Document:-
A/CN.4/SR.1861

Summary record of the 1861st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

1861st MEETING

Friday, 13 July 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

State responsibility (*continued*) (A/CN.4/366 and Add.1,[1] A/CN.4/380,[2] A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf.Room Doc.5)

[Agenda item 2]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*[3] (continued)**

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

ARTICLES 1 to 16[4] (*continued*)

1. Mr. USHAKOV thanked the Special Rapporteur for his set of draft articles, which would facilitate the work of the Commission. Referring to draft article 5, which was fundamental since it defined the concept of "injured State", he said, first, that he had always advocated beginning part 2 of the draft articles with a chapter devoted to international crimes, which did not entail the same type of responsibility as did delicts. The Special Rapporteur, however, proposed dealing simultaneously with international crimes and international delicts. While that was a possible solution, it would be better to draw a distinction between those two categories of internationally wrongful act since, in any event, the Commission could not adopt the same approach to responsibility for crimes and responsibility for delicts.

2. Secondly, the draft articles under consideration were necessarily general in scope and were not intended to be a sort of penal code. Consequently, they must comprise rules which were general, but which had definite limits. Could the Commission refer in the draft to general international law as such? If so, exactly what rules would it invoke? In his view, rules of international law on responsibility could be referred to only in exceptional cases.

3. Thirdly, it had always been his view that the draft on the content, forms and degrees of international responsibility should be approached from the standpoint of the injured State and should specify the possibilities open to it in the event of a delict. In that respect, he endorsed the approach which the Special Rapporteur seemed to be taking, namely that the responsibility of the author State was not engaged until the injured State so requested. In the case of delicts, it was sufficient to specify that the injured State was the State affected by an internationally wrongful act, since it would be virtually impossible to enumerate all the specific instances in which a State might be injured, short of re-examining part 1 of the draft on obligations. It was unnecessary, therefore, to give a detailed definition of the term "injured State", particularly in the case of bilateral relations, where the injured State could easily be distinguished from the State which had failed to perform its obligations. Nevertheless, a State party to a limited treaty could, by a breach of its obligations, affect all the other States parties. A case in point was the European Economic Community, which had been established by a limited treaty, the Treaty of Rome, any breach of which could adversely affect all the parties, although some States might be injured directly and others indirectly. But it would be absurd to attempt to cover all those possibilities in draft article 5.

4. The view of the Special Rapporteur that, if the internationally wrongful act constituted an international crime, all the other States were injured, was generally correct. However, without forgetting the existence of obligations *erga omnes*, he himself did not share the view that an international crime necessarily injured all States within the international community, since some of them would be injured directly, while others would not. Indeed, in some instances, no State was actually injured; it was rather the international community of States as such that was affected. In the case of armed aggression against a State, for example, the victim of the aggression was clearly injured, whereas the other States of the international community were not. In such cases, under contemporary international law, or more precisely the Charter of the United Nations, the responsibility of the author State towards the international community as a whole was entailed since, when a breach of international order occurred, it was the international community that was regarded as the injured party. When one State committed an act of genocide within its own territory, could another State be regarded as directly injured? Such could be the case if the victims were members of a minority represented in the latter State; otherwise the injured party could be considered to be the international community as such. The international community was almost invariably called on to react to an international crime, whereas a simple delict affected only bilateral relations. It was for those reasons that he felt a separate chapter should be devoted to international crimes.

5. Moreover, all international crimes might be regarded as detrimental to international peace and security. Consequently, the words "constituting a threat to, or breach

---

[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

of, peace" should be appended to the term "international crime". The Commission could specify the consequences of such a crime. Thus, in the chapter on international crimes, it should be made clear that it was not States, but the international community, that could be injured and could be called upon to take measures.

6. Referring to draft article 12, he wondered whether a State could take countermeasures. Obviously, that possibility existed. For example, if, in the case of a severance of diplomatic relations, accompanied by armed conflict, the State which had taken the initiative of breaking off diplomatic relations held the staff of the embassy of the other State hostage, the latter State could, without committing a breach of international law, take such coercive measures as preventing the diplomatic agents of the first State from leaving its territory. It was not entirely correct, therefore, to say that countermeasures did not exist in diplomatic law. However, that was a minor question. He reserved the right to speak again later on the draft articles to which he had not referred.

