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Summary record of the 1668th meeting

Topic:
State responsibility

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1668th MEETING

Tuesday, 9 June 1981, at 3.05 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/344)

[Item 4 of the agenda]

The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)

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

ARTICLES 1, 2 AND 3[1] (*continued*)

1. Mr. FRANCIS commended the Special Rapporteur on his excellent report. He agreed with the view expressed by the Special Rapporteur that Part 2 of the draft articles should begin with a statement of general principles (Chapter 1).

2. With regard to the three parameters for the possible new legal relationship arising from an internationally wrongful act of a State, (see A/CN.4/344, para. 7), he said that the third parameter, which concerned the position of third States, could relate to two possible situations: first, a wrongful act directed against a State and constituting a breach of an obligation in respect of that State, while at the same time unintentionally causing injury to a third State; and second, a wrongful act affecting a State directly and, at the same time, giving other States rights under international law, thus making them third States. While the second possibility was dealt with to some extent in draft article 3, the draft general principles did not seem to encompass a situation in which a third State injured by a wrongful act of another State was eligible for compensation. The draft articles should cover the general situations which were likely to arise and should state general principles as a basis for the more detailed rules to follow. Another aspect which was dealt with in the report, but not in Chapter 1 of the draft articles, was the question of non-recognition, in appropriate circumstances. The general principles should be expanded to cover both those aspects.

3. Referring to draft article 1, he agreed with the view expressed by Sir Francis Vallat (1667th meeting) that, contrary to what seemed to be stated in the draft article, a wrongful act did affect the obligation of a State in that it represented a breach of that obligation. Accordingly, the words "the force of", which the Special Rapporteur had placed in brackets, were an essential part of the article and should be included in it. On the other hand, the words "as such and for that State" should be deleted, since it was well known that the breach of an obligation by one State did not affect the obligations of other States, and since it was clear from the report that what the Special Rapporteur had in mind was that the breach of an obligation should not affect the legal force of that obligation. It is preferable, however, to qualify the word "force" by either the word "legal" or the word "binding".

4. Draft article 2 seemed to touch only marginally on the essence of what the Special Rapporteur wished to say. As it stood, the article appeared to be a statement of the existence of a rule of international law rather than of the principle formulated in consequence of the existence of that rule. Consequently, the text might be reworded to state that a breach of an international obligation established by a rule of customary, conventional or other origin which imposed specific consequences for its breach would attract such consequences. The draft article might also indicate in general terms that breaches not falling within those categories would attract the consequences established in the draft articles.

5. If, as the Special Rapporteur had stated, draft article 3 was intended to be a statement of the rule of proportionality, it should be redrafted to indicate the extent to which the rule of proportionality related to the action of the injured State, and to that of third States in so far as they were entitled to respond to a wrongful act under international law.

6. Mr. TABIBI congratulated the Special Rapporteur on his excellent report.

7. Whether the Commission was to base its deliberations on the premise that internationally wrongful acts should be sanctioned or on the premise that they should be remedied, the principle of proportionality underlay all the provisions of Part 2 of the draft articles. Moreover, the determination of proportionality was, in itself, a very complex question.

8. In dealing with the topic of State responsibility, the Special Rapporteur and the Commission as a whole must take account of the primary rules of international law and of the new principles of international law developed following the entry into force of the Covenant of the League of Nations, the Charter of the United Nations and the various conventions, declarations and other instruments adopted by the United Nations, in the light of article 19 of Part 1 of the draft articles on State responsibility.[2] Those principles included the maintenance of international peace and security, the self-determination of peoples, the inviol-

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[1] For texts, see 1666th meeting, para. 9.

[2] See 1666th meeting, footnote 3.

ability of national frontiers and respect for human rights. The overwhelming majority of States Members of the United Nations were small States, and it was for their protection that those principles existed. Unless, in considering Part 2 of the draft articles, the Commission took careful account of all the basic new developments of international law, it would not only risk damaging the valuable articles contained in Part 1, but would preclude any possibility of completing consideration of Part 3.

