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Summary record of the 1011th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1969, **vol. I**

37. Mr. ROSENNE said he would like to associate himself with the expressions of appreciation to the two members who had represented the Commission at important regional meetings. He attached great significance to the regular submission of reports on the activities of regional bodies concerned with international law and hoped that the Commission's documentation on those activities would be kept as complete as possible. That documentation, which was useful for the edification of members of the Commission, also drew attention to important trends in various parts of the world. Thus, it was interesting to note the silence of regional bodies on certain issues; for example, at the previous session, the representative of the Asian-African Legal Consultative Committee had made no reference to State succession.

38. The reports on regional activities provided the Commission with authentic and objective documentation on the matters with which the regional bodies had dealt. In the past, the Commission had found valuable material in such reports on the subject of reservations to multilateral treaties. In the future, its work on State responsibility would benefit from the same exchange of authentic information.

39. He had listened with interest to Mr. Ruda's analysis of the new statutes of the Inter-American Juridical Committee and looked forward to learning what solutions were ultimately adopted.

40. As to the Vienna Conference on the Law of Treaties, he had noted Mr. Tabibi's remarks on the role of the Asian-African Legal Consultative Committee, but he believed that there were a number of aspects of the history of that Conference on which it was still too early to lift the veil. That remark, however, did not detract in any way from the well-deserved tribute paid to the role of the African delegations in the success of the Conference.

41. Mr. NAGENDRA SINGH, referring to the comments of Mr. Ramangasoavina, said it was true that African participation in the meetings of the Asian-African Legal Consultative Committee had been somewhat limited in the past. It had now been decided, however, to hold a series of meetings in Africa and the next meeting of the Committee would take place in Ghana; it was hoped that a greater number of Africans would then be able to participate in the Committee's work.

42. The CHAIRMAN said he wished to thank Mr. Tabibi for being so good as to represent the Commission in the Asian-African Legal Consultative Committee, and to congratulate him on the excellent report which he had just presented. The Commission would soon have the pleasure of hearing the Observer for the Asian-African Legal Consultative Committee give a summary of the work of that Committee which, though not as old-established as the Inter-American Juridical Committee, also carried out important and fruitful work.

The meeting rose at 12.25 p.m.

1011th MEETING

Monday, 30 June 1969, at 3.10 p.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]

1. The CHAIRMAN invited the Commission to begin consideration of item 3 of the agenda and called on the Special Rapporteur to introduce his report (A/CN.4/217).

2. Mr. AGO (Special Rapporteur) said that in presenting, in his first report, a review of previous work on codification of the topic of the international responsibility of States, his intention had been to provide the Commission with a conspectus of what had been done so far, by studying which it could derive the maximum benefit for its future work and at the same time avoid committing the errors which had stood in the way of such codification in the past. The international responsibility of States, perhaps more than any other branch of international law, including the law of treaties, had been the subject of the earliest attempts at codification. To emphasize the difficulty of the task he would remind the Commission how arduous the codification of the law of treaties had been, even though that work had been made easier by the fact that the subject-matter had been well defined and the plan to be followed relatively straightforward, and that it had been possible to refer quite extensively to the general theory of obligations in private law.

3. That did not apply where the international responsibility of States was concerned. In the first place, the greatest caution was called for in making any reference in that context to internal law, where the clearly separate development of the concepts of civil responsibility and criminal responsibility made those concepts difficult to transfer to international law. An even greater difficulty lay in the fact that, unlike the law of treaties, which was a clearly differentiated branch of international law, responsibility was generally treated in conjunction with other subjects, which, moreover, differed from each other. It was true that writers were more or less agreed on a general definition, according to which a State incurred responsibility by violating an international obligation. But it was often found that while speaking of responsibility writers were in fact attempting indirectly to define general substantive rules, the primary

rules of international law—those rules from which derived the obligations whose violation in turn entailed responsibility. That resulted in lack of clarity and further difficulties. For when responsibility was linked with other branches of international law it acquired all the difficulties inherent in defining the rules contained in those other branches. Moreover, the inevitable and erroneous conclusion was that responsibility could not be studied as such, but only in relation to a particular sector of general international law.