7. Mr. REUTER congratulated the Special Rapporteur on his fifth report (A/CN.4/380). However, the fact that the Commission had before it a number of draft articles did not mean that it had reached the final stage of its deliberations or that it should refer those articles to the Drafting Committee. His comments were therefore of a purely provisional nature.

8. He shared Mr. Ushakov's view that the question of international crimes was very important. However, although some examples of international crimes such as aggression and genocide came immediately to mind, the whole area was nevertheless still *terra incognita*. Consequently, in his view, it would be preferable for the Commission to adopt military tactics and to attack where it was in a position of strength by examining further the question of delicts. He did not object to the idea of dealing with delicts and crimes in the same article and considered that the Special Rapporteur had been right to defer the question of international crimes to the end of draft article 5. The general régime proposed for delicts would apply also to international crimes, subject to a number of derogations and additional provisions.

9. Draft article 4 called for little comment, since it already met with the approval of the Commission. He wondered, however, whether it was not possible to envisage the draft articles in a context other than that of the United Nations. The question was a serious one, since a number of States were not members of the United Nations and there was no overlooking the fact that States could take action outside the United Nations. It was also a serious matter to refer to the international community as such, since it could be identified with the United Nations, in which case it was necessary to determine whether the responsible body was the General Assembly or the Security Council.

10. In draft article 5, the Special Rapporteur had endeavoured to follow the guidelines laid down in part 1 of the draft. Injury was not a constituent element of responsibility and account had been taken only of legal, abstract injury resulting from any breach of an international obligation. In general, he shared the view of the Special Rapporteur as expressed in draft article 5. However, with regard to paragraph (*e*), he wondered whether international crime was not a treaty concept. If the Commission was of the view that an international crime existed only if the act in question affected the international community as a whole, that would create a problem. For his part, he could not rule out, from the outset, the idea that there were international crimes which concerned the parties to a convention establishing the concept of international crime, but which did not concern other States. He could not subscribe to the idea that some treaties bound all States even if they were not parties to it. Nevertheless, if the Commission intended to take that position, he would help the majority to draft the relevant provision, despite the fact that he held a contrary view.

11. However, draft article 5 gave a somewhat descriptive definition of the term "injured State". While he did not criticize the substantive solutions adopted, he felt that it might be necessary to redraft that provision. While the situation envisaged in paragraph (*b*) was fairly clear, was there not another factor to be taken into account, namely how to be sure in all cases of the relative authority of the *res judicata*? He recognized that that was a controversial question, however, and understood the caution exercised by the Special Rapporteur. Paragraph (*c*) presented no difficulty. However, in paragraph (*a*), the Special Rapporteur appeared to have in mind all customary rules, whether general or specific, provided that, by their nature, they created a subjective right which was in some way appropriate (unknown in common law). That was a special situation rather similar to that of the bilateral treaty. In other words, if the Special Rapporteur thought that some legal rules created subjective rights, would it not be advisable to draft a paragraph to that effect which did not distinguish between customary and written rules? He seemed to remember that, in the view of the Commission, the issues dealt with in a general manner in that part of the draft articles called for no distinction to be drawn on the basis of the source of the right, in which case there would be a small problem to solve, since the situation of a right *in favorem tertii*, which was also covered in paragraph (*a*), was merely a simple and indisputable example of an appropriate right. The Special Rapporteur was concerned, in that instance, with rights arising for a third State. In considering those questions in the course of its debates on the provisions which were to become articles 34 and 36 of the Vienna Convention on the Law of Treaties, the Commission had provided for the creation of rights for a category of States. Yet, however appropriate a right might seem when it was created for a single State, it could nevertheless lead to controversy when a group of States was involved. However, he would willingly endorse the view of the Special Rapporteur if he did not consider it necessary to go into detail.

12. Paragraph (*d*), which formed the core of draft article 5, contained a number of very specific concepts and others of a more general nature calling for clarification. In subparagraph (iii), for example, it was possible to speak of an "interest considered as collective in the view of the parties", since the process of collectivization in-

volved an element of will. At a given moment, it was States which regarded a particular interest as genuinely collective. That had been so in the nineteenth century in the case of public health, and in the twentieth century in the case of the environment. A second factor was that of solidarity among States; some technical and material data gave rise to a community of interest.

