Document:-
A/CN.4/SR.1891

Summary record of the 1891st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1985, vol. I

Downloaded from the web site of the International Law Commission
(http://www.un.org/law/ilc/index.htm)

Copyright © United Nations

resolutions used the expression "appropriate compensation" and, for drafting purposes, it was worth noting that the adjective "appropriate" was translated in French by *adéquate*.

39. As to draft articles 8 and 9, on suspension by the injured State of performance of its obligations by way of reciprocity or by way of reprisal, a qualification in paragraph 2 of article 9 embodied the rule of proportionality. Reciprocity and reprisal, as well as retaliation and retortion, came under the general heading of countermeasures. He suggested that the Special Rapporteur should supplement his commentaries to articles 8 and 9 by including fuller references to State practice in the matter.

40. With reference to draft article 12, he supported the Special Rapporteur's proposal regarding subparagraph (*b*), on *jus cogens*, but he could not altogether agree with the content of subparagraph (*a*), which contained an exception to articles 8 and 9. Under Italian law, for example, the immunities in question were granted only if the foreign State concerned could prove that its own legislation granted such immunities to other States. Another point was that Italian law did not recognize any legal personality for a diplomatic or consular mission; under that system, it was not the mission as such that was entitled to immunities.

41. Still on the question of reciprocity, it was worth noting that article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, on the diplomatic immunity of foreign States, contained a reciprocity clause specifying:

> Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present Article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or that property of that State.[13]

From the examples of Italian law, Soviet legislation and the law of a number of other States, it was plain that the provisions of draft article 12 (*a*) were not supported by State practice.

42. Draft article 14 dealt with the consequences of an international crime, and draft article 15 with those of the particular crime of aggression. In those situations, as stated in paragraph 2 of article 14, States other than the author State had three sets of obligations: (*a*) not to recognize as legal the situation created by the crime; (*b*) not to render any assistance to the author State; (*c*) to join other States in affording mutual assistance in carrying out the obligations under (*a*) and (*b*). In his view, both of those articles required much more elaboration. In addition, he had some doubts about singling out the act of aggression by making it the subject of an article of its own; such crimes as terrorism and genocide also constituted violations of the provisions of the Charter of the United Nations.

43. Draft article 16 was the prelude to part 3 of the draft and, with regard to the three safeguard clauses set out in the article, he was inclined to agree with the formulations proposed by the Special Rapporteur.

44. Lastly, on the question of settlement of disputes, he thought it might be feasible to use the formula adopted in the 1969 Vienna Convention on the Law of Treaties, adapting it *mutatis mutandis* for the purposes of the present topic.

The meeting rose at 1.05 p.m.

---

[13] See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 40.

1891st MEETING

Thursday, 30 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. REUTER said that he would begin with some general comments on the Special Rapporteur's sixth report (A/CN.4/389), which was characterized by its clarity, precision and density and required careful study. As a good grasp of the topic could be acquired from the report, it should be possible for a certain number of important and welcome draft articles, such as articles 5, 8 and 9, to be examined by the Drafting Committee, in spite of the doubts to

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] 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.*

[4] For the texts, see 1890th meeting, para. 3.

which they might still give rise. It was still possible to place between square brackets any terms which had not secured a consensus, particularly if they were connected with provisions which had not yet been drafted. In any case, it was time for the Drafting Committee and the Commission to make progress in elaborating articles on such an important topic as State responsibility.

2. The Special Rapporteur presented the subject in such a way as to make the reader reflect and get to the bottom of things. The topic under consideration was difficult and delicate, since it involved the legislative function and the executive function in international law. The Special Rapporteur sometimes gave the impression that he was pointing out certain dangers in order to provoke a reaction on the part of members of the Commission.

3. The reason why the Special Rapporteur had approached the subject as he had was probably because it could not be approached otherwise. Personally, he would have preferred to proceed from the simplest to the most complicated matters, in other words to examine successively reparation, the "responses" to a breach of international law and, lastly, the offences. But the Commission had already dealt with the problem of international crimes, which was certainly embarrassing for it, since it would not be able to propose a single article without making cross-references or expressing doubts or reservations. That situation led him to ask the Special Rapporteur whether he intended to propose other articles on reparation or on the offences, before passing on to the third and last part of the draft.

