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Summary record of the 1738th meeting

Topic:
State responsibility

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ticles proposed in his third report had in no way been intended to depart or detract from the articles in part 1. With regard to the sources of obligations, Mr. Ushakov had referred to article 17, which was, of course, very relevant to part 1, though it was less relevant to part 2, because a technical breach of a bilateral treaty would not have the same legal consequences as an international crime and because, in principle, the breach of a bilateral treaty had consequences only for the parties to that treaty. In any event, article 17 did not prejudge the legal consequences of the breach of an international obligation. Although it was open to discussion whether a treaty establishing a boundary in itself created obligations, the Commission had, in the past, recognized that there were special treaties which created objective regimes, the object and purpose of which were different from those of other treaties and which must be taken into account at some point in the Commission's work on the topic of State responsibility.

40. Mr. Malek (1731st meeting) had referred to article 35 in part 1 and asked whether it should not be enlarged upon in part 2. The Commission had discussed that question and agreed that it should be dealt with in the context of Mr. Quentin-Baxter's topic.

41. Sir Ian Sinclair (1733rd meeting) had requested him to explain the meaning of the terms "system" and "subsystem". Other members had also had difficulty with those terms, which he had attempted to define in his oral introduction to the third report (1731st meeting) and which, as he had said, referred to substantive, procedural and status rules. He would never use those terms in the text of an article, however; they had merely been suggested as "background" terms to illustrate the great difficulties involved in fitting all the elements of the topic into a set of draft articles.

42. In reply to some of the questions raised at the current meeting, he noted that criticism had been directed at the new introductory articles in general and the new article 2, on proportionality, in particular. In trying to answer the question who was to be the judge of proportionality, it would be difficult for the Commission to avoid using terms that required interpretation. He would be glad if the members of the Commission were in favour of including a provision on the settlement of disputes, because it was unlikely that States would ever agree to rules on State responsibility unless provision was made for a dispute settlement procedure, and because part 2, like part 1, was bound to refer to rules of *jus cogens*.

43. Mr. McCaffrey had made some comments on the structure of part 2, and of part 3 on implementation, suggesting that separate chapters should contain introductory articles and articles on the three parameters. He had taken note of that suggestion and of the remarks made by other members to the effect that the three parameters should not put the articles in a straight-jacket. He had introduced the three parameters only in order to provide a background or framework for the

Commission's thinking, however, and he was not absolutely sure that it would be possible to fit them into the text of the draft articles.

The meeting rose at 1 p.m.

1738th MEETING

Thursday, 1 July 1982, at 10 a.m.

Chairman: Mr. Paul REUTER

State responsibility (concluded) (A/CN.4/342 and Add.1-4,¹ A/CN.4/344,² A/CN.4/351 and Add.1-3, A/CN.4/354 and Add.1 and 2, A/CN.4/L.339)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)³ (concluded)

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

ARTICLES 1 to 6⁴ (*concluded*)

1. Mr. RIPHAGEN (Special Rapporteur), continuing his summing up, said he had been pleased to note that the members of the Commission seemed to agree that a number of framework articles would be useful; that a catalogue of the legal consequences of an internationally wrongful act should be drawn up; that consideration should be given to the circumstances in which legal consequences might be precluded; and that a part 3 on implementation would be necessary.

2. Although there had been some criticism of the content and wording of the new articles 2 and 6, the idea that provisions along those lines should be included somewhere in the draft had been generally supported. The problem of the order in which the articles would be placed in the draft was of minor importance at the current stage and could be solved by the Drafting Committee.

3. The new article 6 had been criticized mainly because it might be interpreted as a provision which prescribed all the legal consequences of an international crime. Such an interpretation would, however, be incorrect and might be the result of the persistent tendency of lawyers to reason *a contrario*. The Drafting Committee might therefore consider Mr. Calero Rodrigues' suggestion (1733rd meeting) that, in article 6, account should be taken only of some of the legal consequences of an

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² *Ibid.*

³ Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted on first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

⁴ For the texts, see 1731st meeting, para. 2.

international crime and, in particular, of the consequence that an international crime entailed obligations for all States.

