Document:-
A/CN.4/SR.1370

Summary record of the 1370th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1976, vol. I

as a whole as a norm from which no derogation is permitted".[9] Bearing that definition in mind, a list could be drawn up of matters which were governed by rules of *jus cogens* such as the prohibition of aggression, genocide, piracy and slavery; the rules of *jus cogens* were those which protected the most fundamental human rights and covered all questions concerned with human freedom, such as the principle of self-determination of peoples.

36. The rules of *jus cogens*, however, certainly did not include rules on purely economic matters, such as the proposed 200-mile economic zone of the high seas. Any rule that might be adopted on such a subject would merely constitute a compromise in the competition for the resources of the world; it would be entirely outside the scope of the basic norms of international law, since it did not affect life, peace or freedom but merely material interests.

37. The rules of *jus cogens* constituted a means of adapting man's behaviour to the required legal order in human society, both nationally and internationally. At the present critical stage of world affairs, it was becoming increasingly necessary to look more closely into the fundamentals of life and human behaviour. When the law of nature, as expressed by peremptory norms of international law, was ignored too long, situations suddenly arose in the world which showed how necessary it was to codify such norms.

38. That need was particularly apparent with regard to international crimes, in respect of which the experience of the war crimes trials at the end of the Second World War was very significant. At that time, crimes against the peace, war crimes and crimes against humanity had been tried on the basis of rules of law not previously in existence. The relevant principles had been enunciated at the time and given retroactive effect, contrary to the basic concept of non-retroactivity of laws; it had not been possible to do otherwise because of the enormity of the crimes and their implications if they had gone unpunished. The purpose had been to give the world a necessary example. He doubted, however, whether the lesson had been learned and whether the world situation had since improved.

39. The experience of the Nuremberg trials showed the need to proceed expeditiously with the codification of international law. The Commission should therefore go ahead speedily with its codification, especially in matters connected with *jus cogens*. Those matters included the offences against the peace and security of mankind covered by the draft code adopted by the Commission in 1954[10] as well as aggression, which had been covered not by that code but by a General Assembly resolution adopted much later.[11]

40. As for the provisions of article 17 as prepared by the Special Rapporteur, he found them sufficiently attuned to present day requirements and could accept them as progressive development of international law.

The meeting rose at 12.45 p.m.

1370th MEETING

Monday, 17 May 1976, at 3.10 p.m.

Chairman: Mr. Abdullah EL-ERIAN
later: Mr. Juan José CALLE Y CALLE

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility (*continued*) (A/CN.4/291 and Add.1-2)

[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 17 (Force of an international obligation)[1] (*continued*)

1. The CHAIRMAN, after welcoming the participants in the twelfth session of the Seminar on International Law and expressing the hope that it would prove as fruitful as previous Seminars, invited the Commission to continue its consideration of article 17.

2. Mr. BILGE said that he would confine his comments to paragraph 2, since paragraph 1 set forth an accepted general principle which was confirmed by jurisprudence, State practice and doctrine. Paragraph 2 expressed an exception to that principle, and one which he personally hesitated to accept. The paragraph concerned the effect which a peremptory rule that emerged after the performance of a wrongful act might have on the wrongfulness of the act or on the consequences of its wrongfulness. The Special Rapporteur had cited as an illustration the examples of the slave trade and the sale of arms. The sale of arms to be used for aggression was certainly contrary to international law, since the use of force was prohibited by the Charter of the United Nations and by the conventions governing relations between States. After concluding a sale of arms, the selling State might learn that the buying State intended to use those arms to commit aggression against another State, and might accordingly refuse to deliver the arms which it had sold to the aggressor State; it would thereby breach its obligation under the contract of sale, but in accordance with paragraph 2 it would not be responsible internationally, since its non-performance of the contract would have

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[9] *Official Reports of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 296.

[10] *Yearbook... 1954*, vol. II, pp. 149-152, document A/2693, chapter III.

[11] Resolution 3314 (XXIX), of 14 December 1974.

[1] For text, see 1367th meeting, para. 3.

become not only lawful but mandatory. In that case, the selling State could not be obliged to perform the contract, since the performance of the contract would have become wrongful. But that did not mean that it would be released entirely from its contractual obligation, since it would have to return the money it had received. The question might therefore be asked, in such a case, whether the wrongfulness concerned the act itself or the consequences of the act.

3. He had no difficulty in accepting paragraph 3, which simply applied the general rule set forth in paragraph 1. He favoured the retention of subparagraph (*c*), which dealt with the awkward question of the exhaustion of local remedies.

