Document:-
A/CN.4/SR.2452

Summary record of the 2452nd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1996, vol. I

2452nd MEETING

Wednesday, 3 July 1996, at 10.35 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

State responsibility (*continued*)* (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,[1] A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE[2] PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee on the topic under consideration (A/CN.4/L.524 and Corr.2).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, at its thirty-second session in 1980, the Commission had completed its consideration on first reading of part one of the draft articles on State responsibility. The Drafting Committee had therefore dealt only with parts two and three at the current session. It had had two tasks to accomplish: first, to examine the draft articles dealing with international crimes which had been referred to it; and, secondly, to undertake the fine-tuning, or *toilette finale*, of all the articles in parts two and three. Some had been adopted quite a long time ago and there was a need to establish consistency in the use of terms. For the Commission's convenience, the entire set of articles in parts one, two and three had been reproduced and renumbered consecutively.

3. The Drafting Committee had been very careful to limit any changes in the articles of parts two and three which had been previously adopted by the Commission. The few changes made were intended to bring older articles into line with new ones or to clarify the text.

4. The Drafting Committee had had to work under extremely difficult conditions: it had been deprived of the essential assistance of the Special Rapporteur, whose function had traditionally been to guide the Drafting Committee, make alternative proposals and, of course, prepare the commentary to the articles once they had been adopted in plenary. The members of the Drafting Committee therefore deserved a special tribute for their efforts. Special thanks were owed to Mr. Bowett, who had taken the trouble to formulate revised texts and commentaries for the articles that had been referred to the Drafting Committee, taking into account the views expressed in plenary.

5. The titles and text of parts two and three proposed by the Drafting Committee read as follows (the number within square brackets indicates the number of the corresponding article adopted by the Commission at previous sessions):

Part two

CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY

CHAPTER I

GENERAL PRINCIPLES

Article 36 [1]. Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of part one, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 [2]. **Lex specialis**

The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

Article 38 [3]. Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this part.

Article 39 [4]. Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 40 [5]. Meaning of injured State

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part one, an internationally wrongful act of that State.

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* Resumed from the 2438th meeting.

[1] Reproduced in *Yearbook . . . 1996*, vol. II (Part One).

[2] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 et seq.

2. In particular, "injured State" means:

(*a*) If the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(*b*) If the right infringed by the act of a State arises from a judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute are entitled to the benefit of that right;

(*c*) If the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(*d*) If the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(*e*) If the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) The right has been created or is established in its favour;

(ii) The infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law; or

(iii) The right has been created or is established for the protection of human rights and fundamental freedoms;

(*f*) If the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime,* all other States.

CHAPTER II

RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 [6]. Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 42 [6 bis]. Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(*a*) The injured State; or

(*b*) A national of that State on whose behalf the claim is brought;

which contributed to the damage.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 43 [7]. Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(*a*) Is not materially impossible;

(*b*) Would not involve a breach of an obligation arising from a peremptory norm of general international law;

(*c*) Would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(*d*) Would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 44 [8]. Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 45 [10]. Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(*a*) An apology;

(*b*) Nominal damages;

(*c*) In cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(*d*) In cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 46 [10 bis]. Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III

COUNTERMEASURES

Article 47 [11]. Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 41 to 46, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set out in articles 48 to 50, not to comply with one or more of its obligations towards the State which has committed the internationally wrongful

* The term "crime" is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia*, avoiding the penal implication of the term.

act, as necessary in the light of the response to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 48 [12]. Conditions relating to resort to countermeasures

1. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

2. Provided that the internationally wrongful act has ceased, the right of the injured State to take countermeasures is suspended when and to the extent that the dispute settlement procedure referred to in paragraph 1 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 49 [13]. Proportionality

Countermeasures taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 50 [14]. Prohibited countermeasures

An injured State shall not resort, by way of countermeasures, to:

(*a*) The threat or use of force as prohibited by the Charter of the United Nations;

(*b*) Extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act;

(*c*) Any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(*d*) Any conduct which derogates from basic human rights; or

(*e*) Any other conduct in contravention of a peremptory norm of general international law.

