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Summary record of the 2547th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

53. Lastly, with regard to the concept of "fault", in English it was not always clear that fault (*culpa*) included an element of intention (*dolus*). Hence, there might be some value in occasionally using the expression "fault or intention" in the commentary. In the American literature of tort, for example, the unwritten assumption tended to be that all wrongfulness was negligence; yet that was often not so, and sometimes dramatically not so, as in the *Rainbow Warrior* case.

54. Mr. PAMBOU-TCHIVOUNDA said he too thanked the Special Rapporteur for his presentation. As a first reaction, he wished to endorse the proposal by France referred to in the footnote to paragraph 103 that the title of part one should speak not of the "origin" but of the "basis" of State responsibility, on the understanding that in the French the term "basis" would be rendered as *les fondements*. As to the expression "State which has committed an internationally wrongful act" and the proposal in paragraph 98 (*b*) to replace it by "wrongdoing State", he wondered whether such a course would not be inconsistent with the recommendation in paragraph 126 that article 1 be adopted unchanged. In view of the pressure of time, it might be best to defer the matter to the second part of the fiftieth session of the Commission in New York.

55. Mr. ECONOMIDES said he endorsed Mr. Pambou-Tchivounda's comments about the use of the term "wrongdoing State". It would be undesirable to make the change in the very short time remaining at the current part of the session. As to the rest of the Special Rapporteur's recommendations, he agreed that article 1 should be maintained, article 2 deleted and the title of part one amended. He also concurred that articles 3 and 4 should be adopted, but he intended to propose drafting changes at some later date.

56. Mr. MELESCANU said that the Special Rapporteur deserved the Commission's thanks for his preparation and presentation of a most interesting document which provided an excellent basis for an eventual decision. While agreeing in principle with the Special Rapporteur's main recommendations, he shared the misgivings voiced by Mr. Pambou-Tchivounda and Mr. Economides about the expression "wrongdoing State" and also expressed reservations about the proposal to delete article 2. Admittedly the article added nothing of substance to articles 1 and 3, but he could not help feeling that something that went without saying might go still better if it was said. For example, in his own country, Romania, where he was engaged in work on a new Constitution, the article which proclaimed that no one was above the Constitution had given rise to a surprising amount of discussion. The Special Rapporteur was no doubt right from the technical point of view, but he nevertheless wished to place on record his reservations regarding deletion of article 2.

57. Mr. ROSENSTOCK said that he considered all the points raised by the other members so far to be matters of drafting. None of them justified action other than the referral of articles 1 to 4 to the Drafting Committee with a view to the Commission's taking up the Committee's report thereon in New York.

58. Mr. CRAWFORD (Special Rapporteur) said that those members who had invoked the pressure of time were evidently under a misapprehension. The Commission was scheduled to continue its consideration of the topic of State responsibility that afternoon.

The meeting rose at 1.05 p.m.

2547th MEETING

Thursday, 11 June 1998, at 3.10 p.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Rosenstock, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. DUGARD said that he would like the Special Rapporteur to explain the approach he was proposing that the Commission should adopt with regard to articles 1 to 4, since he had suggested that three of them should be kept, that article 2 (Possibility that every State may be held to have committed an internationally wrongful act) should be deleted and that the text should be referred to the Drafting Committee. In the case of other instruments, the opinion had been expressed that it was not advisable to amend the existing text. Did the Special Rapporteur share that opinion about the articles to be kept or would he be prepared to consider more elegant wording for some parts? He personally thought that some should be redrafted, but without touching any of the principles adopted. He was not sure that that was up to the Drafting Committee alone. It was for the members of the Commission to decide.

2. Mr. CRAWFORD (Special Rapporteur) said he agreed that that problem was one to be solved by the Commission as a whole. The Working Group chaired by

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.

Mr. Simma had given him some indications of how far the Commission was willing to go in reconsidering the text in respect both of principles and of wording.

3. As far as principles were concerned, it was clear that some provisions of the draft articles did require reconsideration, either because they had given rise to sharp disagreement or misunderstanding, as in the case of article 22 (Exhaustion of local remedies), or because those provisions were currently outdated or had been called into question in later decisions, as in the case of article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State), which did not contain any reference to the possibility that a State might *ex post facto* claim responsibility for an act which would not otherwise be attributable to it. That possibility had arisen in the case concerning *United States Diplomatic and Consular Staff in Tehran*, and had prompted ICJ to state that principle expressly and it should therefore be incorporated in the draft articles.

