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Summary record of the 1899th meeting

Topic:
State responsibility

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

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. ROUKOUNAS, continuing the statement he had begun at the previous meeting, pointed out Mr. Koroma that the word *préjudice* should be taken to mean *dommage matériel ou moral* or, in English, "injury". He had little to add to the proposals already made with regard to draft article 5 and would simply note that, in order to cover all possible origins of the obligation breached, mention might be made of the customary, conventional or "other" origin of the obligation. Furthermore, he too would favour a provision which covered the situation of a third State by specifying that the rights concerned must be rights accepted by third parties. In that regard, the situation of the "third" State might be somewhat different, depending on whether a conventional text or custom as expressed in a conventional text was involved.

2. Subject to his comments, which were not categorical, on "appropriate guarantees", he thought that draft article 6 should introduce the idea of injury and that paragraph 1 should be strengthened. It would be preferable to say that "The injured State *has the right* to require". The article seemed essentially to cover injury to private persons, something that was not justified. It should be broader in scope and should refer to "reparations", a generic term, and then to the satisfaction to be given to the injured State, which could be an apology, compensation or restitution, measures which would not necessarily be cumulative. Paragraph 2 was concerned with compensation. In actual fact, everything depended on the wrongful act, the nature of the injury and the evaluation of it. The judgment of the PCIJ in the case concerning the *Factory at Chorzów (Merits)*[5] which was sometimes cited no longer seemed to satisfy all present-day needs. However, it had been seen that satisfaction could be obtained through a decision of an international organ (the ICJ itself in the *Corfu Channel* case[6]). With regard to compensation, jurisprudence had adopted a restrictive approach concerning remote consequences; it rightly recognized, first and foremost, the "normal immediate consequences of the act". Furthermore, in addition to the situation of the directly injured State and that of the indirectly injured State, it was essential to take the direct and the indirect injury into consideration.

3. If article 6 was restructured and made broader in scope, draft article 7 would lose its usefulness. In any event, the Special Rapporteur seemed to have no major objection to the idea of deleting from paragraph (4) of the commentary to article 7 the reference to the unclear concept of "extraterritoriality". It would be preferable to speak of the competence of a State that was recognized by international law and was sometimes exercised outside its territory.

4. Draft article 8 lacked uniformity in the terms employed. It dealt with one of the aspects of the reaction by the injured State within the framework of interrelated obligations; it was not a question of retortion, in other words a response to a lawful act by another lawful act. In the case in point, if the act which provoked a reaction was lawful, was an article required in the draft? In practice, it was unfortunately very difficult to evaluate *prima facie* the lawful or wrongful nature of the reaction, hence the need for a provision that would cover all possibilities. The idea of reciprocity was a much wider institution and related not only to crises, but also to harmonious relations between States. Some constitutions, including the Greek Constitution, called for reciprocity in the performance of international commitments and in trade and co-operation relations. Therefore it would be better to speak of "countermeasures", a term used in part 1 of the draft and endorsed by the ICJ, and which had not encountered any major difficulty in legal theory.

5. The Special Rapporteur, who had set draft article 9 in a framework of "interobligations", proposed, as a measure of reprisal, suspension of the performance of the obligations of the injured State towards the State which had committed the internationally wrongful act. The use of the term "reprisal" indicated the extent of the action: the measure by way of reprisal would mean a wrongful measure taken in response to a wrongful act and designed to bring it to an end. Various recent instruments contained more or less distinct provisions in that regard. Thus the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[7] in the first principle, sixth paragraph, proclaimed the duty of States to refrain from acts of reprisal involving the use of force. Similarly, Additional Protocol I of 1977[8] to the Geneva Conventions of 12 August 1949[9] prohibited, in article 20, reprisals against certain categories of persons and objects. Reprisals should therefore be

[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] Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17.*

[6] See 1898th meeting, footnote 11.

