Document:-
A/CN.4/SR.1778

Summary record of the 1778th meeting

Topic:
State responsibility

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

hibited by contemporary international law, whether they were disproportional or not.

51. In paragraph 83, the Special Rapporteur also referred to draft article 3 as proposed in his third report, under which the legal consequences of a breach could be prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law. He concluded that a provision more detailed than that article should be devoted to reprisals. What he had to say about objective régimes seemed to be correct, but it would be necessary to know the wording of the relevant articles before forming any definite opinion on the matter.

52. In paragraph 90, the Special Rapporteur mentioned the case of reprisals constituting a breach of rules relating to the environment. He stated that reprisals consisting in a breach of such rules seemed to be inadmissible even in response to a similar breach by another State. In the Special Rapporteur's view, the case was covered by draft article 4, as proposed in his third report. He also suggested that certain special régimes, particularly those relating to diplomatic law and armed reprisals, should be reserved. So far as armed reprisals were concerned, he (Mr. Barboza) reserved his position. With regard to diplomatic law, he could not agree with the Special Rapporteur that it constituted an exception, since there were parallel obligations. While it was true that a State A could declare *persona non grata* the diplomatic agent of a State B which had declared *persona non grata* a diplomatic agent of State A, no State could resort to a reciprocal measure in the case of a serious breach of diplomatic immunity.

Organization of work (*continued*)*

53. The CHAIRMAN reminded the Commission that, at its 1755th meeting, it had approved the tentative programme for the organization of work (ILC(XXXV)/Conf.Room Doc.3), on the understanding that it would be applied with the necessary flexibility. He suggested that, after completing consideration of item 1 of the agenda, the Commission should take up item 3: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". Item 5 of the agenda would be taken up after that, some time after 20 June.

It was so agreed.

The meeting rose at 1.05 p.m.

* Resumed from the 1760th meeting.

1778th MEETING

Thursday, 9 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS
later: Mr. Edilbert RAZAFINDRALAMBO

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, 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. BARBOZA, continuing the statement he had begun at the previous meeting, said that in the case of the United States embassy staff held hostage in Tehran, the United States could not, by way of reprisal, have taken the same kind of action as that to which it had been subjected. He stressed the need to take account of the purpose of reprisals, which were sometimes only a means of exerting pressure to induce the State which had committed the wrongful act to adopt certain conduct, for example to agree to arbitration. In that connection, he mentioned one of the few relevant legal precedents, namely the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*,[5] which was mentioned in paragraph 103 of the fourth report (A/CN.4/366 and Add.1). In that case, the United States had confined itself to threatening France with the suspension of an Air France flight to California, thus taking reprisals whose purpose was to persuade France to agree to arbitration.

2. Reprisals could also be of a preventive nature, for example when, as a guarantee of payment of compensation, a Government froze the funds of another Government located in its own territory. Finally, the purpose of reprisals could be to punish and discourage any repetition of a wrongful act. Any case could involve a

[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.*

[5] See 1771st meeting, footnote 12.

combination of those characteristics, but one often predominated. Account should also be taken of the fact that, in cases such as those of the embassy staff hostages and the Air Service Agreement, the injury continued for some time and that affected the nature of the reprisals. In the case of persuasive or preventive reprisals, the prior exhaustion of available remedies could not be required: for example, if a State claiming compensation did not freeze the foreign funds in time, it might not be able to do so later. On the other hand, that condition would have to be fulfilled for the taking of reprisals which were dissuasive and thus in the nature of sanctions.

3. With regard to proportionality, he believed there could be greater flexibility for persuasive and preventive reprisals than for punitive reprisals. Reprisals of the first two types depended on a number of factors, including the possibility of resistance by the Government against which they were taken and the possibility of its being determined to maintain its position. The State which took reprisals did not know exactly how far it need go in order to obtain the desired effect. On the other hand, reprisals in the form of sanctions must be proportional, and that was where the *lex talionis* came into play. That was not a cruel law, as was often thought, but one which imposed limitations on the desire for revenge.

