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Summary record of the 1772nd meeting

Topic:
State responsibility

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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

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[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.*

reprisals taken only after the exhaustion of the available international legal remedies.

7. The essential element, of course, was reparation. Although the Special Rapporteur had referred in his third report (A/CN.4/354 and Add.1 and 2, para. 86) to compensation and reparation, the term "reparation", as used in the fourth report, could presumably be said to cover both *restitutio in integrum* and "reparation by equivalent or compensation". For the time being, the Commission should therefore attempt to define the possible types of reparation. It might also try to decide whether the question of the punitive consequences of international delicts should be included in the draft articles of part 2.

8. While in his view suspension of the performance of obligations corresponding to the obligation breached was reasonable, the question of suspending other obligations was more complicated. He was not sure that such suspension should be characterized as a proportional reprisal or that it should be allowed only after exhaustion of the available international legal remedies. Perhaps it was merely the idea of proportionality that was difficult to define. He would hesitate, however, to say that, in addition to its claim to reparation, the injured State might suspend only the performance of an obligation corresponding exactly to the obligation breached and might go no further until it had exhausted the available international legal remedies—unless, of course, in the connecting text between parts 1 and 2, it could be specified that the injured State would not have to wait indefinitely for an international ruling allowing it to suspend its performance of other obligations.

9. With that reservation, he considered that, on the basis of the general ideas presented in the fourth report, the Special Rapporteur could proceed to submit draft articles on the question of reparation.

10. The Special Rapporteur had also indicated, in paragraph 124 of the report, that an injured State could not suspend its performance of obligations under a multilateral treaty if that suspension would affect the rights and obligations of all the other parties. Although he agreed with the Special Rapporteur that an injured State was not entitled to infringe the rights of the other States parties to a multilateral treaty, he doubted whether it was necessary for the suspension to affect all the other parties. If the suspension affected the rights of only one other party, it should not be allowed. At first glance, he had little difficulty in agreeing with the Special Rapporteur that there should be restrictions on the right of the injured State to suspend the performance of obligations which related to protection of the collective interests of all the parties to a treaty, to protection of the interests of individuals, or to collective decision-making machinery provided for in a treaty for the enforcement of obligations.

11. He had no objection to leaving outside the scope of the draft articles in part 2 questions relating to the legal consequences of the suspension or termination of treaties and of a fundamental change of circumstances or a state of necessity, as well as matters covered by diplomatic law in existing conventions and the question of belligerent reprisals.

12. Although it might well be true, as the Special Rapporteur had said (1771st meeting), that international law in the area under consideration was moving away from the sphere of bilateral relations towards a genuine law of nations, it was perhaps too early to deal with that approach now. The Special Rapporteur should realize that many of the doubts to which that approach gave rise would subsist even after parts 2 and 3 of the draft had been completed. In the mean time, he should propose draft articles that were as simple as possible, leaving aside controversial issues that might be interesting from a legal point of view but that would ultimately detract from the practical value of the draft.

13. Mr. REUTER, completing the comments he had made at the previous meeting, said that in his view the Commission should begin at the beginning, with the right to reparation in general, taken in its broadest sense as including both the question of *restitutio in integrum* and that of compensation. It was there that the link appeared between the classical aspect of responsibility, namely the question of reparation, and the more sensitive but secondary question of proportionality, which had already been raised several times.

14. If two States, both with shipping interests, concluded a treaty creating reciprocal rights and obligations for each of them, and one of those States did not respect the treaty, the other undeniably had the right to suspend the application of the provision or provisions of the treaty that had been breached. It was then not a matter of proportionality, but of equivalence. If only one of the two States had shipping interests and the other did not fulfil one of the obligations incumbent upon it under the treaty, the first State was entitled to suspend the performance of another of its obligations, on the grounds not of proportionality, but of equivalence.

