State had overrun several islands belonging to his country in a lake held in common by the two States. In both cases, his Government, which was an elected Government and therefore had to take account of public opinion, had taken prompt action under Article 51 of the Charter of the United Nations, preventing further bloodshed in the former case and re-establishing the situation as it had existed before the act in the latter. It was difficult to see how article 6 could have been observed in such situations. Merely to "require" the author State to discontinue its internationally wrongful act (paragraph 1 (*a*)) might well prove inadequate; as for requiring it to apply such remedies as were provided for in its internal law (paragraph 1 (*b*)), the internal machinery in question might be far too slow or non-existent. He agreed with other members of the Commission that, for the sake of logic, paragraph 1 (*c*) and paragraph 2 should be combined and he endorsed the views on paragraph 2 expressed by Mr. Barboza (1897th meeting) and Mr. Reuter (1891st meeting).

36. Draft article 7, which dealt with the question of the nationalization of assets of aliens, including multinational corporations, did not appear to be entirely consistent with article 1, paragraph 3, and article 25 of the International Covenant on Economic, Social and Cultural Rights[10] and should, in his view, be deleted. Nothing in the draft articles should lend itself to being construed as legalizing intervention by powerful States in the internal affairs of weaker States.

37. Article 8, if maintained, would have to be drafted with greater precision. The meaning of the concepts of reciprocity, countermeasures and reprisals, as well as of the words "directly connected with", should be carefully defined. The same applied to the words "manifestly disproportional" and "seriousness" in draft article 9, paragraph 2.

38. The examples he had cited in connection with article 6 were also relevant to draft article 10. Cases in which parties to a dispute refused to co-operate or ignored Security Council resolutions were not unknown. As for draft article 11 and, in particular, its paragraph 1, he had to confess that he failed to understand its purport. Perhaps the Special Rapporteur or the Drafting Committee might be requested to make the text a little less puzzling.

39. Previous speakers had already made all the points he might have wished to raise with regard to draft article 12. He agreed that, in draft article 13, it might be more appropriate to refer to "material violation" than to "manifest violation" and, in general, felt that the article should be drafted more explicitly.

40. Draft article 14 gave rise to more serious objections in that it appeared to be subject to a political decision by the Security Council. It was by no means clear whether the rights and obligations referred to in paragraph 1 were to be determined before or after the commission of an international crime. He shared the misgivings expressed by previous speakers in connection with the *erga omnes* provision contained in paragraph 2, and wondered whether the rather complicated wording of paragraph 3 was not a way of indirectly saying that the right of veto would be used. As for the provision in paragraph 4 to the effect that obligations under the future convention on State responsibility would prevail over all other rules of international law except the United Nations Charter, he wondered whether States which had already acceded to other conventions containing a similar provision might not, for that reason, be discouraged from accepting the future convention.

41. With regard to draft article 15, he agreed with previous speakers that care should be taken to avoid any discrepancy between the work being done on State responsibility and that on the draft Code of Offences against the Peace and Security of Mankind. In any event, article 15 seemed to him to state the obvious and it could be omitted without harm to the draft as a whole. As to draft article 16, he noted that many States committed acts of aggression under the guise of reprisals.

42. Referring to part 3 of the draft, on the implementation of international responsibility and the settlement of disputes, he recalled that Mr. Ushakov (1895th meeting) had questioned whether it was necessary to have a part 3 at all. If Mr. Ushakov had meant that, at the current stage, it was questionable whether the future part 3 was relevant to part 2, his point had perhaps been well taken. More generally, however, a part 3 on implementation would un-

[10] United Nations, *Treaty Series*, vol. 993, p. 3.

doubtedly be a logical sequel to parts 1 and 2, and the Special Rapporteur deserved thanks for letting the Commission share his thoughts on the subject. The issue of implementation was of the greatest importance, as the history of the Nürnberg and Tokyo trials had shown, and it could materially affect the Commission's thinking on part 2. He therefore welcomed the Special Rapporteur's attempt to grapple with the problem, but he would reserve his position on the substance of part 3 until the appropriate draft articles had been submitted for consideration.

