Document:-
A/CN.4/SR.1539

Summary record of the 1539th meeting

Topic:
Other topics

Extract from the Yearbook of the International Law Commission:-
1979, vol. I

36. Sir Francis VALLAT said that he experienced some doubts with regard to draft article 29, but, as in the case of article 28, he would probably gain a clearer picture of the matter as the discussion proceeded further. In his reading of the report under discussion (A/CN.4/318 and Add.1–3, paras. 56–77), the very title of chapter V had given him the impression that the Commission was now moving into a different area. Hitherto, it had been discussing responsibility for an internationally wrongful act and had operated on the assumption that a particular act was internationally wrongful. Suddenly, the Commission was considering something that was juridically altogether different. Again, the subject-matter now related to exceptions, namely circumstances precluding wrongfulness, yet the Commission had not considered the circumstances giving rise to wrongfulness and had not examined the issue of right and wrong in terms of law. Fortunately, he had found that paragraph 56 of the report referred to the principle *volenti non fit injuria,* the counterpart of which in common law systems was *damnum sine injuria.* However, it had then proved disconcerting to find that the report dealt not with the result of the act but with the nature of the act—with its wrongfulness. The Commission had in a sense taken a position on the question whether consent would preclude wrongfulness, but he still had lingering doubts whether it should proceed on the basis of that kind of fundamental classification.

37. In common law systems, the principle *damnum sine injuria* was expressed without reference to the wrongfulness of the act. For example, a person who suffered damage as a result of an act by another person had no right to compensation for that damage if he had consented to the commission of the act. For his own part, he wondered whether it was not possible to adopt a similar approach in international law. So far, the Commission had studied the matter on the basis of what might be called a civil law analysis and of the wrongfulness of the act; something that he feared would create great difficulties at a later stage for common law countries. If it were possible to find a less theoretical approach to the problem, from the point of view of drafting, it would be much easier for such countries to accept the set of articles.

38. The difficulty might be illustrated by the exception concerning *jus cogens.* He entirely agreed with the principle that a State was not entitled to commit a breach of a peremptory norm of international law. However, it was also necessary to consider the content of the norm. One of the obvious examples of a breach of *jus cogens* was the unlawful use of force, a concept that was embodied in Article 2, paragraph 4, of the Charter of the United Nations. If armed forces entered the territory of another State, characterization of that act as a breach of a peremptory norm must inevitably depend on the circumstances, which would include the question of consent by the State concerned. But the exception enunciated in article 29 specified that the act would remain wrongful if the obligation in question arose out of a peremptory rule of general international law. He very much doubted that the effect of the consent of the State could, in those circumstances, be regarded as irrelevant. Admittedly, there might be cases in which the consent of the State was indeed irrelevant. It was only common sense that a State could not consent to the torture of its nationals by another State and thereby make such torture lawful. Nevertheless, in many instances, consent—or the absence of consent—was an integral part of the nature of the act and of the obligation itself. Naturally, a State could not normally claim compensation for damage when it had given consent to commission of the act, but it was important to consider the exception in article 29 very carefully and to examine the way in which the concept of consent was expressed.

39. Mr. AGO, replying to the comments made by Sir Francis Vallat, said that all the preceding draft articles had been intended precisely to determine the conditions under which there was an internationally wrongful act. Under article 3, there must exist conduct attributable to a State under international law and that conduct must constitute a breach of an international obligation of that State. Chapters II and III of the draft specified respectively when there was an international act of a State and when there was a breach of an international obligation. What remained to be determined was whether, in cases where all the conditions for the occurrence of an internationally wrongful act were fulfilled, the act was possibly not wrongful on account of the following special circumstance: where there was an international obligation and a State was entitled to expect observance of that obligation, but where that State gave its agreement, with the result that a special rule came into being for that specific case and the obligation in question did not apply in that case. Such an approach seemed much more general than the view that, in the event of consent, there was no right to reparation for the injury suffered, and hence no wrongful act.

