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Summary record of the 1771st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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47. In respect of an observation made by Mr. Ushakov, he pointed out that the decision of the District Court of Tokyo in the *Limbin Hteik Tin Lat* v. *Union of Burma* case had not been quoted in its entirety since the text was reproduced in the volume of the United Nations Legislative Series concerning jurisdictional immunities.[21]

48. Lastly, it was his impression that draft article 15 appeared to give rise to drafting rather than substantive problems.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 14 and 15 to the Drafting Committee.

It was so agreed.[22]

The meeting rose at 6 p.m.

[21] See 1769th meeting, footnote 7.

[22] For draft article 14, see the decision by the Drafting Committee, 1805th meeting, para. 59 *in fine*; for draft article 15, see the consideration of the text proposed by the Committee, *ibid.*, paras. 69–74, and 1806th meeting, paras. 78–87.

1771st MEETING

Tuesday, 31 May 1983, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (A/CN.4/354 and Add.1 and 2,[1] A/CN.4/362,[2] A/CN.4/366 and Add.1,[3] ILC(XXXV)/Conf.Room Doc. 5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[4]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN recalled that, for part 2 of the draft articles on State responsibility, the Special Rapporteur, in his second report, had submitted a set of five articles (arts. 1–5),[5] which the Commission, after consideration at its thirty-third session, had decided to refer to the Drafting Committee, but that the latter had been unable to examine them for lack of time. The Special Rapporteur, taking account of the comments made by the Commission on the first set of articles, had submitted in his third report (A/CN.4/354 and Add.1 and 2, paras. 145–150) a new set of six articles (arts. 1–6). The Commission, at its previous session, had decided to refer that second set of articles to the Drafting Committee and had confirmed its referral of articles 1–3 of the first set.

2. The texts of the draft articles referred to the Drafting Committee for consideration at the current session were the following:

Draft articles submitted by the Special Rapporteur in his second report

Article 1

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

Article 2

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

Article 3

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

Draft articles submitted by the Special Rapporteur in his third report

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

(*a*) not to recognize as legal the situation created by such act; and

(*b*) not to render aid or assistance to the author State in maintaining the situation created by such act; and

(*c*) to join other States in affording mutual assistance in carrying out the obligations under (*a*) and (*b*).

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

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

[5] *Yearbook . . . 1981*, vol. II (Part One), pp. 100–101, document A/CN.4/344, para. 164.

paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

3. The Chairman invited the Special Rapporteur to introduce his fourth report on the content, forms and degrees of international responsibility (A/CN.4/366 and Add.1).

4. Mr. RIPHAGEN (Special Rapporteur) said that, in submitting his fourth report, he was above all seeking guidance from the Commission in order to be able to prepare further draft articles for parts 2 and 3. He recalled that the draft articles submitted in his third report dealt with the linkage between parts 1 and 2 of the draft (art.1), the prohibition of manifest disproportionality (art.2), the reservation on self-contained régimes of State responsibility (art.3), the international *jus cogens* régime (art.4), the United Nations régime (art.5) and the minimum obligations of a State in the event of an international crime (art.6).

5. The fourth report contained a number of suggestions in connection with part 3 of the draft articles concerning the "implementation" (*mise en oeuvre*) of international responsibility. He had been prompted to refer to part 3 at the current stage by his own past experience. In 1968 he had played an active role at the first session of the Vienna Conference on the Law of Treaties. The draft articles prepared by the Commission at that time had been devoted largely to circumstances in which the rule *pacta sunt servanda* did not apply. It had become clear that many Governments were unable to accept the provisions drafted by the Commission without some guarantee of an impartial procedure for the settlement of disputes. Subsequently, in 1970, he had served as a judge *ad hoc* in the ICJ when the Court had considered the *Barcelona Traction* case.[6] In that case, almost every fact had been in dispute and, where there had been no disagreement on the facts, the two parties had drawn entirely different legal conclusions from them. Since that time, he had been involved in the preparation of the United Nations Convention on the Law of the Sea, in which it was recognized that a compulsory procedure for the settlement of disputes was part and parcel of the substantive provisions of the law of the sea.[7] He had become increasingly convinced that there was no hope of Governments ever accepting the Commission's articles on State responsibility as binding rules of international law unless they contained a guarantee of impartial application.

