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Summary record of the 1208th meeting

Topic:

State responsibility

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54. The Special Rapporteur had also drawn attention to the situation which could arise when, in the territory of a given State, another subject of international law was acting in its place (A/CN.4/246, para. 83). The subject in question could be an international organization, as had been the case of the United Nations in the Congo, where the police forces of a number of countries had been deployed by the Organization. The Special Rapporteur's third report indicated that international responsibility in that case rested with the Organization, rather than with the State part of whose sovereignty was being temporarily exercised by the United Nations.

55. He would not dwell on the title of article 3, which would obviously be adjusted when the final formulation was adopted, but wished to examine the text in the light of the statement that what it sought to express was "primarily the idea that every State is on an equal footing with others with regard to the possibility of having its conduct characterized as internationally wrongful" and that where all the conditions for the existence of an internationally wrongful act were present, no State could hope to prevent its own actions or omissions from being regarded as reprehensible by international law (A/CN.4/246, para. 81). As he saw it, that essential point appeared to be already covered by the absolute terms of article 1, which laid down that "Every internationally wrongful act of a State involves the international responsibility of that State".

56. In the context of the law of treaties, it was appropriate to deal with the question of capacity to conclude treaties; but in the case of internationally wrongful acts it was not essential to stress the question of so-called "capacity". His own suggestion would be that article 3 should be redrafted in terms of liability, which was the correlative of power, on some such lines as "Every State is liable for its internationally wrongful acts". That formulation would cover the two points raised by Mr. Ushakov.

The meeting rose at 1.5 p.m.

1208th MEETING

Thursday, 17 May 1973, at 10.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]
(continued)

ARTICLE 3 (Subjects which may commit internationally wrongful acts) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of article 3 in the Special Rapporteur's third report (A/CN.4/246).

2. Mr. TSURUOKA said he approved of the principle stated in article 3, which he could accept as it stood. Although it was clear that that principle was a consequence of the equality of States, he did not believe, like some other members of the Commission, that there was no need to formulate it expressly in the draft articles. It had its place in the part of the draft devoted to general principles.

3. Article 3 was, however, open to two criticisms: first, although it appeared to be a corollary to article 1, it was differently constructed; secondly, it did not refer to responsibility, but to the attribution of a wrongful act to the State, that was to say, only to the link attaching an act to the State. To clarify the idea it was desired to express, a supplementary article should be drafted on the attribution of responsibility, and if such an article was not included immediately after article 3, it should at least be indicated in the commentary that the matter would be separately dealt with later.

4. With regard to the drafting, the word "considered" could be deleted for the sake of simplicity.

5. Mr. KEARNEY said the discussion had shown that article 3 was a difficult one. In his view, it stated not so much a legal rule as a basic principle on which international society functioned, namely, that no State, whatever its circumstances, could escape the application of the rules of international law on State responsibility.

6. The Special Rapporteur had cited as an example the case of a new State, which could not claim that it was so inexperienced in international affairs that it could not be held responsible for its internationally wrongful acts. It was equally possible to imagine the case of a State that was so old and exhausted that it could not be held responsible. Other grounds could also be imagined for claiming exoneration.

7. The subject of the present discussion was a fundamental principle of international order, namely, that the obligations of international law must apply equally to all States without exception. There were many theories regarding the basis for general acceptance of international law. He himself favoured the simple proposition that acceptance was essential to the maintenance of peace and respect for human dignity.

8. He was in favour of retaining in the draft the idea expressed in article 3, despite the suggestion by some members that it was so basic and obvious that it need not be stated. The idea was not covered by the provisions of article 1. The statement that every internationally wrongful act of a State involved its international responsibility left open the question of what constituted an internationally wrongful act for that State. Article 2 went some way towards providing an answer to that question by stating that a State committed an internationally wrongful act when it failed to comply with an international obligation incumbent upon it. It did not, however, provide a complete answer, because the question still arose whether, under certain circumstances, a State was considered not to be required to comply with its

international obligations because its character as a State, or some element thereof, afforded a defence. He believed that no such excuse should be authorized, and that the proposition could only be stated in the form of the basic principle to which he had referred.