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

[8] Protocol relating to the protection of victims of international armed conflicts, United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

[9] United Nations, *Treaty Series*, vol. 75.

confined to the field of armed conflict and it would be better for the Special Rapporteur to revert to the idea of countermeasures.

6. In considering articles 8 and 9, account should be taken of the principle of proportionality, the corollary to the use of countermeasures in international relations. The Special Rapporteur envisaged two types of proportionality: one was the subject of paragraph (3) of the commentary to article 8, and the other was explained in the commentary to article 9. The best course would be to merge the two articles in order to deal with countermeasures and to include a formulation on proportionality that precluded any possibility of difficulties of interpretation. For example, what would happen if an injured State took manifestly disproportional measures? Would it be barred from requesting reparation for the wrongful act?

7. He agreed with those members who had called for stronger provisions in draft article 14. With reference more specifically to paragraph 2, he thought that the obligation not to recognize the situation created by an international crime was the least that could be asked of States in exchange for their participation in the international community. International law, in the course of its development, had moved towards a law of co-operation to become finally a law of co-ordination, even solidarity. Never had there been any right to remain indifferent. A State called upon to express its position regarding the lawful nature of an act from the standpoint of international law was always duty-bound to take a decision and it could not equivocate. It was certainly not a question of distinguishing between recognition and "recognition as legal". States must recognize or not recognize an act: if the act was unlawful, there must be no recognition. Accordingly, he shared the views of Mr. Balanda (1894th meeting) and Mr. Díaz González (1898th meeting) and requested the deletion of the words "as legal" in paragraph 2 (*a*).

8. With regard to draft article 15, the crime of aggression needed clarification also in relation to the legal dimensions of self-defence.

9. Draft article 16 (*c*) was of some concern, since it referred to "belligerent reprisals". Belligerence was a situation of war within the classic meaning of the term, which was too narrow. Would it not be better to speak of "armed conflicts"? Again, in the absence of co-ordination between the work of the Special Rapporteur for State responsibility and of the Special Rapporteur for the draft Code of Offences against the Peace and Security of Mankind, it was difficult to determine whether the word "reprisals" should be used. Without going so far as to make a formal proposal, he suggested that the subparagraph should speak of the rules of humanitarian law relating to armed conflicts. Paragraph (5) of the commentary to article 16 could also refer, *inter alia*, to ICRC and to the 1949 Geneva Conventions and Additional Protocol I of 1977, which was in force even though the number of ratifications was not large.

10. Mr. AL-QAYSI said that the sixth report of the Special Rapporteur (A/CN.4/389) marked a major turning-point in the Commission's work on the topic. The basic substance of the draft articles was acceptable as a whole and presumably the brief commentaries would be expanded.

11. Some members continued to hold the view that the Commission should restrict itself to the traditional fields of State responsibility and refrain from introducing novel concepts which would weaken the law on State responsibility. It should be borne in mind that political considerations lay at the root of that viewpoint, more particularly in the light of what the Commission had provisionally adopted in article 19 of part 1 of the draft, concerning the distinction between international crimes and international delicts and its implications for the criminal responsibility of States. The result of adopting such an approach would make the Commission's work unacceptably inconsistent. Since part 1 admitted the possibility that the breach of an international obligation by a State could be towards another State or States, or towards the international community as a whole, in other words *erga omnes*, determination of the legal consequences of the breach could not be restricted by excluding a certain kind of injured party. It was one thing to argue in favour of the idea of being restrictive in determining the legal consequences of an internationally wrongful act; it was quite another, however, to require certain legal and judicial safeguards against abuse. In the matter of State responsibility, conflicting political interests abounded.

12. The strengthening of the law of State responsibility would surely help to strengthen the international legal order. Such an objective could not be fully achieved by confining part 2 of the draft to the legal consequences of international delicts, so as to save States as subjects of law from the implications of international criminal responsibility. With appropriate legal and judicial safeguards as envisaged in the sixth report, the consistency of part 2 of the draft with part 1 was not an invitation to chaos.