4. With regard to principles that the Commission continued to endorse because it thought they were fair or because they had been stated so many times in later decisions that it would be unthinkable to go back on them—and that was the case of some of the draft articles—it could probably be assumed that their wording should not be amended unless there was a good reason to do so. He was naturally in favour of a text that was as elegant and concise as possible and that was why he had proposed to find another wording to replace the expression "State which had committed an internationally wrongful act", which was very cumbersome and used at least 20 times in the text. In that connection, he had no intention of amending the principles, that is to say, the substance; he was referring only to terminology, that is to say, to form. The Drafting Committee might agree on a term such as "responsible State", which would eliminate the problem raised by Mr. Melescanu (2546th meeting), namely, that the wording as it currently stood might have a negative connotation and involve an element of fault, something that was not necessarily the case from the point of view of responsibility within the meaning of article 1 (Responsibility of a State for its internationally wrongful acts). The objective was thus to establish a balance or, in other words, to redraft the text in the light of developments in the last 20 or 30 years with a view to consistency and elegance of drafting, but without changing terms to which international law experts had grown accustomed. Some of those terms were particularly unwieldy and it might cause trouble to question them because they had been referred to so often that they were regarded as forming part of the law, but, if there was some good reason for changing them, that should be done and that was, apparently, what the Commission wanted.

5. Mr. ROSENSTOCK said he agreed that it was not advisable to amend an existing text, but there was no prohibition on doing so for valid reasons and if the text had not become sacrosanct because it had been cited time and time again. There was nothing to prevent the Commission from improving the text to make it clearer and easier to read.

6. Mr. DUGARD, referring to the criterion of fault, said he thought it was generally agreed that, if article 19 (International crimes and international delicts) and the concept of the criminal responsibility of the State were to be maintained, the question of fault as a general requirement would have to be discussed and the question of culpable intent (*mens rea*) would have to be dealt with in the context of State responsibility. That question had been discussed by the Working Group, but, since the Special Rapporteur had not referred to obligations *erga omnes* and had expressed the view that the requirement of fault had to be ruled out at the current stage, he would like to know whether he had considered the possibility of a separate category of responsibility in respect of such obligations.

7. Mr. CRAWFORD (Special Rapporteur) said that the members of the Commission were obviously divided on article 19 and the question whether it dealt with genuine crimes or not. Some were in favour of the principle embodied in article 19, paragraph 2, without necessarily agreeing with its wording, interpreting that concept, rather, as an extremely serious wrongful act. Others were opposed to article 19, although they recognized that there could be obligations to the international community as a whole and that, for different purposes, distinctions must be made between the most serious wrongful acts and the others, both in terms of the degree of seriousness of the breach and its effect on States and in terms of the categories of States which might object, file a claim or demand cessation or restitution. What could be said, however, was that there was agreement on the need to include such distinctions in a regime of State responsibility even if work continued on how to proceed. As international law and international relations currently stood, very few members of the Commission were prepared to consider the possibility of genuinely criminalizing the conduct of States in the sense that a consequence which could be characterized as a sanction could be attached to such conduct. He did not rule out the possibility, however, that that concept of punishable crime might eventually prevail in future. At the current time, if it was included in the draft articles, some articles of part one, including articles 1 and 3 (Elements of an internationally wrongful act of a State), would have to be reconsidered because it was clear that a crime could not be conceived of without the general criterion of fault, but that was not necessarily the case of responsibility. During the discussions, he had not dwelled at length on that element, which was referred to in paragraphs 108 to 118 of his first report on State responsibility (A/CN.4/490 and Add.1-7), so as not to venture on to ground that was likely to create divisions and because he did not think it necessary to do so for the time being, although he would not necessarily close the door on that concept in future.

8. As to obligations *erga omnes*, the discussions in the Working Group, chaired by Mr. Simma, had shown that the provisions of articles 1 to 4 applied, regardless of the nature of the obligation breached, whether it was an obligation *erga omnes*, a rule of *jus cogens* or any other rule. They thus applied whether the obligation was bilateral, of a limited multilateral nature or *erga omnes*. The discussion on that point should thus not affect those articles.