9. With regard to the formulation, a number of suggestions had been made during the discussion. Possibly a preamble would be the best place for so fundamental a principle, but the Commission unfortunately did not prepare preambles for its drafts. The idea should therefore be incorporated in the text of the articles. His own suggestion, for the consideration of the Drafting Committee, would be to delete article 3 and transfer its contents to article 1 by redrafting that article on the following lines:

"In consequence of the application of the rules of international law to all States equally and without exception, every internationally wrongful act of a State involves the international responsibility of that State".

10. Mr. HAMBRO said that, after studying the Special Rapporteur's explanations in section 3 of his third report, he was strongly in favour of article 3.

11. It had been suggested during the discussion that it was not necessary to state the principle embodied in article 3, because there was general agreement on it. That approach revealed a dangerous frame of mind. Carried to its logical conclusion, it would lead to a division of the rules proposed for codification into two categories, one comprising rules which were so obvious that they did not need to be stated, and the other rules that were controversial and therefore should not be codified. Certain truths were worth stressing time and time again. He was reminded of Ibsen's saying that the average life-span of any well-constructed truth was about fourteen years.

12. With regard to the formulation of article 3, some of the suggestions appeared to over-simplify the problem and to ignore the distinction which the Special Rapporteur had been careful to make between the commission of an internationally wrongful act and the attribution of the act to the State.

13. He suggested that the Drafting Committee should try to avoid using the word "may", which normally had a permissive connotation.

14. Although he would not oppose the previous speaker's suggestion that article 3 should be combined with article 1, his own suggestion would be to merge it with article 4. Using the French text of the two articles, he would accordingly suggest a wording on the following lines for the combined new article:

Chaque Etat est susceptible d'être considéré comme l'auteur d'un fait internationalement illicite et son droit interne ne peut être invoqué pour empêcher qu'un fait de cet Etat soit qualifié d'illicite selon le droit international. ["Every State may be considered the author of an internationally wrongful act and its municipal law cannot be invoked to prevent an act of that State from being characterized as wrongful in international law"].

15. A provision of that kind would underline the equality of the rights and obligations of all States by ruling out all pretended grounds of exoneration.

16. Mr. REUTER said that the basic question was whether the idea expressed in article 3 should be the subject of a separate article, or whether it should be expressed either in article 1 or in an article merging articles 3 and 4. That raised problems of substance as well as drafting. But the main problem was to decide exactly what was the idea to be expressed or, more precisely, at what level of generality the Commission wished to define the idea which all members had in mind.

17. The lack of concordance between the title and the content of article 3 showed that the Special Rapporteur himself had been hesitant. His true thought seemed to be discernible in the title. What he had meant to say was that responsibility could not be dissociated from law; as soon as there was legal personality, there was responsibility. If that was the general idea, it was on the lines of the title of the article that it should be expressed.

18. But if the Commission did not wish to express the idea on such a general level and preferred to confine itself to States, the title of article 3 would have to be changed. The idea to be expressed would then no longer be the same. The Special Rapporteur had produced other versions of the idea, one of which, that might perhaps reflect his deepest thought, was linked to article 2. What had to be said was that every State could have attributed to it conduct constituting failure to comply with an international obligation. It would be possible to generalize still further and, going back to article 1, to say that every State was subject to the general principles of responsibility, in other words that the law of responsibility applied to every State. It was in that direction that the Commission should seek a solution.

19. The question was not purely theoretical. It had, indeed, been said that the political or economic situation of a State did not exempt it from the rule of responsibility, that was to say that responsibility was linked with sovereignty. But the jurisprudence showed that under-development, and certain political situations, had sometimes been taken into consideration. For the sake of caution, it would therefore be better to express the underlying principle of article 3 in the most general form possible.

20. With regard to the drafting, the French version should not speak of "*Chaque Etat*", but "*Tout Etat*". Again, the word "*considéré*" was not felicitous and the words "*comme l'auteur*" should read "*comme auteur*", since several States could be authors of the same offence. Moreover, the word "*auteur*" was not used in the other articles of the draft and was not appropriate.

21. Mr. BARTOŠ said he shared Mr. Ushakov's opinion[1] and hoped the Special Rapporteur and the Drafting Committee would take it into account when recasting the article.

22. As to whether article 3 should be retained, although he was generally in favour of limiting the number of

[1] See previous meeting, paras. 34 and 35.

articles, he thought that in the present case the most important point was to be absolutely clear and not to put several ideas into one and the same article. Articles 1, 2 and 3 formed a logical sequence which would be less clear if the ideas they contained were not expressed separately.