CHAPTER IV

INTERNATIONAL CRIMES

Article 51. Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52. Specific consequences

Where an internationally wrongful act of a State is an international crime:

(*a*) An injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;

(*b*) An injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53. Obligations for all States

An international crime committed by a State entails an obligation for every other State:

(*a*) Not to recognize as lawful the situation created by the crime;

(*b*) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

(*c*) To cooperate with other States in carrying out the obligations under subparagraphs (*a*) and (*b*); and

(*d*) To cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

Part three

SETTLEMENT OF DISPUTES

Article 54 [1]. Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 [2]. Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 [3]. Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 [4]. Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 [5]. Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken

is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Article 59 [6]. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 60 [7]. Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Annex I

THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(*a*) The State or States constituting one of the parties to the dispute shall appoint:

(i) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(ii) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(*b*) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(*c*) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(*d*) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(*e*) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(*f*) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Annex II

THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2, shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

6. The Drafting Committee had attempted to bring the style and structure of parts two and three of the draft articles into line with those of part one, which had already been adopted on first reading. Part two had accordingly been divided into chapters, which he proposed that the Commission should take up individually.

PART TWO (Content, forms and degrees of international responsibility)

CHAPTER I (General principles)

ARTICLE 36 (Consequences of an internationally wrongful act),
ARTICLE 37 (*Lex specialis*),
ARTICLE 38 (Customary international law),
ARTICLE 39 (Relationship to the Charter of the United Nations), and
ARTICLE 40 (Meaning of injured State)

7. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that part two, entitled, as in the original draft, "Content, forms and degrees of international responsibility", now consisted of four chapters. Chapter I, entitled "General principles", contained articles 36 [1] to 40 [5], adopted by the Commission at its thirty-fifth session in 1983[3] and at its thirty-seventh session in 1985[4] and had at the current time been given titles. Article 36 [1] (Consequences of an internationally wrongful act), was basically an introductory clause to part two. The Drafting Committee had made only minor drafting changes to the article in order to bring it into line with the terms used in part one, replacing, for example, the words "pursuant to" in paragraph 1 by the words "in accordance with".

8. The Drafting Committee had likewise made some minor drafting changes in the first part of article 37 [2] (*Lex specialis*) to make it more precise.

9. Article 38 [3] (Customary international law) provided for the application of customary international law to those legal consequences of an internationally wrongful act of a State that were not covered by part two. The Drafting Committee had deleted the "without prejudice" clause at the beginning of the article. That clause referred to the Charter of the United Nations and to a draft article never adopted by the Commission on diplomatic protection and it had been found unnecessary. The article had been entitled "Customary international law".

10. The Drafting Committee had made no changes to article 39 [4] (Relationship to the Charter of the United Nations), which it had entitled "Relationship to the Charter of the United Nations".

11. Article 40 [5] (Meaning of injured State) defined the term "injured State". The Drafting Committee had only made minor drafting changes in paragraphs 1 and 3 of that article. The bracketed words in paragraph 3 had been deemed unnecessary and had therefore been deleted. As the word "crime" was used for the first time, after its use in article 19 of part one, in article 40 of part two, the Drafting Committee had found it useful to indicate in a footnote that the word could be replaced by an alternative expression such as "an internationally wrongful act of a serious nature" or "an exceptionally serious wrongful act".

12. In concluding his introduction to chapter I of part two, he recalled that, during the Commission's discussion of the matter at its forty-third and forty-fourth sessions, the question of a plurality of injured States had been raised, particularly in connection with human rights and the protection of the environment. It had been pointed out that not all injured States were injured in the same way or to the same degree and that it must therefore be determined in each case to what extent the State was entitled to claim restitution, compensation, satisfaction or guarantees of non-repetition or to resort to countermeasures.

13. At the forty-fourth session, in 1992, the Special Rapporteur on the topic, Mr. Arangio-Ruiz, had proposed an article 5 *bis*[5] to address that question. However, after discussing the article extensively and reviewing many different scenarios, the Drafting Committee had taken the view that a plurality of injured States did not really give rise to any difficulty, for the following reasons: different forms of reparation were available to every injured State depending on the type and extent of damage suffered, so that each injured State should be able to find a solution suitable to its particular case. As to countermeasures, article 49 [13] (Proportionality) required that any countermeasures taken by an injured State had to be in proportion to the degree of gravity of the injury suffered. The twofold problem of reparation and countermeasures thus appeared to have been solved. The only difficulty envisaged by some members of the Drafting Committee had been the possibility that a plurality of demands in relation to the forms of reparation or countermeasures might complicate or delay the settlement procedure. That issue had, however, not seemed to be of sufficient gravity to be dealt with in a separate article. It had been thought that the issue could be covered in the commentary to article 36 [1], article 40 [5] or article 42 [6 *bis*]. The Drafting Committee had therefore decided not to adopt the proposed article 5 *bis*.

