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Summary record of the 1519th meeting

Topic:
State responsibility

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under discussion was not to say that, even if a State could not itself be said to have committed a given internationally wrongful act, it might have committed a separate internationally wrongful act by facilitating the commission of the first. That was clearly within the essential ambit of the secondary rules formulated by the Commission.

33. He did not agree with Mr. Njenga that the word "participation" could be substituted for the word "complicity", because a State that participated fully in the internationally wrongful act of another State was a co-perpetrator of that act. There were circumstances in which States might be responsible as principals for wrongful actions in which other States had been equally or more prominently involved. There were also, however, actions that could not easily be described as being part of the principal wrongful act, yet that were essential to the commission of that act and were therefore in themselves a separate internationally wrongful act, even though they would not have been wrongful had they not been related to the principal act. Most members of the Commission seemed to be agreed on the broad purpose of the article and on the need for it; its wording, however, gave rise to some difficulty.

34. In conclusion, he asked what was the legal value of the phrase "which thus becomes an accessory to the commission of the offence and incurs international responsibility thereby". The implications were complete, as far as the secondary rules were concerned, when it was said, in the first half of the article, that the mere act of helping a State to commit an internationally wrongful act might itself constitute an internationally wrongful act. He believed, however, that it might be necessary to emphasize the concept set forth in the final clause of the draft article.

35. Mr. SCHWEBEL regarded the proposed article as basically sound. He shared the doubts expressed about the words "complicity" and "accessory", but the substance of the matter left little room for debate.

36. Referring to the statements made by Mr. Reuter and Mr. Njenga, he said that the article should take account of the element of intent. For example, if State A in all innocence supplied arms to State B and those arms were later used by State B to commit an act of aggression, could State A fairly be charged with a breach of international law? He very much doubted, on the basis of State practice, that it could. The need to take account of the elements of knowledge and intent was to be found in E. Lauterpacht's comment on the United Kindgom Government's reply to a parliamentary question concerning the supply of arms and military equipment by certain countries to Yemen, which had subsequently used them in an attack against Aden (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, para. 73).

37. It was not true, as Mr. Njenga contended, that States would never admit illegal intent. The worst aggressors of the age had flagrantly broadcast their intent. Hitler's plans of aggression had been published in explicit detail. In the draft article, however, the Commission was dealing with acts by the assisting State which by definition were not of themselves unlawful. To suggest that such acts would become unlawful because of the action of the State receiving the assistance, even though the assisting State had no knowledge of the unlawful intent of the assisted State and had no unlawful intent itself, seemed to be going too far.

38. Mr. USHAKOV thought that Mr. Reuter had clearly understood his position, which was that the State had to render assistance *in* the commission of the internationally wrongful act, for otherwise there would be no link other than that of intent. It was very difficult to establish intent, however, particularly for minor offences, and it should not be forgotten that the rule enunciated in article 25 was a general rule that applied not only to crimes such as aggression, but also to any other offence. In his opinion, intent was an aggravating circumstance, but it did not have to be established for responsibility to exist. The Commission should therefore mention only assistance in the commission of the internationally wrongful act, and refrain from introducing the notion of wrongful intent into a rule having general scope.

39. Mr. FRANCIS said that, in view of the prominence given to the notion of "participation" in the commentary to the article, and having regard to the text of the article itself, a reader might easily be trapped into assimilating participation in the act with the act itself. Perhaps the Special Rapporteur would consider the possibility of expanding the commentary to make it clear that the term "participation" embraced active or passive involvement, but fell short of actual participation in the wrongful act itself.

The meeting rose at 6 p.m.

1519th MEETING

Tuesday, 18 July 1978, at 11.20 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*)
(A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)[1] (*concluded*)

1. Mr. YANKOV commended the Special Rapporteur for the intellectual courage he had shown in presenting a difficult and politically complex problem, and for his cautious approach to possible analogies with the notion of incitement in criminal law.