43. Mr. ROUKOUNAS, commenting, in the light of part 1 of the draft, on part 2, as contained in the Special Rapporteur's excellent sixth report (A/CN.4/389), said that the mechanism of responsibility provided for in part 2 lacked a core of rules relating to the injury caused. To go on from the primary to the secondary rules, the question of injury would have to be included somewhere in the secondary rules relating to reparation. When the Commission had considered the primary rules, it had not dealt in isolation with the element of injury, but had, probably quite rightly, taken the view that injury was implicitly included in the definition of an internationally wrongful act. Injury, namely material or moral damage, was, however, also of concern to those who had to assess reparation, not the wrongful act.

44. Some international legal decisions, such as that handed down by the ICJ in the *Corfu Channel* case,[11] had, of course, moved on directly from the internationally wrongful act to reparation, but others had dwelt at length on the problem of injury with a view to assessing reparation. Such cases had, moreover, not related only to individuals and the Commission appeared to regard them as implying that injury formed part of the wrongful act. The ICJ had, for example, often dealt with injury in the *Nuclear Tests* cases,[12] even in identifying the injured States. It would also be recalled that, in the *Aegean Sea Continental Shelf* case[13] (request for the indication of interim measures of protection), the Court had linked reparation to the existence of possible injury. In the *Mavrommatis* case,[14] the PCIJ had recognized that a particular act had been wrongful, but had found that it did not give rise to reparation because there had been no injury. It should also be pointed out that injury often had to be taken into account in determining the nature and scope of reparation. In dumping cases, for example, injury was taken into account in determining both wrongfulness and reparation. He therefore proposed that a place should be set aside for the question of injury in draft article 6, unless the Commission decided that it should be dealt with in a separate article.

45. Draft article 5 was, of course, intended to define the term "injured State", but that provision did not appear to cover the problem of injury in relation to reparation, particularly since the injured State was defined as "the State whose right has been infringed"; that wording would have to be further clarified. Part 1 of the draft articles, on the origin of wrongfulness, was based on two ideas, that of the "internationally wrongful act" and that of the "author State". It was therefore difficult to see how part 2 could be based only on the concept of the "injured State".

46. Referring to the extent to which part 2 of the draft could be expected to fit in with part 1, he noted that, in part 1, the Commission had drawn a distinction between obligations of conduct and obligations of result. The consequences of that distinction were, however, difficult to assess and that might well be the cause of the difficulties to which part 2 gave rise.

47. In part 1 of the draft, the Commission had also drawn a distinction between international delicts and international crimes; but, in his view, such a distinction, which had its origin in the internal law of certain States, could be embodied in an international instrument only if it satisfied imperative and specific requirements. In internal law, that distinction determined which court was competent and how harsh the penalty would be, but the same was not true in international law. The Commission had made that distinction in order to emphasize the extremely serious nature of international crimes and to be able to draw consequences therefrom. The most outstanding action was the mobilization of the "international community as a whole" to bring to an end and punish a crime. In part 2 of the draft, an international crime was linked to the concept of the international community as a whole—a concept which had been identified by the ICJ in the *Barcelona Traction* case[15] and which had become institutionalized since the Second World War.

The meeting rose at 1 p.m.

[11] *Corfu Channel, Merits*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4; *Corfu Channel, Assessment of Amount of Compensation*, Judgment of 15 December 1949, *ibid.*, p. 244.

[12] *Nuclear Tests (Australia* v. *France)*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France)*, Judgment of 20 December 1974, *ibid.*, p. 457.

[13] *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3.

[14] *Mavrommatis Jerusalem Concessions*, Judgment No. 5 of 26 March 1925, *P.C.I.J., Series A, No. 5.*

[15] See 1892nd meeting, footnote 5.

1899th MEETING

Tuesday, 11 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. Tomuschat, Mr. Ushakov, Mr. Yankov.