Document:-
A/CN.4/SR.1773

Summary record of the 1773rd meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

and the fact that France could no longer operate the flights between its territory, Canada and Los Angeles which provided a connection with territories for which it assumed responsibility in the Pacific. Might not the United States have claimed that what was of concern to it was performance of the treaty and that it did not wish the treaty to be truncated by the same volume of obligations on either side? In order to compel France to perform its obligations, the United States was therefore applying coercion that was more extensive than the breach committed.

16. Such indirect economic coercion must be distinguished from physical coercion, which involved the use of armed force. In his opinion, it would be worth considering whether coercion of that kind could be allowed in modern international law. In the case to which he had referred, the United States might well have considered that, apart from compensation and punitive sanctions, which might not be covered by the traditional concept of responsibility, international law did not exclude recourse to coercion. It was open to question, however, whether coercion should be linked with responsibility or whether it was a specific problem of public international law. Apart from the absolute coercion provided for in the Charter of the United Nations, namely armed force, for which there were special rules, did coercion really come under the topic of State responsibility? Although he agreed with Mr. Calero Rodrigues that the Commission should make as much progress as possible in its study of the topic, he thought it would be in the Commission's interest not to delay taking a position on the question of coercion, which was not a matter of penalties or of reparation *stricto sensu*. The position taken might affect the Special Rapporteur's task.

17. The CHAIRMAN suggested that the meeting be adjourned to allow the Drafting Committee to meet and make further progress in its work.

It was so agreed.

The meeting rose at 10.50 a.m.

1773rd MEETING

Thursday, 2 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/354 and Add.1 and 2,[1] A/CN.4/362,[2] A/CN.4/366 and Add.1,[3] ILC (XXXV)/Conf. Room Doc.5)

[Agenda item 1]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*[4] (continued)**

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FLITAN said that the Special Rapporteur had produced a fourth report (A/CN.4/366 and Add.1) of high calibre that provided much food for thought. Chapter I described succinctly the status of the work on the topic, while chapter II gave an outline of the possible contents of parts 2 and 3 of the draft articles. However, the Special Rapporteur should perhaps have discussed the draft articles proposed for part 2 in his oral introduction (1771st meeting), rather than confine himself to stating, in paragraph 31 of the report, that they were to be referred to the Drafting Committee. For his own part, he thought that the Commission itself should consider them first.

2. In paragraph 113, the Special Rapporteur compared the situation regarding responsibility under internal law and under international law, and noted that the Commission had been obliged to treat international liability for injurious consequences arising out of acts not prohibited by international law separately from the topic of State responsibility. Under internal law, an injurious act gave rise not only to the author's objective responsibility but also to his responsibility based on fault. In the present case, in order to gain a proper idea of the draft articles on State responsibility as a whole, it had to be realized that the draft produced by the Commission on that topic as such would in effect be complemented by another part based on Mr. Quentin-Baxter's study on international liability for injurious consequences arising out of acts not prohibited by international law, as well as by a draft Code of Offences against the Peace and Security of Mankind prepared by Mr. Thiam, although it was possible to regard such a code of criminal responsibility as a document apart. Accordingly, the Special Rapporteur should make sure that his work did not duplicate that of Mr. Quentin-Baxter or Mr. Thiam.

3. As for the form to be taken by the draft articles, the Commission had chosen the course of drafting a convention, but the Special Rapporteur had raised the question, in paragraph 43 of the report, whether it might not be more appropriate to speak of guidelines. Personally, he shared Mr. Reuter's point of view (*ibid.*) in all respects but one. He approved the idea of preparing a convention on State responsibility proper, but thought

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] Part 1 of the draft articles. (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

that the question of the peaceful settlement of disputes, to be dealt with in part 3, should form the subject of a separate document, since it was not certain that all the States that accepted part 2 of the draft would accept part 3.

