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Summary record of the 1601st meeting

Topic:
State responsibility

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criticized on moral grounds for a failure to act, where an individual could, and the agents, officials or organs of the State which might commit an internationally wrongful act would therefore have to be identified, and the question of the territoriality of acts committed by individuals would call for further examination.

36. In that connexion, the Special Rapporteur had drawn attention in paragraph 24 of the report to the inadvisability of formulating strict rules that would lead to extraterritorial legislation and/or control by the State over what happened within its territory, something which would be contrary to its obligation to respect human rights and fundamental freedoms. He agreed with the Special Rapporteur that that question should be left aside, particularly since it had already been dealt with in draft articles 11, 12 and 14.[9]

37. Lastly, he could but agree with other members of the Commission that use of the term "guilty State" should be avoided.

The meeting rose at 1 p.m.

[9] See 1597th meeting, foot-note 1.

1601st MEETING

Monday, 2 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Boutros Ghali, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

State responsibility (*continued*) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (*concluded*)

1. Mr. JAGOTA noted that the Special Rapporteur had defined his role as one of building a framework for the new legal relationships established by the breach of an international obligation and had indicated in paragraph 99 of his report how those relationships could be explained in terms of proportionality and of limitations on possible responses to a wrongful act. The report in fact focused on what were described as the three parameters of the new legal relationships (A/CN.4/330, para. 28). In his opinion; the second parameter was the heart of the matter to be dealt with in part 2, since the first parameter had been broadly covered in part 1 of the draft articles and, as the Special Rapporteur had indicated, the third parameter did not come within the scope of part 2.

2. The second parameter, namely, the injured State's rights, could be viewed in terms not only of its rights under a treaty specifying the effect of a breach of an obligation created in the treaty but also of its rights under general international law and its rights with regard to possible responses, which might be called countermeasures, reactive measures, measures of self-protection or sanctions. The concept of proportionality was relevant only in the context of that second parameter and was not germane to the rights and obligations of the guilty State, as dealt with in part 1, because the nature of a wrongful act could be described only in terms of its seriousness.

3. Consequently, part 2 of the draft should be confined to matters on which agreement had been reached in part 1, bearing in mind that the latter related solely to responsibility arising from internationally wrongful acts committed by States and not from internationally wrongful acts committed by international organizations, as was pointed out in foot-note 600 of the Commission's report on its thirty-first session.[1] The Commission should be careful not to go too far in its consideration of wrongful acts of international organizations, except in cases where such acts might help to establish State responsibility. Again, it should be remembered that part 1 dealt essentially with what article 1[2] termed "the internationally wrongful act of the State", while part 2 should deal with what the second part of article 1 termed "the international responsibility of that State". The function of part 2 of the draft would thus be to define such responsibility by spelling out its content, forms and degrees and, in particular, by identifying the new legal relationships arising out of a breach of an international obligation.

4. Such legal relationships would depend on the source of the international obligation breached, which could be a bilateral or multilateral agreement, a special multilateral agreement establishing an international régime, a rule of *jus cogens* or a rule of customary international law. Account would then have to be taken of whether, for example, the agreement stated how the new legal relationships were to be regulated. It might also be relevant to consider the question of countermeasures in discussing the regulation of the new legal relationships. A treaty might well allow certain responses or reactions, such as the withdrawal of privileges, the declaration of a person as a *persona non grata*, the severance of diplomatic relations, the withdrawal of State immunity or the imposition of a countervailing duty by an injured State when export

[1] See *Yearbook ... 1979*, vol. II (Part Two), p. 119, document A/34/10.

[2] See 1597th meeting, foot-note 1.

subsidies caused damage to local industry. It would also be possible for the injured State to invoke article 60 of the Vienna Convention[3] in response to a material breach of an international obligation.

5. Part 2 must, moreover, deal with the relationship between reparations and reactive measures or responses. Reparation was a purely technical question, involving either restoration of the situation existing before the breach, payment of damages or guarantees of good behaviour in the future. A more difficult question was that of reactive measures or responses, which had a bearing on the relationship between parts 2 and 3 of the draft articles and raised the legal and political problem of whether the injured State could do anything other than what was provided for in the treaty.

6. The Commission must therefore clearly define what it meant by "responses", which could be classified on the basis of "measures 'legitimate' under international law" and "sanctions", which were discussed in the commentary to draft article 30.[4] It would also be necessary to indicate the kind of unilateral measures permissible and the limitations thereon. The concept of proportionality was certainly relevant in that respect, and its elements must therefore be spelled out. In addition, a decision would be required as to whether a State could take countermeasures without first demanding reparations—in other words, on the question of the preconditions for the exercise of the right to take countermeasures.

