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Summary record of the 1255th meeting

Topic:
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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,

in addition to a national railway system that was considered to be public under the internal legal order, there were about a hundred other railway companies.

2. Mr. SETTE CÂMARA said that, having attended the discussions in the Sixth Committee of the General Assembly, he could bear witness to the excellent reception given to the first six articles on State responsibility. The General Assembly's favourable reaction amounted to an endorsement of the fundamental principles that dictated the philosophy of the whole draft and was particularly significant in regard to the Special Rapporteur's approach to the topic, which departed from the tradition of confining it to the treatment of aliens.

3. He approved of the substance of article 7, which was supported by a masterly commentary. The principle of the unity of the State from the international standpoint was universally recognized; whatever a State's internal organization or degree of decentralization of the exercise of power—functional or territorial—the responsibility of the State in international law remained undivided.

4. With regard to the drafting of the article, he supported the Special Rapporteur's suggestion that it should be aligned with the new wording of article 5. As to the doubts expressed by Mr. Calle y Calle about the necessity of maintaining, in article 7, the distinction between two classes of entity, he thought there was some merit in maintaining that distinction: it served to remove all doubt about the kind of public entities to which the article referred—a useful purpose in view of the great proliferation of internal autonomous ramifications of the State. On the other hand, he supported Mr. Yasseen's suggestion that the enumeration, in brackets, of territorial public entities should be deleted. That enumeration should appear in the commentary to the article.

5. Mr. Yasseen's comment on the need to leave the door open for federations whose component states retained some degree of sovereignty in international life deserved careful study.[1] There had been cases in the past in which the responsibility of the Federal State for acts of its federated states had not been recognized; for example, in the *Robert Fulton Cutting case*[2] between Canada and the United States, Canada had refused to acknowledge responsibility, under the existing rules of international law, for the liabilities of the Province of Quebec. He himself supported the line taken in article 7 in its present form, because it would be very difficult to establish clear-cut limitations on the general rule of the unity of the State for purposes of international responsibility. Any such limitation would dilute the responsibility of the State and introduce an element of uncertainty into international relations. Perhaps the problem could best be solved by expressly excluding from the rule in article 7 cases in which the member states of a federation retained their international sovereignty, or at least a part of it. Modern federations were clearly moving in the opposite direction, towards curtailment of the autonomy of federated states; but some new experiments in federation might revert to the old formula of a loose union or confederation of States.

6. He agreed with Mr. Tammes that the repeated use of the word "organ" could be misleading, since that term usually meant an instrument of the State. Mr. Kearney had made a strong plea for a better definition of public corporations and autonomous public institutions; but it was not easy to find suitable criteria, because of the proliferation of those bodies resulting from the increasingly tentacular role of the State in modern society. Moreover, the growing intromission of the State into realms traditionally belonging to the private sector made it difficult to determine whether a particular entity acted as an organ of the State or not. The problem was still more complex when a corporation was owned partly by the State and partly by private persons, with the State often retaining privileges in regard to the appointment of directors.

7. For those reasons, he was in favour of retaining a general formula in article 7. It was important to remember that the draft dealt with responsibility in international law, where the principle of unity would always prevail. There were two faces to the coin: on one side, the solid, undivided image of the State; on the other, the complicated and intricate fabric of the instruments of action of the modern State. The first side—that of the unity of the State in international law—was sufficient for the purpose of establishing responsibility.

8. He found the substance of the article acceptable and supported Mr. Kearney's suggestion that the Special Rapporteur should try to improve the text in consultation with the other members of the Commission.

9. Mr. MARTÍNEZ MORENO joined in the tributes which had been paid to the Special Rapporteur for the excellent reception of draft articles 1-6 by the General Assembly.

10. He supported the main content of article 7. The principle it followed was consonant with the complexities of the modern State, which had had to become more decentralized in order to respond to the diversity and magnitude of its obligations towards the community. As the Special Rapporteur had pointed out, what mattered was not who performed a particular function, but the nature of the function itself. Responsibility in international law rested on the State because of the nature of the function, even if in fact that function happened to be performed by a body other than a State organ.

11. He had some doubts, however, about the attribution of responsibility for the conduct of component units of certain composite States. Traditionally, writers had drawn a distinction between a federation of states and a mere confederation, based mainly on the fact that, in the former, the conduct of external affairs and national defence were vested in the federal State, whereas in the latter, the international personality of the component units subsisted. Switzerland, despite its official title of "*La Confédération Suisse*", was thus clearly a federation. Doubts could arise, however, in regard to certain composite States which, although not confedera-

[1] See 1252nd meeting, para. 23.