23. Mr. TAMMES said that the purpose of article 3 had been illustrated by the Special Rapporteur by an example: it would prevent a very new State from successfully invoking the immaturity or inadequacy of its structure to disclaim the authorship of an internationally wrongful act. In that respect, article 3 ran parallel with article 4, which precluded any State from invoking its municipal law to dispute the international wrongfulness of its conduct. Articles 3 and 4 were thus placed in a logical order in chapter I; whence the suggestion by Mr. Hambro that they should be merged. The practice behind article 4, however, was very rich, whereas there were no clear precedents to back article 3. He was therefore inclined to favour retaining article 4 as a separate article, since it dealt with an issue which had its roots in the long history of the doctrine of international law.

24. Perhaps the link that had been sought with article 1 could be established by making a slight change in the wording of that article to make it read: "Every internationally wrongful act of any State involves the international responsibility of that State" instead of "Every internationally wrongful act of a State...". The wording suggested by Mr. Kearney to cover that point was, of course, much fuller.

25. As it stood, article 3 dealt with sovereign States, so that the component units of a federal union were not considered as possible authors of an internationally wrongful act, any more than other political entities that were not sovereign States. It might be useful, however, to bear in mind the situation which had been examined at the previous session during the discussion on the topic of Succession of States in respect of treaties. Cases could occur in which, during the process of formation of a union of States, the participating entities should still be classed as sovereign States under international law, in contrast with the component units of a federation, even though they could no longer be considered as the authors of all their external acts.

26. Mr. THIAM said that the principle in article 3 was so fundamental that at first sight it seemed unnecessary to state it in the text. It was obvious that if States were equal in law they were also subject to the principle of responsibility. The important point was not whether that should be expressly stated, but whether certain restrictions should not be applied to the principle later. It was mainly with the situation of newly independent States in mind that the Special Rapporteur had thought it necessary to state that principle, although it was often the more powerful States which tried to evade their obligations.

27. Whether the Drafting Committee decided to retain article 3 or not, there was bound to come a time when the Special Rapporteur would have to say whether there were circumstances which diminished the responsibility of a State or even relieved it of responsibility altogether.

28. Mr. USHAKOV said he did not agree with the Special Rapporteur that a State which had committed an internationally wrongful act might, in certain circumstances—for example, military occupation—not be held responsible for it. When reference was made to a State, it was always a sovereign State that was meant. When article 6 of the Vienna Convention on the Law of Treaties said that every State possessed capacity to conclude treaties, it did not mean that an occupied State had that capacity. It was always understood that what meant was a sovereign State subject to international law. In that sense, every State was capable of being responsible in accordance with international law and was capable of committing an internationally wrongful act. Reversing the reasoning, it could be said that an occupied State was not responsible since it was not free and, at the same time, that it was not capable of committing an internationally wrongful act. The absence of responsibility precluded the possibility of committing a wrongful act. Consequently, it should be emphasized in the draft that the word "State" always meant a "sovereign State".

29. The Special Rapporteur had recognized that article 3, as drafted, did not relate to responsibility, which he considered to be a separate question. He (Mr. Ushakov) did not see any need to dissociate the wrongful act from responsibility. In his opinion, the reasoning of article 3 should be reversed. For why say that every State was capable of committing an internationally wrongful act, but that that did not mean that it was responsible, when if it was said that every State could be held responsible for an internationally wrongful act, that implied that it was capable of committing one? It would therefore be sufficient to express the idea in one and the same article.

30. Mr. BILGE said he did not agree with those who cast doubt on the usefulness of article 3. To say that a State could be held responsible for a wrongful act and to say that an offence could be attributed to it, were two different things. Perhaps the drafting might be changed, but the idea should be retained.

31. The article was not intended merely to state an evident truth, but to preclude the possibility of a State invoking certain circumstances in order to escape the attribution. In view of the failure of the first attempts to codify the law of State responsibility, there was no harm in specifying what those circumstances were, and it was with that idea in mind that the Special Rapporteur had wished to remove all ambiguity. Hence the article was useful.

32. With regard to the drafting, a term would have to be found other than "author", which was not used in the other articles. Subject to that amendment he could accept article 3, as completed by article 4.

33. Sir Francis VALLAT said he shared the general agreement, revealed by the discussion, that a principle such as that set out in article 3 was basically a proper principle of international law.

