Document:-
A/CN.4/SR.2274

Summary record of the 2274th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
1992, vol. I

2274th MEETING

Wednesday, 17 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Idris, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/440 and Add.1,[1] A/CN.4/444 and Add.1-3,[2] A/CN.4/L.469, sect. F, A/CN.4/L.472, A/CN.4/L.478 and Corr.1 and Add.1-3, ILC(XLIV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

THIRD AND FOURTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 5 *bis and*

ARTICLES 11 TO 14[3] (*continued*)

1. Mr. CALERO RODRIGUES said that he welcomed the fourth report on State responsibility (A/CN.4/444 and Add.1 and 2), which provided abundant material and careful analysis and was an outstanding contribution to the literature. He was somewhat disappointed, however, that the report itself did not fully square with the draft articles proposed. Some of the considerations developed in the report were not reflected in the articles and the articles in turn were not sufficiently clarified by the report.

2. With regard to article 11 (Countermeasures by an injured State), he noted that the word "countermeasures" did not appear in the body of the text, but it was defined by the all-embracing formula on non-compliance with obligations, namely "not to comply with one or more of its obligations". That wording was satisfactory and simpler than that proposed by the former Special Rapporteur in his articles 8 and 9.[4] Moreover, since it covered the entire range of possible measures, it avoided the need to list such measures, as the Special Rapporteur had pointed out, and reduced the ambiguities that would derive from the meanings attached to them.

3. He nevertheless suggested that the words "not to comply" should be replaced by the words "suspend the compliance" in order to indicate the temporary nature of countermeasures. It would be even better to state expressly that countermeasures should cease as soon as their purpose had been achieved and, to be still more complete, to say that countermeasures should be resorted to only in order to obtain performance by the wrongdoing State of its secondary substantive obligations. The Special Rapporteur had, of course, explained at the preceding meeting that that omission had been deliberate and that the punitive purpose of countermeasures was not to be ruled out, adding, by way of justification, that the punitive purpose of countermeasures had already been admitted in article 10 (Satisfaction and guarantees of non-repetition).[5] In his own view, however, there was a marked difference between the substantive and instrumental consequences of an internationally wrongful act.

4. Article 12, paragraph 1, set forth the two conditions under which countermeasures could be resorted to: the exhaustion of all available amicable settlement procedures and the appropriate and timely communication by the injured State of its intention to apply countermeasures. The second condition was of relatively minor importance. The Special Rapporteur demonstrated, in his fourth report, that opinions and practice were divided on the question whether such prior communication, or *sommation*, was required before the application of countermeasures, but that there was a tendency to believe that it was. The Special Rapporteur had concluded that appropriate and timely communication by the injured State of its intention to apply countermeasures must precede resort to countermeasures, and that was stated in article 12, paragraph 1 (*b*). He himself agreed with that conclusion and with the suggested provision. It might, of course, be alleged that, once a wrongful act had been committed, the offending State was aware of all the consequences of its act, especially if they had been codified, as well as of the obligations of cessation and reparation by which it was bound, but that it also knew that the injured State was entitled to resort to countermeasures. It was, however, one thing to know that countermeasures could be applied and another to know that the injured State was in fact ready to apply them. That might be a further inducement to the wrongdoing State to mend its ways and to comply with its obligations. The timely notification of a threat of countermeasures could thus have the same effects as the countermeasures themselves.

5. The condition that all the available amicable settlement procedures must be exhausted was of far greater importance. In fact, it was the cornerstone of the concept of countermeasures and of their role in the system devised to redress the situation created by an internationally wrongful act. In primitive societies, before States had set up appropriate rules and machinery to ensure the application of laws and respect for rights, an individual who had been wronged, or thought he had been wronged, would take the law into his own hands and seek reparation, very often in a spirit of revenge. Some individuals who were physically, economically, socially or militarily stronger than others had therefore been able to nullify the consequences of the injury they had suffered, whereas the weak and the poor had been left with-

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[1] Reproduced in *Yearbook... 1991*, vol. II (Part One).

[2] Reproduced in *Yearbook... 1992*, vol. II (Part One).

[3] For texts of proposed draft articles 11 and 12, see 2273rd meeting, para. 18; for 5 *bis*, 13 and 14, see 2275th meeting, para. 1.

[4] See 2273rd meeting, footnote 10.

