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Summary record of the 1361st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1976, vol. I

visional agenda of its thirty-first session, in the hope that it would be allocated to the Sixth Committee.

60. The Codification Division always sought to meet promptly the requirements of the Commission and of the Special Rapporteurs and, to that end, had undertaken research on all of the topics currently under consideration by the Commission. In the matter of State responsibility, for example, the Division was preparing a Survey of State practice, treaties, international judicial decisions and doctrine on "*force majeure*" as a circumstance excluding wrongfulness, and was conducting research on other such circumstances relating to "*état de nécessité*", "self-defence", "sanctions" and "consent".

61. It had embarked on research into all aspects of the topic of succession of States in respect of matters other than treaties and had collected material having a bearing on succession to public property and to public debts, with particular reference to cases arising after the Second World War.

62. With regard to the most-favoured-nation clause, it was in the process of completing its research on relevant clauses in treaties published in the United Nations *Treaty Series* and had collected material on the question of the operation of the clause among States with different levels of economic development. Research requirements in connexion with the topic of treaties of international organizations were obviously fewer, but the Division had none the less prepared a number of documents, including an historical survey,[7] a selected bibliography [8] and a study of the possibilities of participation by the United Nations in international agreements on behalf of a territory.[9]

63. Lastly, for the law of the non-navigational uses of international watercourses, in addition to the two existing reports of 1963 [10] and 1974 [11] and volume 12 of the *Legislative Series*, appropriate material was now being gathered from United Nations bodies, including the specialized agencies and the regional commissions. The bibliographies contained in the two reports in question were being brought up to date, and a list was being prepared of treaties on the uses of such watercourses covering both navigational and non-navigational uses.

64. The Division, despite the smallness of its staff, was continuously engaged in research activity which adapted itself to the needs and priorities of the Commission as well as discharging other responsibilities entrusted to it by the General Assembly. In 1975, for instance, it had been requested to prepare documents on the protection of human rights in armed conflicts and on diplomatic asylum, as well as papers for the Conference on the Representation of States in their Relations with International Organizations and for the *Ad Hoc* Committee on the Charter of the United Nations. It also participated actively in the work of various bodies, which in 1977 would include three plenipotentiary conferences, namely, those on territorial asylum, on succession of States to treaties and on human rights in armed conflicts.

65. There was little he could add to the outgoing Chairman's comprehensive account of the views of the General Assembly on the work and organization of the Commission. The report of the Secretary-General on honoraria payable to members of organs and subsidiary organs of the United Nations, a matter included as an item on the provisional agenda of the thirty-first session of the Assembly, had not been finalized, but a copy of the draft would be submitted to the Legal Counsel by the Budget Division at a later stage. Similarly, the report requested from the Secretary-General on the optimum utilization of office space by organizations and services of the United Nations, with a view to the inclusion of Vienna in the pattern of conferences, was now being prepared. An assurance had been given that the records of the meetings of the Commision would not be noticeably affected by General Assembly resolution 3415 (XXX).

66. The Sixth Committee had taken a favourable view of the establishment of a Planning Group, which could become a permanent feature in the organization of the Commission. The Group's suggestions would not only serve the interests of the Commission—they would also provide guidance to representatives of States on the time factor in carrying out the Commission's programme of work.

67. In conclusion, he wished to assure the Commission of the greatest possible co-operation from its secretariat in the successful completion of the Commission's tasks at the present session.

Adoption of the agenda (A/CN.4/288)

68. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed to adopt the provisional agenda, as set out in document A/CN.4/288.

It was so agreed.

The meeting rose at 5.25 p.m.

1361st MEETING

Tuesday, 4 May 1976 at 10.15 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Organization of work

1. The CHAIRMAN observed that, in accordance with the Commission's usual practice, it might be advisable

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[7] A/CN.4/L.161 and Add.1-2.

[8] *Yearbook... 1974*, vol. II (Part Two), p. 3, document A/CN.4/277.

[9] *Ibid.*, p. 8, document A/CN.4/281.

[10] *Ibid.*, p. 33, document A/5409.

[11] *Ibid.*, p. 265, document A/CN.4/274.

to postpone consideration of item 1 of the agenda, (Filling of casual vacancies in the Commission (Article 11 of the Statute)) for about a week or two, when all the members would be present and could engage in consultations and seek any information they required.

