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Summary record of the 934th meeting

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ARTICLE 39 (Transit through the territory of a third State) [43]¹⁹

103. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee had revised paragraph 4 of article 39 to read:

"The third State shall be bound to comply with the obligations with respect to the persons mentioned in the foregoing three paragraphs only if it has been informed in advance, either in the visa application or by notification, of the transit of those persons as members of the special mission, and has raised no objection to it."

104. The new wording met the objection made to the former text of paragraph 4 of article 39, that it only mentioned the transit of the special mission as such and did not cover the case of transit by a member of the special mission.

105. Mr. EUSTATHIADES said he found the new text acceptable as it included the words "of those persons" which he had suggested earlier.

106. The CHAIRMAN put article 39 to the vote as amended.

Article 39, as amended, was adopted unanimously.

The meeting rose at 5.20 p.m.

934th MEETING

Thursday, 6 July 1967, at 10.10 a.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Special Missions

(A/CN.4/193 and Addenda; A/CN.4/194 and Addenda)

(continued)

[Item 1 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

(continued)

ARTICLE 32 (Administrative and technical staff) [36]¹

1. The CHAIRMAN invited the Acting Chairman of the Drafting Committee to introduce article 32.

2. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 32:

"Members of the administrative and technical staff of the special mission shall enjoy the privileges and

immunities specified in articles 24 to 31, except that the immunity from civil and administrative jurisdiction of the receiving State specified in paragraph 2 of article 26 shall not extend to acts performed outside the course of their duties."

3. The Commission had decided that the representatives in a special mission and members of its diplomatic staff should have diplomatic privileges similar to those provided for by the 1961 Vienna Convention on Diplomatic Relations.

4. Articles 32 to 34 related to other classes of staff of the special mission. Article 32 dealt with the privileges and immunities of members of the administrative and technical staff.

5. Mr. CASTRÉN observed that, as Mr. Nagendra Singh had already pointed out at the 920th meeting², article 32, by referring to articles 24-31, granted wider privileges and immunities in regard to exemption from customs duties and inspection than did article 37 of the Vienna Convention on Diplomatic Relations. In particular, that Convention did not provide that the baggage of administrative and technical staff should be exempt from inspection. It therefore seemed more correct to say "shall enjoy the privileges and immunities specified in articles 24 to 30", or possibly "in articles 24 to 30 and in article 31, paragraph 1".

6. The CHAIRMAN said that article 37, paragraph 2 of the 1961 Vienna Convention gave members of the administrative and technical staff of a permanent diplomatic mission a privilege which was not granted by article 32 to members of such staff of special missions: article 37, paragraph 2, of the Vienna Convention provided that members of the administrative and technical staff "shall also enjoy the privileges specified in article 36, paragraph 1, in respect of articles imported at the time of first installation".

7. Mr. USTOR, Acting Chairman of the Drafting Committee, said that the Drafting Committee had examined the whole question and had come to the conclusion that, in view of the temporary character of special missions, the question of extending customs privileges in respect of first installation did not arise.

8. Mr. NAGENDRA SINGH said that it was true that article 32, as proposed by the Drafting Committee, gave the members of the administrative and technical staff of a special mission greater privileges than the corresponding article of the 1961 Vienna Convention. Article 32 provided that "Members of the administrative and technical staff of the special mission shall enjoy the privileges and immunities specified in articles 24 to 31...", and those articles corresponded to articles 29 to 36 of the 1961 Vienna Convention. But since article 37, paragraph 2, of the Vienna Convention only referred to articles 29 to 35, it granted less extensive privileges than the article under discussion.

9. Unless the words "specified in articles 24 to 31" were amended to read "specified in articles 24 to 30",

¹ For earlier discussion, see 920th meeting, paras. 54-77.

² Para. 8.

as he himself had repeatedly urged in the earlier discussions, the administrative and technical staff of a special mission would enjoy greater privileges than those granted by the 1961 Vienna Convention to staff of the same category serving a permanent diplomatic mission.