4. In draft article 2 proposed in his third report (A/CN.4/354 and Add.1 and 2),[6] the Special Rapporteur had used a negative formulation for proportionality, on which he (Mr. Barboza) had already commented the previous year.[7] Although the opinion he had expressed needed qualification in regard to persuasive and preventive reprisals, the fact remained that positive wording would be preferable in all cases. Furthermore, draft article 2 was very general; it did not deal with reprisals as such, but with the consequences of internationally wrongful acts. The provision could apply to self-defence as a legal consequence of an internationally wrongful act such as aggression. But in the case of self-defence, the element of proportionality must be interpreted very strictly. The state of necessity imposed on the State attacked, which entitled it to resort to self-defence, must not lead it to go further than necessary in the countermeasures it took. Not to accept that rule would be contrary to the principle of refraining from the use of force. In his view, draft article 2 was not sufficient to regulate the question of proportionality as applied to self-defence. The response to an act of aggression must not depend on the seriousness of the wrongful act; the means employed must be proportional to the need to foil the attack. It was therefore necessary to ensure that certain provisions of the draft articles did not suggest an indirect and inappropriate definition of the notion of self-defence.

5. In paragraphs 43–44 of the report, the Special Rapporteur had considered three possibilities for the final form of the draft articles. They might be adopted as a general convention, lead to the endorsement of rules serving as guidelines for States and international organizations, or take the form of a convention establishing an international procedure for the settlement of disputes. He himself would prefer the first possibility, because there would be a serious gap in international law if the topic of State responsibility was not duly codified. It would be regrettable if the Commission wasted the efforts it had made in previous years.

6. Mr. QUENTIN-BAXTER said he fully endorsed the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/366 and Add.1). If the report was difficult to read, that was because its subject-matter represented a completely new dimension in the work of the Commission. Rather than attempt to discuss any of the technical details in which the report abounded, he proposed to examine some of the broader issues involved.

7. Many of the problems implicit in the report could be expressed in terms of relationships. The first relationship which required consideration was that between State responsibility and two other topics on the Commission's agenda: the draft Code of Offences against the Peace and Security of Mankind and international liability for injurious consequences arising out of acts not prohibited by international law. Those three topics were interrelated to the extent that they all responded to a deep desire of the international community to strengthen the framework of the law at a time in history which could be described as transitional in the sense that, on the one hand, the concept of international organization had developed and achieved unprecedented importance, while, on the other hand, the prospect of world government was still remote.

8. The international community's undoubted interest in the draft Code of Offences against the Peace and Security of Mankind, which might at first sight appear surprising in a divided world, was in fact the expression of its desire for a manifesto going beyond the degree of solidarity at present provided by the international order. A similar desire was reflected in the call for the establishment of a new economic order, as well as in other United Nations projects and activities which, until recently, had remained outside the sphere of the Commission, such as the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and that of the Special Committee on the Question of Defining Aggression, many aspects of the United Nations Conference on the Law of the Sea and, at an earlier stage, the General Assembly's own work on self-determination and on human rights. Today, the Commission's agenda included a number of items on which the elements of policy and law were mixed in sometimes perplexing proportions. State responsibility was one of those items, and parts 2 and 3 of the draft articles on that topic were as innovative as anything the Commission had yet had to tackle.

9. The different attitudes adopted within the international community towards part 1 of the draft articles were well known. Some went so far as to question the value of the work as such. He himself regarded part 1 as a very great achievement in response to the desire of the

[6] *Ibid*, para. 2.

[7] *Yearbook . . . 1982*, vol. I, p. 219, 1734th meeting, para. 8.

world as a whole for a better grasp of the law in the area covered. Yet part 1 was concerned only with the bare bones of the problem, whereas what the Commission now had to do in parts 2 and 3 was to produce the living tissue.

10. With regard to the relationship beween parts 2 and 3, he agreed with the Special Rapporteur that to attempt to dispose of part 2 first and then proceed to part 3 would be a mistake. In the modern world, attitudes regarding the consequences of State responsibility were inevitably conditioned by the means available for implementing the law. He agreed with several previous speakers that the only course open to the Commission was to try to draft part 2 in a preliminary way, in the full knowledge that it would eventually have to revert to part 2 in the light of part 3, and to part 1 in the light of parts 2 and 3.