4. Although he was quite prepared to adopt the Special Rapporteur's point of view on part 3 of the draft, he wished to emphasize that the question of settlement of disputes inevitably provoked disagreement in the Commission. He was thinking in particular of the draft Code of Offences against the Peace and Security of Mankind. Some members of the Commission indeed believed that it was important to take a position forthwith on the settlement of disputes and recourse to third parties; others, on the other hand, believed that a consensus would not be possible and that it would be better to defer the question. When the Commission had prepared its draft articles on the law of treaties, it had been very cautious and had left it to the plenipotentiary conference to settle that delicate problem. He could understand why the Special Rapporteur wished to know the reactions of members of the Commission at once, since the drafting of the articles would depend on whether they were addressed to an international court, to national courts or to tribunals common to several States, such as the Nürnberg International Military Tribunal.

5. In his oral presentation (1890th meeting), the Special Rapporteur had emphasized the need to take account of article 22, on the exhaustion of local remedies, in part 1 of the draft. He himself had never been very enthusiastic about that article and he now noted that, according to paragraph 1 (*b*) of draft article 6 as submitted by the Special Rapporteur, the injured State could require the State which had committed an internationally wrongful act to "apply such remedies as are provided for in its internal law". That provision assumed that the internationally wrongful act existed; it therefore appeared to contradict article 22 of part 1 of the draft, since according to that article the internationally wrongful act only came into being after the exhaustion of local remedies.

6. The problem of absolute peremptory rules was more serious. From the outset, he had expressed serious reservations about the concept of *jus cogens* and he tended to maintain them. For it was not known how *jus cogens* came into being, or what existing rules were absolutely peremptory. The Special Rapporteur had referred (*ibid.*) to the case in which a treaty provision gave a State the right to occupy or reoccupy an area belonging to another State, and had said that such a provision would be void by virtue of *jus cogens*. Not only did he find it doubtful that any treaty in force could accord such a right, but the relevance of the example seemed questionable in view of paragraph 1 (*d*) of draft article 6, according to which the State which had committed an internationally wrongful act could be required to "provide appropriate guarantees against repetition of the act".

7. The reference, in the footnote to paragraph (5) of the commentary to draft article 8, to a peremptory norm permitting non-performance of the obligation "in the case of a breach of the same obligation by another State" was also perplexing. He was, of course, aware that a peremptory rule was always absolute for others but not always for oneself, but he was troubled by an absolute peremptory rule which was at the same time conditional. It should not be concluded from that that he did not believe in the absolute peremptory rule. Human rights had been and still were subjected to violations which left no doubt about the existence of sacred rights and absolute rules to which there could be no exception. What he was opposed to was the tendency to introduce the absolute everywhere in law, in such a way that it was no longer respected.

8. Passing on to particular points, he explained that he had spoken of "responses" to a breach of international law because that term seemed to have a wider meaning than the term "countermeasures" used by the Special Rapporteur. For since the latter term had been hallowed by lawyers in an arbitration case,[5] it had perhaps acquired a special meaning. The Commission now had to adopt a terminology. With regard to draft articles 8 and 9, each of which dealt with a particular response—in the one case reciprocity, and in the other reprisals—the Special Rapporteur had given an example of the following kind: a State party to a bilateral treaty interpreted the word "ships" as meaning only merchant ships and not warships. The other State party to the treaty believed that both categories were covered by the term "ships", but it agreed to take the term as covering only merchant ships. That situation did not pertain to responsibility—since neither State alleged a breach of the treaty—but to the interpretation of treaties.

[5] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, arbitral award of 9 December 1978 (see 1892nd meeting, footnote 9).

Conversely, if the second State believed that the term "ships" covered both merchant ships and warships, but decided to apply it only to merchant ships because that was how the first State applied it, there was a breach which generated international responsibility. In his view, there was no question of a "countermeasure" in that case, unless the Special Rapporteur thought that "countermeasures" and "responses" were the same.