13. While he found draft article 6 generally acceptable, the wording of paragraph 1 (*b*) might be reconsidered. Why was it necessary to apply remedies which existed? Moreover, if, in the situation described, it was the injured State which acted without invoking the harm suffered by its nationals, then the question of the exhaustion of the remedies provided for in its internal law did not arise. He was prepared to accept paragraph 1 (*d*) if it was intended to refer to international crimes; however, if it was meant to apply to delicts, it seemed excessive, and it might be preferable to call on the State which had committed an internationally wrongful act to remedy any situation which presented a danger. A State which had committed a delict and continued to maintain a situation likely to provoke a further delict was in an unlawful situation. In that respect, therefore, he objected to the use of the term "appropriate guarantees" with reference to delicts.

14. The distinction made in draft article 8 could have considerable effects, since draft article 10 provided for the limitation of the rights of the State in respect of draft article 9, but not of draft article 8. The Special Rapporteur (1858th meeting) had noted that draft article 8 referred essentially to reciprocity and that, in his view, the area of responsibility was defined by a direct link with the obligation that had been breached. The concept of a direct link should be clarified. The set of obligations enunciated in a treaty were formally and directly linked with one another by virtue of the very existence of the treaty. Common obligations were those found in a group of treaties linked by their scope and purpose. That was a useful concept when it was customary rules that were being dealt with. The situation became more difficult in the absence of formal elements. In the case of a State failing to observe a customary rule of commercial shipping in peacetime, for example, the injured State was entitled not to observe another customary rule of commercial shipping in peacetime. In such cases, there was a unity defined by the scope or object. If the Special Rapporteur found it difficult to clarify the wording, or if the Commission preferred to retain a general wording, the provision must be accompanied by a very full commentary.

15. Draft article 11 was generally acceptable, and his earlier observations on the term "collective interests" applied also to paragraph 1 (*b*). In paragraph 1 (*a*), the Special Rapporteur had intended to refer to treaties the breach of which by any of the parties jeopardized the scope and purpose of the treaty, or its performance by all the parties. For example, in the case of a treaty limiting fishing rights, with a view to protecting stocks, failure by one party to perform its obligations affected all the parties. In some cases, however, the obligations of States were not invariably symmetrical. It was possible to envisage a disarmament treaty imposing the obligation to disarm on one State only. Consequently, in paragraph 1 (*a*), the expression "one State party" should be replaced by "that State party", in order not to overlook the possibility of either a violation by any State, or a violation by a State of its specific obligation, thereby affecting the other parties.

16. With regard to draft article 12 (*a*), he shared the view expressed by Mr. Ushakov. Draft article 9 should not apply to the situation referred to in paragraph (*a*). If his understanding of the decision rendered by the ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*[5] was correct, a set of obligations or régime applicable to embassies existed, so that when an ambassador interfered in the internal affairs of a State he could be declared *persona non grata*, but should not be subjected to a régime which was inconsistent not only with ambassadorial dignity, but also with the rights of the individual. The example given in paragraph (*a*) was highly important in that it demonstrated all the consequences of the régimes of reciprocity and reprisals. The Special Rapporteur had been right, moreover, to exclude the word "countermeasure" from his draft.

17. Draft article 12 (*b*) referred to the peremptory norms of general international law, otherwise known as *jus cogens*. Despite the reservations which he had frequently expressed regarding *jus cogens*, he personally believed in an international morality, the requirements of which went far beyond those of the law. The concept of *jus cogens* had been embodied in article 53 of the Vienna Convention on the Law of Treaties, but was only well known in respect of the nullity of treaties. However, treaties which could be considered null and void by virtue of *jus cogens* were very few. One example was a treaty concluded between the Vichy Government and the German Reich which had been deemed null and void by virtue of *jus cogens* by a war tribunal of the United States of America.

18. While the situation might be fairly clear in the law of treaties, such was not the case in the area of State responsibility. Reiterating arguments that had already been put forward in connection with nuclear arms, while at the same time not wishing to express the view of any Government, or even his personal opinion, he said that, if a peremptory norm existed which prohibited the use of nuclear weapons and was breached by a State, the injured State, if it possessed nuclear weapons, could not use them, in view of article 12 (*b*), which referred to draft articles 8 and 9. Again assuming the existence of a rule prohibiting the use of nuclear weapons, he wondered whether a State which was the victim of an act of aggression—such acts being prohibited—could react by using nuclear weapons. The answer to that question was negative or positive depending on whether draft article 8 was considered as applying to that situation or not. Would the obligation not to use nuclear weapons be considered as corresponding to, or directly linked with, the obligation not to commit an act of aggression? Other examples could be found in humanitarian law. For example, the

[5] See 1858th meeting, footnote 10.

