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Summary record of the 1260th meeting

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representation of the Commission at the Committee's next session.

The meeting rose at 1.10 p.m.

1260th MEETING

Monday, 20 May 1974, at 3.10 p.m.

*Chairman: Mr. Endre USTOR
Later: Mr. José SETTE CÂMARA*

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. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Welcome to Mr. Šahović

1. The CHAIRMAN welcomed Mr. Šahović among the members of the Commission.
2. Mr. ŠAHOVIĆ thanked the members of the Commission for the confidence they had shown in him by electing him to the seat that had been held by Mr. Bartoš. He paid a tribute to his predecessor, who had made an important contribution to the development of contemporary international law, and assured the Commission that he would do his best to discharge his duties.

Appointment of a Drafting Committee

3. The CHAIRMAN said that following consultations held by the Chairman of the Drafting Committee, it was proposed that the Commission should appoint a drafting committee of thirteen members: Mr. Hambro, the Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Elias, Mr. El-Erian, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat and Mr. Thiam, the Commission's Rapporteur.

It was so agreed.

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 8 (Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State) (*continued*).

4. Mr. BEDJAOUTI said he accepted the wording of article 8. At first, he had been somewhat hesitant about the place the article should occupy in the draft as a whole and had thought it might be inserted between articles 10 and 11. For articles 5, 6, 7, 9 and 10 related to the conduct of organs of the State or of separate public institutions, whereas article 11, like article 8, related to the conduct of private persons, and he had therefore thought that article 8 might be placed after article 10, so that it would introduce article 11. On further consideration, however, and in view of what the Special Rapporteur had said, he thought the Special Rapporteur had wished to stress the public character of the mission rather than the private character of the agent. Like the Special Rapporteur, he considered that the basic criterion for the application of the article was the public character of the mission, not the legal nexus which could exist between the person who had committed the act and the State itself. The private character of the agent was, indeed, less decisive than the public character of the mission, because one could speak of *de facto* agents or *de facto* officials. It was, however, necessary to agree on the meaning of the public character of the mission: for example, abductions were not carried out by public missions, but by missions that were usually repudiated by the State. In that connexion, he stressed that article 8 covered a very wide range of situations, in particular, the case of chartered companies mentioned by the Special Rapporteur in his third report,¹ which were really private companies that had appropriated attributes of public power for their own advantage.

5. Article 8 raised the problem of the engagement of the responsibility of the State, because that responsibility was limited in internal law. Thus attribution to the State of acts of private persons was subject, in internal law; to certain prior conditions which varied from country to country, such as the exceptional nature of the event which had motivated the act—accident, war, etc.—impossibility of the regular authority acting legally, the existence of exceptional circumstances at the time when the damage was caused, the public character of the act, etc. But the article did not formally refer to internal law for determining the public character of the act.

6. That problem could also arise in connexion with the subversive activities of multinational companies.

7. Another point worth noting was that the Organization of African Unity (OAS) was trying to adopt a code of ethics condemning political crimes committed against opponents of a régime who had taken refuge in foreign territory.

8. Referring to the case of the hijacking of an aircraft which had been carrying Algerian leaders during the Algerian war of independence, he asked whether the Special Rapporteur, who had taken part in the arbitration of that case, considered that it came under article 8 or article 10. If it was considered that the pilot of the aircraft in question was in fact an agent of the French

¹ See *Yearbook ... 1971*, vol. II, Part One, p. 263, footnote 382.

Government, the case came under article 8; but it was considered that the pilot had only carried out the orders of bodies which had exceeded their powers, the case came under article 10.

9. He was grateful to the Special Rapporteur for having raised a very important and complex question in article 8 and for having illustrated it, in his third report, by many interesting examples, although he had not referred to faked aircraft accidents, like those which had caused the deaths of General Leclerc and Dag Hammarskjöld, or to the Mattei case. He also wished to point out that although the Commission had, for the time being, left aside the question of responsibility for risk, that question nevertheless arose in regard to multi-lateral conventions which provided for liability based on the system of risk. Companies which carried out activities relating to outer space or atomic energy, for example, could engage the responsibility of the State if they were working on behalf of the State. He believed that that question was fully covered by article 8, even though the Commission declined to deal with the problem of responsibility for risk for the time being.

10. In connexion with the *Zafiro Case*, to which the Special Rapporteur had referred,² he mentioned the case of the requisition of ships in time of war, or anarchy, which generated a double responsibility of the State: the State was liable to third parties for damage caused by the requisitioned ship, and it was also liable to the ship's owner for damage to the ship and for loss of earnings resulting from the interruption of its commercial use.

