Document:-

A/CN.4/414

Comments and observations of Governments on part one of the draft articles on State responsibility for internationally wrongful acts

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1988, vol. II(1)

STATE RESPONSIBILITY

[Agenda item 2]

DOCUMENT A/CN.4/414

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[*Original: English*]
[*20 April 1988*]

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Introduction

1. At its thirtieth session, in 1978, the International Law Commission decided, in conformity with articles 16 and 21 of its statute, to communicate the provisions of chapters I, II and III of part 1 of its draft articles on State responsibility for internationally wrongful acts, through the Secretary-General, to the Governments of Member States, requesting them to transmit their comments and observations on those provisions. The General Assembly, in paragraph 8 of section I of its resolution 33/139 of 19 December 1978, endorsed the decision of the Commission.

2. The comments and observations received further to the Commission's request were published in 1980.[1]

3. At its thirty-second session, in 1980, the Commission, having completed the first reading of part 1 of the draft articles on State responsibility for internationally wrongful acts as a whole, decided to renew the request it had made to Governments in 1978. At the same time, the Commission decided, in conformity with articles 16 and 21 of its statute, to communicate the provisions of chapters IV and V of part 1, through the Secretary-General, to the Governments of Member States, requesting them to transmit their comments and observations on those provisions. The Commission stated that the comments and observations of Governments on the provisions of the various chapters of part 1 of the draft would enable it, when the time came, to embark on the second reading of that part of the draft without undue delay.[2] The General Assembly, in paragraph 6 of its resolution 35/163 of 15 December 1980, endorsed the decision of the Commission.

4. The comments and observations received further to the Commission's request referred to in paragraph 3 above were published in 1981,[3] 1982[4] and 1983.[5]

5. Subsequently, one Member State submitted comments and observations, which are reproduced below.

[1] *Yearbook . . . 1980*, vol. II (Part One), p. 87, document A/CN.4/328 and Add.1-4.

[2] *Yearbook . . . 1980*, vol. II (Part Two), pp. 29-30, para. 31.

[3] *Yearbook . . . 1981*, vol. II (Part One), p. 71, document A/CN.4/342 and Add.1-4.

[4] *Yearbook . . . 1982*, vol. II (Part One), p. 15, document A/CN.4/351 and Add.1-3.

[5] *Yearbook . . . 1983*, vol. II (Part One), p. 1, document A/CN.4/362.

Comments and observations of the German Democratic Republic

[*Original: English*]
[*12 April 1988*]

1. In accordance with its foreign policy objectives, the German Democratic Republic has always attached great importance to the codification of rules on State responsibility and has followed with great interest the work of the Commission on the topic. As one of the guarantees for meeting international obligations, State responsibility takes a central place in the international legal system. Today, more than ever before, State responsibility is an important factor for international legality and thus constitutes an indispensable element of the comprehensive system of international security.

2. In the comments below, the German Democratic Republic would like to explain its views on part 1 of the draft articles[6] while reserving the right to comment again, in the overall context of the draft, on part 1 as soon as the work on parts 2 and 3 has been completed.

3. On the whole, the German Democratic Republic considers the method and the results of the Commission's work on part 1 to be positive and promising. The decisive prerequisite for advancing the Commission's activities in the field of State responsibility was the fact that the narrow concept of responsibility for injuries to aliens was dropped and attention was focused on the stipulation of secondary norms applicable to all types of internationally wrongful acts, which thus come up to the status of State responsibility within the system of international law. On the other hand, emphasis is placed on particularly grave internationally wrongful acts which endanger international peace and which are in the form of international crimes. The German Democratic Republic regards this as a central provision of the overall draft articles which is inseparably linked with the development of international law into an instrument for the safeguarding of international peace.

Chapter I (General principles)

4. The principles defined in chapter I reflect the current state of general international law and offer sufficient possibilities for the progressive application of the rules of State responsibility in the future. They have the support of the German Democratic Republic.

Article 1

5. The provision that every internationally wrongful act of a State entails the international responsibility of that State is a corner-stone of the overall concept of State responsibility. In the view of the German Democratic Republic, it is of particular importance that every internationally wrongful act should entail responsibility. Thus the binding nature and stability of the international legal system as a whole is reinforced.

6. It is also important to emphasize that these draft articles deal only with the responsibility of States.

7. An important conclusion from the principle embodied in article 1 is that international responsibility arises only as a consequence of a breach of international obligations of a State. This is not the case when there are violations of unilaterally defined "spheres of influence", national political interests or similar claims not covered under international law. The concept in article 1 is confirmed also in article 5, paragraph 1, of part 2 of the draft articles,[7] according to which only States whose rights have been violated can be considered as "injured States".

