Document:-
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Summary record of the 1734th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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for all with the legal consequences of international crimes. He believed that the Special Rapporteur had meant to state the general principle that the main difference between international crimes and international delicts was that in the case of delicts the relationship established was between the author State and the injured State, whereas in the case of crimes the injury would be done to all members of the international community. He considered that the enunciation of that principle in part 2, though not essential, might be useful. He did agree, however, that draft article 6, as worded, might give the impression that it dealt in depth with the question of international crimes and sought to define their legal consequences. That impression could be corrected by making the article shorter and by providing that, in the case of international crimes, every State was concerned and every State had obligations, without going into details relating to the third parameter.

40. He assumed that the provisions of part 2 would have to specify in some detail the different legal consequences of the various kinds of breach. Lastly, he too thought that, since draft article 6 spoke of obligations which would clearly arise for States from internationally wrongful acts, draft article 1 should refer not only to the rights, but also to the obligations of other States.

41. Mr. USHAKOV said that the Commission should deal with the subject under study in concrete, not abstract, terms. It should draw up general rules, on the basis of State practice, since it could not draw up "primary" rules and then rules on responsibility for each specific case.

42. With regard to the so-called rule of "proportionality", he considered, unlike the Special Rapporteur and other members of the Commission, that it could not be a general rule—a general principle of general international law. In his view, there were two kinds of "proportionality". The first kind was "logical proportionality" according to which, in internal law, the legislator prescribed the maximum sentence for the most serious crimes and light sentences for minor offences. Once the sentence had been thus prescribed, it was for the courts to apply it. However, depending on the circumstances, the legislator could depart from that strictly logical approach. If article 2 was meant to provide, logically, the highest degree of responsibility for the most serious internationally wrongful act, he could accept such a rule of logical proportionality. But in international law the legislators—in other words States—had already laid down the content, forms and degrees of State responsibility: Chapter VII of the Charter of the United Nations set out the measures to be taken with respect to the most serious offences, such as acts of aggression, threats to the peace and breaches of the peace.

43. The second kind of "proportionality" related to the lower and upper limits of the sentence prescribed by the legislator in internal law for each offence. It was for the court to decide on the circumstances of the offence—such as the seriousness of the act, premeditation, etc.—and to impose the corresponding sentence within the prescribed limits. The same applied in international law: in each individual case, the injured State itself determined the content, forms and degrees of the responsibility of the State which committed the internationally wrongful act. The Commission, as the counterpart of the legislators—that was to say, States—should confine itself to specifying, for each concrete situation or group of situations, the responsibility incurred under international law. But the fact remained that States, which were masters of their rights, were free to decide, except perhaps in the case of breach of a rule of *jus cogens*, not to invoke the responsibility of the State which had committed the internationally wrongful act. He would therefore prefer the draft articles to place more emphasis on the right of the injured State to invoke or not to invoke the responsibility of the offending State. It would then be for the injured State alone to define the content, forms and degrees of that responsibility.

44. He saw only two possible solutions: either the principle of proportionality would replace all other rules, in which case there would be a single rule of proportionality which the Commission would have to draw up, and by which the injured State would be governed in its response to an internationally wrongful act and the problem would thus be solved; or the Commission would determine the content, forms and degrees of State responsibility on the basis of international law, according to the content of the international obligations breached, and would leave the injured State free to claim or not to claim its rights. In the latter case, the Commission would merely have to codify rules already established in international law.

The meeting rose at 1.00 p.m.

1734th MEETING

Thursday, 24 June 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (*continued*) (A/CN.4/342 and Add.1-4,[1] A/CN.4/344,[2] A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*[3] (continued)**

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).

[2] *Ibid.*

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

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

ARTICLES 1 to 6[4] (*continued*)

1. Mr. BARBOZA said he noted that the Special Rapporteur had withdrawn the five articles submitted in his second report (A/CN.4/344, para. 164) and had submitted six new articles, proposed in his third report (A/CN.4/354 and Add.1 and 2, paras. 136-150). The former article 1 would be dropped; the former articles 2 and 3 would be covered, in some way, by new provisions, but with more complex wording; the former article 4, which referred to the obligation to make reparation and was therefore very important, would appear after article 6, in the list of legal consequences flowing from the breach of an international obligation; and the former article 5, which had dealt with injury to aliens, had been omitted, though some provision on the treatment of aliens would eventually be included.

