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Summary record of the 1670th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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regime was being built up. The Commission must therefore engage in major work of research, adaptation of the traditional rules, and progressive development of the law. It must move ahead and try to develop the general principles that would govern Part 2 of the draft. Various opinions had been expressed in that regard. Mr. Aldrich had thought that it might be possible to forgo general principles, whereas Mr. Jagota had suggested that the Commission should wait a little before formulating them. Personally, he considered that the Commission should first of all study the existing rules and their practical application. As he had indicated at the previous meeting, articles 1 to 3 could be broadened in scope so that they genuinely covered all of Part 2 of the draft. If the Commission agreed with that point of view, the work could be undertaken by the Drafting Committee in keeping with the Special Rapporteur's directions.

45. Finally, it was highly desirable that the discussion of the articles under consideration should be properly reflected in the Commission's report on the current session, as it would be very instructive for the international community and, in particular, for the Sixth Committee of the General Assembly.

The meeting rose at 1 p.m.

1670th MEETING

Thursday, 11 June 1981, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Boutros Ghali, Mr. Calle y Calle, 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. 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] (*concluded*)

1. Mr. USHAKOV said he disagreed with the assertions by some members of the Commission that it was not possible to lay down general rules of international law on the regime of State responsibility.

2. Admittedly, while special rules applicable to internationally wrongful acts did exist, they were not detailed rules like those of domestic law but more general rules, applicable to specific categories of internationally wrongful acts. In addition to those rules, there were some truly general rules, which included special rules. Indeed, the special rules gave rise to the general rules, which were based on them, whereas the general rules were developed and clarified in the special rules. The principles on which international law was based constituted a category of particularly general rules. Such principles were stated, for example, in Article 2 of the Charter of the United Nations.

3. Mr. Reuter (1669th meeting) held the view that the study of the consequences of internationally wrongful acts led to the statement of special rules, but such rules necessarily implied general rules, under which they were grouped. The special rules contained in Article 11 of the Charter, for example, had no meaning except in relation to the general rule in Article 10, which defined in general terms the functions and powers of the General Assembly. Conversely, the special rules in Article 11 were essential in order to clarify the conditions of the application of the general rule contained in Article 10. Similarly, the general principles stated in articles 1 to 4 of chapter I of Part 1[2] of the draft embraced all the rules in the succeeding chapters.

4. As Mr. Jagota (*ibid.*) had suggested, the general rules to be formulated by the Commission with respect to Part 2 of the draft might possibly be inserted in chapter I of Part 1. In addition to those very general principles, there were general principles relating to each chapter of the draft articles. For example, article 5 of Part 1 of the draft articles, which marked the beginning of chapter II, stated the general rule of the attribution to the State of the conduct of its organs, a rule which was clarified in the other articles of that chapter. The three draft articles under consideration did not, as they stood, express general rules universally applicable to the effects of internationally wrongful acts. Even if special rules on the subject existed, it was important to begin by enunciating general principles. He had no doubt that the Commission would be able to derive such principles from the practice of States, from judicial decisions and from the doctrine.

5. Several members of the Commission had wondered whether the draft articles in Part 1 constituted the adequate basis needed for the formulation of the draft articles in Part 2. For his own part, he believed that, with a few minor exceptions, the draft articles already adopted provided a good working basis for the future work of the Commission. Mr. Reuter had

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

[2] See 1666th meeting, footnote 3.

referred to the fact that, in Part 1 of the draft articles, injury did not appear as a basis for a responsibility. The reason why it did not appear therein as such was that the Commission shared the view that the breach of an international obligation always entailed injury, or at least prejudice, if indeed an "injury" necessarily entailed physical damage. It was unnecessary, therefore, to refer to prejudice as a basis for responsibility. Having accepted that prejudice existed in all cases, the Commission was currently at liberty to evaluate the prejudice which could be caused and to seek means of reparation.

