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Summary record of the 1599th meeting

Topic:
State responsibility

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38. Regarding Mr. Verosta's second question, namely, whether or not part 2 of the draft should include rules applying to international organizations, he said that part should definitely take account of the possibility that international organizations might be entitled to determine the responses of their members to internationally wrongful acts. On the other hand, it was not quite so clear whether part 2 should also deal with the responses of international organizations themselves—in other words, with the possibility that they might expel or suspend one of their members in response to an internationally wrongful act. The course of action possible in that respect depended entirely on the constituent instrument of the international organization.

39. Mr. VEROSTA said that, in his opinion, use of the expression "guilty State" should be carefully avoided in part 2 of the draft articles on State responsibility because States, and in particular the great Powers, did not like to be characterized as "guilty". The term had different connotations in criminal law and civil law, but the risk of confusion between the two made it preferable to avoid using it during the current discussion.

The meeting rose at 11.40 a.m.

1599th MEETING

Thursday, 29 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (*continued*)

1. Mr. USHAKOV said that there were a number of points which were of fundamental importance in the present preliminary stage of the work on part 2 of the draft articles on State responsibility.

2. Under the terms of draft article 1,[1] international responsibility could be incurred on one ground alone, namely, the internationally wrongful act of a State. However, it was clear that there was another form of responsibility which was not identified as such in French terminology but was designated in English terminology by the term "liability".

3. Part 1 of the draft articles therefore seemed to leave a number of questions pending, inasmuch as international law recognized only responsibility properly speaking, whereas internal law also admitted responsibility based on risk. It was not, however, desirable for questions relating to the circumstances and the conditions determining the existence of an internationally wrongful act to remain unanswered. In his opinion, the possible shortcomings revealed by the Special Rapporteur did not fall within the scope of part 2 of the draft. Everything pertaining to the existence of the internationally wrongful act as the basis for incurring international responsibility must be dealt with in part 1; otherwise confusion might arise in the event of discrepancies between the commentaries to two consecutive parts of the set of draft articles.

4. Problems relating to matters other than State responsibility in the strict sense of the term also remained unresolved. The basis for part 1 of the draft was the existence of primary, or substantive, obligations under international law, alongside which there existed secondary rules governing responsibility. A breach of the primary rules brought the secondary rules, or rules of responsibility, into play. It was not for the Commission to say what those substantive or primary rules were, a task that would mean codifying all of international law, including the obligations created in the bilateral treaties that were being concluded almost every day. Clearly, it was not the purpose of the draft articles to define all existing substantive rules of international law.

5. The Commission could, however, examine those rules in order to identify certain categories, as had been done in draft article 19, which differentiated between international obligations in respect of which a breach constituted an international crime and obligations in respect of which a breach constituted an international delict. Obviously, the content of primary obligations (which had some effect on the content, forms and degrees of State responsibility), could not be completely ignored. Nevertheless, it was not for the Commission to concern itself with the existence of rules of substantive international law.

6. The Vienna Convention[2] did not deal with the question of responsibility; it simply defined the conditions determining the existence or absence of international obligations. For example, article 60 of the Convention merely provided that a breach by one of the parties of its obligations entitled the other party to invoke the breach as a ground for terminating the treaty or suspending its operation. Accordingly, the article did not define the responsibility of the State committing the breach; it established the existence of

[1] See 1597th meeting, foot-note 1.

[2] *Ibid.*, foot-note 4.

the internationally wrongful act of the State and its consequences on the obligations of the parties to the treaty other than the defaulting State. Hence, reference could not be made to the Vienna Convention, since the point of departure of the draft articles on State responsibility was a breach by a State of its obligations that gave rise to an internationally wrongful act entailing the responsibility of that State. The draft therefore assumed that an obligation existed and had been breached.

