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Summary record of the 1251st meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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groups. The Chairman of the Drafting Committee played an important part in the Commission's work in any given year, and in the current year that work would be concerned mainly with the topic of State responsibility; the Special Rapporteur on that topic, Mr. Ago, had himself nominated Mr. Hambro. In his (Mr. Tsuruoka's) opinion Mr. Hambro fulfilled all requirements for the post of Chairman of the Drafting Committee, but he would not have objected to a postponement of the election in order to allow members of the Commission to engage in consultations.

55. Mr. ELIAS said that, as a matter of principle, Mr. Yasseen's proposal was a sound one. Nevertheless, he thought that a proposal to separate two important functions for the first time in the practice of the Commission should have been preceded by adequate consultations.

56. Mr. CALLE Y CALLE urged that Mr. Hambro should be elected Chairman of the Drafting Committee immediately. No disagreement had been expressed regarding the proposal to separate that office from the office of First Vice-Chairman, and it would have the additional advantage of reinforcing the officers of the Commission.

57. Mr. AGO stressed that the Chairman of the Drafting Committee should be one of the Commission's officers.

58. The CHAIRMAN said that, since no objection had been made to Mr. Yasseen's proposal, he took it that the Commission agreed to appoint Mr. Hambro Chairman of the Drafting Committee and, as such, an officer of the Commission.

It was so agreed.

59. Mr. SETTE CÂMARA said he fully concurred with the wise decision to separate the functions of Chairman of the Drafting Committee from those of First Vice-Chairman. In recent years, the Commission's enlarged Bureau had played an increasing role in the organization of its work and the decision just taken would strengthen that body.

60. Lastly, he warmly associated himself with the welcome extended by the Chairman to the new Legal Counsel of the United Nations, who was attending the Commission for the first time as representative of the Secretary-General.

Adoption of the agenda

The provisional agenda (A/CN.4/273/Rev.1) was adopted unanimously.

The meeting rose at 6 p.m.

1251st MEETING

Tuesday, 7 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Castañeda, 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, Mr. Yasseen.

State responsibility

(A/CN.4/246 and Add.1 — 3; A/CN.4/264 and Add.1; A/9010/Rev.1; A/9334)

[Item 3 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

1. Mr. AGO (Special Rapporteur) summarized the work of the International Law Commission on the draft articles on State responsibility, taking into account the observations and recommendations made by the Sixth Committee at the twenty-eighth session of the General Assembly. He referred, in particular, to chapter II of the report of the International Law Commission on the work of its twenty-fifth session (A/9010/Rev.1)[1] and to paragraphs 25 to 58 of the report of the Sixth Committee on the report of the International Law Commission (A/9334). He also drew the attention of the members of the Commission to General Assembly resolution 3071 (XXVIII), in particular, operative paragraphs 3 (*b*) and (*c*).

2. The comments of the Sixth Committee were encouraging and could not fail to facilitate the work of the Commission, because they confirmed the general conclusions members had reached the previous year and the basic criteria they had adopted. Those conclusions and criteria were set out in chapter II of the Commission's report on the work of its twenty-fifth session, under the heading "General remarks concerning the draft articles" (paragraphs 36 to 57). Although the Sixth Committee had considered that the remarks on the form of the draft were self-explanatory, since the International Law Commission had decided to give its work on State responsibility the form of draft articles, with a view to the eventual conclusion of an international convention, it had given particular attention to the remarks concerning the scope of the draft. It had endorsed the distinction made by the Commission between two types of rules, namely, those termed "primary", which, in one sector of inter-State relations or another, imposed obligations on States, and those termed "secondary", not, of course, because they were less important than the primary rules, but because they determined the legal consequences of failure to fulfil obligations established by the primary rules. It had also approved of the Commission's intention to concentrate the current study on the "secondary" rules and to maintain a strict distinction between that task and the task of defining the rules which imposed on States obligations the violation of which could be a cause of responsibility.