9. The general worldwide trend seemed to be towards the swift punishment of offenders, whether they were individuals or States. A reflection of that trend had been the efforts made to establish an international criminal court, which unfortunately had been frustrated by the major Powers. In paragraph 99 of his report, the Special Rapporteur appeared to favour that approach.

10. Turning to the draft articles themselves, he said that articles 1 and 3 as they stood appeared to place more emphasis on measures for the protection of the State committing an internationally wrongful act than on ways of remedying breaches of international obligations.

11. With regard to article 2, he said that if it was intended to be the statement of a rule, it should be made more explicit. The use of the word "may" gave rise to doubts in that regard. If the draft article was not intended to be the statement of a rule, it should be deleted entirely.

12. Mr. ŠAHOVIĆ noted that chapter I (General Principles) was presented by the Special Rapporteur as covering the entire topic of Part 2 of the draft articles on State responsibility. However, a reading of the three articles which formed that chapter created the impression that it did not cover the topic as a whole, and that the principles set forth in it were concerned primarily with the situation of a State which committed a breach of an international obligation. To ensure that chapter I really covered the entire question of the content, forms and degrees of State responsibility it would be necessary for it to enunciate some further general principles relating to the new inter-State relationships resulting from a breach of an international obligation. To that end, account would have to be taken in particular of the second and third parameters mentioned by the Special Rapporteur, namely, the new right of the "injured" State, and the position of the "third" State in respect of the situation created by the internationally wrongful act. In the event that chapter I was not supplemented, articles 1 to 3 might be included in chapter II, which specifically concerned the State author of an internationally wrongful act.

13. In the report under consideration (A/CN.4/344), the Special Rapporteur came to the conclusion that it was not necessary to formulate definitions. He agreed with that view, although the previous year he had thought it preferable that definitions be given of the new expressions and concepts which the Special Rapporteur would need to use.[3] He stressed, however, the necessity of treating chapter I from a more general standpoint.

14. While article 1 reflected in fact the situation of a State which committed a breach of an international obligation with regard to that obligation, the provision was perhaps not entirely adequate. It might be necessary for it to refer to the new obligations of the State in question: the legal consequences of the breach of the obligation. That question was dealt with in article 2, but the Special Rapporteur had himself indicated that article 2 served to explain both article 1 and article 3. However, article 2 contained several elements which could be developed in other provisions. In particular, article 1 might be enlarged and no longer deal with only one aspect of the new relationships between States arising from an internationally wrongful act.

15. As for article 3, it called for a similar comment. As Mr. Tabibi had stressed, the provision seemed to be a clause designed to safeguard the rights of the State that had committed an internationally wrongful act. It would be necessary to indicate, in article 3, that the breach of an international obligation by a State, while not depriving that State of its rights under international law, imposed other obligations upon it.

16. Mr. SUCHARITKUL congratulated the Special Rapporteur on his excellent report, in which he had managed to introduce clarity and simplicity into a difficult topic.

17. He agreed with the Special Rapporteur's proposition concerning the concept of proportionality. To be complete and comprehensive, the draft articles should take account not only of the obligation on the part of the author State to cease its wrongful act but also of the consequences arising out of that wrongful act. Although the obligation of the author State would clearly be to make restitution, as far as possible, for its act, it should be remembered that some damages were irreparable, and therefore called for various types of compensation. As the Special Rapporteur had said, the author State was also under an obligation to apologize for its conduct and to undertake not to repeat the breach in the future.

18. Referring to draft article 1, he said that, while it was true that an obligation, although breached, remained an obligation, it was difficult to state that principle adequately. Some obligations were of a continuing nature, while others were not. Consequently emphasis should be placed on the new obligation of the State to continue to respect the obligation it had breached, whether that obligation was a new one or a continuation of the existing obligation.

[3] See *Yearbook ... 1980*, vol. I, p. 83, 1599th meeting, para. 19.

19. Referring to draft article 2, he said that some strengthening of the wording might perhaps be called for. Moreover, the provisions of the article might not be consistent with those of article 3, since the legal consequences determined by a rule of international law might include a curtailment of the rights of the State that had committed the breach, whereas article 3 stated that those rights would continue to be protected. Moreover, as far as the question of outlawing States was concerned, it should be remembered that States could be suspended or even expelled from the international community for having committed serious breaches of their international obligations. Consequently, it might be advisable to qualify the provisions of draft article 3.