6. Admittedly, the breach of some international obligations might give rise to responsibility without the existence of any prejudice. If a State party to the International Convention on the Elimination of All Forms of Racial Discrimination did not introduce into its legislation measures prohibiting racial discrimination, despite the obligation to do so imposed on it by the instrument in question, its responsibility was entailed, since its obligation had not been performed. However, if there was no racial discrimination of any kind in that State, there was no prejudice to individuals, to States or to the international community. Such cases were rare, however. Consequently, while prejudice had not been mentioned as a basis for responsibility in Part 1 of the draft articles and while the breach of an international obligation could, in exceptional circumstances, not entail prejudice, there was nothing to prevent the Commission from formulating rules on the consequences of internationally wrongful acts.

7. Referring to article 19 of Part 1 of the draft articles, concerning international crimes and delicts, he said that the drafting of that provision had been an act of codification as much as of the progressive development of international law on the part of the Commission. The Commission should certainly take that article as a basis when preparing the draft articles in Part 2. Under article 19, paragraph 2, an international crime resulted from the breach by a State of an international obligation *erga omnes*. What emerged from that article was that the States authorized to take countermeasures were not only the States directly affected, but all States, authorized as they were to "respond" to the breach of an international obligation essential for the protection of fundamental interests of the international community. Far from impeding the preparation of Part 2 of the draft articles, article 19 should facilitate the Commission's task. Obviously, the countermeasures which could be taken against the State which was the author of an international crime must be those allowed under international law. To take the example given at the previous meeting by Mr. Reuter, a State clearly could not, by way of countermeasures, have the hands of prisoners of war cut off. It was for the Commission to indicate the countermeasures authorized by international law.

8. Referring to the English text of draft article 1, under which a breach of an international obligation by a State did not, as such and for that State, affect the "force" of that obligation, he pointed out that the question whether an obligation was in force or not was a matter to be determined not by the draft articles but by primary rules. For all treaty obligations, reference should be made to the law of treaties, as codified in the Vienna Convention.[3] Under article 60 of that instrument, a party to a treaty could terminate it, under certain conditions, in the event of a material breach of that treaty by another party. It was therefore not possible to declare that an international obligation remained in force once it had been breached. What counted, under article 18, paragraph 1, of Part 1 of the draft articles, was that the wrongful act should have been committed at a time when the obligation was in force. For the purposes of the draft articles, therefore, it was sufficient that the obligation should have been in force in respect of the State in question, in accordance with the applicable primary rules. In that respect, the wording of draft article 1 was not satisfactory.

9. Mr. FRANCIS said that while Mr. Ushakov's observations concerning the status of draft article 1 must of course be taken into account by the Special Rapporteur, it was his view that, since Part 2 was concerned, *inter alia*, with the consequences of a wrongful act, the inclusion of draft article 1 was warranted. Furthermore, a situation in which an obligation did not continue to be in force could obviously not result from the wrongful act of a State. To consider it as such would be to disregard the whole concept of *pacta sunt servanda*. The termination of the existence of an obligation must be the result of the operation of some other law or of the attitude of the affected State. He hoped that the Special Rapporteur would be able to find a neutral wording that would satisfy all the concerns expressed.

10. He recalled that, in his own earlier observations (1668th meeting), he had said that since article 3 was intended to deal with the notion of proportionality it should include a direct reference to that notion. The article should be drafted from the point of view of the rights of the injured States, rather than emphasizing the rights of the author State. That approach had been adopted in draft articles 30 and 34 of Part 1.

11. Mr. REUTER said that, although Mr. Ushakov did not appear to agree with him, he nevertheless agreed with Mr. Ushakov. In respect of draft article 1, for example, the intentions of the Special Rapporteur were clear. He had stated only that a breach of an international obligation did not, in itself, cause that obligation to disappear without making any reference to conventional or customary law. Obviously, the obligation existed before its breach and continued to exist immediately afterwards, at least for a certain time.

[3] *Ibid.*, footnote 4.

