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Draft report

Addendum

Chapter VII

State responsibility

Contents

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B. Consideration of the topic at the present session

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7. Introduction by the Special Rapporteur of the report concerning draft articles 1 to 4 of Part One (A/CN.4/490/Add.4)

1. The Special Rapporteur noted that the report addressed two issues relating to the draft articles on State responsibility: questions of terminology that arose in respect of the articles as a whole, and recommendations concerning the general principles set out in articles 1 to 4 of Part One, chapter I.

(a) General observations on the second reading process

2. The Commission was beginning the substantive discussion of the articles on State responsibility on second reading, which merited two observations. First, the Commission's practice was not to adopt a draft article definitively on second reading until all the draft articles had been adopted, since the draft articles had to be considered as a whole. Secondly, the Commission's consideration of the draft articles in Part One, particularly chapters I and II, was without prejudice to any conclusions that might be reached with respect to article 19. If a notion of international crimes of State in the proper sense was adopted, it would involve more extensive changes to Part One than were envisaged at the current stage.

(b) Questions of terminology

3. The Special Rapporteur noted that the draft articles contained no definitions clause. Instead the draft specified what the terms meant as required. The matter of a possible definitions clause could be revisited at a later stage.

4. He also noted that terminology used in the draft articles had been questioned and drew attention to the tables included in the report containing the equivalents, in all working languages, of several key terms.

5. Although the phrase "internationally wrongful act" had its direct equivalent in five of the working languages of the United Nations, the Russian language version was closer to "internationally unlawful act". The term "internationally wrongful act" had been well established in the general debate on responsibility and should be retained. The Russian version might require reconsideration.

6. He suggested replacing the phrase "State which has committed an internationally wrongful act" by "wrongdoing State" for two reasons. First, that phrase was much more succinct. Secondly, the use of the past tense implied that the wrongful act had been completed, but the draft articles clearly also applied to wrongful acts of a continuing character. He noted that the International Court of Justice had used the term "wrongdoing State" in the *Gabcikovo-Nagymaros Project* case.

7. The terms "injury" and "damage" required clarification as well. The draft articles referred to "injured State", not injury, and the term was defined in article 40 to mean a State which had suffered *injuria*, an injury in the broadest possible sense. Nowhere in the draft articles was there any indication that "injury" was a correlative to "damage": a State might be damaged without being injured, and vice versa. The word "damage" was used in the draft articles to refer to actual harm suffered, and a distinction was drawn between economically assessable damage and moral damage. That general concept of damage, covering both economically assessable and moral damage, ought to be distinguished from the term "injury",

meaning *injuria* or legal wrong as such. Other questions of terminology arising in Part Two could be considered in due course.

(c) General and savings clauses

8. The draft articles contained three savings clauses, articles 37, 38 and 39, but none of these were in Part One. It had been suggested that those savings clauses should apply generally to the draft articles, especially article 37. Applying article 39 to the draft articles as a whole might also alleviate some of the difficulties raised by that article. While agreeing in principle with these suggestions, the Special Rapporteur proposed reserving the question of general and savings clauses until those articles in Part Two were taken up.

(d) Title of Part One, chapter I

9. The Special Rapporteur indicated that the Drafting Committee might consider the suggestion to replace the title of Part One, "Origin of State responsibility", by "Basis of responsibility" since the word "origin" was somewhat unusual and had a broader connotation than merely an inquiry into issues of responsibility; it might be taken to refer to broader historical issues, as in the phrase "origins of the French revolution".

(e) Article 1

10. This provision was intended to cover all internationally wrongful conduct constituting a breach of an international obligation, whether arising from positive action or an omission or failure to act. There was no general requirement of fault or damage for a State to incur responsibility for an internationally wrongful act. Rather questions of damage or fault were referred to the primary rules. A general requirement of damage for international obligations would, in effect, convert all treaties into provisional undertakings which States could ignore if they felt that they would not thereby cause material damage to other States. That would put the onus of showing damage on innocent States, which was unjustified. Furthermore, violations in certain fields of international law, such as human rights law, usually did not entail damage to other States.

11. There were three important qualifications associated with the absence of a general requirement of fault or damage, which alleviated the legitimate concerns of States about vexatious claims, interference by non-interested States, etc. First, there were rules of international law where damage was an essential element of the obligation; it was simply that not all rules were of this type. Secondly, the question of less directly injured States or a multiplicity of injured States was a separate matter which arose in Part Two. Thirdly, damage was not irrelevant to responsibility, for example, in terms of the amount and form of reparation or the proportionality of countermeasures.

12. While the draft articles were intended to deal with the topic of responsibility of States, Part One was not limited to the responsibility of States to other States and left open the question of entities other than States relying on that responsibility. However, there was nothing in the doctrine or case law to suggest that the secondary rules governing the responsibility of States to other persons in international law would be based on essentially different conditions than in the case of responsibility to other States. However, the obligation of a State was always correlative to the rights of one or more other States or persons. This precluded the possibility of abstract responsibility, i.e. of responsibility in a vacuum. Although the scope of Part Two was limited to the rights of injured States, it was preferable for the purposes of Part One to state the notion of responsibility in "objective" terms, in conformity with the position long taken by the Commission.

