

Document:-
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Summary record of the 1900th meeting

Topic:
State responsibility

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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 *ius 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 suggest¹³ 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. Laclea 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).

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 16⁴ (continued)

1. Mr. MALEK recalled that the importance of the topic of State responsibility and the need to complete the study of it as soon as possible had been emphasized in the Sixth Committee at the thirty-ninth session of the General Assembly. Moreover, the Commission itself had referred, in its report on the work of its thirty-sixth session, to the desirability of completing the first reading of part 2, and possibly of part 3, of the draft articles before the expiration of the current term of office of its members.⁵ Accordingly, the Commission should now make some preparations for the second reading of the draft. Invaluable doctrinal comments had already been made with regard to part 1 of the draft. A systematic compilation of the views expressed by writers and by members of the Commission at its various sessions would be very useful. Moreover, most draft articles had given rise to substantive proposals which called for careful consideration and, in some cases, substantial research on the part of the Special Rapporteur before he could decide which were suitable for referral to the Drafting Committee.

2. While he welcomed draft article 5 (e) and the general principle stated in draft article 14, he experienced some difficulty with article 14, paragraph 3, and with draft article 15. Moreover, the commentaries to the 16 draft articles, while of great scientific value, would have been still more helpful if they had been made more detailed, so as to compensate for a number of inevitable deficiencies in the wording of certain provisions and clarify some obscure points in the texts.

3. A number of specific proposals worthy of consideration had been made in respect of article 5 (e). He would not oppose any wording which, like the existing text, made it quite clear that, following an internationally wrongful act considered to be an international crime, all States other than the author State were injured States, even though they did not all have the same rights and obligations, particularly as far as the State or States directly injured were concerned.

4. The obligations arising out of an international crime for any State other than the author State were enumerated in article 4, which set out in a fairly reasonable and detailed manner the reaction of solidarity to an international crime of a particular scale or gravity. Nevertheless, such solidarity could not be established as long as it remained subject to the

restrictions provided for in paragraphs 1 and 3, as clarified in the commentary to article 14. For example, according to paragraph 1 of the article, the rights and obligations arising out of an international crime must derive, not from the applicable rules of international law, but from the applicable rules accepted by an as yet ill-defined subject of international law, namely the "international community as a whole". The commentary to article 14 followed the same lines, since it was stated therein (paragraphs (5)-(6)) that the obligations of the State which was the author of the international crime could be determined only by the international community as a whole. The obligations of States other than the author State would involve all such States practising "a measure of solidarity as between them when confronted with the commission of an international crime" (paragraph (6) of the commentary). There again, it was stipulated that the substance of the solidarity and the international procedures for the organization of that solidarity might well be determined by the international community as a whole, and that, in any event, an international crime gave rise to minimum obligations of solidarity, as enumerated in article 14, paragraph 2 (c). Could that last assertion be construed as meaning that the obligations set forth in paragraph 2 (c) were not limitative? At the thirty-fourth session, during the consideration of article 6 as originally proposed by the Special Rapporteur, the provisions of which were now contained in article 14, he had asked why mutual assistance between States in response to an international crime should be limited to the performance of the obligations now enumerated in paragraph 2 (a) and (b) and had expressed the hope that subparagraph (c) would be worded so as to cover the obligations not listed in subparagraphs (a) and (b).⁶

5. At the previous session, he had also wondered whether the provision now contained in article 14, paragraph 3, did not duplicate article 4, and could therefore be deleted.⁷ In paragraph (12) of the commentary to article 14, the Special Rapporteur stressed that the commission of an international crime did not necessarily involve the maintenance of international peace and security and that the function of paragraph 3 of article 14 was therefore quite different from that of article 4. That assertion would appear to call for some clarification. Paragraph (11) of the commentary to article 14 and paragraph 35 of the sixth report (A/CN.4/389) were concerned with determining the nature and scope of the primary rule stated in article 14, paragraph 3. It emerged from those paragraphs that the sole purpose of that rule, which was of a residual nature, was to state a condition for the exercise of rights and the performance of obligations of all States in the case of the commission of an international crime, that condition being the application *mutatis mutandis* of the procedures embodied in the Charter of the United Nations with respect to the maintenance of international peace and security. The organization of the reaction of solidarity provided for in article 14, paragraph 2, in the event of the commission of an international crime

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 ... 1984*, vol. II (Part Two), p. 105, para. 387.