4. Some drafting changes would, in his opinion, help to make the meaning of the new article 2 clearer. It should be borne in mind that that provision dealt with the balance to be struck between the seriousness of an internationally wrongful act and the seriousness of the reaction to it. Indeed, every situation created by an internationally wrongful act was unique and the reaction to such an act would depend on the circumstances of the particular case.

5. He proposed that the Commission should refer the new articles 1 to 6 and the former articles 1 to 3 to the Drafting Committee, on the understanding that the latter would prepare framework provisions and decide whether an article along the lines of the new article 6 should have a place in those provisions.

6. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed, on that understanding, to refer the new articles 1 to 6 and the former articles 1 to 3 to the Drafting Committee.

It was so decided.

The meeting rose at 10.25 a.m.

1739th MEETING

Monday, 5 July 1982, at 3 p.m.

Chairman: Mr. Paul REUTER

International liability for injurious consequences arising out of acts not prohibited by international law (continued)* (A/CN.4/346 and Add.1 and 2,¹ A/CN.4/360, A/CN.4/L.339)

[Agenda item 4]

THIRD REPORT BY THE SPECIAL RAPPORTEUR
(continued)

SCHEMATIC OUTLINE² (continued)

1. Mr. MALEK said he would confine himself to some preliminary comments on the Special Rapporteur's third report (A/CN.4/360), which was so complex that it could not be assimilated without reference to the two previous reports and to the Commission's debates on them. The Commission's study of the subject had made considerable progress, but was still in the initial stage. Members had expressed different and sometimes conflicting views on questions that were often fundamental

and called for prior general agreement in the Commission. None of them, however, had seemed to doubt the advisability or the necessity of persevering with the topic. Thus the Commission had not been discouraged when noting the complexity of the problems involved and discussing the difficulties inherent in solving them. After having devoted so much time and effort to studying the topic of State responsibility, the Commission could not leave in abeyance a subject that could not be separated from it, no matter what efforts were made to do so.

2. In his second report, the Special Rapporteur noted that "the regime of responsibility for wrongful acts and the regime with which the present topic deals are not mutually exclusive" and that "the regime described in the title of the topic is not, as has often been thought, an anomalous collection of limiting cases for which the regime of State responsibility for wrongfulness fails to provide" (A/CN.4/346 and Add.1 and 2, paras. 9 and 10). Serious doubts had, indeed, been expressed in the Commission as to whether the distinction between the two topics was justified. For instance, Mr. Reuter had said at the previous session that "certain lawful activities" which the Commission had in mind "were in the process of becoming wrongful".³ It might be asked what would become of the rules the Commission was to draw up if that prediction came true in the near future.

3. Doubts had also been expressed in the Commission as to the pertinence of the distinction between primary and secondary rules for the purposes of the topic under study, and as to whether the texts to be prepared would belong in either of those categories of rules. His own view was that the discerning comments made on that point by the Special Rapporteur in his first two reports, and during the Commission's discussions, were of undoubted scientific interest.

4. It seemed that the Commission ought to reach general agreement, preferably at the current session, on a number of basic questions. In particular, it should adopt a general approach for the continuation of its work and delimit the scope of the topic. It should also take decisions on certain concepts such as the balance of interests, the criterion of foreseeability or duty of care, and the criterion of causality. Not only did the third report deal with all those matters; it also contained proposals on each of them that took account of the views expressed both in the Commission and in the Sixth Committee. The report, which was of high scientific value, had the merit of putting forward a general plan which would be extremely useful for the drafting of articles.

5. Mr. RIPHAGEN reminded the Commission that, in introducing his own topic at the 1731st meeting, he had said that, represented graphically, the topic under consideration would be near the centre, while the topic of State responsibility would be more towards the periphery. In a way, the topic of international liability

* Resumed from the 1735th meeting.

¹ Reproduced in *Yearbook ... 1981*, vol. II (Part One).

² For the text, see 1735th meeting, para. 1.

³ *Yearbook ... 1981*, vol. I, p. 220, 1685th meeting, para. 27.