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Summary record of the 2578th meeting

Topic:
State responsibility

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coercion. An alternative approach would be to revert to the article as adopted on first reading: aid and assistance would be covered by article 27, with the addition of the two provisos, direction and control by article 28, paragraph 1, with clarifications in the commentary, and coercion by article 28, paragraph 2. He was in favour of retaining a separate article 28 bis dealing with the effects of chapter IV as a whole.

63. Some important concepts and possibilities should also be envisaged in chapter IV, as enumerated in paragraphs 159, 161 and 211 of the second report. For example, in the case of incitement, a State would be implicated in the act concerned if it materially assisted a State in committing a wrongful act or directed or coerced it to do so. In the case of conspiracy, where a conspiring State aided or assisted another, the planning might itself constitute such assistance. The concept of joint or collective action or conduct raised questions about the extent to which States were responsible for the acts of the organization concerned or of individual member States, and about reparations for damages caused by the conduct of an individual State or two or more States. Responsibility for such acts should not be overlooked in the draft articles.

64. Mr. CRAWFORD (Special Rapporteur) said he agreed entirely that direction and control were more closely related to coercion than to aid and assistance. He had placed them in article 27 because they would be subject to the same regime as aid and assistance. He had no objection to the idea of three separate articles. There was an important distinction between a case in which a State acted voluntarily, even under direction and control, and a case in which it was actually coerced. The assumption was that nobody should be allowed knowingly to coerce another State, to commit a wrongful act, even if the coercion, considered alone, would not be unlawful.

65. He had an open mind on the question of whether the condition applicable in article 27 should also apply to coercion. If, for example, State A took lawful and proportionate countermeasures against State B, the aim of which was to procure cessation of a wrongful act, it in fact engaged in coercive action. If State A also knew that, in doing so, it was inevitable that State B would as a consequence of the countermeasures breach a bilateral obligation to State C, was State A responsible to State C for that situation? Obviously, if State A was bound by the same rule, it would incur responsibility. If not, the situation was unclear. Mr. Yamada argued that it would be difficult to sustain the breadth of article 28 with respect to coercion. One possible solution was to treat the act of coercion as unlawful and another to apply the terms of new article 27, subparagraph (*b*), to coercion: although the coercion as such need not be unlawful, the conduct would be unlawful if committed by the coercing State.

The meeting rose at 1 p.m.

2578th MEETING

Friday, 28 May 1999, at 10 a.m.

Chairman: Mr. Zdzislaw GALICKI

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Goco, Mr. Hafner, Mr. He, Mr. Kabatsi, Mr. Kateka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Sepúlveda, Mr. Simma, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/492,[2] A/CN.4/496, sect. D, A/CN.4/498 and Add.1-4,[3] A/CN.4/L.574 and Corr.1 and 3)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 27 AND 28 (*concluded*)

1. Mr. HAFNER said that the Special Rapporteur had been correct to take account of the relativity of international law in drafting new articles 27 (Assistance or direction to another State to commit an internationally wrongful act) and 28 (Responsibility of a State for coercion of another State), proposed in his second report on State responsibility (A/CN.4/498 and Add.1-4). State responsibility was rightfully dealt with from a private law rather than a criminal law point of view. The public law aspects of international law covered only very exceptional situations, whereas the Commission was dealing with the normal application of international law in daily relations.

2. With regard to article 27, he fully subscribed to the two conditions required in order to entail a State's responsibility. To some extent, the condition established in proposed new article 27, subparagraph (*a*), included knowledge of the wrongfulness of the act, but such knowledge must be separated from the intention itself. Emphasizing the need for knowledge of wrongfulness did not mean that the notion of intention was automatically being reintroduced. He also shared the Special Rapporteur's opinion that incitement to commit a wrongful act should be excluded. Mr. Rosenstock had pointed out that all those problems could be dealt with through the question of attributability. It would be interesting, in that connection, to compare article 27 with article 8 (Attribution to the State of the conduct of persons acting in fact on

[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 ... 1999*, vol. II (Part One).

[3] Ibid.

behalf of the State) as adopted on first reading. It might be difficult in practice to determine whether a situation fell within the purview of article 8 or article 27. Nevertheless, that should not prevent the Commission from drafting article 27, as the consequences were quite different, depending in particular on whether the conditions spelled out in subparagraphs (*a*) and (*b*) were met. Generally speaking, he was fully in agreement with the new wording of article 27 as proposed by the Special Rapporteur in his second report.

