

Document:-  
**A/CN.4/SR.1225**

**Summary record of the 1225th meeting**

Topic:  
**<multiple topics>**

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ownership” needed to be clarified, because there was also private property of the State. Although Mr. Ushakov had maintained that all State property was public property,<sup>4</sup> under Turkish administrative law there was also private property of the State, which was placed in that category by reason of the use made of it. It would therefore be preferable to contrast public property with property not under the “ownership of private persons”. That formula would also apply to the private property of the State, since when a State owned private property, it dealt with it in the same way as a private person.

48. The CHAIRMAN, speaking as a member of the Commission, said that the problem of defining public property was necessarily complicated by differences in systems of government. He would suggest that, for the purposes of the present draft articles, public property should be considered to be property which had been so considered by the predecessor State.

49. Mr. QUENTIN-BAXTER said he agreed with previous speakers that the successor State was a new lawgiver with powers that were subject only to the overriding requirements of international law. He agreed essentially with what had been said by Sir Francis Vallat, but wondered whether the latter had not gone too far in suggesting that the reference to the law of the predecessor State should be deleted from the definition of public property. As had been rightly pointed out, the fundamental principle of succession was respect for continuity, whether in public or private rights. Thus, the title to the New Zealand High Commission in London was not vested in Her Majesty the Queen, but in a corporation created by the New Zealand Parliament.

50. As to property which was “necessary for the exercise of sovereignty by the successor State,” he did not question the right of the State to legislate in that matter, but wondered what would happen to property in the territory of a third State.

51. Mr. KEARNEY said he had two comments to make. First, the problem the Commission was dealing with perhaps went beyond what property was in the title of the State at the time of succession. For example, certain lands which were in the title of the United States were covered by a series of agreements with the American Indians, under which rights to the territory had been retained by a particular tribe, and those rights remained in the members of the tribe as a collectivity. Those agreements were not considered international treaties, but they had a special status which placed them above the level of an ordinary contract between the State and individuals. It would be difficult to solve, simply by a definition, the problems involved when that kind of legal relationship was affected by a succession, and special provisions could well be necessary.

52. Secondly, it had been pointed out that the high seas had been defined by means of a negative formula.<sup>5</sup> In view of recent developments, however, that did not seem to be the happiest precedent to follow.

The meeting rose at 6 p.m.

## 1225th MEETING

*Tuesday, 12 June 1973, at 10.10 a.m.*

*Chairman:* Mr. Mustafa Kamil YASSEEN

*Present:* Mr. Ago, Mr. Bartoš, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

### Succession of States in respect of matters other than treaties

(A/CN.4/226; A/CN.4/247 and Add.1; A/CN.4/259; A/CN.4/267)

[Item 3 of the agenda]

*(continued)*

ARTICLE 4 (Sphere of application of the present articles)  
and

ARTICLE 5 (Definition and determination of public  
property) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of articles 4 and 5 in the Special Rapporteur's sixth report (A/CN.4/267).

2. Mr. RAMANGASOAVINA said that the discussion on article 5 and the various alternatives proposed by the Special Rapporteur in his successive reports showed how difficult it was to define public property. The last formulation proposed, the present article 5, could be divided into two parts: the first part was an attempt to define the public property, rights and interests to be transferred, and the second part characterized as public all property necessary for the exercise of sovereignty by the successor State.

3. He could easily accept the first part of the article, which was wide enough to cover the differences between the internal laws of different countries and, although in negative form was preferable to an enumeration, which was never exhaustive. The second part, on the other hand, which was obviously intended to include everything not covered by the first, was too imprecise; and there was a danger that, instead of complementing the first part as it should, it might deprive that part of its content, since it practically left the field open for the successor State. Consequently, the Commission should either delete the last phrase or find a formula which was not open to misinterpretation.

4. The transfer of property in cases of succession was generally regulated by agreement, but successions were also very often the result of a conflict in which the balance of the forces was unequal; hence it was important to find, for article 5, a formulation which could serve as a residuary rule in cases where no agreement had been concluded.

