Document:-

A/CN.4/SR.1597

Summary record of the 1597th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1980, **vol. I**

between disputes in which one or more States constituted one of the parties, disputes in which only international organizations were parties, and disputes in which one or more States and one or more international organizations were parties. That classification had led to the laborious drafting of paragraph 2 *bis* and had resulted in unnecessary repetition.

16. Because sections I and II contained very similar provisions with regard to the functions of the Conciliation Commission, he suggested that the Drafting Committee might try to produce a text dealing first with the role of the Secretary-General of the United Nations or the President of the International Court of Justice as well as the constitution of the Conciliation Commission, and secondly with that Commission's functions. The first part of the text would have to identify each of the three possible situations, and in the second part a single clause could cover the three possibilities, with specific provision for the case in which the United Nations was a party to a dispute.

17. The CHAIRMAN said that, it there were no objections, he would take it that the Commission decided to refer the draft annex to the Drafting Committee.

It was so decided.[3]

The meeting rose at 11 a.m.

[3] For consideration of the text proposed by the Drafting Committee, see 1624th meeting, paras. 30 *et seq.*

1597th MEETING

Tuesday, 27 May 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

State responsibility (A/CN.4/330)

[Item 2 of the agenda]

PRELIMINARY REPORT ON THE CONTENT, FORMS AND DEGREES OF INTERNATIONAL RESPONSIBILITY (PART 2 OF THE DRAFT ARTICLES)

1. The CHAIRMAN invited the Special Rapporteur to introduce his preliminary report on the content, forms and degrees of State responsibility, which constituted part 2 of the draft articles on State responsibility (A/CN.4/330).

2. Mr. RIPHAGEN (Special Rapporteur) said that, since his report was a preliminary one, he had endeavoured to make a systematic and theoretical analysis of the problems with which the Commission would have to deal in preparing draft articles on the content, forms and degrees of State responsibility. Accordingly, the report contained very few references to what Article 38, paragraph 1 (*d*), of the Statute of the International Court of Justice called "the teachings of the most highly qualified publicists of the various nations" or to judicial decisions and State practice. The report was also preliminary in nature in the sense that any conclusions it contained were designed solely to provoke criticism. Indeed, what he was seeking at the current stage was the Commission's guidance for the preparation of further reports and draft articles on the topic.

3. In part 1 of the draft articles on State responsibility,[1] the Commission had defined the internationally wrongful act of a State. Such an act created a situation which called for a response; part 2 would therefore deal with allowable and sometimes compulsory responses under international law.

4. Paragraphs 1 to 9 of his report were purely historical, describing the consideration of part 2 of the topic by the Commission and the General Assembly.

5. Paragraphs 10 to 26 dealt with what might be called the overlap between part 1 of the draft articles and the future part 2. Paragraphs 11 to 13 made it clear that some of the distinctions which had been irrelevant to part 1 would have to be made for the purposes of part 2. For example, paragraph 11 stated that, while it had been possible to refer in part 1 to an obligation of a State under international law without necessarily mentioning another entity towards which such an obligation existed, the word "responsibility" seemed to imply another entity towards which a State was responsible. Indeed, in part 1, the term "international responsibility" had been used to mean "all the forms of new legal relationship which may be established in international law by a State's wrongful act".[2] Because the word "relationship" was used in that context, it would be necessary in part 2 to determine the entities with which such a relationship existed or for which it could be created by an internationally wrongful act. As he stated in paragraph 12 of this report, part 2 could not, moreover, ignore the origin—and, in particular, the conventional origin—of the international obligation breached. It must also take account of the fact that the subject-matter of the obligation breached, or, in other words, the content of the primary rule of international law involved, might influence the legal

[1] For the general structure of the draft, see *Yearbook ... 1979*, vol. II (Part II), p. 89, document A/34/10, paras. 66–67. For the text of the draft articles so far adopted by the Commission, *ibid*, pp. 91 *et seq.*, document A/34/10, chap. III, sect. B.I.

[2] *Yearbook ... 1971*, vol. II (Part One), p. 211, document A/CN.4/246 and Add. 1–3, para. 43.

consequences of such a breach. Indeed, for the purposes of part 2, it was quite probable that the content of the primary rule of international law would influence the responsibility arising from the breach of that rule. Part 1 did not refer to the degree of seriousness of the breach or of the situation created by the breach. That quantitative element might well influence the allowable or compulsory response to that breach and must therefore be dealt with in part 2.