10. Mr. BARTOŠ, Special Rapporteur, said it was correct that members of the administrative and technical staff should enjoy the privileges and immunities specified in articles 24 to 30, and not 24 to 31, if article 32 was to conform with the corresponding provision of the Vienna Convention on Diplomatic Relations (article 37, paragraph 2). The reference to article 31 had been made in error.

11. The exemption from customs duties of articles imported at the time of first installation had not been mentioned in the draft articles on special missions because such missions were not really installed in the territory of the receiving State.

12. Mr. KEARNEY said he wished to raise a more general issue. In view of the temporary nature of special missions, it would be appropriate to restrict the customs privileges of the representatives of the sending State in a special mission and the members of its diplomatic staff to articles brought into the receiving State on their first entry into that State.

13. He had expressed that view in the Drafting Committee, but it had been explained that the receiving State could restrict the customs privileges of such persons by virtue of the words "Within the limits of such laws and regulations as it may adopt" in article 31, paragraph 1,³ which were modelled on a similar proviso in article 36, paragraph 1, of the 1961 Vienna Convention. In view of that explanation, he had not pressed the matter further, but article 36 of the Vienna Convention was ambiguous and the relationship between the proviso in question and other clauses in that Convention was not at all clear. Unfortunately, article 31 of the draft on special missions, which the Commission had adopted in principle at the 933rd meeting, contained similarly ambiguous language.

14. Mr. USTOR, Acting Chairman of the Drafting Committee, said that if the enumeration in article 32 were limited to articles 24 to 30, members of the administrative and technical staff of a special mission would be completely excluded from the benefits of article 31: they would therefore have no customs exemption whatsoever, even in respect of their personal baggage brought into the receiving State on first entry.

15. Mr. NAGENDRA SINGH said that the point made by Mr. Ustor was a valid one; it could be met by giving the administrative and technical staff of special missions the same privileges as similar staff of permanent diplomatic missions enjoyed under the 1961 Vienna Convention, but not more.

16. The CHAIRMAN said that the Commission had perhaps been unnecessarily cautious with regard to the application of the concept of first installation to special missions; some special missions stayed for a long time

in the receiving State and, in any case, it would not be inappropriate to describe as "first installation" the first arrival of a member of a special mission in the receiving State to take up his duties. He therefore suggested that, on the question of first installation, article 32 should follow the model of the Vienna Convention.

17. Mr. BARTOŠ, Special Rapporteur, said that there was no need for any special exemption for articles for personal use, but he had no objection to including a reference to article 31, paragraph 1 as well. It must, however, be recognized that that would not give the administrative and technical staff wider privileges and immunities than were provided for by the Vienna Convention on Diplomatic Relations. Moreover, if the administrative and technical staff were to enjoy advantages on first installation, the representatives and diplomatic staff would, of course, have to enjoy them too, contrary to what had been previously agreed. He saw no need to make such a change.

18. Mr. USHAKOV urged that the Commission should express its opinion on the matter quite clearly. A reference to article 31, paragraph 1 would give the technical and administrative staff wider privileges and immunities than were accorded by the Vienna Convention in article 37, paragraph 2. Was that really the Commission's intention?

19. Mr. USTOR suggested that article 32 should be referred back to the Drafting Committee.

20. The CHAIRMAN invited comments on his suggestion that provision should be made in article 32 for extending to the administrative and technical staff the privileges specified in article 31, paragraph 1, but only in respect of articles imported at the time of first installation.

21. Mr. CASTRÉN proposed that in order to reconcile the different views, article 32 and article 31, on which a vote had not yet been taken, should be recast to make them conform as closely as possible with the corresponding provisions of the Vienna Convention on Diplomatic Relations. After all, though diplomatic missions were permanent, their staff changed frequently so that its position was not unlike that of members of a special mission.

22. Mr. AGO said he doubted whether the word "installation" or "establishment" should be used in connexion with a special mission, which was temporary by definition and usually of brief duration.

23. Mr. IGNACIO-PINTO agreed with Mr. Ago that because of its temporary role a special mission should not be given the same advantages as a permanent mission; only the latter really had to "install" or "establish" itself.