[2] See G. H. Hackworth, *Digest of International Law*, vol. V, p. 561.

tions in the strict sense of the word, did grant a certain element of international personality to all or some of their component units. Should an internationally wrongful act be committed by such a component unit, the question would arise whether it should be attributed to the composite State or to the component unit. If the latter solution were adopted, it would be necessary to amend the text of article 7 by making specific provision for such exceptions.

12. As to the question of undertaking a separate study of the topic of international liability for injurious consequences of activities other than internationally wrongful acts, he suggested the introduction into the draft of an article on the scope of the draft articles, on the lines of article 1 of the Vienna Convention on the Law of Treaties. The purpose of such an article would be to specify clearly that the draft articles applied only to responsibility arising from internationally wrongful acts. That clarification was essential, because in the past certain drafts, such as the Guerrero report adopted by the League of Nations Committee of Experts for the Progressive Codification of International Law, had specified that "international responsibility can only arise out of a wrongful act, contrary to international law"[3]—a statement which was obviously no longer valid in contemporary international law. Thus an article on the scope of the present draft would serve to indicate that the draft articles did not cover all cases of international responsibility.

13. Several members had suggested the inclusion of an introductory article on the use of terms. He feared, however, that the task of drafting such an article would prove extremely difficult, and would tax to the utmost the wisdom and sagacity of the Special Rapporteur. He himself shared some of the doubts and criticisms expressed by other members on the subject of terminology, but was obliged to admit that none of the suggestions yet made would solve all the problems and dispel all the doubts that had arisen. For example, the term "organ" had a variety of connotations and did not have exactly the same meaning in different legal systems. The same was true of the term "autonomous public institution", which was not used in certain countries, but which had a very clear meaning in his own country, where it meant an entity set up by the State by legislative or administrative action, with State funds, but having the capacity to assume legal obligations of its own, having a separate board of directors and performing a particular public function. In that sense, a body like the Tennessee Valley Authority would be an example of an autonomous public institution.

14. He agreed with Mr. Kearney on the desirability of laying down guidelines in international law for determining the organs of public entities covered by article 7, so as not to leave the matter to be governed entirely by the internal legal order of the State. But in view of the diversity of such entities and the variety of functions they performed, and having regard to the present state of development of international law, he thought such international guidelines would be extremely difficult to formulate. His own conclusion, therefore, was that the Special Rapporteur's solution of referring back to the internal legal order of the State, although not ideal, was the only solution possible.

15. Two previous speakers—Mr. Elias and Mr. Reuter—had referred to the important modern phenomenon of common markets and customs unions, which had led to the establishment of certain supranational entities whose international responsibility could in no case be attributed to their member States. He suggested that the Special Rapporteur should make a careful study of that important subject.

16. Mr. BILGE said that article 7 complemented articles 5 and 6, according to which the conduct of any organ of the State, irrespective of its position in the State's organization, was considered as an act of that State in international law. Article 7 added that the acts of organs of public institutions could also be considered to be acts of the State. That rule was completely acceptable, since it expressed the position of States, jurisprudence and doctrine.

17. It should be noted, however, that article 7 did not only complement the two preceding provisions: it provided fuller particulars. As the Special Rapporteur had pointed out, it was in response to different needs that States established public corporations or other autonomous public institutions or territorial public entities. Those various institutions appeared to be separate from the State; they had their own personality and enjoyed a certain freedom of action. On the basis of the concept of the unity of the State as a subject of international law, the Special Rapporteur proposed that the acts of organs of those institutions should be regarded as acts of the State to which they were answerable. Those institutions were separate from the State under internal law so long as the term "State" was construed in its narrow sense; but they were nevertheless attached to the State, in its broad sense, in international law. It was clear from the cases cited by the Special Rapporteur that public institutions were merged with the State, in the broad sense of that term, in international law. That conclusion was particularly striking in regard to territorial public entities, since they had a material link with the territory of the State in the broad sense. Consequently, he could not accept the view that it was because federated states were not subjects of international law and because a subject of international law must be responsible for their wrongful acts or omissions at the international level, that the acts of federated states were considered to be acts of the federal State. If the Commission adopted that view, it would be led to accept other forms of international responsibility.

