United Nations A/CN.4/492

General Assembly

Distr.: General
10 February 1999
English
Original: English/French

International Law Commission
Fifty-first session
Geneva, 3 May–23 July 1999

State responsibility

Comments and observations received from Governments

Contents

99-03520 (E) 030399

I. Introduction

In addition to the comments and observations received from Governments on the draft articles on State responsibility adopted on first reading by the Commission in 1996, which are reproduced in documents A/CN.4/488 and Add.1 to 3, the following replies have been received as of 10 February 1999 (on the dates indicated): Greece (17 September 1998) and Japan (7 September 1998). These replies are reproduced in section II below. Additional replies received will be reproduced in addenda to the present report.

II. Comments and observations received from Governments

General remarks

Greece

The Greek Government wishes first of all to commend all the Special Rapporteurs of the Commission who have worked on the topic of State responsibility, which is both difficult and of fundamental importance for international law as a whole. It commends Professor Ago in particular, who has given impressive impetus to study of the issue. It wishes the new Rapporteur, Mr. Crawford, similar success.

The Greek Government is in favour of giving this draft, which has been adopted on first reading, top priority, so that the work carried out over a number of decades can be completed as soon as possible, before the Commission's mandate expires.

As to the form the set of articles should take, the Greek Government has always been in favour of a convention, essentially because of the exceptional importance of the articles and because of the impact that a treaty has on practice. A convention, even if ratified by only a small number of States, has a far greater impact and influence than just a declaration or a set of guiding principles.

As they stand, the draft articles already represent not only a valuable source of inspiration with respect to State responsibility, but also an authoritative reference text in both international and national practice; moreover, the international community is already well acquainted with some key provisions of the articles, particularly those concerning the concept of an international crime, and these key provisions even form part of general international law. The articles on State responsibility must be able to play both a preventive role and a positive role, promoting international justice by protecting the weakest and serving the interests of peace.

Japan

More than four decades have passed since the International Law Commission decided to begin a study of State responsibility. And now, the draft articles on State responsibility have been finalized owing greatly to the dedicated efforts of four Special Rapporteurs and intensive discussions undertaken by members of the Commission. On this occasion, the Government of Japan would like to express its deep appreciation to those involved in preparing the draft articles.

The Commission is expected, however, to make further efforts to complete the exercise of codifying and developing international law in this important area, because a number of problems remain unresolved. First of all, the Government of Japan would like to offer some

general remarks and then some specific comments on individual sections. It should like to reserve the right to make further comments at a later stage.

It is Japan's fundamental view that the primary objective of any effort to codify a multilateral treaty on State responsibility is to provide an effective legal framework for the resolution of international disputes on that subject. The draft articles consequently must reflect actual State practice and international jurisprudence. Those with provisions that are unrealistic or ambitious will be useless in solving actual disputes. Worse, unrealistic provisions are likely to embroil States participating in diplomatic conferences in prolonged discussions, with the result that the ratification of a treaty is likely to become more difficult.

The Government of Japan is therefore obliged to take a critical stance on certain provisions in the draft articles, in particular, those related to international crimes of States, "injured States", countermeasures and the compulsory dispute settlement mechanism.

Part One. Origin of international responsibility

Chapter I. General principles

Article 1. Responsibility of a State for its internationally wrongful acts

Japan

See article 40.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Greece

Article 2 is superfluous and could be deleted.

Chapter II. The "Act of the State" under international law

Article 5. Attribution to the State of the conduct of its organs

Greece

The words "individual or collective" could be inserted before the words "State organ", and the words "having that status under the internal law of that State" could be deleted, since they are superfluous and might be hard to apply in practice.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority

Greece

An explicit reference should also be made to the case of States members of a federal State.

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

Greece

An explicit reference should also be made to the case of States members of a federal State.

Article 11. Conduct of persons not acting on behalf of the State

Greece

Article 11 should be more closely linked to article 8.

Article 12. Conduct of organs of another State

Greece

Article 12 should be more closely linked to article 9.

Article 13. Conduct of organs of an international organization

Greece

Article 13 should be more closely linked to article 9.

Chapter III. Breach of an international obligation

Japan

In some provisions of the draft articles, excessively abstract concepts are laid down in unclear language. Perhaps the most obvious example of this is the categorization of international obligations in Part One, chapter III.

Articles 20, 21 and 23 classify international obligations respectively as international obligations "requiring the adoption of a particular course of conduct", international obligations "requiring the achievement of a specified result" and international obligations "to prevent a given event". The moment and duration of international obligations are differentiated by articles 24 to 26. Article 25, while distinguishing between "composite acts" and "complex acts" of a State, specifies the moment at which the breach of an international obligation can be said to occur.