2. He agreed that the former article 1 should be dropped, for two reasons. First, while he understood the reasons why some members of the Commission considered that the initial obligation was not extinguished in the case of non-performance, he believed that it was really extinguished. There was no denying that the breach of one obligation created another, which necessarily brought about the termination of the first. For example, a State which had to pay a certain sum of money on 1 January 1982 had an obligation not only to pay that sum, but also to pay it on the stipulated date: the time-limit was an essential element of the obligation. If the State did not pay on the stipulated date, it did not discharge its obligation and a new obligation was created, which contained, besides certain elements of the initial obligation—the amount to be paid—other separate elements, such as payment of interest and the setting of a new time-limit. Logically and legally, therefore, the initial obligation was terminated. Secondly, a State could not have two obligations relating to the same subject at the same time; therefore, if the original obligation continued to exist, the new obligation could not come to life and international responsibility could not arise. The new obligation was thus a substitute obligation.

3. The former article 2 was covered in the third report by the new article 3 (*ibid.*, para. 147). As to the former article 3, it was not very clear to him whether the rights it referred to were all the rights of the State under international law or only the rights linked with the obligation breached. Whatever the meaning of that article, its object seemed to appear in articles 1 and 3, as proposed in the third report: the State which had committed the internationally wrongful act would be deprived of its rights only within the limits laid down by the draft articles and the applicable rules of international law.

4. The new article 1 submitted by the Special Rapporteur in his third report deserved very careful consideration. Some members of the Commission had expressed the opinion that it was nothing more than a link between part 1 and part 2 of the draft. He himself believed that article 1 set out the basic principle underlying all the draft articles: it established the creation of new obligations and rights in the event of breach of an international obligation. It did so in general terms, and the scope of the new rights and obligations created was detailed in the articles that followed, in particular in article 4; he was therefore in favour of maintaining it. Some members of the Commission had suggested that a reference to other rules of international law should be added to article 1, because the Special Rapporteur had indicated (*ibid.*, para. 26) that part 2 of the draft articles was not going to contain an exhaustive list of the legal consequences of a breach of an international obligation. He himself respected that opinion and was quite prepared to follow it, but he wondered whether the saving clause in the new article 3, which read: "except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law", was not sufficient.

5. Article 1 referred to obligations and rights which, in the words of Mr. Ushakov, were two sides of the same coin. Nevertheless, he believed that part 2 of the draft laid down two broad categories of norms. The first category corresponded to the first parameter, namely, and speaking in broad terms, the obligation to make reparation (including in that concept *restitutio in integrum*) or the substitute obligation. That obligation was essentially of the same nature as the initial obligation: it was a "primary" obligation. The State which had committed the internationally wrongful act did not incur responsibility if it carried out the substitute obligation. Nevertheless, there was a very great difference in content between the substitute obligation and the primary obligations under international law which established the initial obligation. Those primary obligations were extremely varied in content, whereas the substitute obligation was basically of the type referred to in the former article 4, and variants of it were very rare. The Commission would have no trouble in defining the concept of a substitute obligation in part 2 of the draft articles, since it would not be coming up against the enormous problems raised by the classification of primary obligations.

6. The second broad category of norms corresponded to the concept of sanctions. By discharging the substitute obligation, the State was cleared of all responsibility; but if it did not discharge the substitute obligation, it could be liable to a sanction. The sanction would thus result from the non-fulfilment of the obligation; but there could also be shorter ways to sanctions, i.e. not passing by the breach of the substitute obligation: for example, *exceptio non adimpleti contractus*. In that connection, he had difficulty in situating the rights and obligations which formed the essence of the new article 1 in regard to sanctions. It was not quite clear who were the subjects of those rights and obligations and

[4] For the texts, see 1731st meeting, para. 2.

with respect to whom they were exercised. For example, what were the obligations of the author State in regard to a countermeasure? Possibly, it had the passive obligation not to oppose the countermeasure; the subject of the right would be the injured State which initiated the countermeasure. But countermeasures, which constituted the majority of, if not the only, sanctions, went beyond the framework of the bilateral relations between the author State and the victim State. The State applying a countermeasure was acting as an organ exceptionally empowered by international law to apply sanctions. Article 5 would thus have to be drafted so as to avoid an overlapping of competence between the central competent organ of the United Nations and "decentralized organs", which were individual authorized States.

