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Summary record of the 1211th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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mission.[10] He suggested that tha member should be Mr. Martínez Moreno.

It was so agreed.

The meeting rose at 5.55 p.m.

[10] See 1207th meeting, para. 3.

1211th MEETING

Tuesday, 22 May 1973, at 11.30 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 5

1. *Article 5*

Attribution to the State, subject of international law, of acts of its organs

For the purposes of these articles, the conduct of a person or group of persons who, according to the internal legal order of a State, possess the status of organs of that State and are acting in that capacity in the case in question, is considered as an act of the State from the standpoint of international law.

2. The CHAIRMAN invited the Special Rapporteur to introduce article 5 in his third report (A/CN.4/246/Add.1).

3. Mr. AGO (Special Rapporteur) said that, in introducing chapter II at the previous meeting, he had pointed out that an examination of the facts of international life led to the initial conclusion that, normally, the acts of persons or groups of persons regarded as organs of the State under its internal law were considered as acts of the State generating international responsibility. Of course, that principle must be accepted as following from an examination of the realities of international relations and not as a corollary of other principles. In particular, it must not be regarded either as absolute or as exclusive.

4. It was also according to international realities that it would be possible to determine whether all the acts of persons or groups of persons constituting organs of the State were to be attributed to the State, and what other conduct capable of involving the responsibility of the State could be attributed to it. Thus the basic principle stated in article 5 did not by any means make it unnecessary to consider whether other conduct was also capable of taking the form of an act of the State.

5. First of all, therefore, the Commission should make sure that the general rule in article 5 followed from the facts of international life. Although that rule had not often been expressly proclaimed by international courts, it had nevertheless often been applied or implicitly acknowledged. Sometimes it had been explicitly stated, however, and he referred members to the cases cited in paragraph 124 of his third report.

6. With regard to the practice of States, he drew attention to the positive replies by Governments to the three points in the request for information sent to them by the Preparatory Committee for the Hague Codification Conference of 1930.[1] Those three points had related respectively to the acts of legislative, judicial and executive organs—a distinction regarding which he urged caution, since States must not be able to find a loophole in induly narrow wording by claiming that some of their organs did not fit into any of those three categories. The Commission might later consider drafting a separate article to deal with just that eventuality.

7. The various formulations given to the principle by the Codification Conference, by public institutions, by learned societies and by individual research workers were to be found in paragraphs 125 and 126 of his third report. As for the literature, writers were unanimous in accepting attribution to the State of the acts of its organs for the purpose of determining its international responsibility; but their unanimity disappeared when it came to finding a theoretical justification for the principle—though that was an aspect of the matter to which the Commission need not devote much attention.

8. There could be no doubt that the rule in article 5 was part of existing international law. The only question that arose was how it should be formulated. It must be quite clear that article 5 stated an initial rule which was to be supplemented by the subsequent articles. It must also be emphasized that the rule related only to attribution to the State of an act which could engage its international responsibility. The rule must express the idea that the acts or omissions of persons or groups of persons having the status of organs of the State under its legal system could be regarded as acts of the State capable of being characterized as internationally wrongful, with the consequences following from such characterization.

9. Some writers had gone so far as to assert that the persons or groups of persons forming the organization of the State were wholly integrated into its personality. That was not the case: every person retained a sphere of private activity, his acts or omissions in which could not be attributed to the State. That seemed obvious, but in some specific cases doubts might arise as to the capacity in which a person had acted. An examination of the jurisprudence, the practice of States and the literature showed that it was not possible to attribute to the State the acts or omissions of private persons acting in their

[1] League of Nations, *Conference for the Codification of International Law*, 1929, vol. III, pp. 16 *et seq.*

private capacity. On that point he referred members to paragraphs 130 and 131 of his third report.

10. There was another source of confusion which must be avoided. The case of an agent of the State acting in a private capacity must not be confused with that of an agent acting in the exercise of his official functions, but exceeding his competence or breaking internal law. For instance, if a police officer stole a suitcase, he was acting in a private capacity; but if, in the performance of his duties, he searched the suitcase of a diplomat, he was acting as an agent of the State who exceeded his competence and broke the regulations. Those cases would only be considered at a later stage of the work.