2. According to the Special Rapporteur, neither advice or incitement nor pressure or coercion came within the scope of complicity as contemplated in article 25; only assistance could be characterized as complicity within the meaning of that article. The Special Rapporteur maintained, moreover, that a State that committed a wrongful act could not claim reduced responsibility by alleging incitement by another State. His own opinion, however, was that in certain cases incitement could constitute grave complicity. It should be noted, in that context, that expressions such as "mere incitement", "serious incitement" and "direct incitement" reflected subjective judgements. Perhaps the Special Rapporteur should further elaborate his conclusion on the question of incitement in the commentary. The Special Rapporteur's conclusion on coercion also required clarification. In paragraph 66 of his seventh report (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1), the Special Rapporteur referred to the position of the special legal system of the United Nations in regard to the use or threat of use of armed force. It should be noted, however, that the United Nations Charter did not confine the notion of force to armed force.

3. He agreed with those members of the Commission who considered that in all cases of complicity the solution to the problem lay in the intent. Perhaps, therefore, the notion of "intent" should be more clearly expressed in article 25. It was also very important, for purposes of application of the article, to distinguish clearly between the situation and intent of the principal, and the situation and intent of the accessory.

4. In a comprehensive set of articles on State responsibility, a provision such as article 25 was needed. He agreed with Mr. Ushakov that in article 25 the Commission was stating a general rule. Nevertheless, careful consideration should be given to the question of complicity. The draft code of offences against the peace and security of mankind[2] took account of such matters as the extent of the practical assistance furnished by the accessory to the author of the offence, the gravity of the complicity and the intent to facilitate the commission of an offence. He appreciated that the draft code applied to the responsibility of individuals, but it might be useful for the Commission to take some of its provisions into consideration.

5. Mr. THIAM congratulated the Special Rapporteur on the frank and objective way in which he had dealt with a subject of a political nature. He thought the text of draft article 25 was timely, since contemporary international relations were not based on purely legal considerations. The article should be examined from as general a viewpoint as possible, and not simply from the viewpoint of relations between small States and great Powers.

6. He endorsed the text submitted by the Special Rapporteur and his supporting analysis, according to which the notion of complicity could be reduced to a single basic element, namely, participation. He also agreed with the Special Rapporteur on what must be excluded from that notion. The Special Rapporteur had been right to exclude coercion because, although coercion could be a basis for establishing separate responsibility, it was not a form of complicity. He had also been right to exclude incitement, for that was a matter of degree and estimation. There were varying degrees of incitement, but it could be said that incitement ended where coercion began, and that neither incitement nor coercion could serve to establish the existence of complicity.

7. Of the constituent elements of complicity, the Special Rapporteur had been right to choose the material element of aid and assistance, basing his choice on the concept of complicity that prevailed in internal criminal law. Personally he saw no objection in using the term "complicity". Like the Special Rapporteur, he thought that, besides the material element, complicity had an intellectual element, which was intent, and he found it difficult, even in international law, to exclude the element of intent. The text of article 25 was fairly explicit on that point, even though it did not use the word "intent", since the words "in order to" clearly meant that, in rendering aid or assistance, the State had an end in view, which was to enable another State to commit an internationally wrongful act. Intent was thus sufficiently emphasized.

8. He believed the Commission should adopt a broad conception of complicity and assume that the aid or assistance rendered by one State to another was enough to characterize complicity, in other words, that it was incumbent on the State that had rendered the aid or assistance to prove that it had not done so with wrongful intent. If the Commission wished to envisage the situation in all its complexity and take account of current international circumstances, it must take a broad enough view to be able to deal with the intermediate situations that might arise. Thus complicity should be understood in the broad sense: once the provision of aid or assistance—the material element—had been established, the element of intent should be presumed.

9. Mr. SUCHARITKUL commended the Special Rapporteur for his analysis, which clearly defined the scope of the legal concept of complicity engaging, as such, the international responsibility of the State. He fully endorsed the content of the text proposed for article 25, which he found well balanced and suffi-

[1] For text, see 1516th meeting, para. 4.

[2] *Official Records of the General Assembly, Ninth Session, Supplement No. 9* (A/2693), p. 9.

ciently flexible. In his openion, the Special Rapporteur had been right to exclude from the scope of the article cases of incitement and cases of coercion, whether by armed force or by pressure of any kind —political, economic or other.