4. Mr. BEDJAOUI said that article 17 did not present him with any particular problems in so far as it came down to a purely technical point: that of determining the temporal effect of the force of an international obligation. Paragraph 1 expressed a general rule which presented no difficulty; the only difficulty which might arise, for some, was in paragraph 2. He personally thought that it would be a pity to delete paragraph 2, since it represented a fairly novel departure on the part of the Commission. It was right that the responsibility of the State should not be entailed where wrongful conduct subsequently became required conduct. The example of the slave trade cited by the Special Rapporteur was a typical case in which it would be unthinkable to impute responsibility to the State. The example of the sale of arms by one State to another was equally significant. Admittedly, there were cases in which a State had to arm for self-defence, but where the buying State intended to wage a war of aggression or violated fundamental human rights, the selling State obviously had not only the right but the duty not to deliver arms to be used for aggression or for violating human rights. The United Nations had already applied that principle in calling for an embargo on arms shipments to South Africa and Southern Rhodesia. The provisions of paragraph 2 would therefore be very useful in such cases. Other examples which might be mentioned were nuclear tests and to national liberation movements struggling against colonialism. In the latter case, the obligation for States not to interfere in the internal affairs of another State could not be invoked by the administering Power as entailing the responsibility of a third State which had given aid to national liberation movements. He therefore favoured the retention of paragraph 2.

5. The CHAIRMAN, speaking as a member of the Commission, said that like other speakers before him he fully supported the Special Rapporteur's basic approach in paragraph 1 which expressed the general rule in the matter. He also agreed with the inductive method followed by the Special Rapporteur.

6. In his fifth report, the Special rapporteur raised the important question whether the rule stated in paragraph 1 was an absolute rule, and stated that he knew of no exceptions to be found in international practice. He then went on to explain, however, that the absence of such precedents was not a sufficient reason for assuming that there could be no exceptions and that it was important not to disregard any cases which might arise in the future, however seldom (A/CN.4/291 and Add.1-2, para. 49). There could be no doubt that, if a case on the lines of the *Enterprize* case were to come up at the present day, the arbitrator's award would not be that given by Umpire Bates over 120 years ago. The basic tenets of the present legal order would not permit such a decision.

7. He also agreed that, with regard to the topic of State responsibility, it was not possible to use the analogy of the private law system of responsibility, which drew a distinction between criminal liability and liability at tort, to use the common law terminology. The position in municipal law was less complex than in international law. In criminal matters, there were clear rules on non-retroactivity. It had been the great achievement of the French Revolution to proclaim the two principles: *pas de crime sans loi* and *pas de peine sans texte*. Those principles of non-retroactivity were enshrined not only in the legislation of practically all countries but in the constitutions of many of them; they were also proclaimed in the Universal Declaration of Human Rights [2] and in the International Covenant on Civil and Political Rights.[3] In criminal law there was only one exception to the principle of non-retroactivity: a new law had retroactive effect when it was more favourable than the old law. That was understandable because, as between the accusing society and the accused individual, the latter was always the weaker party. As was explained by the Special Rapporteur in his report (*ibid.*, para. 44), that reasoning did not apply in a relationship between States, since to apply the more favourable law to a State committing an offence would mean applying the more unfavourable law to the injured State.

8. Several members had already stressed the importance of the principle set forth in paragraph 2, which provided for an exception to the general principle of non-retroactivity stated in paragraph 1, in the case where conduct which, at the time it took place, was contrary to an international obligation, had become required conduct by virtue of a supervening peremptory rule of international law. Article 103 of the United Nations Charter had been rightly mentioned in that connexion. It would be consistent with that important Article of the Charter to state, as did paragraph 2 of article 17, that there were certain basic rules of general international law which must override all pre-existing international obligations. To return once more to the example of the slave trade, it would be noted that the international instruments in the matter not only forbade the trade but laid an obligation on States to punish it in the same way as piracy. It was significant that, contrary to the normal rule of the jurisdiction of the flag State, international law recognized the jurisdiction of all States to try and to punish the crimes of piracy and the slave trade wherever committed on the high seas.

9. The questions which arose in connexion with paragraph 2 were concerned not only with the duration of an international obligation but also with the creation of a new international obligation or the interpretation of an

[2] General Assembly resolution 217 A (III).