6. The reason for that hesitancy on the part of States was that many of the draft articles contained in part 1[8] were necessarily vague. For example, draft articles 11, 12 and 14, while recognizing that a State was not responsible for the conduct of a person not acting on its behalf, or for the conduct of organs of other States or of organs of insurrectional movements, nevertheless implied that a State could be held responsible for the conduct of a person acting on behalf of the State which was related to such conduct. Similarly, article 19, paragraph 2, was also necessarily vague in that, while dealing with the recognition by the international community of an internationally wrongful act as an international crime, it did not indicate how and when such recognition took place. Article 33 was also vague in opening the way for the invocation of a state of necessity as justifying the breach of an international obligation.

7. The provisions of part 2 of the draft articles would also of necessity be vague. The emphasis of part 2 must lie on the limitation of the admissible legal consequences of an internationally wrongful act. Such limitations would have to be sought in a definition of the requirements of quantitative and qualitative proportionality. Such vagueness was inevitable since the topic purported to deal with every type of breach of an international obligation, from aggression to the interpretation of treaty provisions by one State in a manner considered incorrect by another State.

8. International law was no longer limited to bilateral relationships between States, but was slowly, and often only at the regional level, taking the form of a common law of the international community as a whole or, more frequently, of a group of States. That development must be taken into account. It was absolutely futile to take the view that States coexisted in a situation of more or less permanent competition or that contact between States at the regional level was so close that their relations could not be covered by international law at all. It must be recognized that current international relations involved a number of intermediate forms of régime covering various limited fields of relationships.

9. Turning to his fourth report, he said that chapter I contained a brief account of the status of the work on the topic, while chapter II, which was the essential part of the document, presented an outline of the possible contents of parts 2 and 3 of the draft articles. In chapter II, paragraphs 31–36 contained some preliminary observations and paragraphs 37–45 dealt with the links between parts 2 and 3 of the draft. Paragraphs 46–49 dealt with the categorization of internationally wrongful acts in relation to their legal consequences, and paragraphs 50–51 dealt with international crimes and with common elements concerning their legal consequences. Paragraphs 52–56 dealt with the international crime of aggression, a question on which the Charter of the United Nations and other instruments already contained various indications. Paragraphs 57–58 concerned other fields of fundamental interest that could give rise to international crimes, while paragraphs 59–67 discussed the common elements of the legal consequences of international crimes.

10. In paragraphs 68–70, he had referred to the difficulties involved in defining aggression and borderline cases. Paragraph 71 dealt with another category of

[6] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

[7] Part XV of the Convention (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122).

[8] See footnote 4 above.

internationally wrongful acts, namely international delicts which were not international crimes, and in paragraph 72 he had attempted to categorize international delicts by identifying three elements of their possible legal consequences. Paragraphs 73–78 related to the first element, namely the determination of the injured State or States, but no conclusions had been drawn because that element was also dealt with later in paragraphs 112–121. The second element, namely the content of the legal consequences, was discussed in paragraph 79, which distinguished between reparation, suspension or termination of existing relationships and measures of self-help or reprisal. The suspension or termination of existing relationships was, moreover, distinguished from the rule of reciprocity and from what the ICJ had termed "active intergovernmental co-operation" in its Advisory Opinion of 21 June 1971.[9]

11. Paragraphs 80–110 dealt with self-help or reprisals and the limitations thereon. The first limitation was the prohibition of reprisals involving the use of force; it was reviewed in paragraph 81, which referred back to paragraphs 52–54 on borderline cases. Paragraph 82 then dealt with quantitative proportionality, which was the subject of draft article 4, while paragraph 83 attempted to define qualitative proportionality. The idea of the existence of objective régimes had been introduced in paragraphs 84–85.