11. A further relationship which had to be considered was that between part 2 and chapter V of part 1, relating to circumstances precluding wrongfulness. The view had been put forward that self-defence was too important an act to be regarded as a preclusion; nevertheless, it had been included in chapter V of part 1 and would undoubtedly have to be treated in greater depth in part 2. The same was true of the subject of countermeasures, which was dealt with in a rather shallow fashion in what was perhaps the weakest article of part 1 (article 30).

12. The main difficulty which had arisen in connection with part 1 and, more particularly, with article 19—a difficulty which the Commission would surely experience to a still greater degree when preparing parts 2 and 3—was that of relating law and policy. The fact of the matter was that the Security Council possessed the ultimate power to decide on legal questions concerning its own operation. That being so, attempts to strengthen the role of law in the political sphere inevitably suffered from a certain circularity and were never entirely free-standing; moreover, such attempts received very little support from the work of publicists or from State practice. Nevertheless, for the reasons already given, those attempts were not unimportant and should be pursued.

13. The doubts which he had initially entertained concerning the inclusion of an article on proportionality in part 2 had now been entirely dispelled. He also accepted the concept of "objective régimes" proposed by the Special Rapporteur, which should be understood to encompass a wide variety of mechanisms ranging from very concrete ones, such as membership of the United Nations, to the rather loose arrangements which States might enter into in their mutual relations. He was considering introducing a similar concept into his own topic of international liability for injurious consequences arising out of acts not prohibited by international law.

14. Like many earlier speakers, he believed that the Commission's present Statute did not authorize it to venture into the sphere of law relating to the United Nations Charter, and that it should exercise the greatest circumspection in dealing with matters covered by Charter provisions, such as acts of aggression or the right to self-defence. He agreed with the Special Rapporteur's view that, as a first step, the Commission should concern itself with "normal" examples of State responsibility for international delicts, along the lines proposed in paragraphs 122 *et seq.* of the report. At the same time, it should be made absolutely clear that, having dealt with international delicts, the Commission fully intended to move on to the more serious matter of international crimes.

15. Mr. MAHIOU explained that his professional commitments had prevented him from commenting on the Special Rapporteur's third report (A/CN.4/354 and Add.1 and 2) in 1982. The fourth report (A/CN.4/366 and Add.1) testified to its author's perfect knowledge of the various legal systems. It was rich and complex and required several readings before all the subtleties of the arguments put forward by the Special Rapporteur became fully apparent.

16. With regard to method, it might have been expected that the Special Rapporteur would deal more specifically in his fourth report with the consequences of responsibility, since the Commission's task was to formulate draft articles on the basis of international practice. True, he had referred to some international instruments and to a few judicial precedents, but he might have gone further in that direction to support his arguments.

17. In paragraphs 37–42, 45 and 65–67, the Special Rapporteur had considered the question of the relationship between parts 1 and 2 of the draft and had dealt, in particular, with the problem of settlement of disputes. Although there was undoubtedly also a relationship between parts 2 and 3 of the draft, the Commission need not necessarily find solutions to the problems raised in part 3 before dealing with part 2. The Special Rapporteur's reasoning followed a progression. In paragraph 37, he stated the problem; in paragraphs 38–39, he raised the question of whether it was worth drafting part 2 before part 3; in paragraph 40, he suggested that part 3 might usefully establish a procedure for the settlement of disputes; and, in paragraph 45, he affirmed that the Commission should give early consideration to the question of settlement of disputes. Finally, in paragraph 65, he said there was little chance that States would accept, in part 2, a legal rule along the lines of article 19 of part 1 without knowing the contents of part 3. The drafting of part 2 thus depended on that of part 3.

18. Everyone knew that the concept of aggression was difficult to grasp and that the Definition adopted by the General Assembly[8] had its limitations. That Definition was followed by a provision which empowered the Security Council to determine that acts other than those specified constituted aggression under the provisions of the Charter. But the Security Council was a body whose role and composition were sometimes contested and which in any case was not independent. Hence, he saw some justification for doubts about how the problems of responsibility were to be solved, though he did not think that the drafting of part 2 should therefore be made

[8] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

conditional on the existence of a competent and independent authority. Moreover, it might be better to provide several mechanisms than only one. The 1982 United Nations Convention on the Law of the Sea contained primary, secondary and tertiary rules and set up very complete machinery for the settlement of disputes, which permitted recourse to the ICJ, to the International Tribunal for the Law of the Sea, to the special arbitral procedure set up by the Convention itself or to *ad hoc* arbitration.[9] Similar machinery might well be proposed for State responsibility and it would then be unnecessary to postpone the drafting of part 2.