5. The CHAIRMAN invited the Special Rapporteur to reply to the comments made during the discussion.

<sup>4</sup> See 1220th meeting, para. 35.

<sup>5</sup> United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

6. Mr. BEDJAOUI (Special Rapporteur) said he noted that the problems he had submitted to the Commission in the hope that it would find solutions had remained unsolved, and that other problems had been added to them. There were differences of opinion about what should be done with article 5. Some members considered that the problem of the definition should be discussed thoroughly, because the rest of the draft depended on it; others thought that article 5 should be referred to the Drafting Committee; he himself since he required the assistance of all members in the continuation of his work, saw only advantages in continuing the discussion in the Drafting Committee, to which he was prepared to submit new drafts of the article; yet other members—and they were the majority—thought the article could be retained unchanged as a working hypothesis, on a precarious and revocable basis. Mr. Reuter had expressed the opinion that the problems should be discussed and the solutions sought later;<sup>1</sup> Sir Francis Vallat had said that the definition had two functions: to limit the topic, and to make it possible to apply the subsequent articles where items of public property were not individually mentioned;<sup>2</sup> Mr. Yasseen thought it advisable to go ahead and examine the other articles.<sup>3</sup> It was clear that the Commission was trying to find its way, but he now needed precise instructions.

7. Some members of the Commission thought that it should start from two premises—the replacement of one State by another and the actual date of the replacement—and try to deduce only rules of public international law governing the cession to the successor State of property considered to be public in the internal legal order of the predecessor State, the conduct of the successor State after the succession being of no further concern to the Commission. That was why Mr. Ustor had expressed doubts about the advisability of drafting articles on such problems as concession rights and the privilege of issue.<sup>4</sup> If the Commission adopted that procedure, however, it would soon find that the rules of public international law in question were very few. The General Assembly expected the Commission to draft a text applicable to concrete situations, and if it drafted a small number of articles, which would probably not settle much, the Commission might give the impression that succession to public property was not part of succession of States in the strict sense, as understood in international law. On the other hand, the Commission should also be careful not to engage in drafting a sort of wide-ranging code of conduct which would take it many years to complete. For his part, he had chosen a middle way by drafting articles which would allow the Commission to go ahead and prune the draft as it went.

8. Mr Reuter had asked what would be the future consequences of a succession to public property and if the real problem did not consist in deciding whether or not succession entailed compensation or indemnification.<sup>5</sup>

He had said that, logically, the question of compensation was posterior to the succession, that the Commission might not need to deal with it, and that it could be reserved in a separate provision. But the Commission's difficulty over the definition was partly due to the fact that State succession brought about an automatic and gratuitous transfer of a body of property which involved the highest functions of sovereignty. That was why he had referred to property "necessary for the exercise of sovereignty" and had drafted article 9, on the general principle of the transfer of all State property, automatically and without compensation. Thus the same problem constantly recurred.

9. The transfer of the infrastructure of a country to the successor State was one example. It was obvious that the successor State succeeded to it automatically. Roads, for instance, did not remain the property of the predecessor State merely because it had built them. The older treaties, of which he had given some examples in his third report (A/CN.4/226), expressly provided for the transfer of roads to the successor State; that was not done in contemporary treaties, which regarded such a transfer as being self-evident. But other means of communication, such as railways, were dealt with in contemporary treaties. That difference was explained historically by the fact that the transfer of railways, unlike that of roads, raised the problem of the acquired rights of private persons. However, there were now private, toll-paying motorways, which sometimes represented a larger investment than the building of a small railway line.

10. Another problem was whether the definition of public property should include only property of the State, to the exclusion of the property of all other authorities, independent administrations, etc., or whether it should be of wider scope. He himself had provisionally opted for the wider sense and had proposed two working hypotheses: the definition *a contrario* and the definition by ownership.