11. Mr. YASSEEN speaking first on the preliminary considerations in chapter II, section 1 of the report, congratulated the Special Rapporteur on having given a full but condensed account of all the doctrine relating to the attribution of conduct to a State. To a great extent, however, that doctrine was based on theories which could not solve all the problems that arose. Consequently, the Special Rapporteur had rightly advised members not to let themselves be confused by such theories, but rather to be guided by the practice of States in finding solutions to the problems of attribution.

12. He approved of that advice, but wished to remind the Commission that it was not called upon just to codify international law in the narrow sense of the term. Where State responsibility was concerned, its work of codification could include an element of progressive development. It must not only reflect, specify and formulate the practice, but if necessary supplement or even correct the solutions offered by practice, so as to guide them in what it believed to be the best direction. As international practice did not provide all the desired answers, others must be found on the basis of a philosophy on which the Commission should reach agreement.

13. In the case of article 5, it was particularly advisable not to be influenced by existing theories, but rather to consider the practice. The solutions offered by practice took account of the link which, in internal law, attached one or more individuals to the State. That did not mean that an internal law solution was imposed on international law; international law retained its independence and had the last word in regard to the attribution of an internationally wrongful act to a State. It could modify, restrict or extend the internal law solution, which it could take into account.

14. The rule should therefore be formulated in a neutral manner which was without prejudice to the provisions that would be adopted later to define it more precisely and possibly to extend or restrict its field of application. The fact remained that the general rule was correct and could be adapted to many situations. As the Special Rapporteur had explained, an agent remained a human being who could act as such, and it could not be claimed that his acts then involved the responsibility of the State to which he belonged. It might also happen that organs of the State exceeded their competence under internal law while acting in their official capacity. In such cases, the practice was to attribute their conduct to the State for which they were acting.

15. The wording proposed by the Special Rapporteur was therefore acceptable, since on the one hand it reflected a general rule derived from practice and on the other hand it allowed for the introduction of corrections and exceptions, so that a set of rules of law could be drawn up on the attribution of an internationally wrongful act to the State.

16. Mr. SETTE CÂMARA said that in the Commission's discussions on State responsibility at previous sessions, doubts had been expressed about the use of the expression "act of the State", which could give rise to ambiguity because of the internal law concept of an "act of State". It was clear, however, from the Special Rapporteur's lucid explanations, that it would be difficult to find a better expression.

17. The title of chapter II was too broad, since the chapter did not deal with all the acts of the State according to international law, but only with wrongful acts entailing State responsibility. Since there were other acts of the State under international law which did not entail international responsibility, the title of chapter II might perhaps be reworded to read: "The act of the State involving international responsibility according to international law".

18. Article 5 itself, as he had pointed out during the discussion on article 4, dealt with an exception to the rule in the latter article, namely, the case in which reference to internal law was not only necessary, but indispensable for the characterization of an act as internationally wrongful. The State was a juristic person and could only commit acts or omissions through individuals or groups of individuals acting as its organs in accordance with the internal legal order.

19. The attribution to the State of acts of individuals or groups of individuals involved problems which were dealt with in articles 5 to 13. Since the persons concerned did not cease to be individuals, it was necessary to draw a clear distinction between acts of individuals as such and acts of individuals as organs of the State. After a thorough analysis of the different schools of thought regarding the legal foundation for the definition of acts of individuals acting as organs of the State, the Special Rapporteur had arrived at his first conclusion, namely, that international law had nothing to do with the internal organization of the State. The Permanent Court of International Justice had held that, from the standpoint of international law, "municipal laws are merely facts".[2] The question whether a person or group of persons had or had not acted as an organ of the State according to internal law was a question of fact, not of law. As the Special Rapporteur had pointed out, "the conduct of persons or groups of persons to whom the legal status of organ of the State is attributed in the internal order, and solely in that order, is in principle considered as an act of the State". (A/CN.4/246/Add.1, para. 119.)

20. The Special Rapporteur's second conclusion was that international law was completely independent when it took into consideration a situation existing in internal law. An act which was not considered as an act of the

[2] *P.C.I.J.* (1926), Series A, No. 7, p. 19.

State in the internal legal order might well be defined as such by international law. Limitations which existed in the internal legal order were not always valid in the international legal order.

