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Draft report

B. Consideration of the topic at the present session

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1. Introduction by the Special Rapporteur of the first part of his first report concerning some general issues relating to the draft articles (A/CN.4/490)

1. The Special Rapporteur paid tribute to previous Special Rapporteurs for their work on a difficult topic and expressed gratitude to the Commission for entrusting the second reading of the draft to him.

(a) Distinction between "primary" and "secondary" rules of State responsibility

2. The first part of his report contained a brief outline of the history of the Commission's work on State responsibility and discussed certain general issues. One of those issues concerned the distinction between primary and secondary rules of State responsibility. This distinction, which had formed the basis of the Commission's work on the topic since 1963, was essential to the completion of its task. The purpose of the secondary rules was to lay down the framework within which the primary rules would have effect so far as concerned situations of breach. It was a coherent distinction even though sometimes difficult to draw in the particular and even though some of the draft articles, such as article 27, might stray slightly beyond it. He suggested that the Commission's aim should continue to be that set out in 1963, namely, to lay down the general framework within which the primary substantive rules of international law would operate in the context of responsibility; it would be more useful to keep in mind this distinction when considering particular articles so as to avoid a lengthy general debate; there might be good reasons for including an article, notwithstanding the fact that it appeared to lay down, at least in part, a primary rule; and it would be possible to assess whether the Commission had been able to develop a coherent distinction only when it had considered the draft articles as a whole.

(b) Scope of the draft articles

3. A second general issue was whether the draft articles were at present sufficiently broad in scope. Noting the comments received from Governments, the Special Rapporteur suggested three matters that might require further elaboration: (1) reparation, particularly the payment of interest; (2) *erga omnes* obligations, which were presently dealt with in article 40, paragraph 3; and (3) responsibility arising from the joint action of States.

(c) Inclusion of detailed provisions on countermeasures and dispute settlement

4. On the other hand, the Special Rapporteur noted that some Governments had expressed concerns regarding the inclusion of detailed provisions on countermeasures in Part Two and on dispute settlement in Part Three, and that the Commission would consider these issues at a later stage in accordance with its timetable for the consideration of this topic.

(d) Relationship between the draft articles and other rules of international law

5. A third general issue concerned the relationship between the draft articles and other rules of international law. The Special Rapporteur noted that some Governments believed that the draft articles did not fully reflect their residual character and had therefore suggested that article 37 (*lex specialis*) be made into a general principle. That proposal seemed valid, leaving aside any issues of *jus cogens*. He suggested that the Commission discuss the draft articles on the assumption that, where other rules of international law, such as specific treaty regimes, provided their own framework for responsibility, that framework would ordinarily prevail.

(e) Eventual form of the draft articles

6. The last general issue concerned the eventual form of the draft articles. The Commission did not generally decide on its recommendation concerning this issue until it had completed consideration of the matter, although in certain contexts, such as reservations and succession in respect to nationality, the decision was made earlier. The draft articles on State responsibility had been drafted as a neutral set of articles that were not designed as a convention or a declaration. While the dispute settlement issues relating to countermeasures in Part Two could be considered independently of the question of the form of the draft articles, he recognized that the Commission would need to take a position on this question when considering the dispute settlement provisions in Part Three which could be included in a convention but not a declaration. The Special Rapporteur further recognized that, even if the Commission opted for a convention, the question of dispute settlement provisions could be left to a subsequent diplomatic conference. The preference of some Governments for a non-conventional form for the draft articles was clearly influenced by their concerns regarding the substance of the existing draft articles. The Commission could objectively approach the question of the form of the draft articles only after it had reviewed the substance of the draft articles in the light of subsequent developments, taken decisions on key questions and endeavoured to prepare a generally acceptable text. While noting the dual approach suggested by one Government entailing the adoption of a declaration of principles followed by a more detailed draft convention, which had been used in other fields of international law, the Special Rapporteur feared that this approach would not be acceptable to the Governments that were opposed to a convention. He recommended deferring consideration of this question at the current session, since it would be time-consuming and would detract from the debate on the substance of the draft articles.