24. Mr. RAMANGASOAVINA said he considered that, on the contrary, article 31, paragraph 1 should be amended to bring it into line with the corresponding provision of the Vienna Convention on Diplomatic Relations. Customs exemption should not, however, be limited to the provisions of article 31, paragraph 1 alone; to omit the exemption from baggage inspection provided

³ See 933rd meeting, para. 78.

for in paragraph 2 might be regarded as a vexatious measure against the administrative and technical staff.

25. The CHAIRMAN suggested that the Drafting Committee should be asked to find a better expression than "first installation" to describe the situation in regard to special missions. The purpose was simply to give the staff concerned the necessary privileges and immunities to cover their first needs on arrival in the receiving State.

26. Mr. AGO agreed that the matter should be referred back to the Drafting Committee.

27. The CHAIRMAN said that, if there were no objection, he would assume that the Commission agreed to refer back to the Drafting Committee not only article 32, but also article 31, which the Commission had only approved in principle at its previous meeting.

*It was so agreed.*⁴

ARTICLE 33 (Members of the service staff) [37]⁵

28. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 33:

"Members of the service staff of the special mission shall enjoy immunity from the jurisdiction of the receiving State in respect of acts performed in the course of their duties and exemption from dues and taxes on the emoluments they receive by reason of their employment, and exemption from social security legislation as provided in article 28."

29. The Drafting Committee had added, at the end of the article, a clause providing that members of the service staff of a special mission enjoyed exemption from social security legislation as provided in article 28.

30. The CHAIRMAN said that, in the English text, the word "and" before the words "exemption from dues and taxes" should be deleted and replaced by a comma.

Article 33, with that amendment to the English text, was adopted unanimously.

ARTICLE 34 (Private staff) [38]⁶

31. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 34:

"Private staff of the members of the special mission shall be exempt from dues and taxes on the emoluments they receive by reason of their employment. In all other respects, they may enjoy privileges and immunities only to the extent admitted by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission."

32. The Drafting Committee had made drafting changes in the first sentence corresponding to those made in other articles. The article was modelled on article 37, paragraph 4 of the Vienna Convention on Diplomatic Relations.

Article 34 was adopted unanimously.

ARTICLE 35 (Members of the family) [39]⁷

33. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 35:

"1. The members of the families of representatives of the sending State on the special mission and of members of its diplomatic staff shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 24 to 31.

"2. Members of the families of the administrative and technical staff of the special mission shall, if they are not nationals of or permanently resident in the receiving State, enjoy the privileges and immunities specified in article 32."

34. The references to articles 24 to 31 and article 32 would have to be carefully checked if articles 31 and 32 were amended as a result of the discussion which had just taken place on article 32.

35. Article 35 was modelled on the Vienna Convention. However, under article 37 of that Convention the members of the family of a diplomatic agent enjoyed privileges and immunities if they were not nationals of the receiving State, whereas members of the families of persons on the administrative and technical staff, in order to enjoy privileges and immunities, must be neither nationals of the receiving State nor permanently resident in that State. He doubted whether that distinction, which might possibly be accepted for permanent missions, should be maintained with regard to special missions: it would be extraordinary if a person who was permanently resident in the receiving State were to change his status while a special mission was there, merely because he was related to one of the representatives of the sending State on the special mission or to a member of its diplomatic staff. He therefore proposed that the words "or permanently resident in" be inserted after the words "nationals of" in paragraph 1.

36. Mr. YASSEEN supported Mr. Ago's proposal.

37. Mr. BARTOŠ, Special Rapporteur, said he accepted the addition proposed by Mr. Ago.

38. Mr. CASTRÉN said he had no objection to the proposed addition, but asked that the reasons for it should be explained in the commentary.

39. The CHAIRMAN put article 35 to the vote with the addition of the words "or permanently resident in" in paragraph 1.

Article 35, as amended, was adopted unanimously.

⁴ For resumption of discussion and adoption of article 32, see 937th meeting, paras. 1-4.

⁵ For earlier discussion, see 921st meeting, paras. 1-28.

⁶ For earlier discussion, see 921st meeting, paras. 29-41.

⁷ For earlier discussion, see 921st meeting, paras. 42-79.