7. Moreover, the obligations of States, as covered by the draft, derived not only from treaties but also from customary rules of international law. It was easy to conceive of a situation in which, for some States, an obligation derived from the provisions of a treaty and, for others, it derived from custom. The circumstances dealt with in the Vienna Convention of Diplomatic Relations[3] were a case in point. The Commission could not confine the scope of the draft to obligations deriving from treaties between States; it must encompass all the situations that might arise in modern international law, regardless of whether they had their origin in, for example, treaties, mandatory decisions of international bodies or the unilateral acts of States—something that was evident from the terms of draft article 19.

8. As to the meaning of the expression "measure legitimate under international law", which appeared in article 30, the Special Rapporteur had taken the view that the meaning of the adjective "legitimate" should be clarified in part 2 of the draft. Strictly speaking, any clarification should be supplied in part 1, but his own view was that no clarification was in fact required, since defining legitimate measures was a matter that came under the heading of substantive rules and in particular of the Charter of the United Nations, which had to be interpreted. To follow the course proposed by the Special Rapporteur would be an enormous undertaking and one that was beyond the means of the Commission.

9. Similarly, the rule of proportionality was probably an aspect of the primary rules. If the Commission adopted the principle of proportionality as the basis for part 2 of the draft, it would again be facing a Herculean task; the principle of proportionality did exist in positive law, but its content was still vague and confused, and therefore very difficult to define. If, on the other hand, the rule of proportionality was a primary rule, violation of the rule in itself gave rise to responsibility for States.

10. Finally, he noted the confusion surrounding the concept of "third State", which he found difficult to understand. In his opinion, it could not be used to designate States that bore no responsibility, or in other words States which were not active subjects, for the only active subjects were States towards which an obligation existed. The draft was concerned with specific relationships between States in that category; other States were not involved, although they could at times benefit from an obligation *erga omnes* and could be injured to a varying extent, but they could in no way be described as third States.

11. Mr. ŠAHOVIĆ said that the Special Rapporteur's report provided a synthesis of all the articles to be developed in part 2 of the draft, and, in view of the many ideas advanced, the members of the Commission were required to study *en bloc* all of the problems raised by the topic. To be more exact, the Special Rapporteur had posed a dozen questions which called for an in-depth response. For his own part, he would prefer to consider each problem separately as the Commission's work proceeded. For the moment, therefore, he would confine himself to general comments.

12. With regard, first of all, to the relationship between parts 1 and 2 of the draft, the Special Rapporteur had analysed at length the problem of the overlapping of their contents. He (Mr. Šahović) considered that the Commission should take part 1 of the draft, in its present form, as the basis for articles in part 2, concerning the content, forms and degrees of State responsibility. His position in that respect was very close to that of Mr. Ushakov. The Special Rapporteur himself had chosen that method but had at times gone further, something which seemed difficult to justify.

13. Moreover, in preparing part 2 of the draft the Commission would inevitably be compelled to verify the solutions adopted in part 1, since the subject-matter was such that the problems to be dealt with could call into question the very foundations of the draft. He had no objection to verifying the principles underlying part 1, but would not agree to any modification of those principles, which served as the basis for the draft as a whole. Part 1, which related to the origin of State responsibility, must be regarded as fixed once and for all.

14. A further consideration was the problem of the relationship between responsibility for an internationally wrongful act and responsibility for an act not prohibited by international law, a matter mentioned by Mr. Quentin-Baxter at the 1598th meeting. In his (Mr. Šahović's) view, the Commission should continue to deal concurrently with all those problems, indicating possible solutions but taking care not to place too much emphasis on their possible links. Account would also have to be taken of the requirements concerning the line of demarcation between part 2 and part 3, for the latter would concern the "implementation" (*mise en oeuvre*) of international responsibility and would have to deal with specific problems.

[3] United Nations, *Treaty Series*, vol. 500, p. 95.

15. The Commission must also recognize that, as yet, it had scarcely begun to discuss the contents of part 2. Above all, the definition of the concept of the content, forms and degrees of responsibility should be clarified. The Special Rapporteur had brought out certain ideas in that respect, but had not given his final views. Greater precision seemed desirable if work was to move ahead. In particular, consideration should be given to the relationship between the concept of content and that of form. As to the problem of the degree of responsibility, it was bound up with the actual content of the primary rules of international law. A more thorough analysis was essential if the Commission was to identify the principles that must serve as a basis for part 2 of the draft.