7. The Special Rapporteur might give further consideration to the relationship between countermeasures, which involved the concept of proportionality, and part 3 of the draft articles. One aspect of the concept was that, if countermeasures were not proportional, they were themselves a breach of an international obligation and therefore entailed responsibility. Another aspect was that proportionality could act as a mitigating circumstance in the determination by the forum, court or States concerned of the amount of reparation to be paid. In his opinion, part 2 should deal with the validity of countermeasures, while part 3 should deal with the quantum of reparation.

8. Lastly, he was of the opinion that the question raised in paragraph 101 of the report was similar to the subject-matter of chapter 5 of the draft (Circumstances precluding wrongfulness). Nevertheless, once the existence of an internationally wrongful act had been established, it was necessary to decide what circumstances precluded reactive measures, a question that could therefore be dealt with in part 2, as the Special Rapporteur had suggested.

9. Mr. SCHWEBEL said that the draft articles contained in part 1, which had been criticized as abstract, if not abstruse, would necessarily affect the approach to and content of part 2. One reason why the draft articles seemed abstract in nature was that they largely failed to come to grips with the very real problems of the primary rules of State responsibility, on which the Commission had had reason to doubt that it could reach agreement. However, the Commission might also have failed to seize the opportunity to advance the process of the codification and progressive development of the primary rules relating to issues on which it could well have been possible to arrive at an agreement, such as the standing of States to espouse the claims of persons in particular relationships to them. At the same time, it had gone so far as to enunciate in article 19 far-reaching rules on which it was now clear that agreement among States would almost certainly not be reached.

10. The draft articles adopted so far could perhaps be further criticized on the grounds that some of them, such as article 2, seemed to be statements of the obvious, whereas others, such as article 25, were awkwardly cast. Nevertheless, the draft articles had seemed less abstract and abstruse when he had had occasion to take part in their practical application in the case concerning *United States Diplomatic and Consular Staff in Tehran*. The United States memorial in the case had relied heavily on draft article 8 to impute to the Government of the Islamic Republic of Iran responsibility for the acts of the militants who had seized and held hostage United States diplomats and nationals. The International Court of Justice had been gratifyingly responsive to the argumentation that had been based on that draft article and the commentary thereto. Indeed, the Court's decision[5] that Iran was responsible to the United States for gross and grave violations of its international obligations contained many passages of great relevance to the Commission's work on State responsibility.

11. He cited that case because it demonstrated that a statement of the obvious might not be otiose in present-day international relations. Nothing could be more obvious than that the holding of foreign diplomats as hostages was, in the context of international law and relations, incomprehensible and indefensible. The case also demonstrated that a restatement, bearing the authoritativeness of the Commission, of certain fundamental norms of State responsibility could make a significant and practical contribution to the strengthening of international law and relations. He now felt able to tell the most pragmatic of lawyers who queried the practical use of the Commission's work on State responsibility that they should read the judgment of the Court in the hostages case.

[3] *Ibid.*, foot-note 4.

[4] See *Yearbook ... 1979*, vol. II (Part Two), p. 116, document A/34/10, chap. III, sect. B.2, art. 30, paras. (3)–(5) of the commentary.

[5] *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, p. 3

12. It was clear that, in drafting part 2 of the draft articles, the Special Rapporteur and the Commission would have to take full account of part 1. The latter could, if necessary, be refashioned on second reading in the light of the comments of States, which might also have an impact on part 2 and which were already sufficient to place draft article 19 in jeopardy. It was quite clear from those comments that a large number of States seriously challenged that draft article on very substantial grounds, one of them being that the draft article was difficult to reconcile with the Commission's decision to avoid dealing with the primary rules of State responsibility.

13. Still more serious were the criticisms that draft article 19 entailed criminalizing State responsibility; that it did so in vague, subjective, selective and open-ended ways which violated the general principle of *nullum crimen sine lege*; that there was little basis in legal principle or State practice for introducing into the Commission's work on State responsibility a distinction between international delicts and international crimes; that to speak of criminal acts of States as though States could be hanged or imprisoned or as though their peoples could be collectively punished was questionable in the extreme; that, among the great authorities on State responsibility, there was antagonism towards, rather than support for, criminalizing State responsibility; that there was so little support because it was dangerous to confuse the centralized legal order of a State with the decentralized legal order of international life; and that the decentralized character of international life was perfectly illustrated in the fact that no international court would have effective jurisdiction to judge the alleged criminal acts of States.

14. The uneasiness about the use of the expression "guilty State" was perhaps indicative of the caution that should be exercised in preparing part 2 of the draft articles—caution which should take account of the fact that article 19 had not attracted, and gave little sign of attracting, the consensual support that would prove necessary if it was to figure in the final version of the draft. The Special Rapporteur might therefore wish to proceed on alternative assumptions—that draft article 19 might, or that it might not, be retained.