3. The Commission had decided to confine its study of international responsibility to State responsibility for internationally wrongful acts. However, in addition to

[1] Reproduced in *Yearbook ... 1973*, vol. II.

questions of responsibility for internationally wrongful acts—responsibility in the classical sense of the term—it had recognized, in its report, the importance of questions relating to a form of responsibility thought to be more accurately called "liability" in English, which was associated with a guarantee, that was to say, responsibility for possible injurious consequences of certain unlawful activities, or activities which had not yet been definitely prohibited by international law, such as activities carried out at sea, in the atmosphere or in outer space and activities relating to nuclear energy and the protection of the environment. The Commission had thought that the fact that it was limiting the draft articles in preparation to responsibility for internationally wrongful acts should not prevent it from undertaking, at the appropriate time, a study of that other form of responsibility which was the obligation to assume the risks associated with such activities. It had considered that the so-called responsibility "for risk" might be studied after completion of the study of responsibility for wrongful acts, or even parallel with it, but separately. It had been of the opinion that that second category of problems should not be examined in conjunction with the first, because simultaneous examination of the two subjects could only make the understanding of both more difficult.

4. Most of the representatives in the Sixth Committee had recognized that the two subjects were entirely different and should be studied separately, and the Committee had approved the Commission's decision to limit the scope of the draft articles in preparation to State responsibility for internationally wrongful acts. The Sixth Committee had also considered it necessary to study liability for injurious consequences of activities other than internationally wrongful acts. In that connexion, representatives in the Committee had reiterated considerations already put forward in the Commission concerning the problem raised by certain activities which were difficult to characterize as lawful or unlawful, because they were not prohibited by any rule of general international law and were said to lie in a twilight zone between the lawful and the unlawful. Several representatives had affirmed that the line of demarcation between the two questions was fluid and that with the development of international law some dangerous activities, until recently considered lawful, had become wrongful. Like the International Law Commission, the Sixth Committee had considered whether the two separate questions should be studied side by side or in succession. Some representatives had taken the view that the study of liability for risk should be undertaken forthwith, since the subject was sufficiently ripe, whereas others had thought that it should be left till later. The Commission would have to settle that question.

5. So far as the distinction between primary and secondary rules was concerned, the Commission would not always be able to disregard the content of the obligation the breach of which engaged the responsibility of the State, for it was in the light of the content of certain obligations that it would be able to judge, for example, how useful it would be to draw a distinction in international law between two categories of internationally wrongful acts: serious wrongful acts, which might possibly be called international crimes, and less serious wrongful acts. The Commission would have to distinguish between acts entailing only a duty to make reparation and those producing more serious consequences and involving sanctions, for example, such as acts of aggression or breaches of certain essential obligations concerning the maintenance of peace. It was in the light of such considerations that some representatives in the Sixth Committee had pointed out that at some point in its study of State responsibility the Commission would probably have to take account of the existence of different classes of obligation specified in the primary rules and to distinguish between those classes according to their importance for the international community. Other important distinctions between different types of internationally wrongful act would also have to be made, according to the content of the obligation violated.

6. With regard to the method to be adopted in preparing the draft, the Commission had expressed its preference for an inductive method based on the practice of international relations, seeking to determine the rules of State responsibility as far as possible on the basis of the jurisprudence and the practice of States, rather than of theoretical considerations. The Sixth Committee had approved of that method, though some representatives had observed that their States, being relatively new, had not built up a large body of practice. The Commission would have to judge which practices ought to be followed and which should be corrected or developed, having due regard to the historic context of each practice and, especially, to its ultimate objective. For while certain matters were intrinsically fairly stable, others were not found in the older or even in recent practice and were largely material for the progressive development of international law.

7. He noted that the members of the Sixth Committee had approved, in general, of the text of draft articles 1 to 6 adopted the previous year by the International Law Commission (A/9010/Rev.1) and had not proposed any radical changes. In discussing the texts, they had often referred to questions already discussed in the Commission. The Commission still had to consider those articles on second reading, and it would then take into account the comments made in the Sixth Committee and the written observations of governments. It seemed preferable not to revise the articles already adopted until the second reading, and for the time being to continue consideration of the subsequent articles of the draft.

8. In the section of its report dealing with the structure of the draft (paras. 43 *et seq*), the Commission had taken stock of the work done and indicated how it proposed to continue the work at the present session. It had very clearly defined the object of chapter II of the draft, which dealt with the subjective element of the internationally wrongful act and, hence, with the determination of the conditions in which a particular act must be considered as an act of the State in international law. The Commission still had to consider one very difficult question: was it possible to attribute to the State, as a subject of international law, the conduct of

organs not of the State itself, but of separate public institutions—national public institutions separate from the State or local public entities? Similarly, was it possible to attribute to the State, for the purpose of establishing its international responsibility, the conduct of persons or groups of persons who, while formally lacking the status of organs, had in fact acted as such? Lastly, was it possible to attribute to the State the act or omission of an organ placed at its disposal by another State or by an international organization? Those were the three questions dealt with in draft articles 7, 8 and 9, which the Commission must now try to answer.