7. Perhaps the distinction between reparation and sanctions should be reflected in article 1, in a final clause reading: "and may entail countermeasures by the injured State as provided in the present articles". Particular attention would then have to be paid to the arrangement of the articles, and it would be necessary to regulate carefully the responsibility of States in one or more articles, which could appear either in part 2, or in part 3 on the "implementation" of State responsibility. A mere reference to international law, or to self-defence, would not be enough. Countermeasures would have to be defined precisely, or there would be a return to the system which had obtained before the establishment of the United Nations.

8. Article 2 stated the rule of proportionality, a concept which was interesting, but difficult to define. He believed that equivalence played a greater part than proportionality in the obligation to make reparation; but proportionality played an important part in the case of sanctions. The article should be drafted in a positive rather than negative form. As to the substance, he had difficulty in understanding the wording used in reference to the effects of the performance of the obligations and of the exercise of the rights.

9. Article 4, which should be retained as it stood or in some similar form, should not present any difficulties, since the Commission had already had occasion to introduce similar exceptions in favour of rules of *jus cogens* in other draft articles it had prepared. Article 5 should also be retained, subject to the comments he had made concerning it in connection with article 1. Finally, with regard to article 6, he subscribed, on a preliminary basis, to the general ideas expressed by Mr. Jagota at the previous meeting.

10. Mr. FRANCIS said that the six draft articles submitted in the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2, paras. 145-150) should be incorporated, in essence if not in form, in part 2 of the draft. He endorsed, in general, the statement made by Mr. Evensen at the 1733rd meeting and agreed that the Special Rapporteur's withdrawal of the former draft articles 1 to 4, submitted in his second report (A/CN.4/344, para. 164), was premature. He did not, however, have any objection to the withdrawal of former draft article 5. He too would like to know whether the Special Rapporteur intended to examine further principles in subsequent reports, and to have some indication, by the Commission's next session at the latest, of the main articles to be included.

11. The Special Rapporteur's withdrawal of former draft articles 1 to 5 seemed to suggest that he had abandoned his original approach to the first parameter, relating to the new legal relationship created by the breach; perhaps the Special Rapporteur could reassure the Commission on that point, since it was difficult to determine whether all of the six new draft articles dealt with principles, or whether some of them contained substantive provisions.

12. Referring to the withdrawal of the former draft article 1, the Special Rapporteur had said (A/CN.4/354 and Add.1 and 2, para. 15) that there were occasions when an obligation that had been breached could not, in view of its nature, be sustained. But that kind of obligation was the exception; breaches were most frequently in respect of obligations of a continuing, if not of a permanent, character. And it was abundantly clear, in his view, that the former article 1 covered precisely those cases in which the obligation could be regarded as a continuing one.

13. He entirely agreed with Mr. Barboza's views on the new draft article 1, which showed the scope of part 2. It would have no place there as a linkage article, which should normally lead directly to the principles adopted. He would suggest, on an entirely informal basis, a linkage article worded on the following lines: "An internationally wrongful act of a State gives rise to consequences in accordance with the following general principles". A statement of those principles would then follow.

14. As he saw it, there could be a first general principle based on the new draft article 1 as amended in the light of the suggestions made by members. A second general principle could be that laid down in the former draft article 1, which provided, in effect, that an internationally wrongful act of a State did not of itself affect the legal force of the obligation breached. And there could be a third general principle based on the new draft article 3. In that connection, too, he agreed with Mr. Barboza that there was no need to include a reference to other rules of international law in article 1, since the point was already covered in article 3.

15. As to the principle of proportionality laid down in article 2, he considered that the reference to the performance of the obligations of a State should be omitted and that the article should be confined to the responses of the injured State and of third States. He took that view because, bearing in mind the terms of the former draft article 1, he believed that the author State had rights, whether under the instrument in respect of which the breach arose or under international customary law, and that those rights should be preserved within the framework of the principle of proportionality. He

would suggest, however, that the statement of the principle itself be shortened and worded in very general terms. Lastly, he would like a brief statement of the principle of non-recognition to be included in the general principles.