6. Paragraphs 14 to 26 of his report dealt with a number of other questions which had been "announced" in part 1 and which would have to be answered in part 2. For example, paragraph 14 referred to articles 27 and 28, dealing with the international responsibility of a State other than the one which committed an internationally wrongful act. In part 2, it would be necessary to define the relationship between those two States. As noted in paragraph 18 of his report, chapter V of the draft raised the question of the legal consequences that arose from acts committed in circumstances precluding wrongfulness. At its thirty-first session, the Commission had deliberately refrained from taking a decision on the question whether those legal consequences should be dealt with in part 2 or in the context of its consideration of the topic of "international liability for injurious consequences arising out of acts not prohibited by international law".[3] Since he considered that the Commission now had to decide how it would deal with such legal consequences, he had suggested in paragraph 19 of the report that that matter should be dealt with in part 2 of the draft articles on State responsibility, in order to avoid any misunderstanding concerning the fundamental distinction to be made between acts which were illegal, but which might, in certain circumstances, preclude wrongfulness, and acts which were *a priori* legitimate, but which might, in certain circumstances, entail some sort of liability.

7. In paragraphs 20 to 25 of the report, reference was made to the question of the contributory conduct of a State to a situation implying a wrongful act. There were a number of articles in part 1 which seemed to indicate that, although an act was not immediately attributable to a State, the conduct of that State might nevertheless contribute to an illegal result. The Commission would therefore, have to deal with the question of the legal consequences of such contributory conduct.

8. Starting in paragraph 27, he had made an analysis of possible responses to internationally wrongful acts and, in the course of that analysis, has made three main distinctions. The first was to be found in paragraph 28, which identified the three parameters that appeared in drawing up a systematic catalogue of possible legal consequences of internationally wrongful acts. The second distinction, referred to in paragraphs 74 to 76, was that between allowable and compulsory responses. The third was the distinction made in paragraph 79 between quantitative and qualitative proportionality between the wrongful act and the response thereto.

9. Those three distinctions were theoretical in nature and were not meant to establish any definite categories. Indeed, there were obvious connexions between them. For example, with regard to the first parameter, namely, the duty of the guilty State, it could be said that a response was compulsory, while with regard to qualitative proportionality it was questionable whether a response was allowed at all. The distinction between the three parameters referred to in paragraph 28 also gave rise to the problem of changing from "rules" to "relationships", as noted in paragraph 96, and to difficulties resulting from the existence of international organizations, as pointed out in paragraphs 68 to 73, 77, 78 and 89. Moreover, a general problem that arose in connexion with all three of the distinctions was that of relating "quality" to "quantity", as stated in paragraphs 36, 94 and 95.

10. With regard to the first of the parameters mentioned in paragraph 28, it had been assumed (para. 29) that the guilty State was obliged to "make good". Since, however, the situation which would have prevailed if no breach of the international obligation had occurred could never be fully re-established, a distinction had to be drawn between three aspects of the general duty to make good, taking into account the time element involved. Paragraphs 30 and 31 thus differentiated between the *ex nunc* aspect, the *ex tunc* aspect and the *ex ante* aspect. The *ex tunc* aspect typically envisaged the payment of damages as a reparation for the injurious consequences caused by the wrongful act, while the *ex ante* aspect related to a kind of "guarantee" against future breaches of the same obligation, and the *ex nunc* aspect, which was centred on the position of the injured State, envisaged the re-establishment of a right which had been taken away by the wrongful act.

11. It nevertheless remained to be seen whether the distinction between those three time elements had any relevance to the various types of breaches of international obligations or, in other words, whether there was any correlation between the content of the primary rule breached and the content of the new obligation of the guilty State to make good.

12. In that connexion, he noted that there was always a quantitative proportionality between the breach and the content of the new obligation. The Commission would, however, have to consider whether there was also a qualitative proportionality, and whether a distinction could be made between primary obligations by saying that a primary obligation gave rise to a duty of the guilty State either *ex nunc, ex tunc* or *ex ante*.