4. At the origin of all that lay the historical fact that the general theory of responsibility had been born —and not without reason—in the doctrine of the legal obligations of a State relating to the treatment of aliens. For in studying the consequences of violation by a State of the primary rules governing the rights of aliens, it had been found necessary to define the essential obligations of the State towards aliens and to formulate the rules which imposed those obligations on the State. Hence the confusion of the two subjects and the impression that the international responsibility of States need be defined only with reference to the sector of international law relating to the treatment of aliens.

5. Confirmation of what he had just said was provided by the Secretariat study on the status of permanent sovereignty over natural wealth and resources [1] and the second report on succession of States in respect of matters other than treaties (A/CN.4/216/Rev.1), which the Commission had just examined under item 2 (*b*) of its agenda. In both cases, questions had been raised regarding the boundaries between the subjects considered and State responsibility. The real point was the boundaries between those subjects and the rights of aliens.

6. Even those who opposed the idea that responsibility was indissolubly linked with the treatment of aliens and affirmed the need to consider the subject mainly with reference to other branches of international law, in particular, with reference to rules for safeguarding peace, were not always free from the error of trying to define certain essential primary rules of contemporary international law under cover of responsibility. In reality, defining those rules and the obligations that derived from them was one thing, while determining the consequences of violation of such obligations was another.

7. One should therefore beware of speaking of State responsibility when the real problem was to establish the primary bounds to be set by international law to the freedom of action of States. In other cases, a further source of error was the poverty of legal language, which used the term "responsibility" in different senses: for example, responsibility incurred through a wrongful act, and responsibility as an objective and primary obligation to repair certain consequences of a perfectly lawful act or activity.

8. The review he had given in his report confirmed those conclusions with regard both to private codification and to codification undertaken under the auspices of regional bodies, of the League of Nations and of the United Nations [2].

9. Where private codification was concerned, he had referred mainly to collective attempts by learned societies. He had made exceptions in favour of two drafts by private persons: those of Professor Strupp and Professor Roth, which he had included because of their interest. Both the draft on Diplomatic Protection prepared in 1925 by the American Institute of International Law and the draft Code of International Law prepared in 1926 by the Japanese Association of International Law, chapter II of which was entitled "Rules concerning responsibility of a State in relation to the life, person and property of aliens", considered responsibility in relation to the rights of aliens and did not treat the two subjects separately. Similarly, the resolution adopted in 1927 by the Institute of International Law in anticipation of the Codification Conference to be held at The Hague in 1930, although it was a very complete and detailed study, nevertheless considered responsibility only in relation to respect for the rights of aliens and endeavoured to define the content of the State's obligations in that respect at the same time as the consequences of failure to fulfil those obligations. Nevertheless, that study was very interesting in spite of its mixed subject-matter, because it contained many things which it would still be good to adopt and because, owing to its universal character, the Institute of International Law did not, like other bodies, represent a particular point of view.

10. Other attempts to codify responsibility had been undertaken in anticipation of the Hague Conference. In 1929, the Harvard Law School had entrusted Professor Borchard with the preparation of a draft Convention on responsibility of States for damage done in their territory to the person or property of foreigners. There again different problems had been mixed together in an attempt to make an over-all codification of the rules governing the rights of aliens and the international responsibility of States. In 1961, the Harvard Law School had undertaken a review of the Borchard draft to bring it up to date for the benefit of the International Law Commission. The text produced, which was entitled "Draft Convention on the international responsibility of States for injuries to aliens", was not really a revision of the 1929 text, but an entirely new draft and a rather bold one. One idea it put forward was that the right impaired by the internationally wrongful act was that of the individual, not that of his State of nationality, and that the individual himself could bring an international claim direct.

11. He had also drawn attention in his report to two resolutions adopted in 1956 and 1965 respectively by the Institute of International Law and to a draft Convention on the responsibility of States for injuries caused in their territory to the person or property of aliens, prepared in 1930 by the Deutsche Gesellschaft für Völkerrecht (German Association for International

[1] A/AC.97/5/Rev.2.

[2] Source references for the texts mentioned in this statement will be found in the report (A/CN.4/217), which is reproduced in vol. II of this *Yearbook*.

Law), many provisions of which dealt with problems of responsibility proper.

12. Lastly, the drafts prepared by Professor Strupp and Professor Roth were both particularly important for the work of the Commission, because they constituted attempts to codify, in the form of articles, responsibility as such, not in relation to the subject of aliens' rights.