16. Mr. BALANDA said that the method of parameters adopted by the Special Rapporteur was appropriate for the subject, but it was unfortunate that the emphasis had been placed exclusively on the obligations of the State which had committed an internationally wrongful act, whereas the victim State and third States would generally only have rights. Would an injured State be forced to assert its right? That question had to be raised, and he intended to revert to it when examining the draft articles.

17. In paragraph 12 of this third report (A/CN.4/354 and Add.1 and 2) the Special Rapporteur had rightly pointed out that the mechanism of the international responsibility of States should not be confused with its counterpart institution in internal law. The Commission would therefore have to avoid using, in the draft articles, any word which was not in keeping with the nature of the international responsibility of States. For example, any idea of an offence suggested by the concept of negligence, which belonged to internal law, should have no place in draft articles on the international responsibility of States. For international law carefully defined every act or group of acts which constituted a particular offence, whereas in international law any internationally wrongful act engaged the responsibility of its author, even if no damage had been done. He therefore believed that the word "breach", as used in paragraph 88 of the third report, was not appropriate. The concept of "constructive injury" referred to in paragraphs 92 and 94 of that document was not very clear. How could the existence of "constructive injury" be easily proved? Was a "constructive injury" contingent or adventitious? Was a State justified in claiming reparation from another State for a contingent or constructive injury? It should be noted that chapter IV of the same document, entitled "The catalogue of legal consequences", did not give an exhaustive list of such consequences.

18. As a last general comment, he endorsed the view expressed by the Special Rapporteur (*ibid.*, para. 30) that there could be no question of the Commission's proposing a group of rules on the international responsibility of States without providing for an appropriate mechanism for the peaceful settlement of disputes.

19. Turning to the former draft articles 1 to 5 (A/CN.4/344, para. 164), he noted that they dealt with the situation of a State which had committed an internationally wrongful act only from the viewpoint of the obligations which would arise for it under the draft articles, whereas it was no less certain that the author State also had, and retained, rights. that principle should be stated, and it was therefore unfortunate that the Special Rapporteur had withdrawn the former article 3.

20. He wondered whether there might not be an inclination to believe that if an international obligation was frequently breached by States it lapsed, or at least that it lost its binding force; that was, indeed, a characteristic element of any legal rule. And since it was the act which created the law, was there not reason to believe that the repetition of a large group of acts ignoring a rule of law, by a large proportion of the members of the international community, could create a sort of custom affirming the non-existence of the rule being broken? That was where the former article 1, withdrawn by the Special Rapporteur, would be useful: it was important to state, among other principles, that a breach of an international obligation by a State did not affect that obligation.

21. It was also important for the draft articles to contain a provision affirming the principles of *restitutio in integrum* and of equivalent reparation, yet without going into detail as the Special Rapporteur had done in the former article 4. The principle of the obligation of the author State to re-establish the *status quo ante* or, failing *restitutio in integrum*, to make equivalent reparation, was an important principle which should be emphasized. It was quite obvious that certain injuries, because of their nature, could be remedied only by moral reparation. In the five former articles, that double principle was not stated in general and explicit terms.

22. He agreed with the Special Rapporteur that the former article 5 was not necessary. He did not see why the draft should assign a special place to the breach of rules on the status of aliens. To do so might give the impression that the obligation assumed by States in regard to the protection of non-nationals was a special obligation deriving from a superior norm of international law. The reference to "intent", in paragraph 2 (*a*) of the article, was not appropriate in the context: the intent or motive of a State's acts was assessed differently, and in any case in a context completely different from that of internal law, for internal law was equipped with mechanisms which made it quite easy to delimit the *animus delicti connissi* taking account of its structure. Article 5 could therefore be dropped.

23. Turning to the new draft articles proposed by the Special Rapporteur (A/CN.4/354 and Add.1 and 2, paras. 145-150), he observed that article 1 did not state a specific rule, but had some usefulness, as it provided the link between parts 1 and 2 of the draft. Article 2 laid down a principle which deserved to be retained: that of "proportionality". Nevertheless, it had to be acknowledged that application of that principle would come up against many difficulties, because it involved an element of evaluation which was open to different interpretations, especially as the Special Rapporteur used the adverb "manifestly", which was controversial. Furthermore, the evaluation of the proportion would be carried out *post factum*, when the reaction had already taken place, and would certainly not be easy in conflicts between States. According to the Special Rapporteur, the proportion must be between the performance of the

obligations created for a State by its internationally wrongful act and the exercise of the rights created for other States by that act; in other words, between the obligation to make reparation and the right to take countermeasures. But was the proportion limited to that level alone? He believed that it must also be considered at the level of the nature of the illicit act, and of its seriousness. For all those reasons, therefore, it would be preferable to adopt the idea suggested by Mr. Calero Rodrigues (1733rd meeting), that a countermeasure must not be disproportionate. Article 2 mentioned only the rights of the victim State and of third States. But did those States not have any obligations? It would be useful to go more thoroughly into that question.