In view of the fact that the moment and duration of breaches of international obligations are closely related to the content and extent of reparation, we understand the importance attached to these classifications. But the categorization developed in the draft articles tends to be too abstract. Thus, we have doubts on its usefulness in resolving actual disputes. In fact, it is likely to be very difficult to make clear-cut distinctions between obligations requiring the adoption of a particular course of conduct and obligations requiring the achievement of a specified result, breaches extending in time and not extending in time, and composite acts

and complex acts. Rather, these distinctions, if actually applied, would be counter-productive to any effort to settle a dispute.

Article 17. Irrelevance of the origin of the international obligation breached

Greece

Article 17, paragraph 2, would appear to be superfluous.

Article 18. Requirement that the international obligation be in force for the State

Greece

The drafting of paragraph 2 is in need of improvement, because the word "subsequently" gives the false impression that a *jus cogens* rule can have a retroactive effect.

Paragraphs 3, 4 and 5 should be worded more simply and more clearly.

Article 19. International crimes and international delicts

Greece

Article 19, which sets forth the concept of an international crime — without, however, criminalizing or penalizing the international responsibility of States — is one of the most important and essential articles in the draft. The Greek Government has consistently supported this concept in the Sixth Committee of the General Assembly; the concept of an international crime, in turn — with the establishment of the principle of collective security by Chapter VII of the Charter of the United Nations and the peremptory norms of general international law laid down in the Vienna Convention on the Law of Treaties — makes a considerable contribution to the establishment and strengthening of an international public order that the world sorely needs.

See also article 53.

Japan

The draft articles seem to imply that the function of international law in regard to State responsibility now involves restoring and maintaining international legal order. Thus, the draft articles categorize the types of internationally wrongful acts that can affect the "fundamental interests of the international community" as an "international crime" and, in order to restore international legal order, provide certain measures that can be applied especially to an international crime, in addition to the normal forms of reparation.

It cannot be denied that international society has evolved from a group of individual independent States to a community with shared interests and common concerns, and that certain legal forms are necessary to protect the interests of the community as a whole. However, even if the provisions in the draft articles relating to international crimes can be thought to embody such an idea, they entail the following problems, and thus need to be fundamentally rethought.

Article 19, paragraph 3, lists four categories of international crimes, namely: (a) a serious breach of an international obligation to maintain international peace and security; (b) a serious breach of an international obligation to safeguard the right of self-determination of peoples; (c) a serious breach of an international obligation to safeguard the human being, such as slavery, genocide and apartheid; and (d) a serious breach of an international obligation to safeguard and preserve the human environment, such as massive pollution

If certain types of internationally wrongful acts are treated as international crimes of States and are put into a legal framework that is stricter than that applied to ordinary types of internationally wrongful acts, it is obviously necessary to clearly define them. But these four categories of "crime" seem nothing more than examples; and their wording and content are still vague, particularly categories (c) and (d). Furthermore, we are not certain whether it is appropriate to treat "massive environmental pollution" in the same legal manner as other international crimes that fall into category (d).

If certain categories of internationally wrongful acts are regarded as international crimes, then the legal consequences attached to them must be differentiated. In the case of international crimes, the draft articles treat all States other than the wrongdoing State as "injured States", each of which is entitled to seek full reparation and take countermeasures. In addition, such "injured States" are released from certain restrictions which would otherwise be imposed upon their efforts to obtain restitution in kind and compensation. On the other hand, article 53 imposes special duties on "every other State" than that which has committed an international crime.

In cases of international crimes, an "injured State" suffering no tangible damage is entitled to seek reparation more freely than in cases of international delicts. Specifically, it is entitled to seek compensation out of proportion to the benefit it would gain by obtaining restitution in kind, and to endanger the political independence or economic stability and impair the dignity of the wrongdoing State in the course of obtaining restitution in kind and satisfaction. This sort of special treatment would not contribute to restoring or maintaining the international legal order, but would rather undermine legal stability.

Since the cold war era, it has become possible for the United Nations to play a more active role in resolving international disputes of grave concern to the international community. What the draft articles are supposed to accomplish through the provisions on international crimes may be achieved by means of collective security measures carried out by the United Nations Security Council.

Consequently, Japan believes that it is not necessary to incorporate the idea of international crimes into the draft articles on State responsibility. Unless the problems pointed out above are solved in an appropriate manner, the regime designed to deal with international crimes will remain unacceptable.

Article 20. Breach of an international obligation requiring the adoption of a particular course of conduct

Japan

See the general comments under Part One, chapter III.