15. As to the stimulating report under consideration, he generally agreed with the Special Rapporteur's approach and analysis and thus saw no reason to leave aside the question of sanctions or countermeasures. When a State committed a breach of an international obligation and incurred international responsibility, the injured State was entitled to termination of the breach and to reparation. Reparation was not a unilateral phenomenon, because it reflected a kind of agreement between the transgressor State and the injured State. When, however, there was no such agreement and reparation was not made, the injured State could resort to sanctions within the limits of international law. If the term "sanctions" was to apply only to collective responses, then the injured State could take countermeasures. It would therefore be incorrect to maintain that reparations applied in the case of a delict and that sanctions applied in the case of a crime.

16. He had been impressed by the idealism of Sir Francis Vallat's remarks at the previous meeting concerning countermeasures and only wished that he was able to agree with them. However, in view of the current decentralized international legal order, the brazen and repeated violations of international law that characterized the present era and the ineffectiveness of international institutions, countermeasures might be the only recourse open to law-abiding injured States. In the world of today, countermeasures might be not only lawful but necessary, something that was rightly recognized in article 30 of the draft, implicitly in the Judgment of the I.C.J. of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran*[6] and expressly in the arbitral award of 9 December 1978 in the case concerning the *Air Services Agreement of 27 March 1946* between the United States and France.[7] Hence, part 2 of the draft articles must not fail to deal with the matter of countermeasures.

17. In his opinion, a particularly serious offence could well give rise to a new relationship between the transgressor State and a group of States or, indeed, the entire international community. At the previous meeting, Mr. Calle y Calle had aptly drawn attention to a current example and to the measures of retorsion that were being taken by certain States. The provisions of Articles 62 and 63 of the Statute of the International Court of Justice were also of relevance in that regard.

18. He agreed with the tenor of paragraphs 13 to 21 of the report and noted, with regard to paragraph 22, that the Special Rapporteur's conclusion was supported by the fact that, in the hostages case, the International Court of Justice had decided that one of the elements of Iran's responsibility was its failure to prevent or put an end to the conduct of persons or groups of persons who, initially, had been found not to be acting on behalf of the State. On the other hand, further explanation of the rationale of paragraphs 23 to 25 would be welcome. While it was right to affirm that the principles of human rights were such that the State could not be responsible for everything that happened on its territory or everything done by its nationals, it was, none the less important that the principles of State responsibility should continue to hold a State liable for certain acts, of omission as well as of commission. Again, the three parameters mentioned in paragraph 28 formed an appropriate method of analysis, but in connexion with the first of those parameters it should be noted that *restitutio in integrum* first of all demanded and presupposed the cessation of the transgressor State's illegal conduct.

[6] *Ibid.*

[7] See A/CN.4/330, para. 86.

19. The exposition of the three parameters was illuminating, but he did not share the view expressed in paragraph 34 that mere reparation *ex tunc* was required in cases where an obligation concerning the treatment to be accorded to aliens had been breached, since it was easy to conceive of situations in which assurances against future violations might be desirable or necessary.

20. The second sentence of paragraph 53, to the effect that a response to an internationally wrongful act was not necessarily intervention in the affairs of the State committing the act, was one of those statements of the obvious that, in the light of contemporary circumstances, none the less bore repetition because the proposition was accepted neither in the contentions nor in the practice of some of the actors on the international scene. Moreover, like many of his affirmations, the Special Rapporteur's statement in paragraph 64 that a material breach of a multilateral treaty necessarily inflicted a measure of injury on all of the parties to the treaty was also correct. Similarly, the view expressed in the last sentence of paragraph 66 was true, for the answer to the question of whether international crimes constituted the sole category of internationally wrongful acts that entailed a non-neutral position on the part of every other State must definitely be in the negative.

21. On the other hand, he was inclined to doubt the validity of the assertion in paragraphs 71 and 72 of the report that a collective decision was required before third States could take any action in response to a wrongful act. A collective decision might be and probably was needed in order to require third States to take responsive action, but whether it was needed in order to authorize them to take such action was less certain. The question of what constituted a "collective" decision also had to be answered. For instance, was a recommendation of the General Assembly to States to withhold aid from an aggressor such a decision? A recommendation of that kind could not be binding on States, but it might authorize them to take responsive action and thus insulate them against claims based on that action. Admittedly, the case made out in paragraph 74 for a collective decision to impose on third States a duty to react to a wrongful act was a strong one, and the Special Rapporteur's emphasis on observance of the rule of proportionality in that and other paragraphs of the report was sound, yet the argument that a collective decision was required in the case envisaged in paragraph 76 was not altogether convincing.

22. As to the interesting question raised in paragraph 81, it was clear that non-payment of an adequate indemnity was an internationally wrongful act, but it was arguable that the transgressor State was bound to pay more than the "appropriate indemnity" in certain circumstances, such as those involving a denial of justice.