24. Article 3 established the residual nature of the rules stated: in other words, it would be left to States to avoid other legal consequences they wished to attach to internationally wrongful acts. Article 4 was important because it dealt with *jus cogens*.

25. Article 6 contained several elements, the most important of which was that of an "international crime"; but its application was bound to raise several difficulties. The idea behind those provisions was certainly that of international solidarity between States, at least in the case of self-defence—which, as Mr. Malek had emphasized (1732nd meeting), should be defined as an independent concept, not simply by reference to Article 51 of the United Nations Charter. But the concept of self-defence was not easy to define. The obligations regarding assistance might, in some cases, remain a dead letter, judging from the state of current international relations, which were based on interests and affinities. Was it really believed that all States would rush to the aid of the State unjustly attacked? It was to be feared that on the day of reckoning the results would be scanty and bitter. And who would determine whether an "international crime" had been committed? According to the Special Rapporteur (A/CN.4/354 and Add.1 and 2, para. 150), it would be the organized international community, in other words the United Nations system, and more particularly the Security Council, under Chapter VI of the Charter. Was there not good reason to be sceptical about how quickly the Security Council, seized of an internationally wrongful act, would be able to characterize it properly? The Commission should be realistic; it should try to propose rules that could be applied and would not remain purely theoretical and academic. Article 6 raised another question: could abstention from the international solidarity required under paragraph 1 (*c*), be "punished"? In other words, could such abstention be regarded as a breach of international law? That idea, too, should be examined more thoroughly.

26. His preliminary conclusion was that the draft articles merited the attention of the Commission, and that the Commission should encourage the Special Rapporteur to proceed with their elaboration. He suggested that the Special Rapporteur should apply himself to proposing rules capable of application, for in as controversial and difficult a sphere as that of State responsibility, the Commission would not achieve anything useful if its work could not be respected and applied. Furthermore, the rules to be established should, if possible, reflect the conduct of States, failing which States would refuse to apply them.

27. Mr. LACLETA MUÑOZ said he admired the way the Special Rapporteur had tackled the difficulties inherent in the topic. Generally speaking, he endorsed the comments made by Mr. Evensen (1733rd meeting). He, too, would prefer the five draft articles (A/CN.4/344, para. 64) submitted by the Special Rapporteur at the previous session not to be put aside permanently; those articles did correspond to concepts which had become traditional, and they should be inserted somewhere in the draft. The six new articles were also important and should all be included. Many of the difficulties they raised seemed to be due to the fact that the members of the Commission did not yet know enough about the content of the provisions to follow. Useless discussion could be avoided if the Special Rapporteur would indicate the probable structure of the draft. With regard to the order in which the articles were presented, he agreed to a large extent with Mr. Jagota (1733rd meeting).

28. The new article 1 had been criticized as being a mere repetition of article 1 of part 1 of the draft, and because the words "in conformity with the provisions of the present part two" seemed to exclude applicable customary international law. Those making the first of those criticisms had probably been surprised that a provision which was intended to serve as a link between part 1 of the draft, on the origin of international responsibility, and part 2, on the content, forms and degrees of international responsibility, did not mention international responsibility. That could be corrected by drafting article 1 to read:

> "International responsibility deriving from an internationally wrongful act of a State entails obligations for that State and rights for other States."

As to the saving clause relating to the provisions of part 2 of the draft, the Commission could either add a reference to the other rules of international law, following the model provided by the Convention on the Law of the Sea,[5] or add a suitable introductory clause to the article. It would also be possible to omit all reference to part 2 of the draft.