20. Mr. VEROSTA asked whether the Special Rapporteur could give the tentative titles of chapters III and IV of the draft articles, which were to deal with the second and third parameters referred to in paragraph 7 of his report.

21. If chapter I was to deal also with the second and third parameters, he wondered whether it might not be necessary to add to the general principles stated therein. Like other speakers, he felt that the general principles stated thus far were too favourable to the State that had committed the internationally wrongful act, and that additional principles might give greater emphasis to the new obligations of that State, the new rights of the injured State and the attitude of third States.

22. Mr. RIPHAGEN (Special Rapporteur) said that it had been his intention that chapter III of the draft articles should deal with the second parameter concerning the new rights of the injured State, which might not entail more than a suspension of its obligations. Chapter IV would deal with the position of third States, and might necessitate a subdivision between the new rights and the new obligations of third States.

23. Referring to the second question asked by Mr. Verosta, he said that the general principles contained in chapter I were intended to apply to the whole of Part 2 of the draft articles. In fact, articles 2 and 3 were probably more relevant to the second and third parameters than to the first. Of course, the possibility could not be excluded that in the course of its deliberations the Commission might discover other general principles.

24. Mr. USHAKOV said he doubted whether, in legal terms, one could speak of a rule of proportionality, since such a principle in fact existed only with respect to the philosophy of law, as a general idea proceeding from the natural, social and political logic upon which the law was based.

25. In order to justify such a rule, it was assumed that wrongful acts caused a more or less serious danger to human society, which, through its internal law, defended itself in proportion to the danger by providing a scale of punishments in the area of penalties, with the legal consequences of the offence being more or less heavy according to the danger presented by the wrongful act. The same would hold true in international law, where the community of States provided the heaviest sanctions for the most serious offences. Such a concept was not, however, a characteristic of law, but proceeded from metalegal logic. It should not be forgotten that another concept was applied in law, based upon the intentional nature of the offender's behaviour, with an offence committed through negligence entailing less heavy consequences than a premeditated act.

26. The Commission should therefore bear in mind that the so-called "rule of proportionality" did not exist as a rule of international law, the role of which was, on the contrary, to establish the consequences of every wrongful act precisely. The principle of proportionality, which governed internal law as well as international law, was not a rule characteristic of law itself from which universally applicable legal consequences could be drawn.

27. Furthermore, he was afraid that the Special Rapporteur might be construing the concept of *restitutio in integrum* in a general sense, valid for all forms of State responsibility. Such a position would be indefensible. *Restitutio in integrum* was only really possible in the area of material responsibility and, more particularly, in the case of damage to things or property. It seemed inapplicable, however, in the area of political responsibility, since it was difficult to see how it could work, for example, in the case of an act of aggression by one State against another. It was even quite impossible in the event that the State that had been the victim of the act of aggression had lost some human lives which could obviously not be compensated for by *restitutio in integrum*. The concept was thus inappropriate outside the field of material responsibility and even, more precisely, outside the limited case in which property could be fully restored, namely, provided that it had been neither destroyed nor even, as quite often happened, damaged.

28. In that connection, he agreed with Mr. Reuter's comment (1666th meeting) that jurisprudence was of limited value only as a source of inspiration in the matter of State responsibility. International jurisprudence was never called upon to make judgements on the most serious wrongful international acts, those which justified armed intervention, for example. Its sphere in the matter of State responsibility was limited to that of material responsibility, and it would certainly be neither satisfactory nor sufficient to base Part 2 of the draft articles on ideas drawn from international jurisprudence.

29. Furthermore, he had been surprised to read, in paragraph 40 of the second report (A/CN.4/344) that the Commission had "a double task: stating the rights and obligations of States *and* providing guidance to international courts and tribunals for the performance of their task." He did not believe that the Commission

had ever thought of providing guidance to international courts and tribunals. It limited itself to preparing drafts to help the General Assembly in its task of codifying and developing international law, and had at no time claimed to provide guidance to international courts and tribunals, which gave rulings in accordance with existing international law.