19. In paragraphs 54–55, the Special Rapporteur had dealt in considerable detail and, at times, not unambiguously with the exclusion of the legal consequences of international crimes, including aggression. In paragraph 54, he stated that most of those consequences fell outside the scope of the draft articles. In paragraph 55, he reached the conclusion that there was no place in part 2 for an article or articles on the special legal consequences of certain international crimes. In paragraph 67, however, he expressed the view that, since the Commission had recognized the progressive development of international law by provisionally adopting article 19 of part 1, it should carry that development to its logical conclusion by proposing secondary and tertiary rules. In his own view, it seemed obvious that the Commission should identify the legal consequences of the various internationally wrongful acts, whether delicts or crimes, and even the most serious crime, namely aggression.

20. The question of whether the Commission should establish a régime of international responsibility that was identical to the régime of responsibility in internal law was dealt with in paragraph 113 of the report, where the Special Rapporteur had questioned whether it was possible to formulate a rule of general and abstract international law under which every "fault" would entail a duty to make reparation. In fact, any approximation of international law to internal law gave rise to more problems than it solved. At the national level, the existence of legislative and judicial authorities made it possible to establish a coherent and complete legal system. In matters of responsibility, judicial decisions played a major, if not an essential, role. Any comparison with international law would thus presuppose solution of the problem of implementation at the international level. Since that problem had not been solved, however, internal law could only be taken as a general guide and must not be followed too closely.

21. Paragraph 39 raised the problem of the consent of a State to countermeasures. The wording of that passage was too general: it meant that consent could not be challenged unless it was invalid or contrary to a rule of *jus cogens*. That point would require further explanation. In paragraphs 43–44, the Special Rapporteur had dealt with the question of the outcome of the Commission's work on the topic and had referred to a draft convention, guidelines or an intermediary solution. The Commission's terms of reference were quite clear, however, and for the time being its task was to prepare draft articles to serve as the basis for a convention.

22. Paragraphs 54 and 65–66 raised the question of the relationship between the topic under consideration and the one dealt with by Mr. Thiam. It was clear that, if care was not taken, those studies might overlap, whereas in fact they were complementary; for Mr. Riphagen was studying the question of offences in general and, hence, of responsibility in general, while Mr. Thiam was dealing with some particular offences and, hence, with more limited responsibility, namely criminal responsibility. Moreover, the topic under consideration was the responsibility of States, whereas the other topic related mainly to the responsibility of individuals, although even that was open to question. Lastly, the possible penalties were not the same; those applicable to States went to the heart of international law, while the others were governed more by internal law. Thus, for the time being, the two drafts did not overlap as much as might have been feared.

23. The notion of an objective régime also called for further explanation by the Special Rapporteur. He himself would have nothing against that notion if it would help the Commission in its work, but if it was likely to raise difficulties he doubted whether it would serve any useful purpose. There were several types of objective régime: conventional or customary, multilateral or bilateral, universal or regional. Was it not difficult ground to cover? In paragraph 85, the Special Rapporteur himself had described that notion as being somewhat "nebulous". It was nevertheless clear that the problem was an important one in view of the consequences of such régimes, which were examined in several paragraphs, in particular paragraph 97, of which he cited the first sentence. In paragraph 99, the Special Rapporteur stated that an objective régime could be identified by its normative character, the existence of a collective interest, the fact that the parties to the régime were bound to fulfil the obligations it imposed even if another party failed to do so, and the existence of machinery for the settlement of disputes and decision-making. Of those four elements, only the third was peculiar to objective régimes; it was, in fact, the decisive criterion from which all the consequences must be drawn. For the time being, he reserved his position on those consequences, which ought to be specified.

24. Paragraphs 102–103 dealt with reprisals in connection with the notion of objective régimes and the existence of machinery for the settlement of disputes. The first sentence of paragraph 103 suggested that the possibility of settlement of a dispute by an impartial body would rule out reprisals. But the concept of reprisals was not clear and it had various aspects.

