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**Draft articles on State responsibility: proposals by Mr. Kearney concerning articles 7, 8 and 11
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Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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36. He hoped that the Drafting Committee would be able to work out a text that would satisfy the members of the Commission.

37. Mr. USHAKOV said he wished to clear up a misunderstanding about the question of delegation of public power by the State. He had never said that the organs of the State acted by delegation of State power, for that was not a matter of delegation, but of organization of the State power or public power. He had said that the State, as a collective body, could, in principle, act only through its organs. But he had recognized that there could be exceptions to that rule and that a body which was not an organ of the State could be invested by the State with public or State power. For example, the Japanese national railway company, to which Mr. Tsuruoka had referred, was not an organ of the State, but the State could delegate public powers to it and it was through that delegation that the company could exercise public powers. Similarly, a private bank granted the privilege of issuing currency exercised public power in so far as the State had delegated that State privilege to it. The case of municipalities, on the other hand, was quite different: they were not bodies to which the State delegated public power, but organs of the State which exercised the State power within the limits of their autonomy. For he believed that municipalities, like all territorial entities, were organs of the State. Nor was it by delegation that a federated state, such as Virginia or the Ukraine, exercised State power, for historically those states had existed before the federal State.

38. He also wished to reiterate that the State constituted one single entity, whether it was regarded from the internal or the external standpoint. It was the internal legal order, not international law, which governed the organization of the State. Hence it was by internal law alone, and not by international law, that it could be determined whether a body exercised public power. The legal characterization of the conduct of that body could differ according to whether the standpoint adopted was that of internal law or of international law, but the conduct remained the same.

39. Mr. EL-ERIAN said he appreciated the reasons which had prompted the Special Rapporteur to include a reference to dependent territories among the territorial public entities enumerated in article 7, but he thought that to group dependent territories together with such territorial entities as municipalities and provinces might give rise to misunderstandings about the status of dependent territories and the question whether they were considered as an integral part of the metropolitan territory or not. He recalled a case in which a person had been sued on the basis of a court ruling that, under Article 22 of the League of Nations Covenant, a class C mandated territory had to be considered as an integral part of the Union of South Africa and of the British Empire. That was the kind of situation he was anxious to avoid. It would therefore be wise, as had been decided in similar cases in the past, not to refer to situations which were obsolescent, or at least to refer to them in a different context from the present one. The enumeration was in any case not exhaustive as it ended

with the words "et cetera". A dependent territory in fact constituted a case of agency, involving a relationship between the territory and a State which had assumed international responsibility, in the sense of competence, for the territory's relationship with other States, but had given the territory internal autonomy.

40. Mr. KEARNEY, speaking of the references made to the governmental structure of the United States, explained that under article 10 of the Bill of Rights, which formed part of the original Constitution of the United States of America, "The powers not delegated to the United States by the Constitution... are reserved to the States respectively, or to the people". Consequently, the powers exercised by the federated states were their own powers and not the powers of the Federal State—the United States of America. However, that merely reflected a particular political philosophy. Mr. Ushakov's argument represented another political philosophy, but the differences between them should not affect the way in which the Commission dealt with the problem of the status of organs for purposes of international responsibility. Everyone agreed that the status of an organ was determined by internal law—which might include the national law and, in federal unions, the law of individual states—but in the light of international law, which regarded the State as a monolithic structure for the purposes of international law.

41. Mr. USHAKOV said that in the USSR the situation was the same as in the United States in that respect. The Republics of the Union, which exercised supreme authority over their own territory, were at the same time organs of the Soviet Union. They were autonomous, but only within their territorial boundaries, though they could conclude treaties at the same time as the Soviet Union itself. That did not mean that organs of the Republics were not organs of the Soviet Union as a whole.

42. The CHAIRMAN suggested that article 7 should be referred to the Drafting Committee for further consideration in the light of the discussion.

*It was so agreed.*²⁸

The meeting rose at 1 p.m.

²⁸ For resumption of the discussion see 1278th meeting, para. 1.

1258th MEETING

Thursday, 16 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

1. The CHAIRMAN invited the Special Rapporteur to introduce article 8, which read:

Article 8

Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State

The conduct of a person or group of persons who, under the internal legal order, do not formally possess the character of organs of the State or of a public institution separate from the State, but in fact perform public functions or in fact act on behalf of the State, is also considered to be an act of the State in international law.