23. Paragraph 87 mentioned an arbitral award in which it had been stated that the power of a tribunal to decide on interim measures of protection minimizes the authority of the injured State to initiate countermeasures. Where the tribunal had the necessary means to achieve the objectives justifying the countermeasures that was, to some extent, reasonable, but where the transgressor State failed to comply with the tribunal's interim measures of protection, it was plain that the injured State was not debarred from applying or maintaining countermeasures. Moreover, measures of retorsion could be applied in any event. The extract in paragraph 94 from the same arbitral award, with its carefully measured words about the legality of countermeasures in the framework of proportionality, deserved quotation. He wished merely to add that, if countermeasures were permissible while negotiations were in progress, they were, *a fortiori*, permissible when the transgressor State refused to negotiate.

24. Lastly, the Special Rapporteur said in paragraph 98 that a mere statement that there should be "proportionality" between response and breach left the question fully open. Personally, he agreed that some specification of the meaning of proportionality was highly desirable, but was not sure that it was possible. He awaited with interest the Special Rapporteur's clarification and development of the approach suggested in paragraphs 99 and 100 of the report.

25. Mr. EVENSEN said he agreed with Mr. Francis that an outline of the structure of draft articles would be a useful next step in the Special Rapporteur's work on part 2. Such an outline should not be too difficult to prepare, because it had already been sketched out in the report under consideration.

26. For example, he concurred with the view expressed in paragraph 6 that part 2 of the draft should in effect determine the consequences that an internationally wrongful act of a State might have under international law in different hypothetical cases. Moreover, it should cover not only reparation but also punitive measures, in connexion with which the Special Rapporteur had used the term "sanction". It might, however, be useful to use the term "sanction" exclusively for very special types of punitive measures, such as those referred to in Article 41 of the Charter of the United Nations. Various other terms might then be employed for other kinds of responses to breaches of international obligations.

27. It was certainly necessary to differentiate clearly between part 2 and part 3, for the latter would cover the implementation of international responsibility and the settlement of disputes. However, it might well prove difficult to draw a line of demarcation between the content, forms and degrees of international responsibility and its implementation, especially in the case of responses involving countermeasures, for the difference between the content and implementation of international responsibility was somewhat vague and elusive. It was his understanding that, in using the term

"implementation", the Special Rapporteur was referring to the purely procedural aspects of international responsibility.

28. In connexion with the three parameters to be taken into account in drawing up a systematic catalogue of the new legal relationships created by a State's wrongful act, the Special Rapporteur examined in paragraphs 29 to 32 of his report three time elements involved in determining the content of such relationships. Those three elements all related to the problem of re-establishing the balance disturbed by the wrongful act. Reference was made in paragraph 31 to the view of the P.C.I.J. in the *Factory at Chorzów* case that the purpose of the principles of international responsibility for wrongful acts was "to wipe out all the consequences of the illegal act". That view was, in principle, correct, but it gave an oversimplified picture of the problems to be dealt with in part 2. It should be remembered that the *Factory at Chorzów* case, in which economic issues had mainly been at stake, had been concerned with the protection of aliens and their property rights. In such instances, the damage could at least be assessed in terms of economic yardsticks. Nevertheless, he agreed that the three time elements involved in the *ex tunc*, *ex nunc* and *ex ante* approach might, to some extent, be taken into account in determining the size, value and contents of the reparation due as a result of a breach of an international obligation entailing international responsibility.

29. The distinctions drawn in paragraphs 32 to 36 between the various forms of *restitutio in integrum*, on the other hand would be much more valuable for the drafting of specific articles than the different time aspects of the content of the new legal relationships. The Special Rapporteur had introduced the concept of *restitutio in integrum* as a means of referring to the wiping out of all the consequences of the illegal act and to guarantees by the transgressor State that similar illegal acts would not occur in future. The question that arose in that regard was whether part 2 should include an enumeration of the various types of reparation which the transgressor State should be obliged to make.

30. The possible responses by injured States or others to a breach of an international obligation included countermeasures, responses under specific provisions of treaties, the responses of international organizations, and specific means available to the individual members of such organizations. In the traditional—or perhaps westernized—concept of international responsibility, there had been two main forms of responses. One was *restitutio in integrum* in the narrow sense of the term, namely, restitution in kind or restoration of the situation that had existed before the illegal act occurred. The other was payment of compensation for damages suffered, including payment of punitive damages.

31. The first form might be described in part 2 in the strict sense in order to indicate that what was required was the restoration of a particular situation. The second form of response, namely, payment of pecuniary compensation for damages suffered, related to the protection of aliens and the injuries suffered by a State as a result of violations of the rights of its nationals. In principle, he shared the view that the rights of aliens and the ensuing obligations of States should be spelled out in greater detail in part 2 than had been done in part 1. The questions of property rights and full and timely compensation for violations thereof were, however, two of the most controversial in modern State practice and in international law. He did not envy the Special Rapporteur, who would have to spell out the relevant principles in the form of draft articles, or the body which would have to hammer out hard and fast rules that would apply in that respect.