4. Again, the Special Rapporteur had been sparing in his comments on the content of part 3. Could not the application of peaceful means of settlement of disputes be envisaged as soon as signs emerged that a rule of international law was about to be broken or once such a rule began to be breached? Was it always necessary to wait until a breach had in fact been committed before resorting to the peaceful settlement of disputes? In internal law, for example, preventive measures were available. In his opinion, the international community expected the Commission to play a more active role in that connection. Moreover, should the task of settling disputes be left solely to the Security Council or the International Court of Justice? A careful reading of the report gave precisely that impression. Yet the Charter of the United Nations assigned a role to other bodies in that respect. Why were States reluctant to apply Article 38 of the Statute of the ICJ? Why did the Security Council so often prove ineffectual? Certain States, anxious to preserve the Security Council's prerogatives, wanted it to play the leading part, while others took the view that the other means of peaceful settlement provided for in the Charter should not be forgotten. In the Manila Declaration on the Peaceful Settlement of International Disputes which it had adopted at its 37th session,[5] the General Assembly had mentioned other possible mechanisms for the peaceful settlement of disputes, apart from the Security Council and the ICJ. As a result, among other things, of the abusive exercise of the right of veto in the Security Council, it was now incumbent upon the General Assembly to play a greater role in that regard. The fact that it had not yet proved very effective in doing so was altogether another matter. In view of the terms of Article 33 of the Charter, he also wondered whether it might not be worth while considering the establishment of a body which, with a larger membership than that of the Security Council, would study the facts at the origin of any dispute.

5. He thought that the Special Rapporteur should pay particular attention to the tendency of States, noted in paragraph 35 of the report,

> . . . to keep open the option of considering a breach of an international obligation as a violation of their sovereignty, entitling them in principle to any sort of demand and any sort of countermeasure. . . .

6. As stated in paragraph 36, part 1 of the draft articles[6] had been relatively easy to elaborate and the real difficulties arose in connection with parts 2 and 3. Nevertheless, it was plain that part 1 would have to be looked at again in the light of the two other parts.

7. It was true, as affirmed in paragraph 37, that

> . . . in most cases, a State will deny, on the grounds of the facts or of the interpretation of the applicable primary rules, that there has been on its side a non-conformity with a legal rule, an internationally wrongful act for which it bears responsibility. . . .

Consequently, the draft should comprise one part on the settlement of disputes and should envisage the establishment of a body independent of the parties to the dispute.

8. Although he agreed with the first sentence of paragraph 40, he wished to emphasize that some consideration should also be given to the possible provision, in part 3, of a procedure for the peaceful settlement of disputes to come into operation as soon as there were any signs of a breach of a rule of international law. Similarly, with regard to paragraph 44, it was essential to sound a warning against any duplication of the work on the draft Code of Offences against the Peace and Security of Mankind, and Mr. Reuter (1771st meeting) had rightly pointed to the need to speak of offences in the sense of both crimes and delicts, in keeping with article 19 of part 1.

9. He disagreed with the conclusion reached by the Special Rapporteur at the end of paragraph 52, since there was indeed every reason for the Commission to consider the question of "which measures the Security Council should take for 'the maintenance of international peace and security' and the consequences of failure to take effective measures". Conversely, he concurred with the statement in paragraph 55 that there was "no place in part 2 for an article or articles on the special legal consequences" of acts of aggression. Once again, the question of aggression was a matter to be covered by Mr. Thiam in the work on the draft Code of Offences against the Peace and Security of Mankind.

10. As to the comments in paragraph 57, the Commission must in his view certainly try to determine the legal consequences of international crimes other than aggression. *Apartheid*, for example, was one of the international crimes that endangered the maintenance of international peace and security. However, the substance of paragraph 58 posed some problems because legal writings were usually concerned with primary rules and had reservations about secondary rules.

11. Admittedly, an international crime did not necessarily constitute a threat to peace, but he had some doubts about the affirmation made in the first sentence of paragraph 61. Without wishing to go into detail, he would none the less draw attention to rules of an economic nature, such as those of the General Agreement on Tariffs and Trade, which prohibited the adoption of a measure such as a boycott.

12. As to the first question raised in paragraph 64, appropriate secondary and tertiary rules obviously did not exist, but the Commission might consider the possibility of formulating them. On the other hand, the question dealt with in the first sentence of paragraph 65 should be considered in the light of the draft Code of Offences against the Peace and Security of Mankind.

13. In paragraph 73, it might well have been a mistake to cite the example of denial by a coastal State of innocent

[5] General Assembly resolution 37/10 of 15 November 1982, annex.