[5] Ibid.

out redress. In that sense, international society was still very primitive. Even if the legal consequences of an internationally wrongful act were spelled out in detail, that would not be enough to ensure justice if the injured State was given too much latitude to act as a judge in a case to which it was a party. The day had not yet dawned when countermeasures could be abolished. It had to be recognized, as the Special Rapporteur pointed out in the introduction to his third report (A/CN.4/440), that the lack of an adequate institutional framework for the regulation of the conduct of States, even *de lege ferenda*, was keenly felt. However, if the Commission was to be faithful to its duty of contributing to the progressive development of international law, it must try to establish limits to countermeasures in order to correct some of the more glaring injustices to which their broad application might give rise. To establish that available amicable settlement procedures must be exhausted as a prerequisite to the application of countermeasures was therefore a welcome step which, in the words of the Special Rapporteur, could alleviate the impact of the great inequality that was apparent among States in the exercise of their *faculté* to apply countermeasures, which was such a major source of concern, especially since, as he had also stated, in the absence of adequate third-party settlement commitments, powerful or rich countries could the more easily have the advantage over the weak or needy when it came to exercising the means of redress.

6. Under article 12, paragraph 2, as proposed by the Special Rapporteur, the condition of exhausting all the available amicable settlement procedures did not apply: (*a*) where the State which had committed the internationally wrongful act did not cooperate in good faith in the choice and the implementation of available settlement procedures; (*b*) to interim measures of protection taken by the injured State, until the admissibility of such measures had been decided upon by an international body within the framework of a third-party settlement procedure; and (*c*) to any measures taken by the injured State if the State which had committed the internationally wrongful act failed to comply with an interim measure of protection indicated by the said body.

7. In the case where a State was deprived of its faculty to resort to countermeasures so that a procedure for the settlement of the dispute could be applied, it was normal that the restriction of exhausting all the amicable settlement procedures available should not be maintained if the procedure did not work because of the lack of cooperation on the part of the alleged wrongdoing State. However, he had some doubts, although they were not fundamental, about the exception referred to as "interim measures of protection", particularly with regard to the validity of that concept in the present context. The concept was well known in general international law: it referred to the initial provisional measures decided by an adjudicating body. Such measures had a limited purpose, namely, as stated in Article 41 of the Statute of ICJ, to preserve the respective rights of either party. In his view, those measures could not be applied in the context of countermeasures. He wondered whether countermeasures themselves were not some kind of "interim measures", since they were not permanent and lasted only as long as the wrong had not been corrected. They aimed at the protection of rights: they sought redress for the infringement of a right and the application of secondary rights. There was thus good reason to have doubts about the admissibility of "interim measures of protection" taken unilaterally and applied by one party in cases where countermeasures in general were excluded. It would be extremely difficult in practice to establish whether a particular measure was an interim measure of protection or an actual countermeasure. That was true, for example, in the case of the freezing of assets.

8. Article 12, paragraph 2 (*c*), also referred to an "interim measure of protection", but in a different sense, namely, the conventional sense of measures taken within the framework of a third-party settlement procedure. It provided that, if a State failed to comply with the interim measure, the injured State would recover its faculty to apply countermeasures. The State failing to comply was, of course, committing a new wrongful act. The fact that the act was committed in the framework of a settlement procedure indicated that the procedure was not working and that the injured State should be authorized to resort to countermeasures.

9. He had considerable difficulty understanding the language and purpose of paragraph 3 of article 12. It was an exception to the exceptions set forth in paragraph 2: it therefore meant that the injured State was free to apply countermeasures. How should the expression "measure envisaged" be understood? Did it mean one particular countermeasure or the countermeasures as a whole? If so, that would mean that a measure which might endanger international peace and security could be applied because it would be an exception to the exceptions. If, as was the most likely explanation, that provision was intended to mean that no measure could be taken in any case that was inconsistent with the obligation to settle disputes in such a manner that international peace and security, and justice, were not endangered, then it was a prohibition that belonged in article 14 (Prohibited countermeasures). A provision of that kind might also be introduced in article 11, as paragraph 2, or in article 12, as a new paragraph 1. Those three solutions were the only reasonable ones. He would appreciate clarifications from the Special Rapporteur.

10. Mr. ARANGIO-RUIZ (Special Rapporteur) said that an example of an exception to the exceptions was the case where a unilateral interim measure of protection was taken by the injured State and where that measure protected only the interests of the injured State and not those of the other party. That measure could thus not be regarded as an exception for the simple reason that it was not in conformity with Article 2, paragraph 3, of the Charter of the United Nations because, although it did not endanger international peace and security, it would not meet the concern for justice.