⁶ *Yearbook ... 1982*, vol. I, p. 207, 1732nd meeting, para. 9.

⁷ *Yearbook ... 1984*, vol. I, p. 311, 1866th meeting, para. 16.

was thus accompanied by a condition which made it very difficult to see how it could be applied. It was highly doubtful whether the procedures provided for in the Charter for the maintenance of international peace and security would enable a decision to be taken in application of article 14, paragraphs 1 and 2, even in response to the most heinous international crimes. Indeed, it would seem that, under those procedures, the more serious the international crime, the more likely it was to escape any effective legal control. He could not recall any recent case of an international crime in which the Security Council had succeeded in taking an effective decision to bring the author State to reason and alleviate the situation of the victim State.

6. The "international crime" other than aggression whose legal consequences were stipulated in article 14 was perhaps the same as the international crime defined in article 19 of part 1 of the draft. In that regard, it should first be noted that neither of the commentaries to articles 14 and 15 contained an explanation as to why the legal consequences of aggression were dealt with in a separate article. Article 19 of part 1 included the crime of aggression in the general concept of international crimes, without according it any special status. He had already expressed his views on that point at the previous session.⁸ Moreover, the scope of article 14 was considerably reduced by the fact that article 19 of part 1 gave a highly restrictive definition of the term "international crime". The Special Rapporteur might include in the commentary to article 14 the necessary clarifications on the concept of international crime dealt with in that article. As it stood, article 19 of part 1 could be interpreted as excluding international crimes of such extreme gravity as crimes against humanity, which were grave by their very nature, war crimes and, in particular, serious violations of the 1949 Geneva Conventions for the protection of war victims,⁹ as well as other crimes covered by the draft Code of Offences against the Peace and Security of Mankind. It would be shocking for such crimes to be ranked with "international delicts" as defined in article 19, paragraph 4. Moreover, such crimes were the principal subject of contemporary repressive international law and must therefore be referred to expressly in any definition of grave international crimes.

7. Draft article 15, which had attracted considerable comment at the previous session, was now proposed without any amendment. If the Commission decided to adopt that article, together with its commentary, both of which were very straightforward, he would not object. However, he wished to stress that article 15, the importance of which derived from its scope, as well as the functions which it was intended to perform, was devoid of any effect in its current form. The rule set forth in the first part of the article whereby "an act of aggression entails all the legal consequences of an international crime" was already covered in article 14 on the legal consequences of an international crime, which, since it did not exclude aggression, must therefore include it. The rule set

forth in the second part of article 15 whereby an act of aggression entailed "such rights and obligations as are provided for in or by virtue of the United Nations Charter" would appear even less necessary. The absence of such a rule from an international instrument on State responsibility would in no way signify that that instrument could allow a derogation from the rule, which derived from the principle of the prevalence of the obligations provided for by the Charter of the United Nations. In that regard, article 15 appeared to draw a distinction between two categories of rights and obligations—the rights and obligations "provided for in" the Charter, and the rights and obligations provided for "by virtue of" the Charter—on the basis of their immediate source. In drafting the article, the Special Rapporteur had surely had in mind specific examples of rights and obligations within the second category which would be worth mentioning in the commentary. In that connection, the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization could prove informative.

8. If the Commission wished to confer special status on the crime of aggression and devote article 15 specifically to it, that article could not be left in its current form. Moreover, a State wishing to destroy another State might resort, not to an act of aggression, but rather to other international crimes which were no less grave, but whose perpetrator would be more difficult to identify. A provision devoted to the crime of aggression would be meaningful only if its wording, or at least the commentary thereto, stated clearly the fundamental consequence of that crime, namely the right to resort to self-defence. Admittedly, several members of the Commission had advanced very valid scientific and political arguments against that idea, but only out of caution and in the general interest of the established international order. The same might be said of the validity and purpose of the arguments invoked in the past against efforts to define the concept of aggression. Nevertheless, those efforts had finally borne fruit. Despite the earlier criticisms of it, the Definition of Aggression¹⁰ was becoming increasingly indispensable to the international community as a whole, as embodying peremptory rules of general international law.