Article 2

8. The German Democratic Republic endorses the concern of article 2—which, in its view, reaffirms a principle that is self-evident—but feels that this concern is largely covered already by article 1.

Article 3

9. The German Democratic Republic supports the present formulation of the elements of an internationally wrongful act. This wording clearly shows that international responsibility arises when there is conduct of a State which constitutes a breach of an obligation of that State and that no other elements are necessary.

10. Other elements, such as, for instance, guilt or damage, can play an important role in respect of the scope and the form of responsibility or can be essential when it comes to determining the State (or the States) which is (are) directly affected by an internationally wrongful act. These elements, however, do not constitute a general condition for the occurrence of responsibility. These and other questions relating to damage are covered in part 2 of the draft.

Article 4

11. The German Democratic Republic attaches great importance to article 4, which, in its view, reaffirms the basic idea that no State can justify a violation of international law by invoking its internal law.

12. In this connection it should be emphasized that this principle is of a general nature, i.e. that it is also applicable, for example, to judgments of municipal courts, rules of domestic procedure and decisions of other authorities.

Chapter II (The "act of the State" under international law)

Articles 5, 6 and 7, paragraph 1

13. Articles 5 and 6 and paragraph 1 of article 7 deal with the general principles of the attribution of a certain conduct to a State. The German Democratic Republic proceeds from the fact that a State acts through its organs and that their action or omission is identical with the conduct of that State. Whether or not a person or an entity has the status of a State organ is dependent on the internal regulations and is an internal affair of the State concerned.

14. In the case of the attribution to the State of the conduct of an organ, it is important to stress that the State in its international relations appears as an integrated whole

[6] The text of part 1 of the draft articles, which is divided into five chapters containing 35 articles, appears in *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

[7] See *Yearbook . . . 1986*, vol. II (Part Two), p. 39.

as represented by its organs. As a general rule, it is irrelevant what status the organs possess in the internal structure of the State.

15. Article 6 is also fully applicable to the problem of territorial governmental entities (art. 7, para. 1). The latter, no doubt, belong to the organs "having that status under the internal law", as specified in article 5. In the view of the German Democratic Republic, there is no reason to concede a special status to the territorial entities of a federal State, since the problem of the federative structure is also a matter concerning the internal organization of the State and should, after all, be irrelevant to the purpose of the attribution. This results also from the provisions of part 2 of the draft, according to which only the State as a whole can fully meet its obligations as an "author State".

16. The German Democratic Republic therefore suggests that article 7, paragraph 1, be deleted and that in article 6 the words "including a territorial governmental entity" be inserted after the words "judicial or other power".

Article 7, paragraph 2, and articles 8 and 9

17. In this context, special emphasis should be placed on the fact that the complicated case described in article 7, paragraph 2, requires an additional authorization pursuant to internal law.

18. It is now clear that there is conduct of a State only if the respective entity or person exercises elements of the governmental authority of the respective State or acts on its behalf.

19. With regard to article 9, it should be noted that it is necessary clearly to preclude the possibility for a State to evade its international responsibility by the alleged "lending" of an organ to another State. This would also correspond to the commentary to article 9.[8]

20. Article 9 regulates the case of a State acting through organs placed at its disposal by another State where the former State is responsible for the activities of those organs. In its essential points, this case shows similarities to situations covered by article 28. Should the Commission hold the view that the cases covered by article 28 have to be regulated at all, the most appropriate way to do so would be through the addition of a second paragraph to article 9 or of an article 9 (*bis*). Thus the principle that every State is responsible only for activities attributable to it would be reinforced.

Article 10

21. Article 10 is in accordance with the basic concept of part 1 of the draft articles and hence acceptable. The article contains a very broad formulation in which all *ultra vires* activities carried out by the organs of a State are attributable to that State. Even though one could imagine cases in which *ultra vires* activities would be obvious, an exemption would impose an additional and unacceptable burden of proof upon the injured State.

Article 11

22. The German Democratic Republic takes a favourable view of the clear-cut formulation of the basic principle that the conduct of a person or group of persons not acting as an organ of a State, a territorial governmental entity or an entity empowered to exercise elements of governmental authority shall not be considered as an act of that State under international law.

23. This principle should be retained in article 11 and should not be mixed with other provisions.

Articles 12 and 13

24. With regard to article 13, it has to be noted that a provision similar to that in article 12, paragraph 2, is required since the situation regulated in article 13 does not differ essentially from that covered by article 12.

Articles 14 and 15

25. In the view of the German Democratic Republic, articles 14 and 15 are superfluous. The case described in article 14 is already covered by the relevant provisions of articles 7 to 12. Article 15 raises many problems relating to the legality of insurrectional movements. In its present formulation it is not acceptable and is not in line with present international law.