32. The report repeatedly referred to injured States and third States. It was his impression that the Special Rapporteur had perhaps drawn a line between the two without taking sufficient account of the fundamental developments that had taken place since the Second World War and had led to the emergence of a new notion of injury and interdependence. For a broad category of internationally wrongful acts, that notion no longer differentiated between injured States and third States. It would be preferable for the report to deal with the large number of parties that might have suffered injury as a result of an internationally wrongful act. Such parties might include individual States, group of States that were injured because of their interdependence, members of international organizations, international organizations themselves, and even the international community as a whole.

33. Lastly, in paragraph 41 of the report the Special Rapporteur pointed to the Judgments of the International Court of Justice in the *South West Africa* cases of Ethiopia *v.* South Africa and Liberia *v.* South Africa as a precedent indicating that those States had no special right to enforce the rules of international law against South Africa. In his opinion, a number of developments since 1970 had made those Judgments outdated. Hence, they did not offer good examples of a possible response to an internationally wrongful act.

34. Mr. BARBOZA said that the Special Rapporteur's topic should deal with the secondary rules and, in that regard, with the consequences of wrongful acts—in contrast to part 1 of the draft, entrusted to Mr. Ago, who had been concerned principally with wrongful acts. Those secondary rules could be expressed in the following way: a breach of a primary obligation (a wrongful act) must lead to a sanction (the term "sanction" being understood in its broadest sense). In other words, a wrongful act of a State must have clearly determined legal consequences. As Mr. Ago had dealt with the first limb of the rule, namely, the wrongful act, the circumstances in which it occurred and under which a given act would be

attributed to a State, the Commission would now have to deal only with the consequences of the wrongful act. The Commission's work on the topic should be set within those confines.

35. The Special Rapporteur had said it should be borne in mind, in considering part 2 of the draft, that the situation might differ, depending on whether the origins of the wrongful act lay in the breach of a conventional obligation or of a customary obligation. He had said that the breach of a conventional obligation gave rise to very different consequences with regard both to the position of the parties and to the measures available to those parties, because article 60 of the Vienna Convention, in dealing with a material breach of a multilateral treaty by one of the parties, treated the other parties differently according to whether they were especially affected by the breach, or the breach radically changed the situation with respect to the further performance of their obligations, or they were parties on which the breach had neither of those effects. The measures available to the parties as a consequence of the breach varied accordingly. Personally, he wondered whether the Vienna Convention was in fact relevant. It embodied a comprehensive set of rules that governed the responsibility incurred in the event of the breach of a treaty and determined the positions of the parties to the treaty and the corresponding legal consequences. All that was governed by the law of treaties, not by the draft now before the Commission. However, in the case of some further damage that gave rise to compensation over and above the sanction available under the treaty, namely, the termination or suspension of that treaty, the matter would indeed fall within the scope of part 2 of the draft and the distinctions that the treaty made between the parties would disappear.

36. Consequently, part 2 of the draft was concerned with the damage caused by the breach and with the application of the general principles of responsibility, rather than the treaty itself, which was to be regarded as one element in the case, and not as the source of responsibility. For example, in the *South West Africa* cases of Ethiopia *v.* South Africa and Liberia *v.* South Africa mentioned by the Special Rapporteur, the International Court of Justice had clearly based its reasoning on the interpretation of certain treaties; had the provisions of the Charter of the United Nations or of the Covenant of the League of Nations been different, or had the Court's interpretation of those provisions been otherwise, the result would not have been the same. Those cases were based, therefore, on treaty provisions and had no bearing on the draft. That did not mean that there was no link between the rules in part 2 and the primary rules, since the importance of the primary rules and the seriousness of their breach undoubtedly had an impact on the legal consequences attributed to the wrongful act of a State.

37. The Special Rapporteur, who was seeking the Commission's guidance on a number of points, referred in paragraph 14 of his report to draft articles 27 and 28, which clearly came within the purview of part 2 of the draft. Presumably the Special Rapporteur had had in mind in both instances the concept of shared responsibility, which also arose in draft articles 29, 31 and 32.

38. It was difficult to comprehend the Special Rapporteur's concern with regard to draft article 30, relating to countermeasures. His own view was that the article referred to international law to determine in what conditions a countermeasure was legitimate; whether the breach of the obligation was such that a countermeasure should be applied or whether some measure that went beyond reparation was called for; the proportionality between the countermeasures and the seriousness of the breach; and whether or not force should be used in applying them. If the Special Rapporteur thought it advisable to include those conditions in his draft it would be necessary to modify article 30, which referred not to part 2 of the draft but to international law. Clarification on that point would be most helpful.

