

Document:-
A/CN.4/L.524 and Corr.2

Part 1 of the draft articles adopted by the commission on first reading at its thirty-second session, in 1980, and titles and texts of parts 2 and 3 of the draft articles as provisionally adopted by the Drafting Committee on first reading at the forty-eighth session, in 1996

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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2452nd MEETING

Wednesday, 3 July 1996, at 10.35 a.m.

Chairman: Mr. Ahmed MAHIOU

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Jacovides, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Robinson, Mr. Rosenstock, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada.

State responsibility (*continued*)* (A/CN.4/472/Add.1, sect. C, A/CN.4/476 and Add.1,¹ A/CN.4/L.524 and Corr.2)

[Agenda item 2]

DRAFT ARTICLES OF PARTS TWO AND THREE²
PROPOSED BY THE DRAFTING COMMITTEE

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee on the topic under consideration (A/CN.4/L.524 and Corr.2).

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) recalled that, at its thirty-second session in 1980, the Commission had completed its consideration on first reading of part one of the draft articles on State responsibility. The Drafting Committee had therefore dealt only with parts two and three at the current session. It had had two tasks to accomplish: first, to examine the draft articles dealing with international crimes which had been referred to it; and, secondly, to undertake the fine-tuning, or *toilette finale*, of all the articles in parts two and three. Some had been adopted quite a long time ago and there was a need to establish consistency in the use of terms. For the Commission's convenience, the entire set of articles in parts one, two and three had been reproduced and renumbered consecutively.

3. The Drafting Committee had been very careful to limit any changes in the articles of parts two and three which had been previously adopted by the Commission.

* Resumed from the 2438th meeting.

¹ Reproduced in *Yearbook* . . . 1996, vol. II (Part One).

² For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook* . . . 1980, vol. II (Part Two), pp. 30 et seq.

The few changes made were intended to bring older articles into line with new ones or to clarify the text.

4. The Drafting Committee had had to work under extremely difficult conditions: it had been deprived of the essential assistance of the Special Rapporteur, whose function had traditionally been to guide the Drafting Committee, make alternative proposals and, of course, prepare the commentary to the articles once they had been adopted in plenary. The members of the Drafting Committee therefore deserved a special tribute for their efforts. Special thanks were owed to Mr. Bowett, who had taken the trouble to formulate revised texts and commentaries for the articles that had been referred to the Drafting Committee, taking into account the views expressed in plenary.

5. The titles and text of parts two and three proposed by the Drafting Committee read as follows (the number within square brackets indicates the number of the corresponding article adopted by the Commission at previous sessions):

Part two

CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY

CHAPTER I

GENERAL PRINCIPLES

Article 36 [1]. Consequences of an internationally wrongful act

1. The international responsibility of a State which, in accordance with the provisions of part one, arises from an internationally wrongful act committed by that State, entails legal consequences as set out in this part.

2. The legal consequences referred to in paragraph 1 are without prejudice to the continued duty of the State which has committed the internationally wrongful act to perform the obligation it has breached.

Article 37 [2]. Lex specialis

The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act.

Article 38 [3]. Customary international law

The rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this part.

Article 39 [4]. Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State set out in the provisions of this part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 40 [5]. Meaning of injured State

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 one, 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 judgement or other binding dispute settlement decision of an international court or tribunal, the other State or States parties to the dispute are 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,* all other States.

CHAPTER II

RIGHTS OF THE INJURED STATE AND OBLIGATIONS OF THE STATE WHICH HAS COMMITTED AN INTERNATIONALLY WRONGFUL ACT

Article 41 [6]. Cessation of wrongful conduct

A State whose conduct constitutes an internationally wrongful act having a continuing character is under the obligation to cease that conduct, without prejudice to the responsibility it has already incurred.

Article 42 [6 bis]. Reparation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination.

2. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:

(a) The injured State; or

(b) A national of that State on whose behalf the claim is brought;

which contributed to the damage.

* The term "crime" is used for consistency with article 19 of part one of the articles. It was, however, noted that alternative phrases such as "an international wrongful act of a serious nature" or "an exceptionally serious wrongful act" could be substituted for the term "crime", thus, *inter alia*, avoiding the penal implication of the term.

3. In no case shall reparation result in depriving the population of a State of its own means of subsistence.

4. The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation.

Article 43 [7]. Restitution in kind

The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, that is, the re-establishment of the situation which existed before the wrongful act was committed, provided and to the extent that restitution in kind:

(a) Is not materially impossible;

(b) Would not involve a breach of an obligation arising from a peremptory norm of general international law;

(c) Would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or

(d) Would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind.

