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Summary record of the 1901st meeting

Topic:
State responsibility

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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.

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 16⁴ (*continued*)

1. Mr. BARBOZA explained that, when he had raised the question of reprisals and, in particular, reprisals of a "preventive" nature in his earlier statement (1897th meeting), he had been referring to reprisals in the legal framework of the draft articles under consideration and from the point of view of legal rules which would govern countermeasures and provide for the existence of a court that would rule on their legality according to an established procedure. His comments had in no way applied to reprisals taken in the existing legal framework, in which there were no limits to arbitrary action and in which more powerful States could take it upon themselves to punish weaker States.

2. The CHAIRMAN, speaking as a member of the Commission, paid a special tribute to the Special Rapporteur for his sixth report (A/CN.4/389), which was marked by scholarship and a sense of realism.

3. Part 2 of the draft contained a complete set of 16 articles on the legal consequences of State responsibility, articles 1 to 4 of which served as the pedestal on which the framework of part 2 rested, while articles 5 to 16 embodied the substantive provisions. The Special Rapporteur had, as he had explained, adopted a pyramid-like structure in developing part 2, dealing first with what he had termed "normal" cases—variously referred to as torts, delicts or contraventions—and then with the graver cases known as crimes. The consequences of the "normal" cases were dealt with in draft articles 6, 8 and 9 and the broad framework established by the Special Rapporteur in that connection was sound. The additional consequences arising as a result of a crime and also as a result of aggression were then covered in draft articles 14 and 15. Those two articles dealt with a highly sensitive issue and the Sixth Committee of the General Assembly would undoubtedly look to the Commission for guidance in the matter. It was therefore incumbent upon the Commission to endeavour to clarify the legal consequences of the

internationally wrongful acts that constituted international crimes with a view to harmonizing the provisions of articles 14 and 15 with article 19 of part 1 of the draft and with the draft Code of Offences against the Peace and Security of Mankind.

4. With regard to the definition of the term "injured State" contained in draft article 5, he noted that, whereas it had taken almost 35 articles to define the term "author State" in part 1 of the draft, the definition of an injured State had been attempted in a single article. The question was whether that term should be defined in general terms, to provide simply that an injured State was a State which had suffered injury because of the breach of an international obligation, or whether it was necessary to elaborate the sources of the primary obligation the breach of which constituted injury. In a word, should the definition be exhaustive? He had initially been very attracted by the definition, since he had assumed that the Special Rapporteur would proceed, as might have seemed logical, to indicate the legal consequences of a wrongful act by reference to the various sources; the Special Rapporteur had, however, apparently preferred to deal with the legal consequences by reference to the degree of gravity of the case. While that too was acceptable, the Drafting Committee might wish to examine the definition in the light of the comments made, with a view to achieving greater clarity.

5. He endorsed the suggestion that article 5, subparagraph (a), should be subdivided into two clauses dealing, respectively, with customary law and a third-party beneficiary under a treaty. He also agreed that there were different categories of injured States, and considered that article 5, subparagraph (e), should be re-examined with a view to bringing out the distinction between the directly affected injured State and all other States. Once that distinction had been made, the consequences would have to be spelt out in all provisions referring to an obligation *erga omnes*.

6. He was in broad agreement with the suggestion that the words "a sum of money" in draft article 6, paragraph 2, should be replaced by the word "compensation", it being left to the parties concerned to decide on the quantum and modalities of compensation.

7. His impression with regard to draft article 7 was that the Special Rapporteur had included it in part 2 mainly because of the inclusion in part 1 of article 22 on the exhaustion of local remedies. While he had no objection to the retention of article 7, he considered that its wording should be brought into line with that of article 6, paragraph 2. If, however, it were deleted, its substance would in any event be covered by article 6, paragraphs 1 (c) and 2. It had been asked whether article 7 would cover the nationalization of, for example, natural resources or commercial enterprises. That should, in his view, not be taken as a criterion for the retention or deletion of the article, since, again, such consequences would in any event be covered by article 6, paragraphs 1 (c) and 2.