2. Mr. AGO (Special Rapporteur) said that article 7 dealt with the problem of the attribution to the State of acts of organs of certain entities which, although separate from the State, had powers, under the internal legal order of the State, which involved the exercise of a portion of public power. Article 8, on the other hand, dealt with the attribution to the State of acts of persons or groups of persons who were not in any way part of the machinery of the State and could not be confused with it, but who, in special circumstances, in fact performed State functions. Thus they were not private persons acting as such. The Commission would later, in article 11, consider the principle that responsibility for the conduct of a private person or group of persons acting as such could not be attributed to the State, and that the State could not incur responsibility by reason of such conduct unless failed to fulfil its own obligation to prevent and punish that conduct.

3. Thus article 8 raised the problem of the situation of "de facto officials"—in other words, persons who in principle were not State officials at all, but who in special circumstances, were called upon to perform State functions in fact. That was a complex and many-sided situation, which was likely to become more common. To define the situation of such *de facto* officials, lawyers had recourse to various theories—theories of appearance, of necessity, of *negotiorum gestio*, and so on; but there was no need for the Commission to go into those theories. It should merely take note of a fact, a real situation; for there were cases in which private persons came to act as *de facto* officials. In that connexion, he stressed that the situation in international law must always be distinguished from the situation in internal law and that the Commission should consider only the former situation.

4. It might be that an official properly so called had not yet officially taken up his duties or that he had been suspended from his duties because administrative or criminal proceedings had been brought against him. But whatever the special situation of such an official from the standpoint of internal administrative law; interna-

tional law regarded him as an official and his conduct would be attributed to the State under article 5. The situation contemplated in article 8 could arise in the event of war, when the State authorities had disappeared and had not yet been replaced by new authorities. There was no doubt that the acts of the groups which then exercised power—liberation or other committees—engaged the responsibility of the State if there was a breach of an obligation under international law.

5. The principle stated in article 8 also applied to groups which, though not belonging to the regular army of the State, carried out military activities in time of war. Moreover, article 2 of the Regulations annexed to the Hague Convention (IV) of 1907 granted treatment as belligerents to the population of a town which took up arms to defend that town. Similarly, in the event of a natural disaster, the whole machinery of the State might disappear in a particular region and the local people might have to take over the exercise of some of the prerogatives of public power—police, health services, etc.—as had occurred in some parts of Italy at the time of the Messina earthquake. And sometimes the internal legal order of the State provided that citizens in a situation of that kind not only could, but must perform certain public functions. There was also the case of private persons who exceptionally performed the functions of auxiliaries of the regular armed forces, as the Paris taxi-drivers had done in the First World War during the battle of the Marne. It was quite clear that a State which made use of such auxiliaries must answer for any violations of international law they might commit.

6. There were other kinds of case, like that of missions abroad entrusted by the State to private persons who were not members of its administrative organization. Should the acts of those private persons be attributed to the State and did they engage its international responsibility? In that connexion he referred to the award made in 1925 by an arbitral tribunal in the *D. Earnshaw and Others (Zafiro) case*.¹ The tribunal had concluded that the conduct of the crew of the *Zafiro*—a private merchant ship which, during the Spanish-American war had provisioned American troops during a military operation, acting on the orders of the American Navy—must be attributed to the United States as the State responsible for the violation by that ship of an international obligation.

7. There was also the case of the "volunteers" which certain Powers sent, or allowed to go, to countries where a civil war was in progress. Should it be held, as the representative of Mexico to the League of Nations had done in regard to the Spanish Civil War, that the acts of those "volunteers" engaged the responsibility of their Government? Among the best known examples of acts by private persons which could engage the responsibility of the State were those of certain persons acting abroad on behalf of the State: for example, abductions carried out in foreign territory by private persons acting, in fact, on behalf of the State. One example was the

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 264, para. 192.

case of an Italian political refugee who had been abducted from Lugano by agents of the fascist régime and taken to Italy to be tried; the Swiss Federal Council had taken the view that that action violated the territorial sovereignty and security of Switzerland and was therefore contrary to international law. In the abductions of Eichmann and of Colonel Argoud, the responsibility of the State had finally been recognized in a way in both cases, although the Governments concerned had denied any participation.² Cases of that kind were not always very clearly settled; for example, the case of Colonel Argoud had been regarded as closed after an exchange of letters between the President of the French Republic and the German Chancellor, the contents of which were not known.

