Document:-
A/CN.4/SR.1896

Summary record of the 1896th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

"injured" State(s) (B); (*c*) in some cases, new obligations of "third" States (C) *vis-à-vis* the (other) "injured" State or States. (*Ibid.*, para. 3.)

In other words, according to the Special Rapporteur, all those new legal consequences or new legal relationships between States resulted from the commission of an internationally wrongful act by a State.

30. Because of that presumption, the definition of an injured State in draft article 5 was very important, as had been noted in the commentary to the article. The existence of an internationally wrongful act or of an injury might be disputed by the alleged author State. That was a very real possibility in practice, as the Special Rapporteur himself had pointed out (*ibid.*, para. 5). Presumably, therefore, the articles in part 3 of the draft might deal, *inter alia*, with the settlement of that kind of dispute. At the point at which the dispute related to the existence of the injury itself, the parties concerned were neither an author State nor an injured State, but rather an alleged author State and an alleged injured State. The new legal relationship to which he had referred had not yet been created, since, from a strictly legal standpoint, the rights and obligations provided for in draft article 6 and subsequent articles came into being only when the existence of an author State and an injured State had been legally established, which was either on the admission by the author State that an internationally wrongful act had been committed, or by a decision taken in accordance with an international procedure, or, again, by the application of the procedure for the settlement of disputes to be laid down in part 3 of the draft.

31. In practice, however, the sequence of stages in that process was not necessarily so clear-cut. It was usually when the alleged injured State had made the request provided for in article 6 and the alleged author State had admitted that an internationally wrongful act had been committed, by responding to the request in one way or another, that a new legal relationship between the newly identified author State and injured State was established. In other words, agreement on remedies such as *restitutio in integrum stricto sensu* or on payment of reparation should usually be concluded simultaneously with the establishment of the new legal relationship. Thus, although, as a theoretical abstraction, a decision on the status of author State and injured State came first and the new legal relationship came next, a decision as to status could in practice often be made at the time when the solution of the major problems arising from a particular internationally wrongful act had been agreed between the parties concerned. It was in no way his intention to criticize the Special Rapporteur's report, but he had wished to make a general comment to assist members in their understanding of the points he hoped to raise on specific draft articles at the next meeting.

The meeting rose at 1 p.m.

1896th MEETING

Friday, 7 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

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

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. OGISO said that, as he had explained at the previous meeting, he could accept in general the Special Rapporteur's theoretical presumption that, as a result of an internationally wrongful act, a new legal relationship would be established between the author State, the injured State and a third State. In practice, however, the establishment of that new legal relationship would not necessarily follow the same sequence; often, it was established at the same time as the solution of major problems arising out of the internationally wrongful act, since the objection by the author State might make it difficult to establish the status of the injured State and the author State. As a result, the latter might not accept the new legal relationship until a final solution had been reached regarding the result of such wrongful act.

2. Referring to the draft articles, he said that he would like to have some clarification of the wording of subparagraph (*a*) and (*d*) of article 5 and of the commentary to the latter subparagraph. Whereas subparagraph (*a*) referred to an "infringement of a right" and to "the State whose right has been infringed", subparagraph (*d*) and the commentary to

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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

[4] For the texts, see 1890th meeting, para. 3.

it were concerned with how an internationally wrongful act could affect the exercise of a right of a State or the interests of a State. He wondered whether that difference in the wording of the two subparagraphs was meant to indicate that, in the case of a bilateral relationship, injury could be caused only by infringement of a right of the injured State, whereas, in the case of a multilateral treaty, a State party could be an injured State if a situation arose whereby its right was affected by an internationally wrongful act. He also wondered whether the "breach of the obligation" by one party, as referred to in paragraph (*d*) (ii)—or what might be termed the first breach that triggered off the author State's and the injured State's new relationship under the multilateral treaty—was a breach that infringed the right of a given party or a breach affecting the right or interest of the other party without actually infringing a right. He was inclined to think that the internationally wrongful act which triggered off the new legal relationship should be the infringement of the right of the other State, irrespective of whether it related to a bilateral or a multilateral régime. The only difference between those two régimes concerned the status of the other parties to a multilateral treaty régime, whose rights had not been infringed but might be affected.