14. The CHAIRMAN invited the members of the Commission to comment on chapter I of part two of the draft articles.

15. Mr. ARANGIO-RUIZ said that he had two comments to make on chapter I of part two just introduced by the Chairman of the Drafting Committee.

16. With regard to article 5 *bis*, which the Drafting Committee had decided not to adopt, he recalled that, as Special Rapporteur, he had proposed that draft article only at the insistence of some members of the Commission, having tried in vain to demonstrate in his third,[6] fourth[7] and fifth[8] reports, that no such provision was necessary. He therefore did not consider himself to be the "father" of that pointless article and wanted his position to be duly noted.

17. His objections to article 39 [4] went far deeper. As far back as 1992, when he had been thinking about the opening articles of part two of the draft, he had considered that that article should be deleted. In that connection, he referred members of the Commission to the statement he had made at the forty-fourth session of the Commission.[9] He had again expressed his reservations

[3] *Yearbook... 1983*, vol. II (Part Two), pp. 42-43.

[4] *Yearbook... 1985*, vol. II (Part Two), pp. 24-25.

[5] *Yearbook... 1992*, vol. II (Part Two), p. 39, footnote 86.

[6] *Yearbook... 1991*, vol. II (Part One), document A/CN.4/440 and Add.1, chap. IX, "The problem of differently injured States", pp. 26-28.

[7] *Yearbook... 1992*, vol. II (Part One), document A/CN.4/444 and Add.1-3, chap. VIII, "The problem of the plurality of equally or unequally injured States", pp. 43-49.

[8] *Yearbook... 1993*, vol. II (Part One), document A/CN.4/453 and Add.1-3, chap. II, sect. A.4(c), "The wrongdoer 'not directly' injured States relationship", paras. 154-158.

[9] *Yearbook... 1992*, vol. I, 2277th meeting, pp. 150-151, paras. 3 to 5.

about the contents of that article in his seventh report[10] and in his eighth report (A/CN.4/476 and Add.1).

18. Unfortunately, his struggle appeared to have been in vain because the article was still there. The only reaction of the Commission to his criticism of the article in question had apparently been a *fin de non-recevoir* based on the fact that article 4 (now article 39) had already been adopted at the thirty-fourth and thirty-fifth sessions and could therefore not be taken up again. Consequently, he now felt obliged to state again and explain in greater detail the reasons why the maintenance of the article in the draft was dangerous from the point of view not only of the development, but also of the preservation of the law of State responsibility.

19. His objections had to do primarily with the scope of the provision. Not only was the scope not clearly defined, but it also went far beyond the letter of the article itself. Although the article referred to the legal consequences of an internationally wrongful act of a State set out in the provisions of part two of the draft, its effects would inevitably extend to the entire draft, particularly to parts one and three.

20. Part one set forth the general definition of an internationally wrongful act, dealt with the problem of attribution, established a distinction between different internationally wrongful acts and listed the circumstances excluding wrongfulness. But since article 39 [4] spoke of the legal consequences of an internationally wrongful act, it might well be indispensable to deal with the existence or attribution of the wrongful act, its nature and gravity and the possible existence of circumstances excluding wrongfulness. Part three of the draft dealt with dispute settlement, negotiations and third party procedures. Was it not also inevitable that a conciliation commission or arbitral tribunal would also have to take article 39 [4] into account? Part three was clearly conceived in such terms as to include not only part two, but also part one within the mandate of any third party body. In conclusion, it could be said that there was not a single article or paragraph of the draft that would remain unaffected by article 39 [4].

21. But the scope of the article went even beyond the so-called "secondary" rules embodied in the draft. The consequences covered by the draft presupposed the existence and interpretation of the international obligation whose infringement constituted the alleged wrongful act, namely, the existence and meaning of what, in the jargon of the Commission, was called a "primary" rule. It was therefore doubly incorrect to assume that the effects of article 39 [4] would apply only to those rules of part two that related to the substantive or instrumental consequences of the internationally wrongful act. In fact, the scope of article 39 [4] covered the entire draft and more.