9. The efforts to define the concept of self-defence at the same time as the concept of aggression had failed, and the Definition of Aggression adopted by the General Assembly confined itself to a very general allusion to the exception of self-defence laid down by the Charter of the United Nations. Indeed, article 6 of that Definition, stating that "nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful", was quite superfluous. First, the provisions of the Charter did not require any protection of that kind, since they were explicitly

⁸ *Ibid.*, paras. 21-22.

⁹ See 1899th meeting, footnote 8.

¹⁰ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

protected by its Article 103, whereby the obligations of Members of the United Nations under the Charter prevailed over their obligations under any other international agreement. Secondly, self-defence was a right inherent in the sovereignty of every State and did not need to be formally proclaimed; it was implicit in every international agreement. The unlawful exercise or abuse of that right would not necessarily be prevented by a definition of the right to self-defence. It was not sufficient to reiterate or refer to the relevant provisions of the Charter; the limits of the concept of self-defence and the conditions governing its exercise should be spelt out, if only in the commentary to an article. It was important to define that right clearly, particularly in part 2 of the draft articles.

10. Another term which several members of the Commission had felt it imperative to clarify was that of "reprisal", used in draft article 9, paragraph 1. He noted that, in the commentary to that article, the Special Rapporteur made a number of very useful observations on the principle of proportionality referred to in paragraph 2 of the article. In general, where the wording of a rule required, the Commission did not hesitate to resort to the use of a detailed text. For example, article 33 of part 1 of the draft concerning a state of necessity was intended to set out precisely the conditions under which a state of necessity could not be invoked. Finally, he pointed out that the traditional objection to any attempt to define a concept or principle laid down in the Charter of the United Nations, namely that any such definition would be inadvisable, if not dangerous, could no longer be seriously defended.

11. With regard to a future part 3 of the draft articles, he said that he did not intend to make any observations before having studied the draft articles concerned, which it would be desirable for the Special Rapporteur to submit to the Commission as soon as possible.

12. Mr. ARANGIO-RUIZ expressed unconditional admiration for the work done by the Special Rapporteur, the difficulty of whose task was compounded by the obligation to take account of his predecessors' efforts. As other speakers had already pointed out, some of the difficulties arising in connection with part 2 of the draft articles were undoubtedly the result of previous decisions with regard to part 1. He associated himself with the suggestion that part 2 might be subdivided into chapters or sections in the same way as part 1 and that not only those sections, but also the individual draft articles, should be given titles. He also associated himself with the doubts expressed by other speakers, and particularly by Mr. Balanda (1894th meeting) as to the appropriateness of the expression "new obligations", which was frequently to be found in the commentaries and in section II of the sixth report (A/CN.4/389). Since the primary rule violated by an internationally wrongful act did not disappear as a result of that act, to speak of "new" obligations in that context was technically incorrect. The obligations in question were perhaps altered or extended, but hardly new.

13. With regard to draft article 5, he agreed with Mr. Yankov (1899th meeting) that too much stress

was placed on the source of the rule from which the violated obligation derived. When all was said and done, international law remained essentially a horizontal system in which every obligation of a State had its counterpart in a corresponding right of another State. To identify the injured State, in accordance with Mr. Yankov's suggestion, as the State whose right had been infringed by an internationally wrongful act would be useful because it would pin-point all the affected States, subject to subsequent determination of their respective entitlements to reparation. In that connection, he welcomed the concept of material or moral injury (*préjudice*) introduced by Mr. Roukounas (*ibid.*) as a factor which must certainly affect the kind of reparation or the severity of the countermeasures to which each injured State would be entitled to have recourse. The broad interpretation of the concept of the injured State was supported by the fact that, inasmuch as all States Members of the United Nations were bound by the provisions of the Charter, including the prohibition of the threat or use of force in Article 2 (4), they were also injured by a violation of that rule.