21. The Special Rapporteur's third conclusion was the need to disregard theoretical considerations and concentrate on determining "what conduct international law really attributes to the State" (A/CN.4/246/Add.1, para. 121), not the conduct which international law should attribute to the State according to abstract approaches to the problem.

22. The Special Rapporteur had cited an impressive body of judicial opinion and legal writings in support of the principle that the acts of persons who formed part of the internal machinery of the State were, as a general rule, considered as acts of the State. At the same time, he had recognized that the rule was neither absolute nor exclusive, and the articles which followed dealt with a number of special situations in which other principles prevailed.

23. As to the drafting, the introductory phrase "For the purposes of these articles" seemed unnecessary, since it was obvious that the rule in article 5 could not be intended for any other purpose. The words "in the case in question" could also be dropped without changing the meaning of the text, since it could be safely assumed that every case would be considered separately.

24. On the whole, he was in agreement with the proposed text, subject to further examination by the Drafting Committee.

25. Mr. TAMMES said that the draft had to be considered as an organic whole; an article of the importance of article 5 had its links with other articles, particularly articles 10 and 11 (A/CN.4/264).

26. Article 5 described what constituted an act of the State. Article 6 gave what seemed to him a complete picture of what constituted the organs of the State. Article 10 showed that there existed acts of the State other than those dealt with in article 5; he would call them "fictitious acts of the State". On grounds of international equity, article 10 made the State responsible for injurious conduct which was somehow connected with the State, but which did not really constitute an act of the State since it did not in any way correspond to the will of the State; indeed, the conduct in question would probably be contrary to the law of the State concerned.

27. The admirable historical account given by the Special Rapporteur in his fourth report (A/CN.4/264) showed that during the past hundred years the fictitious act of the State had come to be increasingly recognized in judicial and arbitral decisions and in State practice as a source of international responsibility. At first, a defendant State would only admit responsibility if its government had given specific instructions leading to the injurious act. Gradually, however, international tribunals had come to reject all distinction between a superior and a subordinate; action *ultra vires* by an organ of a State was regarded as attributable to the State, provided only that there existed an outward appearance of a link with the State.

28. The Special Rapporteur had not subscribed to all the fictitious links which judicial opinion and State practice had admitted over that period of a century. He had made a careful selection among them and had set a limit in paragraph 2 of article 10: in order to be considered as an act of the State, the act of the individual organ must not be wholly and manifestly foreign to the specific functions of that organ. Acts which went beyond that limit came under the heading of conduct of private individuals and were covered by article 11.

29. Even the dictinction between real acts of the State and real acts of individuals, however, was not absolute. The Special Rapporteur's fourth report mentioned cases in which the lack of vigilance of the territorial State's authorities regarding internationally wrongful conduct of private individuals came close to tolerance if not authorization. Such cases would involve a direct act of the State rather than its indirect responsibility for acts of individuals. There were, in addition, all the cases of absolute or strict responsibility of the State for certain categories of acts on the part of individuals under its jurisdiction or control.

30. In the circumstances, doubts might well be entertained about the usefulness of the intellectual efforts of generations of jurists who had tried to explain the precise differences between acts of the State and acts of the individual, between direct and indirect responsibility and between full responsibility and responsibility for lack of due diligence. Those distinctions were undoubtedly useful as an aid to understanding the historical background of the problem of State responsibility and might help the Commission to reach a decision. He was not at all certain, however, that in the final draft the distinction between acts of the State and acts of individuals should play such a prominent part.

31. Mr. USHAKOV said he largely shared the ideas set out by the Special Rapporteur in his preliminary considerations and commentary on article 5, but could hardly accept that article as it stood.

32. His reservations were bound up with the mental confusion which often existed, and which had even crept into some of the examples given by the Special Rapporteur, regarding the terms "attribution" and "imputation". He was among those who had urged that the Commission should use the term "attribution" in preference to "imputation"; it was not simply a question of drafting it was also a question of substance.

33. The difference between attribution and imputation was two-fold. The term "attribution" applied to acts in general, both lawful and wrongful, whereas the term "imputation" applied only to wrongful acts. In other words, attribution meant simply noting an act, whereas imputation meant both noting that an act had been committed and the legal operation of characterizing the act as a wrongful act producing consequences. That was why it was correct to speak, in the chapter on the attribution of acts to the State, not of the attribution of internationally wrongful acts, but simply of the attribution of acts.