18. In several passages in his third report (A/CN.4/246 and Add.1-3), the Special Rapporteur implied that the rule laid down in article 7 was a rule of customary law or, at least, that it was already firmly established in practice and "in the conviction of States".[4] He might usefully clarify his position on that point.

[3] *See Yearbook ... 1956*, vol. II, p. 222, conclusion No. 1.

[4] See *Yearbook ... 1971*, vol. II, Part One, p. 259, para. 179.

19. Several members of the Commission had suggested that an attempt should be made to define "public corporations" and other "autonomous public institutions". There was, indeed, no definition of them in international law, and the definitions found in the different systems of internal law were not consistent. The Special Rapporteur had chosen to leave the matter to internal law. It might be asked, however, whether an objective criterion did not exist, though care must be taken not to deprive States of their freedom to choose their mode of internal organization, by imposing on them a definition of public institutions and corporations. It would be possible, for example, to adopt a definition based on the importance of the public functions performed by public institutions, without imposing it on States. Thus, if a State decided that a certain activity, such as air transport, was a public function under its internal law, it could not subsequently complain because another State did not treat that activity in the same way. It could even happen, as Mr. Kearney had observed, that some of the partners in a joint enterprise considered a certain function to be public, whereas others considered it to be private, relying on their respective systems of internal law. In short, he could not see any better criterion than that referred to in article 7, namely, internal law.

20. As far as the drafting was concerned, the title should be brought more closely into line with the body of the article, and instead of referring to the status of an organ of a public institution under internal law, it might be preferable to speak of the public character of the institution under that law.

21. Mr. USHAKOV said he agreed with the views expressed by the Special Rapporteur regarding the principle governing the draft articles as a whole, in particular the distinction between the causal responsibility of the State and the responsibility of the State for internationally wrongful acts.

22. As to article 7, at least as at present drafted, it seemed to him that it was out of place in the draft. It would seem to be sufficient to lay down the principle, as did articles 1 and 3, that any conduct which constituted a breach of an international obligation of a State under international law engaged that State's responsibility. Chapter II of the draft dealt with the attribution of certain acts to the State, in other words with the finding that, in certain cases, it was the State itself which acted. It seemed to him that it should be possible to cover all that was meant by "conduct of the State" without the aid of the provisions of chapter II.

23. A State was a collective body which could act only through its organs. By its nature, the State was a body invested with a power which it held exclusively: the State power. In that connexion, the expression "public power", which was sometimes used in connexion with public property, and which relied on the notion of ownership, should be avoided. Public property was not under the public power as such. Yet it seemed that the reference to public corporations in article 7 had sometimes been taken to mean corporations owned by the State.

24. While it was true that the organs exercising the State power in the legislative, executive and judicial branches were organs of the State—were indeed the State itself—it might be asked whether that principle was subject to exceptions. The answer to that question depended on the approach adopted. Where a State delegated its State power to a body, that body could be regarded either as an organ of the State or as a separate body not among those regarded as organs of the State in its Constitution, for example. The bodies in question might then be held to engage the responsibility of the State by reason of their conduct. That point of view might well be reflected in an article of the draft.

25. As it stood, article 7 dealt with two quite different categories of public institutions: territorial public entities, which certainly had the status of organs of the State, and other institutions which did not possess that status at all. It might be thought that territorial public entities should form the subject of a separate article; their organs were undoubtedly organs of the State. For example, the organs of the federated republics and autonomous republics of the Soviet Union were organs of the Soviet Union; and the organs of Sicily were organs of Italy. It mattered little how the State apportioned its power territorially. If any doubt remained on that point, it should be dispelled by article 5 or article 6.

26. Article 7 also dealt with autonomous public institutions, in particular with public corporations: the latter might be regarded either as bodies exercising the State power, in which case they were organs of the State, or as bodies belonging to the State, in which case they were simply endowed with juridical personality in conformity with civil law. In the Soviet Union, where private ownership did not exist, every factory belonged to the State. From the standpoint of ownership it was a public corporation, but from the standpoint of the State power, it did not exercise any delegated authority and did not commit the State by its conduct. If a Soviet factory concluded a contract with a foreign factory, it entered into civil law relations. In the Soviet Union there was a Soviet State Bank whose Director was a member of the Soviet Government, and which committed the Soviet State by its acts. Any other bank, like the Bank for Foreign Trade, was public property, but in no way committed the Soviet Union. Any contracts concluded by that bank with foreign banks were governed by the rules of Soviet civil law or by whatever other law was applicable according to the principles of private international law.