[3] General Assembly resolution 2200 A (XXI).

existing obligation. On that point, he would like to draw attention to the important dissenting opinion by Judge Jessup in the *South West Africa* case in 1966,[4] and the International Court of Justice's advisory opinion in the *Namibia* case in 1971,[5] that South Africa's obligations under the League of Nations Mandate must be interpreted in accordance with United Nations law.

10. He had a few brief comments to make on the drafting of the article. First, the title should be carefully reviewed by the Drafting Committee, because it was inadvisable to speak of the "force" of an international obligation. Next, the Drafting Committee should consider whether the material in article 17 should form one or two articles. Lastly, it should examine the point raised by Mr. Ushakov at the 1367th meeting, namely whether paragraph 2 dealt with the duration of an international obligation, with the creation of a new obligation, or with the interpretation of an existing obligation; in other words, it should examine the scope of the paragraph in the light of the new values now accepted by the international community.

11. Mr. AGO (Special Rapporteur), replying to the debate on article 17, said that the title of the article was purely provisional. The final title would perhaps have to emphasize the temporal element, which pervaded the whole article.

12. With respect to the general rule set forth in paragraph 1, Mr. Quentin-Baxter had drawn attention to the instinctive reluctance to accept the notion of retroactivity.[6] Other members of the Commission had pointed out that, although the rule was a general one, that did not make it a rule of *jus cogens*, and that States could derogate from it by treaty. He shared that view, and indeed had expressed it in his report (A/CN.4/291/Add. 1-2, para. 57), but it would be possible to derogate by treaty from most of the articles of the draft, since rules of *jus cogens* would be rare. It would be better to draw up a general provision on the subject, applicable to the draft articles as a whole, than to add a special provision to most of the articles. With regard to the purpose of the basic rule, it was to indicate that an international obligation was not breached unless the performance of the act by the State coincided with the existence of that obligation for the State. The purpose of the rule was not really to indicate that responsibility arose with the breach of the obligation, as Mr. Ustor had suggested.[7] The question of the point at which responsibility arose came after the question contemplated by article 17 and would have to be considered later.

13. Several members of the Commission had criticized the term "force" (*vigueur*) and had made the point that an obligation which was not in force for a State did not exist for that State. Although that was true enough, it would be going too far to say that it was wrong to talk of "force" because an obligation either existed or did not exist, for an obligation could be incumbent on a State at one time and not at another. Since the award by Max Huber, the arbitrator in the *Island of Palmas* case, the practice had always been to speak of an obligation in force for a State at the material time, and there was no reason to depart from that terminology. It remained to be seen what happened where an obligation ceased for the State after the performance of the act of the State or where, on the other hand, the obligation arose after the performance of the act, and in particular what happened if the act of the State was continuous.

14. Some members had considered that the wording of paragraph 1 should be improved. The article which Mr. Ushakov had suggested inserting in the draft before article 16[8] would no doubt enable the succeeding articles to be simplified to some extent, particularly article 17. Mr. Kearney had urged that the wording of article 17 should be brought into line with that of other articles,[9] while Mr. Martínez Moreno had expressed a preference for the wording used by the Special Rapporteur in his report.[10] He personally had no objection to article 17 being redrafted if it could be improved in form without affecting the substance.

15. He was not surprised that paragraph 2 had raised many doubts, since he himself had been hesitant about including it. He had done so mainly because he feared that there would be a dangerous gap without it. As Mr. Ushakov had pointed out,[11] paragraph 2 in no way introduced the idea of the retroactivity of an obligation which was not incumbent on the State at the time when it performed the act; it was concerned rather with the exoneration of the State, in exceptional circumstances, from the wrongfulness of its act and its consequences. It would also be a mistake to draw an analogy between that situation and the situation in which it was possible, in penal law, to apply the law most favourable to the accused. Mr. Tabibi had asked, at the 1368th meeting, whether it was really a general rule and Mr. Ushakov had expressed the view that the rule was not valid in all cases. As an example of a case in which the rule could not apply, Mr. Ushakov had cited the seizure by a State of fishing vessels in an area of the open sea which subsequently became part of the economic zone of that State.[12] On that point, he (the Special Rapporteur) would observe, first of all, that the rules relating to fishing limits were in no wise rules of *jus cogens* and, in addition, that paragraph 2 related exclusively to peremptory rules of international law which rendered mandatory conduct that had previously been wrongful.

16. The exception described in paragraph 2 was therefore very limited in scope. Any cases which fell within it

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[4] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 323.

[5] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16.

[6] 1369th meeting, para. 20.

[7] 1368th meeting, para. 26.

[8] 1365th meeting, para. 2.