9. Mr. KEARNEY agreed with Mr. Ago that the term "liability" might be preferable in the case of legitimate acts which did not entail State responsibility in the classical sense, but could have consequences harmful to other States. A recent meeting of OECD experts on trans-frontier pollution, which he had attended, had also concluded that the term "liability" was more appropriate than "responsibility" for describing the legal consequence of such pollution. However, the whole question of legitimate acts which could give rise to certain rights on the part of other States had to be approached with caution, because in practice such cases often involved a combination of acts, some of which had a responsibility aspect, while others did not.

10. Mr. REUTER said that sooner or later the Commission would have to study the question of liability for risk, for there was a close connexion between responsibility for a wrongful act and objective liability for risk. He did not, however, think it advisable to appoint a Special Rapporteur to study the latter subject forthwith, since the Special Rapporteur for the topic of State responsibility for internationally wrongful acts would be bound, in the course of his work, to examine the essential question of damage, which was common to both subjects; and it was to be feared that when the Special Rapporteur appointed to study the second subject looked at that same question from his point of view he might reach different or even conflicting conclusions. Hence it would be preferable to consider the question of damage in the current study, before another Special Rapporteur was asked to study the subject of liability for risk.

11. The CHAIRMAN, speaking as a member of the Commission, agreed with Mr. Kearney that the question of liability for risk was a complicated one, regarding which primary rules had not yet been established. They should perhaps first be established in specific sectors, such as pollution, where interdisciplinary problems might well arise. The Commission might revert to the question later, to consider whether it should be studied or not.

12. Mr. AGO (Special Rapporteur) said he had listened with great interest to the comments of Mr. Kearney, Mr. Reuter and Mr. Ustor; he would be grateful to Mr. Kearney for any additional information he could provide on the work of OECD on the subject. As had rightly been observed, the facts of international life were very complex, and it was difficult in some cases to determine whether a particular activity was lawful or wrongful; not because there was a kind of twilight zone between what was lawful and what wrongful, but because in some spheres, international law was evolving so fast that an activity permitted today might be prohibited tomorrow. In any case it was essential to make a very clear distinction between responsibility for wrongful activities and liability for lawful activities liable to cause damage. In the case of wrongful activities, damage was often an important element, but it was not absolutely necessary as a basis for international responsibility. On the other hand, damage was an indispensable element for establishing liability for lawful, but injurious activities. Hence, as Mr. Reuter had remarked, it was to be expected that two parallel studies might reach different conclusions concerning the notion of damage.

13. The study of liability for the risks inherent in lawful activities involved the examination of questions that were complicated not only from the juridical, but also from the interdisciplinary point of view. On the subject of pollution, in particular, international law was developing fast, and it was a moot point whether it was moving towards the prohibition of certain activities or only towards the requirement of guarantees by States. Thus the question arose whether the Commission should undertake the study of liability for risk at once, or whether it should wait.

Draft Articles submitted by the Special Rapporteur

ARTICLE 7

14. The CHAIRMAN invited the Special Rapporteur to introduce draft article 7, which read:

Article 7 [2]

Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State

The conduct of any organ of a public corporation or other autonomous public institution or of a territorial public entity (municipality, province, region, canton, member state of a federale State, autonomous administration of a dependent territory, etc.) having that status under the internal law of the State and acting in that capacity in the case at issue, is also considered to be an act of the State in international law.

15. Mr. AGO (Special Rapporteur), referring to paragraphs 163-185 of his third report on State responsibility (A/CN.4/246 and Add.1-3),[3] said that at its previous session the Commission had confirmed the basic principle of attribution to a State, as a subject of international law, of the conduct of persons who, under its internal legal system, had the status of organs of that State, while specifying that that principle might be neither absolute nor exclusive. The principle would not be absolute if it were found that among the organs of the State there were some whose acts were not attributable to the State as a subject of international law. However, the Commission had not subsequently come to that conclusion, and it had approved the draft of article 6, accord-

[2] Text as amended by the Special Rapporteur; see next meeting, para. 13.