2. By its resolution 3495 (XXX), the General Assembly had recommended that the Commission should continue on a high priority basis its work on State responsibility, which was item 2 of the agenda, and proceed with the preparation on a priority basis of draft articles on succession of States in respect of matters other than treaties (item 3). The Assembly had also recommended that the Commission should complete the first reading of draft articles on the most-favoured-nation clause (item 4) at the present session, proceed with the preparation of draft articles on treaties concluded between States and international organizations or between international organizations (item 5) and continue the study of the law of the non-navigational uses of international watercourses (item 6).

3. He suggested that the Commission should first consider item 2 (State responsibility), setting aside some three weeks of the session for that purpose. Later, with the help of information from the secretariat concerning the issue of documents, it would be possible to discuss, in consultation with the Special Rapporteurs, the order in which the other items would be examined. If there was no objection, he would take it that the Commission agreed to that course.

It was so decided.

State responsibility (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

CHAPTER III: PRELIMINARY CONSIDERATIONS

4. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on State responsibility (A/CN.4/291 and Add.1-2).

5. Mr. AGO (Special Rapporteur) said that his fifth report raised some very difficult questions and that he would like the members of the Commission first of all to give him their advice on some preliminary considerations. In 1974 and 1975 the Commission had studied chapter II of the draft (The "act of the State" according to international law), which dealt with questions concerning the attribution to the State of certain conduct, in other words, with the subjective element of the internationally wrongful act. It was now time to take up the question of the objective element, that was to say, to see what distinguished the internationally wrongful act from the other acts of the State.

6. There were many acts of the State to which international law attached legal consequences, but obviously they did not all constitute wrongful acts. The Commission had taken the view that the objective element in question consisted in the fact that the conduct attributed to the State constituted a failure by that State to comply with an international obligation incumbent upon it. In fact, what characterized the internationally wrongful act, as a source of international responsibility, was the conflict between the State's actual conduct and the conduct required of it under a particular international obligation. The Commission had also noted that the link between the breach of an international obligation and the new legal situation engendered thereby demonstrated the complementary nature of the rules relating to international responsibility. The obligations and other legal situations embraced by the concept of responsibility existed only in relation to the primary obligations which States might fail to fulfil.

7. It was those considerations which had led the Commission to adopt a draft of article 3 [1] in which it had identified two elements that were essential for the existence of an internationally wrongful act, the first being conduct consisting of an action or omission attributable to the State under international law, and the second, the fact that such conduct constituted a breach of an international obligation of the State. The Commission, which had been unanimous in adopting draft article 3, had stated in its commentary thereto that such a definition of the objective element was in conformity with State practice, international jurisprudence and doctrine. It had also pointed out that in internal law, the breach of an obligation did not always entail infringement of a subjective right of another, whereas in international law, the breach of an obligation by the State committing an internationally wrongful act always entailed infringement of a subjective right of one or more other States.[2] The Commission had refrained from stating an opinion on the question whether there existed a rule of international law prohibiting the abusive exercise of their rights by States. For the general definition of the objective element would admit of no exception, whether or not there was any such rule. If there was no such rule, there could be no question of its giving rise to exceptions. If on the other hand, there was such a rule, and supposing that the State exercised its rights in an abusive manner, it would thereby breach an international obligation incumbent upon it, which merely confirmed the general principle that the distinguishing feature of the internationally unlawful act was that it consisted of a breach by a State of an international obligation. Finally, the Commission had preferred to speak of the breach of an "international obligation", rather than of an "international rule" or a "norm of international law". The existence selected was the one most commonly used in international judicial decisions and State practice. Indeed, an international obligation might not flow from a rule, but from a particular legal instrument or a decision of a judicial or arbitral tribunal; moreover, a rule was the objective expression of the law, whereas an obligation was linked with the subjective situation of the State—whether the State complied with or breached the obligation. Thus the State did not by

[1] For the text of the articles adopted by the Commission at previous sessions, see *Yearbook... 1975*, vol. II, p. 110, document A/10010/Rev.1, chap. II, sect. B.

[2] See *Yearbook... 1973*, vol. II, p. 179 *et seq.*, document A/9010/Rev.1, chap. II, sect. B, commentary to article 3.

its act or omission fail to comply with a norm or a rule, but with the obligation imposed on it by such a rule.