14. Article 17 of the Charter, which provided that the expenses of the United Nations were to be borne by the Members as apportioned by the General Assembly, was another case in point. Every Member State was entitled to insist that other Member States should pay their fair share of the Organization's expenses. The rule was even more obvious in the fields of self-determination and human rights, where every State was patently entitled to insist on respect by all other States for the international rules in force in those fields. As for the distinctions that would subsequently have to be drawn between injured States on the basis of the respective damage suffered and the consequences thereof, he did not entirely accept the distinction between "subjective rights" and "legitimate interests" suggested by Mr. Mahiou (1897th meeting), since in his opinion all injured States, even those indirectly affected, possessed rights amounting to more than a legitimate interest.

15. Like several previous speakers, he thought that the reference to "collective interests" in subparagraph (d) (iii) of article 5 was unclear and that the provision in subparagraph (a) was too comprehensive and should be further subdivided.

16. Turning to draft article 6, he agreed that the words "*inter alia*" or "in particular" should be inserted in the opening clause of paragraph 1, that mention should be made of reparation in kind and *ex gratia* settlement, etc., and that the reference to internal law in paragraph 1 (b) should be deleted.

17. With regard to draft article 7, he had little to add except to say that he did not agree that it should be merged with article 6, paragraph 2.

18. Draft articles 8 and 9, on the other hand, might well be combined, since the idea of acceptable countermeasures was not necessarily reflected in the distinction between reciprocity and reprisal.

19. He had serious misgivings about the provision in draft article 10, paragraph 1. The international procedures for peaceful settlement of disputes normally available to the average member of the inter-

national community were basically those referred to in Article 33 of the Charter of the United Nations. The Manila Declaration on the Peaceful Settlement of International Disputes,¹¹ referred to by one member of the Commission, was unfortunately not a very forceful document. The jurisdiction of the ICJ was in decline. Considerable caution should be exercised before subjecting the measures envisaged in article 9 to the exhaustion of international procedures such as those. A greater degree of specification was indispensable, in his view, in order to take account of the "natural" tendency of the author State to escape the consequences of its wrongful act by unduly protracting negotiations and putting obstacles in the way of arbitration or judicial settlement. This was particularly so when the possibility of unilateral recourse to "third-party" settlement had not been envisaged in advance.

20. The doubts he had already expressed in connection with article 5, subparagraph (d) (iii), concerning the expression "collective interests" also applied to article 11, paragraph 1 (b). He also deprecated the reference to "collective decisions" in article 11, paragraph 2. Such restriction of the injured State's right to take countermeasures might be advisable only if the decision-making facility were automatically available to all States, in other words if a permanent body were established, mobilizable at the request of any State and empowered to make independent majority decisions which could not be vetoed or otherwise reversed. Moreover, the decisions of the permanent body in question would have to be capable of effective implementation. With regard to paragraph 1 (c) of article 11, he agreed with Mr. Calero Rodrigues (1892nd meeting) that advantages for nationals of the author State, with the exception of those of a strictly humanitarian character, might well be excluded from the scope of the provision.

21. With regard to draft article 12 (a), he said that only the personal safety of diplomats needed to be safeguarded; other facilities available to them might well be suspended by way of countermeasures. The possibility of subjecting diplomats to civil jurisdiction should also be open to the injured State, if the author State took similar action. As to the reference to peremptory norms of general international law in article 12 (b), he thought that some mention of *jus cogens* in part 2 of the draft was unavoidable, if only because of the frequency with which it was alluded to in part 1. The degree to which part 3 succeeded in developing the concept would, of course, be of crucial importance.

22. He agreed with those previous speakers who had recommended a prompt delimitation of the respective areas covered by the topics of State responsibility and the draft Code of Offences against the Peace and Security of Mankind. The question whether crimes other than acts of aggression should be mentioned in article 5 should be left open pending such delimitation and the second reading of article 19 of part 1.

