Public International Law

Lecture 9

UNIT V :- STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS-

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The Content of State Responsibility

Upon the commission of an internationally wrongful act, new legal obligations come into existence for the State responsible for that act. First, that State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Reparation may take one of three-forms: restitution, compensation, or satisfaction (or some combination of them). Traditionally, restitution has played the primary role, although in instances in which restitution is materially impossible, the injured State may have to content itself with compensation or satisfaction. Second, the responsible State is under an obligation to conclude the internationally wrongful act if it is continuing, and in an appropriate case, may be required to make assurances and guarantees of non-repetition.

The Articles mark a decisive step away from the traditional bilateralism of international law and toward what has been called "community interest" in the provisions dealing with the States that are entitled to react to the breach of an internationally wrongful act. Traditionally, only the State that was directly injured, or in some way "targeted," by the breach of an international obligation could demand reparation. In addition, although any state could take unfriendly measures that did not constitute the breach of an international obligation owed to the State at which they were directed (retorsion), the taking of countermeasures was commonly understood as being limited to these "injured States."

The first major move away from the strict bilateralism of international law was the judgment of the International Court of Justice in the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain) case. In that case, the court stated:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

In the next paragraph, the court went on to state that.“such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.” This distinction between obligations of which only the injured State may complain, and those in the observance of which a wider community of States have an interest, is reflected in Articles 42 and 48, although it should be stressed that the latter provision is undoubtedly one of the clearest examples of progressive development to be found within the articles. It seems indisputable that all other States have an interest in the observance by other States (and individuals) of the prohibitions of genocide and crimes against humanity. However, the exact implications of this interest require further working out in the light of State practice.

The Invocation of Responsibility and Diplomatic Protection

Both Articles 42 and 48 refer to states' entitlements 'to invoke the responsibility of another State' but , despite 'the pivotal significance of the concept of invocation of responsibility', invocation is not defined anywhere in the Articles. It is, however, tased in the commentary to Article 42 that:

"For this purpose, invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceeding before an International court or tribunal. A State does not invoke the responsibility of another State merely because it criticised that State for a breach and calls for the observance of the obligation, or even reserve its rights or protests. For the purposed of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility."

This definition of invocation clearly entails the presentation of some type of claim by a state either 'injured' under the terms of Article 42 or 'interested' within the meaning of Article 48. Although it should be clear that mere protest need not amount to the invocation of responsibility — consider, for instance, the role of protest in the process of the formation of customary international law it might be difficult to distinguish protest clearly from invocation where a state is acting under Article 48 in the collective interest. Drawing this distinction could well depend on the circumstances and terms of the complaint made, but it seems impossible to do so if an interested state requests only cessation and/or non-repetition of the alleged delict. Arguably, these are per formatively inherent in the very notion of protest. An interested State, or for that matter an injured state, has a discretion whether or not to seek reparation but, as shall be seen, an interested state could face difficulties in claiming reparation.

Diplomatic Protection

Articles 42 and 48 are subject to the same requirements for the invocation of a claim, namely, those specified in Articles 43, 44 and 45. Article 43', Notice of a Claim by an Injured State', simply indicates that notice of a claim need be given to the alleged delinquent. It need not detain us. Articles 44 and 45, however, raise issues worth exploring. Article 44 provides:

The responsibility of a State may not be invoked if:

- (a) the claim is not brought in accordance with any applicable rule relating to the nationality
  of claims;

- (b) the claim is one to which the rule of exhaustion of local remedies applies and any
  available and effective local remedy has not been exhausted.

Article 45 provides:

The responsibility of a State may not be invoked if:

(a) the injured State has validly waived the claim;

(b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Although Article 44 embodies hurdles that a state injured in terms of Article 42 must overcome in order to present a claim on behalf of one of its nationals, these are unexceptional. Article 44, however, could present acute problems for a state wishing to invoke responsibility under Article 48. Article 45 poses the paradox of whether an injured state itself could block invocation of responsibility under Article 48, even when the obligation breached is peremptory and owed to the international community as a whole.

ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian

By resolution ES-10/14, adopted on 8 December 2003 at its Tenth Emergency Special Session, the General Assembly decided to request the Court for an advisory opinion on the following question :

"What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions ?"

The resolution requested the Court to render its opinion "urgently". The Court decided that all States entitled to appear before it, as well as Palestine, the United Nations and subsequently, at their request, the League of Arab States and the Organization of the Islamic Conference, were likely to be able to furnish information on the question in accordance with Article 66, paragraphs 2 and 3, of the Statute. Written statements were submitted by 45 States and four international organizations, including the European Union. At the oral proceedings, which were held from 23 to 25 February 2004, 12 States, Palestine and two international organizations made oral submissions. The Court rendered its Advisory Opinion on 9 July 2004.

The Court began by finding that the General Assembly, which had requested the advisory opinion, was authorized to do so under Article 96, paragraph 1, of the Charter. It further found that the question asked of it fell within the competence of the General Assembly pursuant to Articles 10, paragraph 2, and 11 of the Charter. Moreover, in requesting an opinion of the Court, the General Assembly had not

exceeded its competence, as qualified by Article 12, paragraph 1, of the Charter, which provides that while the Security Council is exercising its functions in respect of any dispute or situation the Assembly must not make any recommendation with regard thereto unless the Security Council so requests. The Court further observed that the General Assembly had adopted resolution ES-10/14 during its Tenth Emergency Special Session, convened pursuant to resolution 377 A (V), whereby, in the event that the Security Council has failed to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly may consider the matter immediately with a view to making recommendations to Member States. Rejecting a number of procedural objections, the Court found that the conditions laid down by that resolution had been met when the Tenth Emergency Special Session was convened, and in particular when the General Assembly decided to request the opinion, as the Security Council had at that time been unable to adopt a resolution concerning the construction of the wall as a result of the negative vote of a permanent member. Lastly, the Court rejected the argument that an opinion could not be given in the present case on the ground that the question posed was not a legal one, or that it was of an abstract or political nature.

Having established its jurisdiction, the Court then considered the propriety of giving the requested opinion. It recalled that lack of consent by a State to its contentious jurisdiction had no bearing on its advisory jurisdiction, and that the giving of an opinion in the present case would not have the effect of circumventing the principle of consent to judicial settlement, since the subject-matter of the request was located in a much broader frame of reference than that of the bilateral dispute between Israel and Palestine, and was of direct concern to the United Nations. Nor did the Court accept the contention that it should decline to give the advisory opinion requested because its opinion could impede a political, negotiated settlement to the Israeli-Palestinian conflict. It further found that it had before it sufficient information and evidence to enable it to give its opinion, and empha- sized that it was for the General

Assembly to assess the opinion's usefulness. The Court accordingly concluded that there was no compelling reason precluding it from giving the requested opinion.

Turning to the question of the legality under international law of the construction of the wall by Israel in the Occupied Palestinian Territory, the Court first determined the rules and principles of international law relevant to the question posed by the General Assembly. After recalling the customary principles laid down in Article 2, paragraph 4, of the United Nations Charter and in General Assembly resolution 2625 (XXV), which prohibit the threat or use of force and emphasize the illegality of any territorial acquisition by such means, the Court further cited the principle of self-determination of peoples, as enshrined in the Charter and reaffirmed by resolution 2625 (XXV). In relation to international humanitarian law, the Court then referred to the provisions of the Hague Regulations of 1907, which it found to have become part of customary law, as well as to the Fourth Geneva Convention of 1949, holding that these were applicable in those Palestinian territories which, before the armed conflict of 1967, lay to the east of the 1949 Armistice demarcation line (or "Green Line") and were occupied by Israel during that conflict. The Court further established that certain human rights instruments (International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, United Nations Convention on the Rights of the Child) were applicable in the Occupied Palestinian Territory.