8. All those cases rested on the assumption that private persons were acting as *de facto* officials—a situation not to be confused with that of a *de facto* government. A *de facto* government was, after all, a government—even if it had taken power as the result of a *coup d'état* or a revolution and was not recognized by some governments—and any act of a government, whether official or *de facto*, could incur international responsibility. Thus the problem of the legitimacy of a *de facto* government did not arise in article 8, which dealt only with the case of persons having no organic link with the government.

9. As in the case of article 7, the Commission would have to change the drafting of article 8. But whereas article 7 must be brought into line with article 5, article 8 would need a different terminology, for it dealt with private persons whose characteristic was, precisely, that they were not organs of the State and had no connexion with the State or with institutions invested with prerogatives of public power.

10. Mr. KEARNEY, referring to the interrelationship between articles 7 and 8 and the potentially wide range of their effect, said it was not clear what the limits of that effect would be. For example, in certain circumstances private citizens might be entitled to take, on their own initiative, action which would amount to the performance of public functions and which might therefore entail State responsibility under the present provisions of article 8. Those provisions might also bring many essentially private enterprises within the scope of State responsibility, in addition to the public entities which provided a public service and were covered by article 7. The already wide range of possibilities covered by article 8 had been mentioned by the Special Rapporteur in his third report.³ In that respect articles 7 and 8 overlapped.

11. Article 8 also overlapped with article 11. For purposes of application, the distinction between the term “person” in article 8 and the term “private individual” in article 11 might raise problems. Paragraph 2 of article 11, which stated a substantive rule of international law concerning State responsibility, was also related to some of the cases and judicial decisions cited by the Special

Rapporteur in support of his conclusions on the content of article 8. In fact, the combined effect of the definitions in the three overlapping articles was so wide that it would be virtually immaterial, for the purpose of attributing responsibility to the State, whether the person or entity had the status of an organ of the State or not. To avoid that overlapping he submitted the following proposals, the effect of which would be to merge article 8 partly with article 7 and partly with article 11:

Combined text for articles 7 and 8

1. The conduct of an organ of a territorial governmental entity, when acting in that capacity in the case at issue, shall be considered to be an act of the State under international law.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity shall be considered to be an act of the State under international law when, under the internal law of the State or the internal law of a territorial governmental entity, the entity is specifically designated as having governmental status and has acted in that capacity in the case at issue or is authorized to exercise elements of the governmental authority of the State or territorial governmental entity and has exercised that authority in the case at issue.

3. The act of any such organ relating to the establishment or fulfilment of a contractual obligation shall be considered as an act of the State under international law only to the extent permitted under the internal law of the State in effect at the date of the entry into force of the contract.

Combined text for articles 8 and 11

1. The conduct of a private person or entity, acting in that capacity, is an act of the State under international law only if such a person or entity performs the conduct pursuant to lawful or apparently lawful orders of an organ of the State or territorial governmental entity or performs public functions or acts on behalf of the State or a territorial governmental entity in situations of crisis or disruption of functioning of the organs of the State.

2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the private person or entity and failed to do so.

12. Paragraph 3 of the combined text for articles 7 and 8 dealt, in broader terms, with the kind of situation mentioned by Mr. Hambro as not entailing State responsibility. In the case of a loan issue by a municipality, for example, the State would only be responsible if it had guaranteed the loan. Similarly, it would be responsible only for contracts which it had underwritten. That responsibility would depend only on internal law, as the essential condition was the express assumption of an obligation by the State.

13. The combined text for articles 8 and 11 covered unusual cases, in which the State's responsibility was engaged because it had derived an advantage from the acts in question or because it ought to have acted to prevent or punish those acts. The original text of paragraph 2 of article 11 had been retained, although some amendments might be necessary.

14. He did not claim that the texts he proposed offered a final solution to the problems of attribution; he merely wished to suggest a possible way of dealing with certain questions of substance arising in connexion with that aspect of State responsibility.

² *Ibid.*, para. 193.

³ *Ibid.*, p. 263, para. 190.