10. Mr. USHAKOV had rightly emphasized the need to adopt general wording for article 25, since the draft articles dealt with responsibility in general, not with responsibility for delicts or crimes; but it should not be forgotten that the text would apply to specific cases. Moreover, the facts and circumstances to be taken into consideration in establishing the existence of complicity were extremely varied, because of the complexity of State affairs and modern international relations. In practice, it was not easy to make a clear distinction between cases that involved complicity and cases that did not, for there was always an area of uncertainty in which relative values were a very important factor.

11. With regard to the material element, he thought that participation must be active and direct. It must not be too direct, however, for the participant then became a co-author of the offence, and that went beyond complicity. If, on the other hand, participation were too indirect, there might be no real complicity. For instance, it would be difficult to speak of complicity in an armed aggression if the aid and assistance given to a State consisted in supplying food to ensure the survival of the population for humanitarian reasons.

12. The case of arms supplies was also very complex, because complicity could depend on the State to which the arms were supplied. For example, according to Security Council resolution 418 (1977), the provision of arms to South Africa was in itself a wrongful act, without any element of intent. Complicity also depended on the type of arms provided; if they contributed to the proliferation of nuclear weapons, the responsibility of the State supplying them would be engaged, regardless of the element of intent.

13. The provision of arms could be without wrongful intent, as, for example, when arms were sold by private enterprises, but when such sales were prohibited by the State. In that case, did absence of State control generate State responsibility? Arms could also be provided with wrongful intent. But the sales contract concluded by the State might contain conditions prohibiting the use of the arms for certain purposes, such as the repression of national liberation movements. The question then arose whether such restrictive conditions would exempt the supplying State from responsibility.

14. Mr. DADZIE endorsed the comments made by Mr. Quentin-Baxter at the previous meeting on the question of complicity. Nevertheless, the arguments advanced by the Special Rapporteur in support of article 25 were convincing, both in regard to complicity as a form of participation and in regard to assistance.

15. He fully agreed with the Special Rapporteur's analysis of the question of participation. A State incurred international responsibility if, by its conduct, it breached an international obligation. The Special Rapporteur had established that any international wrongfulness that might attach to the conduct of a State was supplemented by an additional and separate wrongfulness by reason of its complicity in an international offence by another State, even if the conduct of the former State was not in itself a breach of an international obligation. It was true that in internal law there were degrees of complicity, but it was perhaps neither necessary nor desirable to take such degrees into account where inter-State relations were concerned. A State was either responsible for the breach of an international obligation or it was not. Recent history provided examples of the complicity of certain States in the perpetration of international crimes.

16. The progressive development of international law required that States that were implicated in offences committed by other States should be held fully responsible for their conduct. He fully supported the article submitted by the Special Rapporteur, which contained elements of progressive development of international law, and hoped that, with the help of the Drafting Committee, a text acceptable to the whole Commission could be formulated.

17. The CHAIRMAN, speaking as a member of the Commission, said that with article 25 the Commission was embarking on a new chapter of the Special Rapporteur's report: that dealing with the implication of a State in the internationally wrongful act of another State. In order to establish the content of his working hypothesis, the Special Rapporteur had distinguished between participation proper and vicarious responsibility. He had also emphasized the differences between the situations contemplated in article 25 and those referred to in article 9,[3] and had distinguished "participation", on the one hand, from failure to take preventive measures and parallel perpetration of identical offences, on the other. Having delimited the scope of article 25, the Special Rapporteur had defined various cases of participation proper, distinguishing them from cases of incitement and coercion. That had led him to the conclusion set out in paragraph 70 of his report, and to the question of complicity.

18. The Special Rapporteur had cited the classic cases of complicity, such as a State allowing its territory to be used by another State for the commission of aggression, or supplying arms to another State for the maintenance of *apartheid* or colonial domination, and he had recognized that the act of participation might not in itself constitute an international crime or delict as defined in article 19. Finally, he had stressed the element of intent that characterized wrongful participation and brought out the difference between the responsibility of the principal and that of the accessory.

