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Summary record of the 1013th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

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topic of responsibility, it would give priority in its future draft articles to the most serious international delinquencies—those which endangered international peace and security.

The meeting rose at 1 p.m.

1013th MEETING

Wednesday, 2 July 1969, at 10.20 a.m

Chairman: Mr. Nikolai USHAKOV

Present: Mr. Ago, Mr. Albónico, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Ruda, Mr. Tammes, Mr. Tsuruoka, Mr. Ustor, Mr. Yasseen.

State responsibility

(A/CN.4/208; A/CN.4/209; A/CN.4/217)

[Item 3 of the agenda]

(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's first report on State responsibility (A/CN.4/217).

2. Mr. USTOR, after congratulating the Special Rapporteur on the lucidity of his report, said that he had been struck by the comparison he had made in his introductory statement between the difficulties in codifying the topics of State responsibility and the law of treaties.[1] There could be no doubt that any task of codification of international law involved considerable difficulties and he would remind the Commission of the views expressed by Sir Hersch Lauterpacht in 1955, in an article entitled "Codification and Development of International Law", where he had said: ". . . the experience of codification under the United Nations fully confirms the lessons of past attempts to the effect that there is very little to codify if by that term is meant no more than giving, in the language of Article 15 of the Statute of the International Law Commission, precision and systematic order to rules of international law in fields 'where there already has been extensive State practice, precedent and doctrine'. For, once we approach at close quarters practically any branch of international law, we are driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle—even this may be an over-estimate in some cases—there is no semblance of agreement in relation to specific rules and problems. Thus, for instance, with regard to the law of treaties, perhaps the only principle of wider import as to which there is no dissent is that treaties ought to be fulfilled in good faith. . . . Apart from that general unavoidable acceptance of the basic principle, *pacta sunt servanda,* there is little agreement and there is much discord at almost every point".[2] And it should be noted that the law of treaties had the advantage of being based on a much larger body of State practice than State responsibility. The Special Rapporteur was right when he held that the codification of State responsibility would prove even more difficult.

3. The Special Rapporteur had explained that he wished to separate the general principles of State responsibility from the particular rules applicable to international wrongful acts; in that respect, he had followed the Commission's decision at its fifteenth session to give priority in codification to the definition of general rules—a decision it had reaffirmed at its nineteenth session when approving the programme of work reproduced in the Special Rapporteur's first report para. 91).[3] That programme was generally acceptable, but it should be divided into two main parts, the first covering codification of the general principles of State responsibility, and the second applying particular rules to individual cases of international delinquency. While he agreed that, as a general rule, it was dangerous to draw analogies between international law and internal law, he would venture to do so in at least one case: that of the criminal codes of the continental European States. The first part of those codes usually dealt with general principles of criminal responsibility relating, among other things, to the difference between an attempted and an accomplished crime, whereas the second part dealt with individual crimes and misdemeanours. By analogy, the code or convention which the Commission was to draw up on State responsibility could follow the same lines: the first part could consist of a statement of general principles, and the second part of a series of rules showing how those general principles should apply to certain types of international wrongful acts. That view was supported by the Commission's decision at its fifteenth session to give priority to the definition of the general rules governing the international responsibility of States,[4] which did not, of course, mean that the topic would be exhausted with the codification of those general rules.

4. In the second part of its study, the Commission should give an enumeration of the wrongful international acts incurring responsibility, beginning with the gravest delinquencies, such as breaches of international peace and security and infringement of the right of peoples to self-determination. He agreed with the Chairman that the safeguarding of international peace and security was a crucial part of the Commission's work and that it would mainly involve the progressive development of international law. He also agreed with the Special Rapporteur that there was not a very large

[1] See 1011th meeting, paras. 2-3.

[2] The *American Journal of International Law,* vol. 49, 1955, p. 17.

[3] See *Yearbook of the International Law Commission, 1967,* vol. II, p. 368, para. 42.

[4] *Op. cit., 1963,* vol. II, p. 224, para. 52.

body of precedent and doctrine in that field, since it was a relatively new one in international law. Mr. Bartoš had, to be sure, mentioned the precedent of the Potsdam Agreement [5] and he hoped that the Special Rapporteur would bear that and similar precedents in mind. He should also take into account the gravest types of international delinquency referred to by Mr. Tammes, who had rightly pointed out that all States had the right to defend the cause of peace. Mention should also be made of the duty of the Secretary-General, as laid down in Article 99 of the Charter, to "bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security".