[6] See footnote 4 above.

passage through its territorial sea, and he urged the Special Rapporteur to refrain from using such an example.

14. The special draft article on reprisals proposed at the end of paragraph 83, whether drafted in positive or negative terms, should be given particular attention by all members of the Commission. Again, the question of the objective régime referred to in paragraph 97 posed numerous problems, for if a particular group of States wanted to take a specific measure, it had to have the authorization of the international community as a whole. It was incorrect to contrast the concept of a regional objective régime with that of a universal objective régime.

15. Unfortunately, paragraph 100 was not clear and he would be grateful for some elucidation in that connection. In paragraph 106, the Special Rapporteur had expressed a judicious view but, there too, as in paragraph 102, it was necessary to reflect further on the various means for the settlement of disputes. He also wondered why paragraph 108 referred only to the absence of a "binding final decision of a court or tribunal". Furthermore, with regard to paragraphs 116–117, it was imperative to bear in mind that objective régimes could only be of a universal nature and that, if regional objective régimes in fact existed, they had to be recognized by the international community in order to be applicable.

16. Lastly, the draft articles themselves (ILC(XXXV)/Conf.Room Doc.5)[7] enunciated the rule of proportionality, which was essential. However, the rule must be drafted in more precise terms. The word "manifestly" in draft article 2 was imprecise, for it might even suggest that an attempt was being made to introduce an idea of "appreciable proportionality" (*proportionnalité notable*) that would not be prohibited by international law, whereas that was not in fact the case.

17. Mr. REUTER said that Mr. Flitan appeared to suggest that, at least with regard to international crimes, the scope of the measures to be envisaged should be expanded somewhat to include both punishment and prevention. It was true that, under the régime of responsibility, account had to be taken of conduct that would be equivalent to preparing a crime or initiating its commission. That was an important observation which might well be borne in mind.

18. In municipal law, however, the very definition of an offence covered initiation of the commission or attempted commission of the offence in question. Accordingly, there were two possibilities. In the definition of each crime, such as aggression, *apartheid* or a serious violation of human rights, the draft could either specify the moment (preparation, attempt, commission) at which it was possible to speak of a "crime" or adopt the bolder and more dangerous solution of saying that attempted commission was part and parcel of every international crime. In addition to the two elements of an international crime that he had mentioned previously (1771st meeting), namely that an international crime was committed *erga omnes* and could not be erased by time, there would then be the fact that an attempt to commit an international crime was a crime in itself. Hence the idea would have to be introduced that, in the case of an ordinary offence, attempted commission could not be assimilated to actual commission of the offence. In Mr. Flitan's view, a sound international régime of responsibility should provide for preventive measures. It would be remembered in that connection that the League of Nations had interpreted the Covenant as giving it the right to deal with situations likely to lead to an international dispute and to acts contrary to international law, an idea that was also found in the Charter of the United Nations.

19. In respect of the various means for the peaceful settlement of disputes, a matter on which his position differed from that of Mr. Flitan, account must be taken of the role assigned by the Charter to the Secretary-General of the United Nations, who was empowered to draw the attention of the competent bodies to certain situations. Could preventive and enforcement measures be included in the régime of State responsibility? The Special Rapporteur had viewed the question from a broad standpoint by discussing countermeasures, proportionality and reprisals, for example, which were in some respects enforcement measures. A dangerous situation that might lead to preparations for an international crime or to an attempted international crime came under the régime of prevention. In that respect, members would have to decide which points should and should not be covered in the draft. Again, in many cases the General Assembly, for example, had already had to deal with acts that had taken place either before or after the commission of an offence. Nevertheless, he was disturbed to find that the Commission was enlarging on a problem it still had not managed to encompass. He did not think that, *vis-à-vis* the General Assembly, the Commission should inflate the topic to such an extent that it became increasingly difficult to mark out the proper limits. In his view, the best course would be to split up the task by adopting various sets of self-contained articles that could be submitted promptly to the General Assembly. If the General Assembly considered that the Commission had a clear grasp of a problem that had had to be left aside, it would invite the Commission to revert to the matter.

