

Document:-
A/CN.4/L.480 and Add.1

**Draft articles on State responsibility. Titles and texts of articles adopted by the Drafting
Committee: Part 2**

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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be duly reflected in the draft of the final chapter of its report to the General Assembly.

It was so agreed.

37. The CHAIRMAN recalled that members had been invited to indicate whether they would be willing to participate in preparing a publication as part of the Commission's contribution to the United Nations Decade of International Law.⁵ He reminded members that few replies had been received and that the deadline was 15 July.

The meeting rose at 12.20 p.m.

⁵ See footnote 1 above.

2318th MEETING

Tuesday, 13 July 1993, at 10.05 a.m.

Chairman: Mr. Julio BARBOZA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Vereshchetin, Mr. Villagrán Kramer, Mr. Yankov.

State responsibility (concluded)* (A/CN.4/453 and Add.1-3,¹ A/CN.4/L.480 and Add.1, ILC(XLV)/Conf.Room Doc.1)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.480 and Add.1).

2. Mr. MIKULKA (Chairman of the Drafting Committee), said that at the forty-fourth session of the Commission (1992), the Drafting Committee had adopted articles 6, 6 *bis*, 7, 8, 10² and 10 *bis*, on reparation, as well as a new paragraph 2 for article 1.³ Those articles, which had

* Resumed from the 2316th meeting.

¹ Reproduced in *Yearbook... 1993*, vol. II (Part One).

² The substance of article 9 (Interest), as proposed by the Special Rapporteur in his second report in 1989, was incorporated in paragraph 2 of article 8. Hence the gap in the sequence of articles.

³ For the text, see *Yearbook... 1992*, vol. I, 2288th meeting, para. 5.

not been acted on at the previous session in the absence of commentaries, had now been adopted at the present session.⁴

3. At the present session, the Drafting Committee had considered the articles of part 2, proposed by the Special Rapporteur in his fourth report⁵ and adopted articles 11 to 14, concerning countermeasures. The titles and texts of those provisions read as follows:

Article 11. Countermeasures by an injured State

1. As long as the State which has committed an internationally wrongful act has not complied with its obligations under articles 6 to 10 *bis*, the injured State is entitled, subject to the conditions and restrictions set forth in articles . . . , not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary to induce it to comply with its obligations under articles 6 to 10 *bis*.

2. Where a countermeasure against a State which has committed an internationally wrongful act involves a breach of an obligation towards a third State, such a breach cannot be justified as against the third State by reason of paragraph 1.

Article 12. Conditions relating to resort to countermeasures

1. An injured State may not take countermeasures unless:

(a) it has recourse to a [binding/third party] dispute settlement procedure which both the injured State and the State which has committed the internationally wrongful act are bound to use under any relevant treaty to which they are parties; or

(b) in the absence of such a treaty, it offers a [binding/third party] dispute settlement procedure to the State which has committed the internationally wrongful act.

2. The right of the injured State to take countermeasures is suspended when and to the extent that an agreed [binding] dispute settlement procedure is being implemented in good faith by the State which has committed the internationally wrongful act, provided that the internationally wrongful act has ceased.

3. A failure by the State which has committed the internationally wrongful act to honour a request or order emanating from the dispute settlement procedure shall terminate the suspension of the right of the injured State to take countermeasures.

Article 13. Proportionality

Any countermeasure taken by an injured State shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State.

Article 14. Prohibited countermeasures

An injured State shall not resort, by way of countermeasure, to:

(a) the threat or use of force as prohibited by the Charter of the United Nations;

(b) extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed an internationally wrongful act;

(c) any conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents;

(d) any conduct which derogates from basic human rights; or

⁴ For the adoption of article 1, paragraph 2, and article 6, see 2314th meeting; for the adoption of articles 6 *bis*, 7, 8, 10 and 10 *bis*, see 2316th meeting.

⁵ For the texts of draft articles 5 *bis* and 11 to 14 of part 2 referred to the Drafting Committee, see *Yearbook... 1992*, vol. II (Part Two), footnotes 86, 56, 61, 67 and 69, respectively.

(e) any other conduct in contravention of a peremptory norm of general international law.

ARTICLE 11 (Countermeasures by an injured State)

4. Article 11, as originally proposed by the Special Rapporteur, had placed three conditions on lawful resort to countermeasures: the actual existence of an internationally wrongful act, the prior submission by the injured State of a demand for a cessation and/or reparation, and the lack of an adequate response to the demand. The Drafting Committee's version focused not so much on the conditions to be met for resort to countermeasures to be lawful as on the scope and limits of the injured State's entitlement to resort to countermeasures.

