

Document:-
A/CN.4/L.395

Draft articles on State responsibility (part 2 of the draft articles). Text adopted by the Drafting Committee: article 5 - reproduced in A/CN.4/SR.1929, para. 26

Topic:
State responsibility

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

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invited the Special Rapporteur to be very cautious in using terms which could cause misunderstanding before anything had been decided about the international organizations to be covered in the topic under study. However, he noted the explanation which the Special Rapporteur had given at the beginning of his statement.

18. As to what should be done with the text of the draft article or articles submitted, he shared Sir Ian Sinclair's perplexity. Since the Special Rapporteur had not outlined the nature of the international organizations he proposed to deal with, it would be difficult for the Commission to draw up any rules as yet. That being so, the proposed texts, especially the provision concerning the capacity of an international organization to conclude treaties, could hardly be referred to the Drafting Committee. The texts could be left in abeyance and the Commission could decide later, in the light of subsequent reports, which elements of legal personality—legal capacity in general and capacity to conclude treaties in particular—should be retained.

19. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) thanked Mr. Balanda for his advice, which he would certainly follow. He repeated that he had not used the word *pouvoirs* in his report, the original version of which was in Spanish; if a mistake had crept into the French translation he could not be held responsible. Moreover, as he had already pointed out, the paragraph in question was purely descriptive.

20. Mr. McCAFFREY said that he, too, thought it might be premature to draft a provision without knowing to what it would apply. It had been his understanding that, given the very limited time available for discussion of the topic, the Commission would engage in only a preliminary consideration of the issues raised in the Special Rapporteur's second report (A/CN.4/391 and Add.1). His own comments had therefore been confined to a few general remarks, as had those of other members. In any event, so far as article 2 in alternative B was concerned, the Special Rapporteur had pointed out that it would be necessary to await the outcome of the United Nations Conference to be held in 1986, and it was doubtful whether that article was ripe for referral to the Drafting Committee.

21. The CHAIRMAN suggested that the Special Rapporteur should be invited to bear member's comments in mind when preparing his third report, and to make specific suggestions on the scope of the draft articles. He also suggested that the draft article or articles should not be referred to the Drafting Committee until the topic had been further discussed at the Commission's thirty-eighth session.

It was so agreed.

22. In reply to a question by the Chairman, Mr. DE SARAM (Deputy Secretary of the Commission) said that the Secretariat would be pleased to provide members with copies of the materials received from organizations outside the United Nations system, before the Commission's thirty-eighth session.

23. Mr. FRANCIS said it might be useful to have some idea of the points that the Commission would take up at its next session. He assumed that it would

confine itself to the question of scope and that any discussion of privileges and immunities would take place in that context.

24. The CHAIRMAN said that the Special Rapporteur would undoubtedly wish to concentrate on the privileges and immunities of international organizations; but several members thought that it would be useful to determine the scope of the draft articles before certain matters were discussed, and the Special Rapporteur had agreed to bear that in mind.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/394⁷)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (concluded)

25. The CHAIRMAN reminded members that the Commission was required to take a procedural decision on item 8 of the agenda. A consensus had been reached in informal consultations on a short text for inclusion in the Commission's report, to the effect that the Commission had taken note of the Special Rapporteur's preliminary report (A/CN.4/394), but had been unable to discuss it at its thirty-seventh session, and that the Commission hoped that the Special Rapporteur would be able to present a new report which it would discuss at its thirty-eighth session, in 1986, along with his preliminary report. If there were no objections, he would take it that the Commission agreed to include that text in its report.

It was so agreed.

**State responsibility (continued)* (A/CN.4/380,⁸
A/CN.4/389,⁹ A/CN.4/L.395, 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)¹⁰ (continued)***

DRAFT ARTICLE PROPOSED BY
THE DRAFTING COMMITTEE

ARTICLE 5

26. The CHAIRMAN invited the Chairman of the Drafting Committee to present article 5 as proposed by the Drafting Committee (A/CN.4/L.395), which read:

⁷ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

* Resumed from the 1902nd meeting.