8. It was now time to consider analytically the notion of the breach of an international obligation. The Commission would have to determine in what circumstances and on what conditions it must be concluded that a State had committed such a breach, and also whether, and on what bases, it must be admitted that there was a distinction between different breaches of that nature. In considering the question of the attribution of certain conduct to the State, the Commission had had first to overcome certain theoretical difficulties due more especially to the fact that one school of thought affirmed the need to refer to internal law as the basis for the attribution of conduct to the State, while another school insisted on the need to refer to international law for that purpose. Those differences of opinion arose from confusion between the problem properly so called of the attribution or imputation of an act to the State, which could only be governed by international law, and that of determining the organization of the State, which was of necessity governed by internal law. It seemed that that the determination of the objective element would not come up against difficulties of that kind, but others would be encountered. The problem likely to arise was essentially one of "boundaries".

9. In studying the chapter on the breach of an international obligation, the Commission would have to take care not to try to define such "primary" obligations at any stage of the proceedings. First of all, the formal aspects of international obligations would raise certain problems. For example, the Commission would have to consider whether a breach of an obligation appeared in a different light according to whether it had a customary, conventional or other source, without, however, getting involved in the elaboration of a theory of the sources of international law. The Commission should confine itself to studying State responsibility arising from the breach of international obligations whatever their origin, without stopping to discuss the matter of whether certain procedures were sources of international obligations. The Commission should also, when it came to consider the incidence on international responsibility of the content of the obligations breached, avoid undertaking the task of defining the content of the various obligations. It would, of course, be necessary to distinguish between internationally wrongful acts by referring for that purpose to the content of the obligations breached, but it would be dangerous for the Commission to allow itself to be drawn into defining the terms of the different international obligations which, in one sphere or another, were incumbent upon States. The reason why the attempt made in 1930 to codify the rules governing international responsibility for damage to the person or property of foreigners had failed, was, precisely, that it had at the same time aimed at determining the content of the objective primary rules relating to the treatment of foreigners. If the Commission now entered on the same course, it would have to define the content of all international obligations of which the breach constituted an internationally wrongful act—which would mean defining the whole of international law.

10. That being so, he would like to obtain the Commission's agreement to the method of work he proposed. His suggestion was accordingly that the possible incidence on international responsibility of the formal aspects of international obligations should be considered first. As to distinguishing between the sources of obligations, there would be observed a tendency to assimilate international law rather too closely to internal law, and to transpose into the former distinctions which belonged to the latter—that tendency should in his opinion be avoided. Furthermore, although it might seem obvious that, for there to be any real breach of an international obligation, it must have been in force at the time of the breach, a whole series of problems might arise in that connexion. The question was in fact linked with that of the retroactivity of international obligations. When at a later stage, the Commission came to examine the question of the objective element of the content of the international obligations breached, not from the formal viewpoint, but as to substance, it would have to deal with the most important questions.

11. In dealing with those problems, it could *inter alia* be considered either that there was only one category of internationally wrongful acts, whatever the content of the obligations breached, or that there were several categories corresponding to the importance of the obligations to the international community. In the second case, different consequences could ensue for the State which had committed the wrongful act. For the breach of an international obligation need not always give rise solely to an obligation to make reparation; in serious cases, it might justify the imposition of sanctions, quite apart from any preliminary attempt to obtain reparation. It was also possible that the breach of certain international obligations might infringe the subjective rights of more than one State or that the content of the obligation concerned might be so important that its breach injured the interests of all States members of the international community and provoked reactions from subjects other than States directly injured.

12. The Commission would subsequently have to make yet further distinctions. In international law, just as in internal law, many different categories of obligations might be distinguished on the basis of the conduct required of various State organs. Under some international obligations, States had to adopt pre-determined conduct: they had, for example, to repeal a law, adopt a law having specific content, or quash a judgment. The mere fact of not adopting the conduct indicated constituted a breach of such obligations, which might be defined as obligations of conduct. But there was another quite different category of obligations, particularly in connexion with the treatment of foreigners, which were not simply obligations of conduct but obligations of result, the State being required merely to ensure that a certain result was obtained, but being free to choose the means of obtaining it. In such cases, it was more difficult to determine at what moment a breach of the obligation concerned occurred. In that connexion, he recalled that he had once said that the justification for the rule of prior exhaustion of local remedies lay precisely in the fact that where the treatment of foreigners was concerned, it

