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Summary record of the 1667th meeting

Topic:
State responsibility

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conclusions of the Special Rapporteur in some depth, said that he would like to know what method the Special Rapporteur proposed should be used for the consideration of his report. It might be useful to decide from the outset whether the Commission should first hold a general discussion or whether it would be more efficient and appropriate to examine in turn the various articles proposed, discussing general problems as they arose.

31. Mr. REUTER said that the question of international responsibility was a highly complex one and observed that the topic chosen by the Special Rapporteur, of the consequences of the breach of one of its obligations by a State and the nature of the obligations arising from such a breach, was particularly difficult. However, the topic was not wholly new to the Commission, which had already evaluated its scope in connection with its work on the text of the 1969 Vienna Convention on the Law of Treaties,[4] as was clear from article 60 of that instrument, concerning the termination or suspension of the operation of a treaty as a consequence of its breach. Moreover, even in the field of the theory of the shortcomings of consent, the text of the above-mentioned convention had qualified the consequences of those shortcomings to take account of the requirements of responsibility.

32. At the conclusion of his work on Part 1 of the draft articles, Mr. Ago himself had not hidden the fact that the question of the consequences of responsibility would raise immense difficulties, since those consequences could not be uniform because they depended, first of all, on the number of States affected by the breach. The most recent jurisprudence of the International Court of Justice showed clearly that the importance and number of interests involved modified the consequences of the breach.

33. Moreover, the dignity of the rule itself also modified the consequences of the breach, as could be seen, in positive law, from article 60, paragraph 5, of the Vienna Convention. While it was undeniable that *jus cogens* existed, it should nevertheless be asked whether there were degrees of *jus cogens*. Thus, for example, some obligations might concern the human person (through his family situation, for example), and the question of the effectiveness of *restitutio in integrum* could validly be raised. Lastly, the problem of consequences could have a different aspect according to the matter in which it arose.

34. Like Mr. Šahović, he thought that the Commission should select a method. It stood seized of two preliminary articles and two specific articles, and the Special Rapporteur rightly considered that certain fundamental general rules should be laid down. He himself approved the principle and substance of the three general articles that had been proposed, but noted that it would be necessary to resolve some drafting problems, in particular that of deciding on the wording of the general principles. The Commission should nevertheless decide from the outset of the discussion whether it would first examine the three principles or articles 4 and 5, which were specific in nature.

35. Lastly, he regretted having to recall that, however agreeable it might be, when studying international law, to refer to actual practice by invoking jurisprudence, it should not be forgotten that there was in fact no compulsory international justice, since international justice existed only by consent, that was, on an exceptional basis. It was thus legitimate to wonder whether the Commission should deal in its draft articles with a problem such as that of constraints and obligations at a time when an unduly large number of States reserved their position with regard to international justice. By adopting such an approach, the Commission ran the risk of restricting the general scope of its work, and he was not certain that such a choice would be a fruitful one in the over-all framework of the draft articles.

36. Mr. VEROSTA said he agreed with Mr. Reuter that the Commission should base its discussion of the topic under consideration on the first three draft articles proposed by the Special Rapporteur.

37. Mr. RIPHAGEN (Special Rapporteur) said he, too, thought that the Commission should begin by considering the draft articles which he had proposed. During the discussion the Commission might decide whether the general principles embodied in draft articles 1 to 3 were really necessary and, if so, where they should be placed in the draft articles as a whole.

38. Sir Francis VALLAT said he was of the opinion that the Commission should first discuss the general principles embodied in draft articles 1 to 3 and then go on to consider articles 4 and 5. Such a course of action would enable the members of the Commission to express their general views as might prove necessary.

39. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to begin by considering the first three draft articles proposed by the Special Rapporteur.

It was so decided.

The meeting rose at 1 p.m.

1667th MEETING

Friday, 5 June 1981, at 10.15 a.m.

Chairman: Mr. Robert Q. QUENTIN-BAXTER

Present: Mr. Aldrich, Mr. Calle y Calle, Mr. Francis, Mr. Jagota, Mr. Reuter, Mr. Riphagen, Mr.