9. To distinguish between reciprocity and reprisals, the Special Rapporteur emphasized that there was reciprocity in the case of suspension of performance of certain obligations, provided that those obligations corresponded to or were directly connected with the obligation which had been breached. An example might be the case of a customs agreement between two States, each of which exported wine to the other and had agreed to levy a duty on wine. If one of those States omitted to levy the duty and the other did likewise, there was suspension of performance of a corresponding obligation. But more frequently, when a tariff provision of that kind was not observed, the injured State was not an exporter of the same product and could only suspend performance of an equivalent obligation relating to a different product. That situation also qualified as reciprocity, since the obligations were directly connected. But he wondered whether the Special Rapporteur did not think that the drafting of article 8 could be improved. Did that provision refer to obligations under one and the same treaty, under the same conventional system or relating to the same matter?

10. For reprisals, which had no such limitation, the Special Rapporteur had introduced into the commentary to draft article 9 another idea, which was a variant of the idea of proportionality: the response could be strictly equivalent, as could happen under GATT if there was parallel suspension of tariff obligations. When the response was accompanied by an idea of coercion, it should no doubt be proportional, as the Special Rapporteur affirmed, but it must not be forgotten that, to oblige the author State to fulfil its obligations, it might be necessary to go rather further than it had gone in the non-performance of another obligation. Did passing from strict equivalence to the idea of coercion mean passing from one kind of response to another?

11. It should also be noted that there was never any question in the draft articles of punishing the offending State. But if the offences were considered, it must be with a view to punishment. Did the Special Rapporteur intend to deal with that delicate question in other articles?

12. The question of the offences led him to urge the need to define the exact scope of the topic of State responsibility in relation to that of the draft Code of Offences against the Peace and Security of Mankind. Both the Special Rapporteurs for those two topics and the Commission itself were still working in uncertainty. But it was for third persons to decide the question. Yet the Sixth Committee of the General Assembly often appeared to be composed of third persons who did not fully appreciate the practical difficulties involved. Was there not something abnormal about a situation in which two topics overlapped and the Commission did not know how the problem would be solved? As the Special Rapporteur for the draft code had suggested (1879th meeting), it would probably be better to deal with aggression first and leave the statement of general principles until later, so that the Special Rapporteur for State responsibility could continue in the mean time to explore the consequences of certain international crimes. It was true that the latter had observed, in paragraph (1) of the commentary to draft article 14, that the distinction drawn in article 19 of part 1 of the draft articles between "international delicts" and "international crimes" made sense only if the legal consequences of the latter were different from those of the former. That was why the Special Rapporteur dealt with the legal consequences of international crimes, which were different from those of other internationally wrongful acts. But another question arose, that of the régime of responsibility, which might come under either topic.

13. Just as article 73 of the 1969 Vienna Convention on the Law of Treaties reserved the question of the international responsibility of States, draft article 16 as submitted by the Special Rapporteur reserved the question of the invalidity, termination and suspension of the operation of treaties. It might be asked not only whether it was appropriate to show this courtesy to the 1969 Vienna Convention, but also what was the exact scope or effect of such a precaution. Draft article 13, the substance of which he approved, only increased his doubts. As indicated in paragraph (1) of the commentary to that article, it dealt with "the complete breakdown of the system established by a multilateral treaty". That case was plausible, but was it covered by the 1969 Vienna Convention? If not, the situation would be embarrassing, because the Vienna Convention contained a provision excluding any new cause for the disappearance of a treaty; if so, it would be necessary to establish that a provision such as article 61 of the Vienna Convention, which referred rather to the disappearance of a material object, was applicable. It would be interesting to hear the views of members of the Commission who had made a special study of the Vienna Convention.

14. There remained the very disturbing question of the relationship between the draft articles and the Charter of the United Nations, or rather the United Nations system. That question was raised by several draft articles, in particular article 14, paragraph 4, and article 15. The expression "the international community as a whole", which had been coined to meet the need for a definition of absolute peremptory rules, had since set a trend, although its content was very hard to grasp. He could understand that expression being used in article 53 of the Vienna Convention on the Law of Treaties in connection with the concept of *jus cogens* and in article 19 of part 1 of the draft articles. If such peremptory rules existed, it was not by virtue of a particular treaty, but by virtue of customary law reflecting a deep-seated *opinio juris*. To demonstrate the existence of a rule of customary law it was not, of course, necessary to cite precedents from all States. It should be noted in that connection that a State which had expressly declared that it did not recognize a certain rule as customary law could

not subsequently have that rule invoked against it, at least in a world where there was no international legislator. While he could accept that a general rule emanating from the legislative power, such as the rule prohibiting aggression, was an absolute peremptory rule accepted by the international community as a whole, he was not prepared to make the leap suggested by the Special Rapporteur and accept an individual decision of the executive power. It was certainly difficult to give a general definition of an act violating an obligation that was of essential importance for the international community, but it was an even more serious matter to decide, in a specific case, that a particular State was the aggressor. That was where the question of the relationship between the draft articles and the Charter of the United Nations arose.