30. Similarly, he was unable to accept the idea that international courts and tribunals could sometimes be seized of requests for them to establish rules of law, since it was never within their power to determine the rules applicable to the facts submitted to them, but only to interpret the content of the law and to define the facts which entered into the framework of the pertinent rules. He had some reservations, therefore, regarding the wording of paragraphs 41 and 42 of the report. He noted that, according to the Special Rapporteur, the internal law of a State could prevent it from fulfilling its obligations arising from the rules of responsibility in cases where the courts were not under the authority of the Executive but were independent. Such reasoning could lead to the conclusion that, since the courts were independent, their acts contrary to the law would not engage the responsibility of the State. In fact, the State itself created its own internal organization, and it was for the State to change its system if the one it had established prevented it from respecting certain of its obligations.

31. On the specific question of the three draft articles proposed by the Special Rapporteur, he considered that those three provisions were actually alien to the draft articles of the Commission in that they established no real rules of State responsibility, and were even individually indefensible.

32. Chapter I of Part 2 of the draft articles concerned the general principles applicable to the content, forms and degrees of State responsibility, but they were not dealt with at all in articles 1, 2 and 3, which contained principles irrelevant to the subject.

33. Moreover, the provisions taken separately did not stand up to criticism. Thus, article 1 provided that the breach of an obligation did not affect that obligation. Such an approach was an unsatisfactory one; in internal law, it could not be said that if a person were killed, the obligation not to kill remained. On the contrary, it would be appropriate to say that the obligation remained violated. In the same way, in international law, if a State were the victim of an act of aggression, it could not be said that the obligation not to commit an act of aggression remained, since in fact the obligation remained violated, in that case also. The obligation that had been breached suffered the effects of the internationally wrongful act contrary to the rule, and it was precisely because the obligation was affected in that way that the internationally wrongful act, the source of international responsibility, was created.

34. As for draft article 2, it provided that a rule might itself determine the consequences of an internationally wrongful act. It was necessary to decide, however, whether those consequences should be stated in the rule, in a treaty, or in another way. Since international law had some of the characteristics of law in general, every legal obligation was necessarily accompanied by sanctions, wherever they were set out. Without such sanctions, a rule was not a legal one but of another kind—a moral rule, for example. Thus there was no point in saying that a rule could itself determine the consequences of its breach, since those consequences could in fact be provided for by any type of document or even by customary law.

35. Finally, article 3, according to the Special Rapporteur, responded to the concern not to place the State responsible for an internationally wrongful act outside the law. However, if the law provided for certain specific consequences, such as international responsibility, those consequences were of a legal nature and the State was obviously not outside the law because of its wrongful act. On the other hand, in describing that situation it would be erroneous to say that the responsible State retained its rights under international law. An aggressor State, for example, lost its right to non-intervention provided for under Article 2, paragraph 7, of the Charter of the United Nations. A provision along the lines of draft article 3 would be in open contradiction to that established principle of international legal life. In the same way, it could not be maintained that a State which was in breach of the provisions of a treaty retained all its rights under that treaty. If the purpose of article 3 were simply to say that a State was not placed outside international law by the mere fact of being in breach of one of its obligations, it would certainly be more accurate to say that the State responsible for an internationally wrongful act would be deprived of some of its rights. Even outside the framework of the general principles of responsibility, article 3 could not be defended.

36. He also urged the Commission to consider the question whether reparation represented a sanction or the consequence of an internationally wrongful act. He doubted whether the act of restoring lost property and that of restoring stolen property were identical. In the case of theft, the perpetrator was legally bound to restore the item and was also punished by a sanction; the theft created the victim's right to claim restitution and also a sanction having a social purpose. Similarly, in international law, a State's breach of one of its obligations created the right for the victim State or States to claim reparation and impose it.

37. Generally, chapter I of Part 2 of the draft articles should be based not on the obligations of the State responsible but on the rights of the injured States, and even of the entire international community in some cases, arising from the internationally wrongful act. He reserved the right to propose at a later date draft principles that might be included in that chapter.

The meeting rose at 6.05 p.m.