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Summary record of the 1263rd meeting

Topic:
State responsibility

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conduct of any private person present in a State's territory and had nothing to do with the article under consideration. It should be noted, in that connexion, that all persons present in a State's territory were "actually under the authority" of that State, but their conduct need not necessarily be regarded as the conduct of the State.

43. Turning to the examples cited by the Special Rapporteur and by other members of the Commission, he said that all the cases not concerned with the loan of armed forces were irrelevant for the purposes of article 9. If a State sent military personnel to help a State which had suffered an earthquake, that personnel came under the authority of the State at whose disposal it was placed, but did not directly engage that State's international responsibility by its conduct. If a State did not have among its nationals a judge qualified to act as president of the supreme court and asked another State to place a person having the required qualifications at its disposal, it was not an "organ" that was lent to it, but an ordinary private person. In the *Chevreau Case*, the British Consul had been appointed as a natural person, not as an "organ", to replace the French Consul. If a State applied to another State for the services of an executioner, he would not be sent as an "organ", and he could not perform his duties until he had been appointed by the requesting State. As to persons placed at the disposal of a State to organize its judiciary, they would merely be acting as consultants, without exercising any part of the recipient State's public power.

44. It thus appeared that, with the exception of armed forces, no State organ could be placed at the disposal of another State. Nor could international organizations place at the disposal of a State any natural or legal person who could exercise a part of its State power. If such organizations seconded experts or officials, they were ordinary private persons in the recipient State and did not possess the status of organs of the international organization in any way.

45. The example given by Mr. Quentin-Baxter, which related to organs that were held to be simultaneously organs of New Zealand and of the United Kingdom, and to exercise public powers in both countries, was not a case of organs lent, but of State organs proper, within the meaning of draft articles 5 and 6.

The meeting rose at 1.05 p.m.

1263rd MEETING

Thursday, 23 May 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahovič, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Valat, Mr. Yasseen.

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization) (continued).

1. Mr. AGO (Special Rapporteur), replying to the comments made on draft article 9, said that that provision covered only persons or groups of persons who, though placed at the disposal of a particular State, were, and continued to be, organs of the State or international organization which had sent them. In that respect, paragraph 200 of his third report¹ might perhaps require clarification. There were some situations which did not come under the article in question: for example, when a person who had the character of an organ in a State lost that character when he was placed at the disposal of another State, in which he acquired the character of an organ of that other State. In such a case, internationally wrongful acts committed by that person were attributable to the recipient State in accordance with article 5. Thus, if the President of the Supreme Court of a State resigned his office and agreed to go and carry out similar duties in another State, he lost the character of an organ in his home State and acquired that character in the recipient State. It was also necessary to rule out the case in which a State or an international organization sent to another State an expert who did not have the character of an organ; such an expert could carry out his mission either as a private person or as an organ of the recipient State, but not as an organ of one State lent to another. Article 9 covered only cases in which an organ of a State or an international organization was placed at the disposal of another State and did not lose the character of an organ of the sending State or international organization.

2. There were then various possibilities within the framework of the recipient State. It could make the necessary arrangements for the foreign organ placed at its disposal also to become its own organ in its internal legal system; the person or group of persons concerned would then have the character of organs in both States. If the recipient State did not make such arrangements, it was also possible that the persons or groups of persons concerned might be *de jure* organs in the lending State and *de facto* organs in the recipient State. On the other hand, it was clear that cases of co-operation by substitution, which occurred when a State substituted its own organs for the organs of another State, should be excluded from the scope of article 9, as Mr. Bedjaoui had said.²

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 267.

² See 1261st meeting, para. 31.