13. Of the attempts at codification made under the auspices of regional bodies, those singled out for special attention were the drafts prepared by inter-American bodies, in particular the two drafts of the Inter-American Juridical Committee. The value of those drafts lay in the fact that one of them reflected the point of view of the United States and the other that of Latin America —two different conceptions the Commission would have to take into consideration. But there again, the rules governing the rights of aliens and responsibility were treated as interdependent. The Asian-African Legal Consultative Committee was also making a contribution on the subject.

14. The work of the League of Nations on codification was most enlightening; the texts were annexed to his report. The plenary meeting of the Hague Codification Conference of 1930 had not adopted the ten articles which had been approved by the Third Committee of the Conference, because it had been unable to agree on the articles which should have followed them. The first ten articles had dealt with general problems of responsibility, while those which followed had dealt with the status of aliens. Thus the 1930 Conference could have been successful if it had confined itself to responsibility instead of venturing onto the quicksand of aliens' rights.

15. Finally, the United Nations had attempted, through the International Law Commission, to codify the international responsibility of States. A history of that work was given in the document prepared by the Secretariat (A/CN.4/209). To facilitate comparison he had included in the annexes to his report the texts prepared for the Commission by Mr. García-Amador, its first Special Rapporteur on State responsibility.

16. Mr. García-Amador had first wished to codify responsibility in general, but at that time the Commission had preferred him to limit the scope of his first study to injury caused to aliens. The main difficulty encountered by the Commission had been due to the fact that in the bases for discussion prepared by Mr. García-Amador the individual was presented as a subject of international law beside the State, with all the consequences that followed. In addition Mr. García-Amador had tried to overcome the main difficulties that arose in regard to aliens' rights by having recourse to the notion of fundamental human rights, and at that time the Commission had not been prepared to codify the rules governing the treatment of aliens on such a novel basis.

17. Having achieved no concrete results on the basis of the successive reports of its first Special Rapporteur, the Commission had then considered the possibility of codifying responsibility apart from any other subject, in particular the rights of aliens. The basic idea guiding the Commission in that second phase, which was well known to members, had been the idea of isolating the subject of responsibility from the other subjects with which it had often been linked, and trying to define the rules independently of any definition of other substantive rules, or primary rules of international law.

18. The main idea which had emerged from the work of the Sub-Committee set up in 1962, and later from the conclusions reached by the Commission itself in 1963 and approved by the General Assembly, was, in other words, that of the need to concentrate on the notion of violation of an international obligation and the consequences of such violation. He would like to sum up that programme in the phrase: the whole of responsibility and nothing but responsibility. According to the plan adopted by the Sub-Committee in 1963 and confirmed by the Commission in 1967, which was reproduced in paragraph 91 of his report, the Commission would first take up the problem of the origin of international responsibility, namely, the notion of a wrongful act or infringement, the determination of the components of that notion and, in particular, the determination of the conditions under which an international wrongful act could be imputed to a State. On that basis it must distinguish between the different kinds of infringement and define the circumstances in which the wrongful nature of an act or omission could be set aside. Secondly, the Commission would have to study the forms of international responsibility, the relationships between reparation and sanctions and between individual sanctions and collective sanctions, with all the consequences that followed. That was a complicated and difficult task, but there was reason to hope that the difficulties of defining responsibility as such could be overcome, especially in view of the difficulties the Commission had surmounted when codifying the law of treaties.

19. If it was to be successful, the Commission would have to devote more time to responsibility at its next session than it had hitherto. He himself had already made good progress in the work of drafting his second report, in which he hoped to be able to submit a first draft of articles to the Commission if it wished him to do so.

20. Mr. BARTOŠ said that both the Commission and the General Assembly had recommended a study of the responsibility of States incurred by the violation of rules relating to international peace and security. Although that aspect of the topic was mentioned in the report, the Special Rapporteur had said nothing about it in his introductory statement. He would like to know whether the Special Rapporteur intended to confine himself to the question of State responsibility for injury to aliens or whether he intended to follow those recommendations.

21. Mr. AGO (Special Rapporteur) said he could assure M. Bartoš that he had no intention of confining his study to the problem of injury to aliens. The topic of responsibility had to be considered as a whole; obviously therefore, it would also have to be studied with reference to the matters mentioned by Mr. Bartoš.