3. As to article 28, the question was whether the term coercion included only unlawful coercion and whether the conditions provided for in article 27, subparagraph (*b*), should also apply to article 28. He was not certain that all reprisals and countermeasures could be included in the meaning of the term coercion. The principle that countermeasures or reprisals must not interfere with the rights of third States must also be taken into account. The Special Rapporteur appeared to have drafted new article 28 with that in mind. According to the text, a third State would incur no risk at all, as the coercing State was responsible even if the coercion was not wrongful. The coercing State had to compensate the third State for the injury sustained. The coerced State might also become responsible if it could not claim force majeure.

4. On the other hand, if article 28 were to include only unlawful coercion, the third State would risk not being compensated if the coercion was lawful and the coerced State could claim force majeure to escape responsibility. The third State would have to pay a price, in the interest, perhaps, of international law. It therefore seemed desirable to qualify the coercion as unlawful. The condition contained in new article 27, subparagraph (*b*), that "the act would be internationally wrongful if committed by that State", might also be included. Consequently, if that condition was met, the coercing State would certainly be aware of the possibility of a breach occurring and it should assume responsibility towards the third State even if the coercion was not wrongful.

5. For those reasons, he proposed that article 28 should specify that the responsibility of the coercing State was entailed only if the coercion was unlawful or if the act would be internationally wrongful if committed by that State. That wording would, on the one hand, respect the rule that reprisals must not interfere with the rights of third States and, on the other, avoid the situation of responsibility without wrongfulness.

6. Mr. Sreenivasa RAO requested clarification as to what Mr. Hafner had meant by the "relativity of international law" and by "third State". Did "third State" refer to the coercing State or to the State affected by the act committed under coercion?

7. Mr. HAFNER said that article 28 involved three States: the coercing State (State A), the coerced State (State B) and the third State, or the State affected by the act in question.

8. The third State should certainly be protected, but not to the extent that the coercing State would have to pay compensation even if there had been no wrongfulness on its part, for instance if the coercion was lawful. However, the coercing State should assume responsibility if the act would be internationally wrongful if committed by it. Instances might arise where the third State was not protected, but that was justified by the fact that the coercing State could not be held responsible when the coercion was not unlawful and when it was not bound by the obligation breached.

9. International law was still based to a large extent on the relativity of rules, in the sense that those rules were applicable only to the States which were bound by them. He referred in that connection to the principle *pacta tertiis nec nocent nec prosunt*, embodied in article 34 of the 1969 Vienna Convention, which stated that a treaty did not create either obligations or rights for a third State without its consent. The public law principle according to which all States were bound by one and the same obligation did not yet fully apply in international law. Mr. Yamada (2576th meeting) had drawn a distinction between the criminal law and the civil law approach. The civil law or, more exactly, private law approach prevailed in the present case. That was what he understood by the relativity of international law.

10. Mr. Sreenivasa RAO said that, apart from the obligations arising out of bilateral or multilateral treaties, which bound only the parties to those treaties, there were obligations *erga omnes* and rules of *jus cogens* which applied to all, and that the question could not be approached only from the civil law point of view.

11. The Commission must not try to define coercion or to reconsider the primary rules relating to it. By qualifying coercion, as Mr. Hafner was proposing, the Commission might be entering a realm it did not wish to enter. He invited Mr. Hafner to approach the matter more flexibly.

12. Mr. PAMBOU-TCHIVOUNDA said he wondered why Mr. Hafner had said nothing about the rules of international law giving rise to obligations *erga omnes*.

13. Mr. CRAWFORD (Special Rapporteur) said that Mr. Hafner's reference to the international system being in line with a civil law paradigm had obviously related to issues of general theory. Although the draft articles at times gave the impression of relating to general theory, they aimed to establish a framework for the institution of State responsibility and they were, fortunately, consistent with a variety of theories, thereby facilitating the Commission's work.