25. Among the points in the report that might lead to positive results, he referred to paragraphs 46–50, which stated the legal consequences the Commission should study. Paragraphs 59–62 would provide a useful working

[9] Part XV and annexes V–VIII of the Convention (*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).

basis, but it was mainly paragraphs 75–76, 79, 114 and 122–123 that went to the heart of the problem and would constitute a foundation for the edifice to be built. In that connection, he welcomed the views expressed by Mr. Jagota (1777th meeting) on the consequences of State responsibility, namely reparation, the suspension of relations, the breaking off of relations and armed or unarmed reprisals.

26. He noted that some of the terms used in the report were rather ambiguous and made it difficult to understand the propositions advanced. He was not sure that he had understood the distinguishing differences between countermeasures, reprisals, reciprocity and retaliation. Those terms should be defined more clearly, showing the different situations to which they applied. For example, if the diplomats of a sending State were subjected to unlawful measures, that State could take not only reciprocal measures, but also measures of retaliation; and the more dangerous case of reprisals might also arise.

27. He had no definite ideas on the method of work to be adopted but he thought the main point was to examine, with regard to both crimes and delicts, all the consequences of the relations between the injured State and the author State and of their relations with third States.

28. Mr. REUTER, associating himself with the tributes paid to the Special Rapporteur by members of the Commission, said that Mr. Jagota's analysis (*ibid.*) of the report had been particularly lucid, clear and forceful. He himself would comment only on methods of work and on the substance of the problem, which was the question of aggression.

29. He had always known that the Commission would devote much time and effort to the questions of international crimes and aggression, since at the current session it had before it the reports of Mr. Riphagen and Mr. Thiam, although, for the time being, it knew nothing about Mr. Thiam's future reports. Two considerations made him think that the Commission should begin by studying the general régime of delicts and then consider that of crimes, before going on to the particular case of aggression, which would, of course, have all the legal consequences of the first two categories of wrongful acts, Although its Statute did not require it to reach agreement in every case, it was a fact that the Commission had always reached compromises on the drafts it prepared. In the present case, it would be more difficult to agree on the consequences of aggression than on those of other international crimes, and more difficult to agree on the consequences of crimes than on those of delicts. The Commission should therefore begin with the question on which positions were the least clear-cut. The Sixth Committee would probably forgive the Commission for not agreeing on the question of aggression and, despite the difficulties to which he had just referred, he thought the Commission should begin by considering that question. He hoped that at its next session the Commission would have before it simultaneously reports by Mr. Riphagen and Mr. Thiam and that those reports would be submitted on time. He emphasized the need to co-ordinate the study of those two reports; that was a task which the Commission, a technical body, could not avoid.

30. With regard to aggression, he believed that as things stood at present only the United Nations had the right to establish that an act of aggression had been committed and to determine its legal consequences. Did the States parties to the dispute also have that right, with all the ensuing legal consequences? Some held that they did, and it was a fact that State sovereignty remained one of the pillars of the international order. But he could not help noting that, for the past 25 years, the world had been continually torn by armed conflicts and the United Nations had never established that such acts had been committed. What was even more important was that no State which was a party to a dispute and which had established that an act of aggression had occurred had ever drawn the logical consequences of that act. Ideological differences of opinion might, of course, have prevented the Security Council from finding that an act of aggression had been committed, but it must be recognized that, in many armed conflicts, the legal position was not clear and that a State might, in good faith, consider that another State was the aggressor.

31. What was more important than anything else was not so much the sanctions to be imposed as the restoration of peace. In many cases, it would be disastrous for the United Nations to establish that aggression had occurred. The States concerned had often shown great wisdom and had limited the advantages they could have derived from their military superiority. That being so, he agreed that the United Nations could establish that an act of aggression had occurred, with all the ensuing consequences such as reparation or sanctions, but he could not agree that the same consequences followed from determination of such an act by one of the States parties to a dispute. If the Commission had to provide for strict measures to punish aggressors, it must not treat a finding by the United Nations in the same way as a finding by a State. Did any member of the Commission believe that resort to arms automatically showed which State had been attacked? As to the problem of self-defence, he wondered what the critics of the United Nations proposed as a substitute for that institution.

The meeting rose at 12.55 p.m.

1779th MEETING

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

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, 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.