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Summary record of the 1253rd meeting

Topic:

State responsibility

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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).

was responsible even for the acts of the courts, even though they were generally regarded as independent of the authorities in power. Even so, some representatives in the Sixth Committee had considered that those provisions might already be implicit in article 5.

3. In the case of article 7, however, it might not be altogether desirable to reflect, in a modern rule, all the past controversies regarding the impact of internal decentralization on the idea of the unity of the State in international law. The most pertinent of those controversies had arisen from the composition of federal States at a time when the federal State had been much nearer to its origin as an international organization of sovereign States—that was to say, before the integration of historic confederations into federations.

4. It therefore seemed to him that the enumeration of territorial public entities given in brackets in the text of article 7 could well be omitted, not simply as a matter of drafting, but because, since the Commission's adoption of article 5, there could be no doubt that organs of territorial public authorities, regardless of their degree of international autonomy, were State organs "having that status under the internal law of that State". Thus the whole statement on territorial public entities in article 7 was already implicit in article 5.

5. The case of public corporations was somewhat different, because in international law they might or might not have the status of internal organs of the State. In a recent article Mr. Suy, the Legal Counsel, had shown that a public corporation sometimes acted as an agent of the State and sometimes as a private corporation.[1]

6. That ambiguity raised the question of the use of the term "organ" in the present draft, sometimes in the sense of a part of the structure of the State, as in article 6, and sometimes in the sense of an agent separate from the State, as in articles 7 and 8. Following the reasoning of Kelsen, it could be said that both were varieties of the same kind of organ, in the sense of "*organon*", namely, an instrument; that instrument could be either a regular and permanent institution of the State, or an *ad hoc*, temporary or *de facto* separate agent, used incidentally by the State for some public function.

7. At some stage in its work on the present topic, the Commission might possibly reach the conclusion that it had better reduce the references to municipal law and reconsider one of the earlier formulas, such as that quoted by the Special Rapporteur in footnote 227 to his third report.[2] That approach would mean adopting a formula which, instead of the term "organ", would use wording such as "individuals whom, or corporations which, the State entrusts with the performance of public functions" or "which the State employs for the accomplishment of its purposes". To sum up, he believed that part of article 7 was already implied in article 5, and he had some doubts about the inconsistent use of the term "organ".

8. Lastly, he thought he should comment on the question raised by Mr. Pinto regarding damage done in the past to resources which had since come under the sovereignty of new States.[3] In that type of situation, of course, no internationally wrongful act had been committed according to the predominant opinion at the time when the acts had been performed. However, a new concept of intertemporal international law was beginning to appear; it had in fact already appeared in the preparatory work on State succession in respect of matters other than treaties, in which consideration had been given to the question of restitution of archives, libraries, regalia and works of art belonging to political and cultural entities that had become sovereign States.[4] It was not so much a matter of State responsibility and indemnification, as of *in integrum restitutio*, as far as possible, of a pre-existing state of affairs, which corresponded to present-day views and hence would operate with a particular retroactive effect.

9. Mr. KEARNEY agreed with the basic theory underlying article 7, but drew attention to some problems of drafting and definition which had an important substantive aspect. For example, the original text of article 7 (A/CN.4/246 and Add.1-3) spoke of "a person or group of persons having ... the status of an organ of a public corporation", whereas article 5 referred only to the conduct of a State organ, which must nevertheless also be a person or group of persons. If a distinction was intended, he would like to know why. If not, article 7 should perhaps be changed to make it conform with article 5, as the Special Rapporteur suggested. On the other hand, it might be desirable to retain the reference to "a person or group of persons" in order to preserve the antithesis with article 8, where such a reference was essential. Article 9, again, referred to a person or group of persons having "the character of organs", but without specifying whether they were State organs or public corporations or institutions. The organs mentioned in article 10 were apparently abstract entities and not persons or groups of persons. It was, perhaps, time to consider whether the term "organ" should not be defined, if it was to be the basis of distinctions between various types of act.