The Court then sought to ascertain whether the construction of the wall had violated the above-mentioned rules and principles. Noting that the route of the wall encompassed some 80 per cent of the settlers living in the Occupied Palestinian Territory, the Court, citing statements by the Security Council in that regard in relation to the Fourth Geneva Convention, recalled that those settlements had been established in breach of international law. After considering certain fears expressed to it that the route of the wall would prejudge the future frontier between Israel and Palestine, the Court observed that the construction of the wall and its associated

régime created a “fait accompli” on the ground that could well become permanent, and hence tantamount to a *de facto* annexation. Noting further that the route chosen for the wall gave expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements and entailed further alterations to the demographic composition of the Occupied Palestinian Territory, the Court concluded that the construction of the wall, along with measures taken previously, severely impeded the exercise by the Palestinian people of its right to self-determination and was thus a breach of Israel’s obligation to respect that right.

The Court then went on to consider the impact of the construction of the wall on the daily life of the inhabitants of the Occupied Palestinian Territory, finding that the construction of the wall and its associated régime were contrary to the relevant provisions of the Hague Regulations of 1907 and of the Fourth Geneva Convention and that they impeded the liberty of movement of the inhabitants of the territory as guaranteed by the International Covenant on Civil and Political Rights, as well as their exercise of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the Convention on the Rights of the Child. The Court further found that, coupled with the establishment of settlements, the construction of the wall and its associated régime were tending to alter the demographic composition of the Occupied Palestinian Territory, thereby contravening the Fourth Geneva Convention and the relevant Security Council resolutions. The Court then considered the qualifying clauses or provisions for derogation contained in certain humanitarian law and human rights instruments, which might be invoked *inter alia* where military exigencies or the needs of national security or public order so required. The Court found that such clauses were not applicable in the present case, stating that it was not convinced that the specific course Israel had chosen for the wall was necessary to attain its security objectives, and that accordingly the construction of the wall constituted a breach by Israel of certain of its obligations under humanitarian and human rights law. Lastly, the Court concluded that Israel could not rely on a right of

self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall, and that such construction and its associated régime were accordingly contrary to international law.

The Court went on to consider the consequences of these violations, recalling Israel's obligation to respect the right of the Palestinian people to self-determination and its obligations under humanitarian and human rights law. The Court stated that Israel must put an immediate end to the violation of its international obligations by ceasing the works of construction of the wall and dismantling those parts of that structure situated within Occupied Palestinian Territory and repealing or rendering ineffective all legislative and regulatory acts adopted with a view to construction of the wall and establishment of its associated régime. The Court further made it clear that Israel must make reparation for all damage suffered by all natural or legal persons affected by the wall's construction. As regards the legal consequences for other States, the Court held that all States were under an obligation not to recognize the illegal situation resulting from the construction of the wall and not to render aid or assistance in maintaining the situation created by such construction. It further stated that it was for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination be brought to an end. In addition, the Court pointed out that all States parties to the Fourth Geneva Convention were under an obligation, while respecting the Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention. Finally, in regard to the United Nations, and especially the General Assembly and the Security Council, the Court indicated that they should consider what further action was required to bring to an end the illegal situation in question, taking due account of the present Advisory Opinion.

The Court concluded by observing that the construction of the wall must be placed in a more general context, noting the obligation on Israel and Palestine to comply with

international humanitarian law, as well as the need for implementation in good faith of all relevant Security Council resolutions, and drawing the attention of the General Assembly to the need for efforts to be encouraged with a view to achieving a negotiated solution to the outstanding problems on the basis of international law and the establishment of a Palestinian State.

Diplomatic Means of Dispute Settlement: Negotiation, Good Offices, Mediation, Inquiry, Conciliation.