5. With regard to the limits of the topic of State responsibility, they were inherent in the title itself; it was clearly confined to the responsibility of States and should not be extended beyond that point.

6. As to Mr. Kearney's view that the Commission should give prominence to the question of the settlement of disputes, he considered that that question constituted a topic in itself and should not be dealt with piecemeal. The Commission should be satisfied if it succeeded in codifying the substantive rules governing State responsibility in general, without trying to deal with the question of the settlement of disputes.

7. Mr. EUSTATHIADES said he fully associated himself with the tributes paid to the Special Rapporteur and the hopes expressed for the success of the task entrusted to him by the Commission, and congratulated him on his excellent statement introducing his report. He agreed with the Special Rapporteur that the Commission would be well advised to confine its study to State responsibility; but it should first of all define very precisely what it meant by the rules of State responsibility. The Commission could allow the Special Rapporteur full freedom to delimit his subject as he thought fit, provided that he took full account of the new trends, which could not be ignored in a modern work of codification such as that expected from the Commission; at the same time, some general directions could be given during the discussion.

8. Like the Special Rapporteur, he thought that a distinction should be made between responsibility as such and substantive rules; but the expression "substantive rules" might cause some uncertainty, for it was evident that what was really meant was "other substantive rules", namely rules governing matters other than responsibility, since the rules on responsibility, particularly those which did not concern its application, were also substantive rules. No doubt what the Special Rapporteur had meant to say was that the rules governing State responsibility were not independent rules, but complementary to substantive rules and important only in connexion with the breaking of a rule, that was to say, an internationally wrongful act. That was a very traditional approach, but international law was developing beyond the traditional rules and in view of certain new trends it would be well to consider responsibility incurred not only for wrongful acts, but also for acts that were not wrongful, for example, responsibility for "risk" in such fields as nuclear energy, outer space and civil aviation. In those cases, the rules were not complementary, since responsibility existed even though no rules had been broken; there was no international delinquency as understood in traditional law, unless an international delinquency was defined in terms of the obligation to make reparation, not in terms of breach of a rule.

9. In any event, a first point to be noted was that the concept of a substantive rule as delimiting the topic of responsibility was not decisive. With reference to Mr. Tammes' remarks, he observed that substantive rules were involved in the subject-matter of responsibility, for example, rules relating to the abuse of rights, state of necessity and self-defence. A further question to be considered was whether some of the rules on such matters as denial of justice, particularly with reference to the requirement of exhaustion of local remedies, were rules of responsibility or rules for its application.

10. It was also important to make a very clear distinction between the substantive rules which governed responsibility and the rules which governed its application. It was perhaps from that angle that the problem of the treatment of aliens, among others, should be considered. The first question at issue was that of injury to aliens, which showed that the treatment of aliens could not be excluded *en bloc* from the topic of responsibility. That question was connected with denial of justice and the exhaustion of local remedies, and thus with diplomatic protection: in other words, with the application of responsibility. The Special Rapporteur's report and the documents submitted by the Secretariat showed that both writers and regional bodies had always dealt with the question from the point of view of application, but that in considering application they had in fact discussed substantive rules. The persistence with which writers had studied the problem of the treatment of aliens showed the importance of the subject, both from the practical point of view and from the point of view of the formulation of rules of international responsibility.

11. Moreover, there had been a tendency to link the question of the treatment of aliens with that of the protection of human rights. For example, Chapter III of the draft on "Responsibility of the State for injuries caused in its territory to the person or property of aliens", prepared by Mr. García-Amador in 1957, dealt with "Violation of fundamental human rights".[6] That work reflected the trend towards equal treatment of aliens and nationals. If the protection of aliens was henceforth to be merged with the protection of human rights, the Commission would have to provide for the necessary means of practical application, since it would no longer be a question of diplomatic protection, but of collective guarantees either under the Charter or under some regional instrument. The disputes arising would then no longer be duels between two States, for

[5] See previous meeting, para. 34.