19. The text proposed for article 25 had been very ably drafted. The article, which constituted an im-

[3] See 1516th meeting, foot-note 6.

portant provision of the draft, was indispensable and was well placed in the structure of the draft. However, he had certain misgivings about the use of the terms "complicity" and "accessory", both of which pertained to criminal law. The Drafting Committee should endeavour to find a wording that avoided those terms.

20. The title of the article, in which the word "complicity" appeared, might be amended to read "Participation of a State in the internationally wrongful act of another State". In the body of the article, it might be advisable to replace the words "which thus become an accessory to the commission of the offence" by the words "which thus participates in the commission of an offence".

21. Mr. AGO (Special Rapporteur) noted that, with some minor differences, the members of the Commission all agreed on the justification of the rule stated in article 25. He thanked those who had drawn attention to the intellectual courage shown in the rule, for he believed that the Commission ought to show intellectual courage in dealing with that subject. He agreed with Mr. Schwebel that the rule partook more of the progressive development of international law than of its codification, but he believed that, if there was one case in which the Commission should carry out progressive development, it was surely the case covered by article 25.

22. He doubted that the scope of the rule should be confined to cases in which the assistance rendered was of an abnormal nature, or in which the interests of the international community as a whole were at issue, as Mr. Riphagen had suggested (1518th meeting), for that would lead to limiting the rule to complicity in international crimes. He remained convinced—and he thanked those who, like Mr. Ushakov, Mr. Reuter, Mr. Yankov and Mr. Sette Câmara, had agreed with him on that point—that the rule stated in article 25 was a general rule, and that the fact of being an accessory to a delict was not necessarily a less important source of international responsibility than the fact of being an accessory to a crime, since the fact of participation through aid or assistance could not be thus assimilated to the principal internationally wrongful act.

23. Mr. Verosta had asked (1518th meeting) whether it was not dangerous to adopt a rule without knowing exactly what its consequences would be. But it was impossible to say exactly what the consequences of an internationally wrongful act consisting in complicity would be, for, as Mr. Ushakov had so rightly said, everything would depend on the circumstances—in other words, on the extent of participation, the way in which it was effected and the act in which the State was participating. It would rest with practice and jurisprudence to establish exact standards and criteria.

24. The situation to which Mr. Verosta had referred, in which the State committing the principal internationally wrongful act was not free or not entirely free, was certainly of interest, but was in no way related to the case covered by article 25, nor were the consequences the same. For where the freedom of decision of the State that committed the principal international wrongful act was limited, to the advantage of another State, there could only be dissociation between the subject that was the author of the internationally wrongful act and the subject that must assume responsibility for that act. That case would be dealt with in the next article. The subject-matter of article 25 was not the relationship between the State that was the author of the principal internationally wrongful act and the State that had participated in that act, but the relationship between the latter State and the State victim of the internationally wrongful act. Hence the case in which the State author of the principal internationally wrongful act was in a position of dependence should not concern the Commission at that juncture.

25. On the question of the intellectual element or the element of intent inherent in the concept of complicity, opinions appeared to differ: some members were inclined to minimize the importance of that element, others to emphasize it. He himself considered that, if intent should not, perhaps, be overemphasized, it was impossible to pass it over in silence, since a State could not be accused of complicity if it had acted in all innocence.

26. Although mere incitement, as Mr. El-Erian (1518th meeting), Mr. Yankov and Mr. Thiam had pointed out, could not in itself be an internationally wrongful act, there were cases where the State that "incited" did not confine itself to incitement alone. For example, if a State concluded an agreement with another State undertaking to maintain benign neutrality if the latter committed an act of aggression, that was not mere incitement but aid and assistance, and it would then be proper to speak of complicity.

27. In reply to Mr. Quentin-Baxter's question (1518th meeting) whether article 25 did not leap the barrier between primary and secondary rules, he said that in his opinion the Commission should not hesitate to leap that barrier whenever necessary.

