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Summary record of the 1252nd meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
1974, vol. I

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

devoted to the commemoration of the twenty-fifth anniversary of the opening of the Commission's first session (item 2 of the agenda). Invitations to attend that meeting would be sent to the Director-General of the United Nations Office at Geneva and to all former members of the Commission. There would be a limited number of speakers: the Legal Counsel, as representative of the Secretary-General; the President of the International Court of Justice; a former Chairman no longer a member of the Commission; the former Chairmen still members of the Commission and the Chairman of the present session.

5. The Commission's main objective was to complete the second reading of the draft articles on succession of States in respect of treaties and to make as much progress as possible on the topic of State responsibility.

6. If there were no comments, he would take it that the Commission agreed to adopt the proposals of the enlarged Bureau on the organization of work.

The proposals were adopted.

State responsibility

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

[Item 3 of the agenda]

(resumed from the previous meeting)

Draft articles submitted by the Special Rapporteur

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) (*continued*).

7. Mr. AGO (Special Rapporteur), resuming his introduction of draft article 7, begun at the previous meeting, said that the provision dealt with the case of decentralization within a State of certain public functions which were entrusted to public institutions established or recognized by the internal legal order, whereas draft article 8 dealt with the less frequent case in which a public function was performed *de facto* by one or more private persons. As the representative of the German Democratic Republic had pointed out in the Sixth Committee during the twenty-eighth session of the General Assembly, the internal organization of States could take a great variety of forms, ranging from complete centralization to very advanced decentralization of the exercise of public functions. For the purposes of the international responsibility of the State, however, it mattered little whether public functions were performed by one or more State entities. In international law, the State was regarded as a unity. That had been the situation in England, for example, when the Crown and Parliament had been separate legal entities.

8. As he had pointed out at the previous meeting, public institutions could be decentralized either *ratione materiae* or *ratione loci*. In the former case, according to international jurisprudence, practice and doctrine, the acts and omissions of such institutions were attributable to the State under international law. That principle, being applicable to public institutions with special competence, applied *a fortiori* to institutions which, in a particular territory, possessed a more general competence, and both international jurisprudence and international doctrine had recognized that it applied to the latter class of public institutions.

9. The practice of States, as reflected in the replies of governments to the request for information by the Preparatory Committee for the 1930 Codification Conference, was summarized in paragraphs 178 and 179 of his third report (A/CN.4/246 and Add. 1-3).[1] Even though the wording of the relevant questions in points VI and X of the questionnaire had been ambiguous, some States, including the United States of America and Switzerland, had accepted the principle that a federal State was answerable for acts or omissions which constituted a failure to fulfil its international obligations, regardless of whether the conduct in question was that of organs of the federated states or of federal organs.

10. Doctrine, however, was not entirely unanimous; for certain writers, probably influenced by the ambiguous wording of the League of Nations questionnaire, had been concerned at one time with a hypothetical case which had become almost a classic: the case in which a component state of a federal State retained a very limited degree of international personality. Those writers had considered whether the responsibility of the federal State would be engaged by acts or omissions of organs of a federated state in the restricted sector in which the federated state was regarded as an autonomous subject of international rights and duties.

11. That question, however, was not related to the case under consideration, in which the only issue was whether the federal State was capable of violating its own international obligations through the acts or omissions of organs of the federated states. That question should undoubtedly be answered in the affirmative. Moreover, the great majority of writers agreed that it should be so answered. It was even more evident that the principle was valid not only for federated states, but also for more limited territorial entities which had never even possessed international personality, such as municipalities, provinces and autonomous regions. The same was true of the organs of the autonomous administration of dependent territories, in so far as any still existed; the metropolitan State would be responsible for the wrongful conduct of the metropolitan organs responsible for administering a dependent territory, even if those organs claimed to enjoy a certain independence from the central authorities.

12. He therefore concluded that the principle of attribution to the State, as a subject of international law, of the acts of organs of public institutions separate from the State and possessing a specific competence, whether *ratione materiae* or *ratione loci*, appeared to be incontestable.