12. Perhaps the simplest way to indicate what was meant by "objective régimes" was to say that, under such régimes, States had parallel, rather than reciprocal, obligations. That distinction, in his opinion, was very important for the question of the legal consequences of the breach of such obligations. Parallel obligations existed when they protected the collective interests of all States, of a group of States or of individual persons. That point was dealt with in paragraph 86. Paragraph 87 related to the collective interests that were protected by parallel obligations, while paragraphs 88–89 dealt with the protection of human rights and paragraph 90 discussed the question of the protection of the human environment. Paragraph 91 referred to the very particular régime of diplomatic immunities, which might, in a way, also be called an objective régime, although it was a bilateral one.

13. Paragraphs 92–94 attempted to draw a distinction between reprisals and the termination or suspension of a treaty, and paragraphs 95–96 related to a fundamental change of circumstances or a state of necessity, in connection with which reference could also be made to the legal consequences of an internationally wrongful act. Paragraph 96 also described the rule of strict reciprocity.

14. Paragraph 97 took up the question of the basis for a collective decision in the case of the breach of parallel obligations. Paragraph 98 referred briefly to strict reciprocity in the case of a non-material breach. In that connection, he recalled that the 1969 Vienna Convention on the Law of Treaties dealt with the consequences, as far as a treaty was concerned, of a material breach. However, he was of the opinion that a non-material breach could also give rise to some measure of pure reciprocity. Paragraph 99 defined the various types of objective régimes and paragraph 100 referred to collective decisions in the absence of decision-making machinery.

15. One of the other limitations on reprisals, namely prior notification, was discussed in paragraph 101. Paragraphs 102–108 dealt with possible limitations on reprisals in the case of the presence of other means of enforcement and, in particular, with the peaceful settlement of disputes. In paragraph 109, reference was made to the situation where an objective régime failed completely. That situation was also discussed in paragraph 130, which suggested that that particular case might be referred to in the draft articles.

16. Paragraph 110 dealt with active intergovernmental co-operation, which might be suspended in the case of an internationally wrongful act. Paragraph 111 mentioned the concept of reparation and referred to the second report.[10] Paragraphs 112–121 came back to the question of the identification of the injured State, and in that connection paragraph 114 drew attention to the fact that, whereas most obligations under international law were abstract, the breach of an obligation was always concrete. That helped to identify the injured State. Paragraph 114 pointed out that, in the case of most obligations under general customary international law, it was easy to identify the injured State because most such obligations were merely a reflection of the sovereignty of another State that was infringed by the breach of those obligations. There was also no problem in identifying the injured State in the case of a breach of an obligation under a bilateral treaty. The main rule in that regard was that an internationally wrongful act created a new bilateral relationship between the author State and the injured State. However, there were exceptions to that bilateralism and they were discussed in paragraphs 117–121. The three types of objective régimes were defined in paragraphs 119–121.

17. In paragraphs 122–130, he had attempted to sum up the preceding paragraphs and had used language that could be easily transformed into draft articles if the Commission decided to endorse the approach he had adopted in the fourth report.

Mr. Francis took the Chair.

18. Mr. REUTER said that the topic under consideration was extremely difficult to circumscribe. If the Commission failed to overcome the problems raised by the topic, it would not be the fault of the Special Rapporteur, who had accomplished sterling work and had not tried to conceal any of the difficulties he had encountered.

[9] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970), I.C.J. Reports 1971*, p. 55, para. 122.

[10] *Yearbook . . . 1981*, vol. II (Part One), p. 101, document A/CN.4/344, para. 164, arts. 4 and 5.