The meeting rose at 12.55 p.m.

1539th MEETING

Friday, 25 May 1979, at 11.40 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Organization of work (*continued*) *

1. The CHAIRMAN said that the Enlarged Bureau had suggested the following approximate dates for consideration of the items of the agenda:

* Resumed from the 1531st meeting.

1. State responsibility (item 2)	16 May – 5 June 13–19 July	(4 weeks)
2. Filling of casual vacancies in the Commission (article 11 of the Statute) (item 1)	29 May	
3. Question of treaties concluded between States and international organizations or between two or more international organizations (item 4)	6–12 June 27 June – 10 July	(3 weeks)
4. Succession of States in respect of matters other than treaties (item 3)	13–26 June	(2 weeks)
5. Review of the multilateral treaty-making process (General Assembly resolution 32/48, para. 2) (item 6)	11–12 July	
6. The law of the non-navigational uses of international watercourses (item 5)	20–26 July	(1 week)
7. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (General Assembly resolution 33/139, part 1, para. 5; General Assembly resolution 33/140, para. 5) (item 7)	27 July	
8. Report of the Commission and related matters	30 July – 3 August	(1 week)

2. If there were no objections, he would take it that the Commission agreed to adopt the above programme of work.

It was so decided.

The meeting rose at 11.45 a.m.

1540th MEETING

Monday, 28 May 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*) * (A/CN.4/318 and Add.1–3, A/CN.4/L.291)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY MR. AGO (*continued*)

ARTICLE 29 (Consent of the injured State) [1] (*continued*)

1. Mr. TSURUOKA considered that article 29 truly dealt with the case of the preclusion of the wrongfulness of the act and not with the case of the injured State's waiver of its right to invoke the responsibility of the State committing the wrongful act. For that reason he considered that chapter V of the draft articles was the right context for article 29.

2. As Mr. Ago had said in his report, what was at issue in practice was not the principle that consent was a bar to the charge of wrongfulness; what was at issue was the actual existence of the consent and the validity of the way in which it was expressed. Accordingly, he considered that it would be advisable if the article itself stipulated that the consent must be given validly and expressly.

3. On the other hand, he considered it preferable that the article should not specify that the consent must precede or accompany the conduct, as Mr. Ago had said in paragraph 72 of his report (A/CN.4/318 and Add.1-3), for a provision on those lines might well be inconsistent with the rule laid down in article 25, paragraph 1. [2] It would be preferable to look to interpretation to settle that question in practice.

4. For those reasons, he proposed a redraft of article 29 (A/CN.4/L.291):

> "If it is established that the valid and explicit consent has been given by a State to an act of another State which would otherwise be a breach of an international obligation of the latter State towards the former State, such consent precludes the wrongfulness of the act in question. Such an effect shall not, however, ensue if the obligation concerned arises out of a peremptory norm of general international law."

5. Mr. FRANCIS said that under draft article 29 an act that would have been wrongful without a State's consent, could be transformed into a lawful act by virtue of that consent. The question of consent, particularly as it related to the presence of the troops of one State on the territory of another, continued to be a source of misunderstanding; most of the difficulties related to the need for consent to be genuine and validly expressed. However, there had never been any dispute about the general principle that, within certain limitations, a State could sanction a wrong done to it, a principle which, moreover, also had its application in other areas of international relations. It was therefore right and proper that the draft should reflect contemporary practice in the matter.

6. He noted that Mr. Ago, drawing widely on State practice and doctrine, had laid emphasis on the transformation of a wrongful act into a lawful act rather than on the waiver of a claim based on international responsibility. His own approach, initially, had been to test the validity of the terms of draft article 29 by reference to articles 1, 16 and 18. Article 18 provided that, for the act in question to entail the international

* Resumed from the 1538th meeting.

[1] For text, see 1537th meeting, para. 25.

[2] See 1532nd meeting, foot-note 2.