3. The concept of collective interests, referred to in article 5, subparagraph (*d*) (iii), was more political than legal and the dividing line between collective interests, on the one hand, and common or parallel interests, on the other, was extremely difficult to draw. As he interpreted the concept, however, it applied solely to cases in which the treaty itself made express reference to the collective interests of the parties, as was the case, for example, with the reference to collective self-defence under Article 51 of the Charter of the United Nations. In the absence of such a reference, it was difficult to see how the existence of collective interests could be established within the meaning of subparagraph (*d*) (iii) of article 5. For instance, if a multilateral treaty did not specify whether its terms covered collective or common interests, a dispute as to the legal nature of the protected interests was very likely to arise. Who, in such a case, determined the existence of collective interests? Although the Special Rapporteur seemed to suggest that a procedure under part 3 of the draft might apply, normally the basic character of a treaty should be decided by the parties to it. He was not sure whether a third party could properly make a decision as to the character of the interests protected by a given treaty and it therefore seemed preferable that the protection of collective interests should apply only where expressly provided for in the treaty in question.

4. With regard to subparagraph (*e*) and the second and last sentences of paragraph (23) of the commentary to article 5, the real difficulty was to determine by whom and by what procedure the existence of an international crime was to be decided. Reference could, of course, be made to the international community as a whole, and each act could be assessed and held to be an international crime under one of the categories provided for in article 19, paragraph 3, of part 1 of the draft. The international community as a whole, however, was an abstract legal concept. Even if it did exist, on the basis of what procedure did it make a decision on international crimes? Admittedly, the Charter of the United Nations laid down the procedure for determining the existence of an act of aggression, but what about the cases, other than aggression, enumerated in article 19 of part 1? Could the international community as a whole, for example, arrive at a finding of fact that there had been a serious breach of an international obligation relating to environmental protection without having further criteria or a proper international mechanism upon which to rely? Aggression, therefore, was perhaps the only case in which an international procedure for determining the existence of such an act had been clearly established.

5. He did not think it was the Special Rapporteur's view that the General Assembly could take such a decision on behalf of the international community as a whole without a further multilateral decision that would invest the Assembly with such a right. Subparagraph (*e*) stipulated that, in the case of an international crime, "all other States" became injured States, a conclusion that could perhaps be drawn from the *erga omnes* nature of an international crime. Even in the case of such crimes, however, there could be two categories of injured State: the State whose right had been infringed as a result of an act amounting to an international crime; and the State or States whose rights might be, or were, affected by the same act. Those two categories appeared to have been given equal status as injured States under subparagraph (*e*) of article 5.

6. The Special Rapporteur seemed to be contemplating the establishment of two different legal systems, one to govern the legal relationship arising out of the internationally wrongful act in general, and the other to govern the legal relationship arising out of an international crime. The latter would, in his own view, give rise to difficulties when the Commission came to consider part 3 of the draft, since, in the absence of criteria and a proper international mechanism for establishing that there had been a serious breach of an international obligation, as provided for under article 19, paragraph 3, of part 1, it was doubtful whether the ICJ would be able to pass judgment.

7. On reading draft article 6, he had been a little puzzled by the fact that both paragraphs were formulated in terms of what the injured State "may require" of the author State, rather than in terms of the right of the injured State to take certain steps and the obligation of the author State to do likewise. That was, however, only a drafting point.

8. In article 9, paragraph 1, after the words "an internationally wrongful act to", the words *"inter alia"* could perhaps be added to denote that the points enumerated in subparagraphs (*a*) to (*d*) were not exhaustive. Also, a new paragraph 3 might be added, worded along the following lines:

> "3. Paragraphs 1 and 2 shall be without prejudice to any other form of settlement which the injured State may accept."

In practice there were many cases of *ex gratia* settlements without any legal payment of compensation

that corresponded to "the value which a re-establishment of the situation as it existed before the breach would bear". It would therefore be advisable, for practical purposes, to leave room for such settlements, which might also meet the concern expressed regarding compensation in kind.

9. He was a little uncertain about the application of article 6 in the case of an international crime. Assuming that the State directly injured by the international crime had taken steps pursuant to article 6, and that its request had been completely satisfied by the response of the author State, would States other than the directly injured State, within the meaning of article 5, subparagraph (*e*), still apply the sanctions provided for under draft article 14, paragraph 2?