Negotiation

Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached while avoiding argument and dispute. In any disagreement, individuals understandably aim to achieve the best possible outcome for their position (or perhaps an organization they represent). However, the principles of fairness, seeking mutual benefit and maintaining a relationship are the keys to a successful outcome. Specific forms of negotiation are used in many situations: international affairs, the legal system, government, industrial disputes or domestic relationships as examples. However, general negotiation skills can be learned and applied in a wide range of activities. Negotiation skills can be of great benefit in resolving any differences that arise between you and others. Negotiation is a flexible means of peaceful settlement of disputes in several respects. It can be applied to all kinds of disputes, whether political, legal or technical. Because, unlike the other means listed in Article 33 of the Charter, it involves only the States parties to the dispute, those States can monitor all the phases of the process from its initiation to its conclusion and conduct it in the way they deem most appropriate. Another characteristic of negotiation highlighted by the Manila Declaration is effectiveness. Suffice it to say in this connection that in the reality of international life, negotiation, as one of the means of peaceful settlement of disputes, is most often resorted to by States for solving contentious issues and that, while it is not always successful, it does solve the majority of disputes. Negotiation is a dialogue between two or more people or parties intended to reach a beneficial outcome. This beneficial outcome can be for all of the parties involved, or just for one or some of them. It is aimed to resolve points of difference, to gain advantage for an individual or collective, or to craft outcomes to satisfy various interests (Buettner, R,. 2006) . It is often conducted by putting forward a position and making small concessions to achieve an agreement. The degree to which the negotiating parties trust each other to implement the

negotiated solution is a major factor in determining whether negotiations are successful. Negotiation is not a zero-sum game; if there is no cooperation, the negotiation will fail. Everyone negotiates every day, often without even considering it a negotiation. Negotiation occurs in business, sales, non-profit organizations, government branches, legal proceedings, among nations, and in personal situations such as marriage, divorce, parenting, etc. The study of the subject is called negotiation theory. Professional negotiators are often specialized, such as union negotiators, leverage buyout negotiators, peace negotiator, or hostage negotiators. They may also work under other titles, such as diplomats, legislators, or brokers.

Enquiry

One of the common obstacles preventing the successful settlement of a dispute by negotiation is the difficulty of ascertaining the facts which have given rise to the differences between the disputants. Most international disputes involve an inability or unwillingness of the parties to agree on points of facts. Herein lays the significance of the procedure of inquiry as a means of pacific settlement of disputes. Many bilateral agreements have been concluded under which fact-finding commissions have been set up for the task of reporting to the parties concerned on the disputed facts. In addition, the procedure of inquiry has found expression in treaties for the pacific settlement of disputes. The two Hague Conventions of 1899 and 1907 established commissions of inquiry as formal institutions for the pacific settlement of international disputes. They provided a permanent panel of names from which the parties could select the commissioners. The task of a commission of inquiry was to facilitate the solution of disputes by elucidating the facts by means of an impartial and conscientious investigation. The report of a commission was to be limited to fact-finding and was not expected to include any proposal for the settlement of the dispute in question. With the establishment of the League of Nations, the means of inquiry took on a new significance. Inquiry and conciliation were viewed as integral parts of a single process for bringing about a pacific settlement to a dispute. It is in the light of this background that the Charter of the United Nations specifically lists “enquiry” as one of the methods of pacific settlement of international disputes. Enquiry as a

separate method of dispute settlement has fallen out of favor. It has been used as part of other methods of dispute settlement. Its purpose is to produce an impartial finding of disputed facts and thus to prepare the way for settlement of dispute by other peaceful methods. The parties are not obliged to accept the findings of the enquiry; however, they always do accept them. The utilization of enquiry has been evident in the practice of international organizations, such as the United Nations and its specialized agencies. Enquiry has been used as part of other methods of dispute settlement in the context of general fact-finding

Mediation

Use of an independent, impartial, and respected third party (called the conciliator or mediator) in settlement of a dispute, instead of opting for arbitration or litigation. Unlike an arbitrator, a mediator has no legal power to force acceptance of his or her decision but relies on persuasion to reach an agreement. Also called conciliation. Mediation'" is a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques. All participants in mediation are encouraged to actively participate in the process. Mediation is a "party-centered" process in that it is focused primarily upon the needs, rights, and interests of the parties. The mediator uses a wide variety of techniques to guide the process in a constructive direction and to help the parties find their optimal solution. A mediator is facilitative in that s/he manages the interaction between parties and facilitates open communication. Mediation is also evaluative in that the mediator analyzes issues and relevant norms while refraining from providing prescriptive advice to the parties. Mediation, as used in law, is a form of (alternative dispute resolution) (ADR), a way of resolving disputes between two or more with concrete effects. Typically, a third party, the mediator assists the parties to a settlement. Disputants may mediate disputes in a variety of domains, such as commercial, legal, diplomatic, workplace, community and family matters. The term "mediation" broadly refers to any instance in which a third party helps others reach agreement. More specifically, mediation has a structure, timetable and dynamics that "ordinary" negotiation lacks. The process is

private and confidential, possibly enforced by law. Participation is typically voluntary. The mediator acts as a neutral third party and facilitates rather than directs the process. Mediation is becoming a more peaceful and internationally accepted solution in order to end conflict