13. On that basis, he had no difficulty in accepting the substance of draft article 5, subparagraph (*e*), and draft articles 14 and 15 as they stood in the overall context of part 2. The relevant commentaries, moreover, should serve to dispel any doubts regarding the exact parameters of their substantive operation. With regard to article 15, he considered that the inclusion in the draft of a separate article on the crime of aggression was necessary because of the concept of self-defence, which did not come into play in the case of other international crimes.

14. Article 5, subparagraphs (*a*) (*b*) and (*c*), did not seem to raise any special problems, particularly since the Special Rapporteur clearly observed in paragraph (7) of the commentary that the text "cannot prejudge the 'sources' of primary rules nor their content". Subparagraph (*d*) (i) and (ii) were acceptable in substance; but the concept of the "collective interests of the State parties" in subparagraph (*d*) (iii) seemed to have been the cause of misgivings for some members. Admittedly, the drafting could be improved. If the point raised in the first two sentences of paragraph (21) of the commentary was that rights were concomitant aspects of obligations and that they were legally protected interests, the underlying substance of the concept embodied in subparagraph (*d*)

(iii) became clearer, for the collective, in contradistinction to a merely common or parallel, obligation which the States parties entered into for the protection or promotion of their collective interests entitled them to a collective right to remedies in the event of a breach. On the other hand, he did not understand why subparagraph (*d*) (iv) mentioned "the protection of individual persons", while paragraph (22) of the commentary spoke of respect for "fundamental human rights as such", and he would welcome some clarification in that regard.

15. Draft articles 6 and 7 established the new obligations of the author State towards the injured State. One purpose was to undo the internationally wrongful act of the State, and when that was materially impossible, a substitute performance was envisaged. In that connection, it might be preferable to replace the word "before", in article 6, paragraph 2, and in article 7, by the words "at the time of". Although the situation governed by article 7 was already covered by article 6, he wished to reserve his position on whether a separate article was needed on the question of the treatment of aliens. It might also be appropriate to settle, by suitable drafting, the apparent relationship between article 6, paragraph 1 (*b*), and article 22 of part 1 of the draft. However, the Special Rapporteur seemed to imply in paragraph (5) of the commentary to article 6 that there was no connection whatsoever between the two provisions, stating that the exhaustion of local remedies was construed in article 22 as "a condition for the existence of a breach of an international obligation", whereas the application of internal law remedies under article 6, paragraph 1 (*b*), was carried out by the author State after the breach. As the Special Rapporteur had said at the previous session,[10] it might be better to alter the wording of that provision so as to speak of the application of "measures" rather than "remedies".

16. Generally speaking, draft articles 8 and 9 seemed to be appropriate, but any doubts concerning the distinction between reciprocity and reprisal should be dispelled by the commentaries. The negative criterion for measuring the exercise of the right of reprisals, in article 9, paragraph 2, should not be changed to a positive one, as had been suggested by some speakers, because the criterion of manifest disproportionality was tied in with the effects of the exercise of the right of reprisals against the author State. It was reasonable to expect that the injured State should not be burdened by having to judge what was essentially proportional, in addition to the injury it had suffered as a result of the commission by the author State of the unlawful act. The burden of proof should be on the author State, and that could only be achieved through a negative criterion.

17. Noting that article 8 was made subject to the limitations set out in articles 11 to 13, he drew attention to the statement in paragraph (3) of the commentary to article 8 that "while article 9, paragraph 2, and article 10 contain special conditions for the taking of reprisals only, the object and purpose of those conditions is also relevant for the qualification of the measures taken as measures by way of reciprocity". If that was so, he would like to know why draft article 10 was specifically related to article 9 alone.

18. The provisions of draft article 12 seemed essential. Subparagraph (*a*), however, seemed to be intended to cover "hard-core" immunities, and the wording could perhaps be improved by the Drafting Committee. As to subparagraph (*b*), he agreed with the Special Rapporteur that it was simply not possible to disregard peremptory norms of general international law. The Special Rapporteur had also rightly pointed out that draft article 16 must be exhaustive; otherwise, the remaining articles would make no sense.