But there again, no attempt should be made to define the primary rules whose violation was a source of responsibility; the Commission would study the conditions in which responsibility was incurred by the violation of a rule, whatever the rule might be.

22. Mr. RUDA said the Special Rapporteur was to be commended for his valuable review of previous work on codification of the topic of State responsibility and for his excellent introductory statement.

23. A historical introduction such as that contained in the Special Rapporteur's report was necessary, and the annexes would prove particularly useful for the Commission's future work on the topic. The material he had assembled confirmed the Special Rapporteur's conclusion that the Commission should not neglect any part of the work already done on the topic, but should at the same time avoid past errors. Some success had undoubtedly been achieved in the past, but mistakes had also been made, particularly in the general approach to the subject. The time had come for the Commission to undertake a study of State responsibility in contemporary international law, with due regard to the work previously done. The topic was perhaps even more difficult than that of the law of treaties.

24. Some of the difficulties involved in such a study were connected with the introduction into past discussions of concepts of municipal law. Other difficulties, however, were attributable to the traditional treatment of the subject, particularly in the early part of the twentieth century.

25. The Special Rapporteur, with his usual clarity, had offered the Commission a satisfactory basis for its work when he had stated, in paragraph 6 of the report, his firm belief "that, for purposes of codification, the international responsibility of the State must be considered as such, i.e. as the situation resulting from a State's non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates." He shared the Special Rapporteur's view that it was necessary to isolate the rules governing State responsibility and to endeavour to deal exclusively with those rules, as distinct from the rules of other parts of international law. Any attempt to deal with those other substantive rules of international law would lead the Commission into difficulties that would only hamper the codification of the international law of State responsibility.

26. He had, however, some doubts about the Special Rapporteur's statement that State responsibility was the situation resulting from a State's "non-fulfilment of an international legal obligation". Viewed in that light, a study of State responsibility would be confined to the consequences of wrongful acts, whereas the international responsibility of a State could arise from lawful activities. One example was State responsibility in cases of nuclear damage, a matter on which a number of conventions had been drafted. Another example was provided by State activities in outer space; the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space was at present engaged in studying drafts dealing, precisely, with the damage that could result from certain activities of a State in outer space which were not in any way wrongful.

27. He was grateful to the Special Rapporteur for his careful and extensive treatment in his report of the Latin American contribution to the study of the topic of State responsibility, in particular, the work done in 1925 by the American Institute of International Law at the invitation of the Governing Board of the Pan-American Union and the more recent work of official codification by inter-American bodies.

28. He supported the Special Rapporteur's intention to deal with the whole subject of State responsibility, and nothing but that subject.

29. Mr. YASSEEN, after congratulating the Special Rapporteur on his report and his masterly presentation of it, said that the Commission had now to decide how to deal with the subject. Since 1963, he himself had consistently maintained, both in the sub-Committee and in the Commission, that the Commission should study responsibility itself, in other words, the general theory of responsibility, and should not begin by considering responsibility in the various sectors of international relations. The general theory did exist, and it formed part of positive international law; the Commission should undertake both codification and progressive development of international law on State responsibility.

30. The Special Rapporteur had wisely drawn a distinction between the rules on responsibility and substantive rules. That distinction was imperative, for to study international obligations *per se* would mean studying the whole of international law.

31. Of course, the possibility of special features of the application of the general theory of responsibility arising in certain sectors of international relations must not be excluded. But the Commission should begin by working out the general principles and then see whether their application presented special features. For instance, in applying the general theory of responsibility in internal law to industrial or traffic accidents, certain special features of application had been introduced such as presumptions or reversal of the burden of proof. In international law one of the areas where the application of the general theory of responsibility might have special features was breaches of the peace, which were a matter of cardinal importance to the international community.

32. Mr. RAMANGASOAVINA said the Special Rapporteur was to be congratulated on the very full documentation he had produced on a topic which needed urgent consideration, since it had been on the Commission's agenda for many years.

33. The Special Rapporteur rightly wished to study the general principles of responsibility without going into substantive rules, and as he had confirmed in his reply to Mr. Bartoš, the study should not be limited to any particular sector of responsibility. It should extend to State responsibility for violation of the national sovereignty, independence or national integrity of other States, or of the right of nations to self-determination and the use of their natural resources.

