

Document:-
A/CN.4/L.297 and Add.1

Draft articles on State responsibility - texts adopted by the Drafting Committee: articles 28-32 and title of chapter V of the draft -reproduced in A/CN.4/SR.1567, para.1 and SR.1579, para.1

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

5. As every year, the members of the Committee would take an active part in the course on international law to be given in Rio de Janeiro in July and August under the Committee's auspices, to which eminent lawyers were invited. Mr. Barboza, a member of the Commission, had been invited that year.

6. The Committee was to hold its next session in July and August 1979. The main items on its agenda were: torture as an international crime (on which subject a draft convention was to be prepared in collaboration with the Inter-American Commission on Human Rights); transnational corporations and a code of conduct; revision of the inter-American conventions on industrial property; legal aspects of co-operation in transfer of technology; the principle of self-determination and its sphere of application; measures to promote the accession of non-autonomous territories to independence within the American system; jurisdictional immunity of States; and settlement of disputes relating to the law of the sea.

7. The CHAIRMAN thanked Mr. Herrarte González, Vice-Chairman of the Inter-American Juridical Committee, for his account of the Committee's work. He emphasized that co-operation between the Commission and regional bodies should be maintained and further strengthened. It was particularly important that the views of regional bodies should lead to concrete achievements, so that the Commission could take them into account in the codification and progressive development of international law, which it was pursuing at a universal level.

8. The Inter-American Juridical Committee was the first intergovernmental regional body responsible for codifying international law with which the Commission had established co-operative relations, in accordance with article 26, paragraph 4, of its statute. The Committee's achievements and the range and diversity of the subjects on its agenda showed the importance attached by OAS to the codification and progressive development of international law and to the work of its principal legal organ. Latin American lawyers had always been in the front rank of those who strove for the progress of international law in the service of peace and the promotion of friendly relations between States and peoples based on respect for the principle of sovereignty, as evidenced by their contribution to the development of the principle of non-intervention, the law of the sea and the right of asylum. The Commission was itself indebted to them on several counts. For example, it was on the basis of a draft submitted to the General Assembly by the delegation of Panama that the Commission had prepared, in 1949, a draft declaration on the rights and duties of States. And it was the system of reservations originating in Latin America that had prevailed in the Commission during the preparation of the draft articles on the law of treaties which had formed the basis of the Vienna Convention on the Law of Treaties.

9. He hoped that the Inter-American Juridical Committee would continue its work with the same success as in the past, in the interests of Latin America and of the rest of the world.

10. Mr. FRANCIS said that the work of the Inter-American Juridical Committee, like that of the other regional juridical committees, was an essential tributary to the mainstream of the codification process in which the Commission was engaged. The Committee was also a source of that process, as was clear from Mr. Herrarte González's account of its contribution to both public and private international law.

11. As one who came from the Caribbean region, he wished to convey to the members of the Committee his personal regards and his best wishes for the success of its 1979 session. He trusted that co-operation between the Committee and the International Law Commission would continue to flourish.

The meeting rose at 11.20 a.m.

1567th MEETING

Tuesday, 10 July 1979, at 10.40 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Valat, Mr. Verosta.

Also present: Mr. Ago.

State responsibility (*continued*)* (A/CN.4/318 and Add.1-3, A/CN.4/L.297)
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

ARTICLES 28, 29 AND 30

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce draft articles 28, 29 and 30 adopted by the Drafting Committee (A/CN.4/L.297), which read:

Article 28. Responsibility of a State for an internationally wrongful act of another State

1. An internationally wrongful act committed by a State in a field of activity in which that State is subject to the power of direction or control of another State entails the international responsibility of that other State.

* Resumed from the 1545th meeting.

2. An internationally wrongful act committed by a State as the result of coercion exerted by another State to secure the commission of that act entails the international responsibility of that other State.

3. Paragraphs 1 and 2 are without prejudice to the international responsibility of the State which has committed the internationally wrongful act, under the other articles of the present draft.

Article 29. Consent

1. The consent validly given by a State to the commission by another State of a specified act not in conformity with an obligation of the latter State towards the former State precludes the wrongfulness of the act in relation to that State to the extent that the act remains within the limits of that consent.

2. Paragraph 1 does not apply if the obligation arises out of a peremptory norm of general international law. For the purposes of the present draft articles, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Article 30. Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an obligation of that State towards another State is precluded if the act constitutes a measure legitimate under international law against that other State, in consequence of an internationally wrongful act of that other State.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in its consideration of articles 28 to 30 and of the title of chapter V, the Drafting Committee had been privileged to have the active participation of Mr. Ago, and had taken account of the Commission's discussion of the topic and of the formal proposals contained in documents A/CN.4/L.289/Rev.1 and A/CN.4/L.290-295. The Committee had also had before it written proposals and suggestions by some of its members and had kept in mind the need to maintain consistency of terminology throughout the draft.