ARTICLE 36 (Nationals of the receiving State and persons permanently resident in the territory of the receiving State) [40]⁸

40. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 36:

"1. Except in so far as additional privileges and immunities may be recognized by the receiving State, the representatives of the sending State on the special mission and the members of its diplomatic staff who are nationals of or permanently resident in that State shall enjoy immunity from jurisdiction and inviolability only in respect of official acts performed in the exercise of their functions.

"2. Other members of the special mission and private staff who are nationals of or permanently resident in the receiving State shall enjoy privileges and immunities only to the extent granted to them by the receiving State. However, the receiving State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the special mission."

41. Only drafting changes had been made to the article; the substance was identical with the corresponding provision of the Vienna Convention (article 38).

42. Mr. USHAKOV observed that the words "special agreement or by decision of" had been omitted after the words "recognized by" in paragraph 1.

43. Mr. BARTOŠ, Special Rapporteur, explained that the reference to a special agreement had been deleted because that question would be dealt with in a general way in the article on derogations.

44. Personally, he still had some doubt about the feasibility of making a distinction between official acts and other acts where personal inviolability was concerned. He appreciated, however, that the Drafting Committee had not wished to change that provision, which appeared in the Vienna Convention.

45. Furthermore, he considered that the expression "official acts performed in the exercise of their functions" was pleonastic; but there again the Drafting Committee had not wished to change the form of words used in the Vienna Convention.

46. Mr. CASTRÉN drew attention to the fact that the expression "*qui ont la nationalité*" was used in paragraph 1, whereas the term "*ressortissants*" was used in the title and in paragraph 2.

47. Mr. AGO said that the words "*qui ont la nationalité*" in paragraph 1 should be replaced by the words "*sont ressortissants*", as the Commission had used the term "*ressortissants*" throughout.

48. Furthermore, the word "recognized" in paragraph 1 (in French "*reconnus*") should be replaced by the word "granted" (in French "*accordés*"), a more correct term

which was used in article 38, paragraph 1 of the Vienna Convention.

It was so agreed.

Article 36, as amended, was adopted unanimously.

ARTICLE 37 (Duration of privileges and immunities) [44]⁹

49. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 37:

"1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State for the purpose of performing his functions in the special mission, or, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other organ of the receiving State as may be agreed.

"2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in the case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the special mission, immunity shall continue to subsist.

"3. In the event of the death of a member of the special mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the country."

50. Paragraph 3 was the former paragraph 1 of article 38; the new arrangement was more logical because the paragraph concerned the duration of privileges and immunities.

Article 37 was adopted unanimously.

ARTICLE 38 (Property of a member of the special mission or of a member of his family in the event of death) [45]¹⁰

51. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following title and text for article 38:

"Property of a member of the special mission or of a member of his family in the event of death"

"1. In the event of the death of a member of the special mission or of a member of his family, if the deceased was not a national of or permanently resident in the receiving State, the receiving State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the country the export of which was prohibited at the time of his death.

"2. Estate, succession and inheritance duties shall not be levied on movable property which is in the receiving State solely because of the presence there of

⁸ For earlier discussion, see 922nd meeting, paras. 1-53.

⁹ For earlier discussion, see 922nd meeting, paras. 66-79.

¹⁰ For earlier discussion, see 922nd meeting, paras. 80-85.

the deceased as a member of the special mission or as one of the family of a member of the mission."

52. Mr. CASTRÉN said he noted that there was a difference of substance between that article and the corresponding provision in article 39, paragraph 4 of the Vienna Convention, for the words "or of a member of his family", in paragraph 1, preceded the words "if the deceased was not a national of or permanently resident in the receiving State" instead of following them. It would be better not to change the system established by the Vienna Convention, for the right provided for in paragraph 1 should be granted in the event of the death of a member of the family, even if the deceased was a national of, or permanently resident in, the receiving State.

53. Mr. AGO said that Mr. Castrén was right. The opening words of the paragraph might be altered to read: "In the event of the death of a member of the special mission not a national of, or permanently resident in, the receiving State or of a member of his family..."

54. Mr. KEARNEY pointed out that if that change were made, the result would be contrary to all the normal rules of private international law on the disposal of private property. The disposal of the property of a person who was permanently resident in the receiving State would normally be governed by the laws of that State.