10. The reference to the internal legal order of a State raised the problem of federal States, and Mr. Pinto had already mentioned the practice of including "federal State clauses" in private law conventions.[5] The reference might be taken to mean the national legal order of the State as a whole, or the various legal orders of its constituent territorial elements. Mr. Tammes had expressed some doubt about the need for clarification, since the term "organ", as used in article 5, would include any governmental organs within the State. Article 7 mentioned territorial public entities, but as an alternative to public corporations and institutions, and it was not clear whether the public corporations and institutions of the various territorial entities fell within

[1] Erik Suy, "De IBRAMCO-affaire (internationale aspecten)" in *Revue belge de droit international*, vol. X, 1974-1, p. 142 (in Dutch).

[2] *Yearbook ... 1971*, vol. II, Part One, p. 240.

[3] See previous meeting, para. 28.

[4] *Yearbook ... 1970*, vol. II, pp. 151 *et seq.*

[5] See previous meeting, para. 26.

article 7. If they did, the applicable internal legal order would be that of the subordinate territorial entity whose law had established their status. There were in fact two types of federal State clauses. One allowed some degree of autonomy to the constituent entities of the federal State with respect to the international undertaking in question; the other provided for cases in which there were secondary internal legal orders as well as the primary one. Such cases were not confined to federal States: in the United Kingdom, for example, the legal order in Scotland was different from that applied in the rest of the country. That point needed to be clarified.

11. He was not sure what was meant by the term "autonomous" when applied to public corporations and institutions. It implied some degree of separateness from the governmental structure, but what degree of autonomy could a corporation or institution have before it ceased to be public? That was no longer a matter of mere definition, but was linked with one of the most difficult problems raised by article 7: what made a corporation or institution public in the sense that its acts engendered State responsibility? Was it ownership by the State, control by the State, provision of capital by the State, special powers conferred by the State, the exercise of powers normally exercised by the State—for example, eminent domain or nationalization of property—or was it a separate act of incorporation by a government unit, or a combination of such attributes? Article 7 left the answer to the internal law of the State. In view of the diversity of internal legislations and the great variety of institutions and corporations, the present draft might well be the only solution possible. It might nevertheless be useful to try to devise some criteria to serve as a guide. They might be based on the following points made by the Special Rapporteur in his commentary: "It seems logical that the decisive criterion here should be the nature of the functions performed and not whether they are performed by an organ of the State machinery proper or by an organ of a separate institution which is merely co-ordinated with the State ... This principle must also lead us to disregard, for the same purposes, the distinction between all the different institutions which, also in a public capacity, provide specific services for the community or perform functions considered to concern the community.[6]

12. That principle might be consolidated into a definition stating that an autonomous public corporation or institution was one which, in a public capacity, provided specific services for the community or performed functions considered to concern the community. The words "in a public capacity" would limit an otherwise broad definition, though the expression "public capacity" would itself be difficult to define. A government airline would be acting in a public capacity, whereas a privately-owned airline would be acting in a private capacity. However, it would be difficult to define the status of an airline operated as a fifty-fifty joint venture between the State and private enterprise, or an airline operated jointly by several States, or operated by a private company on behalf of the State under a management contract. A similar problem would arise in the case of jointly-owned or jointly-operated public utilities. At present there was little guidance on such matters in international law. In the *Oscar Chinn* decision of the Permanent Court of International Justice,[7] a Belgian Government-controlled shipping company operating on the river Congo, in which there had been substantial private stock holdings, had been held to be a public corporation because it had been operated as a public service. In a libel case against the TASS agency in London in 1948, a United Kingdom court had found that, although TASS had been incorporated as a legal entity separate from the State, it remained a department of the State for purposes of sovereign immunity, since it continued to function as a State organ.[8]

13. In his commentary, the Special Rapporteur had cited the *Case of Certain Norwegian Loans*, when dealing with the question of the possible relation between the principle of sovereign immunity and the problems of State responsibility.[9] But the main point at issue in that case had been whether a State should be subject to the jurisdiction of the courts of another State as a result of the acts of its public corporations or institutions. Although it might be useful to give some thought to the principle of sovereign immunity, that was unlikely to lead to a practical solution of the quite different problems of State responsibility. The question of sovereign immunity was as complicated as that of State responsibility, and the doctrine of the distinction between *res gestionis* and *res imperii* was still being developed.

14. Although, basically, internal law had to be the starting point for the criteria he had in mind, since corporations and institutions were established under internal law, it might be useful if the Commission prepared some guidelines on what it considered to be crucial factors in distinguishing between public and private institutions. In view of the many disputes that had arisen in the past, some guidelines for courts, which would in most cases be national courts, seemed necessary.