[3] Reproduced in *Yearbook ... 1971*, vol. II, Part One.

ing to which the fact that an organ belonged to one branch of the State power rather than another was no reason for not attributing its conduct to the State. The principle would not be exclusive if it were recognized, as it should be, that certain acts or omissions which did not emanate from an organ of the State having that status under its internal legal order, might nevertheless be attributed to the State under the international legal order and thus engage its international responsibility. It was a fact that such acts or omissions could emanate from two distinct classes of State institution: first, public corporations and other public institutions, which terms covered institutions of very different kinds, separate from the State and carrying on activities relating to specific matters; and secondly, territorial public entities, that was to say, institutions distinguished not by the subject-matter of their competence, but by the territorial area of their activities.

16. Public corporations were characterized by their specific, rather than general, sphere of competence. Their proliferation was characteristic of the contemporary phenomenon of decentralization of certain public functions *ratione materiae*. The diversity of the tasks of common interest which the community itself had to perform in a modern society, the ever increasing number of services which only the community was able to provide, the gradual extension of those services to the most widely different sectors of economic, social and cultural life, the fact that they were often of a technical nature and thus required both autonomy of decision and action and the possession of special qualifications, the need to make procedures more flexible and simplify controls in the interests of efficient service—those, in short, were the main causes of the phenomenon. Thus, side by side with the State, there were being established a number of institutions which, though their functions gave them a distinctly public character, had a separate legal personality under the internal legal order, possessed their own organization distinct from that of the State and were subject, in their activities, to a legal régime *sui generis*. To use a neologism which had also found its way into French public law doctrine, such institutions might be described as "para-State" institutions, that was to say, institutions existing side by side with the State, which were responsible fo a certain sector of public functions.

17. Should the acts or omissions of the organs of such institutions be regarded as acts of the State in international law? It was necessary to guard against extending the responsibility of the State too far, and also against not treating all States alike. If the same public function were performed in one State by organs of the State proper and in another by para-State institutions, it would indeed be absurd if the international responsibility of the State were engaged in one case and not in the other. True, it was necessary to take account of the present wide diversity of State organizations, as had been observed in the Sixth Committee. Beside public corporations proper, there were other public institutions separate from the State which must be taken into consideration. For example, a State might be alone in exercising, at the summit of the internal organization, the function of supreme political direction; but it might also happen that the same function was shared between the State and a particular political party. Did that preclude attribution to a State of the acts or omissions of an organ of an institution which, under the internal order of that State, was separate from it, but in reality performed a function of political guidance which, under other systems, was performed by organs of the State proper?

18. More often than public corporations and the other public institutions he had mentioned, territorial public entities were called upon to carry on activities in which they might be concerned with, and possibly violate, obligations to foreign States. Must a different criterion be applied according to whether the State in question was a unitary State or a decentralized State? One example was the last constitution of the Italian monarchy, based on the Napoleonic unitary system, under which the State alone had been responsible for the administration of Sicily, whereas under the new republican constitution, which gave a very large degree of independence to Sicily, the same functions were largely reserved to the Sicilian regional authorities. A similar situation was to be found in many other modern States which were tending towards wider territorial distribution of the exercise of public functions. Moreover, the very existence of municipalities raised problems of the same order: an internationally wrongful act committed by an officer of the State police would no doubt engage the international responsibility of the State; but should it be concluded that the same act committed by an officer of the municipal police would not have the same consequence?

19. International jurisprudence, practice and doctrine concerning public corporations were illustrated by several examples in paragraphs 167 to 170 of his third report on State responsibility (A/CN.4/246 and Add.1-3). After referring to the opinion expressed by Mr. Gros as agent of the French Government in the *Case of Certain Norwegian Loans*, before the International Court of Justice, to the effect that, from the standpoint of international law public corporations merged with the State, he pointed out that two of the judges of the International Court had stressed the validity of that argument (*ibid.*, para. 167).