[6] See *Yearbook of the International Law Commission, 1957*, vol. II, pp. 112-116.

no State would be able to infringe the rights of aliens, that was to say human rights, without being called to account by the community of States under the provisions for their joint international protection. In other words there would be a collective guarantee, under which the guilty State would be the same as under the system of diplomatic protection of aliens, but the injury would no longer concern only the State of the injured person's nationality; a community of States would be concerned and would be able to give effect to responsibility. Collective guarantees within the framework of State responsibility would therefore have to be included among the general rules and, especially, among the means of application.

12. In addition to responsibility for risk and respect for human rights, there was a third new trend which reflected progress towards the idea of collective guarantees: the notion of the gravity ob violations, to which the Chairman had referred when quoting a work by Mr. Tunkin.[7] The Commission should give close attention to those new trends. State responsibility could no longer be based exclusively on the traditional foundations. Perhaps the Commission could keep to the traditional line for the general rules of responsibility, but it should certainly not disregard the new trends, which mainly affected application procedure. Hence it was important that the Commission should study the various procedures for applying the rules of responsibility, for it was not enough to lay down general rules on responsibility without establishing application procedure. That aspect of the matter, which was of the greatest practical importance, should perhaps be dealt with separately.

13. Since the subject-matter of responsibility which was to be codified should also be based on progressive development, he thought it necessary to consider a number of new trends: first, the responsibility of the individual; secondly, the responsibility of international organizations; thirdly, responsibility for risk and joint responsibility; fourthly, equal treatment of aliens and nationals; fifthly, grave violations; sixthly, the criminal responsibility of the State; and lastly, the joint responsibility of the State and of the individual for the same breach of the same rule. The Commission was not called upon to deal with the responsibility of individuals or of international organizations, which were not within its terms of reference. With regard to responsibility for risk and joint responsibility, the discussion had shown that they could be included among the general rules of responsibility. The question of equal treatment of aliens and nationals belonged both to the general rules and to the application procedure, and it raised the question of collective guarantees.

14. To come to the question of grave violations, it would be remembered that the General Assembly had asked the Commission to study problems relating to international peace and security, to the right of peoples to self-determination and to other leading principles, the violation of which was regarded as grave. There had been some support for inclusion of the question of grave violations, in addition to that of the status of aliens; he did not think it would be any hindrance at the stage when the general principles of responsibility were being studied. The difficulties would only appear when the forms of reparation, in other words, the consequences of responsibility, came to be considered, particularly in connexion with the application of responsibility.

15. In considering the criminal responsibility of the State, it was necessary to take account of the development which had led, in positive law, to various applications of that notion. True, it could be dangerous to transfer to international law notions derived from internal law. International law drew no distinction between civil and criminal responsibility. Nevertheless, a penal element did sometimes appear. That applied to sanctions such as exclusion from the United Nations, suspension of the exercise of certain rights and measures by the Security Council in the event of failure to comply with a decision of the International Court of Justice; in such cases the notion of reparation gave way to that of penalty. But that was a question which could be examined later, for it related mainly to the application of responsibility.

16. Lastly, there was a clear trend towards recognition of a dual international responsibility in the matter of war crimes in the broad sense, such as breaking the laws of war, crimes against the peace and crimes against humanity. The same act could involve both the responsibility of the State and the individual, responsibility of its agents. The Commission should deal with that individual responsibility, not as a separate suject, as Mr. García-Amador had done, but perhaps under the general rules of responsibility and certainly under the procedure for its application.

17. He linked those new trends in international law, and the seven points he had mentioned earlier, more with the application of responsibility than with the general rules of responsibility, not only because he believed that that approach was legally correct, but also for reasons of order and working method. They could be examined separately, perhaps with reference to the forms of responsibility constituting the second point of the programme in paragraph 91 of the Special Rapporteur's report. The application of responsibility, which was of great practical importance, would raise certain difficulties because of the great diversity of cases, and it was therefore desirable, for that reason also, that it should be kept separate from the general rules of responsibility.