3. Article 28 had been the subject of a formal reservation in the Drafting Committee. The word "indirect" had been deleted from the title proposed by Mr. Ago (A/CN.4/318 and Add.1-3, para. 47), in order to take account of the Commission's views. Whereas the original text of the article had been divided into two paragraphs, the text adopted by the Drafting Committee contained three paragraphs. Paragraph 1, which concerned the "stable relationship" aspect of the rule, corresponded to paragraph 1 of the original article, but a number of drafting changes had been introduced to make the rule clearer. First of all, the negative formulation of the original text, which had placed the emphasis on the absence of international responsibility of the State committing the wrongful act, had been changed to a positive formulation stressing the international responsibility of the State exercising the power of direction or control over the State that committed the act. Thus the last part of the original paragraph, which had read "does not entail the international responsibility of the State committing the wrongful act but entails the indirect international responsibility of the State which is in a position to give directions or

exercise control", had been amended to read "entails the international responsibility of that other State", a formulation expressing the same idea in a more succinct manner. In addition, the expression "in law or in fact" had been deleted, and the words "the power of" had been inserted before the words "direction or control", it being understood that, for the purpose of invoking responsibility under article 28, paragraph 1, it was not necessary to establish that that power had in fact been exercised to secure the commission of the internationally wrongful act. The words "not in possession of complete freedom of decision, being" had been deleted, as unnecessary.

4. Paragraph 2 of article 28, which concerned the "coercion" aspect of the rule, corresponded to paragraph 2 of the original text, although some drafting changes had been made for the sake of greater precision and clarity. The new text included a change similar to the one made in paragraph 1, the negative formulation "does not entail the international responsibility of the State which acted under coercion but entails the indirect international responsibility of the State which exerted it" having been replaced by the positive wording "entails the international responsibility of that other State". Again, as in the case of paragraph 1, the reference to "indirect" responsibility had been omitted. Moreover, the words "under coercion" had been replaced by the words "as the result of coercion", to stress the direct causal connexion between coercion and the commission of the internationally wrongful act. The expression "to that end" had been amended to read "to secure the commission of that act", to emphasize the purpose of the coercion.

5. Paragraph 3 of article 28 had been inserted in order to separate the question of the possible responsibility of the State committing the wrongful act from that of the responsibility of the State which exercised the power of direction or control, or which had coerced the State committing the act. Paragraph 3 thus made it clear that the rules in paragraphs 1 and 2 did not necessarily exclude any responsibility that the State committing the wrongful act might incur under other articles of the draft. It also left open the possibility that the State committing the act might incur joint and several responsibility with the dominant State.

6. Article 29 was entitled "Consent". The words "of the injured State", used in the original title (A/CN.4/318 and Add.1-3, para. 77), had been deleted as not being entirely accurate or necessary. The article was set out in two paragraphs, which corresponded to the two sentences of the single paragraph of the original text. In paragraph 1, taking due account of the Commission's discussion, the Drafting Committee had inserted the word "validly", to qualify the consent given by a State. That word had been included in some of the formal proposals submitted to the Commission, notably in documents A/CN.4/L.291, L.292 and L.293, and it was to be understood in relation to international law. To circumscribe the application of the rule more clearly, the word "specified" had also been inserted to qualify the word "act", an idea that

point that all aspects of the subject would have to be considered at some stage, including uses, abuses and effects, competing priorities among uses, general principles, co-operative institutions and measures for the peaceful settlement of disputes.

19. The question had been raised whether the draft articles should deal not only with the uses of international watercourses but also with the uses of the water of international watercourses—a distinction which he had not thought to be profound. Reference had likewise been made to related problems such as flood control, erosion, sedimentation, salt-water intrusion and estuaries. In view of the approach adopted by the Commission so far, and of the response of States to the questionnaire, there was every expectation that the Commission would deal with such related problems, the importance of which must not be minimized. As far as any distinction between the uses of international watercourses and the uses of the water of international watercourses was concerned, the latter expression had been used in his report solely for purposes of clarification. It had been taken for granted, however, that the Commission was meant to deal, and was dealing, with the uses of the water of international watercourses. Of the uses referred to in question D of the questionnaire, some, such as swimming, fishing and timber floating, were clearly direct uses of the watercourse, but most were not. For example, water used for irrigation was water diverted from watercourses, and the use of water for the production of nuclear energy, or for building or manufacturing, was a use of the water of a watercourse, not a direct use of the watercourse itself.

20. In view of the terms of the questionnaire and the answers to it, he believed that the contention that the Commission should confine itself to uses of the watercourse as such could not be upheld. Moreover, the possibility of excluding the uses of the water of international watercourses from the scope of the Commission's work had not been entertained earlier, and he saw no reason for now allowing such an exclusion.

21. Another point stressed during the discussion had been the problem of pollution, and it had been noted that pollution could not be dealt with effectively if measures were confined to riparian States. The need to analyse the provisions of the relevant treaties had rightly been emphasized. It had also been observed that the draft articles should provide for the responsibility of States which caused injury, and for technical assistance to developing countries.

22. The need to take account of the physical characteristics of water, and to obtain the necessary technical and scientific advice, had been generally recognized, and the Commission appeared to be largely in favour of dealing with the navigational uses of international watercourses when they affected, or were affected by, other uses. The majority also apparently took the view that the subject was ripe for codification.