22. Considering further that it was in the very nature of a convention on State responsibility to apply to the infringement of any international obligation in any area of international relations that might be of legal relevance, the provision of article 39 [4] would apply to any primary or secondary international obligations deriving from international treaties and also to those deriving from customary international law.

23. The presumable effects of article 39 [4] also had to be considered. The reference in that article to "the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security" meant mainly the power of the Security Council to make recommendations to Member States or to take binding decisions, especially of the kind referred to in Chapter VII of the Charter. Article 39 [4] would subject any obligations of States and the corresponding rights to the decisions of the Security Council, and that would mean that any such rights and obligations could be restricted, suspended or otherwise modified at the discretion of the Council whenever it decided to take action for the maintenance of international peace and security. That possibility was aggravated by the words "as appropriate" in the second line. Who would be the judge of such "appropriateness" if not, yet again, the political organ of the United Nations principally responsible for the maintenance of peace and international security—in other words, the Council?

24. Another delicate point that had not been explained either at the thirty-fourth and thirty-fifth sessions was the ambiguity of the word "procedures" used in the article. The commentary to former article 4[11] was very laconic on that point. Should the term be understood to mean "procedural rules", although that meaning seemed to be implicitly covered by the term "provisions", or should it be understood to mean the action that might be taken by the international body or bodies concerned with the maintenance of international peace and security? Was it part of the de facto application of the Charter of the United Nations or part of Charter interpretation by the political body or bodies concerned? In short, to what exactly were all the rules on State responsibility—primary, secondary or tertiary—supposed to be subject according to article 39 [4]? To legal rules or just to facts?

25. Another issue was the relationship between article 39 [4] and Article 103 of the Charter of the United Nations. Article 103 subjected any international agreement to all the provisions of the Charter (and not only to the all-important purposes and principles of the United Nations). But when article 39 [4] spoke of the "provisions and procedures" of the Charter, it was referring to a specific area, that of the maintenance of international peace and security. By thus singling out some specific provisions and procedures of the Charter, did not the article create a very questionable imbalance among the obligations, rights and functions envisaged in the Charter? On what basis—*de lege lata* or *de lege ferenda*—would the Commission suggest that the law of State responsibility as codified and developed should be subjected, not to all the obligations and rights deriving from the Charter, but only to the "provisions and procedures" relating to the maintenance of international peace and security? It should not be forgotten that Article 103 of the Charter was the general rule governing the relationship between the Charter and other international agreements.

[10] See *Yearbook... 1995*, vol. II (Part One), document A/CN.4/469 and Add.1-2, chap. I, sect. C.

[11] See 2438th meeting, footnote 8.

Was a partial interpretation of the Charter legally admissible? By emphasizing the primacy of the decisions of a political organ of the United Nations—and, what was more, an organ of restricted composition—did not article 39 [4] alter the balance established by the Charter between the General Assembly and the Security Council? Could a commission of experts entrusted with the development and codification of a most crucial area of international law allow itself that liberty?

26. By adopting a provision such as article 39 [4], the Commission would be fully espousing the views of the very few supporters of the legality of the Security Council's actions in the *Lockerbie* case.[12] The Commission would practically admit that, by resolution 748 (1992) of 31 March 1992, the Security Council had been entitled, in the words of some of the members of ICJ, to "bind" that Court to a finding of a political body issued by that body while the matter was *sub judice* before the Court itself. By adopting the article, the Commission would contest the distinction between Chapters VI and VII of the Charter of the United Nations and, at the same time, the fact generally admitted by international legal scholars that the acts of the Council did not represent *res judicata* in a dispute between States over their legal rights and obligations. By adopting article 39 [4], the Commission would be "undoing" the law of State responsibility rather than codifying and developing it.

27. Having taken a new look at the documents of 1982 and 1983, he thought that the relatively confused nature of the initial discussions on part two of the draft could be explained by the fact that, at the time, there had been little or no mention of the fundamental distinction between Chapters VI and VII and, within Chapter VII itself, of any limits on the Security Council's function, although, as he had stated when introducing the eighth report (2436th meeting), such limits within Chapter VII did exist. At the time of those initial debates, the Commission had not yet known very clearly whether it should deal with crimes at the beginning or at the end of part two or even whether part three should not precede part two. Furthermore, those debates had taken place at the time of the cold war and of the paralysis of the Council, so that problems of distinctions between Chapters VI and VII of the Charter or of possible limits on Council action under Chapter VII had hardly begun to be considered. The situation was different today, and no international lawyer could ignore problems that were discussed in almost every issue of the international law quarterlies.