11. The definition *a contrario* had given rise to several objections. Some members regarded it as sterile in itself but it was not unusual to have recourse to definitions of that kind in various sciences, including jurisprudence; one had been used in the case of the high seas, which had been defined *a contrario* by reference to the territorial sea.<sup>6</sup> Other members had been unable to accept the definition because very often the reference datum did not exist. For instance, Mr. Ushakov had pointed out that under the Soviet Constitution there was no private property in the USSR. But that simplified the problem, because it meant that all property was public and it only remained to define its nature, not its character. Other members, again, had objected that such a definition would make it necessary to define private property, which would be all the more difficult because there was such a thing as private property of the State. But the private property of the State was public property—property belonging to a national entity, not to a private person, even though it was subject to a special legal

<sup>1</sup> See 1223rd meeting, para. 27.

<sup>2</sup> See 1224th meeting, paras. 13-16.

<sup>3</sup> *Ibid.*, para. 32.

<sup>4</sup> See 1221st meeting, paras. 44 and 45.

<sup>5</sup> See 1224th meeting, paras. 36-38.

<sup>6</sup> United Nations, *Treaty Series*, vol. 450, p. 82, article 1.

régime. It had been very well said that the expression “private property of the State” contained a contradiction *in objecto*. The same answer could be given to the objection raised by Mr. Reuter, who had set the term “public property”, defined in article 5, against the expression “private property of the . . . State”, used in article 8. He (the Special Rapporteur) could equally well have referred simply to State property, public or private, and he admitted that he had followed the distinction made in French law between the public and the private domain of the State. Lastly, Mr. Bartoš had referred to the difficulties created by successor States deciding to declare as public, items of property which had been private in the legal order of the predecessor State.<sup>7</sup> But those were problems posterior to the succession—acts performed by the successor State as a sovereign State, not as a successor.

12. With regard to the definition by ownership, that raised the question whether the Commission should concern itself only with property of the State, or with all public property. Some members, including Mr. Ago and Mr. Ushakov, considered that only property of the State should be taken into consideration. His task would be simplified if the Commission adopted that view, but in addition to the fact that the rules of international law which could be deduced would be very few, several difficulties would remain.

13. First, there was State property even in the patrimony of certain communes or certain public institutions in which the State had a share. The property of those entities would thus not be entirely excluded from the Commission’s field of study. It would therefore be better to wait until a complete inventory had been made before deciding on that course.

14. Secondly, many conventions gave definitions of State property that included property which the Commission did not regard as such. That applied, for example, to the peace treaty between the RSFSR, Poland and the Ukraine, signed at Riga in 1921.<sup>8</sup>

15. Lastly, in the peoples’ democracies there were State companies—commercial import-export organizations—which, being in contact with foreign countries, were also in contact with the legal systems of other countries. Soviet law made a distinction between State property and the property of State bodies, in particular for purposes of immunity from jurisdiction—State bodies could be prosecuted in foreign courts. But that distinction would certainly not apply if it was a case of succession, not of trade.

16. The question of sovereignty had given rise to several objections. Mr. Sette Câmara had been concerned about the fate of property of which, under article 37, the ownership would not be transferred, whereas article 6 provided for the transfer of public property as it existed.<sup>9</sup> The example of Brazil, which he had chosen, was not relevant, for if Brazil adopted a unitary structure, it would not be a case of succession; for succession to occur, there must be at least two States and the federated states of Brazil

were not subjects of international law. A distinction must be made between property which the State could receive as a successor and property which it would receive by reason of its own jurisdiction. As a sovereign State, it could enlarge or reduce its patrimony by procedures of internal law which it was fully justified in applying.

17. With regard to sovereignty, Mr. Kearney had raised the problem of natural resources.<sup>10</sup> But the situation had evolved considerably since the United Nations had first examined that problem in the 1950s, and UNCTAD was now trying to define the economic rights of States. The Commission must admit that he had been relatively discreet on that point in his sixth report. Moreover, Mr. Kearney had merely considered that it would be premature to deal with the matter.