14. Mr. Hafner's reflections on articles 27 and 28 were directly in line with the debate in the Commission where Mr. Yamada had said (ibid.) that the condition attached to article 27 would make it operate differently depending on whether the underlying obligation was bilateral or multilateral and equip it to meet different types of obligations. Thus, there was no need to establish dichotomies between delict and crime or between bilateral and multilateral obligations. It was possible to formulate the articles so as to cover different situations. Moreover, it would be very undesirable to retain chapter IV (Implication of a State in the internationally wrongful act of another State) and at the same time take an a priori decision to the effect that it applied only to a certain type of wrongdoing.

15. Mr. HAFNER said he had wished to point out that articles 27 and 28 adopted on first reading had not taken account of possibilities other than the criminal law or public law approach. Consequently, other aspects had to be covered and the reformulation of article 27 proposed by the Special Rapporteur, as well as his own proposal on

article 28, should take account of different kinds of rules, including *jus cogens* rules and obligations *erga omnes*.

16. Mr. ROSENSTOCK asked whether, to the extent that the Commission was going beyond the question of attribution, it was remaining within the realm of secondary rules.

17. Mr. KABATSI said that chapter IV was intended to establish a general rule prohibiting complicity or participation by one State in the internationally wrongful act of another State. That complicity or participation, though material, must not be of such gravity as to amount to the commission of the principal act or acts covered by the primary rules. The distinction was a very delicate one, since the occurrences sought to be covered by those provisions must be very unusual, if not rare. The assistance provided for in article 27 must be material, given with the intent of facilitating commission of the wrongful act by the other State, and the assisted State must actually commit the wrongful act. The situation was worse still when the wrongful act was committed under coercion, as envisaged in article 28. It was probable that in such a case the assisting or coercing State could be considered as the perpetrator, in which case its conduct would fall within the general primary rules. It was difficult, however, to eliminate the grey areas and perhaps more difficult still to convince anyone that such situations would always be covered by the primary rules. The Commission had chosen not to take that risk and appeared to have convinced the majority of States of the need to keep chapter IV, subject to a clearer drafting being provided. The Special Rapporteur had indeed proposed clearer new articles and had introduced certain limitations, particularly in article 27. He thus favoured the retention of chapter IV.

18. He also supported the shifting of article 28, paragraph 1, to article 27 and the new formulation for that article proposed by the Special Rapporteur. He was persuaded of the value of placing the provisions of former article 28, paragraph 3, in a separate new article 28 bis (Effect of this chapter), as they also covered situations referred to in article 27.

19. With regard to article 28, he endorsed Mr. Hafner's proposal to indicate explicitly that the coercion must be unlawful or that the act would be unlawful if committed by the coercing State. Why should State A, which lawfully coerced State B, for economic reasons, for example, be held responsible for a breach by State B of obligations under a treaty concluded with State C to which State A was not a party?

20. Lastly, with regard to the change in the title of chapter IV, he noted that the new title, "Responsibility of a State for the acts of another State", proposed by the Special Rapporteur was shorter and therefore more attractive, but that it was not as accurate as the title adopted on first reading. In his opinion, chapter IV was concerned more with complicity than with total responsibility, and it would therefore be preferable to retain the former title.

21. Mr. ADDO drew attention to paragraph (22) of the commentary to article 27,[4] which stated: "the Commission considers it useful to emphasize that aid or assistance rendered by a State to another State for the commission by the latter of an internationally wrongful act is itself an internationally wrongful act". In his opinion, that meant that the aid or assistance rendered to a State itself constituted an independent internationally wrongful act and did not create a sort of co-responsibility nor a sharing of responsibility with the assisted State. That presupposed the existence of a general rule of international law that prohibited the rendering of aid or assistance in the commission of an internationally wrongful act. It was doubtful that any such rule existed, at least in customary international law. If no such rule existed, then there was no point in elaborating other rules relating to it. And if it did exist, then it belonged in the realm of primary rules, which did not fall within the Commission's remit. It thus seemed appropriate to consider whether the concept set forth in article 27 was a primary rule or a secondary rule. He personally had come to the conclusion that article 27, whether in the version adopted on first reading or in the new version proposed by the Special Rapporteur, stated a primary rule and that consequently it was outside the scope of the draft articles. He was aware that that view was not shared by the majority of members of the Commission.