55. Article 39, paragraph 4 of the Vienna Convention on Diplomatic Relations was very poorly drafted and he opposed the suggestion now being made to introduce that defective wording into article 38, paragraph 1 as adopted by the Drafting Committee.

56. Mr. BARTOŠ, Special Rapporteur, said he agreed with Mr. Kearney. The provision adopted in the Vienna Convention was contrary to the principles of private international law—which, in such cases, took nationality or residence as the criterion—and constituted an unwarrantable interference with the sovereign rights of States.

57. Mr. USTOR supported the views expressed by Mr. Kearney and Mr. Bartoš. It was essential that the words "not a national of, or permanently resident in, the receiving State" should qualify not only "a member of the special mission" but also "a member of his family".

58. The CHAIRMAN noted that the suggestion by Mr. Kearney, Mr. Bartoš and Mr. Ustor was that the language proposed by the Drafting Committee for article 38, paragraph 1 should be retained.

59. Mr. AGO said he had come round to the view put forward by Mr. Kearney, Mr. Bartoš and Mr. Ustor about the placing of the words "or of a member of his family". It would be better to rectify the anomaly in the Vienna Convention.

60. He suggested that, in the French text of paragraph 1, the future tense "*permettra*" be replaced by the present tense "*permet*", as all the provisions of the draft were expressed in the present tense.

61. Mr. RAMANGASOAVINA said he would prefer to keep the future tense in that particular case, because it had a different shade of meaning: the receiving State

would permit the withdrawal of the property when asked to do so.

62. The CHAIRMAN said that the point of substance which had been raised was an important one and justified a departure from the corresponding text of the Vienna Convention. It was to be hoped that the improved draft on special missions now before the Commission would conduce to a liberal interpretation of the defective text of article 39, paragraph 4 of the 1961 Vienna Convention.

63. He then put to the vote article 38 as proposed by the Drafting Committee, without amendment.

Article 38 was adopted by 14 votes to none, with 1 abstention.

ARTICLE 43 (Right to leave the territory of the receiving State) [46]¹¹

64. Mr. AGO, Acting Chairman of the Drafting Committee, said that the Drafting Committee proposed the following text for article 43:

"1. The receiving State must, even in case of armed conflict, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the receiving State, and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. In particular it must, in case of need, place at their disposal the necessary means of transport for themselves and their property.

"2. The receiving State is required to grant the sending State facilities for removing the archives of the special mission from the territory of the receiving State."

65. Paragraph 2 had no equivalent in the corresponding article of the Vienna Convention (article 44), but it was necessary because of the temporary nature of special missions.

66. Mr. KEARNEY said that the burden imposed on the receiving State by paragraph 1 should only be imposed in the case of armed conflict or some other serious breach. He saw no reason for applying that provision in normal circumstances, and he therefore questioned the need for the word "even".

67. The CHAIRMAN pointed out that the word "even" appeared in article 44 of the 1961 Vienna Convention; the purpose was to stress that the obligation stated in article 44 was a general one, while emphasizing that it also applied in the case of armed conflict.

68. Mr. KEARNEY said it seemed excessive to require the receiving State to meet a demand for embarkation on the very first ship or aircraft even if there was no urgency.

69. Mr. TSURUOKA said he would prefer the concluding words of paragraph 2 of the French text to read "*pour retirer les archives de la mission spéciale du territoire de l'État de réception*", in order to avoid any misunderstanding about the meaning of the words "*son territoire*".

¹¹ For earlier discussion, see 922nd meeting, paras. 54-65.

70. Mr. AGO said that the wording proposed by Mr. Tsuruoka would have the advantage of making the English and French texts of paragraph 2 correspond exactly.

71. Mr. YASSEEN said that, grammatically, there could be no doubt about the meaning of the adjective “*son*”, since the receiving State was the subject of the main clause.

72. Mr. KEARNEY asked whether the words “is required to grant” in paragraph 2 implied a free grant.

73. The CHAIRMAN said that they did not.

Article 43 was adopted unanimously.