18. It was mainly the determination of public property which had led him to take up the problem of the internal law of the State. But which State? Practice showed that in many cases it was the internal law of the successor State which applied. To accept that fact would make codification illusory, but it would not be wise entirely to reject it either. It would be better to compromise. There was always some conflict between internal legal systems and it was necessary to choose, or to find compromise formulas. He had tried to take account of the facts, first in his third report (A/CN.4/226), by affirming the principle of *renvoi* to the internal law of the predecessor State, but allowing an exception based on the public policy of the successor State,<sup>11</sup> and a second time in his sixth report (A/CN.4/267), by referring to the notion of property “necessary for the exercise of sovereignty”, which evoked the general principle of the viability of the successor State. The successor State must have a viable country in which it could operate. It was necessary to find a definition which would lead to that functional determination.

19. He agreed with Mr. Reuter that the future articles would be rules of international law, that the *renvoi* to internal law should be made article by article, and that it was not possible to formulate a general rule on the subject at once.

20. With regard to the question of territory, he had himself asked that a distinction be made between the case of public property and that of territory. He intended to delete paragraph 1 of article 6, which had been an anticipation on his part. But there remained the major objection relating to property situated outside the territory. He had always considered the case of such property to be a separate question, so much so that he had given a definition which related only to property situated in the territory. But the reason why he had decided to deal separately, for each type of succession, with the case of property situated abroad, was that the transfer of such property raised the problem of recognition of the State, and that entailed the intervention of a third State in the relations between the predecessor and successor States. Perhaps another formula should be

<sup>7</sup> See previous meeting, paras. 2 and 3.

<sup>8</sup> League of Nations, *Treaty Series*, vol. VI, p. 123.

<sup>9</sup> See 1223rd meeting, para. 24.

<sup>10</sup> *Ibid.*, para. 35.

<sup>11</sup> See *Yearbook of the International Law Commission*, 1970, vol. II, p. 133, article 1.

found for the attachment: for instance, economic attachment. But if the search for an appropriate basis for the replacement of sovereignty over property situated outside the territory should raise unduly difficult problems for the definition of public property, or if it should prove inelegant to have a second definition for property situated outside the territory, it would be necessary to amend article 5, either by referring to property "attached to the territory" instead of property situated "in the territory", or by deleting all reference to the territory.

21. Mr. SETTE CÂMARA said that the Special Rapporteur's very lucid explanation would greatly facilitate the Commission's understanding of article 5, and help it to reach a decision.

22. He wished to clear up a misunderstanding, however, about the hypothetical example he had given at a previous meeting relating to the application of article 6 (Transfer of public property as it exists) and article 37 (Public property proper to territorial authorities). He had not been referring to a federal State which became a unitary State; in such a case, there would be no room for application of the rules of State succession. What he had had in mind was the possibility of the predecessor State being a federal State, and the fate of property belonging to a component unit of that State and situated in the transferred territory. The problem then was the extent to which such property would be transferred to the successor State or retained as the property of the territorial authority.

23. The CHAIRMAN said that, as the Commission had heard the comments of its members and the replies of the Special Rapporteur, it might perhaps be wise to approve article 5 as a working hypothesis, so as to be able to proceed to the subsequent articles, leaving it open to the Commission or the Drafting Committee to revert to article 5 if necessary and if the programme of work permitted.

24. Mr. KEARNEY said that, during the discussion, several members had raised serious objections to the concluding phrase of article 5: "or which are necessary for the exercise of sovereignty by the successor State in the said territory". They had expressed concern at the vagueness of that phrase. It was therefore extremely doubtful whether that particular phrase could be accepted as part of the text to be used as a working hypothesis.