2. Summary of the debate on general issues

7. The Commission held a brief debate on the general issues identified by the Special Rapporteur for two reasons: (1) the Commission should concentrate at the current session on the question of State crimes and the articles contained in Part One; and (2) for the most part, these issues could not be resolved at the present stage of work on the topic.

(a) Distinction between "primary" and "secondary" rules of State responsibility

8. The view was expressed that the distinction drawn between primary and secondary rules, despite all its imperfections, had considerably facilitated the Commission's task by freeing it from the burdensome legacy of doctrinal debate on such questions as the existence of damage or the moral element as a condition of responsibility. By deciding to leave aside the specific content of the "primary" rule violated by a wrongful act, the Commission had not intended to disregard the distinction between the various categories of primary rules nor the various consequences which their breach could entail.

(b) Scope of the draft articles

9. In terms of the scope of the draft articles, the view was expressed that it was necessary to achieve a balance between the first two parts of the draft by pruning the unduly detailed Part One, especially the "negative" articles on attribution and some aspects of Chapter III dealing with the distinctions between different primary rules, while filling the gaps in Part One concerning important issues, such as the joint action of States (solidary liability), and giving more weight to rather superficial aspects of Part Two, which ignored essential, technical questions, such as calculating interest, and was too general to answer the needs of States. It was suggested that, in considering Part One of the draft, a careful distinction should be drawn between those provisions which were and those which were not hallowed by State practice in order to avoid eliminating provisions on which some international judgement or arbitral award was already based. On the other hand, it was suggested that the Commission should debate the general scope of the draft articles, including the question of dispute settlement and the crucial question of crimes and, taking account of the views of those Governments that had forwarded their comments on the topic, submit various options and seek the reactions of Governments.

10. As regards the title of the draft articles, it was observed that "State responsibility under international law" would be more juridically precise and would emphasize the international law element of this responsibility.

(c) Inclusion of detailed provisions on countermeasures and dispute settlement

11. There was general agreement concerning the importance of considering these issues in detail at a later stage of work on the topic.

(d) Relationship between the draft articles and other rules of international law

12. Having regard to the International Court of Justice ruling in the *Gabćikovo Nagymaros* case, it was considered important to indicate clearly the relationship between the draft articles to be produced by the Commission and the provisions of the Vienna Convention on the Law of Treaties. The view was also expressed that the idea of extending to Part One of the draft articles the *lex specialis* provision in article 37 of Part Two was not as simple as it looked because the special regime would prevail only if it provided for a different rule.

(e) Eventual form of the draft articles

13. With respect to the eventual form of the draft, some members endorsed the Special Rapporteur's suggestion to begin the consideration of Part One at the current session and defer deciding on the recommended form of the draft until the next session. The view was expressed that the Commission should refrain from entering into a debate on the form of the draft articles, since this procedural debate might obscure substantive differences, the Commission could ill afford to lose valuable time that it needed to address the extensive topic of State responsibility, and it would in any case be impossible to settle that question in advance. Noting the consideration of similar issues in relation to the Vienna Convention on the Law of Treaties, it was considered premature for the Commission to decide on the final form of the draft articles at the current session, particularly in view of the limited and inconclusive guidance given by Governments.

14. However, other members were not entirely persuaded by these arguments. While recognizing that the Commission usually recommended the form its draft should take after concluding its consideration thereof, the view was expressed that the Commission should have reached that stage by now; there was no reason to believe that the Commission would be in a better position to consider this question in the next year or two; and the link between the form of the draft articles and the issues excluded from or insufficiently developed in the draft articles was a fundamental reason that militated in favour of the Commission's taking an immediate interest in the matter, rather than the dispute settlement provisions. It was suggested that a decision concerning the final form of the draft should not be postponed, since the form would govern both the structure and the content of the instrument and that, given the scepticism expressed by Governments about the likelihood of a convention on the topic being adopted in the near future, it might be expedient to adopt a compromise solution in the form of a code of State responsibility under international law that would be similar to a convention in its content, but would resemble a General Assembly declaration, in the extent to which it was binding.