Article 21. Breach of an international obligation requiring the achievement of a specified result

Japan

See the general comments under Part One, chapter III.

Article 23. Breach of an international obligation to prevent a given event

Japan

See the general comments under Part One, chapter III.

Article 24. Moment and duration of the breach of an international obligation by an act of the State not extending in time

Greece

Article 24 should be worded more simply and more clearly.

Japan

See the general comments under Part One, chapter III.

Article 25. Moment and duration of the breach of an international obligation by an act of the State extending in time

Greece

Article 25 should be worded more simply and more clearly.

Japan

See the general comments under Part One, chapter III.

Article 26. Moment and duration of the breach of an international obligation to prevent a given event

Greece

Article 26 should be worded more simply and more clearly.

Japan

See the general comments under Part One, chapter III.

Chapter IV. Implication of a State in the internationally wrongful act of another State

Article 27. Aid or assistance by a State to another State for the commission of an internationally wrongful act

Japan

The Commission's commentary to article 27 identifies those elements that determine whether aid or assistance rendered by one State to another constitutes an internationally wrongful act, namely: (a) it must have the effect of making it materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act; and (b) it must have been rendered with intent to facilitate the commission of that internationally wrongful act.

Although Japan basically agrees with the Commission on the validity of these elements, it suggests that they should be clearly defined in the draft articles in order to prevent unnecessary disputes over their interpretation.

With regard to (b) above, further consideration may be necessary to formulate the means of determining when one State has the intention of helping another commit an internationally wrongful act.

Chapter V. Circumstances precluding wrongfulness

Japan

It is appropriate and necessary to provide for circumstances precluding wrongfulness in the draft articles on State responsibility. However, in order to decide the content and extent of these circumstances, customary international law and State practice should be well reflected. Unless the content and extent of these circumstances are clearly defined, the wrongdoing States may be prone to abuse the provisions. From this point of view, the circumstances precluding wrongfulness must be provided not in an illustrative list but in an exhaustive one.

Among the circumstances precluding wrongfulness listed in chapter V, such circumstances as *force majeure* (article 31), distress (article 32) or state of necessity (article 33) can be treated differently from the others. Could one not conclude that with these circumstances in place, wrongfulness of conduct of a wrongdoing State would not exist in the first place, and thus these circumstances would not preclude wrongfulness but render it non-existent? This may appear to be an important point in practice, and therefore we suggest it be further studied.

Article 30. Countermeasures in respect of an internationally wrongful act

Japan

The countermeasures provided in article 30, as with those in Part Two, chapter III, must be understood as individual measures taken by an individual State whose interests have been damaged directly by the internationally wrongful act of another State, and thus do not include

collective measures or sanctions that international organizations such as the United Nations would take.

Although not specifically mentioned in article 30, it is our understanding that countermeasures provided for in that article are also subject to the conditions specified in Part Two, chapter III.

Article 32. Distress

Japan

Distress as a circumstance precluding wrongfulness under article 32 may not necessarily be limited to a situation where the life of person is in grave danger; it can also be invoked where important interests of a person (such as significant financial and economic interests) are jeopardized, so long as a reasonable balance is maintained between such interests and the extent to which an international obligation is breached.

Article 35. Reservation as to compensation for damage

Japan

As is provided in article 35, we understand that even if the wrongfulness of conduct by a State that would otherwise constitute an internationally wrongful act and entail State responsibility is precluded by certain circumstances, the question of "compensation" for that conduct may remain unresolved.

We detect some confusion in the language used here inasmuch as article 44 cites "compensation" as one of the means to make full reparation for State responsibility, which by definition presupposes the existence of an internationally "wrongful act". Thus, in order to preserve the integrity of the draft articles concerning the basic concept of State responsibility and to avoid conceptual confusion, we suggest replacing the word "compensation" in article 35 with another term.

Part Two. Content, forms and degrees of international responsibility

Chapter I. General principles

Article 37. *Lex specialis*

Japan

Article 37 of Part Two states that the provisions of this Part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question. This statement is in itself appropriate. However, the precedence given to the *lex specialis* rule certainly cannot be unique to Part Two, but may also be relevant to Part Three or even Part One. Thus we suggest that this article be placed in Part One, chapter I.

Article 38. Customary international law

Japan

What is meant by the phrase "the rules of international law" as provided in article 38 is not made sufficiently clear. If this refers to the relationship between State responsibility in the event that international law is breached and other legal consequences in the field of the law of treaties, this should be clearly stated. However, if the intention of this article is to set out in a more general manner the relationship between the draft articles and customary international law, it seems odd because the draft articles are the product of efforts to codify what has been regarded as customary rules of international law on State responsibility. Either way, we suggest that the Commission specify the rules of customary international law envisaged in this article.