25. Mr. HAMBRO said he fully agreed.

26. Mr. AGO said he recognized that it was essential to have a working hypothesis in order to continue the examination of the draft articles, but he could not accept draft article 5 for that purpose. The discussion had shown that the Commission could accept a simpler hypothesis, namely, that public property was property which, at the time of the succession, that was to say at the time of transfer of sovereignty, had been property of the predecessor State under its internal legal order. That was the only hypothesis he found acceptable.

27. Mr. BARTOŠ said he agreed with Mr. Ago. As Mr. Reuter had pointed out at the previous meeting, the Commission need not concern itself with the conduct of the successor State after the succession. It should confine itself to saying what property was transferable.

That was a point to which the attention of the Drafting Committee should be drawn.

28. Mr. REUTER said he could accept article 5 as a working hypothesis, but without committing himself to any of its provisions. The discussion and the Special Rapporteur's excellent summing up had given an idea of the problems involved, but those problems remained unsolved. It was obvious that article 5 would come up again in connexion with each of the subsequent articles and that the Commission would be obliged to revert to it.

29. Mr. SETTE CÂMARA said he shared the view of previous speakers that article 5, as it stood, raised too many difficulties for the Commission to accept it even as a working hypothesis. Personally, he would be prepared to accept a simple formula such as that outlined by Mr. Ago, if a formal proposal were made to use it as a working basis which did not involve any commitment on controversial issues.

30. It would be a delusion to think that article 5 could be left aside. The problems it involved were bound to arise at every turn. Perhaps the Commission could agree to take no decision on article 5 at that stage, but to discuss its controversial elements as occasion arose during the examination of subsequent articles. Later on, the Commission could take a decision on the question whether a definition of public property was necessary in the draft and, if appropriate, on the contents of that definition.

31. Mr. BILGE said he agreed with Mr. Ago. After hearing the comments of the Special Rapporteur, he maintained his reservation concerning the last clause of article 5.

32. Mr. TSURUOKA said he thought article 5 should be referred to the Drafting Committee, with the request that it draft a provisional abstract formulation which would enable the Commission to examine the subsequent draft articles.

33. Mr. USTOR said that the formula outlined by Mr. Ago was simpler than that put forward by the Chairman (Mr. Castañeda) at the previous meeting.<sup>12</sup> He thought that, for practical purposes, it would perhaps be well first to restrict the topic to succession in property belonging directly to the State, and then proceed to examine the problem of other types of "public property".

34. Mr. RAMANGASOAVINA said that the Commission must have a basis to work on. The hypothesis suggested by Mr. Ago would be satisfactory, but so was the first part of article 5 as it stood. The last phrase, which several members could not accept because they considered the concept of sovereignty to be vague or dangerous, could be deleted without difficulty, since in any case it made the first part of the article meaningless. The working basis would then be the idea—very close to that of Mr. Ago—that public property meant all property, rights and interests which, on the date of the change of sovereignty and in accordance with the law of the predecessor State, had not been under private ownership.

<sup>12</sup> See para. 48.

35. The CHAIRMAN,\* speaking as a member of the Commission, said that the Commission should not let itself be held up by the obstacle of article 5. It was not essential to adopt, even provisionally, an article on the definition and determination of public property. Acceptance of the article as a working hypothesis did not mean adopting it as it stood. Of course, the wording used by the Commission at the present stage would influence its future work, but that work would also be subsequently reflected in the wording. Only when examination of the chapter had been completed would it be possible to work out the final formulation.

36. He therefore proposed that the Drafting Committee be asked to try to work out, with the help of the Special Rapporteur, an acceptable provisional formula taking account of all the comments of members, on the understanding that it could be amended as the Commission proceeded with the work. The Special Rapporteur had himself said that he was willing to submit further proposals to the Drafting Committee. Members could also submit specific comments in writing on the problems they had mentioned, in order to facilitate the work of the Drafting Committee and the Special Rapporteur. As Chairman of the Drafting Committee, he would ask them to do so, if the Commission decided to refer article 5 to the Committee on the terms he had outlined.