22. With regard to new article 27 proposed by the Special Rapporteur, he noted that, according to that article, first, there must be aid or assistance in the commission of an internationally wrongful act committed by another State, and, secondly, that aid or assistance must have been provided "with knowledge of the circumstances of the internationally wrongful act". What did that expression mean? Did it mean that the assisting State must have the intention of facilitating the commission of the internationally wrongful act? Or did it mean that it must have knowledge of the fact that the assisted State would use the aid or assistance to commit an internationally wrongful act? Thirdly, article 27 presupposed that the internationally wrongful act for which the assistance had been provided must have been actually accomplished and that attempt or failure did not incur responsibility.

23. He regretted the fact that new article 27 gave no clue as to what kind of aid or assistance would trigger responsibility of the aiding or assisting State. The aid or assistance could be military, financial or consist purely of advice on what strategy to adopt. For instance, a State might aid another State by sending it technicians to train its personnel in how to operate sophisticated fighter jets that the assisted State had purchased from State A with funds provided by State B. In such a case, which of the types of assistance provided by those States would trigger State responsibility if the assisted State committed an internationally wrongful act using the aircraft in question?

24. Paragraph (17) of the commentary to article 27 mentioned that the aid or assistance must have the effect of making it materially easier for the aided or assisted State to commit an internationally wrongful act. In his opinion, that material element was very difficult to determine. If article 27 was to serve any practical purpose, it was essential to spell out in its wording what kind of aid would trigger the responsibility of the assisting State. As the Special Rapporteur himself said in paragraph 180 of his second report, the term "materially" was problematic. The Special Rapporteur advocated not qualifying the words "aids

[4] See 2576th meeting, footnote 6.

or assists" and considered that it would be sufficient to explain the meaning in the commentary. But, in his view, that did not resolve the problems and it would therefore be preferable to delete article 27. Besides, as Mr. Yamada had recalled (2576th meeting), article 27 had been drafted with article 19 (International crimes and international delicts) in mind, and as it had more or less been decided that article 19 should be deleted, article 27 should also be deleted. In addition, that article was more related to international crimes than to international delicts and the basis of States' international responsibility was essentially delictual.

25. The Commission had a duty not only to tidy up the draft articles submitted to it, but also to subject them to a rigorous reappraisal to determine their practical utility for the purpose of carrying out its mission of progressive development and codification of international law. If, in the process of appraisal, it concluded that some draft articles did not stand up to close scrutiny, it must delete them.

26. Mr. DUGARD said he tended to agree with Mr. Addo's comments and endorsed his suggestion that article 27 should be deleted. He would be interested to know whether Mr. Addo took the same position in respect of article 28, which also seemed to be a primary rule. Indeed, at a previous meeting, one member of the Commission had said that article 28 was even more of a primary rule than article 27 and that those rules had no place in the draft articles.

27. Mr. ADDO said that article 28 should also be deleted as it, too, set forth a primary rule.

28. Mr. YAMADA, replying to Mr. Addo's question concerning the meaning of the expression "with knowledge of the circumstances", said that, 20 years previously, the Government of Japan had authorized the export of several hundred Yamaha plastic boats to a country in the Middle East, in the belief that those boats would be used for leisure purposes. In fact, several years later, they had been used in a war between that State and a neighbouring State and had indeed played a significant role in the course the war had taken. In that case, the State that had acquired the boats had claimed that its role in the conflict was one of self-defence, but it was not difficult to envisage a scenario in which it might have been the aggressor. If the Government of Japan had known that those boats were going to be used in a war of aggression, it would have been responsible under article 27, even if it had not intended to assist the aggression.

29. Mr. ADDO said that, if a Government had knowledge of the fact that its aid was going to be used to commit an act of aggression, one had entered the realm of a criminal act. Furthermore, the fact that boats or aircraft could be used in a conflict for purposes of self-defence as well as in an act of aggression clearly showed the difficulty of pinpointing the nature of the aid or assistance provided and the impossibility of foreseeing every eventuality. Consequently, the best solution seemed to be to delete article 27.

30. Mr. ECONOMIDES, noting that Mr. Addo considered that articles 27 and 28 came within the realm of primary rules and must therefore be deleted, said that article 1 (Responsibility of a State for its internationally wrongful acts), which provided that every internationally wrongful act of a State entailed its international responsibility, could also be added to the category of primary rules and asked whether Mr. Addo would also advocate deleting that article. Article 3 (Elements of an internationally wrongful act of a State) and other articles could also be taken as belonging to the category of primary rules. But to adopt such an approach would mean jettisoning the work the Commission had carried out over several decades. The question of primary and secondary rules should therefore not be taken too far. Admittedly, those categories created a line of demarcation and offered some criteria, but it must be acknowledged that borderline cases sometimes arose in which a rule could be construed both as a primary rule and as a secondary rule. In such cases, the criteria of the secondary rule should prevail, in the interests of the draft articles and of the activity of the Commission.