Article 44 [8]. Compensation

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act compensation for the damage caused by that act, if and to the extent that the damage is not made good by restitution in kind.

2. For the purposes of the present article, compensation covers any economically assessable damage sustained by the injured State, and may include interest and, where appropriate, loss of profits.

Article 45 [10]. Satisfaction

1. The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation.

2. Satisfaction may take the form of one or more of the following:

(a) An apology;

(b) Nominal damages;

(c) In cases of gross infringement of the rights of the injured State, damages reflecting the gravity of the infringement;

(d) In cases where the internationally wrongful act arose from the serious misconduct of officials or from criminal conduct of officials or private parties, disciplinary action against, or punishment of, those responsible.

3. The right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act.

Article 46 [10 bis]. Assurances and guarantees of non-repetition

The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act.

CHAPTER III

COUNTERMEASURES

Article 47 [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 41 to 46, the injured State is entitled to take countermeasures, that is, subject to the conditions and restrictions set out in articles 48 to 50, 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 to its demands by the State which has committed the internationally wrongful act in order to induce it to comply with its obligations under articles 41 to 46.

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 48 [12]. Conditions relating to resort to countermeasures

1. An injured State taking countermeasures shall fulfil the obligations in relation to dispute settlement arising under Part Three or any other binding dispute settlement procedure in force between the injured State and the State which has committed the internationally wrongful act.

2. Provided that the internationally wrongful act has ceased, the right of the injured State to take countermeasures is suspended when and to the extent that the dispute settlement procedure referred to in paragraph 1 is being implemented in good faith by the State which has committed the internationally wrongful act and the dispute is submitted to a tribunal which has the authority to issue orders binding on the parties.

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 49 [13]. Proportionality

Countermeasures 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 50 [14]. Prohibited countermeasures

An injured State shall not resort, by way of countermeasures, 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 the 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.

CHAPTER IV

INTERNATIONAL CRIMES

Article 51. Consequences of an international crime

An international crime entails all the legal consequences of any other internationally wrongful act and, in addition, such further consequences as are set out in articles 52 and 53.

Article 52. Specific consequences

Where an internationally wrongful act of a State is an international crime:

- (a) An injured State's entitlement to obtain restitution in kind is not subject to the limitations set out in subparagraphs (c) and (d) of article 43;
- (b) An injured State's entitlement to obtain satisfaction is not subject to the restriction in paragraph 3 of article 45.

Article 53. Obligations for all States

An international crime committed by a State entails an obligation for every other State:

- (a) Not to recognize as lawful the situation created by the crime;

- (b) Not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;

- (c) To cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and

- (d) To cooperate with other States in the application of measures designed to eliminate the consequences of the crime.

Part three

SETTLEMENT OF DISPUTES

Article 54 [1]. Negotiation

If a dispute regarding the interpretation or application of the present articles arises between two or more States Parties to the present articles, they shall, upon the request of any of them, seek to settle it amicably by negotiation.

Article 55 [2]. Good offices and mediation

Any State Party to the present articles, not being a party to the dispute may, at the request of any party to the dispute or upon its own initiative, tender its good offices or offer to mediate with a view to facilitating an amicable settlement of the dispute.

Article 56 [3]. Conciliation

If, three months after the first request for negotiations, the dispute has not been settled by agreement and no mode of binding third party settlement has been instituted, any party to the dispute may submit it to conciliation in conformity with the procedure set out in annex I to the present articles.

Article 57 [4]. Task of the Conciliation Commission

1. The task of the Conciliation Commission shall be to elucidate the questions in dispute, to collect with that object all necessary information by means of inquiry or otherwise and to endeavour to bring the parties to the dispute to a settlement.

2. To that end, the parties shall provide the Commission with a statement of their position regarding the dispute and of the facts upon which that position is based. In addition, they shall provide the Commission with any further information or evidence as the Commission may request and shall assist the Commission in any independent fact-finding it may wish to undertake, including fact-finding within the territory of any party to the dispute, except where exceptional reasons make this impractical. In that event, that party shall give the Commission an explanation of those exceptional reasons.

3. The Commission may, at its discretion, make preliminary proposals to any or all of the parties, without prejudice to its final recommendations.

4. The recommendations to the parties shall be embodied in a report to be presented not later than three months from the formal constitution of the Commission, and the Commission may specify the period within which the parties are to respond to those recommendations.

5. If the response by the parties to the Commission's recommendations does not lead to the settlement of the dispute, the Commission may submit to them a final report containing its own evaluation of the dispute and its recommendations for settlement.