was chiefly obligations of result, not of conduct that were incumbent on States, which meant that the desired result might not be finally unobtainable so long as there was the possibility that it might be obtained through organs other than those which had originally taken action in a given case. In his view, however, that did not mean that the Commission ought at the present time to settle the question of the prior exhaustion of local remedies. That question, like many others, should be settled later within the context of the implementation (*mise en œuvre*) of international responsibility. All that he wanted to emphasize at present was that the origin of that rule was the distinction between the breach of obligations of conduct and that of obligations of result.

13. Referring to the comments made by Mr. Rossides the previous day, he said he did not intend to abandon the inductive method in studying the objective element of the internationally wrongful act. The Commission's primary task was codification, so it must analyse in the first place State practice and international jurisprudence and, incidentally, doctrine. But too much reliance should not be placed on that. In regard to some questions, such as that of attribution to the State of the conduct of organs acting outside their competence, for example, the Commission had found more numerous precedents than it would find in regard to the others relating to the objective element. In addition, while it might be unnecessary in some cases to depart from the rules sanctioned by State practice and international jurisprudence, and confirmed by doctrine, it might be necessary in others to try to meet the expectations of the international community. In other words, whereas, in regard to the attribution of certain conduct to the State, the Commission had been able to confine itself to reaffirming existing rules, in dealing with breach it might find that it would have to contribute to the progressive development of international law and to interpret the trends emerging in the international community. That would make its task all the more difficult and delicate.

14. Mr. ROSSIDES said that the fifth report on State responsibility exemplified what he had meant when expressing his agreement with the Special Rapporteur at the previous meeting: it was essential for the Commission to keep in touch with the times in its task of codification and progressive development of international law. For example, in article 18 the Special Rapporteur had ably reconciled the classical and the modern, progressive aspects of international law. Paragraph 3 of that article stated that the serious breach by a State of an international obligation established by a norm of general international law accepted by the international community as a whole and having as its purpose ... the conservation and the free enjoyment for everyone of a resource common to all mankind was also an "international crime". The article thus established a new idea which had not even existed at the time of the adoption of the Charter of the United Nations, and introduced questions of the law of the sea, such as the exploitation of the resources of the sea-bed, which were new in international law.

15. He wished to express his deep satisfaction at the election as Chairman of a jurist from a country with an ancient culture and a long tradition in international law, especially as Mr. El-Erian had amply demonstrated his great personal dedication to the work of the Commission and the codification and progressive development of international law.

16. Mr. USHAKOV congratulated the Special Rapporteur on the excellent work he had done in a very difficult and entirely new field, and expressed support for the preliminary considerations he had put forward. He wondered, however, whether it was possible to introduce the idea of the source of an international obligation into the draft, without defining it in the article on the use of terms. It was not necessary to define the concept of an obligation, which was a concept not only of international law, but also of law in general. The notion of a source, on the other hand, which appeared in article 16, did need to be defined. But the Special Rapporteur himself had said that, if the Commission went into the notion of a source of international law, it would encounter great difficulties; for the sources of international law were multifarious, and included customary law, treaty law, United Nations resolutions, etc. The term "régime of responsibility", which appeared in article 16, paragraph 2, should also be defined, for Governments might be uncertain of its meaning. That definition, too, was likely to raise problems. Hence, while agreeing in theory with the ideas put forward by the Special Rapporteur, he was concerned about the difficulties the new draft articles might raise in practice.

17. Mr. CALLE Y CALLE said that, in response to the request the Special Rapporteur had made to the members of the Commission in his introductory statement, he would make a few brief comments on the preliminary considerations relating to chapter III of the draft. Those considerations were prompted by the essential need for coherence in the formulation of the draft articles as a whole. In adopting article 3, the Commission had accepted the two elements of the internationally wrongful act set out in subparagraphs (*a*) and (*b*) of that article. And having incorporated those two elements in article 3, the Commission was now called upon to define conduct which constituted a breach of an international obligation of the State. It was therefore logical to include in the draft a rule of law governing the characterization of such conduct and specifying the conditions under which it generated international responsibility of the State.