8. Draft articles 8 and 9 conferred upon the injured State the right to take certain measures to restore the *status quo ante* by way either of reciprocity or of reprisal. Reciprocity was more in the nature of what

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.

he would term "tit for tat", whereas reprisals were a sanction designed to bring pressure to bear with a view to restoring the balance and also as a warning that the injured State might resort to self-help. It seemed to him that a similar right was contemplated in article 30 of part 1, which provided that, in the event of legitimate countermeasures being taken, the wrongfulness of such acts would be precluded. He would therefore urge that any wording that might give rise to unnecessary difficulties of interpretation should be avoided. Reprisals had a sinister connotation even if armed and belligerent reprisals were excluded. The Drafting Committee might therefore wish to consider the possibility of following article 30 of part 1 and referring to countermeasures or legitimate countermeasures rather than to reciprocity and reprisal.

9. He fully agreed with the basic distinction between articles 8 and 9, but noted that, although the commentaries stated that both articles were subject to the principle of proportionality, that principle was expressly referred to only in article 9, presumably because of the wider scope of the latter article. It might none the less be useful to include a similar reference in article 8 as well.

10. As to draft article 10, he considered that paragraph 1 might refer not only to the availability of peaceful settlement procedures, but also to their effectiveness.

11. Draft article 11 provided that measures taken by an injured State by way of reprisal could not extend to what he would term a "self-contained" treaty. While the underlying idea was sound, the question was what right the injured State would have in such a situation. Assuming that collective measures were delayed or ineffective, the injured State would be prohibited by the terms of article 11 from taking any interim measures of protection under article 10, paragraph 2, pending more effective collective action. He therefore considered that article 11, paragraph 2, should be modified, along with article 5, subparagraph (b), with a view to classifying injured States into directly affected States and other injured States, and that the consequences of wrongful acts should be elaborated on that basis. A directly injured State would thus be protected in the event of a graver offence.

12. It would also be necessary to decide whether draft article 13, which was a proviso to article 11, should be based on the wording of article 60 of the 1969 Vienna Convention on the Law of Treaties. He nevertheless agreed with the substance of article 13.

13. Draft article 12, subparagraph (a), provided that article 9 relating to reprisals would not apply in the case of diplomatic and consular immunities. As he interpreted that provision, it would apply in cases where, if certain members of the diplomatic mission of a sending State had been declared *persona non grata* by the receiving State, the former State retaliated by taking similar action against members of the diplomatic or consular mission of the receiving State on its territory. It could also apply where diplomatic relations were mutually severed. It would, however, not apply where an ambassador was held incom-

municado for days or even months until agreement had been reached on his release. On the basis of that interpretation, he considered that article 12, subparagraph (a), should be retained.

14. While he agreed on the need for article 12, subparagraph (b), he was not certain as to its scope. If, as he believed, the question of *jus cogens* should not be confined to the application of articles 8 and 9, but should be broader in scope, it should be referred to in a separate article, failing which draft article 14, paragraph 4, could be interpreted as applying in that case as well.

15. With regard to article 14, he noted that the consequences of an internationally wrongful act, as defined in article 19 of part 1 of the draft, were not spelt out. Moreover, paragraph 1 of article 14 was far too vague and did not answer the questions raised either by article 19 of part 1 or by the draft Code of Offences against the Peace and Security of Mankind. With a view to bringing the provisions of article 14 into line with article 19 of part 1 and also with the draft code, he therefore suggested that article 14, paragraph 1, should be redrafted to read:

"1. An international crime committed by a State entails all the legal consequences of an internationally wrongful act and, in addition, entails the international responsibility of that State, as well as the individual criminal responsibility of its agents or of individuals whose conduct is attributable to that State under international law. The additional obligations of the State committing an international crime and the rights and obligations of the injured State and other States will be such as are determined by the applicable rules accepted by the international community as a whole."

16. Since paragraph 2 (c) of article 14 merely repeated the terms of subparagraphs (a) and (b) and did not really assist the injured State, he suggested that it should be redrafted in more positive terms to read:

"(c) to join other States in affording mutual assistance to the injured State in exercising its rights in relation to the situation created by such crime."

A reference to *jus cogens* should also be included in article 14, paragraph 4.