34. Since attribution meant simply noting, it could not be said that the conduct of an organ of the State could be

characterized differently in international law and in internal law for the purposes of attribution to the State. For instance, to "attribute" to a State the decision of a court—that was to say the decision of one of its organs—which was lawful under internal law but wrongful in international law, was to confuse attribution with imputation, since the State was charged with responsibility for a wrongful act. The difference between the attribution of an uncharacterized act and the imputation of a wrongful, and hence characterized act, should be clearly understood.

35. Then again, attribution—the objective rather than legal noting that an act had been committed—indicated the identity of the author of the act. The act was attributed to one particular State rather than another. There, too, there was no need to invoke either internal or international law. For example, if soldiers from one State wearing the uniform of the army of another State raided a third State, the attribution of the act would consist of noting that the soldiers belonged to such or such a State. There again, it was simply a question of noting without any legal characterization. That showed how important it was to agree on the meaning of the words "attribution" and "imputation".

36. He would speak again on the text of article 5.

The meeting rose at 1.5 p.m.

1212th MEETING

Wednesday, 23 May 1973, at 10.10 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(continued)

ARTICLE 5 (Attributions to the State, subject of international law, of acts of its organs) *(continued)*

1. The CHAIRMAN invited Mr. Ushakov to conclude the statement he had begun at the previous meeting.

2. Mr. USHAKOV said he agreed with the Special Rapporteur that the conduct of organs of the State must be attributed to the State, though in his opinion there was no need to specify that the attribution was made by virtue of international law, since it consisted merely in establishing, independently of any legal order, that an act had been committed and by whom it had been committed. The question which then arose was under what conditions the State could be assimilated to its organs, and on that point he did not share the Special Rapporteur's opinion.

3. In article 5 and the subsequent articles, the Special Rapporteur referred sometimes to the conduct of organs of the State and sometimes to the conduct of a person or group of persons who possessed the status of organs of the State. In his opinion, no such distinction could be made. To accept such a distinction would be to support the theory of certain writers, including the eminent French jurist Georges Scelle, who in that context did not recognize even the existence of the State or of legal persons in general, but regarded them as fictions and maintained that it was always individuals who acted.

4. In the exercise of public authority, which took place through the machinery of the State, it was certainly organs and not individuals that acted. For instance, the will of a parliament was not the sum of the wills of its members; its decisions were those of a unitary organ. The same applied to a court of law. Even when the organ consisted of a single person, it was as an organ and not as an individual that he acted, except, of course, when he was acting outside the exercise of his functions. Thus it was through the agency of its organs and not through that of the individuals composing them that the State acted. Consequently, he could not accept the distinction made by the Special Rapporteur between the conduct of persons acting as organs and the conduct of persons acting in a private capacity.

5. With regard to the drafting of article 5, there was a lack of concordance between the title, which referred to attribution to the State of acts of its organs, and the text, which referred to the conduct of a person or group of persons.

6. Moreover, the idea covered by the expression "State, subject of international law", which appeared in the title of article 5 and of some of the subsequent articles, but not in the text of those articles, was not clear. If the purpose was to preclude the attribution of an act to States which had no international personality, such as the Swiss cantons or the member states of a federation, he saw no objection; otherwise he did not think the phrase served any useful purpose.

7. Mr. AGO (Special Rapporteur) said that Mr. Ushakov's comments called for explanations on three points: the meaning of the word "attribution"; the distinction between an organ and a person or group of persons possessing the status of an organ; and the use of the expression "State, subject of international law".

8. With regard to the question of attribution, which Mr. Ushakov had already raised at a previous session, it should not be forgotten that words had only the meaning given to them. Even when he had used the word "imputation" in his first reports, he had never given it the sense of imputation in criminal procedure; that was why he had willingly accepted the proposal made by Mr. Ushakov at the twenty-second session, that he use the more neutral term "attribution".[1] But no matter whether the term adopted was "attribution" or "imputa-

[1] See *Yearbook of the International Law Commission, 1970*, vol. I, p. 189, para. 20 *et seq.* and p. 221, paras. 72 and 73.