19. One important question to be resolved was whether the Commission should work towards a convention or towards a carefully drafted text that would not be formulated with a view to the conclusion of a convention proper. He was in favour of the first option because, at the current stage of codification, the method itself of preparing a convention, the concern for logic and precision in drafting, was beneficial for the work of the Commission. It mattered little whether the convention was ratified or not. In a period of reticence and discord within the international community, a convention was not systematically ratified by all States. Nevertheless, an instrument such as the Vienna Convention on the Law of Treaties, which had not been ratified by all States, was a bench-mark; it had repeatedly been cited by the ICJ and was referred to by many States. In the case under discussion, he considered it doubtful that all States, and particularly certain great Powers, would accept the obligations stemming from a convention on State responsibility, even if it had been drafted by the Commission.

20. There was a second, almost equally serious, question. In the field of international responsibility, the problem arose of recourse to armed force—aggression or armed reprisals—and consequently of the relationship between the draft under consideration and the Charter of the United Nations. In his opinion, it would be better to refrain from taking any decision that would involve tampering with the Charter. In that connection, he recalled the Definition of Aggression adopted by the General Assembly,[11] and questioned the value of such a text. At the legal level, the definition was virtually worthless, as in article 2 it allowed a rather defective supreme authority, the Security Council, not to follow it in some specific cases. The Commission should not lose sight of the limit placed upon its work by that text, which had been adopted at the highest level.

21. Thirdly, it would be difficult not to refer to international crimes. An even more thorny question than that of the relationship between the Commission and the supreme authorities set up by the Charter arose, namely the question of the relationship between the Special Rapporteur's present study and Mr. Thiam's first report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364). In that connection, he recalled that the Commission had bound itself by article 19 of part 1 of the draft on State responsibility, which it had formally adopted. For his part, he had accepted the article in the belief that it was merely a frame of reference. The Commission knew roughly in what areas international crimes would occur, but had not yet taken a position on the régime governing them. Would it be best to deal with them one by one, as would be reasonable, in which case the Commission would know what should be understood by an international crime once it had completed its work, or else to specify what the régime of international crimes would be in relation to any particular point, in which case the results would be scanty?

22. If he had understood the Special Rapporteur's fourth report correctly, the Rapporteur had taken the view that international crimes concerned all States, whereas mere delicts concerned only one State or a small number of States. However, international crimes would supposedly have something else in common, which was that statutory limitations did not apply to them, whereas in the case of delicts the Commission would probably have to ask whether it should not accept that time could erase an international delict. The Commission knew nothing more about international crimes. For the time being, he would be tempted to leave the question to Mr. Thiam, but in the case of both Mr. Thiam's report and Mr. Riphagen's report, he was most reluctant to embark upon a general and abstract consideration of the specific problems of international crime.

23. He wished to make two further remarks on the question of method. The Commission was faced with a problem of terminology, as everyone invented his own vocabulary. He had very often felt that a difference between French and English terminology raised a tremendous problem. That was the case, for example, with "criminal offence", which had nothing to do with *crime*. In that connection, there was an astonishing confusion with regard to the measures that a State might be led to take in response to the conduct of another State. In the case of an act that followed another act, a distinction was drawn between retortion, an unpleasant measure which did not, however, violate international law, and reprisals, which constituted a violation. In that same area, other terms had appeared, such as "reciprocity". Was there a difference between reciprocity and reprisals? For its part, the United States of America had started using the word "countermeasure", which meant nothing but had established itself by being adopted by an arbitral tribunal seeking to avoid the words "reciprocal obligations" or "reprisals".[12] The ICJ had in turn taken it up in a case relating to the status of diplomats.[13] What had become of the expression "objective régime", which had already been used by the Commission? That expression had been used for the first time in a very special case, where it had been a question of describing the régime of neutrality of Belgium, a universally applicable régime. At a later stage, won over by the arguments of Sir Humphrey Waldock, the Commission had abandoned it and had used other terms in the 1978 Vienna Convention on Succession of States in Respect of Treaties. Then there were the "integral obligations", obligations created by a treaty, which concerned all States: he had in mind the specific case of a fishing treaty which imposed quotas. A

[11] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[12] Decision of 9 December 1978 in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 443, paras. 80 *et seq.*).

