

(iii) Secretariat Study

Report on Work of the International Law Commission (ILC)

1. State Responsibility

Introduction

The object of the work of the ILC on the topic "State Responsibility" has been to codify the customary rules governing State Responsibility stricto sensu, as a general and independent topic. The basis of the ILC's work were, and have generally been (i) to not limit its study of the topic to any particular areas, such as responsibilities for injuries to the person or property of aliens; (ii) to codify the rules governing international responsibility without engaging in the definition and codification of the primary rules whose breach entails, or would entail, responsibility for an internationally wrongful act. The Commission

has, accordingly, concerned itself with the progressive development and codification of what may be termed as "Secondary rules" aimed at determining whether a breach of the obligations imposed by the primary rules has taken place and, in the event that it has, what the consequences of that breach should be.

It will be recalled that the General Assembly had by its resolution 3071 (XXVII) of 30 November 1973 *inter alia* recommended that the Commission should continue, on a priority basis, its work on State Responsibility with a view to the preparation of a set of draft articles on responsibility of States for internationally wrongful acts and that it should, at an appropriate time, undertake a separate study of the topic of International Liability for Injurious Consequences Arising Out of the performance of other activities.² Accordingly, the set of draft articles developed by the Commission deal solely with the responsibility of States for internationally wrongful acts, not relatable to lawful or even risk creating activities which are not, otherwise,

² See U.N. the work of the International Law Commission, No. 7, 4th edn, 1988, p. 95

wrongful. It may be recalled that the ILC has also prepared a set of draft articles on the topic "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law".

Work of the Commission at the forty eighth Session

In accordance with its plan of work the Commission has at its 48th Session adopted a set of 60 draft articles arranged in Three Parts and Two Annexes thereto. Part One of the draft articles comprising 35 draft articles addresses the issue of the origin of international responsibility, and deals with such issues as determining the grounds and circumstances in which a State may be held to have committed an international wrongful act. It may be recalled that a set of 35 draft articles addresses the issue of the origin of international responsibility, and deals with such issues as determining the grounds and circumstances in which a State may be held to have committed an international wrongful act. It may be recalled that a set of 35 draft articles relating to the origin of international responsibility was adopted, on first reading, by the ILC in 1980 with a view towards its possible adoption in the form of a Convention. Now that the ILC has completed its work on Parts Two and Three of the topic it could, if the General Assembly so recommends, commence the task of the second reading of these draft articles.

Part One of the Draft Articles

Part one of the draft articles as adopted, on first reading together with commentaries thereto, in 1980 is in principle divided into five chapters. Chapter I entitled General Principles comprising 4 articles is devoted to the definition of a set of fundamental principles, including the principle attaching responsibility to every internationally wrongful act and the principle of the two elements - subjective and objective - of an internationally wrongful act. Chapter II of Part One of the draft articles on the "Act of State" under International Law" is concerned with the subjective element of the internationally wrongful act, and the provisions of draft articles 5 to 15 are addressed to the determination of the conditions in which particular conduct must be considered as an "Act of State" under international law. The various aspects of the objective element of international wrongful obligation are dealt with by the provisions of draft articles 16 to 26 comprising Chapter III and

termed "Breach of an International Obligation". Chapter IV on the "Implication of a State in the International Wrongful Act of another State" deals with cases in which a State participates in the Commission by another State of an international offence and the cases in which responsibility is placed on a State other than the State which committed the internationally wrongful act. Finally draft articles 29 to 35 comprise the Chapter "Circumstances Precluding Wrongfulness" define such circumstances as; prior consent of informed State; legitimate application of counter-measures in respect of an internationally wrongful act; force majeure; and fortuitous event; distress; State of necessity; and self defence; may have the effect of precluding wrongfulness.

Part Two of the Draft Articles

Part Two of the draft articles as adopted on first reading by the ILC in 1996 is designed to deal with matters relating to the content, forms and degrees of international responsibility. The text of draft articles 36 to 53 comprising Part Two are divided into four Chapters. Chapter I comprising the text of draft articles 36 to 40 spell out the General Principles relating to the content, form and degree of international responsibility. Draft Article 36 on the Consequences of an Internationally Wrongful Act forms the link between Parts One and Two. Paragraph 2 of Article 36 stipulates that the legal consequences of internationally wrongful acts are without prejudice to the continued duty of the State which has committed the international wrongful act to perform the obligation it has breached.

Paragraph 2 of Article 36 states the rule that where as a result of an internationally wrongful act a new set of relations is established between the author State and the injured State, the previous relationship does not ipso facto disappear and that even if the author State complies with its secondary obligation it is not relieved of its duty to perform the obligation which it has breached. Paragraph 2 is of the nature of a saving clause to allow for the possibility of exceptions, such as the eventuality that the injured State might waive its right to the continued performance of the obligation. Draft Article 37 entitled Lex specialis states that the provisions of Part Two govern the legal consequences of any internationally

wrongful act of a State except where, and to the extent that, those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Draft Article 38 on customary international law provides that customary law shall continue to govern legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part Draft Article 39 on the Relationship to the Charter of the United Nations states that the legal consequences of an internationally wrongful act are subject, as appropriate, to the provisions and procedures of the United Nations Charter, relating to the maintenance of international peace and security.