[9] 1368th meeting, para. 6.

[10] See 1369th meeting, para. 17.

[11] 1367th meeting, para. 18.

[12] *Ibid.*, para. 19.

would be of the kind to which a "moral stigma" attached, to use Mr. Quentin-Baxter's apt expression.[13] That was precisely why he had stated in his report (*ibid.*, para. 49) that today a court would be loath to condemn Great Britain for having freed the American slaves on board the vessel *Enterprize* seized in Bermuda. Since those days, a rule had emerged which made it not only lawful to free slaves but mandatory to do so. With regard to the case of a neutral State which undertook to deliver arms to another State, at a time when no peremptory rule of international law existed with regard to aggression or genocide, and subsequently refused to deliver the arms because it learned they were in fact to be used for aggression or genocide, that State would be acting as a kind of precursor by behaving as though the new rule already existed; in so doing, it would virtually be contributing to the creation of the rule. As a result, the act of the State which was unlawful according to the law in force when the act was performed would no longer be regarded as unlawful, but that did not mean, of course, that it would be considered retrospectively as lawful at the time when it was performed. If, for example, the act of the State had given rise to reparation at the time, it was obvious that no one would call for restitution of the reparation.

17. Some members of the Commission had questioned whether paragraph 2 was not concerned with notions of responsibility and competence rather than wrongfulness. On that point, what appeared to be startling in the cases contemplated by paragraph 2 was not that a particular act had to be indemnified but that an act which had become mandatory should continue to be regarded as wrongful. Mr. Kearney, at the 1368th meeting, and Mr. Bedjaoui, at the present meeting, had taken the case of a country furnishing aid to a people struggling for self-determination before the right to self-determination had been recognized. According to the international law of the time, such aid constituted interference in the internal affairs of the country in whose territory the people in question was struggling for its right to self-determination. Not only was aid of that kind now lawful but it might even be mandatory under convention or other rules. There would certainly be a reluctance now to condemn such conduct on the ground that it had been wrongful according to the international law of the time. Although history might not furnish many examples of cases such as those contemplated in paragraph 2, and although it was highly unlikely that such cases would occur in the future, it was nevertheless useful to devote a special provision to them. To remain silent on the question might imply that the general rule in paragraph 1 was so absolute as to permit of no exception, even where its application would be repugnant. In his opinion, it was therefore worth while to retain paragraph 2 and thereby affirm a principle; that represented a modest contribution to the progressive development of international law.

18. As Mr. Šahović[14] and Sir Francis Vallat[15] had pointed out, paragraph 2 applied to paragraph 1 as well as to paragraph 3. In addition, paragraphs 1 and 3 were linked, so that the possibility of placing paragraph 2 at the end of article 17 might be considered.

19. Paragraph 3 had given rise to a variety of opinions. Some members had approved it; some had doubted whether subparagraph (*a*) was necessary, while others had thought it essential; still others had considered that the questions dealt with in subparagraphs (*a*) and (*b*) had already been settled by paragraph 1.

20. At that stage he would not deal with observations on the wording and translation of article 17, since they would have to be considered by the Drafting Committee.

21. The case dealt with in subparagraph (*a*) was not as simple as it looked. Although it might be said to be just a logical application of the basic rule, it needed to be mentioned separately, in order to remove any doubt. With regard to the comments by Mr. Quentin-Baxter at the previous meeting, although the European Commission of Human Rights had heard many cases concerning continuing acts, that did not mean that international practice had been non-existent before that. In that connexion, he would also like to make clear the distinction between an instantaneous act of continuing effect and a continuing act. If a State inflicted torture on a person, the act of the State as such ceased when the torture ceased, although the torture might leave lasting effects. On the other hand, if a person was refused the right to exercise his profession, as in the *De Becker* case (A/CN.4/291 and Add.1-2, para. 63), the act of the State itself was prolonged and constituted a continuing act. An act of that kind became wrongful if the obligation of the State arose while the act was prolonged, whereas that did not occur in the case of an instantaneous act of continuing effect. The distinction in question had been made in many cases which had come before international authorities.

22. The case dealt with in subparagraph (*b*) was that of a succession of acts independent of each other and relating to separate situations, but together forming conduct which in itself constituted a wrongful act of the State contrary to a specific international obligation. If a State had undertaken to refrain from discriminatory practices in connexion with allowing nationals of a particular country to exercise a certain profession, it did not breach its obligation until refusal to allow nationals of that country to exercise the profession in question constituted a definite practice. A composite wrongful act was therefore the result of a whole series of separate acts which, as such, might be lawful, or again might be wrongful, but on the basis of another international obligation.