27. Whereas the conduct of the State remained unchanged however it was regarded, the legal characterization of that conduct might differ: an act could be lawful in internal law and wrongful in international law. The expression "conduct of the State" should be understood to mean the conduct of organs of the State properly so called, or of organs in which the State had vested some State power, that was to say, legislative, executive or judicial power. In his opinion the power of the State was one and indivisible, for the State was always a single entity. Hence one could hardly speak of autonomous public institutions, for there was no autonomy of power within the State. Either the institution in question was an organ performing State functions, in which case it belonged to the single entity of the State, or it was an

organ not belonging to the State. The so-called autonomy was in reality no more than a decentralization of the powers of the State, since no State power could exist outside the State: all organs performing State functions existed only within the State and were subject to the State power. The only exception to that rule occurred during certain transitional periods, when two State powers coexisted within the same State, as had happened in Russia between the February Revolution and the October Revolution, when the power of the official Government had coexisted with the power of the Soviets. Autonomous public institutions could not, therefore, be invested with State power or perform State functions.

28. In his commentary to article 7 the Special Rapporteur had cited, as an example of autonomous public institutions whose conduct would engage the responsibility of the State, the single parties which, in various countries, performed particularly important public functions.[5] But political parties, in the socialist as in other countries, were nothing other than social organizations. The Communist Party of the Soviet Union certainly exerted a very great influence on the policy of the State, for it enjoyed the support of all the people, but that did not mean that it was an organ of the State: it had its own ideology and formulated its own policy. The policy of a party could influence the policy of the State and be reflected in acts of the State and its organs, but those acts constituted the conduct of the State, not of the party itself. In that respect the Communist Party of the Soviet Union did not differ from the political parties of other countries, and its role had often been misunderstood in western countries. Article 126 of the Constitution of the Soviet Union showed that the Soviet Communist Party was only a social organization uniting all the citizens of the Soviet Union; that article appeared in Chapter X of the Constitution of the Soviet Union entitled "Fundamental Rights and Duties of Citizens", which did not deal with the organization of the State at all.

29. There might, admittedly, be bodies which were not State organs properly so called but exercised State powers by delegation, and whose acts engaged the responsibility of the State. That was the idea which ought to be developed in article 7. Could such public corporations engage the responsibility of the State with respect to public property? They could not do so directly by their conduct, because they were not organs of the State, but their conduct might result in a breach of international law and thus engage the responsibility of the State, in so far as the State had done nothing to prevent the wrongful act. The State would then be responsible by reason of an omission. In that sense the State was responsible for the conduct of any entity situated in its territory, whether that entity was an organ of the State or not, for any entity in a State's territory was subject to its power. For determining whether an entity was an organ of the State, the only guide must be the legislation and the legal order of the State concerned. That rule suffered only one exception: the case of persons or groups of persons who carried on their activities abroad and did not possess the status of organs of the State, but acted on its behalf. Within the territory of the State, nobody could act on behalf of the State unless authorized to do so by the State—except, of course, in the case of a struggle for power, when a *de facto* order preceded the establishment of a new legal order. Hence, the conduct described in article 8 could be that of persons situated abroad, but not of persons in the territory of the State.

30. Mr. TABIBI expressed wholehearted support for the general approach adopted by the Special Rapporteur to the question of State responsibility, especially in chapter I. That chapter would provide a basis in international law for judicial decisions in cases of State responsibility for wrongful acts committed in violation of a principle of international law, whether against a single State or against the community of nations.

31. Chapter II raised certain difficulties. He agreed with earlier speakers that the formulation of the rules, especially article 7, should be as broad and flexible as possible, to leave no loopholes for offenders. It would be wise not to try to list all possible State entities, as that might enable a State with a relatively simple structure to disown wrongful acts of one of its organs by changing the organ's status by decree or legislation, while encouraging it to continue to commit such acts. The only solution in such cases was to have appropriate machinery for settling the dispute between the injured party and the State committing the wrongful act. It was also possible that the entity committing a wrongful act on behalf of a State might not be regarded as a State entity under the proposed rules. For example, in some countries certain transport companies had a semi-official status. If such a company was authorized by the government to deny a land-locked country means of transport, for political or economic reasons, the effect might well be more serious than an act of aggression. The rules should not be so worded as to allow such acts to be committed with impunity. In some instances, not one State, but a community of States might be responsible for a wrongful act.