15. Mr. TAMMES said that, whereas article 7 dealt with formal organs of the State which were an integral part of the State's constitutional structure, article 8 was concerned with what might be called *de facto* organs of the State. The Special Rapporteur had himself used the term "*de facto*" to qualify organs or officials in his third report, though he had rightly pointed out the danger of confusion with the concept of a *de facto* government.⁴ Little attention had hitherto been paid to that second category of organs, but the abundance of cases involving them showed convincingly that the proposed article 8 truly reflected the present state of international law and that the treatment of such organs in a separate article was justified.

16. Article 8 distinguished between persons in fact performing public functions and persons in fact acting on behalf of the State. There might be a certain hesitation to include the former category of persons, whose acts would derive their public character from the fact that they were incidental caretakers of some public interest in an emergency. The establishment of State responsibility in such cases would not always be easy in practice and it might be wise, as Mr. Quentin-Baxter had said, to be satisfied with any existing local remedies. For example, during the power failure in the eastern United States some years ago, private persons had taken it upon themselves to regulate traffic in the dark, thereby performing a public function, which, in the event of injury or damage of international relevance, might, under article 8, have entailed the responsibility of the United States. That would clearly be stretching the principle of State responsibility too far.

17. The distinction between the formal organs covered by article 7 and the *de facto* organs, whether self-appointed or State-appointed, covered by article 8, might help to solve the problem of the "autonomous public institutions" referred to in article 7. Such institutions, whether political parties, corporations or organizations, could be considered to be covered, either by article 7, if they were formally and lastingly entrusted with public functions, or by article 8, if they were incidentally so entrusted or assumed such functions on their own initiative in an emergency. Undue reliance on internal law could then be avoided. As had been pointed out, the State was free to choose whether the corporations it used for its purposes should be public or private, and the State's constitution determined whether or not a political party or other organization would function as an association of private citizens. That would not be strictly relevant in the application of international law, unless it could be proved that the party, corporation or organization in question had acted as, or on behalf of, the State. The acts of persons or groups of persons who were sometimes used by the State for its own purposes, but whose position differed according to the legal system and circumstances, could then be dealt with in a separate article. The Special Rapporteur had not objected to a proposal that article 7 be divided into two articles, one dealing with territorial entities, the other

embodying the rest of the content of article 7⁵ and perhaps also dealing with the ambiguous situations he had just mentioned.

18. There would then be three categories of agent whose conduct could engage the State's responsibility. First, the formal State organs which were an integral part of the State; they would be dealt with in article 5, part of article 7 and perhaps in the definition suggested by Mr. Elias.⁶ Secondly, individuals or groups of individuals acting as *de facto* State organs, at present covered by part of article 8, as distinct from individuals for whose conduct the State was indirectly responsible, for example, because of a lack of diligence; they would be dealt with in article 11. Thirdly, organizations established by internal law and sometimes used by the State; they would be dealt with in the present article 7 and partly in article 8, and would perhaps also be defined. The present chapter II could perhaps be arranged in three parts along those lines.

19. Mr. REUTER said he was in favour of retaining article 8 as a separate article; in its broad outline, he approved of the draft submitted by the Special Rapporteur. Being somewhat concerned about the slow progress the Commission was making, he hoped that article 8 would be only very briefly discussed before being referred to the Drafting Committee; for as the Special Rapporteur had stressed with regard to the cases covered by article 8, while States did not always agree on the facts they almost always agreed on the principles, as was shown by the case referred to the Franco-Swiss Conciliation Commission on customs provocations. He did not think the time had come to rearrange articles 7, 8 and 11, as Mr. Kearney had proposed; while the Commission would clearly have to consider the relations between those three articles at some point, it should for the time being confine itself to examining them separately on first reading.

20. With regard to the question of contracts mentioned by Mr. Kearney, contractual liability should be treated as a special case, since the liability arising out of a contract could only in exceptional circumstances be an international responsibility. The question of contractual liability could not be sub-divided, and the Commission should leave its consideration until later.

21. He was in favour of referring draft article 8 to the Drafting Committee at once, though he had a few comments to make. In the first place, the English term "public" seemed inappropriate, for in common law countries it was often applied to private bodies. Secondly, if, as he believed, article 8 was quite different from article 7, it should contain a cross-reference to article 7: the words "do not formally possess the character of organs of the State or of a public institution separate from the State" should be replaced by the words "do not formally possess an organic status rendering article 7 applicable".