20. Personally, he had reservations about the advisability of enunciating rules that would in effect amend the Charter, but the members of the Commission could still make suggestions in that regard. The Third United Nations Conference on the Law of the Sea had introduced an innovation by establishing a technical body to deal with matters relating to the delimitation of the continental shelf,[8] and such an initiative in other areas might not be prejudicial to the Charter. In conclusion, he said that, in a spirit of discipline, the Commission should for the time being adopt a rigorous method of work.

[7] See 1771st meeting, para. 2.

[8] Commission on the Limits of the Continental Shelf, established in accordance with the provisions of annex II of the United Nations Convention on the Law of the Sea (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122).

21. Mr. FLITAN explained that he had raised the question of crimes against the maintenance of international peace and security from the point of view of incrimination—in other words, of attachment of guilt to an attempt at such crimes. He had not made any suggestion but hoped that the Special Rapporteur and members of the Commission would consider, on the basis of internal law, at what point an attempted crime could be viewed as a crime in international law.

22. He wondered, moreover, whether some form of recourse to the means afforded by the Charter—without, of course, modifying it in any way—might not be indicated in order to prevent the occurrence of a dispute as soon as preparations were made to commit a breach of a rule of international law or as soon as the breach was initiated. There again, it was difficult to make specific proposals. In referring (para.4 above) to the Manila Declaration adopted by the General Assembly in 1982, he had had in mind, like Mr. Reuter, the role that might be played by the Secretary-General, the General Assembly, the Security Council and the ICJ. In that text, the General Assembly drew the attention of States to all the means offered by the Charter for the peaceful settlement of disputes between States. In his view, questions of that kind fell within the mandate of the Commission, which was required to formulate any suggestions it might consider useful.

23. Mr. LACLETA MUÑOZ said that, by and large, he endorsed Mr. Flitan's remarks concerning the peaceful settlement of disputes. It was concern with the application of a régime of responsibility that had led Mr. Flitan to touch upon the problem of prevention. Consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law had brought the Commission face to face with a similar problem. Indeed, the question of attempted crimes derived from that of prevention. However, while it was true that an attempt could be made to commit every crime, and the attempt itself constituted an offence, the study of attempted crime took the Commission back to the sphere of primary rules at a stage at which it should be considering secondary rules.

The meeting rose at 11.50 a.m.

1774th MEETING

Friday, 3 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/359 and Add.1,[1] A/CN.4/372 and Add.1 and 2,[2] A/CN.4/374 and Add. 1–4,[3] A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLES 15 to 19

1. The CHAIRMAN invited the Commission to consider item 3 of the agenda and called upon the Special Rapporteur to introduce his fourth report (A/CN.4/374 and Add.1–4), and, in particular, draft articles 15 to 19, which read:

Article 15. General facilities

The receiving State and the transit State shall accord to the diplomatic courier the facilities required for the performance of his official functions.

Article 16. Entry into the territory of the receiving State and the transit State

1. The receiving State and the transit State shall allow the diplomatic courier to enter their territory in the performance of his official functions.

2. Entry or transit visas, if required, shall be granted by the receiving or the transit State to the diplomatic courier as quickly as possible.

Article 17. Freedom of movement

Subject to the laws and regulations concerning zones where access is prohibited or regulated for reasons of national security, the receiving State and the transit State shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions or when returning to the sending State.

Article 18. Freedom of communication

The receiving and the transit State shall facilitate, when necessary, the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1, situated in the territory of the receiving State or in that of the transit State, as applicable.

Article 19. Temporary accommodation

The receiving and the transit State shall, when requested, assist the diplomatic courier in obtaining temporary accommodation in connection with the performance of his official functions.

2. Mr. YANKOV (Special Rapporteur) said that, in his second report,[4] he had submitted draft articles 1 to 6, which constituted part I of the draft articles (General provisions).[5] In his third report (A/CN.4/359 and Add.1), he had presented the revised texts of articles 1 to 6 (with the exception of article 2, which was unchanged), and

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[1] Reproduced in *Yearbook . . . 1982*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1983*, vol. II (Part One).

[3] *Idem.*

[4] *Yearbook . . . 1981*, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2.

[5] For the texts, see *Yearbook . . . 1982*, vol. II (Part Two), pp. 112–114, footnotes 304–309.