19. In his opinion, part 3 of the draft was essential, since it would make for certainty in the law, eliminate abuse and strengthen the international legal order.

20. Lastly, within the context of articles 5 (*e*), 14 and 15, as well as the provisions of article 4, the legal consequences of internationally wrongful acts were subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. While it was impossible to reject those rules, the question remained what the legal consequences were for States within the framework of part 2 of the draft when the machinery for the maintenance of international peace and security under the Charter became impotent as a result of its outright rejection by a State party engaged in armed conflict.

21. If States A and B were locked in an armed conflict under consideration in the Security Council, what were the legal consequences under part 2 of the draft for those two States, for States Members of the United Nations generally and for States members of the Security Council specifically, (*a*) if State A accepted the unanimous resolutions of the Security Council on a cease-fire and peaceful settlement, including judicial settlement; (*b*) if State B rejected the authority of the Security Council, rejected peaceful settlement, and rejected unanimously adopted cease-fire resolutions? What legal consequences applied to other Member States, in particular members of the Security Council and specifically the permanent members, if some of them continued to conduct business as usual with State B and enabled it to prolong the armed conflict? The lawlessness epitomized by the conduct of State B in the situation in question, which was real, made the Commission's exercise seem somewhat academic unless those aspects were squarely faced. Such situations might be accepted on the basis that the underlying problem was political. However, was it not time for the Commission to lead the way in drawing up legal rules to govern political conduct?

22. Mr. LACLETA MUÑOZ said that his first comments on the Spanish version of the Special Rapporteur's sixth report (A/CN.4/389) related not only to drafting matters, but also to conceptual matters. In Spanish, the meaning of *crimen* and *responsabilidad criminal* was different in the draft from their meaning under internal law. International law could adopt its own definitions—for example, in article 19 of part 1 of the draft *delito*, meant a wrongful act

[10] *Yearbook ... 1984*, vol. I, p. 318, 1867th meeting, para. 31.

that was not of any particular gravity, whereas *crimen* signified a particularly serious wrongful act. He requested the Secretariat to correct those mistakes, which were a source of confusion in the commentaries and even more annoying in the draft articles.

23. Draft article 5, setting forth the legal consequences of an internationally wrongful act, posed no great difficulty, but it might well be preferable to separate the two cases covered by subparagraph (*a*). Again, subparagraph (*d*) was not very clear, at least in Spanish: did "a State party" mean "any (*cualquier*) State party"? Would it not be better to say in subparagraph (*d*) (ii) and (iii) that all the other parties were injured, and if not, specify that it was any other party?

24. He appreciated the Special Rapporteur's concern, apparent from paragraph (14) of the commentary to article 5, to distinguish multilateral treaties involving bilateral legal relationships as between each pair of States parties from other multilateral treaties founded upon an interest common to a larger number of States. Yet the text of articles did not seem to meet that concern satisfactorily, nor was it in keeping with the explanations given in paragraphs (19) to (21) of the commentary. Like other members, he did not think that all the other States had the same rights as the State directly injured by an international crime. One way or another, the article should reflect what was stated in paragraph (26) of the commentary, namely that the difference in degree of injury naturally affected the countermeasures applicable.

25. Draft article 6 was clearly conceived from the standpoint of options, for the injured State could choose from among the possibilities enumerated in paragraph 1. No reference was made to apologies—a measure of reparation that was customary in the absence of material injury. There was in link between paragraph 1 (*a*) and paragraph 1 (*c*): the latter set forth a new and essential obligation upon the author State, whereas the former established the initial and minimum obligation that the author State could not evade in some clearly determined cases. In his opinion, paragraph 1 (*c*) should take first place, so as to demonstrate clearly the obligation of *restitutio in integrum*, as qualified later by paragraph 2. On the other hand, the *renvoi* to article 7 that was now contained in paragraph 1 (*c*) was pointless, since article 7 dealt only with the case in which the wrongful act breached obligations concerning the treatment to be accorded to aliens, whether natural or juridical persons. The *renvoi* duplicated the provisions of article 6, paragraph 2. He also had some doubts about paragraph 1 (*b*).