39. The title of part 2 was fairly explicit, but it was not easy to grasp the meaning of the expression "content" of State responsibility; perhaps it merely signified the consequences of wrongful acts by States. The "forms" of State responsibility related essentially to reparation and sanctions, although redress could also be secured through compensation, while the "degrees" of State responsibility seemed to refer to the rules of proportionality. He had certain doubts, however, regarding the form of sanctions. The Sub-Committee on State Responsibility had considered various types of sanction in addition to *restitutio in integrum* and compensation, and had stressed the importance of sanctions for the maintenance of peace and international security. Also, as indicated in paragraph 1 of the report, it had referred to the need to examine the relationship between reparation and punitive action. In the circumstances, he wondered why the Special Rapporteur had not examined the whole question in a closer and more systematic manner. International law provided the machinery that was most accessible to States in the event of a breach of their rights. Unfortunately, that machinery was defective, because it was primitive and decentralized, but it was none the less important for the application of individual sanctions and countermeasures.

40. The rule of proportionality was the linchpin of part 2 of the draft, and it applied equally to reparation and to sanctions. The equality involved in reparation was, after all, a form of proportionality.

41. With regard to the method of work to be adopted, he agreed that it was not possible to itemize all possible breaches in the manner of a code of criminal law, matching each breach with an appropriate sanction. Rather, categories of breaches should be established, according to a given scale of values, and account should be taken of the rule of proportionality

for the relevant sanctions. It was also important to bear in mind positive law as developed by the courts.

42. Lastly, with regard to terminology he agreed that some more neutral term, such as "transgressor State", should be found to replace "guilty State". In addition, the word "response" should be avoided to denominate the reaction to a wrongful act, for in the context of part 2 of the project it was used in relation to the term "responsibility" and should be used in reference to that term alone.

43. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, said that the questions raised could be grouped in four broad categories: those relating to principle, those relating to terminology, those relating to the method of work, and miscellaneous questions.

44. The first point to bear in mind with regard to questions of principle was that, in using the term "parties", a distinction had to be drawn between the parties to the primary rule that laid down the particular obligation under international law, the parties to the breach of the obligation, and the parties to a dispute.

45. Most of the questions of principle raised by members concerned the relationship between parts 1 and 2 of the draft. In that connexion, Mr. Ushakov had contended (1599th meeting), first, that any questions left open in part 1 should be answered in part 1; secondly, that part 1 did not lay down primary rules and part 2 should therefore not do so either; and, thirdly, that the Vienna Convention had no bearing on the topic under consideration. So far as the distribution of the final articles was concerned, he, as Special Rapporteur, kept an open mind, although he would point out that the lines of demarcation between parts 1, 2 and 3 had already been approved by the Commission. However, a question of principle arose, because the Commission must decide what the draft should and should not cover. Part 1 covered the whole range of obligations under international law, irrespective of the origin, content and seriousness of the breach, and, while that did not necessarily mean that part 2 had to do likewise, it did require the Commission to give early consideration to articles that, like articles 73 and 75 of the Vienna Convention, would determine the matters that were to be omitted. Moreover, although the Vienna Convention did not deal with State responsibility, article 60 of the Convention did refer to new legal relationships that arose as a consequence of the breach of a treaty. Hence the Commission could not ignore that article, or such related articles as articles 34, 70 and 72.

46. Another question of principle was the relationship of part 2 of the draft to the so-called primary rules. Admittedly, part 1 did not lay down primary rules, just as the Vienna Convention did not stipulate the content of a treaty, but merely the obligations arising thereunder. Part 1 nevertheless recognized that there were different types of primary obligations, in the same way as the Vienna Convention recognized that there were different types of treaty. Accordingly, part 2 should recognize different types of obligations, treaties, rules of general international law, and perhaps even rules of *jus cogens*. It was particularly important that it should do so since many Governments would not consider accepting part 1 as a whole (and particularly draft article 33)[8] without clarification regarding the legal consequences of acts of the kind covered by chapter V of the draft. In drafting articles on any topic, the Commission could not altogether avoid the need to interpret the sources and rules of international law, since no one part of that law was entirely independent of the others; but with a little care it should be possible to avoid the pitfalls.

47. A further point of principle related to the rule of proportionality, which was a fundamental aspect of the question of responsibility. It was apparent, however, that further analysis was required in order to define its scope more precisely in part 2 of the draft. Mr. Šahović (1599th meeting) had not ruled out the need for part 2 to take due account of the different kinds of primary rules and had also referred to the boundary line between parts 2 and 3, a point that was touched upon in paragraphs 41, 42 and 101 of the report. The Commission might well wish to discuss it further within the context of specific draft articles.