Draft Article 40 provisionally adopted at the 37th Session of the ILC defines the term "Injured State" to mean any State a right of which is infringed by the act of another State; if that act constitutes, in accordance with Part One of the draft articles, an internationally wrongful act of that State. Paragraph 2 of Article 40 then enumerates six situations in which the infringement of a right may occur; such as breach of bilateral treaty; a multilateral treaty or a rule of customary international law; or non observance of a decision of an international court or tribunal; the infringement of the right arising from a decision of an international organization; or breach of treaty provisions for a third State and; a multilateral treaty. Where an internationally wrongful act constitutes an international crime paragraph 3 of draft article 40 provides that the term "injured State" means all other State. The *raison d'être* of draft article 40 is that it is necessary to determine which State or States are legally considered "injured" State or States because only that State or States would be entitled to invoke the legal relationship, as described in Part Two, entailed by the internationally wrongful act. Such a determination is connected with the origin and content of the obligation breached by the internationally wrongful act.

In the course of discussions in the Sixth Committee at the forty-ninth Session of the General Assembly a view had been expressed that whilst the definition of the term "injured State" was useful there was bound to be disagreement on whether the definition covered the whole gamut or range of internationally wrongful acts and it had been suggested

that in view of the diversity of internationally wrongful acts it would be preferable to adopt a definition that was sufficiently flexible to cover all cases. In the opinion of some representatives the definition of the term "Injured State", however, needed to be examined further since an internationally wrongful act could have different legal consequences for different States and thus give rise to different claims. It was said in this regard that a distinction needed to be made between directly affected States and indirectly affected States and that the degree of injury suffered should also be considered.

Chapter II of Part Two of the draft articles is addressed to the "Rights of the Injured State and Obligations of the State which has committed An Internationally Wrongful Act". The provisions of draft articles 41 and 46 stipulate such obligations as cessation of wrongful acts and Assurances and Guarantees of Non-Repetition. Draft articles 42, 43, 44 and 45 provide for such rights as Reparation Restitution in Kind Compensation and Satisfaction respectively for the injured State.

Draft Article 41 on cessation of wrongful conduct as provisionally adopted is the first of series of provisions dealing with the new relations which arise from an international delict between the author State and the injured State. Their new relations involve *inter alia* (i) new obligations of another State and corresponding entitlements of the injured State which are dealt with in articles 41 to 46 and (ii) new rights of the injured State or States such as the right to take countermeasures.

The new obligations of the author State consist in the redressal of the situation stemming from the breach of a primary obligation, that is to say, an obligation embodied in a primary rule. The obligation to make reparation is the most frequently invoked of the new obligations and is dealt with in article 42. The obligation to make reparation may be discharged in a number of forms as stipulated in articles 43, 44, 45 and 46. These articles must therefore be read together. A primary exigency in eliminating the consequences of a wrongful act is to ensure its cessation i.e. discontinuance of the specific conduct which is in violation of the obligation breached. This provision thus emphasizes and incorporates the importance of cessation.

The Commission has taken the view that cessation falls within the grey area of the "primary" and "secondary" rules in as much as it operates in concertizing the primary obligation, the infringement of which is in progress and affects the quantity and quality of reparation and the modalities and conditions of the measures to which the injured State or States or an international institution may resort to in order to secure reparation.

Among the reasons for devoting an entire article to cessation is to avoid subjecting cessation to the limitations or exceptions applicable to forms of reparation such as restitutio in integrum. The difficulties which may normally prevent or hinder restitution in kind are not such, as to affect the obligation to cease the wrongful conduct.

Draft Article 42 entitled Reparation provides: that the injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination. In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of (a) the injured State; or (b) a national of that State on whose behalf the claim is brought which contributed to the damage. This is based mer alia on the widely shared view that a State discharges the responsibility incumbent on it for breach of an international obligation by giving reparation for the injury or harm caused. The term "reparation", is generic and describe the various methods available to a State for discharging or releasing itself from such responsibility and, is employed in Article 36 paragraph 2 of the Statute of the ICJ.

It would have been observed that while draft article 41 stipulates an obligation for the State which commits an internationally wrongful act draft Article 42 provide for a right of the injured State taking cognizance of the fact that it is a decision of the latter i.e. the injured State that sets a secondary set of legal relations into motion. Thus paragraph 1 expressly provides that a State which commits an internationally wrongful act is under an obligation to provide full reparation for the injury sustained as a result of the internationally wrongful act. The injury may be the result of concomitant factors among which the wrongful act plays a decisive but

not an exclusive role. In such cases, to hold the author State liable for reparation of all the injury would be neither equitable nor in conformity with the proper application of the causal link theory which is extensively dealt with in the commentary to article 44. Among the various factors which may combine with the wrongful act to produce the injury, paragraph 2 singles out the negligence or the wilful act or omission of the injured State which contributed to the damage subparagraph (b). States may bring such claims on behalf of their nationals, namely natural or juridical persons, both of which are covered by the term "national". This factor is widely recognized both in doctrine and in practice as relevant to the determination of reparation.

Paragraph 3 adopted at the 48th Session of the Commission provides that reparation is not to result in depriving the population of a State, including that of the wrong doing State, of its own means of subsistence. The Commission has observed in this regard that this has nothing to do with the obligation of cessation including the return to the injured State, of territory wrongfully seized.

Draft Article 43 on Restitution in kind provides that the injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind, the re-establishment of the situation that existed before the wrongful act was committed, provided, and to the extent, that restitution in kind: (a) is not materially impossible; (b) would not involve a breach of an obligation arising from a peremptory norm of general international law; (c) would not involve a burden out of all proportion to the benefit which the injured State would gain from obtaining restitution in kind instead of compensation; or (d) would not seriously jeopardize the political independence or economic stability of the State which has committed the internationally wrongful act, whereas the injured State would not be, similarly affected if it did not obtain restitution in kind.

It may be recalled that in Article 42 restitution in kind was the first of the methods of reparations listed as being available to a State injured by an internationally wrongful act. There is, however, no accepted definition of restitution. It has been variously defined as re-establishing the situation that existed prior to the occurrence of the wrongful act in