Article 58 [5]. Arbitration

1. Failing the establishment of the Conciliation Commission provided for in article 56 or failing an agreed settlement within six months following the report of the Commission, the parties to the dispute may, by agreement, submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken

is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Article 59 [6]. Terms of reference of the Arbitral Tribunal

1. The Arbitral Tribunal, which shall decide with binding effect any issues of fact or law which may be in dispute between the parties and are relevant under any of the provisions of the present articles, shall operate under the rules laid down or referred to in annex II to the present articles and shall submit its decision to the parties within six months from the date of completion of the parties' written and oral pleadings and submissions.

2. The Tribunal shall be entitled to resort to any fact-finding it deems necessary for the determination of the facts of the case.

Article 60 [7]. Validity of an arbitral award

1. If the validity of an arbitral award is challenged by either party to the dispute, and if within three months of the date of the challenge the parties have not agreed on another tribunal, the International Court of Justice shall be competent, upon the timely request of any party, to confirm the validity of the award or declare its total or partial nullity.

2. Any issue in dispute left unresolved by the nullification of the award may, at the request of any party, be submitted to a new arbitration before an arbitral tribunal to be constituted in conformity with annex II to the present articles.

Annex I

THE CONCILIATION COMMISSION

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a Party to the present articles shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfil any function for which he shall have been chosen under paragraph 2.

2. A party may submit a dispute to conciliation under article 56 by a request to the Secretary-General who shall establish a Conciliation Commission to be constituted as follows:

(a) The State or States constituting one of the parties to the dispute shall appoint:

- (i) One conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and
- (ii) One conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

(b) The State or States constituting the other party to the dispute shall appoint two conciliators in the same way.

(c) The four conciliators appointed by the parties shall be appointed within 60 days following the date on which the Secretary-General receives the request.

(d) The four conciliators shall, within 60 days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

(e) If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made from the list by the Secretary-General within 60 days following the expiry of that period. Any of the periods within which appointments must be made may be extended by agreement between the parties.

(f) Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The failure of a party or parties to participate in the conciliation procedure shall not constitute a bar to the proceedings.

4. A disagreement as to whether a Commission acting under this Annex has competence shall be decided by the Commission.

5. The Commission shall determine its own procedure. Decisions of the Commission shall be made by a majority vote of the five members.

6. In disputes involving more than two parties having separate interests, or where there is disagreement as to whether they are of the same interest, the parties shall apply paragraph 2 in so far as possible.

Annex II

THE ARBITRAL TRIBUNAL

1. The Arbitral Tribunal referred to in articles 58 and 60, paragraph 2, shall consist of five members. The parties to the dispute shall each appoint one member, who may be chosen from among their respective nationals. The three other arbitrators including the Chairman shall be chosen by common agreement from among the nationals of third States.

2. If the appointment of the members of the Tribunal is not made within a period of three months from the date on which one of the parties requested the other party to constitute an arbitral tribunal, the necessary appointments shall be made by the President of the International Court of Justice. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the most senior member of the Court who is not a national of either party. The members so appointed shall be of different nationalities and, except in the case of appointments made because of failure by either party to appoint a member, may not be nationals of, in the service of or ordinarily resident in the territory of a party.

3. Any vacancy which may occur as a result of death, resignation or any other cause shall be filled within the shortest possible time in the manner prescribed for the initial appointment.

4. Following the establishment of the Tribunal, the parties shall draw up an agreement specifying the subject-matter of the dispute, unless they have done so before.

5. Failing the conclusion of an agreement within a period of three months from the date on which the Tribunal was constituted, the subject-matter of the dispute shall be determined by the Tribunal on the basis of the application submitted to it.

6. The failure of a party or parties to participate in the arbitration procedure shall not constitute a bar to the proceedings.

7. Unless the parties otherwise agree, the Tribunal shall determine its own procedure. Decisions of the Tribunal shall be made by a majority vote of the five members.

6. The Drafting Committee had attempted to bring the style and structure of parts two and three of the draft articles into line with those of part one, which had already been adopted on first reading. Part two had accordingly been divided into chapters, which he proposed that the Commission should take up individually.

PART TWO (Content, forms and degrees of international responsibility)

CHAPTER I (General principles)

ARTICLE 36 (Consequences of an internationally wrongful act),

ARTICLE 37 (*Lex specialis*),

ARTICLE 38 (Customary international law),

ARTICLE 39 (Relationship to the Charter of the United Nations), and

ARTICLE 40 (Meaning of injured State)