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A/CN.4/L.294

Draft articles on State responsibility: text of article 30 proposed by Mr. Jagota - reproduced in A/CN.4/SR.1545, para. 18

Topic:

State responsibility

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than evident that sanctions involving the use of force could be applied only when they were in the interests of the international community as a whole and only when they were authorized by the United Nations itself, something that should be reflected in the wording of the article.

13. In his opinion, if a third State was injured as a result of the application of sanctions, that State too was entitled to demand reparation and, where no reparation was made, to apply sanctions. It was plain that no State or States should inflict injury on a third State in the course of applying sanctions to punish one member of the international community.

14. Mr. JAGOTA considered that the proper place for draft article 30 was at the end of chapter V, since it would be more logical to deal first with the circumstances precluding wrongfulness in the initial act, such as consent and *force majeure,* and only then with those precluding wrongfulness in retaliatory action, such as legitimate sanctions.

15. As far as the substance of the draft article was concerned, he considered that the concept of legitimate sanction required amplification with special reference to the source and type of wrongfulness involved. For instance, the initial wrongful act could be a breach of a treaty or a non-treaty obligation; the resultant sanction might involve the use of armed force, which was permissible in contemporary international law only in pursuance of a decision of a competent international organization such as the United Nations, or other measures taken pursuant to such a decision, or again measures taken at the initiative of the State concerned. There was a wealth of literature and State practice on the subject and, in the specific case of a breach of a treaty obligation, some of it might profitably be reflected in part II of the draft. As far as draft article 30 was concerned, however, a legitimate sanction meant a sanction that was in conformity with the Vienna Convention [3] and with State practice developed on the basis of that Convention. There were many cases in point, including that between Pakistan and India concerning the suspension of air flights after 1971, in which he had himself been concerned, when all the elements of legitimacy had been considered in detail. [4]

16. He was not entirely in favour of the word "sanction", since it had acquired a somewhat unfortunate connotation and was now largely associated with the use of force in one form or another. It was of course also used in the sense of "measures", and, where self-defence was concerned, in the sense of measures of self-protection. A sanction, however, was not legitimate if applied by one or more States; it had to be applied by a body such as the United Nations. Like Mr. Schwebel, therefore, he thought that it would be preferable, within the context of draft article 30, to use the word "measure" rather than "sanction". Alternatively, both words could be used, in which case the former could perhaps be understood as action taken by the State concerned on its own initiative and the latter as action taken pursuant to the decision of a competent international organization. Thus action sanctioned by the United Nations but applied by a State would be lawful. He was not suggesting that the Commission should enter into the question of the lawfulness or otherwise of action taken by the United Nations, since that matter did not come within the scope of the draft articles clearly delineated by Mr. Ago. However, if the retaliatory action were out of all proportion to the original wrong (if, for example, it totally crippled the economy of the other State); then such action would be unlawful and would be covered by the concept of the legitimacy of the sanction.

17. A further question to be considered concerned the areas of priority for claims for reparation, since in some cases that would determine whether the sanction was legitimate.

18. In view of those considerations, he proposed that draft article 30 should be slightly amended so as to read (A/CN.4/L.294):

"*Legitimate measure or sanction*

"The international wrongfulness of an act not in conformity with what would otherwise be required of a State by virtue of an international obligation towards another State is precluded if the act was committed as a legitimate measure or sanction, whether on its own initiative or pursuant to a decision of a competent international organization, against that other State, in consequence of an internationally wrongful act committed by that other State."

19. Sir Francis VALLAT said that, broadly speaking, he supported the principle set forth in draft article 30. Two points, however, caused him some difficulty, the first of which concerned the word "sanction". It seemed to him that the sense in which that word was used in the French text of the draft article was nearer to the meaning that should be attributed to it in the English text. Unfortunately, in English usage, the word "sanction" had come to have a much narrower meaning, particularly in international legal circles, and tended to be used for action taken by or on the decision of the Security Council. His concern was that such usage would perhaps unduly limit the scope of the draft article, bearing in mind the need to take account of cases where action was taken not for the purpose of maintaining international peace and security but simply to ensure that a State was not injured by the unlawful act of another State. For example, in the event of a breach of a treaty, it was perfectly legitimate in certain circumstances for one State to take action against another. Consequently, he considered that some additional word was needed to amplify the meaning of "sanction" or, alternatively, that some other phraseology should be found to cover the situation.

[3] See 1533rd meeting, foot-note 2.

[4] See Appeal relating to the jurisdiction of the ICAO Council (India v. Pakistan), Judgment: *I.C.J. Reports 1972,* p. 46.