12. Referring to article 19 of Part 1 of the draft articles, he emphasized the difficulties created by that provision, which necessitated different regimes of responsibility depending on whether the responsibility in question conferred the universal right to impose sanctions or constituted responsibility for acts resulting in physical injury. In the first case, it would be necessary to draft both detailed and general rules, while in the second case provision would have to be made for reparation measures, independent of the consequential right to impose sanctions.

13. Mr. RIPHAGEN (Special Rapporteur), summing up the Commission's debate on draft articles 1 to 3, said that his initial reaction on rereading the comments made on his preliminary report,[4] both in the Commission and in the Sixth Committee of the General Assembly, had been that the task of reducing them to the form of draft articles was a virtually impossible one. However, he had been encouraged by the thought that, since it had been possible to draft very general rules covering all types of treaty, as in the case of the Vienna Convention, it should also be possible to do so in respect of internationally wrongful acts.

14. That conclusion had led him to draft some very abstract rules, which had been subjected to various degrees of criticism by a number of members of the Commission. While many members had expressed the view that an attempt should be made to draft such preliminary rules, all speakers had expressed doubts as to the wording to be used. He noted that many speakers had referred to the phenomenon of aggression and its legal consequences as a test of the validity of the provisions proposed. In that connection, he wished to point out that the articles would cover many other types of wrongful acts, and that the regime of State responsibility applicable in cases of aggression was a special regime, which draft article 2 was intended to safeguard. Although the Commission had always envisaged the existence of several different regimes of State responsibility, that did not exclude the possibility that some rules would be applicable to all of them.

15. Draft articles 1 to 3 had been criticized as stating nothing and as stating too much. Those articles should be read as applicable, unless otherwise provided for either in subsequent articles or in the rules referred to in article 2. In that regard, Mr. Aldrich had suggested that articles 1 and 3 should be reworked by combining them in one provision stating that a breach of an obligation affected existing rights and obligations only as provided in Part 2 of the draft articles (1669th meeting, para. 5). He had also suggested that article 2 should be reworded to cover other exceptions (*ibid.*, para. 6). That approach might meet, as least partially, the concerns expressed by Mr. Quentin-Baxter (1669th meeting) and others.

16. Referring to the observations made by Mr. Tabibi and Mr. Sucharitkul (1668th meeting), he said that he failed to see how article 1 could be read as protecting the author State or as precluding new observations from arising on the part of the author State.

17. He was inclined to agree with Mr. Francis (*ibid.*) that the words "the force of" should be included in article 1. He had placed them in brackets simply because they has not been used before. At the same time, he noted Mr. Ushakov's objection to the use of the term "force".

18. The underlying idea of draft article 1 was that the fact of a breach did not simply create a new situation to which the old obligation was irrelevant—a rule to which there were practically no exceptions. That concept was, however, not as self-evident as it might appear, and in fact, under the old Civil Code of the Netherlands, in the event of the non-performance of a contractual obligation, that obligation was replaced by the obligation to pay damages.

19. Draft articles 1 to 3 had also been criticized by some members, including Mr. Francis, Mr. Jagota (1669th meeting) and Mr. Šahović (1668th meeting), as stating too little. In that connection, he agreed that the title of Chapter I—"General Principles"—might be misleading, since the draft articles were simply meant to provide a general framework which was essentially negative in character. The title "Introduction", along the lines of a suggestion by Mr. Aldrich, might be a better and more neutral term. Given the essentially negative character of Chapter I, he doubted whether positive elements should be added to it, as had been suggested by a number of members. However, that question could be taken up after the consideration of the special articles relating to the three basic parameters listed by the Special Rapporteur (A/CN.4/344, para. 7).

20. He agreed with Mr. Reuter (1669th meeting) and Mr. Ushakov (1668th meeting) that consideration of the topic could not be based simply on existing jurisprudence. He had, in fact, stated as much in paragraph 106 of his report.