29. With regard to article 2, several members of the Commission had spoken of the criterion of proportionality, which he believed to be useful. Certainly there was automatic proportionality in the case of damage which could be assessed materially. In such cases, restitution or reparation must be proportionate to the damage caused. But proportionality was also very important in regard to countermeasures.

30. He endorsed Mr. Jagota's comments on the nature of article 3, its importance and the advisability of in-

[5] See 1699th meeting, footnote 7.

cluding it among the general articles. Article 4, which dealt with peremptory norms of general international law, and article 5, which referred to the provisions and procedures embodied in the Charter of the United Nations, were both acceptable.

31. Article 6 was so important that it should be studied carefully and at length. It implicitly referred to the content of article 19 in part 1 of the draft, the article which undoubtedly constituted the Commissions's main contribution to the progressive development of international law on the subject. Article 6 should certainly be expanded, but for the time being it was difficult to see where it might lead the Commission. For example, how should the three parameters adopted by the Special Rapporteur be combined with the different types of internationally wrongful acts to establish the legal consequences flowing from them? The rights of injured States and third States and the obligations of the author State could vary considerably, and the question of the relations between primary and secondary rules could arise. What should be the reaction to material or moral damage, or when there was no damage? What happened when there was one injured State, several injured States, or when all States were injured, as they were in the case of international crime? He wondered whether each of those possibilities would be considered from the point of view of each parameter, whether they would be partly regrouped or whether they would require the application of a new parameter. The Special Rapporteur had studied the question of international crimes, but it remained to be seen how his conception would fit into the general outline. It seemed that it would be necessary to devote a whole chapter to that question, regarding which he was concerned about the same points as Mr. Balanda.

32. For his other comments, he referred the Commission to those submitted by the Spanish Government on part 1 of the draft (A/CN.4/351 and Add.1-3). On the whole, the views expressed in regard to article 19 could be considered as his own. He believed it was necessary to set up institutional mechanisms for determining both the occurrence of international crimes and their legal effects.

33. Finally, he drew attention to a drafting point he had mentioned more than once in the Sixth Committee of the General Assembly: in accordance with the terminology traditionally used in Spanish-speaking countries, the expression "*acto internacionalmente ilícito*" should be used, rather than the expression "*hecho internacionalmente ilícito*".

34. Mr. JACOVIDES said he believed that the topic of State responsibility was perhaps the most important on the Commission's agenda, in both its scope and its implications. The "cornerpieces of the jigsaw puzzle", in the words of Sir Ian Sinclair (1733rd meeting), had been provided, but more effort would be needed to put the new draft articles 1 to 6 into acceptable form.

35. The element of proportionality, at present expressed in article 2 in the form of a double negative—"not ... manifestly disproportional"—was a key element that should be retained, either in its present position or elsewhere. Two other very important factors in providing the desired parameters were the peremptory norms of general international law and the provisions and procedures embodied in the United Nations Charter, which were dealt with in draft articles 4 and 5, respectively. In this third report (A/CN.4/354 and Add.1 and 2, paras. 148-149), the Special Rapporteur had rightly acknowledged that recognition of *jus cogens* constituted one of the most important elements in the progressive development of international law, and had pointed out that the legal principle stated in Article 103 of the Charter also applied to obligations not imposed by "any other international agreement". The Charter system in all its aspects, as authoritatively interpreted in such documents as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[6] and the Definition of Aggression[7] also applied to the legal relationships between States resulting from an internationally wrongful act of a State.

36. Another important element which should be retained was the effect upon third States of an act of a State which constituted an international crime. That element derived from article 19 in part 1 of the draft, and the new article 6 rightly laid an obligation on third States not to recognize as legal the situation created by such act; not to render aid or assistance to the author State in maintaining the situation created by such act; and to join other States in affording mutual assistance in carrying out [those] obligations. Article 6 was well within the framework of the relevant provisions of the United Nations Charter and constituted progressive development in the proper sense of the term. The fact that it was not easy to apply in the present state of development of international society was not, in his view, sufficient reason for dropping it. The Commission's efforts looked to the long term, and it was to be hoped that what was not feasible today would become so in the future.

37. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his third report, which showed that the abstract way in which he had had to analyse the subject was not conducive to a series of simple and complete articles. There was a constant interaction between the various parts of the draft, which militated against crystallization into rigid forms. It was that special characteristic which had struck the members of the Commission who had spoken of overlapping of the parts, and even of steps backward. In view of the premises stated by the Special Rapporteur, however, it was not surprising that part 2 of the draft sometimes overflowed into concepts belonging in the two other parts.