16. The method followed by the Special Rapporteur with regard to the "new legal relationships" between States after the commission of an internationally wrongful act seemed justified. However, too much emphasis had perhaps been placed on the problem of third States, since the principal new relationship concerned the subjects that were directly affected by the problem of responsibility. The main general rule had to be worked out by establishing the elements that would enable it to be defined. Perhaps it would be possible to draw up a general plan indicating how the matter was to be tackled and how the position of the various subjects, particularly international organizations, were to be analysed.

17. Again, the problem of degree of responsibility seemed to be linked to the principle of proportionality. The Commission would have to study the nature of the principle and the possibility of applying it to the subject under consideration, determining in particular whether a substantive rule was involved, and what place it should be accorded in future work.

18. As to the problem of method, mentioned in paragraphs 97 to 99 of the report, the Commission should adhere to the approach adopted by Mr. Ago—in other words, an empirical approach based on an analysis of State practice—in order to follow the developments of modern international law as closely as possible. He did not favour adopting a normative method for the formulation of articles on the basis of the contents of part 1 of the draft without taking account of the specific requirements of international life, the practice of States and positive law, including jurisprudence. The difficulties pointed out by the Special Rapporteur were clearly inevitable, and it did not seem possible to work more quickly than in the past.

19. The terminology to be employed, which should be free of certain theoretical or doctrinaire connotations, should be in keeping with that used previously and with the concepts already adopted by the Commission. Perhaps the Commission should have included an article on terminology in part 1, in order to fix the meaning of the terms used, for the Special Rapporteur would gradually find himself forced to use and therefore define new expressions and concepts, an exceedingly delicate task.

20. Lastly, the Commission must pursue its work on the distinction between primary rules and secondary rules, since it was a valuable tool for its deliberations and had enabled the Commission to formulate the draft articles of part 1 satisfactorily. It was to be hoped that the time available would allow the Commission to turn rapidly to some of the specific problems listed by the Special Rapporteur in his report and to analyse them in detail.

21. Mr. VEROSTA said that, in considering the question of treaties concluded between States and international organizations or between two or more international organizations, the Commission had exercised restraint in criticizing its model, the Vienna Convention, because the Convention had already entered into force. In examining part 2 of the draft articles on State responsibility, it was not necessary for the Commission to take the same attitude in connexion with part 1 of the draft, since the latter had not yet been fully drafted and its wording was far from final. Before pronouncing themselves on the articles that made up part 1 of the draft, many States were in fact waiting to see the contents of parts 2 and 3. Part 1—even more than the Vienna Convention, which the Commission had not regarded as sacrosanct despite its entry into force—was in no way immune from change.

22. In order to proceed with the categorizations proposed by Mr. Ushakov, the Commission could draw on the distinction between breaches of treaty provisions and violations of rules of customary international law.

23. Lastly, he suggested that one or two meetings should be set aside at the end of the session to consider the preliminary report so that members of the Commission who were currently absent and members who felt that they had not had the time to give such an important document all the attention it deserved could make their comments at a later stage.

24. The CHAIRMAN, speaking as a member of the Commission, said that the subject was one of the most difficult to come before the Commission, and he therefore wished to be certain that he had fully understood the Special Rapporteur's methods and objectives.

25. It appeared that the Special Rapporteur used the term "responsibility" in the sense of a liability incurred by the State called upon to answer for an act. In other words, new legal consequences arose and were reflected in turn in new legal relationships, and in a new reallocation of interests, following a disturbance in equilibrium created by the wrongful act. The Special Rapporteur had isolated certain factors that determined the extent to which, and the entities in respect of which, new legal relationships arose as a result of the wrongful act. The two main factors were the origin of the obligation and the nature and quality of the

breach. On that basis, the Special Rapporteur had developed the principle of the proportionality of the response, together with a derivative principle whereby a response which was not porportional was not allowable and, accordingly, not legal. In that respect, it would be interesting to hear more about the relevance of the origin of the obligation, which seemed to introduce a degree of pluralism into the philosophy. He wondered whether that was either necessary or practical.