15. Mr. ELIAS said it was difficult to disagree with the principle stated in article 7, which was unassailable from the point of view of doctrine and State practice.

16. He was not sure, however, that the present draft properly expressed that principle. In contemporary international law, it was appropriate to emphasize the unity of the State, but there was also the question of decentralization. The State acted through organs which had a personality separate from that of the State under its internal law, and performed functions and provided services of a public character. The problem was to define what degree of decentralization could be provided for without enabling a State to disclaim responsibility for the internationally wrongful acts of its organs.

17. In view of the enumeration of different types of entities in the text of article 7, the reference to "public

[6] *Yearbook ... 1971*, vol. II, Part One, p. 256, para. 170.

[7] P.C.I.J. (1934), Series A/B, No 63.

[8] [1949] All E.R. 274.

[9] *Yearbook ... 1971*, vol. II, Part One, p. 255, para. 167.

institutions" in the title of the article did not adequately reflect its full content. It might therefore be advisable to have an article 1 defining the scope of the present set of articles, as explained by the Special Rapporteur in his introduction,[10] namely, that they were confined to those consequences of the acts or omissions of State organs which engaged State responsibility. It would then be clear that they were not concerned with liability for the harmful consequences of acts which were not necessarily of an internationally wrongful character, but which nevertheless engaged the primary liability of the State. A second article, entitled "Use of terms", might define such terms as "public institutions", "public corporations", "autonomous public institutions" and "autonomous administrations of dependent territories". That was a matter of some urgency, since without definitions the list of examples, which was not exhaustive, might be misleading. He was not in favour of omitting the list of entities in brackets or of relegating it to a footnote, since footnotes might be omitted after the adoption of the articles at a Plenipotentiary Conference.

18. He agreed with Mr. Yasseen that the wording of the article should not be too rigid to accommodate certain types of modern federal structure. It would be difficult to consider the various units of a federal State, as distinct from the federal State itself, as being wholly responsible for internationally wrongful acts. Mr. Kearney had mentioned the case of public institutions jointly established by two or more independent States. An example was the East African Commission, jointly established by Kenya, Tanzania and Uganda for the joint operation of airlines, railways and shipping lines. If that Commission was held liable by a court for an internationally wrongful act and had insufficient resources to pay the damages awarded against it, could proceedings be taken against the sponsoring States? Which "internal law" would apply in such a case?

19. He agreed in general with the points made by Mr. Kearney, but thought the article would be unduly complicated if it was to meet them all. It would be better to draft the article as simply as possible and deal with those points in a commentary, together with the explanatory material provided by the Special Rapporteur.

20. Mr. REUTER said that he approved of article 7 as a whole and agreed with the basic ideas set out by the Special Rapporteur in his introduction. He appreciated, however, the complexity of the problems raised by other members of the Commission, so he would confine his remarks to a few cautious considerations of a hypothetical nature.

21. As several members of the Commission had said, article 7 raised drafting problems which were bound up with questions of substance. In his opinion, the article was quite different from article 8 and stated a much more surprising principle; for it showed that in certain *de facto* situations international law made an attribution of responsibility which did not coincide with the attribution made in internal law. That contradiction between international law and internal law was at the root of a number of misunderstandings.

22. It was obvious that the attribution of responsibility in international law was subject to limitations: should they all be stated expressly, or should it be assumed that some were self-evident and need not be mentioned in the text of the article? For example, where the acts of certain territorial public entities were attributed to the State—a matter which would raise very few difficulties, since the practice was well established and commonly followed—he thought it was unnecessary to specify in the article the *de facto* limitations on the application of the rule. The rule would apply to all wrongful acts involving the violation of a customary or conventional rule which was silent on the problem of attribution. Admittedly, in regard to many conventions federal States made reservations on the attribution of responsibility, invoking the federal clause. But in his opinion that was a different question for which no provision need be made in the article and which it would suffice to mention in the commentary.

23. Article 7 raised another problem, referred to by Mr. Yasseen: that of composite structures which were not States, such as confederations, and the European or African Communities. In his view, that question was not relevant to the article under discussion, and the Commission should not deal with questions relating to international organizations, which were outside the scope of its study and would take it on to uncertain and dangerous ground. It was significant, in that connexion, that third States did not much like dealing with international organizations on questions of responsibility, as was shown by the Convention on International Liability for Damage caused by Space Objects,[11] for at the moment States offered better guarantees in that sphere than did international organizations.