18. Mr. CASTAÑEDA said that the important topic of State responsibility and the excellent report submitted by the Special Rapporteur merited fuller consideration than the Commission had been able to give them during the present discussion. The report contained much valuable material, but it would have been useful also to include a reference to article VII of the American Treaty on Pacific Settlement—the "Pact of Bogota"—of 1948, which was already in force and binding on a dozen States of the western hemisphere. The parties to that Treaty undertook "not to make diplomatic representations in order to protect their

[7] See previous meeting, para. 38.

nationals, or to refer a controversy to a court of international jurisdiction for that purpose, when the said nationals have had available the means to place their case before competent domestic courts of the respective State".[8]

19. He supported the Special Rapporteur's approach to the topic of State responsibility. Previous attempts to codify it had been hampered by its being combined with the question of injuries to the person or property of aliens, so that the difficulties of that question were added to those inherent in the topic of State responsibility as such. The method now proposed of isolating the topic of State responsibility proper would help the Commission, and the international community, in its task of codification.

20. That method would, however, involve a number of problems. In the first place, it was important to remember why, in the past, the subject of State responsibility had been combined with that of injury to aliens. The reason was essentially historical: it was that the two subjects had been indissolubly linked in the practice of the nineteenth and the early twentieth centuries. As a result, even in the early codification work of the United Nations, in the period 1954-62, they had been combined in the traditional manner by the General Assembly, the Commission and the then Special Rapporteur.

21. The Commission could, of course, decide to separate the two subjects; it certainly had sufficient technical autonomy to do so. And that decision would accord with the conclusions reached in 1963 by its Sub-Committee,[9] which had been implicitly endorsed by the General Assembly.

22. The Commission would have to consider, however, whether it wished to eliminate from the scope of the work of codification those matters which it was now proposed to leave aside. The substantive rules of international law in question were not only those concerning injury to aliens, but also those relating to violations of the obligations of States regarding the maintenance of world peace and security.

23. As far as the rules relating to the maintenance of peace and security were concerned, he would agree that they did not call for work on State responsibility by the Special Rapporteur and the Commission. Those rules were contained in the United Nations Charter, but were also to be found in the most unexpected places; one example was a little-known resolution by the Security Council on an incident relating to a fort in Yemen, in which the Security Council had held that armed reprisals were contrary to the Charter.[10] A great deal of work had also been done on those rules by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. The Commission itself, at its very first session in 1949, had adopted a draft Declaration on Rigts and Duties of States.[11] Unfortunately, that Declaration had not become a binding instrument, but its contents were nevertheless relevant to the subject of maintenance of peace and security.

24. With regard to injury to the person or property of aliens, he could not accept the argument that that subject was not ripe for codification. The Commission's twenty years' experience had shown that it was possible to carry out successful codification and progressive development of subjects which, on the traditional view, were not ripe for codification. For a subject to be considered ripe, it had formerly been customary to require that there should be a considerable body of practice, that the practice should be both uniform and general, that there should be a substantial body of case-law, and even that there should be some degree of uniformity in the views expressed by writers. In 1958, however, the first United Nations Conference on the Law of the Sea had adopted the Convention on Fishing and Conservation of the Living Resources of the High Seas, which embodied in article 6 the revolutionary idea that "A coastal State has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea".[12] That idea was not based on pre-existing practice, any more than the principles embodied in the Convention on the Continental Shelf,[13] which had been adopted almost unanimously by the same Conference. Both those Conventions were now in force and binding on a considerable number of States. The rules embodied in them related to matters which had not been considered ripe for codification at the time, but they had been adopted in response to the interest expressed by the international community, which had felt the need to regulate certain matters.

25. A similar need now existed in regard to injuries to the person or property of aliens. Despite the division of opinion among writers and the lack of uniformity both in State practice and in the case-law, it was desirable that the subject should be codified. And he agreed with Mr. Bartoš that contemporary international law showed a trend towards the recognition of international standards of treatment for all human beings, not merely for aliens. The developments relating to human rights in the Council of Europe were particularly significant in that respect, and the United Nations had adopted the International Covenants on human rights,[14] which would in due course no doubt attract the necessary number of ratifications and enter into force.

26. Another important contemporary development related to the question of compensation, which was, in a sense, being increasingly transferred from the strictly legal field to that of international economic co-operation, or at least to that of bilateral treaty relations. Reference had been made to the Convention on the

[8] United Nations, *Treaty Series*, vol. 30, p. 86.

[9] See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 227 *et seq.*

[10] See Security Council resolution 188 (1964).

[11] See *Yearbook of the International Law Commission, 1949*, p. 286.

[12] United Nations, *Treaty Series*, vol. 559, p. 290.

[13] *Op. cit.*, vol. 499, p. 312.

