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Note on State Responsibility by Roberto Ago, Special Rapporteur

Topic:
State responsibility

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STATE RESPONSIBILITY

[Agenda item 3]

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Note by Mr. Roberto Ago, Special Rapporteur

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1. The International Law Commission considered the problems of the international responsibility of States for the first time at its sixth session, in pursuance of an invitation formulated by the General Assembly in resolution 799 (VIII) of 7 December 1953. From its eighth to its thirteenth session, the Commission received successive reports from the Special Rapporteur, Mr. F. V. García Amador.¹ Nevertheless, the brief general discussions to which those reports gave rise did not enable the Commission to reach agreement in principle on the scope of the topic to be dealt with, or on the criteria to be followed for its consideration. In the face of these difficulties and in pursuance of its decision at its fourteenth session to include the international responsibility of States among the three major topics to be dealt with as a matter of priority, the Commission decided to approach the problem from a new angle and to explore the possibility of determining by common agreement the general criteria which should govern an attempt to codify the topic. To that end, at its 637th meeting, held on 7 May 1962, it set up a Sub-Committee on State Responsibility, composed of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen.²

2. The Sub-Committee met in June 1962 and again at Geneva in January 1963. The results of its work are set out

in a report (A/CN.4/152)³ submitted by its Chairman to the Commission at its fifteenth session, in the following terms:

... The terms of reference of the Sub-Committee, as laid down by the Commission at its 668th meeting on 26 June 1962,⁴ were as follows:

“(1) The Sub-Committee will meet at Geneva between the Commission’s current session and its next session from 7 to 16 January 1963;

“(2) Its work will be devoted primarily to the general aspects of State responsibility;

“(3) The members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963;

“(4) The Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session.”

2. The Sub-Committee held seven meetings ending on 16 January 1963. All its members were present with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members:

Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1);
Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/SC.1/WP.7);
Mr. Gros (A/CN.4/SC.1/WP.3);
Mr. Tsuruoka (A/CN.4/SC.1/WP.4);
Mr. Yasseen (A/CN.4/SC.1/WP.5);
Mr. Ago (A/CN.4/SC.1/WP.6).

3. The Sub-Committee held a general discussion of the questions to be studied in connexion with the work relating to the international responsibility of States, and with the directives to be given by the Commission to the Rapporteur on that topic.

¹ *Yearbook of the International Law Commission, 1956*, vol. II, document A/CN.4/96; *Yearbook of the International Law Commission, 1957*, vol. II, document A/CN.4/106; *Yearbook of the International Law Commission, 1958*, vol. II, document A/CN.4/111; *Yearbook of the International Law Commission, 1959*, vol. II, document A/CN.4/119; *Yearbook of the International Law Commission, 1960*, vol. II, document A/CN.4/125; *Yearbook of the International Law Commission, 1961*, vol. II, document A/CN.4/134 and Add.1.

² *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 189, para. 47.

³ *Yearbook of the International Law Commission, 1963*, vol. II, annex I, p. 227.

⁴ *Yearbook of the International Law Commission, 1962*, vol. II, document A/5209, p. 191, para. 68.

4. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very vast subject of the international responsibility of the State by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was desirable to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law—and in particular those relating to the treatment of aliens—the breach of which can give rise to responsibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, new developments of international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

5. In the end, the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the State. It was agreed, firstly that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.

6. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After this debate, it decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the State; these indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

*Preliminary point: Definition of the concept of the international responsibility of the State.*⁵

First point: Origin of international responsibility

(1) *International wrongful act:* the breach by a State of a legal obligation imposed upon it by a rule of international law whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act:*

(a) *Objective element:* act or omission objectively conflicting with an international legal obligation of the State.⁶ Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) *Subjective element:* imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. System of law applicable for determining the status of organ. Legislative, administrative and judicial organs. Organs acting *ultra vires*.

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

⁵ The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

⁶ The question of possible responsibility based on "risk", in cases where a State's conduct does not constitute a breach of an international obligation, may be studied in this connexion.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault.⁷

(3) *The various kinds of violations of international obligations.* Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

International wrongful acts and omissions. Possible consequences of the distinction, particularly with regard to *restitutio in integrum*.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of the exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) *Circumstances in which an act is not wrongful*

Consent of the injured party. Problem of presumed consent;

Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility

(1) *The duty to make reparation*, and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation.* Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction.* Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.

3. The report quoted above was considered by the Commission at its fifteenth session in the course of the 686th meeting.⁸ In introducing the report, the Chairman of the Sub-Committee drew attention to the conclusions set out and the programme of work proposed in the report.

4. All the members of the Commission who took part in the discussion expressed agreement with the general conclusions of the report, *viz.*: (1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility.

⁷ It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

⁸ See *Yearbook of the International Law Commission, 1963, vol. II, document A/5509, pp. 223 and 224, paras. 51-55.*

5. Some members of the Commission felt that the emphasis should be placed in particular on the study of State responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law. Other members considered that none of the fields of responsibility should be neglected and that the precedents existing in all the fields in which the principle of State responsibility had been applied should be studied.

6. The members of the Commission also approved the programme of work proposed by the Sub-Committee, without prejudice to their position on the substance of the questions set out in that programme. Thus, during the discussion, doubts or reservations were expressed with regard to the solution to be given to certain problems arising in connexion with some of the questions listed. In this connexion, it was pointed out that these questions were intended solely to serve as an *aide-mémoire* for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. The Sub-Committee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.

7. After having unanimously approved the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of State responsibility. It was understood that the Secretariat would prepare certain working papers on the question.

8. Progress in the Commission's work on State responsibility was described in chapter IV of its report on the work of its fifteenth session. The General Assembly noted it with approval at its eighteenth session and recommended that the Commission should continue its work on the topic, taking into account the views and considerations expressed in its resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963.

9. Since the term of office of members of the Commission elected in 1962 has expired and since the election by the General Assembly in 1966 resulted in a new membership of the Commission, the Special Rapporteur, who was appointed by the Commission at its fifteenth session, ventures to hope that the new Commission will consider afresh the report the Commission approved at its fifteenth session and will kindly let him know whether it intends to confirm his appointment and to repeat, if that is thought necessary, the instructions it gave him at that time, so that he may have the assurance that in continuing his work he enjoys the full confidence of his colleagues.