24. The expression "*collectivités territoriales*" and its English equivalent ("territorial entities") were acceptable. The terms used to designate non-territorial entities, on the other hand, raised some difficulties, in particular with regard to entities which performed economic functions, not only in a socialist State, but also in a capitalist State in so far as it accepted socialist structures. Actually, those entities did not raise any problem in practice, for it was obvious that acts imputable to industrial or commercial bodies which were not organs of the State were not attributable to the State. Besides, he did not see how such bodies could commit internationally wrongful acts. For example, if a concern like the *régie Renault* violated a rule in an agreement made between the United States and France, it was obvious that the French State would be directly responsible if the violation took place in France, and that the United States Government would sue the *régie Renault* if the violation took place in the United States. That kind of problem should therefore be excluded.

25. With regard to the problem of immunity mentioned by Mr. Kearney, the question of the immunity of

[10] See 1251st meeting, paras. 3 and 4.

[11] General Assembly resolution 2777 (XXVI).

public undertakings had some very controversial aspects, and it would be preferable not to refer to it in the article. On the other hand, the Commission should take a position on the question of principle after considering the basis of the rule it was going to state. The reason why the rule existed was, in his opinion, that for practical reasons international law wished to treat the activity of the State—its essential, not its subsidiary activity—as a unity. Consequently, it was the standpoint of international law, not that of internal law, that had to be defined, and one could speak in terms of "functions" as the Special Rapporteur himself had done. If the text referred to "organs", it would have to specify that the term meant only certain entities which were not State entities, but had a structure which gave them a public law régime. However, the notions of public law and private law existed only in some systems of law and were meaningless for the Anglo-Saxon countries. The Commission should therefore avoid the term "organ" and any other expression which, like "public corporation", might suggest that a *renvoi* to internal law was intended. There were, moreover, cases in which a private organ was manifestly concerned, but a private organ which performed State functions—a situation corresponding exactly to the definition of the corporative State. He considered the term "functions" used by the Special Rapporteur acceptable, provided it was explained that it referred to the specific functions of the State.

26. Personally, he would prefer yet another expression to be used, namely, "prerogatives of public power" (*privilèges de puissance publique*). For where an entity that was not a State entity—whatever its status—exercised prerogatives of public power, in other words, where it exercised juridical, legislative, judicial, executive, physical or other compulsion, the State might be said to have split up. Thus he accepted the idea underlying Mr. Kearney's statement, though he was categorically opposed to any reference to immunities in the article itself. It should be noted that legal acts of a commercial nature, such as acts of exchange or sale, were never attributable to the State, even if carried out by a State body. By contrast, in the case of issuing banks, for example, regardless of their internal status—whether they were private companies or State bodies—the issuing of currency was a regalian privilege, so that in international law the acts of issuing banks in monetary matters could be attributed to the State, as was clear, moreover, from the cases concerning succession of States in monetary matters.

27. In conclusion, he accepted the principle stated in article 7, but would like the drafting to be made more precise. Like Mr. Calle y Calle, he thought it would be preferable to mention the territorial entities first, since they raised the fewest problems.

The meeting rose at 11.50 a.m.

1254th MEETING

Thursday, 9 May 1974, at 12.25 p.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.

Filling of casual vacancies on the Commission
(A/CN.4/276 and Add.1)

[Item 1 of the agenda]

The CHAIRMAN announced that at a private meeting the Commission, in conformity with its Statute, had elected Mr. Milan Šahović of Yugoslavia, to fill the vacancy caused by the death of Mr. Milan Bartoš. A telegram had been sent to Mr. Šahović inviting him to take part in the Commission's proceedings.

The meeting rose at 12.30 p.m.

1255th MEETING

Friday, 10 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.

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 1253rd 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*).

1. Mr. TSURUOKA said he thought that draft article 7 was useful, even indispensable; he approved of the principle it stated, in particular where territorial public entities were concerned. As to public corporations and other autonomous public institutions, it might perhaps be desirable to specify the criteria by which their public or private character could be judged. That point was certainly of interest to a country such as Japan, where,