37. Mr. USHAKOV supported that proposal.

38. Mr. AGO said he could agree to the article being referred to the Drafting Committee, on the clear understanding that the Committee would function as a working group and not as a committee called upon to prepare a final draft of a provision which presented no further problems of substance. It would be merely a matter of seeing whether agreement could be reached on an idea.

39. The CHAIRMAN endorsed that interpretation. The Drafting Committee would have before it all the ideas put forward during the discussion and would re-examine them, with the assistance of the Special Rapporteur, in an attempt to work out a provisional formula which, in the words of the Special Rapporteur, would be "precarious and revocable".

40. Mr. REUTER said he would support the proposal if it was clearly understood that the Drafting Committee would, in fact, be resuming the present discussion in a smaller body. Before it did so, however, it would be better to wait until the Commission had examined articles 6, 7, 8 and 9, which were basic articles.

41. The CHAIRMAN said that that was indeed the only possible course. If there were no objections, he would take it that the Commission agreed to refer articles 4 and 5 to the Drafting Committee and to ask members to submit their written comments to that Committee, on the understanding that it would examine article 5 if such examination seemed useful and was warranted by the Commission's rate of progress.

*It was so agreed.*<sup>13</sup>

\* Mr. Yasseen.

<sup>13</sup> For resumption of the discussion see 1230th meeting, para. 41 and 1231st meeting, para. 1.

## State responsibility

(A/CN.4/L.194)

[Item 2 of the agenda]

(resumed from the 1215th meeting)

### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

42. The CHAIRMAN\*\* invited the Commission to consider the titles of the draft and of Chapters I and II and the titles and texts of articles 1 to 6 adopted by the Drafting Committee.

#### TITLE OF THE DRAFT

43. Speaking as Chairman of the Drafting Committee, he said the Committee had noted a large measure of agreement in the Commission to exclude from the draft anything that touched on responsibility for risk. The rules on responsibility for risk were different from those which governed responsibility for internationally wrongful acts, and to mix the two types of responsibility in a single draft would introduce an element of confusion which ought to be avoided.

44. The Drafting Committee had considered whether, as several members had suggested, the title should itself specify that the draft concerned only responsibility for internationally wrongful acts; but after due reflection, the Committee had preferred to retain the title proposed by the Special Rapporteur: "Draft articles on State responsibility". That was the traditional designation of the topic and any other designation might lead to misunderstanding. The Committee suggested, however, that the Commission's report, and more particularly the commentary to the draft articles, should make it clear that responsibility for risk was excluded from the draft, and give the reasons for its exclusion.

45. Speaking as Chairman of the Commission, he said that if there were no comments he would take it that the Commission provisionally approved the title of the draft as proposed by the Drafting Committee.

*It was so agreed.*

#### TITLE OF CHAPTER I

46. The CHAIRMAN speaking as Chairman of the Drafting Committee, said that several amendments to the title of chapter I had been suggested. The Committee nevertheless proposed that the Commission should retain the Special Rapporteur's title "General principles". Chapter I did in fact contain general principles, in other words, rules of law applicable to the draft as a whole. No other expression such as "fundamental rules" or "basic principles" would be as appropriate. Other chapters of the draft contained rules or principles of a fundamental character, but only the provisions of chapter I were general principles applicable to the draft as a whole.

47. The Drafting Committee had considered it unnecessary to add the qualification "of State responsibility"

\*\* Mr. Yasseen.

to the words "General principles", since the title of the draft, immediately above that of chapter I, showed that only State responsibility was concerned.

48. Speaking as Chairman of the Commission, he said that if there were no comments he would take it that the Commission provisionally approved the title of chapter I as proposed by the Drafting Committee.

*It was so agreed.*

#### ARTICLE 1<sup>14</sup>

49. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had retained the French text of article 1 without change. The key phrase in that text, "*engage sa responsabilité internationale*" was hallowed by abundant precedents, but the Committee had found the English and Spanish translations of the word "*engage*" unsatisfactory, and had replaced them by the words "entails" and "*da lugar*" respectively.