17. In draft article 15, he suggested that the words "by virtue of" should be replaced either by the words "pursuant to" or by the words "in conformity with". It would also be desirable to include a specific reference to the right of self-defence. That could be done by adding the following phrase at the end of the article: "including a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

18. There were two matters relating to part 1 of the draft with which the Commission had undertaken to deal in discussing part 2 and which it should not overlook. The first concerned article 30, in which connection the Commission had said that a distinction should be drawn between countermeasures adopted by an injured State independently, and those

adopted pursuant to a collective decision.⁵ As stated in paragraph (23) of the commentary to that article, "the Commission reserves the right to undertake the study of these questions in the context of part 2 of the draft articles, dealing with the content, forms and degrees of international responsibility".⁶ The second matter arose in connection with the Commission's consideration of chapter V of part 1 of the draft, relating to circumstances precluding wrongfulness. As stated in paragraph (11) of the commentary to that chapter, "the Commission ... intends to take up the questions raised by attenuating or aggravating circumstances when it comes to study the extent of responsibility, i.e. in the context of part 2 of the draft articles".⁷

19. With regard to part 3 of the draft, he agreed entirely with the framework proposed by the Special Rapporteur, who had relied on the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea and had rightly stressed the residual character of that part. He considered, however, that it was absolutely essential to provide for or at least refer to the establishment of an international criminal jurisdiction. It would be pointless to provide the ICJ with jurisdiction to determine whether an international crime had been committed, but not to determine what the legal consequences of such a crime would be.

20. Mr. RIPHAGEN (Special Rapporteur), summing up the debate, said that many of the points raised in criticism of his sixth report (A/CN.4/389) had already been in his mind during the preparation of his fifth report (A/CN.4/380). Keenly aware as he was of the hazardous nature of his task, he had considered it his duty as Special Rapporteur to make proposals rather than to express doubts. The greatest difficulty, as he saw it, in preparing parts 2 and 3 of the draft articles was to strike a proper balance, not between the interests of the author State and the injured State—a relatively easy matter—but, rather, between the respective interests of States alleged to be the author State and the injured State. The balance was inevitably a delicate one and efforts had to be made to avoid tipping it in either direction. At the same time, a balance also had to be struck between the credibility of international law and the process of permanent negotiation between States, or, in other words, between a rigid and a flexible approach.

21. In reply to the general criticisms levelled at the sixth report, he stressed that the commentaries to the draft articles were intended only to facilitate discussion and would certainly not be reproduced as they stood in the final commentary to the draft as a whole. Many of the references to literature and jurisprudence that had appeared in his earlier reports would, for example, be included in the final text.

22. Another recurring theme had been the relationship between the topic of State responsibility and the law of treaties. The essential point which had to be borne in mind in that connection was that an inter-

nationally wrongful act did not do away with the primary right or obligation violated, whereas a treaty whose operation had been suspended or terminated could no longer be invoked. The draft articles on State responsibility and the 1969 Vienna Convention on the Law of Treaties thus did not cover the same ground.

23. Many speakers had criticized his failure to spell out the legal consequences of an international crime in draft article 14, but very few had suggested what those consequences might actually be. The question of the criminal responsibility of States was an extremely difficult one. In the first place, the idea of collective punishment was generally unpopular, if only because it raised the problem of penalizing innocent people, including future generations not born when the international crime had been committed. Indeed, even the generation that was already living could not always be held responsible, because decisions leading to an international crime were almost never the result of a democratic process, but, at most, only of the semblance of one. Another fundamental problem was that of the nature of the punishment to be imposed. To draw an analogy with domestic penal law would be hazardous, especially at a time when the value of the penal system as a whole was increasingly coming under criticism in many countries. Penalties equivalent to the death sentence, corporal punishment or deprivation of liberty were, for many reasons, hardly able to be applied to States. As for economic penalties equivalent to the imposition of heavy fines, the method had been tried, in particular after the First World War, but with a notable lack of success. In his view, the Commission could not, at the current stage in history, venture to specify the legal consequences of an international crime, but could only, as it were, pave the way in article 14 for the future development of international solidarity.

24. One of the general comments made by Chief Akinjide (1898th meeting) had taken the form of a plea for realism. Although he did, of course, agree that it was always desirable to be realistic, a degree of utopian vision was also necessary if any progress was to be made in international law. The legislator could, moreover, not take account of the fact that law-breakers often escaped with impunity.

25. Referring to draft article 5, he said that he would endeavour to reply in order to the comments made by members of the Commission. With regard to article 5, subparagraph (b), Sir Ian Sinclair (1895th meeting), Mr. Ogiso (1896th meeting) and others had asked whether an interim order of the ICJ was or was not binding and, in that connection, he drew attention to paragraph (10) of the commentary to article 5, which referred to "such orders ... as may be binding on the parties to the dispute". He agreed with Sir Ian Sinclair that a connection existed between article 5, subparagraph (d) (iv), and article 7, and that it might be appropriate to include a reference to fundamental human rights in the former article in order to avoid any misunderstanding about the scope of the latter. As to Sir Ian's criticism of article 5, subparagraph (e) (1890th meeting), he noted that, while the victim of an act of aggression was easy enough to identify, that was not always so in the case of other international

⁵ *Yearbook ... 1979*, vol. II (Part Two), p. 121, commentary to article 30, para. (21).