[3] See *Yearbook ... 1979*, vol. II (Part Two), p. 133, document A/34/10, chap. III, sect. B.2, para. (39) of the commentary to article 31, *in fine*.

13. Another problem that arose in connexion with the first parameter was what distinction should be made between the parties to a convention stipulating a primary obligation and the parties to a convention stipulating the obligation of the guilty State to make good. In that connexion, he considered that it was the origin of the primary obligation that was important, because, normally, if a primary obligation was stipulated in a bilateral treaty, only the other party to the bilateral treaty could claim a *restitutio in integrum*. The situation could, of course, arise in which a treaty created rights and obligations for States which were not parties to that treaty. In such a case, the consequences of the breach of an obligation laid down in the treaty would be the same for the third States and for the parties to the treaty.

14. In the case of multilateral treaties, the situation was more complicated, as shown in paragraph 39 of the report. That paragraph referred to article 60 of the 1969 Vienna Convention on the Law of Treaties,[4] which distinguished between "a party specially affected by the breach" of a multilateral treaty and any other party to the treaty. The question arose whether the parties to the treaty not especially affected by the breach had the same rights as the injured States. Although the Vienna Convention answered that question in the negative, the Commission might like to look at it more closely in the context of the topic of State responsibility, paying particular attention to the examples given and ideas put forward in paragraphs 41 and 42 of his report.

15. The second parameter, discussed in paragraphs 44 to 61, related to new rights of the injured State which might arise as a consequence of the internationally wrongful act. Two different types of rights could be distinguished: first, those arising out of non-recognition of the situation created by the wrongful act and, secondly, those to which the maxim *exceptio non adimpleti contractus* applied. Within the context of the latter group of rights, the report considered (in its paragraphs 58 to 61) the scope of the principle underlying article 60 of the Vienna Convention and noted, in particular, that the International Court of Justice, in its advisory opinion on the legal consequences of the continued presence of South Africa in Namibia,[5] had extended that principle to all types of relationships between States.

16. The third parameter, which was discussed in paragraphs 62 to 73, concerned the legal position of third States in the event of the breach of an international obligation. The basic principle was that the legal relationship created by an internationally wrongful act was bilateral in character (guilty State/injured State), but there were cases where a third State had a right to take a non-neutral position in regard to such an act. Three types of exception to the basic principle were, therefore, considered; those exceptions related, respectively, to cases where there might be more than one "directly" injured State; cases where the bilateral relationships between States parties to a multilateral treaty were so interconnected that an exception to the bilateral relationship between the guilty State and the directly injured State had to be made; and cases where certain rules of international law protected a fundamental interest that was not solely an interest of an individual State. In regard to the third exception, reference was made in paragraph 66 of his report to article 19 of the draft on State responsibility, which dealt with international crimes, and the Commission might wish to consider whether it was only with respect to such crimes that third States could adopt a non-neutral position. He, for his part, would be inclined to answer that question in the negative. On the other hand, it seemed, as stated in paragraph 67, that the legal consequences of the various international crimes covered by article 19 were not necessarily identical. For example, the consequences of the crime of aggression, which were provided for in the Charter of the United Nations, were not necessarily the same as the consequences of pollution, which were not provided for in the Charter. Reference was also made, in connexion with the third exception, to the possible need for a collective decision regarding the response to a wrongful act (paragraphs 68 to 73).

17. Paragraph 74 dealt with the possible duty, as distinct from the right, of a third State to take a non-neutral position in regard to a wrongful act committed by another State. Paragraphs 75 and 76 considered, first, the "sacrifice" which that duty might require of such a State (so far as certain of its interests were concerned) and, secondly, the sacrifice in which a third "innocent" State might be involved as a result of countermeasures taken by another State. In the latter connexion, reference was made to Articles 48 to 50 of the Charter of the United Nations.

18. A further aspect of the legal consequences of an internationally wrongful act, which was dealt with in paragraphs 77 and 78, related to the effect of countermeasures taken within the framework of an international organization on the rights of a member State of that organization. As explained in paragraph 89, a situation could arise where a member State would be superseded in a right by the power of the organization to take such measures as it deemed fit. That would, however, depend on the nature and rules of the organization concerned.