10. As he had already pointed out (1895th meeting), in practice the legal relationship between an author State and an injured State was established simultaneously with the virtual solution of the main problems regarding the responsibility of the author State. Article 6 could be interpreted to mean that the alleged injured State might not be able to invoke the provisions of paragraph 1 (*a*) to (*d*) because, so long as the alleged author State objected to the existence of an internationally wrongful act, it did not acquire the status of an injured State. A saving clause should perhaps be included at an appropriate point to provide, in mandatory terms, that for the purposes of articles 6 and 8 the term "injured State" should be interpreted to cover States alleged to have suffered injury.

11. As to draft article 7, he was not convinced of the need for a separate provision concerning the treatment of aliens. It would be helpful if the Special Rapporteur could provide some specific examples of the "marked tendency" not to require *restitutio in integrum stricto sensu* referred to in paragraph (2) of the commentary to that article. He would also suggest that the words "without prejudice to article 22 of part 1" should be added, to reflect the content of paragraph (3) of the commentary.

12. His only problem with draft article 9 related to the criterion whereby the exercise of the injured State's right to take certain measures by way of reprisal must not be "manifestly disproportional" to the seriousness of the internationally wrongful act in question. That criterion was too loose, and could lead to an escalation of the situation. A more restrictive criterion, such as "essentially proportional" would be preferable, in the interests of maintaining legal stability. Such a change would also shift the initial burden of proof from the State which was the target of the reprisal to the State which triggered off the reprisal. He agreed that a phrase should be added to provide for the prohibition of armed reprisal in response to an internationally wrongful act not accompanied by the use of force. The actual wording could be left to the Drafting Committee.

13. Reference had been made to the binding nature of the interim measures of protection provided for under paragraph 2 (*b*) of draft article 10. In his view, provisional measures taken by the ICJ were binding upon the parties to the dispute pending the final decision of the Court in the matter.

14. In regard to draft article 12, he agreed with those members who had referred to the vagueness of the content of *jus cogens* and therefore supported the deletion of subparagraph (*b*). He considered, however, that the content of *jus cogens* should be determined by means of an international procedure, such as a written application made by the parties in the case to the ICJ. If the Commission decided to retain subparagraph (*b*), the point regarding a determination as to the content of *jus cogens* should be clarified in part 3 of the draft.

15. He was not entirely convinced of the need for paragraph 2 (*c*) of draft article 14. If it was meant to refer to the kind of collective self-defence measures referred to in paragraph (9) of the commentary to that article, that should be stated clearly.

16. Draft article 15 might be unnecessary, since its content was already covered by articles 4 and 14. However, he had no strong views on the matter.

17. With regard to draft article 16, he wondered how the exception provided for in subparagraph (*b*) would apply in the case of an international crime. With regard to subparagraph (*c*), he wondered whether it would not be better to use the term "belligerent relationship", in view of the Special Rapporteur's explanation in paragraph (5) of the commentary to article 16.

18. Lastly, concerning part 3 of the draft, he said that, while he recognized that the general direction advocated in the sixth report was perhaps the best one for the Commission to follow, the actual application of part 3 could give rise to many practical difficulties. With regard to the Special Rapporteur's proposed dispute-settlement procedure (A/CN.4/389, para. 32), providing for the submission of a dispute concerning an international crime to the ICJ, he was doubtful whether, in the absence of international agreement on an appropriate mechanism, the Court could properly take a decision on behalf of the international community as a whole regarding the existence of a serious breach of an international obligation.

19. Mr. Njenga paid tribute to the Special Rapporteur for his concise and well-thought out sixth report (A/CN.4/389) and for providing the Commission with a very sound basis for its debate.

20. He agreed that article 5 was central to part 2 of the draft. He also agreed with the categories of injured State specified in subparagraphs (*a*), (*b*) and (*c*), of the article, since the parties concerned were clearly identifiable. However, the situation was far more complex in the case of multilateral treaties, where identical, though parallel, bilateral rights and obligations could be created as between individual contracting parties, but where they could also be created, simultaneously, with regard to certain specific matters affecting all the contracting parties. The first two sentences of paragraph (21) of the commentary to article 5 contained an admirable statement of the position. In the case of the 1982 United Nations Convention on the Law of the Sea,[5] for example, the principles governing the "Area"

[5] See 1890th meeting, footnote 6.

embodied in Part XI—particularly article 136, which provided that the Area and its resources were the common heritage of mankind, and article 137 on the legal status of the Area and its resources—reflected the collective interests of all States, and any breach of those principles had to be seen in that light. The extent to which a State or group of States could, by remaining outside the Convention, evade their legal responsibility for the breach of what many regarded as a part of customary international law was highly dubious and, in his view, legally unwarranted. The term "collective interests", in subparagraph (*d*) (iii) of article 5, might, however, require further refinement, in order to draw a clear distinction between such interests and common interests.

