

Document:-
A/CN.4/L.569

State responsibility. Draft articles provisionally adopted by the Drafting Committee: articles 1, 3, 4 (Part One, chapter I), 5, 7, 8, 8 bis, 9, 10, 15, 15 bis and A (chapter II) - reproduced in document A/CN.4/SR.2562, para.72

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1998, vol. I

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

66. Mr. ECONOMIDES read out paragraph 81 *bis* which had been proposed for inclusion in document A/CN.4/L.561/Add.3: “Several other members expressed opposition to the exclusion of the notion from the draft articles for the reasons already mentioned, particularly in paragraph 79.”

Document A/CN.4/L.561/Add.4

67. Mr. PELLET said that he was opposed to the term “innocent States”, which appeared in the penultimate sentence of paragraph 10, because it evoked the notion of fault. He proposed that the term should be replaced by “States which had not committed internationally wrongful acts”.

68. Mr. CRAWFORD (Special Rapporteur) suggested that the sentence reading “That would put the onus of showing damage on innocent States, which was unjustified” should simply be deleted.

69. Mr. ECONOMIDES said that in paragraph 28 in the French version, *en droit international* should be replaced by *d’après le droit international*.

Document A/CN.4/L.561/Add.4, as amended, was adopted.

State responsibility² (concluded)* (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,³ A/CN.4/490 and Add.1-7,⁴ A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE
ON SECOND READING

70. Mr. SIMMA (Chairman of the Drafting Committee), introducing the report of the Drafting Committee on the topic of State responsibility (A/CN.4/L.569), recalled that the Commission, in conformity with its general practice, should adopt the articles on second reading as a whole, in other words, once they had been discussed in plenary meeting and worked out by the Drafting Committee, solely on the basis of the text as it appeared in the document under consideration.

71. The Drafting Committee had examined all the articles referred to it at the current session, namely, those in part one, chapters I and II. It had not considered the question of the structure of the draft and the placement of the articles, which would have to be settled at a later stage, when most of the articles had been considered by the Drafting Committee. The original structure adopted on first reading had therefore been maintained. While the Drafting Committee had not proposed a title for part one, it had felt that the current title was not the most felicitous. The titles of chapters I and II had been maintained as

adopted on first reading, with the exception of the removal of the quotation marks from around the words “act of the State” in the title of chapter II.

72. The titles and texts of the draft articles adopted by the Drafting Committee at the fiftieth session read:

STATE RESPONSIBILITY

PART ONE

ORIGIN OF INTERNATIONAL RESPONSIBILITY

CHAPTER I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

[Article 2. Possibility that every State may be held to have committed an internationally wrongful act]

[deleted]

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of an international obligation of the State.

Article 4. Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II

THE ACT OF THE STATE UNDER INTERNATIONAL LAW

Article 5. Attribution to the State of the conduct of its organs

1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State.

[Article 6. Irrelevance of the position of the organ in the organization of the State]

[deleted]

* Resumed from the 2558th meeting.

² For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

³ See footnote 1 above.

⁴ Ibid.

Article 7. Attribution to the State of the conduct of entities exercising elements of the governmental authority

The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question.

Article 8. Attribution to the State of conduct in fact carried out on its instructions or under its direction or control

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 8 bis. Attribution to the State of certain conduct carried out in the absence of the official authorities

The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it had been placed.

Article 10. Attribution to the State of the conduct of organs acting outside their authority or contrary to instructions

The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise.

Articles 11 to 14

[proposed deletion]

Article 15. Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement, which becomes the new government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles . . . 5 to . . . 10.

Article 15 bis. Conduct which is acknowledged and adopted by the State as its own

Conduct which is not attributable to a State under articles 5, 7, 8, 8 bis, 9 or 15 shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

Article A. Responsibility of or for conduct of an international organization

These draft articles shall not prejudice any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

73. With regard to article 1 (Responsibility of a State for its internationally wrongful acts), the Drafting Committee had followed the advice of the Special Rapporteur in his first report on State responsibility (A/CN.4/490 and Add.1-7) and maintained the text as adopted on first reading; it recognized, however, that the use of the word "act" was not an ideal solution, as it usually referred to an action rather than an omission, whereas the article referred to both. The Drafting Committee had not been able to find an equivalent for the French word *fait* or the Spanish word *hecho*, which were more appropriate. That point would be explained in the commentary, but in any event, article 2 dispelled any doubt by stating that an "act" could consist of "an action or omission". Moreover, also on the recommendation of the Special Rapporteur, the Drafting Committee had decided to delete article 2, entitled "Possibility that every State may be held to have committed an internationally wrongful act", on the belief that the notion that the principle of international responsibility applied to all States without exception was implicit in article 1. The relevant portions of the commentary on the deleted article would be included in the commentary on article 1. The other issues raised in the deleted article were outside the scope of the question of international responsibility as such.

74. As to article 3 (Elements of an internationally wrongful act of a State), the Drafting Committee had confined itself to moving the phrase "conduct consisting of an action or omission" into the *chapeau*, so as to avoid repeating the word "conduct". It had been agreed not to add any other requirement, such as the element of damage or fault, to the general rule in the article. In subparagraph (a), the Drafting Committee had preferred to retain the term "attributable", which implied a legal operation, rather than replace it with the term "imputable", which appeared to refer to a mere causal link. It had retained the emphasis in subparagraph (a) on the notion that the attribution of a certain conduct to a State was made "under international law". The Drafting Committee had not deemed it necessary to add a reference to international law also in subparagraph (b); the commentary would, however, make clear that the determination that a particular conduct constituted a breach of an international obligation was to be made under international law.

75. With regard to article 4 (Characterization of an act of a State as internationally wrongful), the Special Rapporteur had proposed no changes to the article in his first report, as it did not seem to pose difficulties for Governments. The article contained two elements. The first was the statement that the characterization of an act of a State as internationally wrongful was governed by international law. The second, by analogy with article 27 of the 1969 Vienna Convention, was the principle that a State should not invoke its internal law as a ground for avoiding international responsibility. There was yet a further concern, namely, to avoid language too similar to that of part one,