21. With regard to the suggestion by Mr. Francis (*ibid.*) that Chapter I should include a reference to indirect injury to a third State and to the principle of proportionality, he doubted whether such positive elements should be included in that chapter, for the reasons he had already given. In any event, the question of injury to one or more third States would be dealt with in subsequent chapters.

22. Mr. Tabibi (*ibid.*) had quite rightly referred to new tendencies in international law, particularly the tendency to take account of extra-State interests. That point would be dealt with in the chapters relating to the second and third parameters.

[4] *Yearbook ... 1980*, vol. II (Part One), document A/CN.4/330.

23. Referring to observations made by Mr. Sucharitkul (*ibid.*), he said that, while it was possible to expel a State from an international organization, the rights and duties of that State under international law remained in force. That question was, in fact, dealt with in paragraphs 77 and 78 of his preliminary report. Moreover, it had been his impression that most members of the Commission had not wished to include that question within the scope of the draft articles. In any event, it would certainly be dealt with in connection with the response of international organizations to internationally wrongful acts.

24. In his earlier remarks, Mr. Ushakov (*ibid.*) had adopted a somewhat limited approach in which he had stressed the danger which internationally wrongful acts presented to the international community. While that aspect was an important one, the draft articles had to take account of many other obligations which did not affect the interests of the international community as a whole. He agreed with Mr. Ushakov's remark that, in national systems of law, the judge, in determining sanctions, frequently applied the principle of proportionality without being forced to do so by law.

25. As for Mr Ushakov's observation concerning paragraph 40 of the report, and in particular the expression therein "*fournir des directives*", the problem was essentially one of translation, since the word "guidance" had been used in the original English text. He did not think that many jurists would share the view expressed by Mr. Ushakov that judges only applied the law and did not make it.

26. In commenting on article 3, Mr. Ushakov had also observed that the rights of States could be infringed under Article 2 of the Charter of the United Nations. In that connection, he wished to point out that that Article dealt specifically with enforcement measures, and not with the other legal consequences of wrongful acts.

27. Finally, referring to the later statement made by Mr. Ushakov, he emphasized that article 1 dealt with wrongful acts *as such*.

28. With regard to Mr. Pinto's reference at the previous meeting to the obligations of co-operation and their legal consequences, he said that article 1 would apply to such obligations, which would also be covered by the second parameter, particularly in so far as it concerned countermeasures. The question of obligations of that type and the limits placed on possible countermeasures was dealt with in paragraph 93 of his preliminary report.

29. He felt that articles 1 to 3 could be referred to the Drafting Committee.

30. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer draft articles 1 to 3 to the Drafting Committee.

It was so decided.

The meeting rose at 11.35 a.m.

1671st MEETING

Monday, 15 June 1981, at 3.05 p.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Pinto, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Mr. Verosta, Mr. Yankov.

Succession of States in respect of matters other than treaties (*continued*)* (A/CN.4/338 and Add.1–4, A/CN.4/345 and Add.1 and 2)

[Item 2 of the agenda]

DRAFT ARTICLES ADOPTED BY THE COMMISSION: SECOND READING (*continued*)

ARTICLE 15 (Scope of the articles in the present Part) *and*

ARTICLE 16 (State debt)

1. The CHAIRMAN invited the Commission to consider Part III of the draft articles (State debts), and particularly section 1, entitled "General Provisions". The first two articles of this section are articles 15 and 16, which read:

Article 15. Scope of the articles in the present Part

The articles in the present Part apply to the effects of a succession of States in respect of State debts.

Article 16. State debt

For the purposes of the articles in the present Part, "State debt" means:

(*a*) any financial obligation of a State towards another State, an international organization or any other subject of international law;

(*b*) any other financial obligation chargeable to a State.

2. Mr. BEDJAOUI (Special Rapporteur) said that articles 15 and 16 were applicable to all types of State succession in which a problem of State debts arose.

3. Article 15 had not elicited any particular comments, either in the Sixth Committee or in the written replies of Governments. In the context of Part III of

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* Resumed from the 1662nd meeting.