[4] For the text of the Convention (hereinafter called "Vienna Convention"), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

Šahović, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (*continued*) (A/CN.4/344)

[Item 4 of the agenda]

The content, forms and degrees of international responsibility (Part 2 of the draft articles) (continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1, 2 AND 3[1]

1. Mr. RIPHAGEN (Special Rapporteur) said that articles 1, 2 and 3 were intended simply as a frame for the picture that would eventually emerge in the draft articles that were to follow. There was a close relationship between articles 1 and 3, which dealt with what might be called the "non-consequences" of a wrongful act, while article 2 indicated the residual nature of the rules that would apply as a result of a wrongful act.

2. The rules contained in articles 1 and 3 might be considered self-evident, but it was useful to state them because there were many lawyers who were inclined to say that a wrongful act was of such a nature that it caused the law to cease to apply, as was apparent when it was maintained that treaties were invalid because they were not in conformity with the rules that gave effect to them. Invalidity thus reflected the idea that, through wrongfulness, something disappeared.

3. Articles 1, 2 and 3 also laid the foundations for a number of more detailed rules that would be set forth in the rest of Part 2 of the draft. Thus, article 1 laid the foundation for the first duty of any State which had committed a wrongful act, namely, the duty of stopping the breach of its obligation, while article 3 laid the foundation for the rule of proportionality between the wrongful act and the response to that act. Article 2 provided that a rule of international law could, in addition to imposing an obligation on a State, determine the legal consequences of a breach of the obligation. It therefore applied to treaty rules and rules of customary law, such as those of diplomatic law, which constituted self-contained regimes that had their own regulations concerning the consequences of wrongful acts. Article 2 had been placed in its present position because it referred to both articles 1 and 3, and also to the existence of a self-contained regime concerning the relationship between rights and obligations and the relationship between the breach of an international obligation and the rights and obligations that followed from such a breach.

4. Mr. CALLE Y CALLE said it was gratifying that the Commission had decided to refrain from engaging in a general discussion and to proceed forthwith to consider the draft articles submitted by the Special Rapporteur, articles which, indeed, did not seem to require any changes.

5. Articles 1 to 3 set forth the general rules that should apply to the whole of Part 2 of the draft. Article 1 provided that an international obligation in force between States did not disappear because it was breached by a State, and made it clear that the new relationships created by the breach did not replace the previous relationships. For his own part, he unreservedly endorsed that analysis. Again, as stated in article 2, a rule of international law could determine the consequences of a breach of the rule in question. At the same time, he fully shared the view reflected in article 3 that the State committing a breach of an international obligation was not deprived of its rights vis-à-vis the State that was affected by the breach.

6. Accordingly, he considered that the three draft articles under discussion had a place at the beginning of Part 2 of the draft.

7. Mr. JAGOTA noted that the Special Rapporteur had explained that article 3 was the counterpart of article 1 and that, when a breach of an international obligation occurred, the obligation itself did not disappear and the author State was not deprived of its rights. Those were sound propositions and would serve as a useful basis for the elaboration of other articles to be included in Part 2.

8. However, the Special Rapporteur had then gone on to explain that a rule of proportionality was built into article 3. Personally, he failed to see how such a rule could be said to exist if article 3 was intended to apply only to the breach of an "original" obligation, and not to the breach of an obligation by means of a countermeasure—in other words, by means of a response which must of necessity be in proportion to the wrongful act if it was not itself to constitute another wrongful act. He would therefore like the Special Rapporteur to explain how the rule of proportionality related to the breach of an "original" international obligation.

9. Mr. RIPHAGEN (Special Rapporteur), replying to the question raised by Mr. Jagota, said that in his opinion the rule of proportionality—or rather the "rule against disproportionality"—was, in a broad sense, an existing rule of international law which played a part in respect of the new obligations of the State that had committed a wrongful act. Article 3 laid the groundwork for the limitations to those new obligations, in other words, for the proposition that the author State was not, in every instance, obliged to re-establish the situation which the original obligation had sought to ensure and that the breach did not deprive the author State of its rights under international law. For example, in humanitarian law, a State which committed a breach

[1] For texts, see 1666th meeting, para. 9.

of an international obligation relating to prisoners of war still had the right to claim that other States should treat its prisoners of war according to the rules, which prohibited retaliation.