State Responsibility

(A/CN.4/196)

[Item 3 of the agenda]

74. The CHAIRMAN invited the Commission to consider item 3 of the agenda.

75. Mr. AGO, Special Rapporteur, introducing his note on State Responsibility (A/CN.4/196), said that the report of the Sub-Committee on State Responsibility and the outline programme it contained had been approved by the Commission in 1963;¹² it had been on that basis that he, as Special Rapporteur, had been instructed to prepare a report. As the membership of the Commission had changed in 1966, he wished to know whether the Commission confirmed his appointment and the instructions it had previously given to him.

76. Mr. RAMANGASOAVINA said that, in his view, the programme set out in Mr. Ago's note included everything necessary for the study of the subject. A report based on that programme would be most valuable.

77. Mr. TAMMES said that the Sub-Committee on State responsibility had taken an important step in deciding unanimously on a new approach to the topic—that of separating the elements of the illegal act and its consequences from the substantive rules, violation of which made an act illegal. It was true that much might be learned about the existence of a rule from international reactions to the violation of an alleged rule, and a study of the mass of existing material on disputes concerning such rules would undoubtedly be useful. Nevertheless, it would be a considerable advantage for the Commission not to be hampered in its future work on State responsibility by being obliged first to formulate substantive rules on such matters as nationalization and Charter principles, or, in its practical work of codification, by having to await the completion of work on State responsibility in the widest sense, which might be regarded as the keystone of international law.

78. In his opinion, the term “State responsibility” was tinged with the nineteenth-century conception of international disputes and conflicts as, so to speak, large-scale civil proceedings, and he had suggested at the 928th

meeting,¹³ during the discussion on the organization of future work, that the title of the topic might be changed. The Special Rapporteur was fully aware of the old-fashioned connotation of the term, but considered that a change might create confusion, so he would not press his suggestion. Nevertheless, remnants of the traditional conception subsisted in the Sub-Committee's outline programme, which dealt very fully with the passive subject of responsibility, or subject of international law held responsible for violating a substantive international rule. Perhaps there was still room for study of the collective subject of responsibility, arising from a situation in which a number of States were engaged in a joint enterprise and incurred joint liability for damage to third States; but such situations had so far arisen only in connexion with the law of outer space, after the outline had been drafted; moreover, the Sub-Committee had decided to leave aside the question of the responsibility of international organizations.

79. The outline programme did not deal with some wider questions concerning the active subject of responsibility, or subject of international law—usually the State—which set the process of imputation of responsibility in motion. Was that subject the injured State? Was it a State having a direct interest in seeing the legal situation restored, if possible? Did the individual interest of any party to a treaty in ensuring strict observance of that treaty in itself warrant initiating an action to impute responsibility, as was expressly provided in a number of instruments? Or was there a collective interest of a community of parties in the integrity of a treaty and, consequently, a collective active subject of responsibility? Such questions might have been regarded as theoretical when the programme had been drawn up but no one could take that view now, and the Commission could hardly leave those questions unanswered in the context of its work on State responsibility, especially the second point of the programme: “The forms of international responsibility”.

80. The CHAIRMAN, replying to a question by Mr. TABIBI, said he had announced at the 928th meeting¹⁴ that Mr. Ago hoped to be able to submit a report with draft articles to the Commission in 1969.

81. Mr. USHAKOV, referring to paragraph 5 of the note on State responsibility (A/CN.4/196), said that he agreed with those members of the Commission who had thought that the emphasis should be placed in particular on the study of State responsibility in the maintenance of peace.

82. There was no reference in the programme to the question of the subject of international law entitled to assert the responsibility of a State which had committed a wrongful act. For example, the injured State would assert the responsibility of a State which had violated the régime of the high seas; but other States should also intervene, because an international rule had been broken.

83. With regard to the forms of international responsibility, it seemed to him that sanction should be mentioned

¹² *Yearbook of the International Law Commission, 1963, vol. II, document A/5509, para. 55.*

¹³ Para. 10.

¹⁴ Para. 1.

before reparation. In Russian, the expressions corresponding to "imputation of the wrongful act" and "imputation of responsibility" belonged to the terminology of criminal law; he was not sure that they could be used in international law.