21. He did not share the doubts expressed with regard to the formulation of article 5 (*e*) relating to international crimes, which, by their very nature, were to be considered as wrongful acts against all members of the international community. Indeed, international crimes such as genocide, *apartheid*, colonialism and the massive abuse of human rights could be considered as crimes not only against the international community, but against humanity itself, particularly since they were committed within States and thus did not, strictly speaking, fall within the arena of inter-State relations.

22. While draft article 6 was acceptable to him, he doubted whether the enumeration of measures which the injured State could require of the author State was exhaustive. The fact that *restitutio in integrum* was not possible did not mean that the only satisfaction could be in monetary terms. Where, for instance, a State was in breach of an obligation to afford a right of access to and from the sea to a land-locked country, provision of an alternative access route might be more appropriate than monetary compensation. The Drafting Committee might therefore wish to consider the addition of the words *"inter alia"* at the end of the opening clause of article 6, paragraph 1, to indicate that the enumeration was not exhaustive.

23. He did not share the doubts voiced regarding draft article 7. In the case of an alien, the State had an absolute right to exercise its sovereignty and the alien could avail himself of the local remedies. An alien should not be able to acquire rights greater than those of a national. In the case of nationalization, for example, nationals could not require their State to repeal its laws and restore their property to them, and aliens should not have such a right either. At most, the alien's right would be to monetary compensation, the right of his State to intervene on his behalf arising only after the alien had exhausted the available local remedies and there had been an abuse of process. Likewise, if a State decided unilaterally to rescind a contract with an alien, it was exercising its sovereign right and there could be no question of *restitutio in integrum*. In his view, therefore, the Special Rapporteur had captured both the spirit and the letter of the law in article 7.

24. While he did not wish to be a prophet of doom, he feared that draft articles 8 and 9, unless qualified, might have far-reaching and very detrimental repercussions, in particular for small and weak States. Those articles could operate to induce a régime of self-help which the strong could use as a pretext to impose their views, on the basis of their own interpretation of their rights arising out of a real or assumed breach of an international obligation. He did not think that was the Special Rapporteur's intention; indeed, in paragraph (2) of the commentary to article 8, the Special Rapporteur had himself stated: "Obviously this right to take countermeasures is not unlimited." In the absence of machinery for the compulsory settlement of third-party disputes, however, who but the State in question would determine where the limit should be set? For States, the ultimate purpose of both reciprocity and reprisal was undoubtedly in effect to restore the old primary legal relations, but he doubted whether that was realistic in the context of modern-day power relationships. More likely, such a "right" would be used to take coercive measures against the weaker members of the international community.

25. Paragraph 1 of article 9, and in particular the reference to "its other obligations", was very broadly phrased and should be amended. Mr. Ushakov had made a useful proposal in that connection (1895th meeting, para. 24). Furthermore, the proportionality requirement in paragraph 2 of article 9, according to which acts of reprisal should not be "manifestly disproportional" to the internationally wrongful act committed, could have a legally meaningful content only within the framework of binding, compulsory dispute-settlement procedures, which, if past experience was any indication, would be difficult to establish.

26. That weakness had been recognized and provided for in paragraph 1 of draft article 10. Unfortunately, however, in the context of the sovereign immunity of States, effective remedies were very rare. Even where machinery for the compulsory and peaceful settlement of disputes did exist, there was no guarantee that it would be acceptable to the superior Power, as had been seen in a very recent case before the ICJ. It was therefore a very difficult area in which the possibility of unilateral interpretation by a State of its rights could easily be abused.

27. He agreed with the wording of draft article 11, except for the expression "collective decisions" in paragraph 2, which he did not altogether understand.

28. In regard to draft article 12, while he was in agreement with subparagraph (*b*), he had serious doubts about the blanket exception to articles 8 and 9 provided for in subparagraph (*a*). What gave diplomatic law, and particularly diplomatic privileges, such wide acceptance was the fact of reciprocity. Possibly reprisals could be excluded, but the exclusion of reciprocity would undermine the very foundation upon which respect for diplomatic privileges and immunities was based. In contemporary State practice, if a State violated its obligations in respect of the granting of diplomatic or consular privileges, the injured State could do likewise: that was why there were so few abuses. Subparagraph (*a*) therefore had no place in the draft convention.