13. He pointed out that he had slightly amended the text of draft article 7 to take account of the wording of article 5 as approved by the Commission on first reading at its previous session.[2]

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

[2] For former text see *Yearbook ... 1971*, vol. II, Part One, p. 262.

14. Mr. CALLE Y CALLE said that the Special Rapporteur was to be congratulated on the success of articles 1 to 6 at the General Assembly. Only minor comments and suggestions for slight amendments had been made during the discussion in the Sixth Committee, and it was clear that the provisions embodied in those articles had been found generally acceptable as clear and concise legal rules. That discussion had shown that the Commission was working on the right lines and that it had done well to discard certain obsolete elements which, in the past, had encumbered the work on codification of the rules of State responsibility, and to undertake the formulation of a body of well-balanced rules that met the present needs of international law.

15. With regard to draft article 7, he fully recognized the need to include in the draft a rule under which the acts of organs of public institutions separate from the State would be attributed to the State in international law. It was essentially a matter of the State assuming international responsibility for the acts of entities or bodies which were not State organs.

16. However, a number of questions arose with regard to the text of the article. The first concerned the distinction between the two kinds of body covered: public corporations or other autonomous public institutions, which represented a modern phenomenon in the development of the State structure; and territorial public entities or subdivisions of the State, which were well known to traditional international law. Earlier attempts at codification had dealt mainly with the second kind of body; the first had, as a rule, been dealt with only indirectly or by implication. The two kinds of body had been covered by one article in the draft because the international responsibility of the State was based on the same criterion in both cases, namely, the public character of the functions exercised by all the bodies concerned.

17. That being so, he wished to know whether there was any compelling reason for the order in which the two categories were mentioned in draft article 7. His own feeling was that it would have been preferable to mention first the territorial public entities, which were of a permanent character and, in such cases as the component states or cantons of a federation, had some similarity in structure to the State itself. Besides, such territorial entities were well known to public law, and the codification of the rules of international law governing State responsibility for their acts should normally precede the rules of progressive development relating to the modern problem of public corporations and autonomous institutions.

18. His second question concerned the ascending order in which the various entities had been placed in the passage in parentheses. It would seem more appropriate to adopt a descending order, beginning with the largest entity and ending with the smallest, that was to say the municipality.

19. As to terminology, he was not altogether satisfied with the word "institutions" as used in the title, because it was intended to cover both the classes of entity mentioned in the body of the article. It seemed incongruous to use the term "institution" to describe a subdivision of the State, such as a member state of a federal State.

20. Lastly, he urged that an effort be made to improve the wording of the Spanish version, in which the ambiguous expression "*o incluso*" was used to render the original French words "*ou encore*".

21. Mr. YASSEEN said that he appreciated the force of the arguments, based on doctrine and international practice, which the Special Rapporteur had put forward in support of the principle stated in article 7; and, for his part, he was convinced of the existence—or at least of the need for the existence—of a rule to that effect. He wished however to emphasize one point, to make a reservation and to comment on a matter of drafting.

22. The Special Rapporteur had rightly emphasized that a State could not allege, in order to escape responsibility, that its constitution did not permit it to control the activities of a particular organ. That rule was fully justified; for although, in certain cases, the constitution of a State did not permit it to control the activities of some of its sub-divisions, the result of that constitutional defect could not be that the State would not be responsible for the acts of those sub-divisions. Thus article 7 also applied to cases in which the constitution of the State deprived it of some degree of control over the activities of some of its organs.

23. He wished, however, to make a reservation regarding federal States. In his opinion it was not incompatible with the federal system that a federated state should be able to incur international responsibility. For it was possible to imagine the existence of a certain degree of federalism under which the federated states could enjoy some international competence. It would then be the federated states themselves which would be internationally responsible, not the federal State. That case might very well arise in the future, and it was important to distinguish it from the other cases considered by the Special Rapporteur. It would be wrong to exclude that eventuality or to underestimate its importance.

24. Lastly, with regard to the drafting, he proposed that the examples given in parentheses should be deleted from the text of the article and put into the commentary.