31. Mr. CRAWFORD (Special Rapporteur) said that questions of borders and boundaries raised difficult problems in any sphere. In his opinion, the Commission must remain faithful to the fundamental principles of the draft articles while being conscious that, in some situations, the draft articles touched on the area of primary rules. He agreed with Mr. Economides that some elements of the text must be appreciated having regard to the economy of the draft articles and to the legal tradition. What must certainly be excluded was the adoption of secondary rules which depended for their content on a judgement as to the content of individual primary rules. By definition, the rules in the draft articles were of a general nature, in other words, applicable to all primary rules or at least to certain general categories of primary rules. One of the main difficulties posed by article 19 was that it went deeply into the content of the primary rules. In answer to the question asked by Mr. Rosenstock, he said that, in his opinion, one could not pretend that chapter IV contained only secondary rules in the strict sense of the term.

32. Nonetheless, articles 27 and 28 had a place in the draft articles, first, because they dealt with questions analogous to problems of attribution and, secondly, at least in respect to coercion, because of the relationship with the excuse provided for in chapter V (Circumstances precluding wrongfulness). Thus, it was important as a matter of principle not to adopt too rigid a position and not to push the analysis of the scope of chapter IV too far.

33. Mr. DUGARD said that, in view of the difficulties to which articles 27 and 28 gave rise, he wondered whether it would be possible to distinguish between the two by arguing that article 27 was applicable to all primary rules, which was not the case with article 28. Article 27 should therefore perhaps be retained and article 28 deleted.

34. The CHAIRMAN said that the consideration of that question had been made even more complicated by the fact that the new article 27 contained several elements of article 28.

35. Mr. GOCO said that, in the commentary to article 27 adopted on first reading, there could be no question of the participation of a State in the internationally wrongful act of another State in cases where identical offences were committed in concert, or sometimes even simultaneously, by two or more States. According to the same commentary, the wording of article 27 brought out clearly that the material element characterizing the internationally

wrongful act of participation must consist in real aid or assistance in the commission by another State of an internationally wrongful act, but must also remain within the limits of such aid or assistance. Moreover, the aid or assistance must be rendered with a view to its use in committing the principal internationally wrongful act. It was not sufficient that that intention should be "presumed"; it must be "established". The Commission had also stressed that the principal internationally wrongful act must actually have been committed by the State which received the aid or assistance, as the words "carried out by the latter" in the article suggested.

36. Article 27 had given rise to many comments by Governments. One Government had doubted whether it was possible to give it a sound foundation in international law and practice. According to that Government, it would seem that many of the situations contemplated by the Commission and cited as examples of aid and assistance actually referred to independent breaches of obligations under international law. For example, the fact that a State which had made its territory available to another State allowed it to be used by the latter to commit an act of aggression constituted aggression and not aid or assistance for that aggression. For another State it did not emerge clearly from article 27 whether the State which rendered the assistance was responsible only if it was aware of the wrongfulness of the behaviour for which the assistance was meant or whether its responsibility was incurred even when, aware of the nature of the behaviour for which it rendered its assistance, it regarded such behaviour as lawful. According to that same State, it was difficult to see what the effects would be if the State rendering the assistance misinterpreted the law. The example had been given of a State which, rendering assistance to another State in order to intervene by force in a third State, considered that the intervention was justified for humanitarian or other reasons. Yet another State had referred to the difficulty of drawing a distinction between aid and assistance, on the one hand, and joint commission and responsibility, on the other. All the comments and observations received from Governments on State responsibility (A/CN.4/492),[5] which were summarized by the Special Rapporteur in paragraphs 171 and 172 of his second report, must be taken duly into account.

37. The Special Rapporteur's own comments showed all the difficulties, both substantive and procedural, inherent in article 27 as it was formulated and constructed, in establishing the responsibility of the State rendering the aid. The comments made in paragraph 177 of his report were very pertinent and demonstrated well that the questions of formulation and definition overlapped with others which were really questions of substance. For many years, the Philippines had had military bases of the United States of America on its territory which had played an important role in the military operations of the Korean war and, later, the Viet Nam war. Did article 27 allow a third State which considered those wars to be acts of aggression to accuse the Philippines of complicity?