23. Lastly, he expressed doubt concerning the usefulness of paragraph 2 (c) of article 14.

24. Turning to section II of the sixth report, he said that, although it was essential to strengthen dispute-settlement procedures in the field of international responsibility, it would be difficult to secure acceptance by States of a system of implementation as rigid as that rightly advocated by the Special Rapporteur in a field as broad as State responsibility. Conversely, some States would be reluctant to accept any codification or progressive development of the law in such a sensitive area without an adequate system of implementation and peaceful settlement. Consequently the Special Rapporteur should draft articles based on the content of section II of the report for submission to the Commission at its thirty-eighth session.

25. While he concurred in general with the views expressed, it seemed to him that there was a normative gap between the point at which there was partial or total non-compliance with a primary rule and the point at which the secondary rules embodied in articles 6 *et seq.* came into operation, a gap which he felt should be filled more effectively than it currently was under article 6. It should be possible, in the context of normal friendly relations between States, to envisage some kind of "intermediate phase" other than, and clearly preceding, the adoption of countermeasures by the injured State or States (and *a fortiori* any third-party settlement procedure). During that phase, the injured State should be able to approach the author State in a friendly manner with a request to consider, likewise in a friendly manner, the situation arising out of the allegedly wrongful act. Only after friendly representations, and following an unsatisfactory or inadequate reply, should a relatively strong protest be delivered and the request as spelt out in article 6 be made. The door to further measures should be opened only if such a request remained unsatisfied.

26. The Special Rapporteur was himself aware of the problems involved, since some of the language used in article 6 apparently contemplated certain preliminary steps by the injured State. In that connection, he noted that the Special Rapporteur had acknowledged in the report (A/CN.4/389, para. 24) that the rules contained in part 3 of the draft formed an integral part of the legal consequences of an internationally wrongful act. Irrespective of the Special Rapporteur's intention in the matter, however, the Commission might wish to give some thought to an "intermediate" or preparatory phase of the kind he had mentioned, on the understanding that the wrongful act in question and the attitude of the wrongdoer were not such as to preclude anything other than a swift and energetic response. Consideration might also be given to the possibility of providing, also in part 2 of the draft, for some measure to be taken before the wrongful act reached the "decisive" moment, for example when the act of a subordinate or of a peripheral administrative officer was confirmed at a higher level, or when all local remedies had been exhausted. It should also be made as clear as possible that any preliminary steps designed to call a State's attention to the danger of an international

¹¹ General Assembly resolution 37/10 of 15 November 1982, annex.

obligation being violated should not be regarded as a less than friendly act, or even as interference in the internal affairs of the Government concerned, provided that the appropriate channels and forms were followed. The Special Rapporteur had possibly had something of the kind in mind when he had included paragraph 1 (b) in article 6.

27. Provision for such preliminary steps should be included in part 2 of the draft forthwith and not await the submission of the draft articles of part 3, thereby meeting the justified concern of Mr. Ogiso (1895th meeting) that, until a settlement had been agreed by the parties, it was not entirely correct to assume that there was much more than an alleged author State, an alleged wrongful act and an alleged injured State. It might also meet the concern of those who felt variously that the term “may require”, in the opening clause of article 6, paragraph 1, was either too mild or too strong. In his view, however, the Commission would be failing to take account of the exigencies of the progressive development of a delicate area of international law if it did not, first, indicate that the preliminary steps he had referred to were neither unlawful nor even unfriendly, and, secondly, qualify as unlawful any unjustified and hasty recourse to countermeasures before friendly diplomatic representations had been made or after the alleged author State had manifested evident signs of regret and a willingness to meet any secondary or primary obligations. In so doing, the Commission could draw inspiration from the 1969 Vienna Convention on the Law of Treaties—specifically from articles 60, 61, 62 and 65—and also from Article 33 of the Charter of the United Nations. He was not advocating the immediate inclusion in part 2 of the draft of third-party or any other dispute-settlement procedures, but was merely suggesting that some of the elements now set out in part 3—although not those concerning dispute-settlement procedures—should be incorporated in part 2. In other words, the Commission should make an unambiguous statement to the effect that, before any peremptory demands were made or recourse was had to countermeasures, the alleged injured State should make approaches to the alleged author State.