9. He hoped that, on the basis of a very brief discussion, at the beginning of the second part of the session in New York, the members of the Commission would agree to

refer the four articles to the Drafting Committee. So far, it was not his own point of view that he had put forward, but that resulting from the discussions in the Working Group. He would nevertheless refer to some of the points made at that time.

10. In the case of the terminology problem to which the French wording (*État auteur du fait internationalement illicite*) gave rise and to which Messrs Economides, Melescanu and Pambou-Tchivounda had referred, it should be noted that article 1 did not expressly mention the concept of fault, but, paradoxically, that concept was implied in the term used in the French text. The problem did not arise in English because the term "wrongful" did not necessarily have the pejorative connotation of "fault". The Drafting Committee might take a look at that question and consider the possibility of using the term "responsible State", which would avoid any negative connotation and was concise.

11. The internal constitutional law experience that had been gained was valuable from the point of view of the work on State responsibility, as Mr. Melescanu had rightly pointed out in the Working Group. International law was, of course, an autonomous institution which did not depend on any internal law system, but it could not be dissociated from the experience mankind had gained in the field of internal law. Although the Commission had to be cautious when it came to analogies, it must be noted that international law was constantly borrowing from internal law, particularly techniques and terminology. He still did not agree with Mr. Melescanu's conclusions, however, because, in the first place, the Commission had not been entrusted with the task of drafting an international constitution and, even if it had, it would be rather strange to prepare such an instrument on the basis of the breach of the primary rules which it contained by the member States which acceded to it. The usual role of a constitution was to make rules with which the signatories had to comply and not to take account of the abnormal situation constituted by a breach of those rules. Recalling that all States were governed by international law was a key point. It was, of course, important that the very first paragraph of the draft Declaration on the Rights and Duties of States, adopted by the Commission,[4] indicated that the States of the world formed a community governed by international law, but that was a predicate formulated in the preamble—not a principle expressly stated in an article—on the basis of which the concept of the equality of States had subsequently been affirmed. State responsibility was only one, and not even the most important, component of international law. It was therefore not necessary, in a text on a sub-component of international law, to refer to that predicate, which was the basis of international law as a whole. That predicate took on its full meaning in the context of the equality of States, but not in that of State responsibility, moreover, and saying that every State was "subject" to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility tended to debase the noble idea of the equality of subjects of law. He was therefore of the opinion that, if it was decided that a preamble should be added to the draft articles, that was where that predicate should be recalled and that idea might be developed in the commentary, but there was no justification for including it in the text itself of the draft articles.

12. Mr. MELESCANU said that he would not press that idea if no one else supported it. As to the term "responsible State", the joint position of the French-speaking members of the Commission was that it was probably not the best solution, for, in some cases, a wrongful act could be committed without entailing the responsibility of the author, since a special article established the conditions in which the author of a wrongful act could be exempted from responsibility. The question was complicated and should be discussed at greater length.

13. Mr. ECONOMIDES congratulated the Special Rapporteur on his latest communication, which was of the highest quality, and said that he was prepared to follow the recommendations being made to the Commission.

14. Referring to the draft articles one by one, he said that article 2 was entirely superfluous. In his opinion, it should be deleted, but, as its deletion might be misunderstood, the reason should be explained in the commentary.

15. Article 3 could be criticized as to form. Not only must conduct consisting of an action or an omission be attributable to the State under international law, as provided for in subparagraph (*a*), but the breach of the international obligation referred to in subparagraph (*b*) must also be assessed in the light of international law, and that was not expressly stated. He suggested that the article should read:

> "There is an internationally wrongful act of a State under international law when:
>
> (*a*) Conduct consisting of an action or omission is attributable to the State;
>
> (*b*) That conduct constitutes a breach of an international obligation of the State."

16. With regard to article 4, he said that, theoretically, it had to be assumed that internal law must be in conformity with the provisions of international law and use the solutions it provided, and not the opposite. That consideration was not made sufficiently clear in the second sentence, which should be replaced by the following, more neutral wording: "Internal law cannot take precedence over international law in this regard." Such wording would, moreover, be in keeping with the original proposal by the former Special Rapporteur, Mr. Roberto Ago.[5]

17. As to the Commission's doubts about the characterization of a State which had committed an internationally wrongful act, he agreed that the term "wrongdoing State" was full of connotations, but the term "responsible State" was also not entirely satisfactory. In French, the term *État mis en cause* might be used. The Drafting Committee would no doubt find an elegant solution to that problem.