26. Generally speaking, draft articles 8 and 9 were sound and both related to countermeasures, a term to which he was not opposed. He had no objection to the distinction drawn between reciprocity, in article 8, and reprisals, in article 9. Surprisingly, however, no mention was made of retortion, which could probably be explained by the lawfulness of retortion, although it came within the context of countermeasures. Apart from conventional reciprocity, reciprocity was nothing less than a kind of reprisal. It was *lex talionis*, unless the wrongfulness of a State's conduct was justified because the conduct in question merely reproduced that of the author State. Did the slight difference between reciprocity and reprisals warrant two separate articles? Again, if reprisals, as provided for in article 9, could consist of non-performance of obligations towards the author State, it was necessary to specify the limitations on the exercise of that right. For the purpose of indicating that the obligations in question were not directly bound up with those which had been breached, article 9 should speak of suspension of the "performance of other obligations". The formulation used, at least in the Spanish text, conveyed the idea that the injured State could suspend the performance of all its other obligations, including those not covered by reciprocity under article 8. In actual fact, a State which decided on measures of reprisals could choose, from among a wide range, the rights of the author State that it would breach; the idea was not to urge it to breach all of them, which would be excessive.

27. Draft article 10, which put a brake on reprisals, seemed acceptable, and he endorsed the idea that recourse to reprisals should be subject to a prior requirement, namely exhaustion of the international procedures for peaceful settlement of the dispute. However, acceptance of such a restriction naturally depended on the machinery for the peaceful settlement of disputes, which would be covered by part 3 of the draft and should consist of genuine means of settlement rather than mere negotiations that could well prolong matters indefinitely.

28. As to draft article 12, he did not share the view that diplomatic privileges and immunities were based essentially on the notion of reciprocity. Like the Special Rapporteur, he thought that those matters should be excluded from the scope of articles 8 and 9. It was enough to see that article 47 of the 1961 Vienna Convention on Diplomatic Relations expressly prohibited discrimination, and consequently reciprocity.

29. Draft articles 14 and 15, like article 5 (*e*), set out the legal consequences of the distinction drawn in article 19 of part 1 of the draft between an international crime and an international delict; but was article 14 sufficient? He too considered that wrongful acts which constituted delicts also entailed obligations—the degree alone was different. Surely one of the consequences of an international crime was precisely to trigger the individual responsibility of natural persons who had guided the conduct of the author State. The reference in article 14, paragraph 1, to the rights and obligations determined by the applicable rules accepted by the international community covered that possibility, but the Special Rapporteur could well express that idea more clearly. Again, the expression *"mutatis mutandis"*, in paragraph 3, raised some doubts: perhaps it would be better to say "where appropriate" (*en su caso*), for the case envisaged related not to all international crimes, but only to those which were an offence against the peace and security of mankind.

30. With reference to article 15, he agreed with those members who had called for an express reference to the legal consequences of an act of aggres-

sion, in other words exercise of the injured State's right of self-defence.

31. Lastly, he was convinced of the need for a part 3 of the draft. More particularly, he endorsed the Special Rapporteur's description in his report (A/CN.4/389, paras. 4-5) of the way things really happened and of the situations that inevitably arose in practice. Plainly, the author State could deny the facts, deny it was the author of the act, and deny that the act was wrongful. Dispute lay at the core of responsibility, as in internal law. Moreover, in view of the broad scope of the draft, which was to cover all the secondary rules relating to all the violations of the primary rules, the consequence drawn by the Special Rapporteur (*ibid.*, para. 8), although ambitious, seemed well founded. The Commission would doubtless encounter practical difficulties, but such an approach was desirable and he hoped that it would succeed. Harmonization of the dispute-settlement machinery with the Charter of the United Nations and particularly with the powers of the Security Council in the case of offences against the peace and security of mankind posed some special problems, but the Special Rapporteur's competence and his knowledge of the subject would undoubtedly enable him to complete the task.