28. At the preceding session, he had proposed, as Special Rapporteur, a different formulation for a saving clause relating to the maintenance of international peace and security, which had formed the subject of proposed draft article 20 for part two.[13] In that article, he had tried to pay due respect to the law of collective security without subordinating the law of State responsibility to it. To that end, he had inverted the order of the two sets of rules with a view to achieving two results: ensuring, on the one hand, that the rules on State responsibility did not interfere with the Security Council's legitimate action for the maintenance of international peace and security and, on the other, that the rules of State responsibility would not be subject unconditionally to derogation by virtue of decisions of the Security Council. He had also relied, of course, on the judicial competence vested in ICJ under his proposed draft article 19 to determine the existence/attribution of the most serious internationally wrongful acts.

29. The proposed draft article also marked an improvement with regard to those provisions of the Charter of the United Nations that the draft on State responsibility must not prejudge. The wording of draft article 20 had referred only to measures decided upon by the Security Council of the United Nations in the exercise of its functions under the provisions of the Charter, which was much less broad than the formula used in article 39 [4], which referred to provisions and procedures. Draft article 20 had, however, been only a makeshift provision, as it were, for his idea had simply been to try and propose a better text, or a less damaging one, than article 4 as drafted at the time.

30. Lastly, he would prefer it by far if the Commission did not just replace article 39 [4] by another article, but simply deleted it from the draft. Even draft article 20 would be superfluous, not to say ambiguous, having regard to the existence of Article 103 of the Charter of the United Nations. Moreover, there was no reason to introduce a special rule into such a sensitive area and within the framework of such a broad-ranging subject as State responsibility.

31. The CHAIRMAN invited the members of the Commission to comment first on article 39 [4], to which Mr. Arangio-Ruiz' remarks related.

32. Mr. BENNOUNA said that the ambiguity that marked article 39 [4] was not fortuitous and those members who defended the article should therefore make their precise intentions known. If it were simply a matter of giving priority to the Charter of the United Nations, Article 103 would suffice and a provision like article 39 [4] was pointless. On the other hand, if article 39 [4] were meant to supplement Article 103 in any way, at all, he would like to have an explanation before taking a decision.

33. Moreover, it was not normal for article 39 [4] to refer only to the provisions on the maintenance of peace and security, since it was the whole of the Charter of the United Nations that took priority over a convention. In any event, article 34 of part one cited the Charter with regard to self-defence, as did article 50 [14] of part two with regard to the threat or use of force, as prohibited by the Charter. Also, if by "procedures" the Commission meant the resolutions of the Security Council, it should say so clearly and not allow any ambiguity to subsist. He also wondered why the words "subject to" rather than "without prejudice to" were used.

34. He formally requested that any deletion of article 39 [4] should be put to the vote. If the Commission

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[12] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom*; *Libyan Arab Jamahiriya* v. *United States of America)*, see, in particular, *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, pp. 3 and 114.

[13] See 2436th meeting, footnote 4.

decided to retain the article, he would have amendments to propose.

35. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, after comparing the article as adopted at the thirty-fifth session with the article proposed by the Special Rapporteur, the Drafting Committee had decided that it would be preferable to retain the first version, which reflected Article 103 of the Charter of the United Nations without anything more. In that connection, he considered that Mr. Arangio-Ruiz' interpretation was somewhat excessive. At all events, the Drafting Committee had not considered the possible deletion of the article and it was up to the Commission to decide the matter.

36. The CHAIRMAN said that, before formally proposing that the Commission should vote on the deletion of article 39 [4], he would like to know whether it was not possible for members to agree on more neutral wording for the article. The words "subject to" could indeed suggest that, so far as the Commission was concerned, there was a hierarchy between the various provisions of international law. The words "without prejudice to" would refer more simply to Article 103 of the Charter of the United Nations.

37. Mr. ROSENSTOCK, speaking on a point of order, said that the discussion would be more orderly if the Commission had before it formal proposals made by individual members of the Commission, in accordance with the order of speakers.

38. The CHAIRMAN suggested that article 39 [4] should be reworded to read:

"The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are without prejudice to the provisions of the Charter of the United Nations."