22. Lastly, he had reservations about the phrase "in fact perform public functions or in fact act on behalf of

⁴ *Ibid.*, p. 266, para. 196.

⁵ See 1256th meeting, para. 27.

⁶ See 1253rd meeting, para. 17.

the State". The French expression "*fonctions publiques*" seemed ill-chosen, not only because it raised problems of translation into English, but also because it might be thought that in that case, too, the functions in question came within the scope of public power. The use of the conjunction "or", in the phrase "or in fact act on behalf of the State", showed that there were two cases. But was it intended to refer to two separate cases or to two cumulative conditions? He himself was not sure that the two conditions were separate. If, for example, a citizen arrested a malefactor, he was performing an act of public power by acting in lieu of the police and was at the same time acting on behalf of the State. In the case of abductions carried out by secret agents, on the other hand, the situation was not so clear, since such agents were not always acting on behalf of the State.

23. Mr. USHAKOV said he approved of the content of article 8, but had serious reservations about its formulation. In the first place, the expression "public institution separate from the State" could only be used in article 8 if it was retained in article 7. Secondly, the text of article 8 did not make it sufficiently clear that the situations it dealt with were exceptional. As drafted, the article seemed to apply to normal situations, and its exact scope could only be learnt from the explanations and examples given by the Special Rapporteur. Moreover, it was impossible to make provision in a single article for all the cases of international war, civil war or war of liberation that could arise. Quite exceptional and unforeseen situations might arise at any time.

24. Article 8 dealt, first, with persons who "in fact perform public functions" and, secondly, with persons who "in fact act on behalf of the State". Normally, persons or groups of persons who performed public functions—that was to say, who exercised a part of the State power—came within the scope of article 7. They were members of an institution which was not an organ of the State, but which was duly authorized by the State to perform public functions. The contingencies contemplated in article 8, on the other hand, were quite exceptional. Apart from cases of civil war, they occurred when, for example, in the event of a natural disaster the authorities disappeared and some persons in fact acted as organs of the State. Yet article 8 gave no indication that such persons were in an exceptional situation. It simply provided that although, under the internal legal order, they did not formally possess the character of organs of the State, such persons in fact performed public functions, which implied that they were part of *de facto* organs.

25. The other class of persons or groups of persons to which article 8 applied was persons who "in fact act on behalf of the State". Such situations, which were no less exceptional, arose when a person acted on behalf of a State without being duly empowered to do so. If a private person committed an outrage against a foreign ambassador, the international responsibility of the State of that person's nationality was engaged, not by reason of the act itself, but because the State had failed to take measures to prevent the act. It was also possible that the person concerned had acted at the instigation of the State, in which case the act itself was a breach of the

State's international obligations. It would then be necessary to prove that the person concerned had acted on behalf of the State, which was difficult, because such instigation by a State was never overt. In the absence of conclusive evidence, the State was responsible by reason of omission, not by reason of commission.

26. Mr. HAMBRO said he associated himself with the fears expressed by Mr. Reuter at the slow progress being made. To save time, he would not discuss drafting questions, which could safely be left to the Drafting Committee.

27. He agreed with the idea expressed in article 8 and found many of the supporting examples given by the Special Rapporteur quite convincing. He had serious doubts about the wording of the article, however, in particular the reference to the performance of "public functions". He did not believe that there existed in international law any recognized definition of either the nature or the scope of "public functions". Those functions had, therefore, to be defined by internal law; but the definition varied from country to country. For example, railways, shipping, postal, telegraphic and telephone services constituted "public functions" in some States, but not in others. Hence the term could not be used in article 8 for purposes of international law. It was much more than a question of drafting; a genuine problem of substance was involved.

28. Mr. ELIAS said he shared the concern expressed about the Commission's rate of progress. He did not think article 8 required a long discussion; its content seemed quite straightforward, and the cases of *D. Earnshaw and others (Zafiro)*, *Stephens* and *Eichmann* were sufficient to illustrate the problem. Article 8 dealt with the rare situation in which a person or group of persons who, either under the constitutional or administrative law of the State concerned or for any other reason, were not regarded as organs of the State, but were forced to perform certain acts on behalf of the State or purportedly on behalf of the State. The State should then be held responsible for the acts of those persons.