19. Paragraphs 79 and 80 considered the impact of a rule of *jus cogens* on the qualitative proportionality between the wrongful act and the response thereto, and

[4] For the text of the Convention (hereinafter called the "Vienna Convention"), see *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. 287.

[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.

also raised the question of the retroactive force of a *jus cogens* rule. As pointed out in paragraphs 81 and 82, there were cases, although they were not common, of treaties which laid down a primary rule of international law and provided for an admissible or mandatory response in the event of a breach of that rule. In that connexion. paragraphs 83 and 84 discussed the impact of Article 103 of the Charter of the United Nations on the content of State responsibility, and paragraph 85 dealt with the special problem of the non-fulfilment of a primary obligation arising under a multilateral treaty—particularly as the question related to articles 41 and 58 of the Vienna Convention—and also with the question of the admissibility of certain countermeasures taken pursuant to article 60 of that Convention. Paragraphs 86 to 89 dealt with another aspect of the impact of a breach of a primary rule of international law, namely, its impact on a mechanism of consultation and negotiation, on machinery for the settlement of disputes, and on an international organization in cases where the organization was empowered to take measures in response to an act that was wrongful within the context of that organization.

20. Paragraphs 90 *et seq.* considered whether there were certain obligations under international law which could never be breached in response to the internationally wrongful act of another State. In that regard, the principle underlying paragraph 5 of article 60 of the Vienna Convention was perhaps relevant to situations other than those specified in that paragraph. Within the context of qualitative proportionality, certain distinctions should be drawn between, for instance, primary obligations of a reciprocal character, special international régimes and—to cover cases where the content of the primary obligation determined the admissible or mandatory response—what might be termed parallel obligations. In that connexion, paragraph 95 referred to the impact of qualitative proportionality on quantitative proportionality and, specifically, to the problems which arose, in international as in national legal affairs, when translating quantity into quality and vice versa. Another very general problem, referred to in paragraph 96, concerned the change from "rule" to "relationship". It often fell to be decided in municipal law, as it might well do in international law, whether a breach of an obligation imposed by legislation constituted a wrongful act as between the guilty party and any other person having a material interest in the performance of that obligation. At the same time, it was a phenomenon of modern legal practice that a contract which embodied clauses designed to protect the interests of third parties could give rise to obligations vis-à-vis those third parties in the event of a breach of the contractual relationship. Such difficult borderline cases, which reflected the structural changes both in national and in international society, made it difficult to lay down hard and fast rules governing the response to any given internationally wrongful act.

21. It was in the light of those considerations that the problem of method was discussed in paragraphs 97 to 100. Since it was not possible to deal with each and every case of the breach of an international obligation, together with the corresponding admissible or mandatory response, it was suggested that the Commission should proceed by way of approximation. On that basis, it might wish to consider the limitations of possible responses under the three headings listed in subparagraphs 99 (*a*), (*b*) and (*c*).

22. Lastly, the Commission was requested, in paragraph 101, to decide whether to include a provision in part 2 of the draft articles to cover loss of the right of an injured or third State to invoke the new legal relationship which arose as a consequence of an internationally wrongful act.

23. Mr. USHAKOV said that if the Commission should decide to reopen, in part 2 of the draft articles, the question of the origin of responsibility, in other words the occurrence of an internationally wrongful act, it might be giving the impression that part 1 did not adequately cover the subject.

24. Referring to the terms of draft article 3, as adopted by the Commission,[6] he said that the objective feature of the internationally wrongful act was the breach of an international obligation owed by the State. Accordingly, it was legitimate to inquire in what circumstances and at what point that obligation arose, and it was the Commission's task to consider whether it ought to answer the question in its draft articles.

25. Secondly, with reference to draft article 30 concerning countermeasures in respect of an internationally wrongful act, in that context likewise the Commission should probably also determine whether it was its task to define the meaning of "legitimate" countermeasures or whether no definition was necessary because the question was settled by existing international law.

26. Thirdly, he expressed the opinion that, so far as the proportionality of countermeasures was concerned, the Commission had to decide, in the context of the draft articles, which of the two prevailed in cases where both primary and secondary rules co-existed.

The meeting rose at 4.40 p.m.

[6] See foot-note 1 above.

1598th MEETING

Wednesday, 28 May 1980, at 10 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Calle y Calle, Mr. Diaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr.