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Summary record of the 1012th meeting

Topic:
State responsibility

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1012th MEETING

Tuesday, 1 July 1969, at 10.15 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. TAMMES said he was grateful to the Special Rapporteur for his valuable historical report and to the Secretariat for the useful documentation it had provided. The report was a great help to an understanding of the obstacles which for many years had hampered the codification of the topic of State responsibility. The material it contained confirmed the Special Rapporteur's persuasive thesis that the "continued confusion of State responsibility with other topics was undoubtedly one of the reasons which prevented it from becoming ripe for codification" (para. 6).

3. He therefore supported the Special Rapporteur's "vertical" method, as opposed to the "horizontal" method which mixed the obligations of State responsibility with the rules whose non-fulfilment gave rise to State responsibility. It could even be said that past insistence on State responsibility had been partly inspired by what was otherwise a legitimate desire to clarify certain disputed substantive rules of international law. The more such matters were codified, the less there would remain for State responsibility as such, and certain time-honoured topics would decrease in interest and urgency.

4. The work of the 1963 Sub-Committee, and the Special Rapporteur's excellent analysis of that work, showed that even if the topic of State responsibility were cleared of all extraneous matter, there would remain abundant material for study. The issues to be considered would centre mainly on the determination of the agent of the international wrongful act and the consequences of that act. That approach to the subject would be consistent with the consensus of opinion in the Commission when it had discussed the topic of State responsibility at its nineteenth session.[1]

5. For want of a better terminology, the distinction which was being adopted could be described as a distinction between primary, material or substantive rules of international law, on the one hand, and secondary or functional rules, on the other. Primary rules were intended to influence the conduct of States directly; secondary rules, which were those of State responsibility proper, were intended to promote the practical realization of the substance of international law contained in the primary rules.

6. At the nineteenth session, he had welcomed that distinction as basically sound and progressive;[2] he now wished to raise some problems of classification with the aim of seeing how the "purified" topic of State responsibility could be made more manageable and brought more within reach of codification. In doing so, he fully realized that the Special Rapporteur, in paragraph 91 of his report, had intended to submit only a classification for purposes of discussion, not a rigid framework for future draft articles.

7. The first problem was that of the abuse of rights, referred to under the heading "First point: Origin of international responsibility", in sub-paragraph (2) (*a*) of paragraph 91. Clearly, the abuse of rights constituted by the abusive interpretation of treaty provisions would come under the heading of State responsibility. Other cases of abuse of rights, however, would be of a borderline character, for example, cases arising out of peaceful uses of the sea bed and the ocean floor beyond the limits of national jurisdiction, referred to in the Secretariat study (A/CN.4/209, paras. 41 and 42). The same was true of certain matters connected with peace and security, which Mr. Bartoš mentioned.

8. He also had some doubts about the "state of necessity", listed by the Special Rapporteur in sub-paragraph (4) of the "First point" in paragraph 91. In many fields of codification, where the need had been felt for an escape clause to cover cases of emergency, the relevant exceptions had been formulated with the utmost care. Examples could be given from the 1958 Conventions on the law of the sea, the international instruments on human rights, and the Geneva Conventions for the protection of war victims. The Special Rapporteur ought not to be burdened with the extremely difficult task of drawing up a general rule for the state of necessity, or for self-defence, which was a special case of the state of necessity. The boundaries of the topic would remain sufficiently elastic to allow the Commission to deal with such questions at a later stage.

9. The work to be undertaken on the topic of State responsibility would be essentially work of codification. He had been much impressed by the concise language used in the drafts prepared by Professor Strupp in 1927 and by Professor Roth in 1932, which were annexed to the report. Except, perhaps, with respect to the rules on denial of justice, both those drafts were based on the approach now proposed by the Special Rapporteur and were restricted to the elementary principles of State responsibility. They reflected the doctrine prevailing in about 1930, in a small number of concise rules dealing with such matters as the responsibility of the State for

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[1] See *Yearbook of the International Law Commission, 1967*, vol. I, pp. 225-228.

[2] *Ibid.*, p. 225.

the conduct of its organs, its territorial sub-divisions and persons under its control, and questions of the exceeding of powers and of due diligence in protecting aliens from mob violence. All those subjects came under the heading of general principles, as discussed by the Commission at the previous meeting.

10. The work on the topic of State responsibility would not, however, be confined to codification. In the past, it had centred on cases of responsibility for injuries done in the territory of a State to the person or property of aliens. With scientific and technological progress, however, it had become possible for damage to be caused in the territory of another State at a great distance from its border. Cases of that type raised the question of the distinction between risk and negligence, to which reference was made in footnote 79 to the report. They were also sometimes connected with the problem of collective responsibility for joint ventures by several States, such as schemes for peaceful use of the ocean floor.

11. A question raised during the Commission's past proceedings on State responsibility, and also in the present discussion, was whether international law should admit some concept such as the *actio publica* of Roman law. Consideration might be given to the question whether the requirement of interest for initiating an international action should be extended beyond the concept of the direct interest, material or otherwise, of the injured party.

12. Another question of progressive development was that of reprisals, to which reference was made in the Special Rapporteur's classification in sub-paragraph (3), under the heading "Second point: The forms of international responsibility". That question raised the important problem of the proportionality of reprisals to the gravity of the wrongful act they were intended to sanction. The subject was one on which contemporary international law had gone beyond the former traditional rules and was governed by the prohibition of the threat or use of force.

13. A question which had not so far been mentioned was that of the feasibility of drawing a distinction, both for purposes of responsibility and for purposes of sanction, between more serious and less serious wrongful acts. A distinction of that type had been drawn in all four of the 1949 Geneva Conventions for the protection of war victims.[3]

14. In the short term, work on State responsibility would consist largely in the codification of established principles. In the long term, some progressive development would have to be undertaken, covering such matters as joint responsibility, responsibility for risk as well as negligence, and the proportionality of reprisals.

15. Mr. ALBÓNICO said he associated himself with the tributes paid to the Special Rapporteur for his excellent historical analysis.

16. He agreed with him on the need to draw a distinction between the rules of State responsibility as such, and the substantive rules, violation of which brought State responsibility into play. Although both types of rule were substantive in character, it was convenient in the present context to reserve the term "substantive rules" for those whose non-fulfilment gave rise to State responsibility.

17. In studying the rules of State responsibility, special emphasis should be placed on objective responsibility, which was connected more with the concept of damage than with that of a wrongful act. In municipal law, the doctrine of objective liability had been applied to such matters as industrial accidents involving workmen's compensation. In the case of railway accidents, it had been recognized that a presumption of negligence could be derived from the mere fact that a collision had occurred. Of course, concepts of municipal law should not be imported bodily into international law, but they could have an influence on its information.

18. An example of State responsibility could be taken from the law of extradition. If a State extradited a person to his own country on the understanding that he would be tried for a particular offence, and his own country then tried him for a different offence, that was an act of bad faith and entailed the obligation to make reparation.

19. In contemporary international law, there was a clear tendency to broaden the scope of the objective responsibility of the State, so that such subjects as abuse of rights, state of necessity and collective sanctions deserved consideration.

20. The Special Rapporteur should be instructed to prepare draft rules on State responsibility as such. They should be general rules, but it would be appropriate also to draft a few rules for special cases; they should not, however, include the subject of compensation for injury to the person or property of aliens, which had caused so much controversy in the past, partly for reasons of national pride.

21. Among the special subjects that should be dealt with was that of State responsibility for the violation of human rights, which was not covered by the general rules on State responsibility because the individual was not recognized as a subject of international law. Another special subject was that of State responsibility arising from relations between neighbouring States in such matters as the use of common rivers and lakes. Another was the question of damage caused by outer space activities, to which the doctrine of objective responsibility was particularly relevant.

22. The outline programme of work adopted by the Sub-Committee in 1963 might prove in some respects inadequate for present purposes. Some problems which had appeared urgent in 1963 had become even more urgent in 1969, for example, those connected with outer space activities, while others, such as those arising from human rights, had become especially relevant as a result of recent violations.

23. He was in favour of a broad approach to the work on State responsibility. The Special Rapporteur should deal with the rules of State responsibility proper, but should at the same time select from State practice certain subjects for special treatment in the future.

[3] United Nations, *Treaty Series*, vol. 75.

24. Mr. KEARNEY said the Special Rapporteur's report contained an excellent analysis of how the extremely difficult topic of State responsibility should be dealt with. He wished to thank him particularly for the attention he had given to the contributions of the Inter-American Juridical Committee and the Harvard Law School.