34. The difficulties which had arisen during the discussion related to the question whether that principle should be stated in the draft and, if so, in what manner. He himself believed that the principle should be stated. The

reason was that if, in the future, States were asked to apply the general provision in article 1, a State might claim that, because of its own particular circumstances, it did not fall within that general provision. Experience showed that grounds not unlike those described by Mr. Kearney had been invoked in the past as an excuse for not applying a general rule of international law.

35. Article 3 could be said to be a corollary of article 1; the provisions of the one could be said to follow from those of the other. Article 3 was closely linked in principle to the very concept of State responsibility; it was almost as much a starting point for the Commission's work on State responsibility as article 1 itself.

36. For those reasons, he would favour a rearrangement that would merge articles 1 and 3 so as to place in a sub-paragraph (*a*) the positive principle stated in article 1 and in a sub-paragraph (*b*) the negative principle now contained in article 3.

37. He did not favour the suggestion that article 3, which dealt essentially with attribution, should be combined with article 4, which dealt with the characterization of an act. The contents of article 4 were connected with article 2 (Conditions for the existence of an internationally wrongful act) rather than with article 3.

38. His suggestion that article 3 should be combined with article 1 would have the additional advantage of eliminating the difficulty created by the present title of article 3, in which the word "subjects" was used in the plural in a manner seeming to imply that the article was exhaustive, although, of course, its provisions were far from dealing with all the subjects which could commit internationally wrongful acts. If the two articles were merged, the present title of article 1 might or might not have to be adjusted in order to serve as a title for the combined article.

39. With regard to the drafting, he found the word "author" unsatisfactory. Moreover, the language used in the English version did not fully reflect the French original; for example, the words "may be considered" did not render adequately the meaning of the French "*est susceptible d'être considéré*".

40. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur had been justified in dealing separately with the two situations envisaged in articles 1 and 3. The first of those articles stated that every internationally wrongful act of a State involved its international responsibility. The second dealt with the so-called "capacity" to commit internationally wrongful acts.

41. In the form in which it was drafted, article 3 appeared more as a statement of fact than as a legal rule, partly because of the use of the term "author". The content of article 3 did not add anything to the body of legal rules that would govern State responsibility. If the Commission did not include it in the draft, the legal position would remain the same. It would still be true that no State could, for example, invoke its inexperience to claim that its wrongful act could not be attributed to it.

42. He agreed with Mr. Hambro that the fact that the content of article 3 expressed a generally accepted truth was not a sufficient reason for dropping it. The article would serve to stress an existing situation. He himself believed that the Special Rapporteur's purpose in article 3 had been to make it clear that no State could escape being considered the author of an internationally wrongful act. That being so, he would suggest that article 3 be couched in negative terms, as article 4 already was.

43. It might be possible to go even further and combine the two articles in a single provision to the effect that neither the municipal law of a State nor any other circumstance could be invoked to prevent an act of that State from being characterized as wrongful in international law.

44. Mr. USTOR said that the commentary to article 3 should mention all the valuable ideas which had been put forward during the discussion. The provisions of the article itself, however, had to be brief.

45. He was in favour of retaining article 3. Its provisions, like those of article 6 of the Vienna Convention on the Law of Treaties,[2] were a corollary of the principle of the sovereign equality of States. The inclusion of article 6 in the Vienna Convention was an argument in favour of including article 3 in the present draft.

46. He also believed that the provisions of article 3 deserved to be placed in a separate article, rather than combined with those of article 4.

47. As to the formulation, the article might begin: "Every State is capable of being considered...". It might also be useful to add the thought expressed by Mr. Ushakov and Mr. Elias that no State could escape responsibility for any internationally wrongful act that could be attributed to it.

48. It was true that the provisions of article 3 overlapped those of article 1, but only to a limited extent. Article 1 laid down that every internationally wrongful act of a State involved its international responsibility, whereas article 3 provided that every State could be held responsible.

49. Mr. AGO (Special Rapporteur), summing up the discussion on article 3, said that the difficulties which had arisen were mainly due to the fact that the concept on which that provision was based, namely, delictual capacity, was unknown to some legal systems.

50. It was clear that the wording of the proposed article was not entirely satisfactory, as Mr. Reuter had pointed out; but in view of the Commission's previous discussion, he had been obliged to adopt a positive formula beginning with the expression "Every State", although he would have preferred something close to the Chairman's suggestion.