32. He agreed with Mr. Pinto that the Commission should not forget the great interest shown by the General Assembly in the question of international liability for injurious consequences of activities other than wrongful acts. That was an important subject with a bearing on the peace and economic life of developed and developing countries. Its economic aspect, in particular, should be carefully studied. The Commission should perhaps appoint a Special Rapporteur for that purpose.

Organization of work

33. The CHAIRMAN suggested that the enlarged Bureau should meet on Monday afternoon to consider the General Assembly's recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses (item 8 (a) of the agenda).

It was so agreed.

The meeting rose at 1 p.m.

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[5] See *Yearbook ... 1971*, vol. II, Part One, p. 254, para. 165.

1256th MEETING

Tuesday, 14 May 1974, at 10.10 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bedjaoui, 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, Sir Francis Vallat, Mr. Yasseen.

Organization of work

1. The CHAIRMAN announced that, in accordance with the Commission's instructions, the enlarged Bureau had met the previous day to consider the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) and had decided to recommend that the first step in the work on the law of non-navigational uses of international watercourses should be to appoint a five-member sub-committee, consisting of Mr. Kearney, as Chairman, Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi. The sub-committee would consider the matter and report to the Commission.

It was so agreed.

2. Mr. KEARNEY said he thought the Sub-Committee should not be exclusive and that any other members of the Commission interested in the subject should be entitled to attend its meetings.

3. Mr. BEDJAOUI noted with satisfaction that, on the proposal of Mr. Yasseen, the Commission had decided to institutionalize the office of Chairman of the Drafting Committee and to elect Mr. Hambro to that office.

4. As he was speaking for the first time during the session, he could not omit to evoke the memory of Mr. Bartoš and to recall his great qualities of heart and mind and his devotion to the cause of international law. Mr. Bartoš, who had been one of the founders of the Commission, had had wide experience, acquired in long practice in international bodies, and had left behind him as a monument his work on special missions. It would be difficult to replace him in the Commission, but Mr. Milan Šahović could certainly do so better than anyone else. Referring to the role played by Mr. Šahović in the adoption of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, he welcomed his election to the Commission.

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*)

5. Mr. EL-ERIAN noted with satisfaction the favourable reaction of the Sixth Committee of the General Assembly to the Special Rapporteur's conclusions, the criteria and methods he had adopted and the texts of articles 1 to 6. The Committee had accepted the distinction between "primary" and "secondary" rules, and had endorsed the Commission's decision to concentrate on the secondary rules and also to consider the question of responsibility for risk.[1]

6. In article 7, the inclusion of dependent territories in the list of territorial entities seemed unwise, for the same reason as had prompted the Commission to omit such a reference from texts it had adopted in the past, especially its draft on the law of treaties: protectorates and dependent territories would soon be a thing of the past and, since the Commission was legislating for the future, explicit provision for such cases was unnecessary. Moreover, a dependent territory was not an integral part of the metropolitan State, which merely assumed responsibility for the territory's international relations. The article should therefore be harmonized, in that respect, with other texts drafted by the Commission. The commentary to the article could include a paragraph explaining that point.

7. The reference to federal States might also raise a problem, because the federations formed in recent years, for example in the Middle East and Africa, were not federations in the traditional sense of the term as understood in international law, since their constituent elements retained their international personality. The classical federal State, for example the United States of America, was a composite State with a single personality in international law. He had no solution to offer, but hoped that the Special Rapporteur would find a way of overcoming that drafting problem.

8. Mr. RAMANGASOAVINA said he thought that article 7 definitely belonged among the articles relating to attribution to the State of the acts of various persons or groups of persons. The Special Rapporteur had submitted a draft article which was perfectly clear in scope and intention and had provided it with an excellent commentary, abundantly illustrated by examples drawn from international practice and the decisions of arbitral commissions and international courts. The article once again stressed the unity of the State for purposes of international responsibility, whatever the nature of the organ in question according to the internal legal order, and whatever the degree of attachment of the entity, political or administrative sub-division or autonomous public institution to the central power. The article did, however, call for some comments, some of which had already been made by other members of the Commission.

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[1] See document A/9334, chapter III, section B.