28. Mr. Yankov (1899th meeting) had stressed that the Commission should not confine itself to codification at the expense of the progressive development of international law. Moreover, the rules drafted by the Commission received very wide circulation long before a draft became a convention and became part of the legal materials used by States in their international relations. To omit from part 2 the “intermediate phase” provisions that he had advocated might not be in the best interests of a minimum “rule of law” in international relations. His suggestion was made without prejudice to the addition, at the appropriate time, of adequate draft articles of part 3 covering dispute-settlement procedures (and also to the purposes of article 9 already referred to).

29. Mr. EL RASHEED MOHAMED AHMED complimented the Special Rapporteur on his masterly sixth report (A/CN.4/389) on a difficult topic.

30. Article 5 provided the necessary link between parts 1 and 2 of the draft and, despite the criticism that had been voiced, was important, in his view, since, in order to describe the legal consequences of an internationally wrongful act, it was necessary, as stated in paragraph (1) of the commentary to the article, “at the outset, to define the ‘author’ State and the ‘injured’ State or States”. But, as the definition laid down in the article was perforce not exhaustive, it could perhaps be improved either by the addition at the end of the opening clause of the words *inter alia*, or by widening the ambit of injured States to embrace the international community as a whole, though he shared some of the doubts expressed on the latter score. He was confident, none the less, that a review of the article in the light of the discussion would suffice to meet most of the points raised. It had been said that Sir Gerald Fitzmaurice had favoured a code for the law of treaties rather than an international agreement, because a code had the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in a way that would not be possible if it were necessary to limit the instrument in question to a strict statement of obligation. The Special Rapporteur had done his best to meet that requirement.

31. A question that had rightly been raised concerning article 5 was who would determine the injured State. As the Special Rapporteur noted in his report (*ibid.*, para. 4), there would be a claimant State, with a double claim, and a defendant State, which might either refute the alleged facts altogether or deny liability or responsibility. Article 5 (d) restricted the ambit of the term “injured State”. Although, according to the commentary, it could possibly be taken to have a wider meaning, it could also be argued that States parties to multilateral treaties which were not directly affected would not be covered by the definition of an injured State, because, if the *ejusdem generis* rule applied, the proximity of the injured States would be an operative factor. That might not apply in all cases, however. In the *South West Africa, Second Phase* cases in 1966,¹² the ICJ had rejected the claims submitted by Ethiopia and Liberia and had declined to pass judgment on the merits, thereby attracting the criticism of the third world and casting doubt on the role of the Court. Again, if the *erga omnes* notion advanced by the Special Rapporteur was accepted, the problem was that the international community was not ascertainable; indeed, during the Namibia proceedings,¹³ it had been conspicuous by its absence. Admittedly, the determination of the injured State could not be divorced from the origin and content of the obligation violated, but that approach might not always help to solve the problems that arose.

32. In draft article 6, it would be preferable to retain the expression “may require”, since “may demand”, the suggested alternative, would not improve matters and might well antagonize the author

¹² *I.C.J. Reports 1966*, p. 6.

¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

State. He did not share the doubts expressed as to the relevance and utility of paragraph 1 (b). Indeed, in a recent case,¹⁴ the International Chamber of Commerce Court of Arbitration had held that the principle of just compensation for expropriation was not incompatible with Egyptian law. Also, in another recently decided case concerning the non-performance of contractual obligations, the tribunal had held that *restitutio in integrum* was justified under both domestic and international law. In regard to paragraph 1 (d), he suggested that the word "guarantees" should be replaced by "assurances".