CHAPTER III (BREACH OF AN INTERNATIONAL OBLIGATION)

Article 16

26. The provisions of article 16 are in accordance with the general principles covered in chapter I and have as their counterpart also article 5, paragraph 1, in part 2 of the draft articles.[9] The provisions emphasize the strictly juridical nature of State responsibility.

Article 17

27. Article 17 reaffirms the principle that the "origin" or the "source" of the international obligation breached is irrelevant to the occurrence of responsibility. Article 17 should, therefore, remain in its present form.

Articles 18 and 24 to 26

28. Articles 18 and 24 to 26 deal with intertemporal questions and should, therefore, be assessed in the same context.

29. The German Democratic Republic welcomes the thorough identification of the different time periods in question. That is highly interesting and could be of importance for the practice of States and international courts.

30. At the same time, it has to be stated that the present regulation of the time factor in relation to the application of State responsibility is formulated in very general and abstract terms. It constitutes an inflexible system which, as a consequence of different interpretations of individual acts, will in practice entail more problems than it could resolve.

[8] *Yearbook . . . 1974*, vol. II (Part One), p. 287, document A/9610/Rev.1, para. (6) of the commentary to article 9.

[9] See footnote 7 above.

31. The German Democratic Republic suggests that article 18, paragraphs 1 and 2, be retained as general principles and that paragraphs 3 to 5 be deleted. As articles 24, 25 and 26 contain regulations which correspond to article 18, paragraphs 3 to 5, they should be deleted as well.

Article 19

32. In the view of the German Democratic Republic, the differentiation of international responsibility in certain categories is of great importance for the adequate coverage of the nature and the effectiveness of responsibility. Such differentiation results from the particular importance of the object attacked, from the subjects (a single State, several States or all States) which are entitled to adopt sanctions, and from the scope and kind of the approved sanctions in a broader sense. The recognition of the principle of differentiation in article 19 is the outstanding positive result of the work of the Commission on part 1 of the draft articles. The German Democratic Republic therefore fully supports article 19.

33. However, in the view of the German Democratic Republic, it is of great importance that due to this differentiation the régime of the legal consequences of international crimes should be thoroughly elaborated in part 2. Unfortunately, this has not yet been done in a consistent manner and should become one of the priority tasks of the Special Rapporteur.

34. The German Democratic Republic welcomes the method employed by the Commission in having combined a general definition of international crimes under paragraph 2 with a non-exhaustive list of examples. This method is not identical with the determination of primary rules. In article 19 general criteria for the occurrence of international crimes are illustrated by examples.

35. From the point of view of the German Democratic Republic, the singling out of particularly grave breaches as international crimes does not mean an introduction of criminal law elements into the concept of State responsibility. Such an approach, however, allows the rules which are vital for the coexistence of peoples to be protected by a special régime of responsibility, and particularly by speedy and collective reactions of States.

36. Pursuant to article 19, paragraph 2, an act is qualified as an international crime only if that act is recognized as a crime by the international community as a whole. Such recognition by the international community does exist with regard to cases of aggression and colonial domination as well as slavery, genocide and *apartheid*, as mentioned in paragraph 3. Similarly, military or any other hostile acts causing widespread, long-term and severe damage to the environment are recognized as crimes against the environment.

Articles 20, 21 and 23

37. The differentiation made in articles 20, 21 and 23 between obligations of result and obligations of conduct is helpful. It elucidates the discretion States have in implementing obligations of result. This is made clear especially in article 21, paragraph 2.

38. Article 23, however, could be dealt with as a subcase of article 21. This would improve the structure of the draft articles.

Article 22

39. Article 22 is of basic significance as it emphasizes the importance of the domestic jurisdiction and internal law of a State also for questions of international responsibility. It focuses on the quest for solutions in terms of internal law and has a preventive effect.

40. However, there is no reason that this rule should be confined to obligations of result. It is of general importance for situations arising in the national jurisdiction of a State.

CHAPTER IV (IMPLICATION OF A STATE IN THE INTERNATIONALLY WRONGFUL ACT OF ANOTHER STATE)

Article 27

41. Article 27 raises complex questions. In its present formulation it is applicable to all norms of international law and to both delicts and international crimes. With such a wide-ranging formula, article 27 contravenes the general principle of article 3 that "there is an internationally wrongful act of a State when [its] conduct constitutes a breach of an international obligation".