48. In the matter of terminology, the most frequent query was the relevance of the distinction drawn in the report between the guilty, or transgressor, State, the injured State and the third State, and the definitions of those terms. He had drawn that distinction, first, because it had already been used in one of Mr. Ago's earlier reports and, secondly, because it had, in effect, also been drawn in article 60 of the Vienna Convention. Moreover, it did not prejudge the possibility that a third State might claim reparation or take other measures. The distinction had not yet been discussed in relation to part 3 of the draft, but that could be done later.

49. If he had laid what might seem to be undue emphasis on the position of third States, it was because of the structural changes in international society. The position of third States thus typified modern developments in international law and should give the Commission much food for thought in an area which had yet to be clearly defined.

50. Mr. Pinto had raised at the 1599th meeting a number of matters in which terminology and principle overlapped. On the whole, his analysis of the report was correct. It was true that the purpose of the new legal relationships created by international law as a consequence of an internationally wrongful act was to restore in some measure the equilibrium that had been disturbed by that act, but it followed that the parties to the new legal relationship were not necessarily the

[8] See A/CN.4/318/Add.5, para. 81.

same as the parties to the primary rule breached. In that connexion, it should be noted that, in many cases, a universal rule of international law, or one laid down in a multilateral treaty, was a uniform rule only for the purpose of bilateral relationships. For instance, under the universal law of the sea, if a coastal State treated a flag State in a manner that was not in conformity with the universal rules, it was difficult to see *a priori* how another coastal or flag State would be affected by that situation. In other words, the parties to the new legal relationship arising out of the breach were not the same as the parties to the universal primary rule. Normally, the breach of an obligation laid down in a bilateral treaty simply created new legal relationships between the same parties—namely, the parties to the rule—and in that case the parties to the breach were generally the same.

51. With regard to the word "response", he was not suggesting that it should appear in the draft; he had simply used it in the report in the sense of a reply under international law to the breach of a rule of international law. It could also be used, in the same sense, in relation to the duty of the transgressor State to make good any damage suffered as a consequence of the internationally wrongful act of that State, where such a duty was imposed by international law. There again, the rule of proportionality would apply, since there were several types of reparation and it was not certain that all of them, including punitive damages, would be resorted to under international law. "Response", therefore, had been used to denote a reply to all the consequences of an illegal act, including the duty to make reparation.

52. As to method of work, an outline of part 2 would certainly be needed for the future. He had not submitted such an outline from the outset, since he had considered it premature to do so before the Commission decided which matters it wished to cover in the draft.

53. In the category of miscellaneous questions, Mr. Pinto's point regarding a possible extension of the concept of new legal relationships to cover the case of several transgressor States was in fact discussed in paragraphs 14 and 26 of the report, but he agreed that it was necessary to consider the point further. Mr. Pinto had also queried the term "risk-allocation", which appeared in paragraph 19 of the report. It was not a familiar term in international law and had been used, rather in the nature of an aside, to take account of cases in which the legal consequences arose as a result not of a wrongful act but of some extraneous force. On the other hand, it might be of some significance in the matter of the boundaries between his own and Mr. Quentin-Baxter's topics. The expression "quantitative proportionality" had been used to indicate the seriousness of the situation created by a breach, and the expression "qualitative proportionality" denoted a difference in the quality of the rules.

54. Mr. Thiam had rightly observed (1600th meeting) that it would be difficult to draw up a tariff of penalties. For his own part, as Special Rapporteur he had no intention of laying down a penal code that would itemize all the different offences and determine the relevant penalties. It might, however, be possible to establish a *scala* of gravity, with a view to enunciating a general principle of proportionality and then providing some further indications for the application of the principle. Mr. Thiam had also referred to the important distinction between two kinds of responses, namely, reparation and sanctions. For all that, somewhere between the two lay certain countermeasures, and in the arbitral award cited in paragraph 94 of the report the countermeasures had been considered as measures to re-establish equality between the parties. Possibly, therefore, a third category of response should be established in order to cover countermeasures.

55. Mr. Francis (*ibid.*) had questioned whether the three exceptions to the third parameter of the new legal relationships, as listed in paragraph 62, were valid. The point he had sought to make as Special Rapporteur was that, if a wrongful act created a bilateral relationship between the transgressor State and the injured State, a special reason would be required for vesting in a third State another right, let alone a duty, to intervene in that bilateral relationship. Such a special reason might be, for example, that a State not directly affected by the breach was none the less a party to the rule breached, and thus entitled to intervene, or that the obligation breached was one which protected a fundamental interest of the international community as a whole. Members would recall that a recent judgment of the I.C.J. took the view that certain breaches of the law of diplomatic and consular relations affected the international community as a whole.

56. Mr. Calle y Calle had suggested at the previous meeting that, by definition, every internationally wrongful act caused injury—something which was in a sense true. However, it need not be inferred that a distinction could not be drawn between the various responses to such an act; even within the framework of reparation, the scope of the duty of the transgressor State would vary, depending on the nature and seriousness of the breach. In that connexion, members would note that paragraph 31 of the report mentioned the question of "punitive" damages and also of damages for *lucrum cessans*.

