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Summary record of the 633rd meeting

Topic:
Programme of work

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633rd MEETING

Tuesday, 1 May 1962, at 10 a.m.

Chairman: Mr. Radhabinod PAL

Future work in the field of the codification and progressive development of international law (General Assembly resolution 1686 (XVI)) (item 2 of the agenda) (A/CN.4/145) (continued)

1. The CHAIRMAN invited the Commission to continue its discussion of item 2 of the agenda.

2. Mr. AMADO said that he was greatly concerned about the difficulties which would face the special rapporteur who had to deal with the topic of state responsibility. It was most important that the Commission should give precise instructions to its special rapporteurs, for otherwise they might, through excessive zeal, write reports which tried to cover too much ground. The main function of the Commission was to restate customary rules of law in a form suitable for international instruments and acceptable to the majority of states. Even that relatively modest task was not free from controversy, as had been seen when the Commission had prepared its draft on the continental shelf and its draft on consular intercourse and immunities, which had contained some innovations. Any realistic codification was bound to contain an element of progressive development: to attempt to fix immutable rules of international law was to deny the realities of international life.

3. The Commission could not hope to reduce to a series of rules the enormous body of doctrine and practice which existed in the matter of state responsibility. The law had changed greatly since the days of the Drago doctrine and the Calvo clause. Whereas, for example, the second Hague Peace Conference, in 1907, had adopted a convention admitting by implication that in certain circumstances recourse to armed force for the recovery of contract debts was permitted, the Seventh International Conference of American States, in 1933, had proclaimed as part of international law the principle of non-intervention in the affairs of other states. Not only had the law evolved, but also some of the firmly established principles were difficult to codify. For example, it was universally recognized that the duty to make reparation was one of the consequences of a wrong committed by a state. Yet, the Codification Conference of The Hague, in 1930, had been unable to codify the principle. Again, the imputability of wrong to the state was a controversial question, some authors thinking that unlawful intent was necessary, and others that it was not indispensable. The formulation of rules concerning the nationality of the claim and the exhaustion of local remedies would pose no less thorny problems.

4. Besides, the Commission would have to consider to what extent the law governing state responsibility had been affected by the Charter of the United Nations, with its recognition of the sovereign equality of states and its provisions concerning the pacific settlement of disputes.

5. Similarly, in the case of the topic of state succession, precise instructions would have to be given to the special rapporteur, if one were appointed. Indeed, he was by no means convinced that the topic was ripe for codification. Nevertheless, although customary rules of international law did not exist on the subject, certain rules could be deduced from treaties; for example, a successor state undoubtedly inherited certain obligations, such as those connected with river systems, and financial obligations.

6. He hoped the Commission would reach unanimous agreement on the method to be followed in dealing with state responsibility and, in particular, would delimit the scope of the study so that the special rapporteur did not introduce material not strictly relevant to his task.

7. Mr. AGO said that the exchange of views during what was virtually a general discussion on state responsibility and state succession would have cleared the ground and might save considerable discussion later. It was reassuring to note that there was no real major disagreement concerning the content of future reports on state responsibility; both Mr. Gros and Mr. Amado had mentioned some of the essential points that would have to be covered.

8. To his mind, the first general report on state responsibility should define the nature of that responsibility and the meaning of "unlawful act" in international law. It should answer, among others, the questions: When could a breach of an international obligation be said to have occurred? Was it imputable to a subject of international law? Could there be responsibility without fault? It should also investigate the different kinds of unlawful acts, whether of commission or omission and whether complex or simple; all those questions had already formed the subject of international arbitrations. Among the other points to be covered in the report were: circumstances exonerating from responsibility, such as consent of the injured party, legitimate measures of sanction, "légitime défense"; state of necessity; the scope and measure of reparation; the admissibility of repressive sanctions for certain kinds of unlawful acts; the rule concerning the exhaustion of local remedies, and so on.

9. To allay the concern expressed by Mr. Briggs and Mr. Gros at his suggested approach to the subject of the treatment of aliens, he said he agreed that the vast case-law in that field should not be overlooked. One of the reasons for that abundance of material was that breaches of the rules concerning the treatment of aliens did not affect the prestige of states to the same extent as other breaches and were therefore more readily submitted to arbitration. Although responsibility for breaches of the rules concerning the treatment of aliens was probably not the most important part of the topic of state responsibility, he agreed that the case-law built up by arbitral tribunals in the matter of responsibility for damage to aliens could be a valuable source of rules and principles concerning the responsibility of the state in general. At the same time, the material already mentioned should be utilized for an even more direct purpose, namely, the determination of the substantive rules concerning the duties and obligations of states as to the treatment of aliens.