29. Draft article 13 was manifestly justified. Referring to draft article 14, he said that the Special Rapporteurs for the topics of State responsibility and the draft Code of Offences against the Peace and Security of Mankind should proceed to provide the Commission with substantive provisions. Whatever individual members' views might be, the Commission had firmly embraced the distinction between international crimes and international delicts. Unfortunately, however, while both the Special Rapporteurs and the members of the Commission agreed that international crimes constituted the gravest offence under State responsibility, one Special Rapporteur persistently maintained, despite a strong body of opinion to the contrary, that the draft code should be confined to individuals. There were, of course, some who shared that view, and all members were aware of the difficulties entailed in making States accountable for international crimes. However, that was not a convincing reason for dismissing the possibility of a State's responsibility for international crimes. Despite the statement in paragraph (1) of the commentary to article 14, the Special Rapporteur had not actually provided for any fundamental difference in the consequences for a State of committing an international crime as opposed to an international delict. Moreover, article 14, paragraph 1, contained no indication of what "all the legal consequences" or the additional obligations to be determined by the applicable rules might be. Reference was simply made to a chapter that was actually non-existent, since the Special Rapporteur for the draft code of offences had decided to exclude the application of the code to States.

30. Article 19 of part 1 of the draft might be an unwanted child, but it was very much alive, and many States considered it crucial to a future convention on State responsibility. Whittling down the concept until it was no more than an empty slogan would be quite unacceptable. The Commission therefore had to decide whether to deal with it under the topic of State responsibility or in the draft code; no progress would be made on either topic until the issue had been resolved. He agreed entirely with Mr. Francis (1894th meeting) in that respect.

31. While he could accept the provisions of draft articles 15 and 16, he considered, in the case of the former, that singling out aggression could give the impression that other crimes, such as colonialism, *apartheid* or massive pollution of the environment, were of considerably less importance to the international community.

32. He wholeheartedly endorsed the need for a part 3 of the draft, but underlined that difficulties were likely to arise in securing the acceptance of States for the inclusion of machinery for compulsory third-party settlement of disputes in a set of draft articles on State responsibility. The Special Rapporteur might, however, gain inspiration from the procedures adopted in the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. Mr Balanda (*ibid.*) had already referred to the difficulties in the OAU, whose member States preferred to resolve their disputes by *ad hoc* arrangements rather than refer them to the Commission of Mediation, Conciliation and Arbitration, which was virtually moribund.

33. Mr. TOMUSCHAT said that draft article 5 should perhaps state more clearly that the injured State was the State in whose favour certain specific entitlements arose once an international obligation had been breached. The crucial question was whether a right of a State had been violated; that was stated in article 5 (*a*), but it should also be made the focal point elsewhere. The existence of a right was easy enough to determine in a bilateral relationship, but extremely difficult in a multilateral framework, where practice and precedent had to be relied upon to provide the most dependable criteria. He agreed with previous speakers that no selection should be made as between sources of law; Article 38 of the Statute of the ICJ should not be ignored and the *Nuclear Tests* cases[6] brought before the Court should also be borne in mind. The Special Rapporteur went some way towards making that point in paragraph (8) of the commentary to article 5, but the idea should also be reflected in the text of the provision, which might then read roughly as follows:

> "For the purposes of the present articles, 'injured State' means a State whose rights under international law have been violated. The following are to be considered injured States, *inter alia:*
>
> "(*a*) if the internationally wrongful act constitutes a breach of an obligation existing in a bilateral relationship with another State, that other State;
>
> "(*b*) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty or by another rule of international law which is generally applicable, a State party to that treaty or subject to that rule if the obligation exists specifically in its favour or if it is specially affected by the breach."

34. Article 5, subparagraph (*d*), as submitted by the Special Rapporteur, should not cover only obligations imposed by a treaty, but should be expanded to include other sources of international law. A particular difficulty arose in connection with subparagraph (*d*) (iv), dealing with the protection of human rights, in that minor violations of human rights occurred in every country, but so long as they were more or less accidental they could not give rise to countermeasures by other States. He would revert to that issue in connection with articles 8 and 9 of the draft. Lastly, there would appear to be some overlapping between subparagraph (*d*) (iv) and subparagraph (*e*), since in some instances violations of human rights constituted international crimes.