Article 39. Relationship to the Charter of the United Nations

Japan

It is evident that under such provisions as Article 103 of the Charter of the United Nations and article 39 of the draft articles, the Charter of the United Nations has precedence over the draft articles. As article 39 is related to the draft articles as a whole, it would seem better to place it in Part One, chapter I, rather than in Part Two.

Article 40. Meaning of injured State

Japan

The fundamental definition of State responsibility is provided in article 1 of the draft articles: "Every internationally wrongful act of a State entails the international responsibility of that State". That is to say, damage, whether tangible or not, is not required for there to be international responsibility. With a view to further ensuring the rule of law in international society, we basically support his formula.

On the other hand, we believe that careful consideration should be given to whether States whose interests are not directly damaged should always be entitled to seek full reparation from the wrongdoing State or, as long as certain conditions are met, to take countermeasures against the wrongdoing State. Allowing every contracting party to a multilateral treaty whose "legal" interests are infringed to seek "full reparation" against a wrongdoing State may, more often than not, create more disputes and rather hamper a peaceful settlement of the original dispute. It would therefore seem more appropriate that an injured State suffering no tangible damage to its interests is, in principle, entitled only to request the wrongdoing State to cease its internationally wrongful act as provided in article 41.

Regarding the definition of "injured State" contained in article 40, clarification is needed with respect to the phrase "the right has been created or is established for the protection of human rights and fundamental freedoms" in paragraph 2 (e) (iii), and the phrase "for the protection of the collective interests of the State parties thereto" in paragraph 2 (f).

Chapter II. Rights of the injured State and obligations of the State which has committed an internationally wrongful act

Article 42. Reparation

Japan

What is intended in article 42, paragraph 2, and article 43, subparagraph (d), is not defined clearly. The provisions contained therein are very likely to be used as a pretext by the wrongdoing State to refuse full reparation.

Article 42, paragraph 3 should clearly provide that a contribution to damage through an action of the injured State or any of its nationals does not automatically release the wrongdoing State from its obligation to make full reparation.

Article 43. Restitution in kind

Japan

As regards article 43, subparagraph (d), though we agree with the Commission on the need to place such a provision in the draft articles, we are concerned that the words "seriously jeopardize ... the economic stability" might serve as an easy justification for the wrongdoing State to insist on rejecting requests for compensation or even restitution in kind. Thus, this part must be redrafted to define what it actually intends and some wording must be added to pre-empt the abuse of this provision; otherwise this part should be deleted.

See also article 42.

Article 44. Compensation

Japan

In article 44, paragraph 1, the phrase "if and to the extent that the damage is not made good by restitution in kind" may be interpreted, in the first place, as requiring the injured State to seek restitution in kind whatever the circumstances may be, and entitling it to seek compensation only when restitution in kind proved to be impossible in making full reparation. According to this interpretation, the wrongdoing State would be able to reject the request made by the injured State for (financial) compensation with the excuse that restitution in kind had not been proved completely impossible. However, in the light of the principle of full reparation, the relationship between restitution in kind and compensation should not be interpreted in this way, since it would severely restrict the freedom of the injured State to choose whatever form of full reparation it deems appropriate.

Article 45. Satisfaction

Japan

Article 45, paragraph 1, provides that the injured State is entitled to obtain satisfaction, for damage, "in particular moral damage". Japan is of the view that the phrase "in particular moral damage" should be deleted, because the term "moral damage", which is not defined in this article, may lead to disputes concerning its interpretation. Also, the purpose of the words "in particular" is unclear.

In article 45, paragraph 2 (c), the phrase “damages reflecting the gravity of the infringement” can be interpreted as virtually allowing for punitive reparation. However, punitive reparation is not well established in State practice. We therefore suggest that this provision be deleted.

Chapter III. Countermeasures

Greece

The Greek Government has some doubts about draft articles 47 to 50, concerning countermeasures, as currently worded. These articles would appear to be more appropriate for breaches characterized as delicts than for breaches that constitute international crimes. They are much in need of improvement, so as to reflect the distinction just mentioned.

Japan

We highly appreciate the fact that the Commission has provided for the regulation of countermeasures in the draft articles on State responsibility.

What is most important in this area is to maintain a reasonable balance between the wrongdoing States and the injured States. From this point of view, articles 48 to 50 are, generally speaking, well drafted in that they would prevent abuse of countermeasures by imposing not only procedural but also substantive restrictions.