11. Mr. BOWETT said that one of the preconditions for the use of countermeasures, namely, the exhaustion of all the amicable settlement procedures available, as established in article 12, paragraph 1 (*a*), would not only be unacceptable to many States, but would also be unworkable in practice. It was clear that, confronted with the demands of the injured State under articles 6 to 10, the State which had committed the internationally wrongful act would deny that any violation had occurred

and would call for negotiations. Those negotiations could easily continue for three to six months and, if they failed, the dispute could then be submitted for arbitration or to ICJ by special agreement. It was not uncommon for a special agreement to take two years to negotiate, and for a case to take at least two further years before the decision was handed down. It was unlikely that the injured State would wait more than four years to be free to take countermeasures and it would be difficult for the injured State to argue that the State which had committed the wrongful act had not cooperated in good faith, as provided for in article 12, paragraph 2 (*a*): the latter State had every right to claim that the long negotiation process was a normal aspect of relations between States and did not imply any bad faith on its part. Consequently, the exhaustion of all amicable settlement procedures should not be a precondition for resort to countermeasures, but a parallel obligation, meaning that the State which was taking the measures in question had to accompany them with an offer of a peaceful settlement procedure which, if accepted, would result in the suspension of those measures. If, on the other hand, the offer was refused, the countermeasures could be resumed. That was, in his view, the only way to solve the problem; a State had to be prepared to settle a dispute through peaceful means, but resort to such means should not be a precondition to the application of countermeasures.

12. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he wished to caution his colleagues, in particular Mr. Bowett, against undue pessimism with regard to what would be acceptable or unacceptable to States. In any case, at the present stage of its work, the Commission should not be asking whether a provision would be acceptable or not. It would see how States would react when the draft had been submitted to them. He also did not see why States could not wait two years, the time to try to settle a dispute by negotiation, before taking radical measures. In any event, in the meantime, they could, if they so wished, take interim measures, provided that they took proper and just account of the interests of all concerned.

13. Mr. PELLET said he would wait until the Special Rapporteur had submitted all the addenda to his fourth report before commenting on them. For the time being, he would refer only to a very important question which had already been discussed at length by Mr. Shi (2267th meeting) and which had also been raised in the statement by Mr. Calero Rodrigues, namely, whether countermeasures had a place in the draft articles. The view that they did not was strongly held by Mr. Shi because, as he saw it, resort to countermeasures was a practice which, although it had been very widespread for over a century, was incompatible with the law, since countermeasures were an instrument used by rich or powerful States against poorer and weaker States. Moreover, in so far as the Charter of the United Nations specifically prohibited the use of force, the Commission would be regulating unlawful conduct if it codified the law applicable to countermeasures, which were, in a way, a special case of the use of force. Mr. Shi's conclusion was that it was impossible to justify such countermeasures, whether from the point of view of *lex lata* or of *lex ferenda*, and thus to include them in the draft articles. He found some measure of support for that reasoning in the judgment of ICJ in the *Corfu Channel* case, according to which "The Court can only regard the alleged right of intervention"—and intervention was a type of countermeasure as understood by the Special Rapporteur—

> as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law ... for, from the nature of things, it would be reserved for the most powerful States.[6]

14. He largely agreed with that analysis, but drew quite different conclusions from it that were similar in some ways to the point of view expressed by the Special Rapporteur in the introduction to his third report. There was no doubt that countermeasures were a more effective and more uncontrollable weapon in the hands of powerful States and that they should therefore not exist, but the fact was that they did exist and that, at present, there was, as Mr. Shi himself had noted, no effective and efficient system to replace them.

15. In those circumstances, the use of countermeasures had to be restricted and regulated and a distinction had to be drawn between what could be tolerated for want of a better solution and what could not be tolerated, in the interests not of the strongest, but of the weakest. In fact, Mr. Shi's reasoning should lead to the logical conclusion that the question of countermeasures must be included in the draft articles, with the explanation that they could not, in any case, be an admissible response to a wrongful act. In any society, some degree of constraint was tolerable and even inevitable and the Special Rapporteur could only be commended for trying to determine the threshold and nature of a tolerable response, whatever might be thought of the rules he was proposing for that purpose. That would not really be contrary to the dictum of ICJ in the *Corfu Channel* case, which reflected a more radical view of the matter because, in that case, British intervention had been a physical constraint operation carried out by armed forces in the territorial waters of the State held to be responsible for a violation of international law, and that had limited the scope of the precedent. In any event, the Court had thus set a limit on resort to countermeasures of which account should be taken and, in his view, article 14 as proposed by the Special Rapporteur would serve that purpose.