35. Turning to draft article 6, he said that the text should make it perfectly clear that a breach of an international obligation did not destroy the original primary obligation. The point was made indirectly in paragraph 1 (*d*), but it should be spelt out at the very beginning of the article. That criticism apart, he welcomed paragraph 1 as being less abstract than many other parts of the draft. With regard to paragraph 1 (*b*), he agreed with Mr. Balanda (1894th meeting)

[6] See 1898th meeting, footnote 12.

that the term "remedies" in English was broader in scope than *recours* in French, which meant formal legal proceedings only. To require the defaulting State to take such formal steps as were provided for in its internal law might introduce an element of delay and interfere with the main object of the article, which was to provide swift redress to the injured party. Other acts of redress which the injured State might require of the author State and which should accordingly be mentioned in the text were apologies and the bringing to justice of the individual perpetrator of a crime. If the primary obligation breached was only the obligation to consult other States parties to a treaty before taking an important decision, it was difficult to see what the appropriate redress might be. In the case of very serious breaches of international law, such as wars of aggression, the aggressor State was hardly ever required to make reparation for the full damage caused, simply because the burden upon the people of the State concerned would then be too great. Lastly, he agreed with previous speakers who had expressed doubts about the use of the words "appropriate guarantees" in paragraph 1 (*d*).

36. He had no strong views on draft article 7, which no doubt provided a useful clarification.

37. Draft article 8, however, did give rise to a major question. If the obligations to which it referred were based on treaties, then, as Sir Ian Sinclair (1895th meeting) had rightly pointed out, the article covered much the same ground as article 60 of the 1969 Vienna Convention on the Law of Treaties. So far as obligations deriving from customary law were concerned, the distinction between reciprocity and reprisal was surely unusual, and possibly inappropriate. He would revert to that point in connection with article 10.

38. Draft article 9 was basically acceptable, but the concept of suspending the performance of obligations implied an essentially passive reaction and might perhaps be replaced by language which made it clear that the injured State was entitled to take positive action. A more substantial point arising from article 9 was the question of establishing a distinction between the right of the directly affected State and that of other injured States to take countermeasures by way of reprisal. For example, the complaints procedure provided for in article 41 of the International Covenant on Civil and Political Rights,[7] under which any State party could charge another with having violated its treaty obligations, was not subject to any limitation *ratione magnitudinis* of the alleged violation. On the other hand, in current United Nations practice, the community of nations could manifest its concern only in the presence of a consistent pattern of gross and reliably attested violations of human rights. Some similar requirement should be established as a pre-condition for the right of a State not directly affected by an internationally wrongful act to take measures by way of reprisal. Generally speaking, the concept of countermeasures should be explained more clearly, and the right of other States to inquire into alleged violations should be mentioned as a peaceful and therefore desirable alternative to the taking of countermeasures by way of reprisal. Lastly, he agreed with Mr. Ogiso that the temporary nature of the right referred to in paragraph 1 of article 9 should be made clear in paragraph 2.

39. The restrictions in draft article 10 upon the measures which an injured State could take in application of article 9 were too broad. The injured State could not, in the face of conduct which was clearly in breach of existing commitments, be expected to wait for negotiations to yield positive results. To impose such an obligation on the injured State would be to encourage the law-breaker. Too far-reaching an attempt to limit reprisals might seriously weaken the international legal order, which did not in any event have many sanctions at its disposal. Although the rule suggested by the Special Rapporteur fitted perfectly well into the framework of a regional system such as that of the European Communities, he doubted whether it could operate successfully on a world scale.

40. Draft article 11 covered more or less the same ground as article 60 of the Vienna Convention on the Law of Treaties, but diverged significantly from the rules set forth therein. Those divergences should be examined very carefully.

41. Turning to draft article 12, he agreed with Mr. Sucharitkul (1890th meeting) that the meaning of the words "do not apply" was not clear. Moreover, the reference to "a peremptory norm of general international law" did not solve the problem of the limitation of rights under articles 8 and 9. So far as subparagraph (*a*) of article 12 was concerned, he agreed with Sir Ian Sinclair (1895th meeting) that only a hard core of the immunities of diplomatic and consular missions and staff should be protected. The article should recognize that other immunities might be legitimately restricted by way of reciprocity or reprisal.