3. The main criterion for deciding to attribute an act to one State rather than to another, and for determining a State's responsibility, was that of effective control. The idea of instructions, which was also employed in the draft article, should not lead to confusion. By using that idea, he had meant to indicate that an organ was not really placed at the disposal of another State when it continued, even in the performance of its duties in the service of the recipient State, to order its conduct according to instructions it received from the lending State. Whatever the wording finally used, that situation should be excluded from the scope of article 9. On the other hand, the responsibility of the lending State was not engaged when the organ lent simply exceeded the instructions it received from the beneficiary State. In the *Nissan Case*,³ the United Kingdom forces which had requisitioned a hotel in Cyprus had not been under the authority of that country, but had acted under British command, so that it had not been possible to attribute their internationally wrongful acts to Cyprus. The essential point was, therefore, that the acts of the organ lent should take place under the authority of the recipient State or, as Mr. Elias had said, "within the scope of that State's ostensible authority".⁴

4. Moreover, as Mr. Kearney had pointed out, the general rule stated in article 5 must be kept in mind, since the rule in article 9 covered only exceptional cases.

5. With regard to shared responsibility, that complex question was related both to the problem of attribution and to the problem of the offence, that was to say the objective element, which would have to be considered later. In that connexion, it should be noted that if the international legal obligation violated derived from a customary rule valid for all States, it could engage the responsibility of several States; but if it derived from a bilateral treaty, which bound only one of the two States concerned, only the international responsibility of that State would be engaged by reason of the treaty.

6. With regard to the additional clause proposed by Mr. El-Erian, reserving the responsibility of the State lending the organ,⁵ he feared that it might introduce problems unrelated to the article under consideration, especially as the main rule was stated in article 5.

7. Several members of the Commission had considered that article 9 should apply not only to loans of organs of a State, but also to loans of organs of the separate public institutions referred to in article 7. For it might happen that when a town suffered a disaster, a town in another country placed its fire service at its disposal for a certain time; or a town might come to the assistance of a foreign town having difficulties with planning, by placing at its disposal its entire town-planning department. In both cases, it was not impossible that, in the performance of their duties, the persons thus lent might injure foreign interests.

8. Many members of the Commission had remarked that the situations covered by article 9 would probably

arise more frequently in the future, particularly in the context of technical, economic and cultural assistance programmes. Often, it was not State organs, but experts or private persons who were seconded for assistance purposes. Such persons sometimes acquired the status of organs of the beneficiary State, but of course they did not come within the scope of the cases covered by article 9.

9. No member of the Commission had denied that the loan of armed forces could come within the scope of the article. It might be said that that case could be more common, but it was by no means the only one. Besides, the troops of one State might be placed at the disposal of another, not for military purposes, but to help in rescue or police operations.

10. Among the other cases covered by article 9, was that of an international organization which sent a complete service to the territory of a State. At one time the International Labour Organisation had sent to Latin America a complete unit to set up a regional development plan in co-operation with the World Health Organization and the United Nations Educational, Scientific and Cultural Organization.

11. In the *Chevreau Case*, the British Consul had not been placed at the disposal of France in his personal capacity; he had been asked to act simultaneously as British Consul and as French Consul.

12. It was precisely when there were special relations between two countries, like those between New Zealand and the United Kingdom, that the loan of organs could take place most easily. It was conceivable that when Algeria had become independent, it might have concluded with France an agreement under which Algerians could, for a certain time, have appealed to the French *Conseil d'Etat*, which would have applied Algerian law and thus acted as an organ of the Algerian State pending the formation of an Algerian *Conseil d'Etat*.

13. Thus article 9 could apply to many situations. Practice would show the real scope of the provision.

14. If two States had concluded a special agreement governing their respective international responsibilities, that agreement was not binding on third States, which were not obliged to apply to one of those States rather than to the other. In such cases, the general principle of the draft was applicable. In the *Romano-Americana Case*,⁶ British officers acting under the authority and control of the Romanian State had destroyed oil wells in Romania, lest they fall into the hands of the German troops. Since those officers, though remaining organs of the United Kingdom, had acted under the control and authority of Romania, that country had admitted that its international responsibility was engaged by their acts. Similarly, a bilateral treaty could regulate both the question of the international responsibility of the signatory States and the question of their share of the reparation due by reason of that responsibility. In the *Romano-Americana Case*, there had been an arrangement whereby Romania had admitted that its international

³ See *Yearbook ... 1971*, vol. II, p. 271, para. 208.

⁴ See 1261st meeting, para. 1.

⁵ See previous meeting, para. 32.