15. The view was expressed that the elaboration of a treaty was not essential, since the positive effect of an instrument stemmed from its content rather than its form. In addition, the treaty form had disadvantages concerning the varying application of the law, depending on whether a State was a party thereto, the rigidity of treaty language and the possibility of States entering reservations. Although the preparation of a convention had seemed the most logical course of action when the Commission had begun its work on the topic, subsequent experience indicated that other options might be equally viable, given the delay in ratifying conventions which permitted certain interpretations *a contrario* to be drawn, and that consideration should therefore be given to elaborating a non-binding yet authoritative document to be adopted by the General Assembly.

16. There was some support for considering the successive elaboration of two instruments, possibly in the form of a declaration and then a convention, with attention being drawn to a similar undertaking in the field of outer space law. It was suggested that these instruments could take the form of a general declaration setting forth the essential principles of the law of State responsibility and a more detailed guide to State practice to meet the needs of States. It was also suggested, on the one hand, that the first document could set forth guiding principles in the area of State responsibility embracing the content of Part One of the draft articles and incorporating some ideas from Part Two that were already accepted in State practice, and that the second treaty or non-treaty instrument could be more elaborate, possibly containing elements of progressive development, and would seek to tackle all aspects of State responsibility.

17. On the other hand, a concern was expressed that this two-track approach would not ensure the adoption of the second binding instrument unless there was a clear linkage between the two instruments, and that it would cause still further delays.

3. Concluding remarks of the Special Rapporteur on the debate on general issues

18. Following the consideration of the first part of his report, the Special Rapporteur observed that there was no general definitions clause in the draft articles, though implicit definitions, including that of State responsibility itself, were craftily concealed in many places. Terminological questions were addressed in the fourth addendum to his report (A/CN.4/490/Add.4). Although the word "responsibility" was by now too deeply entrenched in the draft and in the doctrine to be changed, he agreed that it needed explanation, possibly in the commentary.

19. He had also been giving careful thought to the way in which the very rich material contained in the commentaries could be best displayed. One possible solution would be to prepare a two-tier commentary, consisting of a first, more general and explanatory part, and a second, more detailed part. The contrast between Parts One and Two that had correctly been pointed out was equally apparent in the commentaries.

20. The Commission should request the views of Governments on all questions throughout the exercise and take careful account of these views. In terms of the eventual form of the draft, the Commission could well decide that it should take the form of a declaration rather than of a convention, taking account of the limited and varied views so far received. However, while taking account of Governments' views, the Commission must at the same time reach its own conclusions, if possible by consensus, as to what course should be taken. That conclusion should be submitted as a provisional view to the Sixth Committee, and the Commission should listen very carefully to the reactions thereto.

21. While he was not opposed to the suggested approach of elaborating two successive instruments, possibly in the form of a declaration and a convention, the Special Rapporteur felt that this approach required further clarification. The approach would appear to require some differentiation between more and less essential draft articles; there was no need to make that differentiation at the current session. The Commission could ask the Sixth Committee about this option and would, of course, attend to any consensus that emerged, either from its own discussions or from those of the Sixth Committee. But the Commission did not need to reach that decision at the current session. Moreover, given the form of the draft articles and the detailed work done on them, it would be easier now to produce the detailed text first and to derive from it, if required, a more general statement of a few basic principles, than it would be to go back to basics and discuss principles at large. The latter course risked still further delays and might appear to involve setting to one side the work that had been done.

22. The Special Rapporteur hoped that, during the present session, the Commission would be able to consider the general principles in Part One (arts. 1-4), together with the detailed provisions concerning imputability (arts. 5-15), which also raised important questions of principle. The substance of the topic needed to be fleshed out at present, on the understanding that, for the next session, he would propose a procedure for addressing the form it would take.