39. Mr. ROSENSTOCK said that he was not prepared to accept an off-the-cuff suggestion to amend a provision that had been before the Commission for a number of years and that it had considered several times. The expression "without prejudice to" would create more problems than it would solve and would turn the phrase in question into a totally unnecessary statement. Moreover, all the arguments put forward by the former Special Rapporteur had been debated at length and finally rejected by the majority of the members of the Drafting Committee. He suggested that the Commission should revert to the matter when the subject was reconsidered at a later session.

40. The CHAIRMAN said that, when the article had been adopted at the thirty-fifth session, the other draft articles had still not been available; it was normal for the members of the Commission to have questions about the interpretation of a provision in the light of all the articles. At that time, as a member of the Commission, he had accepted the article with reservations, since he believed that it was not the Commission's role to try and establish a hierarchy between the rules of law.

41. Mr. TOMUSCHAT, speaking on a point of order, asked whether there was a commentary to former article 4 of part two. If so, the Commission should take cognizance of it.

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the commentary, which was very short, read:

> (1) Part two will indicate the legal consequences of an internationally wrongful act in terms of new obligations and new rights of States.
>
> (2) It cannot a priori be excluded that, under particular circumstances, the performance of such obligations and/or the exercise of such rights might result in a situation relevant to the maintenance of international peace and security. In those particular circumstances, the provisions and procedures of the Charter of the United Nations apply and *may result in measures deviating from the general provisions of* part two. In particular, the maintenance of international peace and security may require that countermeasures in response to a particular internationally wrongful act are not to be taken for the time being. In this connection, it is noted that, even under the Definition of Aggression, the Security Council is empowered to conclude . . . that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.[14]

43. Mr. VILLAGRÁN KRAMER said that some of the articles of the draft had been adopted at the thirty-fifth and thirty-seventh sessions and others at the forty-fourth and later sessions. The question was therefore whether the Commission could review what it had done at earlier sessions sometime in the past—and it must not forget, in that case, that, at the thirty-fourth session, it also had had an exchange of views on part one—or should focus on what it had done in recent years and in its present composition. Furthermore, Governments had submitted their observations on the draft articles the Commission had submitted to the Sixth Committee. Article 39 [4] had, however, not given rise to any objections on their part. If the Commission wished to amend the wording of those articles, it must bear in mind the old parameters which had provided the framework when they had been drafted.

44. With regard more specifically to the content of article 39 [4], he noted that wrongful acts were governed by general international law—*lex generalis*—and the Charter of the United Nations—*lex specialis*. In that connection, Mr. Crawford had very clearly demonstrated the role the Commission played in the elaboration of general international law. The treatment of wrongful acts, for instance, had no limits other than those laid down in the Charter.

45. The Chairman's suggestion did not seem convincing and he would be more inclined to support Mr. Rosenstock's position. He had no definite ideas about the words "and procedures" and would like to have a written proposal before he took a decision.

46. Mr. BOWETT said that the question was whether the Security Council could, in the exercise of its powers with regard to the maintenance of international peace and security, suspend or abrogate the legal rights which the international law of responsibility vested in States. However, if article 39 [4] did not address the problem then its deletion would not, nor indeed would any drafting changes made to it. The best solution would perhaps be to deal with the matter in the commentary.

47. Mr. Sreenivasa RAO said that, while Mr. Arangio-Ruiz had raised a substantive problem and his views

[14] See 2438th meeting, footnote 8.

were not without merit, the Commission could not consider that issue because, first of all, it had not been referred to it and, secondly, it did not have enough time to do so. In respect of the substance, if article 39 [4] were to be given the extreme interpretation Mr. Arangio-Ruiz had given it, it would clearly be better if it was left out altogether. Nevertheless, because of its radical nature, such an interpretation was hardly possible. It would therefore be enough to discuss the problem in the commentary without attempting to solve it as to substance.

48. Mr. ARANGIO-RUIZ said that, in the first place, it was not the case that article 39 [4] had been considered several times by the Commission. Secondly, the commentary to article 4, as just read out by the Chairman of the Drafting Committee, showed that not enough thought had been given to the question at the time. Thirdly, the work done by the Commission in the past did not have the force of *res judicata* and the Commission could certainly resume its consideration of texts which had already been adopted on first reading. Lastly, the Charter of the United Nations did not govern State responsibility. He therefore maintained that article 39 [4] should be deleted because it overlapped with Article 103 of the Charter.