25. One aspect of the subject of State responsibility which had not yet been touched on and which he hoped the Special Rapporteur would take into account was the problem of the settlement of disputes. In view of his recent experience as President of the Vienna Conference on the Law of Treaties, the Special Rapporteur was certainly familiar with the difficulties to which that problem could give rise. One thing which the Vienna Conference had established was that when a topic of international law of wide scope and far-reaching effects on international relations was dealt with in the process of codification, it was a grave mistake not to deal simultaneously with the problem of settling any disputes that might arise. If the Commission had faced that problem boldly when preparing its draft articles on the law of treaties, the Vienna Conference would probably have run a much smoother course and produced more satisfactory results. In fact, however, a solution of the problem of settlement of disputes had been achieved only by way of last-minute improvisation and compromise.

26. In the field of State responsibility, adequate attention to the problem of the settlement of disputes was particularly necessary, since a wide variety of cases might arise. One example was the case of an accident at sea, when a naval vessel of one country collided with a merchant vessel of another; that was a relatively simple case which could usually be settled by the payment of damages. When dealing with the problem of pollution of international waterways, on the other hand, it was necessary to consider an entirely different series of possible remedies. Only a few days ago, for example, the entire water supply of the Netherlands had been endangered by the accidental discharge of insecticides into the Rhine some hundred miles from the Netherlands border. In the over-populated world of today, that type of problem was bound to arise with increasing frequency and the Commission should give due consideration to the best way of dealing with it. The usual procedure for righting wrongs of that kind was to restore the situation to what it had been before; under the common law system of private law, that might take the form of issuing injunctions to prevent persons from taking certain undesirable kinds of action. It was extremely difficult, however, to construct such a system of remedies at the international level; in its final decision in the *Haya de la Torre* case [4] for example, the International Court of Justice had clearly indicated that it considered itself debarred from applying that type of remedy. He hoped, however, that the Special Rapporteur would consider that problem carefully.

27. He would like to know whether the Special Rapporteur proposed to deal with those problems of State responsibility arising in connexion with the law of treaties which had not been dealt with in the Vienna Convention on the Law of Treaties.[5] That Convention dealt with problems relating to the termination and suspension of treaties; there remained, however, a number of questions, such as reparation for breach of agreement, which should be settled within the scope of the topic of State responsibility.

28. Mr. BARTOŠ said that the Special Rapporteur well deserved the congratulations he had received, not only because of his learned report, but also because of the enthusiasm he had shown in studying a subject of great importance.

29. The question of the status of aliens certainly had an important place in the study of State responsibility, and jurists had written much on it. The material was abundant, and further sources might be cited in addition to those in the annexes to the report. Problems of State responsibility arose when the United Nations Covenants on human rights [6] were not respected; a number of international treaties already in force contained clauses relating to the status of aliens, and the Bustamante Code itself give a prominent place to that important subject.

30. However, ideas of law in general and consequently of international law had evolved on that question, and attitudes varied from country to country. In Latin America, that evolution had been reflected both in the political sphere and in the law. An illustration was provided by the difficulties that had arisen in that connexion in relations between the United States and such countries as Mexico and Peru, concerning the property of aliens. In Europe, the ideas held by members of the Council of Europe differed sharply from those held in eastern Europe. Yugoslavia took an intermediate position on the matter. The countries of the "third world" very often invoked the principles relating to the status of aliens to protect the rights of their own nationals, but sometimes rejected them when dealing with the status of aliens in their own territory.

31. The evolution of the world brought changes in the legal superstructure. The notion of an international minimum standard for all human beings, instead of just for aliens, was coming to the fore. That was the European doctrine of positive international law on human rights, expressed in the Council of Europe more clearly than by the United Nations. But though the protection thus accorded to the individual was no longer just a matter between States, it had not done away with diplomatic protection of aliens whose rights were violated.

32. It was therefore open to question whether the status of aliens today was the best choice among the possible subjects to be studied, despite the abundance of material from the past. He was not, however, opposed to the Special Rapporteur's approach. The Special Rapporteur started from the idea that principles concerning the status of aliens did exist, but he (Mr. Bartoš)

[4] *I.C.J. Reports 1951*, p. 71.

[5] A/CONF.39/27.

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

would not be content to consider only the scope of rights and obligations in that sphere.

33. Violations of those rights constituted international delinquencies and accordingly raised the problem of sanctions. There too, evolution had taken place. There was no longer any question of sending a gunboat to the delinquent State, or of carrying out a bombardment or even occupying its territory as in the past.