28. With regard to the question of coercion raised by Mr. Tabibi (1518th meeting), he said that he had been very cautious and had refrained from taking a position on the question of forms of coercion that were legitimate and those that were not; he had confined himself to saying that opinions differed on that point. Apart from that, he had pointed out that coercion as such, even if carried out by armed force, was not necessarily an internationally wrongful act—for instance, if the victim of aggression acted in self-defence. But if the victim, in legitimate reaction, subjected the aggressor State to military occupation and thus assumed control over the country and the exercise of certain activities, it might eventually come to participate in an internationally wrongful act of the occupied State, if not—as most frequently happened—to assume indirect responsibility for a similar act if such an act were committed under its control.

29. Like Mr. Sucharitkul, he thought the word "participation" might in itself be ambiguous, for if participation went beyond mere aid or assistance in an internationally wrongful act committed exclusively by another, that was no longer complicity in but co-authorship of that act. The case to which article 25 was intended to refer should therefore be clearly specified.

30. As to the wording of the article, he thought that the English and French texts would have to be harmonized. Mr. Ushakov had been right to criticize (1518th meeting) the word "permettre" ("enable"), which might refer to an act of an authority repealing a prohibition, whereas article 25 dealt with an entirely different matter. The situation to which he had intended to refer in that article was one where a State made possible or facilitated the commission of an internationally wrongful act by the aid or assistance it provided to another State. For example, if the territory of an aggressor State was separated from that of the victim State by the territory of another State, it was obvious that that other State made aggression possible if it allowed the aggressor State to cross its territory to attack the victim State.

31. Mr. Ushakov had perhaps been right to criticize the word "infraction" ("offence"), because someone might wonder why that term had been used instead of the expression "internationally wrongful act" and interpret it differently, whereas he had in fact used it to mean "internationally wrongful act", but had simply wanted to avoid repetition.

32. The most important objection raised had been that relating to the words "against a third State". He had chosen the classical case in which State A helped State B to commit a wrongful act against State C, but he recognized that there were subjects of international law other than States and that an internationally wrongful act could be committed against an international organization. Moreover, an increasing number of international conventions placed on each party obligations towards the whole international community or towards all the other parties to the convention. For example, if a State breached an international labour convention by not according certain treatment to its own workers, it was not committing an internationally wrongful act against any one State, but against all the States that had ratified the convention. He therefore agreed with Mr. Ushakov, Mr. Njenga and Mr. Pinto (1518th meeting) that the words "against a third State" should be deleted and that reference should be made only to the commission of an internationally wrongful act, without saying against whom the act was committed.

33. He noted that the Commission was hesitant about using the term "complicity" and that some members feared to use it, although they had not objected to the use of the word "crime". He thought the Commission could try to avoid the use of the term, provided that the situation referred to was made perfectly clear, and that it was realized that what was at issue was in fact complicity.

34. In his opinion, the words "assistance ... in the commission ... of an internationally wrongful act", proposed by Mr. Ushakov,[4] would be too restrictive, not only because they presupposed that the commission of the internationally wongful act on the same begun when the aid was given, which was not always the case, but especially because they might give the impression that the State took part in the commission of the internationally wrongful act on the same footing as the principal author of the act. A clear distinction must be made between a case where the purpose of the aid or assistance was to make it possible or easier for another State to commit an internationally wrongful act, and a case where the State actually took part in the commission of an internationally wrongful act and became a co-author of that act. He was grateful to Mr. Yankov, Mr. Sucharitkul and Mr. Thiam for having drawn the Commission's attention to that point.

35. Finally, he wondered whether it would not be dangerous to begin the article with the words "if it is established", as Mr. Ushakov had proposed, since that would suggest a form of judgement by a judicial or other authority, an idea the Commission had so far avoided.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission decided to refer article 25 to the Drafting Committee.

It was so agreed.[5]

The meeting rose at 1 p.m.

[4] 1518th meeting, para. 5.

[5] For consideration of the text proposed by the Drafting Committee, see 1524th meeting, paras. 2-6.

1520th MEETING

Tuesday, 18 July 1978, at 3 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Yankov.

The most-favoured-nation clause (*continued*)* (A/CN.4/308 and Add.1 and Add.1/Corr.1 and Add.2, A/CN.4/309 and Add.1 and 2, A/CN.4/L.280)

[Item 1 of the agenda]

* Resumed from the 1506th meeting.