Conciliation

Is a process of settling a dispute by referring it to a specially constituted organ whose task is to elucidate the facts and suggest proposals for a settlement to the parties concerned. However, the proposals of conciliation, like the proposals of mediators, have no binding force on the parties who are free to accept or reject them. As in the case of mediation, conciliators may meet with the parties either jointly or separately. The procedures of conciliation are generally instituted by the parties who agree to refer their dispute to an already established organ, commission or a single conciliator, which is set up on a permanent basis or ad hoc basis; third parties cannot take the initiative on their own. The conciliators are appointed by the parties to a dispute. They can be appointed on the basis of their official functions or as individuals in their personal capacity. Conciliation is described by some as a combination of enquiry and mediation. The conciliator investigates the facts of the dispute and suggests the terms of the settlement. But conciliation differs from enquiry in that the main objective of the latter is the elucidation of the facts in order to enable the parties through their own accord to settle their dispute; whereas the main objective of conciliation is to propose a solution to a dispute and to win the acceptance of the parties to such solution. Also, conciliation differs from mediation in that it is more formal and less flexible than mediation; if a mediator's proposal is not accepted, he can present new proposals, whereas a conciliator usually present a single report. When the parties to a dispute reach the point of not being able to solve it by negotiation, or the point where they have broken off diplomatic relations, but they are convinced that a settlement is important to them, the utilization of the technique of good offices may be helpful. Good offices may be utilized only with the agreement or the consent of both disputants. A third party attempts to bring the disputants together in order to make it possible for them to find an appropriate settlement to their differences through their

negotiations. In this regard, the function of the third party is to act as a go-between, transmitting messages and suggestions in an effort to create or restore a suitable atmosphere for the parties to agree to negotiate or resume negotiation. When the negotiations start, the functions of the good offices come to an end. The procedure of good offices, in contrast to mediation, has a limited function which is simply bringing the disputants together. In mediation, the mediator takes an active part in the negotiations between the disputants and may even suggest terms of settlement to the disputants

Method of good offices

Consists of various kinds of action aiming to encourage negotiations between the parties to a dispute. Also, in contrast to the case of mediation or conciliation, the proffered of good offices does not meet with the disputants jointly but separately with each of them. Seldom, if ever, the proffered attends joint meetings between the parties to a dispute. Normally, the role of the proffered of good offices terminates when the parties agree to negotiate, or to resume negotiation. However, the proffered may be invited by the parties to be present during the negotiations. As in case of mediation, an offer of good offices may be rejected by either or both parties to a dispute. The use of mediation, conciliation, and good offices has a long history. These methods have been the subject of many bilateral and multilateral treaties. However, with the establishment of the League of Nations, permanent organs were set up to perform the functions of these methods of pacific settlement of disputes. In this context, the Charter of the United Nations lists in Article 33(1) mediation and conciliation, but not good offices, as methods of pacific settlement available to the parties to any dispute. Notably, in the practice of the United Nations, the terms “mediation”, “conciliation”, and “good offices” have been used with considerable looseness, flexibility and little regard to the distinctions which exist between them. Mediation and conciliation have both advantages and disadvantages as compared to other methods of dispute settlement. They are more flexible than arbitration or judicial settlement. They leave more room for the wishes of the disputants and the initiatives of the third party. The disputants remain in control of the outcome. Their

proceedings can be conducted in secret. However, there are disadvantages to mediation and conciliation. Their proceedings cannot be started and be effective without the consent, cooperation, and goodwill of the disputants. The proposed settlement is no more than a recommendation with any binding force upon the disputants.