10. Sir Francis VALLAT said he could agree that the ideas expressed in articles 1, 2 and 3 should be reflected somewhere in the draft, but he would not go quite as far as had Mr. Calle y Calle. Rather, he was inclined to think that the Commission should examine the wording of the articles both carefully and critically.

11. It seemed to him that the principle of the non-effect of a breach on the force of an obligation, which was enunciated in article 1, was directly related to the principle stated in article 3, that the author of a wrongful act was not deprived of its rights under international law, and that the application of those general principles was qualified by the principle set forth in article 2. Thus, if it was incorrect that a State which committed an act of aggression was, by virtue of that breach of international law, deprived of its right to self-defence, then the provisions of the Charter of the United Nations relating to the maintenance of international peace and security would be a nonsense; on the other hand, if it was indeed correct, what appeared to be an absolute statement in article 3 had to be subject to qualification by the principle embodied in article 2.

12. He hoped that those comments would bring out the importance of the relationship between articles 1, 2 and 3 and of the order in which they were arranged. It might be better to start with articles 1 and 3 and deal with article 2 somewhere else in the draft. The rule stated in article 2 read more like a textbook rule than a rule to be included in a future convention. It should therefore be worded more along the lines of articles 1 and 3. He also experienced some difficulty with the word "may" in article 2, which suggested permissiveness, but the fact was that treaties frequently laid down specific requirements. The words "explicitly or implicitly determine" should also be examined with care, for if something was true under international law it would be explicitly provided for in a rule. Hence, the word "determine" might be replaced by the words "provide for".

13. Again, some caution should be exercised with regard to the use of the words that had been placed in brackets in article 1. Although it was quite evident that a breach of an international obligation would affect that obligation, it was not as obvious that such a breach would affect the force of that obligation. He would also be grateful if the Special Rapporteur would explain the meaning of the words "deprive that State of its rights", which were used in draft article 3 and, because they were very general, seemed to imply that the State might become a kind of outlaw. It might be preferable to say "some rights" rather than speak simply of "rights", which could be taken to signify all rights.

14. Mr. VEROSTA noted that the Special Rapporteur had not provided titles for the proposed draft articles. Admittedly, it would not be difficult to find a title for article 1, but he was at a loss to see how article 2 could be labelled, for as Sir Francis Vallat had pointed out, it did not contain a normative provision. Perhaps the Special Rapporteur could provide further clarifications concerning that article, and the title that it might be given, at a later stage in the Commission's work.

15. He agreed with Sir Francis Vallat that the rule stated in article 3 was too absolute and seemed to imply that a State which committed a wrongful act might be regarded as an outlaw. It was, however, hardly likely that a State which committed an "international crime" under article 19 of Part 1 of the draft[2] would be deprived of all its rights.

16. Mr. RIPHAGEN (Special Rapporteur), replying to the questions raised by Sir Francis Vallat and Mr. Verosta, said that it had been difficult to draft the actual wording of articles 1, 2 and 3, let alone find titles for them. Moreover, the articles should be clear enough without titles.

17. In preparing article 3, he had at one point used the words "all its rights under international law", but, as a lawyer, he had found those words too strong. Clearly, article 3 still required further discussion, and it might even have to be redrafted. The idea he had wanted to express was merely that under the rule of proportionality a breach did not extinguish the rights of the author State. In that connection, he did not fully understand how Sir Fancis Vallat's example of an act of aggression would apply as between the aggressor State and the State which was the victim of the aggression, because the aggressor State obviously had no right to self-defence vis-à-vis the victim State. The Commission might give further consideration to that example.

18. Sir Francis's suggestions concerning the wording of article 2 might be taken into account by the Drafting Committee. The article was meant to act as a kind of escape clause, in the sense that any self-contained regime established either by a treaty or by customary law could apply instead of the articles that the Commission was preparing. He had placed article 2 between articles 1 and 3 to make it clear that there was always a possibility of applying a different regime of State responsibility, for such régimes were many, as the Commission had had occasion to note in earlier discussions of the topic.

The meeting rose at 11.05 a.m.

[2] See 1666th meeting, footnote 3.