15. In fact, the problem of proportionality, which suggested that a State could suspend the performance of an obligation that was more important than the obligation breached, was one of enforcement or, in other words, of coercion. In traditional international law, the State was entitled to prefer *restitutio in integrum*. Was it then entitled, not to take measures aimed solely at restoring the balance between obligations of which one had been breached, but rather to adopt an attitude intended to induce the offending State to perform its obligation? In one specific case,[5] it had been alleged that France had failed to perform certain obligations arising for it from an air navigation treaty concluded with the United States of America. In accordance with its national law, the United States had decided to suspend the performance of one of its obligations to France. The question had then arisen whether there was equivalence between the fact that the United States could no longer, in certain circumstances, operate flights between its territory, Canada and Paris,

[5] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (see 1771st meeting, footnote 12).

and the fact that France could no longer operate the flights between its territory, Canada and Los Angeles which provided a connection with territories for which it assumed responsibility in the Pacific. Might not the United States have claimed that what was of concern to it was performance of the treaty and that it did not wish the treaty to be truncated by the same volume of obligations on either side? In order to compel France to perform its obligations, the United States was therefore applying coercion that was more extensive than the breach committed.

16. Such indirect economic coercion must be distinguished from physical coercion, which involved the use of armed force. In his opinion, it would be worth considering whether coercion of that kind could be allowed in modern international law. In the case to which he had referred, the United States might well have considered that, apart from compensation and punitive sanctions, which might not be covered by the traditional concept of responsibility, international law did not exclude recourse to coercion. It was open to question, however, whether coercion should be linked with responsibility or whether it was a specific problem of public international law. Apart from the absolute coercion provided for in the Charter of the United Nations, namely armed force, for which there were special rules, did coercion really come under the topic of State responsibility? Although he agreed with Mr. Calero Rodrigues that the Commission should make as much progress as possible in its study of the topic, he thought it would be in the Commission's interest not to delay taking a position on the question of coercion, which was not a matter of penalties or of reparation *stricto sensu*. The position taken might affect the Special Rapporteur's task.

17. The CHAIRMAN suggested that the meeting be adjourned to allow the Drafting Committee to meet and make further progress in its work.

It was so agreed.

The meeting rose at 10.50 a.m.

1773rd MEETING

Thursday, 2 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. Stavropoulos, 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. FLITAN said that the Special Rapporteur had produced a fourth report (A/CN.4/366 and Add.1) of high calibre that provided much food for thought. Chapter I described succinctly the status of the work on the topic, while chapter II gave an outline of the possible contents of parts 2 and 3 of the draft articles. However, the Special Rapporteur should perhaps have discussed the draft articles proposed for part 2 in his oral introduction (1771st meeting), rather than confine himself to stating, in paragraph 31 of the report, that they were to be referred to the Drafting Committee. For his own part, he thought that the Commission itself should consider them first.

2. In paragraph 113, the Special Rapporteur compared the situation regarding responsibility under internal law and under international law, and noted that the Commission had been obliged to treat international liability for injurious consequences arising out of acts not prohibited by international law separately from the topic of State responsibility. Under internal law, an injurious act gave rise not only to the author's objective responsibility but also to his responsibility based on fault. In the present case, in order to gain a proper idea of the draft articles on State responsibility as a whole, it had to be realized that the draft produced by the Commission on that topic as such would in effect be complemented by another part based on Mr. Quentin-Baxter's study on international liability for injurious consequences arising out of acts not prohibited by international law, as well as by a draft Code of Offences against the Peace and Security of Mankind prepared by Mr. Thiam, although it was possible to regard such a code of criminal responsibility as a document apart. Accordingly, the Special Rapporteur should make sure that his work did not duplicate that of Mr. Quentin-Baxter or Mr. Thiam.

3. As for the form to be taken by the draft articles, the Commission had chosen the course of drafting a convention, but the Special Rapporteur had raised the question, in paragraph 43 of the report, whether it might not be more appropriate to speak of guidelines. Personally, he shared Mr. Reuter's point of view (*ibid.*) in all respects but one. He approved the idea of preparing a convention on State responsibility proper, but thought

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[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.*