[14] See General Assembly resolution 2200 (XXI).

settlement of investment disputes between States and nationals of other States,[15] prepared by the International Bank for Reconstruction and Development. That Convention, however, had only been accepted by investing countries and a few of the developing countries with the lowest per capita income. He himself did not believe that the best way of attracting foreign investment was to extend special safeguards. His own country, Mexico, was one of the developing countries which was attracting the largest influx of foreign capital, although it had always made a point of not extending special privileges or giving any special guarantees to foreign investors. Mexico had not signed any of the international instruments formulated for that purpose.

27. The question of compensation to aliens for nationalization was particularly urgent and important at the present moment. A vast agrarian reform scheme had just been introduced in Peru which would affect foreign interests. Many other examples could be cited which explained the present concern of the international community over the problem. It was therefore quite impossible for the Commission to exclude from the process of codification the question of injury to the person or property of aliens. Perhaps, as suggested by some members, the Commission might treat it as a special section of State responsibility at some future date.

28. He agreed that the topic of State responsibility should include the questions of reparation and sanctions, including reprisals. It was not possible, however, to examine the question of reprisals without including armed reprisals. The question of remedies, to which Mr. Kearney had referred during the discussion,[16] was also one that should be included in the topic of State responsibility. As to the rules on compensation, they could no doubt be considered as substantive rules governing the obligations of States towards aliens. It was, however, also possible to regard compensation as part of the important subject of reparation and thus to include it as one of the aspects of State responsibility.

29. It would also be of interest to cover the subject of responsibility for "risk" in cases where a State's conduct did not constitute a breach of an international obligation—a matter to which a brief reference was made in the report (footnote 79). Although, from a technical point of view, it might be argued that the subject fell outside the study of wrongful acts and should therefore not be dealt with under the heading of State responsibility, it was highly desirable to deal with it because of the increasing importance of the doctrine of risk in contemporary international law. That doctrine had originated in municipal law following the large-scale use in industry and transport of instruments, machinery and vehicles which involved risks to individuals. The idea had thus emerged of liability divorced from any notion of fault and of compensation to be paid without any wrong being established; it was sometimes described in municipal law as the doctrine of objective liability. In 1967 Mr. Padilla Nervo had pointed out the relevance of the doctrine of risk to damage caused by atomic radiation and fall-out from nuclear weapons tests—a subject which had then been of great topical interest [17].

30. Such questions as denial of justice, exhaustion of local remedies as a requirement for establishing international responsibility, and the problem of the nationality of claims should also be covered. The question of the nationality of claims did not arise only in cases of injury to the person or property of aliens, but also in other cases.

31. He had every confidence in the leadership of the Special Rapporteur to guide the Commission in its difficult work on State responsibility.

32. Mr. AGO, Special Rapporteur, said he was glad that his preliminary report had provoked such a helpful discussion. For the time being, he would only try to clarify a few points.

33. First of all, in case his introductory statement had created a different impression, he wished to make it clear that he had no hard and fast views on any of the questions discussed. Secondly, he would not like certain ideas which he did not hold to be attributed to him; for example, it had never been his intention to exclude the question of wrongful acts, which was the heart of the subject of State responsibility. Thirdly, the various points in the outline programme of work had been included in his report merely as a guide; they were not the only points that would be dealt with. In some cases they represented chapter headings, but in others they merely served to show that at some stage it would have to be decided where a particular point was to be considered. Lastly, the necessary delimitation of the subject must be understood rather loosely; there could be no question of building a Great Wall of China round it. For example, the reason why it was better not to embark on a study of the substantive rules on the status of aliens was that the Commission would thus obtain a clearer view of the problems of responsibility proper; but that did not mean that the subject of the status of aliens must be excluded. On the contrary, if the Commission did manage to codify that subject, it would be rendering an inestimable service to the international community. Problems had to be taken in order, so as to prevent the difficulties relating to one of them from contaminating the others. Codification was a long-term process and the Commission should begin with what was within its reach. The rest could be left to its successors.

34. The CHAIRMAN said that further discussion of item 3 would be adjourned till later in the session.

The meeting rose at 1 p.m.

[15] United Nations, *Treaty Series*, vol. 575, p. 160.

[16] See previous meeting, paras. 25-27.

[17] See *Yearbook of the International Law Commission, 1957*, vol. I, p. 156, paras. 55-59.