29. Article 11 dealt with a different problem, and he thought that little would be gained by trying to combine it with article 8. He appreciated the reasons underlying the ingenious and interesting proposal put forward by Mr. Kearney, but could not help thinking that the adoption of that proposal would complicate the situation.

30. The purpose of article 8 was to attribute to the State certain acts performed on its behalf, either at the request of the State or because the person concerned had felt the need to perform them. The case was in the nature of the *negotiorum gestio* of Roman law. The functions in question were functions which should normally have been performed by the State, but which the State had failed to perform. An individual then found himself performing them as a matter of necessity—rightly or wrongly.

31. Article 8 should not deal with the question of omissions by private persons. If a private person stood by and allowed certain events to happen, neither his responsibility nor that of the State was engaged, unless

of course the case fell within the exception provided for in article 11, paragraph 2. That provision attributed to the State the omissions of its organs which, in dereliction of duty, allowed an individual to act or not to act in a certain way.

32. He suggested that the Commission should approve article 8 in principle and ask the Drafting Committee to find wording that would cover all the cases contemplated. In the English text the words "public functions" should be replaced by the words "State functions" or, better still, "governmental functions".

33. Mr. TSURUOKA said he shared Mr. Ushakov's view that the situations contemplated in article 8 were quite exceptional. The acts referred to in that provision could, for the most part, be attributed to the State only if the State agreed to such attribution, either before or after the act in question. During the discussion on article 7, some members of the Commission had referred to the notion of "public functions" as meaning prerogatives of the State, and it should certainly be understood in that way in article 8. Referring once again to the Japanese national railway company, he said that that company exercised a part of the State authority by delegation, which was not true of the hundred or so other private railway companies in Japan or of the telecommunication companies, although they were regarded as public. The same applied to the watchmen employed by some big companies, who were often expolicemen; they exercised no police power, although in the performance of their duties they engaged in similar activities. Those cases were outside the scope of article 8, but it would be useful to mention them in the commentary to the article.

34. With regard to disasters, which were not rare in Japan, rescue teams could be formed there immediately after a disaster, could call for mutual assistance and sometimes use constraint. In his opinion it would not be advisable to extend the field of application of article 8 to such spontaneous groups, which were, after all, exceptional.

Organization of work

35. The CHAIRMAN thanked Mr. Reuter and the other speakers who had drawn attention to the need to increase the pace at which the draft articles on State responsibility were being examined. The coming week might well prove to be the last of the present session which the Commission could devote to the first reading of those articles, bearing in mind that absolute priority had to be given to the second reading of the thirty draft articles on succession of States in respect of Treaties. He hoped, therefore, that in the time at its disposal the Commission would press on as far as it could with the first reading of the draft articles on State responsibility.

The meeting rose at 1 p.m.

1259th MEETING

Friday, 17 May 1974, at 10.5 a.m.

Chairman: Mr. Endre USTOR

Later: Mr. José SETTE CÂMARA

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

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]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur

ARTICLE 8 (Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State) (*continued*).

1. Sir Francis VALLAT said that the essential problem was not the ideas under consideration, on which there was general agreement, but the manner of expressing them.

2. The cases covered by the present set of articles fell into five categories. The first was that of State organs, regarding which opinions were virtually unanimous, though Mr. Ushakov took a somewhat broader view of that concept than he did. The second was the category of subsidiary territorial entities, which was very close to that of State organs. The third was that of institutions which had governmental functions—a term that was closer to the intended meaning than "public functions". The fourth was an entirely different category: that of persons acting on behalf of the State. The case was really one of agency, and totally different from that of institutional capacity. That point was fundamental to the Commission's handling of the matter. It was significant that, as mentioned in the Special Rapporteur's third report, the Argentine Government had maintained in the Eichmann case, that "even if the volunteers had acted without the knowledge of the Government of Israel, the fact remained that that Government had subsequently approved the act...".¹ It was interesting to see implicit in that comment the two classical ideas of authority and subsequent approval in the absence of authority. In the situations contemplated in article 8, either the individual acted with the authority of the State or, where no such authority existed, the State subsequently approved, adopted or ratified the act, thereby becoming responsible for it. That position was quite distinct from institutional competence and also

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 265.