23. Subparagraph (*c*), which dealt with complex acts, was connected with the rule of the exhaustion of local remedies, as several members of the Commission had noted. In its present form, subparagraph (*c*) might perhaps cause some confusion. The initial action or omission concerned, not the beginning of the State's conduct but the beginning of the breach of the obligation. To illustrate his point, he would imagine the case of an alien who applied to the local authorities for permission to exercise a profession and had his application refused. If the alien then applied to a central authority,

[13] See 1369th meeting, para. 25.

[14] 1368th meeting, para. 35.

[15] 1369th meeting, para. 11.

two kinds of situation could arise. If, before the refusal by the local authorities, the State had undertaken to permit persons of the applicant's nationality to exercise the profession in question, the central authority would have to annul the local decision, grant the permission requested, and possibly indemnify the applicant. If, on the other hand, the obligation had arisen after the refusal by the local authorities, no exception could be taken to the refusal, but the central authorities themselves would have to grant the permission if the applicant addressed a further request for it to them. If they did not grant it, the wrongful act began from that moment and would continue, unless a court restored the situation to what it should have been. Subparagraph (*c*) would have to be slightly reworded so that such consequences were quite clear.

Mr. Calle y Calle, second Vice-Chairman, took the Chair.

24. Mr. MARTÍNEZ-MORENO, referring to the problem of the so-called *rebus sic stantibus* clause, said that an obligation deriving from a treaty could be modified by a fundamental change of circumstances. But the Vienna Convention on the Law of Treaties stated in article 62 that a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty, if it was "the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty".[16] He wondered whether it might not be advisable to deal with that intertemporal problem in article 17, in order to bring the draft into line with that Convention.

25. Mr. AGO (Special Rapporteur) said it was true that the rule of the Vienna Convention was that a treaty could be terminated as a result of a fundamental change of circumstances, but the actual breach of an obligation could not be interpreted as a fundamental change of circumstances. Thus, in the case of a breach of an obligation, it was not possible to say that, for that reason, the treaty had ceased to be valid because of a fundamental change of circumstances. On the other hand, if a fundamental change of circumstances had occurred and had caused the treaty to cease to be valid, it was not possible to speak of "breach", because the breach no longer existed. The question needed further thought, but he doubted whether a matter of that kind should be dealt with in article 17.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer article 17 to the Drafting Committee, for consideration in the light of the discussion.

It was so agreed.[17]

The meeting rose at 5.20 p.m.

[16] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 297.

[17] For the consideration of the text proposed by the Drafting Committee, see 1401st meeting, paras. 22-45.

1371st MEETING

Tuesday, 18 May 1976, at 10.10 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

Organization of work

1. The CHAIRMAN said that, on 17 May, the enlarged Bureau had decided to recommend to the Commission that, at the conclusion of its consideration of article 18 of the draft articles on State responsibility (item 2 of the agenda), the Commission should take up the question of the most-favoured-nation clause (item 4 of the agenda) for one week and a half. Next, for another week and a half, the Commission should consider the topic of succession of States in respect of matters other than treaties (item 3 of the agenda). The Commission should then revert to its consideration of the most-favoured-nation clause until it had completed the first reading of its draft articles on that topic. The Commission should then devote a further one week and a half to the topic of succession of States in respect of matters other than treaties. The Commission should allocate one or two meetings to consideration of the first report by the Special Rapporteur on the topic of the law of the non-navigational uses of international watercourses (item 6 of the agenda). The Commission should also devote a number of meetings to consideration of the fourth and fifth reports by the Special Rapporteur on the question of treaties concluded between States and international organizations or between two or more international organizations (item 5 of the agenda).

2. It had also been deemed advisable that the Commission, depending upon the information to be obtained by the Secretariat, should insert in its report on the work of the present session a paragraph concerning the desirability and usefulness of reissuing the publication entitled *The Work of the International Law Commission*.[1] However, the Secretariat should be requested to include additional paragraphs on the Commission's activities, together with the text of the conventions that had been adopted on the basis of its work since the issue of that publication in 1972.

3. Lastly, it had been suggested that, in considering the complex draft articles on State responsibility, it would expedite the work of the Commission if the Special Rapporteur were not required to wait until the close of the discussion before answering questions, but were to reply to points as they arose. In that way, the Special Rapporteur's summing-up would be confined to a general

[1] United Nations publication, Sales No. E.72.I.17.