⁶ See G.H. Hackworth, *Digest of International Law*, vol. V, pp. 702-705 and 840-844.

responsibility was engaged and the United Kingdom had agreed to pay compensation to Romania.

15. The case of an organ placed unlawfully at the disposal of a State had been mentioned by Mr. Tammes.⁷ That very exceptional case might occur if a State placed troops at the disposal of another State when that action was specially prohibited by a treaty. Reference had also been made to the case in which a State placed its territory at the disposal of another State, allowing it to station its armed forces there for the purpose of committing aggression against a third State. But so long as no act of aggression occurred, there was no breach of an international obligation, unless a peace treaty provided, for example, that the stationing of foreign troops in the territory was prohibited. In his opinion it was not necessary to make express provision for that situation, which seemed to come within the scope of article 5.

16. It would be for the Drafting Committee to find suitable wording to cover exactly the situations to which article 9 was applicable.

17. Mr. BILGE thought it would be inadvisable to introduce into article 9 the notion of "public institutions separate from the State", which was the subject of article 7. Such institutions had a separate personality only in internal law. If a town placed its town-planning department at the disposal of a foreign town, special relations were established between the two countries concerned, not between the two towns; the arrangement would override internal distinctions.

18. Mr. USHAKOV said that most of the examples given during the discussion were imaginary, and it would be better to keep to existing cases. When private persons were sent abroad under an economic or cultural assistance programme, or to carry out relief operations, they did not exercise any State power of the beneficiary State. But article 9 was concerned with the exercise of State power, that was to say, essentially with the case of the loan of armed forces. He hoped that the Drafting Committee would find an adequate formula.

19. Mr. SETTE CÂMARA said that the objection raised by Mr. Bilge would also apply to article 7. If it was considered that, for purposes of international law, only the relations between States were significant, and that the differences between organs, public corporations and territorial public entities were unimportant except in internal law, then article 7 might not be necessary. The suggestions made regarding article 9 seemed reasonable, however, and if article 7 was to be retained with a specific reference to the kind of situations covered, the same should be done in the case of article 9.

20. Mr. AGO (Special Rapporteur) said there were two possible courses: to explain in the commentary that article 9 could apply to "organs of public institutions separate from the State", or to amend the text of the article accordingly.

21. In reply to Mr. Ushakov's last comment, he pointed out that there could indeed be an exercise of preroga-

tives of State power in cases other than those of the loan of armed forces or police. For example, when health services were sent abroad during an epidemic, their first step was sometimes to restrict freedom of movement in a particular area; such action might also affect the freedom of movement of foreign diplomats.

22. The CHAIRMAN suggested that draft article 9 should be referred to the Drafting Committee for further consideration.

*It was so agreed.*⁸

The meeting rose at 11.20 a.m.

⁸ For resumption of the discussion see 1278th meeting, para. 19.

1264th MEETING

Friday, 24 May, 1974, at 10.05 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahovič, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Tenth session of the Seminar on International Law

1. The CHAIRMAN invited Mr. Raton, the Senior Legal Officer in charge of the Seminar on International Law, to address the Commission.

2. Mr. RATON (Secretariat) said that Monday, 27 May, would be the date not only of the meeting commemorating the Commission's twenty-fifth anniversary, but also of the opening of the tenth session of the Seminar on International Law. In order to associate the Seminar with the tributes paid to the memory of Mr. Milan Bartoš, who had participated as a lecturer in all its sessions, the tenth session would be called the Milan Bartoš session.

3. He thanked those members of the Commission who, at the twenty-eighth session of the General Assembly, had made complimentary references to the organizers of the Seminar. On the present occasion there would be 24 participants, 13 of whom had received fellowships. Seven Governments granted fellowships ranging from 3,600 to 12,000 Swiss francs and having a total value of about 50,000 Swiss francs, which enabled nationals of developing countries to participate in the Seminar. Unfortunately, owing to the fall in the value of the dollar, the increased cost of living in Switzerland and the high cost of air travel, that sum had become insufficient, and the Secretariat had been forced to reduce by two the number of participants in the current session. He therefore appealed to other Governments to grant fellowships.

⁷ See 1261st meeting, para. 25.