23. He trusted that at its next session the Commission would be able to crystallize the measure of agreement achieved, so that it would be possible to deal constructively with the various elements of the law of

the non-navigational uses of international watercourses. He agreed that it would be desirable for the questionnaire to be circulated again to those member States that had not yet responded to it.

24. Lastly, he trusted that the Commission's report to the General Assembly would contain a detailed account of the discussion, especially as no articles had been adopted for the Assembly's consideration.

25. The CHAIRMAN thanked the Special Rapporteur and congratulated him on his work on a complex subject which touched simultaneously on legal, political, technical and economic questions.

26. He explained that the Commission's report to the General Assembly would give an account of the discussions and would mention the need to draw the attention of certain States to the questionnaire adopted by the Commission at its twenty-sixth session.⁵

27. He noted that the Commission had thus completed its consideration of item 5 of its agenda.

The meeting rose at 10.55 a.m.

⁵ See foot-note 2 above.

1579th MEETING

Monday, 30 July 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

State responsibility (concluded)*
(A/CN.4/318 and Add.1-4, A/CN.4/L.297/Add.1)
[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)**

ARTICLES 31 AND 32

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 31 and 32 as adopted by the Drafting Committee (A/CN.4/L.297, Add.1), which read:

* Resumed from the 1573rd meeting.

** Resumed from the 1567th meeting.

Article 31. Force majeure and fortuitous event

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforeseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of material impossibility.

Article 32. Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care.

2. Paragraph 1 shall not apply if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that articles 31 and 32 corresponded to the articles proposed by Mr. Ago in his eighth report (A/CN.4/318 and Add.1-4, para. 153).¹ Those articles had dealt respectively with "*force majeure*" and "fortuitous event", but the Drafting Committee had decided, in the light of the Commission's discussions, to rearrange their contents and to introduce some drafting changes, without in any way altering their meaning as originally intended. Article 31 now dealt with both *force majeure* and fortuitous event, while article 32 dealt with the case of distress.

3. Paragraph 1 of the Committee's article 31 covered the provisions contained in paragraph 1 of articles 31 and 32 presented by Mr. Ago. The Committee had thought it appropriate to deal in a single provision with both *force majeure* and fortuitous event, in view of the characteristics common to those excluding circumstances, particularly the element of impossibility. That element, which in the original text had been qualified, with regard to *force majeure*, by the word "absolutely", was now qualified by the word "materially", which was intended to convey the idea of an objective rather than a subjective criterion for determining the situation of impossibility. In order further to stress the element of impossibility, the Committee had considered it necessary to add that the event that gave rise to the potentially wrongful act of the State must have been "beyond its control". It had emphasized the causal relationship between the *force majeure* or unforeseen event and the State's conduct by using the words "was due". The Committee had also decided to refer, in the last part of the paragraph, to "the State", rather than to "the author of the conduct attributable to the State", since, according to the provisions of chapter II of the draft, and in particular

article 5,² the conduct of any State organ having that status under the internal law of the State was to be considered as an act of the State under international law. The Committee had also considered that it would be more appropriate to say that a fortuitous event would make it impossible for a State "to know", rather than "to realize", that its conduct was not in conformity with an international obligation. Finally, while the Committee had decided to retain, provisionally, the word "external", which Mr. Ago had employed in his article 32, it wished to draw the Commission's attention to the general opinion of its members that the term might be superfluous, particularly in view of the text proposed for paragraph 2 of article 31.

4. Paragraph 2 reproduced, in simplified form and with the drafting changes necessitated by the use of somewhat different terminology in paragraph 1, the provision originally restricted to *force majeure* in paragraph 3 of Mr. Ago's article 31. The Committee, bearing in mind the elements common to both *force majeure* and fortuitous event that were present in paragraph 1 of article 31, had considered it appropriate to extend to fortuitous event the provision that made that paragraph inapplicable when the State in question had contributed to the situation of material impossibility.

5. Paragraph 1 of article 32 covered the case of distress, which Mr. Ago had treated in paragraph 2 of his article 31. The Committee had tried to make the rule more precise and clear by referring to a situation of "extreme" distress, rather than merely to a situation of distress, and to "persons entrusted to his care", rather than to "those accompanying him". Paragraph 2 of article 32 combined elements of Mr. Ago's article 31, paragraphs 2 and 3, and fulfilled a function similar to that of paragraph 2 of the new article 31.

6. The Drafting Committee had been seized of a proposal to add to the draft a new article, reading:

"The preclusion of the wrongfulness of an act committed in the conditions provided for in articles 31 and 32 is without prejudice to the possible substitute obligations of the State and the possible legal consequences of the act under other rules of international law."

It had considered that such an article might be applicable not only to the proposed articles 31 and 32, but also to other articles concerning circumstances precluding wrongfulness, such as the article to be drafted on "state of emergency". It had therefore decided to refrain from examining the proposed text at the current session, on the understanding that the Commission would consider the inclusion in the draft of such a general article at a later stage of its work on State responsibility.

7. The CHAIRMAN invited the Commission to examine the articles proposed by the Drafting Committee one by one.

¹ Texts reproduced in the summary record of the 1569th meeting, para. 1.

² See 1532nd meeting, foot-note 2.