34. Evolution had also introduced into international law a distinction between individual responsibility and State responsibility. Even before the First World War, the individual responsibility of members of armed forces violating the laws of war had been admitted at The Hague Conference. The conventions laid down, moreover, that the State was responsible for violations committed by members of its armed forces.[7] The notions of personal responsibility and State responsibility had also been subsequently included in the Treaty of Versailles [8] and the Potsdam Agreements.[9] There were many treaties in which the State was declared to be responsible even for faults committed by private persons or concession-holders in its territory, for example, in connexion with the law of the sea, telecommunications and rail transport. In the *Corfu Channel* case, the International Court of Justice had found against Albania for failing to comply with its obligation to exercise vigilance over its territorial waters like any sovereign State.[10]

35. The notion of international responsibility in general, not only criminal responsibility, should be extended to matters relating to international peace and security. He recognized, however, that the Special Rapporteur was right in deciding to confine himself for the time being to general principles and to defer consideration of their application to various matters which necessarily had a mainly political bearing. Naturally, there was no question of evading those problems. The status of aliens might be taken first, to be followed successively by administrative negligence and fault, and questions of public law in the strict sense; but it would also be necessary to consider purely political questions, which would bring out clearly the various levels at which State responsibility existed.

36. Despite the changes that had occurred in international life and the development of international law since the texts cited by the Special Rapporteur had been drafted, there was still an international obligation to respect certain principles governing the status of aliens —a universal obligation from which no exemption was possible. He hoped that, after studying the consequences of violation of that obligation, the Special Rapporteur would pass on to the other subjects, finishing with acts against international peace and security, in accordance with the General Assembly's recommendations and the wishes of the Commission.

37. The CHAIRMAN, speaking as a member of the Commission, congratulated Mr. Ago on his report and thanked him for assembling in a single extremely useful document the various texts which made up the annexes to it. It was regrettable that the study of the topic should still be only at the preliminary stage, but the report provided a good basis for discussion and settled some very important questions of method.

38. The Special Rapporteur had considered whether the rules of responsibility should be studied independently of the substantive rules. He himself concurred with those who wished the Commission to give special attention to the question of State responsibility with regard to the maintenance of peace and other general principles of international law. The Soviet conception of contemporary international law was well expressed in a work by a former member of the Commission.[11] The author rejected the idea of the criminal responsibility of the State in international law, but stressed some new aspects of State responsibility. He noted that the right of the victor was giving way to the responsibility of the State for acts of agression. With regard to the subjects of law, it had formerly been held that violations of international law concerned only the State in breach and the injured State, whereas nowadays violations which constituted a breach or threat of a breach of the peace affected the rights of all States. Hence, States other than the State directly injured might act in such cases to compel the offending State to abide by international law. A further new aspect noted by the same writer was that the types and forms of State responsibility could now be classified by three criteria: first, according to the nature of the violation of international law—and he drew a distinction between those which threatened peace and all others; second, according to the consequences of the violation—and he drew a distinction between political responsibility and material responsibility; and third, according to the nature of the legal relationships resulting from the violation with, on the one hand, the obligation to make reparation for the injury and, on the other, sanctions.

39. Although the substantive rules breached by a State might be left aside for the moment and the study confined to certain basic principles in the preliminary stage, it was obvious that when the Commission came to consider sanctions, it could not ignore the wrongful act itself. For sanctions, even military sanctions, could be imposed in the event of a breach or threat of a breach of the peace, though it could not be said that international law made provision in general for the possibility of military sanctions. Hence it was only provisionally that the wrongful act would be left aside; it would be necessary to revert to it when the Commission examined the forms of international responsibility—the second point for study proposed in the report. That idea should be made quite clear in the discussion, since it was important that the Sixth Committee and the General Assembly should understand that, although the Commission was adopting a general approach to the

[7] See The Hague Conventions and Declarations of 1899 and 1907, ed. J. B. Scott, New York, 1918.

[8] *British and Foreign State Papers,* vol. CXII, p. 1.

[9] *Op. cit.,* vol. 145, p. 852.

[10] *I.C.J. Reports 1949,* pp. 23 and 36.

[11] G. I. Tunkin, *Droit international public: problèmes théoriques,* Paris, 1965.

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

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[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.