57. He fully agreed with Mr. Tabibi (1600th meeting) that the topic was a delicate one and had political overtones. He also agreed that it was not possible to dispense with part 2 of the draft, since it was necessary to define not only when State responsibility arose but also what it entailed. References to the teachings of publicists would certainly be included in his future reports and had been omitted in the present instance

merely because he had not thought them appropriate in the context of an initial analysis of the topic.

58. He endorsed Sir Francis Vallat's pertinent comments (*ibid.*) regarding terminology, and also the remark that the State's obligation subsisted after the breach. Yet the obligation could not necessarily be viewed in terms of the same situation. After all, a distinction had to be drawn between cases in which an injured State could claim specific performance of an obligation and those in which it could only claim damages. Such cases would have to be differentiated in part 2. It was true that responsibility related primarily to reparation by the transgressor State, but reparation could involve a number of measures. In that connexion, Sir Francis Vallat had alluded to certain measures which, to his own mind, were essentially punitive or *ex ante* legal consequences. Again, Sir Francis Vallat did not like the emphasis placed on countermeasures and self-help, but perhaps a re-reading of paragraphs 86–89 would give him satisfaction. Similarly he had expressed doubts regarding the approach outlined in paragraphs 99 and 100; possibly, he would be able at some later stage to indicate what other approach might be more appropriate.

59. Mr. Díaz González (*ibid.*) had, generally speaking, been in favour of the report. He had rightly pointed out that the Commission had already decided provisionally on the content of parts 2 and 3 of the draft and should proceed accordingly. His ideas would certainly be borne in mind in the further work on part 2 of the draft.

60. Mr. Jagota's views, expressed at the present meeting, differed from his own on one point: he could not altogether agree that the rule of proportionality was significant only in the case of the second parameter, relating to countermeasures, since there was also an element of proportionality in the duty to make reparation. Different types of reparation were relevant in the context of State responsibility, and a case could be made out for a corresponding degree of proportionality. It was, of course, far easier for a State to pay damages under its internal law than to restore the pre-existing situation, but the degree of gravity of the response also raised the problem of the degree of responsibility. Mr. Jagota had also correctly noted that the draft was concerned exclusively with State responsibility and not with the responsibility of international organizations. In his capacity as Special Rapporteur, he had none the less thought it appropriate to deal in the report with the influence of international organizations on countermeasures. Mr. Jagota had gone on to emphasize that the draft should deal solely with responsibility for wrongful acts. There was, however, one possible exception. Chapter V dealt in effect with circumstances which did not rule out the possibility of some kind of response, and part 2 should therefore deal with the consequences of acts whose wrongfulness was precluded in special circumstances. That was particularly important in the case of draft article 33, relating to state of necessity. In paragraphs 86 to 89 of the report, he had sought to bring out the relationship between countermeasures and the provisions of part 3 of the draft, to which Mr. Jagota had likewise referred, and hoped that they afforded an indication of what he thought might be relevant in the context.

61. Mr. Schwebel, who seemed to endorse the general approach taken in the report, had questioned whether the requirement of a collective decision (as proposed in paragraphs 71 and 72) was really valid. That was a matter which the Commission would have to consider, together with the question raised by Mr. Tsuruoka (1598th meeting), who had asked what constituted a collective decision. Many kinds of decisions, for instance, those taken under the Charter of the United Nations, were not strictly speaking decisions in the legal sense, but they could nevertheless be considered as such.

62. Mr. Evensen considered that the distinction between injured and third States was somewhat outmoded. Cases in which such a distinction did not create a difference were nevertheless becoming increasingly common in modern international law, and in that connexion, he would refer members to the comments set forth in paragraphs 62 and 96 of the report. Mr. Evensen had also taken the view that the 1962 Judgment of the International Court of Justice mentioned in paragraph 41 of the report might also be outdated. However, the Judgment in question had to some extent been reaffirmed in the advisory opinion delivered by the Court in 1971,[9] stating that there was a need for a collective decision in certain instances.

63. He had been greatly assisted by Mr. Barboza's remarks and would simply confine himself to a few points. Mr. Barboza had asked whether it was really necessary to codify the rules of international law involved in draft article 30. That, of course, was a matter for the Commission to decide. His own view, once again, was that the rule of proportionality came into play, and that the relationship of that rule to article 30 should also be dealt with in part 2. He agreed with the observation that the rule of proportionality was of some significance, even within the framework of reparation, and trusted that his explanation of the use of the word "response" had dispelled some of Mr. Barboza's misgivings.

64. The CHAIRMAN thanked the Special Rapporteur for his report. The wealth of ideas it contained augured well for further work on the topic of State responsibility, and the discussion had served to clarify the Commission's thinking on a number of controversial issues.

The meeting rose at 6.15 p.m.

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