51. As to the substance, he would remind members who wished to affirm the principle that every State must bear the responsibility for its own wrongful acts, that that principle had already been clearly stated in article 1. The idea expressed in article 3 was quite different and should be retained, though he would prefer to drop it

[2] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 290.

rather than have to incorporate it in article 1 at the risk of impairing the clarity of that provision.

52. As Mr. Hambro had suggested, it would be simpler to combine articles 3 and 4, although article 4 stated such a classical principle, so hallowed by international jurisprudence and State practice, that any change in the scope of that article would reduce its effectiveness and might give the impression that the Commission had been reluctant to confirm the principle it stated. He was therefore rather opposed to merging articles 3 and 4.

53. Strictly speaking, the concern expressed by Mr. Thiam related only to a later stage of the Commission's work. Admittedly, extenuating circumstances would have to be taken into account when the Commission examined the consequences of an internationally wrongful act, particularly the nature and amount of reparation, but for the time being that aspect need not be considered. It was only necessary to affirm the basic principle that there was no State to which an act characterized as wrongful could not be attributed.

54. Most members agreed with him that it would be better to reaffirm the principle stated in article 3, even though some thought it self-evident. It should first be laid down as a principle that any internationally wrongful act by a State engaged its international responsibility; that had been done in article 1. But a State might try to evade the international responsibility which was the necessary consequence of an internationally wrongful act by claiming that its circumstances were such that it could not commit a wrongful act. It was for the Commission to decide whether it should deal with that situation.

55. The wording proposed by Mr. Kearney tended to give a philosophical basis to the rule in article 3. Personally, he thought it would be better not to do that, so as not to run the risk of restricting the scope of the provision. On the other hand, he saw no immediate objection to the idea put forward by Sir Francis Vallat, of adding a second paragraph to article 1 to replace the present article 3, or, better, reversing the order of articles 2 and 3.

56. The real problem was how to express the idea contained in article 3. At present there was certainly a contradiction between the title and the content of that provision, which was explained by the successive changes that had been made to it. In its present form, the title might give the impression that the Commission considered that States were not the only subjects of international law capable of committing internationally wrongful acts, whereas it had decided to confine itself to the study of State responsibility. Hence the title must be amended.

57. As to the wording of the article, there were several possibilities. Mr. Reuter favoured a positive formula such as "Every State may have an internationally wrongful act attributed to it", whereas the Chairman had stated his preference for a negative formula, which might read: "No State may escape the attribution to itself of an internationally wrongful act if the necessary conditions are satisfied, or escape the resultant responsibility". Such a detailed negative formula would also allay the concern of Mr. Ushakov and Mr. Ustor. Personally, he did not attach very great importance to article 3, though he thought it preferable to restate the principle it contained. It would now be for the Commission or the Drafting Committee to examine the various formulas proposed and adopt one of them.

58. Mr. YASSEEN said that any negative wording which covered both attributability and responsibility might encroach on another sphere, namely, that of justification or perhaps of grounds for exoneration. It did not seem feasible to lay down a hard and fast rule without taking justification or grounds for exoneration into account.

59. Mr. AGO (Special Rapporteur) said he had always considered that the circumstances mentioned by Mr. Yasseen excluded the wrongfulness of the act, not merely the responsibility for it. If it were otherwise, article 1 would not be satisfactory. For if it were accepted that in such circumstances there could be a wrongful act without responsibility, that would give the impression that there was responsibility when a wrongful act was committed, but only provided that certain circumstances were absent.

60. Mr. USHAKOV, supported by Mr. YASSEEN, proposed that, in accordance with the Commission's usual practice, article 3 should be referred to the Drafting Committee.

61. Mr. BILGE said that the Drafting Committee should confine itself to seeking a formula relating to attributability, since there was already a satisfactory provision concerning responsibility.

62. The CHAIRMAN suggested that it would be better to refer article 3 to the Drafting Committee on the usual terms.

It was so agreed.[3]

The meeting rose at 12.35 p.m.

[3] For resumption of the discussion see 1225th meeting, para. 57.

1209th MEETING

Friday, 18 May 1973, at 10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]
(continued)

1. The CHAIRMAN invited the Special Rapporteur to introduce article 4 in his third report (A/CN.4/246).