⁸ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

⁹ Reproduced in *Yearbook ... 1985*, vol. II (Part One).

¹⁰ 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.*
For the texts of articles 1 to 16 of part 2 of the draft as submitted by the Special Rapporteur, see 1890th meeting, para. 3.

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(a) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(b) if the right infringed by the act of a State arises from a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(d) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(e) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour,

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law, or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(f) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 5 was a definitional article, but one of great importance for the articles that would follow in part 2 of the draft. Most members of the Drafting Committee had agreed that it was necessary to include an article defining an "injured State", since the whole of part 2 on the content, forms and degrees of international responsibility would revolve round a clear understanding of which States could claim to be injured by the breach of an international obligation and thus invoke the consequences of State responsibility to be set out in the remaining articles of part 2. The purpose of article 5 was neither to define primary rules of international law, nor to provide an exhaustive list of situations in which a State could claim to be injured. It provided a general rule in paragraph 1, an indicative list in paragraph 2 and dealt with the rather special case of international crimes in paragraph 3.

28. He wished to pay tribute to the Special Rapporteur for his perseverance, ingenuity and flexibility in assisting the Drafting Committee to arrive at a text which commanded the general, if not unanimous, support of the Committee. It had not been possible, in the short time available, for the Committee to deal with the other articles on State responsibility referred to it, but he hoped that further progress on the topic would be made at the Commission's next session.

29. Members would recall that the Special Rapporteur had tried, in his original article 5, to indicate which States should be considered to be injured States in different situations, according to the origin of the obligation violated or of the right infringed. Opinions in the Commission had been divided.¹¹ Some members had supported the Special Rapporteur's approach; others had thought it essential for the article to include a general definition of an "injured State". Some had considered that the definition could take the form of an introductory clause, which would introduce the detailed provisions proposed by the Special Rapporteur. Others had believed that a general definition would suffice and had been opposed to specifications based on "sources". The opinion had also been expressed that, strictly speaking, the article was unnecessary.

30. The Drafting Committee had decided to combine a general definition with the detailed proposals of the Special Rapporteur. The general definition of an "injured State" appeared in paragraph 1; paragraphs 2 and 3 followed the original approach of the Special Rapporteur and indicated which State was to be considered the injured State in specific situations.

31. Since under part 1 of the draft one of the elements of an internationally wrongful act was conduct that constituted a breach of an international obligation, and since a breach of an obligation necessarily infringed a right or rights of another State or States, it was proposed that part 2 should lay down that a State whose right was thus infringed should be considered an injured State. That was the meaning of paragraph 1 of article 5, as adopted by the Drafting Committee.

32. That criterion for identifying an injured State as a State which had had one of its rights infringed had been incorporated in all the provisions proposed. The expression "right ... infringed by the act of another State" had been used throughout article 5.

33. Paragraph 2 had six subparagraphs, (a) to (f), and one of them, subparagraph (e), was subdivided into three. The subparagraphs proceeded from the simplest situation—the breach of an obligation imposed by a bilateral treaty, in which it was easy to identify the injured State—to the more complex situations that arose from the breach of an obligation under a multilateral treaty or a rule of customary international law. In between, situations were contemplated in which the obligation violated had its origin in a judgment or other binding dispute-settlement decision, in a binding decision of an international organ, or in a treaty provision in favour of a third State not a party to the treaty.

34. Referring to the provisions of paragraph 2, he drew attention to the opening words "In particular", which made it clear that the paragraph provided a non-exhaustive, indicative list identifying the "injured State" in various circumstances. That list was roughly based on the circumstances proposed by the

¹¹ Article 5 was considered by the Commission at its thirty-sixth session; see *Yearbook ... 1984*, vol. I, pp. 259 *et seq.*, 1858th meeting, 1860th meeting (paras. 33 *et seq.*), and 1861st and 1865th to 1867th meetings.