18. Referring to a comment by Mr. Dugard, he said that he was not sure about the need for special provisions relating to fault.

[4] *Yearbook . . . 1949*, p. 287.

[5] See 2523rd meeting, footnote 9.

19. Mr. CRAWFORD (Special Rapporteur) said that the amendments proposed by Mr. Economides were entirely acceptable. The Drafting Committee, which would meet when the session resumed in New York, would benefit from them.

20. Following a discussion in which Messrs CANDIOTI, CRAWFORD (Special Rapporteur), KUSUMA-ATMADJA and ROSENSTOCK took part, the CHAIRMAN suggested that the Commission should refer draft articles 1 to 4 to the Drafting Committee.

It was so agreed.

The meeting rose at 4.10 p.m.

2548th MEETING

Friday, 12 June 1998, at 10.05 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Galicki, Mr. Hafner, Mr. Kusuma-Atmadja, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Simma, Mr. Thiam, Mr. Yamada.

Reservations to treaties (*continued*)* (A/CN.4/483, sect. B, A/CN.4/491 and Add.1-6,[1] A/CN.4/L.563 and Corr.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)*

GUIDE TO PRACTICE (*continued*)*

DRAFT GUIDELINE 1.1.4

1. Mr. PELLET (Special Rapporteur) said that he would resume his discussion of the draft guidelines (ILC(L)/INFORMAL/12) with draft guideline 1.1.4, entitled "Object of reservations", which read: "A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State intends to implement the treaty as a whole". In his view, draft guideline 1.1.4 was much more important than those considered so far, and could have practical implications.

2. As he had pointed out in his presentation (2541st meeting), he had omitted to refer in draft guideline 1.1.4 to international organizations, which were obviously concerned as well. The words *ou l'organisation internationale qui la formule* ("or the international organization which formulates it") should therefore be inserted after *dont l'État* ("in which the State").

3. Draft guideline 1.1.4 was important for the following reason: in the Vienna Conventions, a reservation was defined in terms of its purpose, namely as a statement purporting to exclude or to modify the legal effect of certain provisions of the treaty in their application to the State or international organization formulating the reservation. There had been much discussion in the literature about the words "certain provisions" and as to whether a statement which did not concern a specific provision or provisions, but the treaty as a whole, could be called a reservation. That question had long been resolved in practice in a way which departed somewhat from the letter of the Vienna definition but was in keeping with its spirit: through the practice of what might be called "across-the-board" or "transverse" reservations, that is to say, reservations which did not refer to specific provisions of a treaty but, more generally, to the way in which the State or international organization formulating the reservation intended to apply the treaty as a whole. The use of such reservations was very common: they could concern the circumstances under which a State would or would not apply a treaty, or certain categories of persons to whom it denied the benefits of the treaty, or the exclusion of certain territories from the treaty as a whole. In all those cases, the reservation did not concern specific provisions of the treaty, but the effect of the treaty for the State formulating the reservation. Reservations of that kind, a mere handful of which he had cited in paragraph 37 of ILC(L)/INFORMAL/11, had never, as far as he knew, given rise to objections as such, provided that the reservation was not incompatible with the purpose of the treaty. That of course was a question of the validity of the reservation, not of its definition. He hoped the members of the Commission would confine their observations to the latter issue.

4. It would be excessively formalistic of the Commission if, in interpreting the Vienna Conventions, it did not address a common practice which might conceivably cause a problem if a State decided to invoke the Vienna definition literally, in a manner contrary to its spirit; for instance, if a State were to argue that certain legal experts challenged the idea that a reservation could refer to a treaty as a whole if the reservation was looked at on the basis of the Vienna definition, which to his mind was not very satisfactory. He did not think that definition should be changed, but simply interpreted in the light of practice. He therefore believed the Commission should adopt wording along the lines of draft guideline 1.1.4.

5. Mr. HAFNER said that he preferred a factual approach which only took into consideration instruments which already existed. International law must be based on the facts. That led him to raise a number of doubts which he had about draft guideline 1.1.4. The Special Rappor-

* Resumed from the 2545th meeting.

[1] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).