32. Mr. YANKOV congratulated the Special Rapporteur on his sixth report (A/CN.4/389), which contained a well-structured and coherent set of draft articles on the content, forms and degrees of international responsibility.

33. The concise manner in which the commentaries to the draft articles had been presented was, of course, commendable, but they should, in his view, also contain more detailed references to State practice, as evidenced by precedents, treaties, judicial decisions and assessments by writers on law. Since, as the Special Rapporteur had rightly pointed out in his fourth report,[11] there was "an abundance of primary rules of conduct but a relative scarcity of secondary rules and a virtual absence of tertiary rules", it would be easier to formulate appropriate legal provisions if emphasis were placed on the relevant background material, which would be particularly helpful to Governments and their legal offices. The Special Rapporteur might therefore consider the possibility of bringing the content and format of the commentaries to the articles into line with those of the more detailed commentaries to the articles of part 1 of the draft.

34. He seriously doubted whether the three core elements of part 2 of the draft, namely the content, forms and degrees of international responsibility, had been adequately reflected in the draft articles submitted in the sixth report. Articles 2, 5 and 11 made it clear that the "content of international responsibility" meant that an internationally wrongful act created new relationships between the author State and the injured State, but articles 6 to 10 would require further scrutiny and elaboration because, although they referred to the principle of proportionality, they did not include all the other criteria that would be instrumental in determining "the forms and degrees of international responsibility". In that connection, Mr. Ushakov (1895th meeting, para. 24) had proposed a new draft article which would supplement article 6 and refer to action that the injured State would be entitled to take against a State which had committed an international delict. The Commission might draw on that proposal in its attempts to explore the possibility of ensuring more adequate coverage of the three main elements of part 2.

35. Since there might be a dichotomy between the treatment of crimes and the treatment of delicts, he suggested that the Commission should decide as soon as possible whether it would deal in part 2 of the draft with the responsibility of States both for crimes and for delicts and, in the draft Code of Offences against the Peace and Security of Mankind, with the criminal responsibility only of individuals for offences against the peace and security of mankind.

36. Article 5 was of crucial importance because it was intended to define the main actor in part 2 of the draft, namely the "injured State". The article should therefore begin with an introductory clause identifying the "injured State" as "a State whose right under international law has been infringed by an internationally wrongful act committed by another State", thus indicating the main elements of the legal relationship between the injured State and the author State and covering the sources of international law. As it now stood, for example, article 5 (*a*) focused not on a general rule of treaty law, but on a right arising from a treaty provision "for a third State". That subparagraph thus needed further elaboration, as did subparagraph (*b*), relating to a judgment or other binding dispute-settlement decision of an international court or tribunal. The Special Rapporteur had been right to base subparagraph (*d*) on article 60 of the 1969 Vienna Convention on the Law of Treaties, yet the distinction between subparagraph (*d*) (ii) and (iii), and even, to some extent, subparagraph (*d*) (iv), was not at all clear. Perhaps subparagraph (*d*) (ii) and (iii) could be combined and an explanation of the cases they covered be included in the commentary to article 5. Singling out the "protection of individual persons" in subparagraph (*d*) (iv) was not at all justified in terms of the general structure of the draft articles, for there might be other "subjects" that also required special protection. With regard to subparagraph (*e*), he agreed with other members who had emphasized that it could apply to an enormous variety of situations and that it did not express the degrees of State responsibility in clear legal terms.

37. He experienced some difficulty with regard to the content and scope of the reparations that could be required by the injured State under draft article 6. The list contained in paragraph 1 (*a*) to (*d*) was not at all exhaustive, since it did not mention such possibilities as "satisfaction" or "apologies". The substance must therefore be elaborated further and the relationship between article 6, paragraph 2, and article 7 had to be explained more clearly. The words "may require" in paragraph 1 were, moreover, too weak and there was no need to refer specifically to "persons and objects" in paragraph 1 (*a*).