[13] *Case concerning United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

State's failure to respect the limits imposed upon it in such a case entailed the same damage for all the other States concerned. In the light of these considerations, he thought the Special Rapporteur should on each occasion quote all the terms covering the same idea so as to avoid discussions arising from questions of terminology.

24. Finally, he considered it preferable to proceed from the simplest to the most complex. It was best to begin with one's strengths, in so far as one knew one's strengths and weaknesses. While respecting the Special Rapporteur's independence, he considered that it might be best first to deal with the classic matter of reparations, which was fairly familiar ground, before going on to reprisals and concluding with international crimes.

The meeting rose at 11.35 a.m.

1772nd MEETING

Wednesday, 1 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/354 and Add.1 and 2,[1] A/CN.4/362,[2] A/CN.4/366 and Add.1,[3] ILC(XXXV)/Conf.Room Doc. 5)

[Agenda item 1]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*[4] (continued)**

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CALERO RODRIGUES said that, although the fourth report (A/CN.4/366 and Add.1) had been carefully prepared and reflected the Special Rapporteur's deep knowledge of international law, it was not an easy document to consider. As a legal study it was outstanding, but for practical purposes it was too complex.

2. In paragraph 32 of the report the Special Rapporteur had stated that "the present report intends to concentrate on an *outline* of the possible contents of parts 2 and 3 of the draft articles on State responsibility and discuss the admittedly difficult choices with which the Commission is faced". As an outline or preview of the contents of parts 2 and 3, however, most of the report was disappointing, for only paragraphs 122–130 really gave any clear indications of what the Special Rapporteur intended to include in the draft articles in those parts.

3. The Special Rapporteur had stressed the importance of part 3 in his introductory statement at the previous meeting; while he had been right in saying that States would hardly be inclined to accept part 2 if they did not have certain guarantees regarding part 3, it seemed that for the time being the Commission should concentrate on part 2 and leave part 3 for later consideration. If the Commission had considered all the legal consequences of an internationally wrongful act, it would probably never have been able to agree on part 1 of the draft, which defined the elements of an internationally wrongful act attributable to a State and described the circumstances precluding wrongfulness. Similarly, the Commission would be unable to complete part 2 if it now focused on the problems raised by part 3 and constantly referred back to the problems it had had to face in connection with part 1.

4. The Commission should use paragraphs 122–130 of the report as guidelines for the content of the draft articles in part 2. Those paragraphs identified the injured State and indicated what it could and could not do. They also drew attention to problems which should, in the Special Rapporteur's view, be left aside. The question of international crimes should find its place in part 2 of the draft articles, but its consideration should be left until after the statement of the legal consequences of internationally wrongful acts that did not constitute international crimes. To begin with, the Commission would find it difficult enough to draft articles defining the legal consequences of international delicts.

5. With regard to the injured State, he was not fully convinced that it was necessary, as the Special Rapporteur had suggested in paragraph 123, to distinguish between three types of injured State: (*a*) a State whose right under a customary rule of international law had been infringed; (*b*) a State which was a party to a treaty and whose right under that treaty had been infringed; (*c*) a State which had not obtained satisfaction in the settlement of a dispute when a judgment or award had been given in its favour. In the case of international delicts, as distinct from international crimes, it was necessary only to identify the injured State as the State for which certain rights arose out of the new legal relationship created by an internationally wrongful act.

6. The most important element to be taken into consideration in part 2 was what the injured State could and could not do. The Special Rapporteur had specified three possibilities: the injured State could claim reparation; suspend the performance of obligations corresponding to the obligation breached; or suspend the performance of other obligations by way of proportional

[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem*.

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