49. Mr. HE said that he preferred the current wording "subject (. . .) to the provisions" to that suggested by the Chairman, namely, "without prejudice to the provisions". He also considered the words "as appropriate" to be too vague.

50. Mr. EIRIKSSON said that, while it was true that the texts adopted by the Commission did not have the force of *res judicata*, it was preferable for practical purposes not to amend an article that the Commission in its previous composition had already adopted on first reading. In the case at hand, the Commission could come back to article 39 [4] on second reading and would have the added advantage of doing so in the light of part one. Moreover, there were certainly cases where State responsibility was governed by the provisions of the Charter of the United Nations and, in particular, by Article 103, and it was precisely such cases to which reference was being made in article 39 [4] as it now stood. He agreed with Mr. Bowett that it would be best to explain the issue in the commentary and to make it clear that the application of article 39 [4] could not have the radical consequences referred to by Mr. Arangio-Ruiz.

51. Mr. FOMBA said that Article 103 of the Charter of the United Nations could be regarded as an international policing statute and was therefore, by virtue of its peremptory nature, applicable in all cases, with no need to say so. If article 39 [4] gave rise to controversy, the *renvoi* technique could easily be used. The commentary read out by the Chairman of the Drafting Committee seemed to promote a "particularist" approach that was open to criticism. As to substance, he agreed with Mr. Arangio-Ruiz and Mr. Bennouna that article 39 [4] should be deleted or at least made more neutral. He therefore fully supported Mr. Bennouna's proposal.

52. Mr. KABATSI said he fully shared the views of Mr. Arangio-Ruiz and Mr. Bennouna: article 39 [4] was not necessary and should be deleted. Any explanations that might be given in the commentary would not dispel the concerns that might arise in that regard because the question was not simply one of interpretation.

53. Mr. ROSENSTOCK said that the outcry over article 39 [4] was unjustified: it seemed to be designed, by means of a deliberately biased interpretation of the text, to lead the Commission into taking action on questions which were usually not referred to it.

54. Even though its wording was not perfect, article 39 [4] was designed to indicate which part of the Charter of the United Nations, through the application of Article 103, might have an impact on the rules of responsibility. The words "as appropriate" were designed to avoid any extreme consequences of the application of the provisions of the Charter in that regard. Article 39 [4] simply stated that the Charter was so designed that, in certain areas, including that of the maintenance of international peace and security, United Nations bodies had the power to take decisions which were binding on States and which, in accordance with Article 25 of the Charter, established legal obligations. The Commission could always come back to article 39 [4] on second reading, but to delete it at present would be a serious mistake. As to the proposed amendments, if extreme interpretations were maintained they would only exacerbate the problem they were supposed to solve. The best solution was probably to note in the commentary that the Commission would come back to article 39 [4] on second reading and to request the views of Governments in that regard.

55. Mr. VARGAS CARREÑO said that, as Mr. Arangio-Ruiz had explained, article 39 [4] did not fill any legal gap and could thus be deleted without harm. The Charter of the United Nations itself in fact dealt with the problem that article 39 [4] was supposed to solve. If the majority of the members of the Commission wanted to retain it, however, the proposals by Mr. Bennouna and the Chairman should be adopted.

56. Mr. THIAM said that the best solution was probably to put Mr. Bennouna's proposal to a vote. If the proposal was not adopted, the commentary could refer to it and indicate that the members of the Commission intended to come back to article 39 [4] on second reading.

57. Mr. TOMUSCHAT said that, although article 39 [4] was not necessary because the provisions of the Charter of the United Nations and of Article 103 in particular were applicable in any case, it was useful because it served as a reminder that questions relating to international peace and security might arise in the implementation of the consequences of an internationally wrongful act. It was also clear that article 39 [4] was not intended to undermine the authority of the Security Council—it could not do so—any more than it was designed to endorse its recent practice. He therefore did not share the serious concerns which had been expressed. Moreover, the Commission should be extremely careful before amending the current text because it certainly did not have time to give detailed consideration to the problem that had been raised. The best solution would probably be, as some other members had already indicated, to explain in the commentary that the Commission was divided as to the need for article 39 [4] and to request the

opinion of Governments so that the Commission could come back to the article on second reading.