[11] *Yearbook ... 1983*, vol. II (Part One), p. 8, document A/CN.4/366 and Add.1, para. 35.

38. With reference to draft article 7, he realized that the treatment of aliens and State responsibility in respect of aliens had traditionally had a prominent place in international law, but it was questionable whether special importance should be attached to a particular type of internationally wrongful act in a set of articles on the content, forms and degrees of international responsibility. The substance of article 7 could well be incorporated in article 6.

39. As to draft articles 8 and 9, he agreed with Mr. Roukounas that it might be more appropriate to refer to countermeasures, as dealt with in article 30 of part 1 of the draft, than to reciprocity and reprisals. In his opinion, further consideration should be given to the criteria and parameters for countermeasures, including their temporary nature and proportionality, and to the possibility of the peaceful settlement of disputes. It should not be impossible to find a way of referring very comprehensively to "countermeasures" and of combining articles 8 and 9. In addition, it might be dangerous to refer in article 9, paragraph 1, to "its other obligations towards the State which has committed the internationally wrongful act", for obligations under a specific treaty were quite different from other obligations deriving from customary rules. The door would be open to reprisals if the injured State had an unlimited choice of obligations whose performance it could suspend.

40. With regard to draft article 11, the Special Rapporteur had rightly emphasized the importance of interim measures in connection with the organization of the response to a breach of an obligation under a multilateral treaty.

41. In draft article 12, the Special Rapporteur rightly referred to "immunities" alone, rather than to "privileges and immunities". Immunities could be regarded as being within the realm of *jus cogens*, hence they demanded guaranteed protection. The commentary to article 12 should, none the less, explain why reference was being made only to "diplomatic and consular missions and staff" and not to other types of missions, such as permanent missions, which also enjoyed protection. He shared the doubts expressed by other members in connection with the reference in article 12 (*b*) to "a peremptory norm of general international law".

42. Draft article 13, as the Special Rapporteur had indicated in paragraph (1) of the commentary, dealt with the case of a complete breakdown, as a consequence of an internationally wrongful act, of the system established by a multilateral treaty. Such an article should nevertheless have a place in the draft as a safeguard provision.

43. He agreed with Mr. Ushakov (1895th meeting) that draft article 14 should cover both international crimes and international delicts. Paragraph 3 referred to the procedures embodied in the Charter of the United Nations with respect to the maintenance of international peace and security. In that connection, draft article 15 should be considered in relation to article 14 and article 4. It was obvious why aggression was expressly mentioned in article 15, but he failed to see why other crimes covered by part 1 of the draft were omitted.

44. Referring to part 3 of the draft, on the implementation of international responsibility and the settlement of disputes, he recalled that, at its twenty-seventh session, in 1975, the Commission had decided to divide the draft articles on State responsibility into three parts. It would, however, not be sufficient if part 3 was regarded as being limited to the secondary rules contained in part 2 or if, as the Special Rapporteur had stated in his fourth report, "such limited dispute settlement" referred only "to the interpretation of such rules as part 2 might contain relating to quantitative and qualitative proportionality".[12] The Special Rapporteur had therefore been right to suggest[13] that the dispute-settlement procedure might be extended to the interpretation of chapters II, III, IV and V of part 1 of the draft. Although he himself could agree with other members of the Commission that a cautious approach had to be adopted in dealing with the complex problems involved in part 3, he did not think that a system of State responsibility could be established without provisions on the implementation of international responsibility and the settlement of disputes. Consequently, the Commission should encourage the Special Rapporteur to draft such provisions.

The meeting rose at 6.05 p.m.

[12] *Ibid.*, p. 9, document A/CN.4/366 and Add.1, para. 40.
[13] *Ibid.*, paras. 40-41.

1900th MEETING

Wednesday, 12 June 1985, at 10 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]

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).
[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).