38. The new wording of article 27 discarded a number of objectionable aspects of the article adopted on first reading by limiting State responsibility for aid or assistance rendered and introducing the notion of knowledge of the intrinsic wrongfulness of the act the commission of which was facilitated by the assistance. The new wording also incorporated the notions of direction and control which had appeared earlier in article 28. The whole constituted a provision which was simpler and easier to understand, but the principle remained the same. The description of such interaction between two States, one rendering aid or assistance, directing or controlling and the other allowing itself to be assisted, directed or controlled, in particular in the commission of a wrongful act, had no relevance to the modern world, in which sovereign States asserted their national integrity and independence. Regardless of how praiseworthy the principles were which had presided over their preparation, articles 27 and 28 were out of step with the principles of the Charter of the United Nations, which called for friendly relations based on equality of rights and self-determination. In the area of State responsibility, that would be recognition of practices which had prevailed in the past. As a number of States had pointed out, article 27 had no foundation whatsoever in positive law and would only express a purely causal relationship; thus, it should be deleted. As to article 28, there was reason to ask whether the notion of coercion could be transposed from domestic law to international law. There again, the situations of dependence or protectorate referred to in the report no longer prevailed. One State had considered that the content of the provision fell more under circumstances precluding wrongfulness. In any event, either the State really resisted the coercion and could not be held responsible, or it did not, in which case there was joint responsibility.

39. Mr. CRAWFORD (Special Rapporteur) said that there was a primary rule of international law pursuant to which no State could allow its territory to be used for the purpose of committing an attack against another State in violation of the Charter of the United Nations. Consequently, it would suffice to ensure that the rule embodied in article 27 did not establish a more extensive form of responsibility.

40. Mr. SIMMA said that the discussion on article 27 and, in particular, Mr. Addo's comments illustrated the importance of reviewing the Commission's theoretical premises and the positioning of the various articles of the draft. Some of them were based entirely on the traditional, bilateral conception of State responsibility and the traditional notion of delict, while others paid tribute to a new, more "objective" paradigm, according to which the commission of a wrongful act entailed responsibility even when there was no damage. In such a system, it was natural and necessary to provide, in the current case in article 27, for rules on responsibility in cases of cooperation between wrongdoing States and the involvement of third States, but the draft article was clearly torn between the traditional bilateralist position and new considerations of community interest and public order. On the one hand, article 27 was undeniably a case of the progressive development of international law because it was virtually impossible to cite any State practice in that connection, but, on the other hand, the provision reflected a certain hesitation about "going too far". Thus, complicity was taken into account, but not incitement, although the latter weighed heavier in criminal law. There was reason to note that opponents of article 27 invoked above all examples taken from private law. The conclusions of the compara-

[5] See 2567th meeting, footnote 5.

tive analysis of practice were not necessarily relevant because most systems of private law were very cautious about the implication of third States. As for the supporters of article 27, they drew their examples from criminal law. Hence, the distinction between private law and public law persisted, the difficulties posed by article 27 being due to the fact that it straddled the two. Whenever the Commission attempted, in a draft article, to give concrete expression to its concern for objectivity in the sense defined above, it encountered the same problems. The *East Timor* case referred to by the Special Rapporteur was another example which clearly showed how, at the level of primary rules, international law was broadening and opening up to the notion of obligations *erga omnes*, whereas, at the level of the legal dispute settlement in respect of those obligations, the Commission found itself in the usual bilateralist straitjacket. It was very telling that virtually all the examples cited in the commentary of Ago on the drafts adopted on first reading concerned complicity in the breach of obligations *erga omnes*. Mr. Yamada had asked whether it was desirable to draw up rules which simultaneously covered violations of commercial or other bilateral obligations and violations of obligations *erga omnes* and even certain crimes. The answer to that question was that the new article 27 seemed, in principle, geared to what was called international delicts and even in that respect appeared to be moderately progressive, but that, regarding obligations *erga omnes*, the rules on the implication of third States should be more ambitious. In particular, the notion of incitement could be incorporated for breaches of obligations *erga omnes*, for example, incitement to commit genocide, or a mental savings clause should at least be agreed for violations of such obligations, *jus cogens*, etc.

41. Article 27 was also the occasion for the Commission to engage in a number of extravagancies compared to its usual practice. For example, most of the time the Commission used the distinction between primary and secondary rules to deal with difficult questions, whereas, in the text under consideration, it tackled primary rules head on, and that was a positive development. In another extravagance, the Commission showed itself to be open to the subjective elements of knowledge or intention, thereby taking a firm stand against legal opinion. In one of the footnotes of his report, the Special Rapporteur referred to an article by Graefrath,[6] but the latter had been very guarded about the subjective element, contemplating instead a presumption of intention which the wrongdoing State would in a sense have to falsify. In contrast, the substantial or essential element was virtually absent. Always timorous in the use of terms, the Commission was reluctant to speak of materiality, although the context was clear and there could be no confusion with "material breach" in article 60 of the 1969 Vienna Convention. But above and beyond terms, there was a real problem, namely, how to be more precise and specific about the interrelationship between the aid provided to the State and the wrongful act which it committed. To do so, it was important either to restrict the notion of complicity to the most serious breaches of international law and, in particular, the violation of obligations *erga omnes*, and then to be less restrictive on the link between the aid and the wrongful act, or to confine oneself to forms of aid which were essential and then require a causal link between the aid and the wrongful act or, lastly, to emphasize the positive and active nature of the aid, i.e. the existence of a specific link between the aid and the wrongful act.

42. Concerning article 28, the Special Rapporteur was right to stress that that provision concerned actual direction and control and not merely the power to exercise direction or control, possibly by virtue of a treaty, and that coercion must attain a certain threshold. However, coercion could be introduced as a form of implication of a third State without entering into a discussion on when coercion became illegal. In that connection, the title of article 28 was not fully in keeping with the content of the provision. It had probably been chosen so as not to repeat the general title of chapter IV; article 28 could perhaps be given a more specific heading by reverting to the title of that chapter as adopted on first reading.

43. Mr. BROWNLIE said that he was somewhat sceptical about the need expressed by Mr. Simma to make articles 27 and 28 more detailed. The articles were "skeletal" versions of primary rules and should be retained in the draft articles on pragmatic grounds, but it would be dangerous to flesh them out because of the risk of getting bogged down in the manifold particularities, standards and duties pertaining to different fields of international law. To take just one example, the assistance provided for in article 27 could be associated with the use of force, the creation of environmental hazards, human rights violations, and so forth.

44. Mr. CRAWFORD (Special Rapporteur) said that he had tried, particularly in article 27, to draft an article that would deal appropriately with a range of different situations. Without disregarding the concerns expressed by Mr. Simma, he had sought in article 27 to state a rule of general application which might prove useful, subject to certain limitations. The articles in question should therefore not be used, to reintroduce the "delicts/crimes" dichotomy through the back door.

45. Mr. Simma had been right, on the other hand, to stress the need to include a greater element of materiality, preferably in the commentary, but possibly also in the articles themselves, without going too far in elaborating general rules. With regard to terminology, it should be noted that the definition of a "material" breach given in the 1969 Vienna Convention was more reminiscent of a fundamental or repudiatory breach striking at the core of the obligation that had been breached and thus differed from the criterion applicable in article 27. Some clarification was therefore necessary, though without incorporating whole segments of criminal law in the articles.

46. Mr. SIMMA thanked the Special Rapporteur for helping to clear up a misunderstanding between himself and Mr. Brownlie. Recapitulating briefly, he said that his first proposal had been that a reference should be included to "material" or "essential" aid or assistance, which was important enough to appear in the text of the article itself and not just in the commentary. Secondly, when addressing the question of "crimes", the Commission should consider whether the extent of a third State's implication in the case of a "crime" could be greater than in the case of a "delict".

[6] B. Graefrath, "Complicity in the law of international responsibility", *Belgian Review of International Law* (Brussels), vol. XXIX (1996-2), pp. 370-380.

47. Mr. Sreenivasa RAO said that he supported the Special Rapporteur's proposals, whereby he had skilfully achieved a delicate balance.

48. With regard to the notion of "incitement", he said that it existed in international law and was applicable not only to crimes, but also to diverse other situations, covering real circumstances in which crimes were committed in cold blood, without compunction, for personal interest.

49. He agreed with the Special Rapporteur that it was advisable, in the case in point, to avoid relying unduly on notions of internal criminal law.

50. Mr. SIMMA said that, at least in its German equivalent, the term "incitement" did not necessarily convey the idea of "immediacy". It rarely arose in relations between States.

51. Viewed from the standpoint of the degree of implication of a State, "aid or assistance" presupposed that the wrongdoing State took the initiative and was subsequently joined by another State, which encouraged it to persevere and eventually played a coercive role. In his view, the notion of incitement should not be included in the draft articles. However, the Commission could consider whether it had a place in the case of crimes such as genocide.

52. Mr. Sreenivasa RAO said he continued to believe that the Commission should fall in with the Special Rapporteur's proposals. He noted, however, that there was a clear tendency in the discussion to separate, possibly within one and the same article, the notion of "aid or assistance" from that of "direction and control", even though the same conditions were applicable to the two, and that the Special Rapporteur had no objection to the idea.

53. Mr. PAMBOU-TCHIVOUNDA said he thought that chapter IV of the draft articles was useful, not so much because the articles it contained, as explained in the commentary adopted on first reading, were based on past events, but because it was forward-looking. As the means deployed by the "cold-blooded monsters" were becoming more and more complex in technical terms, the Commission must propose safeguards that would check the natural urge of States to take whatever steps were required to further their dark designs.

54. New fields had emerged in which a State would be tempted to provide insidious aid or assistance to another State for the commission of a wrongful act, for example, in business as a consequence of the liberalization of trade or the globalization of the economy. In that new area of operations, which was opening up against the background of ostensibly private interests, nobody could predict the future conduct of States at a time when bilateral agreements were being replaced by multilateral agreements. Economic warfare was a palpable threat. At a fundamental level, the notion of respect for the territorial integrity of States, which entailed obligations and hence rules to be observed, was laden with such normative connotations that no draft articles on the subject were called for. Not everything in international law was written down; a great deal could be implicit. But take, for example, the situation in the Great Lakes region of Africa, in which a number of States were involved. If those States decided to restore some kind of order, it would be necessary to determine where responsibility lay: primary responsibility, immediate responsibility, indirect responsibility. It was for just such a situation that the Commission must develop a minimum set of rules that could be invoked to reach a determination. To that end, it would be appropriate to separate aid or assistance by a State to another State for the commission of an internationally wrongful act from direction and control.

55. Referring to Mr. Simma's comment on the need to specify that aid or assistance should be essential, he drew attention to the correlation with article 19, which the Commission had adopted on first reading, but had set aside for the time being.

56. The CHAIRMAN said that the discussion had brought to light problems pertaining to the three notions of aid or assistance, direction and control, and coercion. The members of the Commission appeared dissatisfied with the Special Rapporteur's proposal that the text adopted on first reading should be amended by divorcing coercion from direction and control and marrying aid or assistance to direction and control. The best solution might be to keep the three notions separate.

57. Mr. CRAWFORD (Special Rapporteur), summarizing the discussion on chapter IV, said that he had joined the notion of aid or assistance to that of direction and control not because he thought they were similar, but on the grounds that they were subject to the same regime. He proposed that the draft articles should be referred to the Drafting Committee with a recommendation that it should consider article 28 first, because a decision on that article could help it solve the problems to which the new version of article 27 gave rise. In that connection, he noted that, with few exceptions, article 27 adopted on first reading had been deemed unacceptable: none of the examples cited in the commentary by way of illustration remotely approximated to the case of aid or assistance in the breach of a bilateral treaty.

58. No Government had suggested deleting chapter IV, but that did not prevent the Commission from trying to improve the wording of the constituent articles so long as it did not go too far. It should set aside for the time being the question whether the most serious breaches should be explored in greater depth. At all events, a general formulation of the articles of chapter IV had its place in the draft articles.

59. Referring to Mr. Dugard's comment on article 28, he said he thought the article should be retained because of the link with the force majeure case referred to in chapter V.

60. Mr. ROSENSTOCK said that Mr. Addo was not alone in considering that it would be preferable to delete chapter IV. The fact that the Commission had adopted it over 20 years earlier was no justification for its retention.

61. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer chapter IV, with all pertinent observations, to the Drafting Committee.

It was so agreed.

The meeting rose at noon.

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