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

[7] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

38. In its entirely new drafting, article 1 was intended to serve as a link between part 1 and part 2. First of all, it should be borne in mind that the obligations and rights referred to in that article arose out of an internationally wrongful act and that that act, as defined in part 1 of the draft, was a breach of an international obligation by a State. That was a primary obligation, different from the new obligations referred to in article 1, which constituted the first parameter. But the second parameter was also introduced in that article, since it referred to the rights of other States; and since rights were the counterpart of obligations, it seemed appropriate to mention them. The other States referred to were obviously the injured States; but in order to provide a proper link between the two parts of the draft, article 1 should also mention the new obligations of third States, which were the subject of article 6. Furthermore, the words "in conformity with the provisions of the present part two" might be interpreted as meaning that there was only one regime of State responsibility: that laid down in part 2. Yet the Special Rapporteur had recognized (A/CN.4/354 and Add.1 and 2, para. 27) the validity of the comment made by the Commission in 1976, that it would be absolutely mistaken to believe that contemporary international law contains only one regime of responsibility applicable universally to every type of internationally wrongful act.

39. The wording of article 1 did not appear to bring out the residual nature of the draft. It was not until article 3 that the necessary saving clause appeared. Perhaps it would be appropriate to combine articles 1 and 3 by making article 3 a second paragraph of article 1—but article 1 would nevertheless have to be redrafted, placing the emphasis not on the internationally wrongful act, but on the breach of an international obligation. Taking as model the formula proposed in the second report (A/CN.4/344, para. 164), article 1 could be redrafted to read:

> "1. A breach of an international obligation by a State entails other obligations and rights for that State, for the injured State and for third States, in conformity with the provisions of the present part.
>
> "2. Paragraph 1 is without prejudice to the legal consequences of the breach to the extent that they are prescribed by the rules of international law establishing the international obligation."

40. Article 2 met the Special Rapporteur's concern to avoid a quantitative disproportion between the breach and its legal consequences. That disproportion must be manifest and must be assessed in relation to the seriousness of the internationally wrongful act. But who was to assess those two characteristics of "manifest" nature and seriousness? The Special Rapporteur left it to States, international organizations and bodies concerned with the peaceful settlement of disputes, which did not help solve the problem. Of course, that assessment should be guided by the rules adopted on attenuating and aggravating circumstances in criminal law, but it might be questioned whether such a reference to internal law was sufficient.

41. Article 4, which referred to the effect of a peremptory norm of general international law on performance of the new obligations laid down by article 1, and article 5, which contained the usual reservation on the precedence of the United Nations Charter, did not appear to raise any particular difficulties. However, the reference in article 5 to the procedures embodied in the Charter would probably be better placed in part 3, on the implementation of international responsibility.

42. Article 6 dealt with the position of third States in regard to the situation created by the internationally wrongful act, in other words the third parameter. Unlike the preceding articles, it contained, in paragraph 1, a list of responses or countermeasures; it dealt with reparation in the special case of international crimes. That article should, of course, be considered as the development of the general principle that should be stated in article 1. It might be asked, however, whether the list in paragraph 1 was exhaustive or merely declaratory, since the wording did not make that clear. His remark concerning the mention, in article 5, of procedures embodied in the Charter, was also applicable to article 6, paragraph 2. Finally, paragraph 3 of article 6 also referred to the precedence of the Charter; perhaps the two reservations on that subject—in articles 5 and 6—could form one separate provision.

43. Mr. USHAKOV said that he had always advocated beginning the work on State responsibility with responsibility for an international crime.[8] He was not satisfied with the new article 6, which dealt with that question. The first obligation stated in paragraph 1, that of not recognizing as legal the situation created by an act of a State constituting an international crime, was an obligation deriving from a primary rule of international law, not from a rule of responsibility. Furthermore, that obligation deriving from a primary rule was valid for all wrongful situations, whether they resulted from an international crime or not.

44. As to the second obligation, that of not rendering aid or assistance to the author State in maintaining the situation created by the act, he wondered how it differed from the obligation referred to in article 27 of part 1 of the draft. That article provided that:

> Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation.

