

Document:-
A/CN.4/L.501

Draft articles on State responsibility. Titles and texts adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission - reproduced in document A/CN.4/SR.2366, para.1

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

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Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/453 and Add.1-3,¹ A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,² A/CN.4/L.501)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce articles 11 to 14 of part two of the draft articles on State responsibility as adopted by the Drafting Committee at the forty-fifth and forty-sixth sessions of the Commission (A/CN.4/L.501). 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 12, 13 and 14) not to comply with one or more of its obligations towards the State which has committed the internationally wrongful act, as necessary in the light of the response by the State which has committed the internationally wrongful act in order 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

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

2. Mr. BOWETT (Chairman of the Drafting Committee) reminded members that, at the Commission's forty-fifth session, the Drafting Committee had adopted for articles 11 to 14 texts that had been introduced by the then Chairman of the Drafting Committee, Mr. Mikulka, but had not been acted on in plenary pending the submission of the relevant commentaries.³ In his sixth report (A/CN.4/461 and Add.1-3), the Special Rapporteur had proposed rewording articles 11 and 12 and the Commission had agreed to refer his proposals to the Drafting Committee. The document before the Commission (A/CN.4/L.501) therefore contained article 11 as it had emerged from the discussion in the Drafting Committee at the present session and articles 12, 13 and 14 as adopted by the Drafting Committee at the forty-fifth session in 1993.⁴ Since articles 13 and 14 had not been referred back to the Drafting Committee at the present session they required no comment on his part and he would simply refer the Commission to the presentation made by the Chairman of the Drafting Committee at the forty-fifth session of the Commission.⁵

3. The Drafting Committee had re-examined the text of article 11 as adopted at the forty-fifth session in the light of the Special Rapporteur's contention that the concept of adequate response must have a place in the article if a proper balance was to be struck between the position of the injured State and that of the wrongdoing State. The Special Rapporteur took the view that the effect of the omission of the notion of adequate response would be to allow the injured State too much scope to use countermeasures in order to compel both cessation and reparation. In the case of cessation, the injured State would be allowed to apply countermeasures without the wrongdoing State being given any opportunity to explain, for example, that there was no wrongful act or that the wrongful act was not attributable to it. In the case of reparation, the injured State might continue to be the target of countermeasures even after it had admitted its responsibility and even though it was in the process of providing reparation and/or satisfaction.

4. The Drafting Committee had noted that, because the text it adopted at the previous session made the right of the injured State to resort to countermeasures subject to the conditions and restrictions set forth in subsequent articles, it provided a safeguard against abuse, and that the requirement of proportionality went some way to meeting the Special Rapporteur's concerns. It had

* Resumed from the 2353rd meeting.

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

² Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

³ *Yearbook . . . 1993*, vol. II (Part Two), para. 204.

⁴ *Ibid.*, vol. I, 2318th meeting, para. 3.

⁵ *Ibid.*, paras. 2-35.