26. He was in general agreement with the scope of the study as proposed by the Special Rapporteur, in which connexion two related questions had first been discussed: to whom did the transgressor State owe the obligation, and in respect of whom did a wrongful act bring about new legal relationships? Clearly, where a State was directly affected a new set of legal relationships would arise, but the Special Rapporteur had also considered an extension of that notion beyond the directly injured State. The Commission might therefore wish to extend it still further to cover the possible joint or collective responsibility of transgressor States. He noted in that regard that the Special Rapporteur had referred to a number of articles in part 1 of the draft, and assumed that the intention had not been to supplement or complement part 1 but rather to use those "interstices" as a signpost to the content of part 2.

27. The Special Rapporteur had then considered the areas with which he and Mr. Quentin-Baxter should each be concerned within their respective topics and, in paragraph 19 of the report, had suggested that the two areas might "tend to 'meet' somewhere, possibly in considerations of risk-allocation". However, it was difficult to see where the line of demarcation fell, and, given the vast and diffuse nature of risk-allocation, further thought should be given to the limits not only of Mr. Quentin-Baxter's topic but also of part 3 of the draft.

28. The Special Rapporteur had proceeded to speak of a catalogue of legal consequences that was to be used as a basis for the further development of the topic. In that connexion, the report referred to three parameters: new obligations of the transgressor State; new rights (and possibly also obligations) of the injured State; and new positions of third States. With regard to the third parameter, although the Special Rapporteur seemed to acknowledge that normally third States would have no new positions, he none the less categorized as third States certain States which were not directly affected but for which a variety of new legal relationships arose. The relevance of that classification was not entirely clear and he would be grateful if the Special Rapporteur confirmed his understanding, namely, that the intention of the catalogue was to develop—assuming there was a generally accepted system of values—a scale of proportionality of allowable responses to the wrongful act. Such a scale would be treated only as a norm, since it would be recognized that no automatically applicable scale could be developed.

29. The report contained a wealth of new ideas and much food for thought, but he had experienced difficulty with the presentation. It would be extremely helpful if the Special Rapporteur could in future adopt a system of titles and sub-titles and include an outline of the subject-matter dealt with in the report.

30. With regard to terminology, he fully agreed that the expression "guilty State" was not the most apt. He had himself used the expression "transgressor State", but was not suggesting that it was necessarily the best. Perhaps some other neutral expression could be found. Again, a more precise term than "third State" was required in referring to States other than those which were directly injured and in respect of which new relationships arose. He could accept the word "response" in the sense of the response required by law of the guilty or transgressor State, but not in the more technical sense of the response of the injured State, since it was difficult to see what would be required of such a State by way of a legal response. A different term might therefore be used in the case of the injured State. Lastly, he had no objection to the use of the words "qualitative" and "quantitative" but, there again, considered that it was necessary to clarify their meaning and differentiate between their use.

31. Mr. USHAKOV, referring to paragraph 6 of the report, said that, so far as the Commission was concerned, sanctions were one of the possible consequences under international law of an internationally wrongful act of a State. Moreover, it could be seen from paragraphs 1 and 2 of the report that the Commission regarded the application of sanctions as one of the forms of international responsibility. In international law, however, the term "sanction" referred both to coercive measures, such as those that might be taken against an aggressor State, and to all the consequences of an internationally wrongful act. In the legal system of the Soviet Union, all such consequences were termed sanctions, even when they did not imply any resort to coercion. In its commentary to draft article 19 (International crimes and international delicts), the Commission had placed inverted commas around the term "sanction",[4] which, in that instance, was used in the sense of coercive measure. Hence, the Commission must now decide the meaning to be attached to that term in the draft. Personally, he would prefer it to apply to all the possible consequences under international law of an internationally wrongful act.