10. In view, however, of the relatively short time at the Commission's disposal during its five-year term, it should perhaps first discuss the general principles of state responsibility and then take up other topics, such as measures for the enforcement of responsibility, and the treatment of aliens.

11. As regards the very important problem of state succession, a great deal of preparatory work was required. Ample material illustrating the practice existed; for instance, material connected with the unification of Italy and of Germany, and with the independence of Latin-American states, but it had to be collected and classified. Perhaps the Secretariat might recruit additional staff for the purpose. In any event the topic should not be postponed, since it would be extremely helpful to a number of states if the Commission could frame general rules based on the lessons of both practice and treaties.

12. So far as the method of work was concerned, special rapporteurs should be appointed who would each be responsible for his own topic; possibly they should be assisted by a committee, which should not be too small. The rapporteurs and the committee could consult each other by mail or even meet between the Commission's sessions.

13. Mr. TUNKIN said that the discussion, and particularly the arguments put forward against his proposal that small committees be appointed to consider the scope of the topics of state responsibility and succession of states, had convinced him of the correctness of that proposal.

14. The main argument against his proposal had been that the outline of the two topics was already sufficiently clear. As far as state responsibility was concerned, the discussion had clearly demonstrated that its outline was far from clear. In particular, several members had spoken of international responsibility exclusively in its traditional sense, as expounded, for example, by Anzilotti.¹

15. Perhaps it would be more correct to say that most speakers had discussed state responsibility in the context of the old conception of international law. The Commission, however, was expected to consider all the aspects of the topic in the light of new developments in international life, and as yet little or no reference had been made to those developments.

16. Since the end of the First World War, new fields of international responsibility had been opened up. For example, state responsibility arose as a result of a war of aggression, an instance of state responsibility not covered by the rules current before the First World War. Yet it was undeniable that modern international law considered aggressive war as a very important case of state responsibility.

17. He could not agree with Mr. Ago's suggestion that the study of state responsibility should be limited to general problems. General problems were undoubtedly of interest, but the Commission should go much further. The main interest of the topic of state responsibility,

both from the point of view of codification and from the point of view of progressive development, was the application of the general rules to those breaches of international law which vitally affected the maintenance of peace. That responsibility could not be reduced to general principles, but on the other hand, it had its bearing on the formulation of general principles of state responsibility.

18. So far as the topic of succession of states was concerned, he agreed with Mr. Verdross that it raised serious problems. He therefore supported Mr. Verdross's proposal that the Secretariat should be asked to collect the necessary material. However, he would go further and press his own proposal that a small committee be appointed to undertake a preliminary study of the topic; the very complexity of the subject rendered such a preliminary study essential.

19. He confessed that he failed to understand some of the arguments which had been put forward against setting up two small committees. It had, for example, been suggested by Mr. Briggs that it would mean substituting a small group for the Commission itself. But there was no such intention; the small group would work when the Commission was not in session and would report back to the Commission itself.

20. Mr. Gros had suggested that, even if a committee were set up, the actual work would always be done by a single person. But already in at least one case the Commission had designated two rapporteurs for the same topic: at its first session it had appointed Mr. Alfaro and Mr. Sandstrom to study the question of international criminal jurisdiction.²

21. Reference had been made to possible technical difficulties. Those difficulties were certainly not insuperable. The Secretariat had indicated that it would be possible to arrange committee meetings for the exchange of views during the current session. Committee members could continue their study in the interval between the sessions, and it would be comparatively easy to arrange for the committees to meet immediately before the next session. In any event, there would be no problem at all in arranging such a meeting in the course of that session.

22. The suggestion had been made that the committees should report to the Commission during the current session. That suggestion was impracticable; the Commission would be fully occupied with the discussion of Sir Humphrey Waldock's first report on the law of treaties.

23. The appointment of the proposed two small committees would have the great advantage of filling a gap in the procedure of the Commission. In the past, the Commission had refrained from giving specific instructions to special rapporteurs. One interesting and notable departure from that tradition had been the Commission's action in giving precise instructions to the special rapporteur on the law of treaties at its thirteenth session.³

² *Yearbook of the International Law Commission 1949* (United Nations publication, Sales No.: 57.V.1), p. 283.