84. Mr. EUSTATHIADES said that in two passages—in paragraph 4 of the note and in paragraph 5 of the extract from the report of the Sub-Committee which it contained—attention was drawn to the need to pay "careful attention... to the possible repercussions which new developments in international law may have had on responsibility", but he did not see which of the items on the programme that remark applied to. As far as the programme as a whole was concerned, he thought it would take several years to carry out, for it covered an extremely wide field. For instance, the question of the responsibility of legislative, administrative and judicial organs, referred to in paragraph (2) of the first point of the outline programme, could form the subject of a convention by itself. Consequently, he wondered whether it would not be possible to leave certain questions aside for the time being and deal with them separately later on. It would be very difficult to consider so many important problems simultaneously.

85. Referring to a question which Mr. Tammes had also raised, he said that in his view it would be preferable to use some expression other than "active subject" which did not correspond to the complex character of the topic. The expression meant subjects capable of setting in motion the process of imputing the international responsibility of States. In that connexion he wished to draw attention to the need for considering the procedures for imputing responsibility. That was a matter which belonged to the topic of responsibility and would have to be studied by the Commission, otherwise its work on the codification of international responsibility would be incomplete.

86. Lastly, the programme contained no reference to the important question of the exhaustion of internal remedies, which was not in all cases associated solely with the rules of procedure for imputing responsibility; it might affect the actual substance of responsibility.

87. Mr. NAGENDRA SINGH expressed his satisfaction with the proposed outline programme as a basis for the Commission's work. In view of its great importance for both developing and developed countries, the topic should be dealt with in all its aspects. If the Commission could bring about the adoption of a convention on State responsibility, it would be making a great contribution to the establishment of the rule of law in the international community.

88. Mr. KEARNEY said he considered that the outline programme represented a reasonable organization of efforts to codify the topic of State responsibility. An attempt to define general problems from the outset had much to recommend it; State responsibility was as broad a general subject as could be found in international law and was hard to reduce to a few well-ordered rules.

89. He had a few general comments to make on the programme in document A/CN.4/196. In the first place,

the distinction between objective and subjective elements in paragraph (2) of the first point seemed to be an unduly psychological approach to the definition of a wrongful act. Secondly, it was difficult to distinguish, as was done in paragraph (3), between wrongful acts arising from conduct alone and those arising from events. He agreed with Mr. Eustathiades's views on the problem of the exhaustion of local remedies. On the other hand, he was not sure that Mr. Ushakov's idea of dealing with sanction first was the logical approach, for sanction was the result of a wrongful act; it was probably wiser to begin by defining an international wrongful act and to deal later with such consequential and procedural questions as sanction. Finally, references to the procedural aspects of responsibility were scattered throughout the programme; the Special Rapporteur might consider whether procedure could not be dealt with in a separate section of the draft.

90. Mr. CASTAÑEDA said he fully approved of the proposed programme of work. He welcomed the decision to make a distinction between the problem of international responsibility and the problem of determining the obligations a breach of which might involve responsibility. The adoption of that procedure would enable the Commission to overcome the difficulty confronting it. Once the general rules of responsibility had been established, the Commission could deal with the matters arising from them.

The meeting rose at 1 p.m.

935th MEETING

Thursday, 6 July 1967, at 3 p.m.

Chairman: Sir Humphrey WALDOCK

Present: Mr. Ago, Mr. Bartoš, Mr. Castrén, Mr. Eustathiades, Mr. Ignacio-Pinto, Mr. Kearney, Mr. Nagendra Singh, Mr. Ramangasoavina, Mr. Tabibi, Mr. Tammes, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State Responsibility

(A/CN.4/196)

(continued)

[Item 3 of the agenda]

1. The CHAIRMAN invited the Commission to continue its discussion of item 3 of the agenda.

2. Mr. USTOR said that State responsibility was a topical subject, for with the development of international society, international delinquencies had not disappeared, but on the contrary were to be witnessed every day. In deciding to depart from the approach adopted by the previous Special Rapporteur and to explore the possibility of finding general criteria for codifying the topic, the Commission had adopted a satisfactory solution, both