25. Mr. PINTO said that article 7 was well drafted, complete and clear, and supported by a wealth of precedent. He agreed with the essentially functional approach adopted by the Special Rapporteur. The acts of public corporations should indeed be attributable to the State, though that attribution could also derive from the rule laid down in article 4. Most public corporations were established by, or functioned under, statutes, and it could be assumed that a government was in full control of its legislation and able to amend it at will.

26. An act of a component state of a federal State should also be attributable to the State as a whole. Article 7 might, however, have implications for the "federal clauses" often included in multilateral agreements. For example, in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[3] such a clause required a federal State to bring the

[3] United Nations, *Treaty Series*, vol. 330, p. 38.

Convention to the notice of all parts of the federation with a suitable recommendation for its implementation. It was evidently considered necessary, in the case of multilateral agreements, to include an express reference to that obligation of federal States. The mere obligation to notify the components of a federation of a multilateral agreement did not, of course, imply that they were not automatically bound by the agreement, but it nevertheless seemed to suggest that their failure to implement the agreement might entail some degree of international responsibility for them.

27. The Special Rapporteur had described in broad terms the nature of the Commission's study of State responsibility for the harmful consequences of unlawful acts, and had raised the question whether it might be useful to conduct a parallel study of State responsibility for the harmful consequences of acts which were not unlawful in themselves. Such a study was worth undertaking and, since it was essentially of a topical nature, warranted some degree of priority. In view of its political aspect and the time it would take, the sooner it was started the better.

28. The Special Rapporteur had drawn a distinction between the primary rules of State responsibility and a certain class of secondary rules whose violation could entail State responsibility. By common consent, the Commisssion was at present concerned only with the latter, which would nevertheless have to be applied in the context of the primary rules now emerging. New substantive rules entailing State responsibility might, for example, result from the definition of aggression, or from the adoption of the formerly proposed Declaration on Rights and Duties of States[4] or the Charter of the Economic Rights and Duties of States now being prepared.[5] Such rules might also have their origin in the Declaration on the Establishment of a New International Economic Order recently adopted without dissent by the special session of the General Assembly.[6] For example, one of the principles stated in that Declaration was:

> The right of all States, territories and peoples under foreign occupation, alien and colonial domination or *apartheid* to restitution and full compensation for the exploitation and depletion of, and damages to, the natural resources and all other resources of those States, territories and peoples.

That principle had been conceived and adopted as a legal right, the infringement of which could engage the responsibility of a State.

29. As the articles drafted by the Special Rapporteur were intended to be universally applicable, some thought might perhaps be given to the rules which would govern the exercise or enforcement of rights of the kind to which he had referred. Such rules would not belong to either category of rules mentioned by the Special Rapporteur—"primary" and "secondary" rules—but would form a category of their own concerned with the application of both "primary" and "secondary" rules in their social and political context. While infringement of the right he had referred to continued to take place in the modern world, major violations had taken place before the twentieth century, during the era of unbridled colonialism. Some might argue that no such right had existed in that era. While he could not agree with that view, consideration might be given, in the present study of State responsibility, to the question how to give effect to such a right in such a way that justice could be done, while taking into account the practical realities of international politics at the present time.

The meeting rose at 12.55 p.m.

1253rd MEETING

Thursday, 9 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

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

State responsibility

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

[Item 3 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 7 (Attribution to the State, as a subject of international law, of acts of organs of public institutions separate from the State) (*continued*).

1. Mr. TAMMES associated himself with the tributes paid to the Special Rapporteur for his valuable draft article 7 and its lucid commentary. No handbook of international law could give a more concise and learned account of the complexities involved in the attribution of conduct to the monolithic State as an act of that State. He found the text of the article acceptable, as it adequately reflected the present state of international law. By way of a general remark, however, he felt bound to express some uncertainty about the method of codification in which the Commission might gradually become engaged.

2. He was not sure that it was really necessary, in codifying contemporary international law, to dispel all the doubts and settle all the controversies that had arisen in the past, either as disputes before international tribunals or as cases in State practice. There were good reasons for restating, in article 6, the fact that the State

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[4] *Yearbook ... 1949*, p. 287.

[5] General Assembly resolution 3037 (XXVII).

[6] General Assembly resolution 3201 (S-VI).