15. To understand what the United Nations was, it was necessary to refer to the Charter as interpreted. In the commentaries to the draft articles, the Special Rapporteur referred more than once to decisions taken by the international community as a whole, or by the organized community. Was that process outside the Charter? At the present time, the United Nations and the international community as a whole did not completely coincide. It had happened, perhaps because the United Nations were not unanimous, that conferences intended to represent all States had been held outside the United Nations system. It was certainly desirable that the United Nations should be identified as closely as possible with the international community as a whole, but legally those were still two different concepts. While it was true that there were armed conflicts which the Security Council did not resolve because of political positions, there were others which it found more reasonable not to treat as cases of aggression. The defects of the Charter should be spoken of only with caution. The draft articles should not give the impression that the international community was an entity, in the process of creation which might be subject to other rules in the near future. Hence caution was also needed in regard to drafting. At the present time, some groups of States believed that they could impose sanctions against other States. The Commission must take care that the draft articles did not lead to indirect justifications or condemnations of the purposes it pursued.

16. Mr. RIPHAGEN (Special Rapporteur) said that he would not attempt, at the present stage, anything like a complete answer to Mr. Reuter's numerous and profound remarks, but would merely furnish certain clarifications on a few points. In the first place, he wished to reiterate that the set of draft articles in his sixth report (A/CN.4/389), namely articles 1 to 16 of part 2 of the draft, constituted the complete set of articles in that part; he did not propose to submit any further articles for part 2. That would perhaps allay some of Mr. Reuter's fears.

17. Mr. Reuter had raised the question of the possible relationship between paragraph 1 (*b*) of draft article 6 and article 22 of part 1 of the draft, which he found unsatisfactory. Article 6, paragraph 1 (*b*) did not refer only to the rules of international law mentioned in draft article 7, namely those relating to wrongful acts in the treatment of aliens. That subparagraph also referred to other matters and covered internationally wrongful acts which affected the foreign State itself—not merely those which affected it through its nationals. In such cases, the author State should take appropriate steps on its own initiative. For instance, if an embassy was attacked by foreign students, the receiving State had to take adequate measures, including repressive measures. Mr. Sucharitkul (1890th meeting) had suggested that the foreign State could set the local remedies in motion. But the foreign State was not bound to do so; it was entitled to ask the author State to take appropriate measures, and it had no obligation to appear before the courts of another State. To be required to appear and thereby accept the jurisdiction of the local courts, it would have to waive its immunity, and no State could be compelled to do that.

18. The scope of article 6, paragraph 1 (*b*), was thus much broader than that of article 22 of part 1. Article 22 referred to the need to exhaust local remedies. That rule applied to the injured alien; it did not apply to the foreign State itself. It was thus clear that article 22 did not have the same scope as article 6, paragraph 1 (*b*), and that the two provisions could perfectly well coexist.

19. Referring to rules of *jus cogens*, he had spoken at the previous meeting of the possibility of a treaty containing a clause under which occupation of a territory was one of the legal consequences of non-performance of obligations under the treaty. His own feeling was that such a clause would make the whole treaty null and void under the rules of *jus cogens*, but he realized that some members might have doubts about the absolute character of *jus cogens* in that situation. There was one field, however, namely humanitarian law, in which there should be no doubt at all. As far as the present draft was concerned, however, the Commission had to take into account the concept of *jus cogens* rules, even though there might be some uncertainty about their character or even their exact content.