33. He was not opposed to the inclusion of draft article 7, for he saw the logic of the argument that it did not overlap with article 6, paragraph 2, since the latter provision applied only where *restitutio in integrum* was materially impossible. There were other considerations, however. For instance, article 7 might be interpreted to cover not aliens *per se*, but foreign investors. In the arbitration case against Egypt to which he had referred earlier, the court had ruled that development contracts between a State and a private party could be removed from the domestic jurisdiction and made subject to international law, thereby conferring upon the private party a quasi-statal status. The inclusion of the article could therefore give rise to the suspicion in the third world that it was designed for the protection of investors and so could stir up delicate political issues.

34. Although he appreciated the distinction between draft articles 8 and 9, several members considered that the demarcation line between reciprocity and reprisals was not clear. In the circumstances, Mr. Calero Rodrigues's suggestion (1892nd meeting) that both terms should be deleted might be appropriate, since the meaning of the articles would not be seriously impaired. Furthermore, although the notion of proportionality might give rise to different interpretations in practice, he did not think that a better solution was readily available.

35. Draft article 10, paragraph 2 (a), could, in his view, pave the way for an interim measure that was detrimental to the author State, such as the freezing of its deposits in the injured State, as had happened when the United Kingdom had frozen Egypt's deposits at the time of the Suez crisis and when the United States of America, more recently, had frozen Iranian deposits. Given its political overtones, the provision in question might be viewed with suspicion by third world countries and he therefore agreed that a court should perhaps be appointed to ensure that the necessary safeguards were taken to guard against oppressive interim measures.

36. It had been suggested that the reference to *jus cogens* in draft article 12 (b) would only add to the confusion. Possibly, therefore, it would be advisable to adopt a definition along the lines of that laid down in article 53 of the 1969 Vienna Convention on the Law of Treaties.

¹⁴ *S.P.P. (Middle East) Limited, Southern Pacific Properties Limited and Arab Republic of Egypt, Egyptian General Company for Tourism and Hotels* (1983) (*International Legal Materials* (Washington, D.C.), vol. XXII, No. 4 (July 1983), p. 752, at p. 770).

37. The language of article 60 of the 1969 Vienna Convention should also be followed in draft article 13, with the word "manifest" being replaced by "material".

38. Draft article 14 had been described as a controversial provision that covered unknown terrain. That was perhaps because, as Ian Brownlie had noted in a recent publication,¹⁵ State responsibility was defined essentially as a form of civil responsibility and there was therefore, in his view, no equivalence between the incidence of State responsibility and illegal or invalid conduct. On the other hand, it was not impossible for State responsibility to give rise to a crime or offence, and article 19 of part 1 of the draft did not provide for any such equivalence, merely stipulating what constituted an internationally wrongful act. Against that background, he was able to accept the argument that article 14 was concerned with the material consequences of an internationally wrongful act, irrespective of whether it was a delict or a crime, whereas the draft Code of Offences against the Peace and Security of Mankind did not cover the material consequences of crimes. He agreed, however, that the two texts should be harmonized to avoid confusion.

39. He fully supported the inclusion of a part 3 of the draft: the whole exercise would be pointless if no machinery for implementation was envisaged. As Ernest Landy had stated,¹⁶ the adoption of international legislation and its formal acceptance by a growing number of countries could not of itself add to the stability of inter-State relations unless there also existed some degree of assurance that the contracting parties really complied with their obligations. The study on the draft articles had already had an impact on such learned writers as Rousseau, McDougall, Reisman and Brownlie; it would also serve to clarify, and build up a uniform glossary of, legal terms pertaining to State responsibility.

40. Mr. KOROMA thanked the Special Rapporteur for a very useful sixth report (A/CN.4/389). He agreed that the commentaries should be amplified somewhat to afford a better understanding of the articles. That would also help to secure the adoption of the draft by Member States and to promote a wider understanding of international law.

41. The definition of an injured State as laid down in draft article 5 could be simplified by amending the opening clause to provide that an injured State was a State whose right had been infringed by the commission of an internationally wrongful act by virtue of customary international law, or by the breach of an obligation imposed either in a judgment or in a multilateral treaty. That would cover all the sources proposed by the Special Rapporteur and, at the same time, serve to harmonize the provisions of the article.