1949 Geneva Conventions [6] prohibited reprisals in some cases, a prohibition which had the character of a *jus cogens* norm when applied to some forms of inhuman treatment, such as the act of shooting a prisoner of war, which constituted a crime not justified by the failure of the enemy to observe the rules. However, did *jus cogens* really impose obligations which were binding to varying degrees, independently of those quite elementary humanitarian rules?

19. While the Commission should not, of course, become involved in the area of the law of war, as he had pointed out at a previous meeting, it must nevertheless take account of the problems raised by the use of nuclear weapons in elaborating articles of the kind under consideration. It must also decide on the advisability of the safeguard clause concerning armed reprisals contained in draft article 16 (*c*). It would be unwise to venture into an area which cast doubt not only on the idea of deterrents, but also on the conducting of nuclear tests in the atmosphere, to the extent that the treaties prohibiting such tests constituted an example of *jus cogens*, as an eminent scholar had once stated. Draft article 16 should make it clear that the Commission reserved its position on the question of armed reprisals, and perhaps even on the law of war.

20. Draft article 13 raised the question of the total violation of a multilateral treaty destroying the object and purpose of that treaty as a whole, in which case articles 10 and 11 did not apply. An exception was made, however, in the case of article 11, paragraph 1 (*c*), whereby the injured State could not suspend the performance of its obligations when those obligations were stipulated for the protection of individual persons, irrespective of their nationality. While he agreed with the intention of the Special Rapporteur, he wondered whether the situation envisaged could really be described in terms of a violation which destroyed the object and purpose of the treaty, since, once the object and purpose of the treaty were destroyed, the treaty no longer existed. The implication was that the Special Rapporteur considered treaties designed to protect human rights as acquiring, upon their entry into force, a scope extending beyond the treaty framework. Once they had recognized given human rights in a multilateral treaty, States could no longer go back, at least after having committed a manifest violation of the obligations deriving from that treaty. Nor could he agree that the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water [7] was now the expression of a customary rule of *jus cogens*, binding on all States, since such did not correspond to the actual political situation, any more than he could agree that article 11, paragraph 1 (*c*), applied to the States parties to a multilateral treaty recognizing fundamental human rights, even if that treaty were to be destroyed. However, the draft should be made a little more explicit on that point.

21. Referring to draft article 14, he said that it appeared dangerous to base the concept of international crime on factors which would not be measured in treaty terms. An international crime might exist only for one region of the world. For example, the African countries had felt it necessary to draft a convention on mercenaries, [8] a phenomenon which was not necessarily the same in other regions. Furthermore, even at the global level, it was rather difficult to dissociate the concept of international crime from a treaty. The question of aggression also raised many difficulties, since it was a crime of a special kind. Indeed, that was why the Special Rapporteur had dealt with aggression in a separate provision —draft article 15—which was actually only a "reminder", since it did not go into the substance of the topic. On reading draft article 14, which referred to United Nations machinery, one thought first of the States which were not members of the United Nations. Should the principle be established, as had been done by the ICJ in its advisory opinion on Namibia, [9] that some effects of the United Nations Charter affected even non-member States? One of the judges who had attached dissenting opinions represented the culture and legal traditions of a country which had adopted a policy of neutrality. As shown by draft article 14, paragraph 2 (*c*), the Special Rapporteur had thought of neutral States, since the obligations which were created in the event of an international crime did not concern the carrying out of armed measures.

22. With regard to paragraph 3 of draft article 14, concerning the procedures provided for by the Charter, he wondered whether the wording should not be moderated. Admittedly, the Charter constituted a special régime, but it was still only a treaty, and it did not seem possible for the time being to go much further. When applied to the question of links between crimes and treaties, those various considerations gave rise to difficulties. For that reason, while he was able to acknowledge the existence of certain international crimes, he felt that the rules common to all such crimes had not yet been established. The Special Rapporteur had attempted to insert one such rule in draft article 5 (*d*). While he felt, like Mr. Ushakov, that some distinctions were called for, what concerned him in the crime hypothesis was that the Commission was in danger of preparing articles which fell within the purview of the draft Code of Offences against the Peace and Security of Mankind if it allowed itself to be drawn by aggression, and that, if it admitted other crimes, it must admit all of them, although what those crimes were or how they differed from one another was not yet known. Under internal criminal law, the drafting of general rules on crimes had taken place at the final stage of codification. However, there were still legal systems in which such codification had never taken place and where each crime was subject to a special régime. Consequently, while the question of international crimes should be borne in mind, any decision on it should be left to the last possible moment.