⁶ *Ibid.*

⁷ *Ibid.*, p. 109.

crimes. Article 5, subparagraph (e), was intended to cover the collective interests jeopardized by an international crime. He had some sympathy with Sir Ian's suggestion that paragraphs (8) to (10) of the commentary to article 14 should be taken into account in article 5, subparagraph (e), and suggested that the matter should be considered by the Drafting Committee.

26. With regard to the general point made by Mr. Balanda (1894th meeting), Mr. Arangio-Ruiz (1900th meeting) and others that it was not always correct to speak of "new legal relationships" arising from an internationally wrongful act, he recalled that the Commission had been using that term since the outset of its work on the topic and, in that connection, referred to the Commission's report on the work of its thirty-second session.⁸ He also noted that the reference to new legal relationships did not imply the disappearance of all previous legal relationships. That was made clear in draft article 1 of part 2 as submitted in his second report;⁹ paragraph 53 of the second report was also relevant in that regard. New legal relationships were, moreover, not completely separable from old ones. Draft article 6, for example, prescribed a related or substitute performance of a primary obligation; and arguments in favour of a new, and possibly separate, third-party dispute-settlement procedure were rejected in his sixth report (A/CN.4/389, para. 8) because of the close links between the new obligations of the author State under article 6 and its old primary obligations.

27. Another general point he wished to make concerning article 5 was that, by its very nature, the article was not exhaustive and that more than one of its provisions might be applicable in a given situation. In the case of aggression, for example, article 5, subparagraphs (a) and (b), would both apply. The Drafting Committee might be requested to consider ways of making that point completely clear.

28. As for the objections raised by Sir Ian Sinclair (1890th meeting) and other speakers to the concept of "collective interests", as referred to in article 5, subparagraph (d) (iii), he had to confess that he was somewhat surprised. As everyone knew, collective interests, whether national or international, had no natural existence, but were always created by law. Examples of the creation of collective interests by multilateral treaty included EEC, ECSC and EURATOM. He failed to see how account could not be taken of the existence of collective interests, which should, of course, always be connected with the recognition of fundamental human rights.

29. Mr. Sucharitkul (*ibid.*) had noted that, even if collective interests existed, there was no procedure for dealing with them. That was, of course, true, but an attempt to provide a solution was made in draft article 11, paragraph 2. Referring to article 5, subparagraph (e), Mr. Sucharitkul had cited the example of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft¹⁰ and had raised the

question whether that Convention could be said to have been stipulated for the protection of collective interests. The answer was no doubt in the affirmative because of the action taken by ICAO to change its Convention in the light of the Hague Convention, but, since the hijacking of aircraft was not currently considered to be an international crime, the point was hardly a material one.

30. Replying to Mr. McCaffrey (1892nd meeting), who had raised the question of human rights violations not covered by a multilateral instrument, he drew attention to paragraph (9) of the commentary to article 5, which emphasized that subparagraph (d) did not imply that obligations could not arise from a source other than a multilateral treaty. As he had already pointed out, moreover, article 5 was not intended to be exhaustive. The same point should be borne in mind in connection with Mr. McCaffrey's comment concerning obligations *erga omnes* not related to international crimes within the meaning of article 19 of part 1 of the draft. While he did not disagree with the suggestion that a reference to the breach of obligations *erga omnes* should be added to article 5, subparagraph (e), he wondered whether the resulting text might not be somewhat tautological. The whole concept of obligations *erga omnes* had been criticized during the debate on the grounds that it did away with the distinction between directly and indirectly affected States. Yet, in cases involving the right of self-determination of peoples or the fundamental human rights of the author State's own nationals, it was difficult to specify what other State was directly involved; in such cases, all other States were injured States.

31. Mr. Calero Rodrigues, too (*ibid.*), had questioned the term "collective interests", which he would prefer to see replaced by the term "common interests". The matter could most appropriately be discussed in the Drafting Committee, of which Mr. Calero Rodrigues was the Chairman. As for the objection that article 5, subparagraph (e), did not sufficiently distinguish between directly and indirectly affected States, he had already explained why, in his view, all States had to be recognized to have been injured by an international crime, although, of course, not all States could be placed on the same footing as far as the consequences of the crime were concerned.