42. Draft article 13 was, of course, closely linked with article 11, and the question of the relevance of article 60 of the Vienna Convention on the Law of Treaties arose once more.

43. With regard to draft article 14, paragraph 1, he agreed with Mr. Reuter (1891st meeting) that the reference to "the applicable rules accepted by the international community as a whole" was unsatisfactory. The mere fact of acceptance or recognition did not suffice: an element of consistent practice was required, and should be mentioned in the text. Unlike Mr. Ushakov (1895th meeting) and Mr. Njenga, he did not consider that a general obligation existed for every State not to recognize as legal the situation created by an international crime (paragraph 2 (*a*)): recognition of the *de facto* consequences of, say, unlawful seizure of foreign property or of a massive expulsion of populations was hardly an international delict. The use of the words *"mutatis mutandis"* in paragraph 3 of the article was, in his opinion, superfluous. Generally speaking, the decisive provisions concerning international crimes were to be found not in article 14, but in article 9 and article 5 (*e*).

44. Referring to draft article 15, he expressed doubt as to the need to include a specific provision on

[7] United Nations, *Treaty Series*, vol. 999, p. 171.

aggression. If the intention was to draw attention to the relevant procedures under the Charter of the United Nations, the article was too narrow.

45. With regard to draft article 16, he questioned the distinction which the Special Rapporteur wished to draw between the termination or suspension of the operation of treaties and the suspension of the performance of treaty obligations. The arguments advanced in the footnotes to paragraph (21) of the commentary to article 5 and to paragraph (3) of the commentary to article 11 had failed to convince him, and he continued to feel that a renewed effort should be made to identify the relationship between the draft articles on State responsibility and the Vienna Convention on the Law of Treaties. Lastly, the reference to the rights of membership of an international organization in subparagraph (*b*) of article 16 was too broad and therefore misleading.

46. Before concluding, he sought the Chairman's leave to address himself to some of the issues arising in connection with articles 2 and 3.

47. The CHAIRMAN said that, since articles 1 to 4 had already been considered and provisionally adopted by the Commission, the appropriate time to comment on articles 2 and 3 would be on the occasion of the second reading of part 2 of the draft.

48. Replying to a point of order raised by Mr. McCaffrey, he said that comments on the minor changes introduced by the Special Rapporteur in articles 2 and 3 since their adoption on first reading were in order and would, in fact, be welcomed by the Drafting Committee. Substantive points, however, should be deferred until the second reading.

49. Mr. TOMUSCHAT said that he would transmit his comments to the Drafting Committee in writing. Reverting to articles 5 to 16, he said that he fully endorsed the Special Rapporteur's proposition that countermeasures taken by States other than the directly affected State should be exercised within the framework of the organized international community. Accordingly, he would wish to see reflected in the draft articles a system which began with the rights of the directly injured State, went on to consider the rights of other States acting collectively, and only in the last resort accorded certain rights to States not directly injured, acting more or less as guardians of the international legal order.

The meeting rose at 1 p.m.

1897th MEETING

Monday, 10 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf. Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

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

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. MAHIOU said that the draft articles submitted by the Special Rapporteur in his sixth report (A/CN.4/389) formed a well-constructed whole; each part fitted closely into the next and there were numerous explicit or implicit cross-references. However, the cross-referencing technique required considerable attention on the part of the reader, whom it might cause to see subtleties where there were only drafting errors, or leave wondering whether certain problems of comprehension originated in form or substance. What, for example, was to be made of the cross-reference in paragraph (6) of the commentary to article 11 to "paragraph 1 (i) and (ii)"? It was not only that paragraph 1 of the article contained no subparagraphs (i) and (ii); the reference did not seem to be to the subparagraphs (*a*) and (*b*) which it did have.

2. The commentaries to the articles were unquestionably of high quality, but they were sometimes too concise and elliptical. As some members of the Commission had said, they would be more convincing for the inclusion of more frequent references to State practice, judicial and arbitral decisions, and doctrine. The general structure of the draft was satisfactory and entirely logical.

3. In draft article 5, the Special Rapporteur sought to identify the State injured in each of the cases contemplated in subparagraphs (*a*) to (*e*) by referring to the source of the obligation breached. While his criterion was not the only one that could be employed, it had the advantage of giving the reader a clear view of the various possible situations.

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

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

[4] For the texts, see 1890th meeting, para. 3.