16. In conclusion, he stressed that it was important for the Commission to avoid turning the discussion Mr. Shi had started on that basic question into a debate on North-South opposition. Power was a very relative concept and, in the matter of countermeasures, some third world countries had no reason to be envious of certain developed countries, many of which were certainly not free from criticism. The Commission should try to draft balanced rules without worrying too much about the political background. As indicated by the Special Rapporteur in his third report, its task was to devise ways and means to alleviate the impact of the great inequality that was apparent among States in the adoption and application of countermeasures. The point was not to strengthen the power of some States, but, rather, to limit its effects and to take account of the fact that it existed in States both rich and poor.

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[6] *I.C.J. Reports 1949*, p. 35.

17. Mr. Sreenivasa RAO said that the topic under discussion required more careful thought and he reserved the right to come back at greater length to its various aspects. At present, however, he wanted to comment on the question of countermeasures, which was of particular importance in the context of the codification of the law of international responsibility.

18. Inequality between States was an undeniable fact. There was thus a great temptation for the minority of the richer and more powerful States to behave as though they had always been besieged by the vast majority of weaker States and to try to make their special interest prevail over the definition of norms and rules whose true purpose was to safeguard the general interest.

19. A look at the way in which countermeasures had been applied over hundreds, even thousands, of years, would reveal that they had often been a reflection of the law of the stronger party, which had imposed them on the weaker party without bothering to obtain its consent or voluntary participation in the process. In those circumstances, could such a practice—no matter how ancient it might be—be regarded as an acceptable basis for the codification and development of international law?

20. That basic issue had already been referred to in clear and courageous terms by Mr. Shi, who considered that the practice of countermeasures was still highly debatable and could certainly not be regarded as the basis of universally recognized rules of international law. Without perhaps being quite as categorical, he too wondered what might be the logical consequences of an attempt to codify the law on that basis.

21. Mr. Pellet had said that, if countermeasures could not be abolished, their use should be limited and regulated, but such "regulation" should also take proper account of the interests and viewpoints of all the States concerned, failing which the outcome would be yet more injustice. Mr. Bowett had said that a State which took countermeasures should, at the same time, make an offer of amicable settlement to the other party which, if accepted, would inevitably lead to the suspension of the countermeasures. That was an excellent idea in so far as the imposition of countermeasures did not place the party taking them in a position of strength in the negotiations, thereby enabling it to impose its law on the other party even if the "unlawful" nature of the facts or acts which had caused it to violate an obligation was not proved conclusively. Care must be taken not to transpose into the field of law the power relationships that could exist at the political level. Only if the more powerful States showed moderation and accepted certain sacrifices would it be possible to build up a system of rules of law that would provide everybody with equitable protection.

22. Mr. ARANGIO-RUIZ (Special Rapporteur), replying to points raised, said that the Sixth Committee and many members of the Commission had stressed the need to make progress on the topic of State responsibility if it was hoped to achieve some results before the end of the current quinquennium.

23. In his view, the remarks and suggestions put forward so far by his colleagues on his third and fourth reports represented, on the whole, a step in the right direction. The debate which had developed so far on draft articles 11 and 12 would certainly be helpful for the elaboration of an adequate legal regime of countermeasures. He looked forward to the further contributions members would make on those two draft articles and on draft articles 13, 14 and 5 *bis*, as well as on the problem he proposed to raise with regard to article 4 of part 2 as adopted on first reading. He hoped that the debate would concentrate on the merits of the best possible regulation of countermeasures, leaving aside, at least for the time being, the doubts raised as to the appropriateness of the Commission's effort to draft such a regulation. Whether one liked it or not, the structure of the inter-State system remained essentially inorganic. Consequently, as he had pointed out in a previous reply to Mr. Shi, reprisals were bound to remain for some time the most common and important means by which international law could be implemented whenever an international obligation was violated.

24. He was not sure that he had understood the point made by Mr. Pellet when he had expressed regret that he (the Special Rapporteur) had not developed his ideas further in the fourth report. In any event, his own view was that it was for the Commission as a whole now to explore the matter further.

25. Finally, he wished to state that while preparing his presentation on the draft articles proposed in document A/CN.4/444/Add.1, he had had second thoughts with regard to the wording of article 14 as it appeared in that document. He would therefore perhaps have to submit a third addendum, consisting of one page only, to document A/CN.4/444, in the interest of serving the Commission properly.

The meeting rose at 11.20 a.m.

2275th MEETING

Thursday, 18 June 1992, at 10.05 a.m.

Chairman: Mr. Christian TOMUSCHAT

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. Jacovides, Mr. Kabatsi, Mr. Koroma, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Shi, Mr. Szekely, Mr. Thiam, Mr. Vereshchetin, Mr. Villagran Kramer, Mr. Yamada, Mr. Yankov.