32. Replying to Mr. Flitan's suggestion (*ibid.*) that a separate article of part 2 should be devoted to the question of *jus cogens* and that article 5, subparagraph (a), should be further subdivided, he said that those matters could be referred to the Drafting Committee. He was somewhat at a loss to understand Mr. Flitan's suggestion that article 5 should take account of groups of States. If international organizations were what Mr. Flitan had had in mind, it should be recalled that the Commission had long ago decided to restrict the topic of State responsibility to relations between States. Lastly, he noted that the overlapping between the subparagraphs of article 5 to which Mr. Flitan had referred was the result of the non-exhaustive nature of the article; a State could thus be an injured State under more than one subparagraph.

⁸ *Yearbook ... 1980*, vol. II (Part Two), p. 28, para. 25

⁹ *Yearbook ... 1981*, vol. II (Part One), p. 100, document A/CN.4/344, para. 164.

¹⁰ See 1890th meeting, footnote 12.

33. Replying to Mr. Huang, who had pointed out (1893rd meeting) that not all sources of rights and obligations were covered in article 5, he said that other sources could be mentioned if the Drafting Committee thought it necessary, but drew attention to the difficulty of referring to such sources as a unilateral declaration. The suggestion by Mr. Francis (1894th meeting) concerning a reference to the object and purpose of multilateral treaties could be considered by the Drafting Committee. Mr. Balanda (*ibid.*) had, in addition to questioning the reference to new legal relationships and making suggestions concerning the French text of subparagraphs (b) and (c), asked whether the "individual persons" referred to in subparagraph (d) (iv) could be considered to include legal persons such as multilateral corporations. Without going into the primary rule involved, he wished to assure the Commission that, in drafting subparagraph (d) (iv), he had intended to refer only to natural persons. In reply to Mr. Balanda's point that subparagraph (d) (iv) went too far and that, in the case of the infringement of individual rights, not all the States parties to the treaty concerned were injured States, he noted that, under the European Convention on Human Rights,¹¹ every State party was entitled to bring a claim against any other State party.

The meeting rose at 1.05 p.m.

¹¹ See 1894th meeting, footnote 10.

1902nd MEETING

Thursday, 13 June 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, 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) (continued) and "Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)³ (concluded)

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

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16⁴ (*concluded*)

1. Mr. RIPHAGEN (Special Rapporteur), continuing his summing-up of the discussion, noted that Mr. Ushakov (1895th meeting) had expressed some doubts about the value of draft article 5. Most speakers had considered that article essential, however, and he was sure that any drafting problems could be dealt with in the Drafting Committee. He would revert to article 5 later, but would like first to make a general remark concerning draft article 6.

2. Many members had found article 6 too detailed, especially in its first paragraph. The reason for including the details was connected with what Mr. Arangio-Ruiz (1900th meeting) had called the "preliminaries", the intermediate phase of a situation arising from an alleged wrongful act. Article 6 tried to set out what the injured State could require the author State to do. It had been held that the article was not strong enough and that it should be based on the obligation of the alleged author State, an approach he had adopted in his earlier drafts. But as Mr. Ushakov had rightly remarked, there was no obligation unless the injured State demanded that something should be done. Hence he believed that the drafting of article 6 was, in principle, correct.

3. The second reason for including the details in paragraph 1 of article 6 was connected with draft article 7. Article 6 dealt with *restitutio in integrum stricto sensu*—what Mr. Reuter had once called the perfect undoing of the internationally wrongful act, the belated performance of the primary obligation. But since that concept might give rise to difficulty in a situation involving the private right of a private individual, he had thought it useful to separate it from the other obligations of the author State. Of course, if one did not accept article 7, that reason was eliminated. In that connection, he noted that some international lawyers seemed to regard international law as being completely separate from internal law—an attitude with which he most emphatically disagreed. Of course, the state of internal law could not excuse non-performance of an obligation, although when looking at article 33 of part 1 of the draft, on a state of necessity, one could have doubts. In any event, the author State should at least apply the possibilities it had *proprio motu* to redress the wrongful act. The main reasons for including the details in article 6, then, were to underscore the preliminary stage, which occurred before the more dramatic stage of reciprocity or reprisals.

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.