50. The Drafting Committee had given the article the title "Responsibility of a State for its internationally wrongful acts", as that seemed clearer and more precise than the one originally proposed, "Principle attaching responsibility to every internationally wrongful act of the State".

51. The Committee thought the commentary should explain that the principle stated in article 1 suffered no exception. It was true that justifying circumstances might be an obstacle to the attribution of international responsibility, and some provisions of the draft would be devoted to such circumstances. But justifying circumstances did not constitute exceptions; they divested the act of the State of its wrongful character. Thus, where there was justification, there was no internationally wrongful act and the conduct of the State did not fall within the scope of article 1.

52. The text proposed for article 1 read:

##### *Article 1*

##### *Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

53. Mr. USTOR said that he could accept article 1, but would point out that the English version of the title spoke of "a State", whereas the French text read "*de l'Etat*".

54. Sir Francis VALLAT said that was purely a question of style; in the present context he preferred the expression "responsibility of a State".

55. The CHAIRMAN said that if there were no objections he would take it that the Commission provisionally approved article 1 as proposed by the Drafting Committee.

*It was so agreed.*

<sup>14</sup> For previous discussion see 1202nd meeting, para. 15.

#### ARTICLE 2<sup>15</sup>

56. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had reversed the order of articles 2 and 3. Article 2, as proposed by the Special Rapporteur, introduced a new concept in sub-paragraph (a): that of the attribution of conduct to the State. In the Committee's view, article 2 should therefore follow article 3, which merely developed the idea set out in article 1. Thus article 1 would proclaim the principle of responsibility and article 2 would provide that every State was subject to being considered as having committed an internationally wrongful act entailing its international responsibility.

57. The Commission's discussion on the former article 3 had dealt mainly with a question of drafting. There seemed to have been broad agreement on the principle stated by the article, namely, that every State had the capacity to commit an internationally wrongful act; but the use of the word "capacity" could give rise to misunderstanding. The Committee had therefore had to find a formulation which, on the one hand, did not contain the word "capacity" and, on the other, would not offend the susceptibility of States.

58. The title given by the Special Rapporteur to article 3 had been "Subjects which may commit internationally wrongful acts". As the draft was only concerned with State responsibility and not with the responsibility of other subjects of international law such as international organizations, the Committee proposed that the title should be changed.

59. The text proposed for the new draft article 2 read:

##### *Article 2*

##### *Possibility that any State may be considered as having committed an internationally wrongful act*

Every State is subject to being considered as having committed an internationally wrongful act entailing its international responsibility.

60. Sir Francis VALLAT said he was essentially in agreement with the substance of article 2, but suggested, as a matter of drafting, that it be amended to read: "Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility".

61. Mr. AGO (Special Rapporteur), referring to Sir Francis Vallat's suggestion, said he thought the words "subject to the possibility of" rendered the idea contained in the French text better than the present English version.

62. Mr. USTOR pointed out that, in the English version, the title referred to "any State", whereas the text of the article said "Every State".

63. The CHAIRMAN said that, to avoid any misunderstanding, it would be better to use the same terms in the title and the text of the article.

64. Mr. CALLE y CALLE said that the Spanish version of article 2 was somewhat too mandatory; he pro-

<sup>15</sup> For previous discussion see 1207th meeting, para. 27.

posed that the word “*sujeto*” be replaced by the word “*susceptible*”, which would be closer to the French.

65. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Secretariat had drawn his attention to an error in the Spanish translation. Consequently, he suggested that Mr. Calle y Calle should consult the Secretariat on the precise wording of the text.

66. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission provisionally approved article 2, as proposed by the Drafting Committee, on the understanding that the Spanish version would be slightly amended.