42. In paragraph (1) of the commentary to article 5, it was stated that "an internationally wrongful act entails new legal relationships between States in-

¹⁵ *System of the Law of Nations. State Responsibility* (Oxford, Clarendon Press, 1983), part I.

¹⁶ *The Effectiveness of International Supervision. Thirty Years of ILO Experience* (London, Stevens, 1966).

dependent of their consent thereto". Although he understood "relationships" to refer to the position of one State by virtue of its contacts with another, he was a little uncomfortable with the term. It seemed to him that a breach of the kind involved would give rise to a breakdown or termination of legal relationships, in which case it was a new legal situation, not a relationship, that would arise. That being so, it would be preferable to replace the word "relationships" by either "situation" or "obligation".

43. He also noted the statement, in paragraph (7) of the commentary, to the effect that article 5 could not "prejudge the 'sources' of primary rules nor their content". In his view, that statement made for considerable uncertainty as to the law in the matter, since it was tantamount to suggesting that what was involved was a rebuttable presumption, whereas in fact there was an abundance of very clear primary rules. For instance, aggression was patently illegal and any State in violation of such a primary rule would also be in breach of an international obligation. He could accept the idea of a rebuttable presumption to the extent that every charge had to be proved, but he certainly could not agree that the law itself was uncertain in all cases where State responsibility was concerned. Recognition of at least a minimum set of primary rules was essential in order to determine whether or not a State had legal responsibility.

44. Article 5 (e), which was extremely important, should be viewed in the context of the most serious international crimes, i.e. those against international peace and the security of mankind. Perhaps the further codification of the primary rules involved would encourage the international community to assume its responsibility whenever such grave offences were committed.

45. With regard to draft article 8, while he agreed that reciprocity had positive connotations inasmuch as it involved, for instance, the granting of diplomatic immunities and privileges, what was actually at issue was retaliation, namely the imposition of similar or identical treatment or the taking of a similar measure by an injured State against an alleged author State, with a view to the cessation of the internationally wrongful act. He suggested, therefore, that the word "reciprocity" should be replaced by "retortion". As the Special Rapporteur had rightly pointed out, however, in paragraph (5) of the commentary to article 8, there could be no reciprocity, retortion, reprisal or countermeasures if the obligation violated was one that arose by virtue of a peremptory norm of general international law, such as the obligation to settle international disputes by peaceful means or to refrain from the use of force in international relations under Article 2, paragraphs 3 and 4, of the Charter of the United Nations. None of those measures should be allowed to endanger international peace and security.

46. He would like further clarification of draft article 9, an important but controversial provision. The use of reprisals was governed by certain parameters—there had to be an internationally wrongful act; the author State must have been requested to give satisfaction for the wrongful act and have failed

to do so—and was conditioned by such international instruments as the Charter of the United Nations, specifically Article 2, paragraphs 3 and 4, and Article 33, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,¹⁷ which expressly stated that States had a duty to refrain from acts of reprisal involving the use of force.

47. It was regrettable that the minimum degree of solidarity required to enforce the terms of draft article 14 was increasingly lacking, so that it was, in effect, a provision without teeth. However, rather than simply stating that certain wrongful acts were not to be recognized as legal, the Commission might wish to consider whether the Security Council should not be reminded of its responsibility under the Charter.

48. He welcomed the inclusion in the draft of article 15 on aggression, one of the gravest of international offences, and considered that it was appropriate to spell out the legal consequences of aggression to ensure that the provisions of the draft were comprehensive.

49. The Special Rapporteur was to be commended for including an outline of part 3 of the draft at the current stage of the work. It was a bold and imaginative move that would confirm the Commission's determination to bring the topic to fruition. Given the nature of the topic, he could only support the Special Rapporteur's proposal (A/CN.4/389, para. 13) that the Commission should draw upon the experience of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. The inclusion in part 3 of a provision for the submission to the ICJ of disputes concerning the interpretation of article 19 of part 1 and article 14 of part 2 of the draft was also to be welcomed.

The meeting rose at 1.10 p.m.

¹⁷ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

1901st MEETING

Thursday, 13 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arango-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.