42. Rights and obligations for States other than those directly affected arise in the context of international crimes, especially in the case of aggression. Therefore, in such a case all States have to meet certain obligations of solidarity, in accordance with Article 2, paragraph 5, of the Charter of the United Nations, which are formulated in the present article 14, paragraph 2, of part 2 of the draft.[10] The most important obligation in this respect is the prohibition of aid or assistance in the commission of an international crime. A violation of this prohibition would constitute an internationally wrongful act. No particular proof of intent is necessary for the establishment of such a violation.

43. The German Democratic Republic favours the deletion of article 27 as its subject-matter is already covered by the regulations in article 19 and in article 14, paragraph 2, of part 2 of the draft. If article 27 is to be retained, it should be confined to aid or assistance in the commission of an international crime and should use an objective criterion.

Article 28

44. Article 28 contravenes the general principle that every State is responsible for its acts. Moreover, the concept of indirect responsibility is based on ideas and cases dating back to colonial times when the existence of States with limited sovereignty and non-sovereign States was still justified under international law. The cases referred to by the previous Special Rapporteur with regard to State practice either are unconvincing or do not warrant the inclusion of article 28.

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[10] See *Yearbook . . . 1985*, vol. II (Part Two), p. 21, footnote 66.

45. The German Democratic Republic holds the view that a State is responsible for acts of its organs (art. 5). The principle that responsibility has to be assumed by the State which commits an act should be observed consistently. The situations described in article 28, paragraphs 1 and 2, are actually cases where a State acts through foreign organs which in one way or another are subject to its control. For such cases, direct responsibility of the controlling State is rightly envisaged in article 9, provided that these organs have been placed voluntarily at the disposal of that State. The cases described in article 28 should be regulated, if at all, in connection with article 9.

46. Article 28 hampers the clear attribution of responsibility and would best be deleted. If that were done, and if the proposal made in paragraph 43 above relating to the deletion of article 27 were taken into account, chapter IV as a whole could be deleted and the structure of the draft articles could thereby be improved.

Chapter V (Circumstances precluding wrongfulness)

47. The German Democratic Republic welcomes the detailed and well-balanced formulation of the circumstances precluding the wrongfulness of certain acts. Articles 29 to 34 are an exclusive enumeration of those circumstances in accordance with present general international law. The circumstances preclude, *a priori*, the wrongfulness of the specified act. They are not a subsequent justification of an act which is wrongful as such. This precludes also the fact that in such cases a legal relationship similar to responsibility may arise.

Articles 30 and 34

48. The German Democratic Republic sees a connection between these two provisions. Countermeasures and self-defence, though constituting different reactions to different wrongful acts, serve the same purpose, namely to combat breaches of international obligations and restore a situation in conformity with international law. The German Democratic Republic therefore believes, in contrast to what is stated in the commentary to article 34,[11] that the reasons justifying the two categories of measures are basically the same. That is why the provisions of articles 30 and 34 should be brought closer together by placing them one after the other.

49. The main problem in respect of article 30 is the prerequisite for the legitimacy of countermeasures. This is underlined by the formulation "a measure legitimate under international law". It would be important to reinforce this aspect through an express formulation, which should read "a measure legitimate under international law and in particular under the provisions of the present Convention".

50. The German Democratic Republic agrees with the general line of article 34. However, it deems it necessary to make an express reference to Article 51 of the Charter of the United Nations. This would make it clear that self-defence is the sole admissible case of the use of military force against another State.

51. In comparison with the title of article 30, it would be more appropriate for the title of article 34 to be changed to "Self-defence in respect of an armed attack".

Articles 31 to 33

52. The German Democratic Republic welcomes the cautious approach of the Commission to the formulation of the circumstances precluding wrongfulness of the acts described therein. This applies particularly to article 33—a rule with a very limited scope and of an exceptional nature.

53. It would be preferable if article 32, entitled "Distress", could be included as a sub-case in article 31, entitled "*Force majeure* and fortuitous event".

54. In articles 31 to 33 the possibility of invoking *force majeure*, distress or a state of necessity is precluded if the State in question has contributed to the occurrence of that situation. In the commentary it is explained that the Commission wanted only to refer to the case in which the State invoking that provision had, intentionally or by negligence, contributed to creating the situation. It would be desirable to have this also clearly reflected in the text.

Article 35

55. The German Democratic Republic understands article 35, which contains no reference to any claim to compensation for damage, to be a mere reminder to the Commission in respect of its work. The article should therefore be deleted.

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56. The German Democratic Republic will continue to follow the Commission's work on the topic, and hopes, through these comments and observations on part 1 of the draft articles on State responsibility, to make a constructive contribution to advancing this work.

[11] *Yearbook . . . 1980*, vol. II (Part Two), p. 53, para. (5) of the commentary.