Thus the second obligation stated in article 6 was laid down by article 27, and did not apply only to international crimes.

45. The third obligation was to join other States in affording mutual assistance in carrying out the other two obligations. He did not see how a State could join other States in order not to recognize a situation and not to render aid or assistance to a State which had committed an international crime. Article 6 did not appear to contribute much to the progressive development of interna-

[8] See *Yearbook ... 1981*, vol. I, p. 209, 1683rd meeting, para. 16.

tional law on responsibility for international crimes. Of course, measures did have to be taken against those crimes, but non-recognition of the wrongful situations they created was a primary obligation recognized by international law and affirmed, for example, in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[9]

46. Referring to article 4, he pointed out that, if a primary obligation was incompatible with a peremptory norm of general international law, that obligation was simply void under international law and could not be breached. But could obligations and rights provided for by international law be contrary to a peremptory norm of general international law? That did not seem possible, and that was why he did not understand the content of article 4.

47. Article 3 appeared to serve no purpose at the moment. The words "every breach by a State of an international obligation" could be replaced by the words "every internationally wrongful act of a State", since according to part 1 of the draft, it was such an act of the State that engaged its responsibility. The first clause of article 3 made it appear that all the provisions in part 2 of the draft would apply to internationally wrongful acts by States, whereas some of them would deal specifically with international crimes and delicts. The clause that followed seemed to refer to cases in which those concerned had agreed otherwise. It was, indeed, possible that the State which had committed the internationally wrongful act and the injured State could reach an agreement, either before or after the occurrence of the act. But it would be premature to provide for that possibility; the rules on the international responsibility of States should be established before specifying to what extent States could regard those rules as residual.

48. He was also perplexed by article 5. According to that provision, the States concerned should conform to the provisions and procedures embodied in the Charter of the United Nations. Yet the Charter contained nothing of the sort for States. It contained only provisions and procedures applicable to the organized international community, concerning the most serious crimes, such as aggression.

49. The Commission should begin by establishing the content, forms and degrees of State responsibility for international crimes, rather than the obligation not to recognize the wrongful situations.

The meeting rose at 1 p.m.

[9] See footnote 6 above.

1735th MEETING

Monday, 28 June 1982, at 3.05 p.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/346 and Add.1 and 2,[1] A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report (A/CN.4/360), which contained, in chapter II, an outline for a set of draft articles which read:

Schematic outline

SECTION 1

1. *Scope*

Activities within the territory or control of a State which give rise or may give rise to loss or injury to persons or things within the territory or control of another State.

[NOTES. (1) It is a matter for later review whether this provision needs to be supplemented or adapted, when the operative provisions have been drafted and considered in relation to matters other than losses or injuries arising out of the physical use of the environment.

(2) Compare this provision, in particular, with the provision contained in section 4, article 1.]

2. *Definitions*

(*a*) "Acting State" and "affected State" have meanings corresponding to the terms of the provision describing the scope.

(*b*) "Activity": includes any human activity.

[NOTE. Should "activity" also include a lack of activity to remove a natural danger which gives rise or may give rise to loss or injury to another State?]

(*c*) "Loss or injury" means any loss or injury, whether to the property of a State, or to any person or thing within the territory or control of a State.

(*d*) "Territory or control" includes, in relation to places not within the territory of the acting State:

(i) any activity which takes place within the substantial control of that State; and

(ii) any activity conducted on ships or aircraft of the acting State, or by nationals of the acting State, and not within the territory or control of any other State, otherwise than by reason of the presence within that territory of a ship in course of innocent passage, or an aircraft in authorized overflight.

3. *Saving*

Nothing contained in these articles shall affect any right or obligation arising independently of these articles.

SECTION 2

1. When an activity taking place within its territory or control gives or may give rise to loss or injury to persons or things within the territory or control of another State, the acting State has a duty to provide the affected State with all relevant and available information, including a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable and the remedial measures it proposes.

2. When a State has reason to believe that persons or things within its territory or control are being or may be subjected to loss or injury by an activity taking place within the territory or control of another State; the affected State may so inform the acting State, giving as far as its means of knowledge will permit, a specific indication of the kinds and degrees of loss or injury that it considers to be foreseeable;

[1] Reproduced in *Yearbook ... 1981*, vol. II (Part One).