58. Mr. GÜNEY said that he shared Mr. Tomuschat's views. If the Commission preferred to adopt more neutral wording, it should choose the amendment suggested by the Chairman and Mr. Bennouna.

59. Mr. ROBINSON said that, in his view, Article 103 of the Charter of the United Nations did not solve the problem raised by some members of the Commission. Article 103 governed the relationship between the treaty obligations of States and their obligations under the Charter. It said nothing about the provisions of general international law. Simply referring to it would therefore not do away with the problem.

60. He also thought that, as it stood, article 39 [4] did not adequately explain the relationship between the law of State responsibility and the Charter of the United Nations. It was thus inappropriate to say that the legal consequences of an internationally wrongful act were "subject" to the provisions of the Charter. He preferred the wording suggested by the Chairman: "are without prejudice to the provisions of the Charter of the United Nations".

61. Mr. ARANGIO-RUIZ said that it would not be appropriate for the Commission to postpone its decision on article 39 [4]. The real question was to decide whether that article was useful.

62. According to Mr. Robinson, Article 103 of the Charter of the United Nations was not enough to solve the problem raised. It was true that Article 103 expressly governed only the relationship between Charter law and treaty law, but, since the Charter could be regarded as *lex specialis*, there was no lack of authors who considered that the Charter also prevailed, from a certain point of view, over customary international law. He did not, however, intend to take a stand on that point. He proposed that article 39 [4] should be put to the vote.

63. Mr. EIRIKSSON said he also thought that the Commission could not brush the problem off lightly. Since it involved a number of complex aspects, the best solution would be to analyse it in the commentary. Mr. Bowett and Mr. Arangio-Ruiz could be asked to help out in that regard.

64. Mr. de SARAM said that the situation referred to in article 39 [4] was that in which an internationally wrongful act gave rise to legal consequences that in fact took the form of rights for the injured State. The purpose of the article was thus to recall that such rights were always subject to that State's obligations under Article 103 of the Charter of the United Nations, which would "prevail", as stated in the Article itself. The proposal by Mr. Bennouna and the Chairman was therefore much too vague. The current wording of article 39 [4] would be better, except for the expressions "as appropriate" and "procedures", which were problematic.

65. As Mr. Sreenivasa Rao had pointed out, however, it was not in the Commission's interests to start a substantive debate at so late a stage. The comments on article 39 [4] should therefore be included in the commentary.

66. Mr. Sreenivasa RAO said that it was not the Charter of the United Nations itself that was being discussed at present. As the Charter itself stated, the Charter prevailed only in the event of a conflict between the obligations of a State under the Charter and its treaty obligations, and that was a special case.

67. The commentary should explain that the expression "as appropriate" did not mean that any limitation was being placed on the action of the Security Council, it being understood that such action came within the context of the maintenance of international peace and security.

68. Mr. BENNOUNA said that, in his view, a *renvoi* to the Charter of the United Nations would be enough. While no member seemed to be in favour of article 39 [4] as it stood, the Commission was ready to adopt it because it had been approved at the thirty-fifth session in 1983. The situation had changed since that time and the Security Council was no longer seen in the same light. In 1996, the problem of abuse of authority was in fact topical.

69. That was why the term "procedures" was so inappropriate: if the Security Council established new procedures, would they prevail, too? He would find it extremely difficult to agree that a mere commentary to the article could solve the problem.

70. Mr. AL-BAHARNA said that he also had reservations about the words "are subject" and "procedures". If article 39 [4] was adopted in its present form, that might give rise to many problems when the articles were applied. In general, the Commission seemed divided in its views on that provision. He therefore proposed that a vote should be taken on article 39 [4], as Mr. Arangio-Ruiz had requested, and then on the amendment proposed by Mr. Bennouna and the Chairman and, lastly, on the proposal by Mr. Tomuschat.

71. The CHAIRMAN invited the members of the Commission to indicate by a show of hands whether they wished to retain article 39 [4].

There were 11 votes in favour, 11 votes against and 4 abstentions.

Article 39 was retained.

72. Mr. BENNOUNA read out the text which would replace the current wording of article 39:

> "The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are without prejudice to the provisions of the Charter of the United Nations."

73. The CHAIRMAN invited the members of the Commission to vote on that amendment.

The amendment was rejected by 10 votes to 9, with 7 abstentions.

The meeting rose at 1.15 p.m.