20. With regard to the practice of States, he pointed out that, in their replies to the request for information by the Preparatory Committee of the 1930 Codification Conference, some governments had observed that the State was responsible not only for the acts or omissions of bodies exercising public functions of a legislative or administrative character, but also for the acts or omissions of bodies other than those of a local character, in so far as such bodies were also required to exercise public functions. The Preparatory Committee had therefore come to the conclusion that it should refer not only to territorial entities such as communes and provinces, but also to "autonomous institutions" in general, and it had drafted the following basis of discussion: "A State is responsible for damage suffered by a foreigner as a result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or adminis-

trative character". Unfortunately, the Third Committee of the Conference had not had time to consider and adopt that basis of discussion (*ibid.*, para. 168).

21. With regard to political institutions, he referred to the examples from the jurisprudence and practice of States given in paragraph 169 of his third report. In the opinion of most writers, where the function associated with a certain act or omission was a public function, no distinction need be made according to whether that function was exercised by an organ of the State proper or by an organ of an autonomous institution. The principle stressed by writers was that the State must not be able to escape its international responsibility by adopting an international system of decentralization.

22. For territorial entities, the principle in question was still more generally accepted in doctrine and confirmed by an even more abundant practice and jurisprudence. The distinction between the State and territorial entities was indeed a relatively old one, whereas the proliferation of "para-State" institutions was fairly recent. The existence of territorial entities might reflect the application of a system of distribution of functions *ratione loci*, whereas the existence of "para-State" corporations and institutions reflected, rather, a system of distribution *ratione materiae*, but the phenomenon was basically the same. Territorial entities, too, had a legal personality separate from that of the State, and possessed their own machinery and organs. Nevertheless, the attribution to the State, as a subject of international law, of the acts and omissions of organs of those entities was generally accepted, as could be seen from the cases cited in paragraph 172 of his third report. Moreover, all the States which had replied on that point to the questionnaire of the Preparatory Committee of the 1930 Hague Conference, had accepted the principle that the State incurred responsibility for acts or omissions of territorial entities performing public functions of a legislative or administrative character. That principle had also been recognized in all the codification drafts emanating from official or private sources referred to in paragraph 174 of his third report. Finally, all the writers on international law who had dealt with the question agreed in affirming the same principle.

23. With regard to the attribution to a federal State of the acts of organs of its component states, he pointed out that the Government of the United States of America had gradually changed its position (*ibid.*, paras. 176 and 177). After having resisted, in the 19th century, the idea that the principle in question was applicable to the United States of America, it had subsequently adopted a much less categorical position, and had finally accepted the principle in its reply to point X of the request for information by the Preparatory Committee of the 1930 Conference, which had referred to "Responsibility of the State in the case of a subordinate or a protected State, a federal State or other unions of States".

The meeting rose at 12.55 p.m.

1252nd MEETING

Wednesday, 8 May 1974, at 11.45 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, 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, Mr. Yasseen.

Organization of work

1. The CHAIRMAN announced that the enlarged Bureau had discussed the organization of the Commission's work for the present session and had reached agreement on certain proposals based on the recommendations made by the General Assembly in operative paragraphs 3 and 4 of resolution 3071 (XXVIII). The Assembly had recommended that at the present session the Commission should complete the second reading of the draft articles on succession of States in respect of treaties adopted at its twenty-fourth session (item 4 of the Commission's agenda) and continue, on a priority basis, its work on State responsibility (item 3). It had also recommended that the Commission should undertake, at an appropriate time, a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (item 8 (*b*)).

2. In the light of those recommendations, it was proposed that the Commission should allocate the first three weeks of the present session and a further week later in the session to consideration of the topic of State responsibility. Most of the remainder of the session would be allocated to consideration of the topic of succession of States in respect of treaties. One week would be set aside for consideration of the recommendations that the Commission should begin its work on the law of non-navigational uses of international watercourses and that it should undertake, at an appropriate time, a separate study of the question of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (items 8 (*a*) and (*b*) of the agenda), and for certain administrative and organizational matters. A few days would also be devoted to discussion of the Special Rapporteur's third report on the question of treaties concluded between States and international organizations or between two or more international organizations (item 7) and to continuation of the work on succession of States in respect of matters other than treaties (item 5).

3. It was also suggested that the Commission should hold a private meeting, after its next meeting, to consider the question of filling the casual vacancy resulting from the death of Mr. Milan Bartoš; another meeting, the date to be decided after consultations, would be devoted wholly or partly to tributes to his memory.

4. Finally, the enlarged Bureau proposed that the meeting to be held on Monday, 27 May 1974, should be