18. The rule proposed by the Special Rapporteur in draft article 16 was that the international responsibility of a State was engaged whenever there was a breach, by that State, of an international obligation incumbent upon it. There was no reason to mention, in that context, the various sources of the international obligations of States; it was sufficient to indicate clearly that, in all cases and whatever the ends in view, a breach by a State of an international obligation incumbent upon it was a source of responsibility.

19. There would undoubtedly be other provisions, later in the draft, dealing with the different types of breach of international obligations; it might perhaps be advisable for those provisions to distinguish between the different kinds of obligation. That point, however, should be taken

up only in relation to the provisions in question. At the present stage, it was essential not to go beyond the limits set by the terms of article 3, as adopted by the Commission. The Commission would thus be taking due heed of the warning given by the Special Rapporteur in his introductory statement concerning the limits of the subject under consideration.

The meeting rose at 12.30 p.m.

1362nd MEETING

Wednesday, 5 May 1976 at 10.20 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

CHAPTER III. PRELIMINARY CONSIDERATIONS (*continued*)

1. Mr. YASSEEN congratulated the Special Rapporteur on his outstanding introductory statement. Like the Special Rapporteur, he was convinced that the Commission should not yield to the temptation of formulating substantive rules by defining the obligations whose breach could engage the responsibility of States. That was an approach which had already been decided. The Commission had chosen the expression "breach of an international obligation" in preference to breach of an "international rule" or "international norm". The choice was justified, for the expression was sanctioned by practice and made it clearer that the reference was to subjective legal situations. On the other hand, he did not agree with the Special Rapporteur that that choice was justifiable because an international obligation could derive, not only from an international rule, but also from a legal instrument, a decision of an international organization, a judgment of a court or an arbitral award. The fact that an obligation might have been created by a decision of an international organization, a judgment or an arbitral award did not mean that the decision, judgment or award was not itself based on a rule of international law. Consequently, the breach of an obligation was, in the last analysis, a breach of the rule from which the decision or judgment derived its binding force. Hence, it was not the decision or judgment as such that was the source of the obligation, but the rule of international law which gave it its mandatory character.

2. Before concluding that there had been a breach of an international obligation, it had to be determined whether the obligation had been in force at the time the act had been committed. He did not think it possible to accept the retroactivity of international obligations as a general rule and to hold that a State had breached an international obligation which had not existed, as such, at the time of its action.

3. A further question was whether the source of an international obligation could affect responsibility. For his part, he believed that, once there was an obligation under international law, the question of its source should not be considered, for whatever that source might be (customary law, treaty law, general principles of law, etc.), the obligation none the less existed. In his view, the source had no effect on the importance of the obligation. It was, after all, impossible to establish a hierarchy of the rules of international law based on their sources: a treaty rule, for example, was not necessarily more important than a customary rule, which might contain elements of *jus cogens*.

4. While the importance of an obligation did not depend on its source, it could, on the other hand, depend on its content. Thus, if an obligation was essential for the international community, it might be thought that its breach would give rise to a heavier responsibility than the breach of an obligation which was not of capital importance for the international legal order. The degree of importance of an international obligation might justify a different régime or a different form of responsibility. International responsibility could therefore vary according to the content of the obligation and probably also according to the seriousness of the breach.

5. With regard to the method of work to be adopted, he thought that, for the formulation of an integrated system of rules on international responsibility, the Commission could not rely solely on the jurisprudence and practice of States, for their solutions had been devised as the chances of international life required and left many points unsettled. It would therefore be necessary to fill the gaps by formulating the rules necessary for a coherent system.

6. Moreover, the Commission must not forget that the international community was in the process of change: it must take account of the evolution of international life. It should take advantage of the contributions of jurisprudence and State practice, but should not hesitate to modify the present rules or to formulate new rules if the reality of contemporary international life so required.

7. Mr. BEDJAOUI congratulated the Special Rapporteur on having identified, in a statement of exceptional clarity and precision, the real problems posed by the adaptation of international law to the new needs of the international community. He reminded the Commission that in 1969, when it had taken up the topic of international responsibility, it had decided, at the request of the Special Rapporteur, to confine the study to State responsibility for internationally wrongful acts.[1] A clear distinction must be made between the task of ascertaining the principles governing such responsibility of States and

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[1] *Yearbook... 1969*, vol. II, p. 233, document A/7610/Rev.1, para. 80.