Article 48. Conditions relating to resort to countermeasures

Japan

Article 48, paragraph 1, provides that, prior to taking countermeasures, an injured State must fulfil its obligation to negotiate with the wrongdoing State provided for in article 54 and is not entitled to take countermeasures unless it does so.

Presumably, the injured State needs to take countermeasures when it urges the wrongdoing State to restore as quickly as possible, the situation in which its interests are being damaged to what it was before the wrongful act was committed, and there is not enough time to negotiate. In such a situation, the obligation to negotiate prior to taking countermeasures would work in favour of the wrongdoing State. This obligation should not be interpreted as meaning that negotiations must proceed substantially prior to taking countermeasures, but rather that the injured State is permitted to take countermeasures if the wrongdoing State has not made any specific response to its proposal within a reasonable period of time.

If the obligation to negotiate prior to taking countermeasures is interpreted in the latter manner, with this interpretation to be elaborated in the draft articles, the obligation to negotiate per se would not work in favour of the wrongdoing State.

In addition, in order to meet its urgent needs, the injured State may invoke interim measures of protection without fulfilling the obligation to negotiate.

However, since interim measures of protection are not specifically defined in the draft articles, disputes may arise over what constitutes such a measure. The injured State would naturally favour a broad interpretation and, thus, the distinction between a countermeasure and an interim measure of protection might be blurred. As we are apprehensive about the abuse of interim measures of protection that may actually serve as countermeasures, we

believe it is necessary to define interim measures of protection as clearly as possible in the draft articles.

Article 48, paragraph 3, provides that countermeasures must be suspended if and when a "dispute is submitted to a tribunal which has the authority to issue orders binding on the parties" and "the dispute settlement procedure referred to in paragraph 2 is being implemented in good faith".

We support this provision because it can contribute to the peaceful settlement of international disputes. It must be noted, however, that the wording "the dispute settlement procedure ... is being implemented in good faith" is rather vague and that if the procedure mentioned is a judicial procedure, this should be clearly stated.

See also articles 30 and 58.

Article 50. Prohibited countermeasures

Japan

The expression "extreme economic and political coercion" in subparagraph (b) is unclear. We suggest deleting it, for fear that it would prohibit virtually all countermeasures.

The same objection can be raised with respect to the expression "basic human rights" in subparagraph (d). Unless the concept is more clearly defined, it too should be deleted.

Chapter IV. International crimes

Japan

See article 19.

Article 53. Obligations for all States

Greece

The obligations of solidarity laid down in draft article 53, although not forcefully worded, nonetheless constitute a basic requirement of international moral standards and have a rightful place in contemporary law.

Part Three. Settlement of disputes

Greece

The Greek Government is in favour of including in the draft articles special provisions on the settlement of disputes arising from the interpretation or implementation of the articles; the provisions in question could be more progressive and go further than current draft articles 54 to 60.

Japan

The procedures for the settlement of disputes listed in the draft articles are basically acceptable, as they would help to do so peacefully. However, they seem rather too detailed, and we are not entirely certain as to their effectiveness.

The "disputes" to which reference is made in article 54 are those "regarding the interpretation or application of the present articles". Thus, it is our understanding that the dispute settlement procedures in Part Three are not necessarily to be applied to disputes on State responsibility in general, nor to disputes related to those international agreements with their own built-in dispute settlement procedures.

The conciliation procedures in Part Three are regarded as compulsory, as mentioned in the commentary to article 56. This would seem difficult, however, for many States to accept, and some may refuse to become contracting parties for this reason alone.

We suggest, therefore, that the Commission give further consideration to the question of whether the provisions that make up Part Three should be made an optional protocol. (Should the draft articles eventually be made a set of guidelines not legally binding, it would not be necessary to discuss the nature of dispute settlement procedures separately.)

Article 56. Conciliation

Japan

See the general comments under Part Three.

Article 58. Arbitration

Japan

While article 58, paragraph 2, provides that the State against which countermeasures are taken is entitled at any time unilaterally to submit the dispute in question to an arbitral tribunal, article 48, paragraph 3, provides that the countermeasures must be suspended when the "dispute is submitted to a tribunal which has the authority to issue orders binding on the parties". Under these provisions, we fear that the invocation of countermeasures would be severely restricted. Article 58, paragraph 2, favours the wrongdoing State unduly and should be reconsidered, in particular, for its effect on countermeasures.

Article 60. Validity of an arbitral award

Japan

Judging from the language of article 60, if one of the parties to a dispute wishes to discuss the validity of an arbitral award further, it can submit the dispute in question to the International Court of Justice. This provision is problematic because it can negate an eventual arbitral award and, in general, it treats the International Court of Justice as an appellate court. It is our view that this article needs serious reconsideration.