23. With regard to draft article 16, he wondered whe-

[6] United Nations, *Treaty Series*, vol. 75.

[7] *Ibid.*, vol. 480, p. 43.

[8] See 1816th meeting, footnote 15.

[9] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

ther the reservation formulated in paragraph (*b*) should be expressed in such forceful terms, or whether it would not be sufficient to refer to the relevant rules of international organizations, a formula which had been adopted in many treaties.

Mr. Barboza, Second Vice-Chairman, took the Chair.

24. Mr. RIPHAGEN (Special Rapporteur) pointed out that the term " the rights of membership", in paragraph (*b*) of draft article 16, did not mean *les droits de membre* of an international organization, but referred to such procedural matters as the right to expel a member for certain reasons or to suspend voting rights.

25. The term "belligerent reprisals", in paragraph (*c*) of draft article 16, was also a technical term which was often used to cover what was permissible during a war. The question which arose was whether, if one State failed to comply with the rules laid down, for instance under the Hague or Geneva Conventions, the other State could do likewise. He had thought it better to leave the development of that kind of rule to the competent bodies. Presumably, however, in suggesting the words *tous les droits de la guerre*, Mr. Reuter had had in mind the Hague and Geneva Conventions. The point also had some relevance for the problem of nuclear weapons, which could not, however, be solved in the context of the draft.

The meeting rose at 12.50 p.m.

1862nd MEETING

Monday, 16 July 1984, at 3.05 p.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)* (A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 9 to 23

1. The CHAIRMAN invited the Chairman of the Drafting Committee to present the Committee's report (A/CN.4/L.378) on articles 9 to 27, and the texts of articles 10, 11, 13 to 17, 20, 21 and 23, paragraphs 2, 3 and 5, as adopted by the Committee.

2. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Committee had held its first meeting during the first week of the session. Of the 27 meetings already held, 19 had been devoted to the topic under consideration. It was thanks to the diligence, good will and hard work of Mr. Yankov, the Special Rapporteur, and all the members of the Drafting Committee that the Commission now had before it a large number of draft articles. The Drafting Committee had made the maximum use of the time available to it, and had thus been able to make up some of the Commission's arrears of work. It must be pointed out, however, that such intensive working had sometimes prevented members of the Committee—or at least the Chairman of the Committee himself—from studying as they deserved the other reports submitted to the Commission by its special rapporteurs and from making detailed statements on them.

3. The Drafting Committee had had before it draft articles 9 to 19, referred to it by the Commission at the previous session, and draft articles 20 to 35, referred to it at the present session. Of those 27 articles, it had been able to examine 19. The document before the Commission (A/CN.4/L.378) contained the recommendations and texts formulated by the Drafting Committee in respect of 18 articles, namely articles 9 to 22 and 24 to 27, originally submitted by the Special Rapporteur. [1] In the case of article 23, the Committee had adopted, subject to reservations by some members, paragraphs 2, 3 and 5; it had been unable to reach agreement on paragraphs 1 and 4, the texts of which had been placed in square brackets to show that they had not been adopted by the Committee, but remained as proposed by the Special Rapporteur. It would be for the Commission to decide what was to be done with those two paragraphs and with the article as a whole. The reduction in the number of articles was due to the fact that the Drafting Committee had deleted some and combined others. In so doing, it had taken account of comments made by members of the Commission in plenary meeting and by representatives in the Sixth Committee of the General Assembly concerning the need to simplify and rationalize the draft.

4. In so far as it was necessary, the Drafting Committee had also tried to harmonize the texts examined with the corresponding articles of the four conventions codifying diplomatic law. [2] Of course, it had sometimes been more

* Resumed from the 1847th meeting.

[1] These draft articles were considered by the Commission as follows:

(*a*) arts. 9-14, at the thirty-fourth session, see *Yearbook ... 1982*, vol. I, 1745th to 1747th meetings;

(*b*) arts. 15-19, at the thirty-fifth session, see *Yearbook ... 1983*, vol. I, 1774th and 1780th to 1783rd meetings;

(*c*) arts. 20-23, at the thirty-fifth session, *ibid.*, 1782nd to 1784th and 1799th meetings; and at the present session, see 1824th and 1825th meetings;

(*d*) arts. 24-27, at the present session, see 1826th to 1829th meetings.

[2] 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.