³ *Yearbook of the International Law Commission 1961*, Vol. II (United Nations publication, Sales No.: 61.V.1, Vol. II), p. 128.

¹ "*Teoria generale della responsabilità dello Stato nel diritto internazionale*", 1902.

24. His proposal was that a small committee of three or four members should, in the interval between the two sessions, consider each of the two topics. Each committee would submit its collective views to the Commission; if a committee were unable to reach agreed conclusions, separate or even dissenting opinions could be submitted. That would be much better than appointing a special rapporteur immediately without giving him definite instructions: a special rapporteur so appointed would have to make a preliminary study of the subject himself and in fact prepare his own instructions. Nor could it be seriously suggested that the Commission should, at that early stage of its consideration of the two topics, give precise instructions to the special rapporteurs immediately.

25. The idea of setting up small committees to work during the interval between the two sessions was admittedly a novel one, but the Sixth Committee had repeatedly invited the Commission to try new methods of work. The Commission should therefore not persist in its old methods but should try the new procedure which he proposed.

26. The CHAIRMAN said that he wished to make three points clear.

27. First, it had become apparent that speakers could not leave out of the discussion the question of substance relating to the scope of the two topics of state responsibility and succession of states. He therefore wished to indicate that, in the exchange of views on item 2, speakers would be free to discuss the scope of the two topics.

28. Secondly, the Commission would on no account disturb the priority which it had allotted to the topic of the law of treaties.

29. Thirdly, the apprehension had been voiced that, by dealing with the topic of state responsibility in its purest sense, the Commission might be excluding altogether the question of the treatment of aliens. He would accordingly remind the Commission of the discussion which had taken place at the 413th to 416th meetings, during its ninth session in 1957, when it had been made perfectly clear that, whatever views members held regarding the substance of the question of the treatment of aliens, none of them wished to exclude it from the study of state responsibility. Two points had been made. First, it had been urged that the subject of state responsibility should be extended so as to cover more than merely the question of the treatment of aliens. Secondly, some members had criticized certain of the rules which had at times been put forward on the treatment of aliens, but no one had suggested that the subject should be dropped. There were, of course, controversies and difficulties connected with the subject, but it was the duty of the Commission to face and overcome those difficulties. However perplexing the problem might appear, nothing would be gained by evading the difficulty. No new level of historic development was expected to emancipate history from vexing problems like those.

30. Mr. TSURUOKA, on the subject of state responsibility, said that in view of its limited possibilities the Commission should not be too ambitious. It should produce work that would prove useful to the international community. Its studies and drafts should cover the various aspects of the subject; at the same time the drafts should prove acceptable to the largest possible number of states.

31. He agreed with Mr. Gros that the topic of state responsibility should be understood in a broad sense as including aspects other than damage to aliens, though the subject of the status of aliens should not of course be excluded.

32. The Commission should not make too many innovations in its procedure. He preferred the direct method of work, by which he meant the preparation of a report by a special rapporteur and the discussion of that report by the plenary Commission, because it was the simplest. Accordingly, although there was much truth in Mr. Tunkin's arguments, he hesitated to accept his proposal for the establishment of special committees.

33. A special rapporteur for the topic of state responsibility should be appointed at the current session; if necessary, the general discussion of the topic might be continued, for from it the special rapporteur could gather useful indications for his work.

34. Lastly, if a small committee were to be set up, he urged that all the members of the Commission should be kept informed of the committee's proceedings and that all members should have the right to address observations to the committee. Those remarks applied whether the proposed committee worked in the course of a session or in the interval between the Commission's sessions.

35. Mr. PESSOU said he shared the views of those who considered that the topic of succession of states was necessarily linked with that of the law of treaties. At previous meetings, both he and Mr. Elias had abundantly demonstrated the connexion between the two topics.

36. With regard to the misgivings expressed by the General Rapporteur regarding the possible invasion of public international law by principles drawn from private international law, it would be difficult to avoid reasoning by analogy with existing rules of law, even if those rules belonged to private law.

37. The basic problem in regard to succession of states and of governments was how far political changes affected the validity of earlier treaties. There were two schools of thought. One held that a new state succeeded only to such treaties as it was willing to accept; the other held that, in international law, by analogy with private law, the principle of succession to such obligations applied. If those two views could not be reconciled, then each particular case would have to be settled on its merits. The questions to be determined would be whether the purpose for which the treaty had been concluded could be achieved in the situation of the new state, in other words, were the clauses of the treaty consistent with the rules of public order of the new state.

38. As regards the category of commercial treaties, often known as treaty-contracts, international practice, at any rate among European states, favoured the extinction of earlier treaties, in application of the principle that a new state could not be bound by obligations to which it had not subscribed. But again, only individual examination of each separate case could provide a satisfactory answer.

39. It was most important that the necessary reference material on the subject of succession of states should be brought together in a single document.

40. Mr. EL-ERIAN said that the current discussion of the Commission's work programme was of special importance in view of the increase in the Commission's membership and of the recommendations of General Assembly resolution 1686 (XVI). He hoped that all members would give their interpretation of that resolution.

41. Such questions as the Commission's composition and the length of the term of office of members should be discussed at the end of the session. Changes might involve a revision of the statute, but the work done during the past twelve years indicated that no basic change in the statute and general method of work was needed. It was specially important to preserve the Commission as a corporate entity. Suggestions had been made in the Sixth Committee for splitting the Commission into two sub-commissions, but that committee had finally agreed that all questions of methods of work should be decided by the Commission itself.

42. There might be other means, such as the appointment of a committee to work in intervals between sessions, of accelerating the Commission's work without prejudice to its corporate personality; the financial implications of such procedures would have to be taken into consideration.

43. In its resolution 1686 (XVI) the General Assembly had recommended the Commission to consider its future programme of work, to continue its work in the field of the law of treaties and of state responsibility and to include on its priority list the topic of succession of states and governments. The Commission would shortly proceed with its study of the law of treaties.

44. State responsibility was in a different position, as no special rapporteur had been appointed and the method to be employed in the study of that topic was still in question. He welcomed the statement by the Secretary that the Commission would do well to consider the general approach to be adopted as well as the actual scope of the subject of state responsibility. At the ninth session he himself had expressed the view that certain aspects of international responsibility, other than the responsibility of the state for injuries caused in its territory to the person or property of aliens, merited prior study.⁴ He would suggest therefore that the general

discussion be continued so as to enable the Commission to agree on its method of work.

45. After completing the general discussion and before beginning the discussion on the law of treaties, the Commission should consider its general approach to the topics of state responsibility and succession of states and of governments, and whether to appoint a special rapporteur or a small committee to prepare a preliminary study during the present session before the appointment of special rapporteurs. It should then consider its future work and select a new list of topics, for which a special rapporteur or committee of experts might be appointed. Lastly, it should discuss its interim report to the General Assembly, prepared in response to sub-paragraph 3 (b) of resolution 1686 (XVI).

46. At its thirteenth session the Commission had started to consider what its next topic should be and Mr. Verdross had suggested four general principles to govern the organization of future work.⁵ While he agreed with those four principles in general, he was opposed to the idea of avoiding controversial subjects. Mr. Verdross also tended to lay more stress on codification than on progressive development, whereas experience showed that the whole trend was towards progressive development. The four Conventions on the Law of the Sea had developed out of the Commission's original intention to confine itself strictly to two topics: the law of the high seas and the law of the territorial sea. It was to be hoped that the rules of state responsibility would develop in a similar way.

47. Mr. CADIEUX said that, so far as the topic of state responsibility was concerned, the main question before the Commission was whether to treat the topic in its entirety or to deal only with the narrower traditional aspect. The latter approach would be preferable, for otherwise the subject would be too unwieldy. Some of the other aspects might be included in the list of topics for future work.

48. Having settled what subject it would study, the Commission would then have to decide how to study it. In theory, logic might be thought to call first for the formulation of general principles; in practice, however, the subject was largely concerned with the treatment of aliens. Consequently, it would be impossible to work out the general principles without considering their incidence on the status of aliens. While it would be appropriate that the Commission should first make an inventory of all the aspects of international responsibility to see which of them were best suited for codification, the topic of the treatment of aliens could not be ignored.

49. So far as the topic of succession of states was concerned, several methods had been suggested, in particular work by the Secretariat, by a working group or by a special rapporteur, but he saw no reason for

⁴ *Yearbook of the International Law Commission 1957*, Vol. I (United Nations publication, Sales No.: 57.V.5, Vol. I), p. 161.

⁵ *Yearbook of the International Law Commission 1961*, Vol. I (United Nations publication, Sales No.: 61.V.1, Vol. I), p. 206.

departing from the traditional method of a special rapporteur assisted by the Secretariat.

50. In addition, it would be useful if the Commission had some other topics on its agenda, which might be chosen from the catalogue in the secretariat working paper (A/CN.4/145). The Commission had already been asked to study the question of the juridical regime of historic waters including historic bays, the right of asylum, and the relations between states and international organizations. As a consequence, the outline of the Commission's programme for the next ten or more years was becoming discernible.

51. Mr. ROSENNE said that it was essential for the Commission to have a number of projects in hand, whether major or minor, so that it could make progress at each session. He agreed with the Chairman that there was no intention to disturb the continuity and priority of the work on the law of treaties at the current and future sessions, but the Commission's work should not depend on the continuous availability of a single special rapporteur throughout the whole of the next five years.

52. General Assembly resolution 1686 (XVI) assumed the continuation of the work on the law of treaties and on state responsibility, but required a formal answer from the Commission on the question of succession of states and governments; the Commission was under an obligation to include such a reply in its report. It should beware of the danger of thinking that all work in hand or all work which it decided to initiate had to be completed during the current term of office; that had never been the assumption in the past. All preliminary work had a value of its own.

53. As the General Rapporteur had pointed out, it was impossible to divorce procedure from substance, and consequently the Commission was forced to touch upon the substance of state responsibility while taking its procedural decisions. The nature of the task imposed upon the Commission, and the expectations and suppositions of the General Assembly, the Economic and Social Council and the other organs, had been well explained at the previous meeting by Mr. Jiménez de Aréchaga, who had tried to relate the topic of state responsibility to the new problems facing the international community and the current trends of international law and practice. That task itself determined the scope of the topic and he agreed with the broad approach advocated at the same meeting by Mr. Gros. The Commission was not, however, concerned with new rules of substantive law which might give rise to new grounds of responsibility, and he was somewhat puzzled by Mr. Tunkin's remark about new forms of international responsibility. Naturally, international law developed, but developments in the general law did not of necessity lead to fundamental changes in the concept of state responsibility itself. If the matter were to be considered within the context of what was sometimes called the law of the United Nations, the Charter should be examined to see whether it contained any pertinent material. A useful clue for the study of state responsibility could be found in certain provisions of the Statute of the International Court of Justice, which

was an integral part of the Charter. Thus, the reference in Article 36, paragraph 2 (c), to "the existence of any fact which, if established, would constitute a breach of an international obligation", on the one hand, and the reference in paragraph 2 (d), to "the nature or extent of the reparation to be made for the breach of an international obligation", on the other hand, seemed to indicate the direction which the Commission might take.

54. With regard to the immediate preparatory work which had to be undertaken, he was impressed by Sir Humphrey Waldock's suggestion at the previous meeting regarding the necessity for an exploratory paper exposing the issues that arose. If the topic were studied in its broad aspect, the treatment of aliens and their property would become really no more than one facet. The Commission was concerned primarily with state responsibility as such, regardless of the manner in which it was reflected. At the same time he thought that within such a broad framework there were nevertheless two practically independent subjects sufficiently complex and of sufficient practical importance to merit separate and special treatment—namely, the problems posed by the rule concerning the exhaustion of local remedies, and the problems posed by the rule concerning the nationality of the claim. He did not think that either of those was exclusively limited to the question of the treatment of aliens, and they might be studied concurrently with the main topic.

55. Another aspect to be considered was the responsibility of a state for actions performed in the territory of what might be called the plaintiff state; the simplest example was where a vehicle driven by a person enjoying diplomatic immunity injured an inhabitant of the state to which the diplomat was accredited, and the assertion of the immunity prevented the adjudication of any claim in the local courts.

56. With regard to material, he said that on the one hand there was a plethora and on the other a paucity. There were certain dangers in paying too close attention to international case-law at the expense of state practice, for so often the import of a decision of an international tribunal, especially arbitrations and mixed claims commissions, depended on the precise terms of the agreement by which the tribunal had been established, which in turn might be found to depend on the political circumstances in which that agreement had been concluded. The practice of states was probably a better guide.

57. He had no objection in principle to the establishment of a committee to assist in clarifying the problems, provided that it was broadly representative of the Commission as a whole; he doubted whether a small committee could meet that requirement. He also thought it preferable that the work should be initiated, and the special rapporteur or rapporteurs appointed, during the current session.

The meeting rose at 1 p.m.