34. That widening of the scope of the topic would naturally cause difficulties, because some principles, even

though well-established, raised awkward problems of definition. For example, despite the principles set out in Article 2 (4) of the Charter, aggression was extremely hard to define. In order to overcome such difficulties advantage should be taken of the work that had already been done, so that at least some essential rules and principles could be formulated; it would then be possible to define some of the obligations which were sources of responsibility.

35. The Special Rapporteur's review of previous work on the international responsibility of States made no mention of a trend towards the recognition of responsibility without fault. That trend had been very marked ever since the 1944 Chicago Agreement on International Civil Aviation [3] right up to the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space,[4] by way of the Conventions on the Law of the Sea.[5] True, it might be dangerous, as the Special Rapporteur had stressed, to draw analogies between international law and municipal law, but in that case they did both seem to be developing on similar lines as a result of technical progress. To be quite complete, therefore, the review should take that trend into account.

36. Mr. CASTRÉN, associating himself with the congratulations expressed to the Special Rapporteur, said that his first report (A/CN.4/217) together with the two documents prepared by the Secretariat (A/CN.4/208 and 209) would provide a good basis for discussion, particularly the Special Rapporteur's detailed examination of García-Amador's reports and the interesting conclusions to which it had led him.

37. The introduction to the report contained some valuable observations. He agreed that the topic of State responsibility was very hard to codify and that particular attention should therefore be paid to the question of method. The decision taken by the Commission in 1963, and confirmed in 1967, to give priority to the general rules governing international responsibility,[6] had been justified. The Special Rapporteur was right in saying that State responsibility should be dealt with as "a single and distinct general problem", and as "the situation resulting from a State's non-fulfilment of an international legal obligation, regardless of the nature of that obligation and the matter to which it relates". Special questions such as that of the responsibility of States for injuries caused to aliens in their territory could be considered later, on the basis of the general principles which emerged from the Commission's work.

38. Mr. NAGENDRA SINGH said that the Special Rapporteur deserved the thanks of the Commission for his illuminating report, in which he had not only given a historical resumé of the subject of State responsibility, but had also brought out clearly the pitfalls to be avoided and the difficulties to be faced. He endorsed every word the Special Rapporteur had said in his introduction.

39. He agreed that the subject of international criminal responsibility had to be viewed with caution and should be avoided.

40. He agreed with the suggestion of the Sub-Committee on State Responsibility that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.[7]

41. He also agreed with the Special Rapporteur that the Commission should not adopt the approach adopted by Mr. García-Amador, the first Special Rapporteur, and, in particular, that it would be a mistake if the topic of State responsibility were made to revolve round the question of the status of aliens.

42. He noted that General Assembly resolution 1902 (XVIII) had recommended that the International Law Commission should "Continue its work on State responsibility, taking into account the views expressed at the eighteenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations". While agreeing that the Commission should include in its study the position of State responsibility in relation to the Charter, he hoped that it would not devote too much attention to that very broad aspect of the matter. He supported Mr. Yasseen's view that the Commission should adopt a general approach and concentrate its attention on violations of international obligations.

43. The Commission should also pay some attention to the latest trends and developments with respect to State responsibility, such as those arising from such subjects as the peaceful uses of outer space, the seabed and the ocean floor, referred to in the document prepared by the Secretariat (A/CN.4/209). As Mr. Ramangasoavina had said, however, caution was necessary in dealing with awkward problems like defining aggression.

44. The Special Rapporteur had endorsed the conclusions reached by the Sub-Committee on State Responsibility, and he agreed that the Commission should follow the general recommendations of that body. The subject of State responsibility had been before the General Assembly since 1952 and before the Commission since 1954, with little result. The Commission should give the Special Rapporteur full latitude to deal with the subject as he thought best; perhaps if the Commission held a winter session in 1970, some progress might at last be made.

The meeting rose at 5.45 p.m.

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[3] United Nations, *Treaty Series*, vol. 171, p. 346.

[4] See General Assembly resolution 2222 (XXI).

[5] United Nations, *Treaty Series*, vol. 450, p. 82; vol. 499, p. 312; vol. 516, p. 206; vol. 559, p. 286.

[6] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 224, para. 52 and 1967, vol. II, p. 368, para. 42.

[7] *Op. cit.*, 1963, vol. II, p. 228, footnote 2.