32. Sir Francis VALLAT said that, in his view, the use of the term "sanction" to describe all the responses to an internationally wrongful act would create

[4] See, for example, *Yearbook ... 1976*, vol. II (Part Two), p. 98, document A/31/10, chap. III, sect. B.2, art. 19, para. (9) of the commentary.

confusion, since the notion usually carried with it the idea of compulsion, as well as an element of punishment. To his mind, and no doubt to many lawyers who derived their thinking from the English legal system, the main objective, in the event of the breach of an obligation, was not to punish the wrongdoer but to repair the damage done; traditionally, the aim in international law had been to secure reparation rather than to inflict punishment.

33. The Special Rapporteur was to be congratulated on the thoroughness with which he had tilled the ground of international responsibility, for he had ploughed deep and exposed much of the subsoil. The ideas he had sown should now be reflected in a specific plan of action for the future, and it was to be hoped that the Commission would concentrate its thinking along those lines so that, in his next report, the Special Rapporteur would be in a position to provide an outline of the way in which he proposed to proceed. The task would be not an easy one, but it had none the less proved possible, even for so abstruse a subject as the origins of international responsibility, to develop a plan and to work systematically. He had every confidence that the Special Rapporteur would respond to what was a very real need.

34. A question that had to be considered, and one that caused him great difficulty, concerned the primary rules of international law which determined the obligations of States. He had long been faced with criticism from lawyers in the United Kingdom about the abstract nature of the Commission's work in that area. For example, he was asked whether the Commission, having spent approximately a decade on the draft articles in part 1, was going to spend another decade on an equally abstruse set of draft articles in part 2, and why the Commission was doing that kind of work when a start had yet to be made on codifying the rules governing one of the most basic aspects of international law, namely, the treatment of aliens on the territory of another State. It was very difficult to find a convincing answer to queries of that kind.

35. The Commission, too, was faced with a dilemma, since it would be extremely difficult in the present state of world affairs to make progress on the substantive rules. There had been a natural tendency to set aside the codification of the more substantive, and hence more complex, aspects of international law and to concentrate on areas which, without the content of the basic obligations, were rather in the nature of unconnected material. Having followed such a course for years, with the approval and indeed under the pressure of the General Assembly, the Commission would find it difficult to do an about-turn on the ground that it had been wasting its time. He was uncertain of the answer to that critical problem. However, in the world of politics, the Commission might well have no choice but to proceed in the same way, although his misgivings were, if anything, heightened by the statement in the Special Rapporteur's report to the effect that the content of responsibility must, to some degree, reflect the content of the primary obligations. If that was so—and he thought it must be—part 2 of the draft articles would have to take account of those obligations. He was not against the idea of categories mentioned by Mr. Ushakov. However, another possible approach might be to consider specific obligations as examples with a view to determining in each case how a breach of the obligation should be reflected in the definition of the relevant content or degree of responsibility. In a sense, the Commission was seeking to order the furniture for a house without knowing the size and shape of that house. In his view, some thought should be given to the ultimate size of the house.

36. Mr. RIPHAGEN said he wished to point out that, as indicated in paragraph 11 of his report, the term "guilty State" had been used before. He did not like the term, but had adopted it as a convenient shorthand way of referring to the State which committed the wrongful act. The term "transgressor State", however, would be quite acceptable.

The meeting rose at 1.05 p.m.

1600th MEETING

Friday, 30 May 1980, at 10.10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES) (*continued*)

1. Mr. THIAM said that the Special Rapporteur, in his excellent preliminary report (A/CN.4/330), had sought to encompass the subject-matter by considering in turn its scope, its substance and the method to be followed in dealing with it.

2. With regard to scope, the Special Rapporteur had asked whether there was not an overlap with the topics entrusted to two other Special Rapporteurs, Mr. Ago and Mr. Quentin-Baxter. The title of the topic being considered by Mr. Riphagen in his capacity as Special Rapporteur, namely "The content, forms and degrees