5. In the Drafting Committee's formulation of paragraph 1—as indeed in the Special Rapporteur's text—the essence of the concept of countermeasures was conveyed by the words “not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act”. In plenary, some members had suggested the phrase “to suspend the performance of its obligations” as an alternative. The Drafting Committee, however, had thought that the phrase might restrict the scope of application of countermeasures to obligations of a continuing character and exclude therefrom obligations requiring the achievement of a specific result. It had therefore opted for the Special Rapporteur's formulation.

6. Aside from defining the basic component of the notion of countermeasures, article 11 circumscribed the scope of the injured State's entitlement in three ways: it first required that the wrongdoing State should have failed to comply with its obligations under articles 6 to 10 *bis*. In that regard, the Drafting Committee had substituted for the criterion of “adequate response”, initially proposed by the Special Rapporteur, the clearer and more objective criterion of failure to comply with specific obligations, and the sentence was so structured as to place in a prominent position, at the very beginning of the article, that basic requirement for lawful resort to countermeasures. Secondly, the text recommended by the Drafting Committee, like the Special Rapporteur's proposal, made the injured State's entitlement subject to the conditions and restrictions set forth in subsequent articles. Thirdly, and perhaps most importantly, it required that resort to countermeasures should be “necessary to induce [the wrongdoing State] to comply with its obligations under articles 6 to 10 *bis*”. The expression “as necessary” performed a dual function. First it made it clear that countermeasures might be applied only as a last resort, where other means available to an injured State such as negotiations, diplomatic protests or measures of retortion would be ineffective in inducing the wrongdoing State to comply with its obligations. It also indicated that the decision of the injured State to resort to countermeasures was to be made reasonably and in good faith and at its own risk. That point would be elaborated on in the commentary.

7. Some members of the Drafting Committee had felt that the right under article 11 should be limited to directly injured States. They had referred to the distinction, which was, of course, relevant only to the violation of multilateral obligations, between the State which was di-

rectly injured by the violation in the material and legal sense and the State which was injured, not materially, but only legally. The majority of the members of the Drafting Committee had, however, been reluctant to make such a distinction, which was not made anywhere else in the draft and would in some way call into question the definition of an injured State in article 5.⁶ Some members had taken the view that the problem was dealt with in article 13, on proportionality, which limited the legally injured State in the choice of the measures it could resort to, as compared with the directly injured State. Furthermore, the issue would arise again in the context of crimes, with which the Commission intended to deal at a later stage. The proponents of the distinction between directly and indirectly injured States had therefore agreed not to insist on the matter, on the understanding that it would be more thoroughly discussed when the Commission addressed the question of crimes.

8. As to paragraph 2 of article 11, the Special Rapporteur had included in his article 14,⁷ on prohibited countermeasures, a paragraph 1 (b) (iv) ruling out resort by way of countermeasures to conduct which consisted of a breach of an obligation towards any State other than the State which had committed the internationally wrongful act. In plenary, it had been generally recognized that the rights of States not involved in the responsibility relationship between the injured State and the wrongdoing State should not be affected by countermeasures taken by the former against the latter. At the same time, the approach adopted by the Special Rapporteur, which denied the legitimacy of any countermeasures incidentally breaching the rights of third States, had been viewed as too sweeping in an interdependent world where States were increasingly bound by multilateral obligations. In view of those considerations, the Drafting Committee had opted for ensuring protection of the rights of third States by relying on one of the initial characteristics of countermeasures, namely the fact that the unlawful character of conduct resorted to by way of countermeasures was precluded only as between the injured State and the wrongdoing State. As stressed by the Commission in paragraph (18) of its commentary to article 30 of part 1 of the draft, “the legitimate application of a sanction against a given State can in no event constitute *per se* a circumstance precluding the wrongfulness of an infringement of a subjective international right of a third State against which no sanction is justified”.⁸ The Drafting Committee had taken the view that, since that rule related to the content and scope of the injured State's entitlement to resort to countermeasures, its proper place was in article 11. It had therefore inserted in article 11 a paragraph 2 which provided that, if a countermeasure involved a breach of an obligation towards a third State, the wrongfulness of such a breach was not precluded by reason of its permissibility in relation to the wrongdoing State. In other words, paragraph 2 was in the nature of a warning to the injured State that any measure which might result in a violation of the rights of the third State would be a wrongful act against that third State and it

⁶ For the texts of articles 1 to 5 of part 2 provisionally adopted on first reading at the thirty-eighth session, see *Yearbook . . . 1986*, vol. II (Part Two), pp. 38-39.

⁷ See footnote 5 above.

⁸ See *Yearbook . . . 1979*, vol. II (Part Two), p. 120.