20. With regard to terminology, the debate had shown the need to agree on the terms used in the draft articles. First, he wished to clarify the meaning of the term "retortion". That term applied to acts which were in themselves legally permissible, unlike "reprisal" and "reciprocity", which referred to acts that were normally not permissible, but could be resorted to in retaliation for an internationally wrongful act by the other party. In that connection, he drew attention to the passage of his sixth report dealing with the interpretation of a treaty (A/CN.4/389, para. 22). If both parties accepted a restrictive interpretation, the countermeasure would constitute a retortion; otherwise, it would be a reprisal. As to the distinction between reciprocity and reprisals, it was admittedly a difficult one. But even though the dividing line was not easy to draw, the distinction still had to be made, because in practice there were a great many cases which clearly involved either reprisals or reciprocity, and the two had to be kept apart.

21. The drafting of article 8, dealing with reciprocity, was certainly susceptible of improvement.

The operation of its provisions should not necessarily be limited to one and the same treaty, although that was the usual situation. Sometimes two States concluded at the same time two treaties having a clear link between them. On the other hand, one and the same treaty could contain different international obligations having no connection between them. There was in fact an infinite variety of situations in practice and it would be difficult to devise language to cover all of them.

22. In connection with reciprocity, Mr. Reuter had mentioned commercial treaties. He himself had been involved in the negotiation and drafting of many such treaties and had noticed a tendency on the part of the competent government bodies to adopt a strict *quid pro quo* approach. In that connection, he drew attention to paragraph (4) of the commentary to article 8 and its conclusion: "Even if in actual fact, at a particular moment, the balance between the performance and non-performance of respective obligations is not completely equal, the measure by way of reciprocity could still be justified as such."

23. It had been pointed out that the punishment of a State was not mentioned in the draft articles. Although there was no explicit reference to it, draft article 14 was relevant. The concept of the punishment of a State depended on what the international community as a whole regarded as a crime, and, hence, as an act for which punishment was in order. One form of punishment might be the imposition of a heavy financial burden upon a State; in practice, that type of measure had always proved ineffectual. There was also the possibility of taking away part of the territory of a State. Clearly, those were matters which the Commission could not codify, but article 14 did provide an opening.

24. On the question of proportionality, he wished to stress that the provisions of draft article 9, paragraph 2, did not require complete proportionality. The purpose of that provision was to avoid manifest disproportionality, which was also necessary in regard to punishment.

25. The question of the relationship between the draft articles on State responsibility and the draft Code of Offences against the Peace and Security of Mankind had also been raised. He himself had a slight preference for dealing with the punishment of a State as part of the topic of State responsibility, but it could equally well be dealt with in the draft code.

26. The question of the relationship between the present draft articles and the law of treaties arose at various levels. In the first place, a clear distinction had to be drawn between the question of the validity of treaties and that of the conduct of a State in response to an internationally wrongful act. Draft article 16, subparagraph (*a*), provided that the provisions of the present articles would not prejudge any question that might arise in regard to the "invalidity, termination and suspension of the operation of treaties". That provision was parallel to article 73 of the 1969 Vienna Convention on the Law of Treaties, which he himself found too sweeping: it was perhaps unwise to say that the Vienna Convention "shall not prejudge any question that may arise in regard to a treaty from ... the international responsibility of a State ...". On that point, he wished to stress that draft article 13 did not refer to the validity or to the suspension of the operation of a treaty; it dealt only with the conduct of a State in the performance of a treaty. Hence it did not come into direct conflict with the 1969 Vienna Convention.

27. The question of the relationship of the draft to the law of treaties also arose at another level, namely that of remedial consequences—a matter connected with the maintenance of international peace and security. Mr. Reuter had said that he could accept only the legislative function of the international community as a whole, although there might be some question as to what constituted that community and how it acted. He himself had, of course, no intention of introducing the concept of executive functions of the international community; there could be no question of any concrete decisions in concrete cases. The intention in the draft was to refer to the action of the international community *in abstracto*, in other words the legislative functions of that community. Perhaps Mr. Reuter feared that the concept of "the international community as a whole" might lead to the recognition of a sort of unofficial United Nations outside the United Nations itself. The fact was, however, that the international community existed, just as the United Nations existed, and that both had to be taken into account. He would revert, at the end of the debate, to the various important issues raised in Mr. Reuter's thought-provoking statement.

The meeting rose at 11.30 a.m.

1892nd MEETING

Monday, 3 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc. 7)

[Agenda item 3]

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).