*It was so agreed.*

#### ARTICLE 3<sup>16</sup>

67. The CHAIRMAN, speaking as Chairman of the Drafting Committee, said that the Committee had noted that each of the two sub-paragraphs of article 3 (former article 2) in a way introduced a separate chapter of the draft. It had therefore preferred to retain those two sub-paragraphs rather than merge them into a single paragraph, as some members had proposed. In the introductory phrase of the article, the Committee had added the words “of a State” after the words “internationally wrongful act” because the draft was concerned only with State responsibility, to the exclusion of the responsibility of other subjects of international law.

68. In sub-paragraph (a), the Committee had replaced the expression “in virtue of international law” by the expression “under international law”, in order to meet the wishes of some members.

69. In sub-paragraph (b) the Committee had replaced the words “failure to comply with” by the words “breach of”, which was the expression used in article 36 of the Statute of the International Court of Justice.

70. Lastly, the Committee had given the article a title which, it thought, better reflected its contents than the title originally proposed.

71. The text proposed for the new draft article 3 read:

#### *Article 3*

##### *Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when:

(a) Conduct consisting of an action or omission is attributable to the State under international law; and

(b) That conduct constitutes a breach of an international obligation of the State.

72. Mr. USTOR, referring to the French text, pointed out that the expression “*fait internationalement illicite de l'Etat*” had been used both in the title and in the text of article 3, whereas the expression “*fait internationalement illicite d'un Etat*” appeared in the text of article 1. The formula used in article 1 should perhaps be repeated in article 3, especially since it corresponded with the wording used in the English version of both article 1 and article 3.

73. Mr. REUTER said he thought it would be better not to change the French title of article 3, because the provision applied to a State which had already been determined. Moreover, even though the words “of a State” appeared in the title and the introductory phrase of article 3 in the English version, the words “to the State” and “of the State” were used in sub-paragraphs (a) and (b).

74. Mr. AGO (Special Rapporteur) said he thought that the words “*de l'Etat*” should be retained in the French version.

75. Mr. KEARNEY said that the use of the indefinite article followed by the definite article was standard usage in English and perfectly satisfactory.

76. Mr. USTOR said he thought the English word “breach”, in sub-paragraph (b), was stronger than the French word “*violation*”.

77. Mr. AGO (Special Rapporteur) said that he had proposed the word “*manquement*”, but as the Committee had followed Mr. Kearney’s suggestion and used the word “breach” in the English version, the word “*violation*”, which was the translation of “breach” in Article 36 of the Statute of the International Court of Justice, had been substituted for the word “*manquement*” in the French version.

78. The CHAIRMAN, speaking as a member of the Commission, said that he had formerly defended the use of the word “*manquement*”, which was less strong than “*violation*”, but the discussions in the Drafting Committee had convinced him that it was advisable to follow the Statute of the International Court.

79. Mr. BARTOŠ said that the basic idea of article 3, sub-paragraph (a), was to place actions and omissions on the same footing. The use of the word “*violation*” in the French version of sub-paragraph (b) was unsatisfactory, because it did not cover those two concepts: one could not commit a “*violation*” by omission. That was why he preferred the term “*manquement*”, which had a broader meaning.

80. Mr. KEARNEY said he was not competent to criticize the French terminology, but the word “breach” in English would also cover an omission. Failure to pay for a purchased article, for example, quite clearly constituted a breach of contract.

81. Mr. REUTER said that the words “*d'après le droit international*” in article 3, sub-paragraph (a), were essential, and they would be more emphatic if they were placed immediately before the words “*à l'Etat*”, instead of after them.

82. The CHAIRMAN, speaking as a member of the Commission, said he supported that suggestion. The words “*à l'Etat*” and “*d'après le droit international*” should not be joined together as if they formed a unit.

83. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission provisionally approved article 3, with the amendment proposed by Mr. Reuter.

*It was so agreed.*

The meeting rose at 12.50 p.m.

<sup>16</sup> For previous discussion see 1205th meeting, para. 2.