13. He accordingly recommended that article 1 be adopted without change, subject to subsequent further consideration of its relation to the concept of "injured State" as defined in article 40 and applied in Part Two. He also noted that many of the observations concerning article 1 were also relevant to article 3.

(f) Article 2

14. This provision was a complete truism which had never been denied in any quarter. Its denial would amount to a denial of the principle of equality of States and of the whole system of international law. Moreover, the article did not deal directly with the topic of international responsibility but, rather, with the possibility of such responsibility. It was an example of the tendency towards overrefinement which was one of the problems with the draft articles. He recommended deleting this unnecessary provision.

(g) Article 3

15. Article 3 was important both for structural reasons and for what it did not say. In particular it omitted any other general condition for responsibility apart from those referred to in its subparagraphs (a) and (b). Although the English word "act" did not normally connote both act and omission, as did the French term "*fait*", article 3 made it perfectly clear that "act" was used in the sense of both act and omission. The proposal to include "legal acts", or, rather, "acts in law", in subparagraph (a), was unnecessary since the current wording already covered acts in law and this point could be clarified in the commentary. Thus article 3 could likewise be adopted without change.

(h) Article 4

16. The proposition contained in article 4 had been repeatedly affirmed in international law beginning with the *Alabama* arbitration. As the Permanent Court of International Justice had pointed out on many occasions, the characterization of an act as unlawful was an autonomous function of international law not contingent on characterization by national law and not affected by the characterization of the same act as lawful under national law. That did not mean that internal law was irrelevant to the characterization of conduct as unlawful; on the contrary, it might well be relevant in a variety of ways. Noting the absence of any criticism of the article in the comments of Governments, he recommended its adoption without change.

17. In conclusion, he proposed that the Commission should, after debate, refer articles 1, 2, 3 and 4 to the Drafting Committee with the recommendation that articles 1, 3 and 4 be adopted without change and that article 2 should be deleted. The Drafting Committee might also give consideration to changing the order of the articles, so that article 3 would precede article 1, and to changing the title of Part One.

8. Summary of the debate on draft articles 1 to 4 of Part One

(a) Questions of terminology

18. Some doubts were expressed concerning the proposal to use the expression "wrongdoing State" given its possible connotations. Likewise the term "responsible State" was also not entirely satisfactory. It was suggested that in French, the term "*État mis en cause*" might be used.

(b) Title of Part One, chapter I

19. Support was expressed for the proposal to amend the title. It was suggested that in the French version the term "basis" should be rendered as "*les fondements*".

(c) Article 1

20. There was support for maintaining article 1 without change.

21. A threefold objection to the concept of damage was expressed in support of the Special Rapporteur's proposal not to include a separate requirement of damage. First, a special damage requirement would *ex post facto* create confusion with regard to the primary rules which often did not contain such a requirement, especially in economic or material terms. Secondly, the more global concept of "*injuria*" and the injured State was preferable in the light of developments in international law since the Second World War, indicating that there could be liability without proof of special damage. Thirdly, an overemphasis on the concept of damage would prejudice the useful concept of moral damage, particularly in the field of human rights.

22. Referring to the requirement of "fault", it was remarked that in English, fault or "*culpa*" did not always include an element of intention (*dolus*) and therefore the expression "fault or intention" could be useful in the commentary.

23. It was also observed that if the concept of the criminal responsibility of the State were to be maintained, the question of fault as a general requirement would have to be discussed again and the question of culpable intent (*mens rea*) would have to be dealt with in the context of State responsibility.

24. The Special Rapporteur noted that article 1 did not expressly mention the concept of fault but, paradoxically, that concept appeared to be present in the term used in the French text. The problem did not arise in English because the term "wrongful" did not necessarily have the pejorative connotation of "fault". The Drafting Committee might consider the possibility of using the term "responsible State", which would offer the twin advantages of avoiding any negative connotation and of being concise.

(d) Article 2

25. There were different views concerning the proposed deletion of this article. It was suggested that the commentary should explain its deletion to avoid any misunderstanding.

26. The Special Rapporteur suggested that the idea underlying this provision, the important idea of the equality of States before the law, could be reflected in a preamble to the draft articles, as well as in the commentary.

(e) Article 3

27. The view was expressed that not only conduct consisting of an action or an omission must be attributable to the State under international law, as provided for in subparagraph (a), but the breach of the international obligation referred to in subparagraph (b) must also be assessed in the light of international law, and that was not expressly stated. It was therefore suggested that the article should read:

"28. There is an internationally wrongful act of a State under international law when:

(a) Conduct consisting of an action or omission is attributable to the State;

(b) That conduct constitutes a breach of an international obligation of the State."

(f) Article 4

29. It was remarked that the second sentence did not indicate clearly that internal law must be in conformity with the provisions of international law and that this sentence should be

replaced by more neutral wording, such as: “Internal law cannot, in this regard, take precedence over international law.”

30. It was agreed to refer draft articles 1 to 4 to the Drafting Committee, which should take into account the various comments made.