11. Lastly, there was international responsibility relating to the existence of governments in exile or insurrectional movements, though he thought that problem was too complex to be dealt with under article 8.

12. Mr. TABIBI said he agreed with the Special Rapporteur that an article was needed to cover the cases contemplated in article 8. Those cases were quite different from the cases coming under article 7, which concerned the State's responsibility under international law for any act authorized under its internal law. The acts to which article 8 referred were not based on any legal or constitutional authorization; they therefore constituted an exception to the rule stated in article 7. And since the cases covered were not numerous, he suggested that they should be dealt with in a second paragraph of article 7. Merging the two articles into one would have the additional advantage of eliminating the title of article 8, to which Mr. Sette Câmara had objected.³

13. The CHAIRMAN, speaking as a member of the Commission, said that at first sight, article 8 had seemed attractive to him, but after hearing the statements made during the discussion he had some doubts about the difficulties it involved, to which the Special Rapporteur himself had already drawn attention in his third report. Those difficulties related not only to the problem of

stating the rule, but also to that of applying it, however it was stated. It was the practice of the Commission to try to adopt rules which were not too difficult to put into effect.

14. The Special Rapporteur had pointed out that since an act by a person invested with the legal status of a State organ was still not an "act of the State" if that person was acting only in a private capacity, it was also logical that "the act of a private person who, in one way or another, is performing a function or task of an obviously public character should be considered as an act attributable to the community and should engage the responsibility of the State at the international level".⁴ The proposition was indeed logical, but he, for one, had doubts as to whether a rule to that effect would be really workable.

15. To illustrate that point, he referred to the case of the region of pre-1914 Hungary formerly known as the Subcarpathian Ukraine, which had been inhabited by a Ruthenian population belonging to the Ukrainian Orthodox Church and clearly distinct from the Protestant or Catholic Slovak minority. That mountainous region, which had been assigned to Czechoslovakia by the Treaty of Trianon in 1920, had been occupied in 1939 by Hungarian troops, with Nazi encouragement, and declared to be once again part of Hungary. In October 1944, the Red Army had expelled the German and Hungarian forces in a matter of days, had freed the inmates of the concentration camps and had moved on in pursuit of the defeated enemy. In those circumstances, the liberating Red Army had not had time to reorganize the territory and had simply appealed to the population to carry on as usual. A vacuum had thus been created, in which very few of the former Hungarian officials had been able to carry on with the administration; in nearly all the cities, former Czech officials had occupied the town halls without even the knowledge of the Czech Government, then in exile. Subsequently, a referendum had been held and, in accordance with the overwhelming wish of its Ukrainian population, the territory had joined the USSR, thereby exercising its right of self-determination. The question he had in mind was that of responsibility for the acts performed by Czech officials during the interim period before the referendum: had those acts been performed as a public function, or should they be considered as having been performed on behalf of a State, and if so, which State? It was difficult to see which of the various States concerned should be held responsible for the acts.

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

16. Mr. AGO (Special Rapporteur), summing up the discussion, noted that the rule stated in article 8 seemed to have met with the general approval of the members of the Commission. It would, of course, be difficult to apply, as Mr. Tabibi and Mr. Ustor had pointed out, but that was no reason for not formulating the rule. In the case cited by Mr. Ustor, it was uncertain whether

² *Ibid.*, p. 264, para. 192.

³ See previous meeting, para. 23.

⁴ See *Yearbook ... 1971*, vol. II, Part One, p. 264, para. 191.

the former Czech officials who had resumed their functions had been *de facto* officials or real officials of the State, which had intended to go on exercising its authority; on the latter view, the case would come within the scope of article 5 and might raise problems relating to State succession.

17. He noted that it was the drafting of article 8 which had raised the most problems. Some of them were translation problems relating, in particular, to the difficulty of finding English equivalents for French terms; others were structural problems, like that mentioned by Mr. Kearney;⁵ and yet others were drafting problems, like those mentioned by Mr. Reuter.⁶ He thanked all those who had stressed that articles 5 to 13 should be considered in their logical sequence and in the whole context of chapter II. In particular, he thanked Sir Francis Vallat, Mr. Quentin-Baxter, Mr. Bilge and Mr. El-Erian, who had drawn attention to that fundamental aspect.

18. In that connexion, he pointed out that, in its report on the work of its twenty-fifth session, the Commission, in defining the object of chapter II of the draft—dealing with the subjective element of the internationally wrongful act—had distinguished three stages: first, establishing what persons could be the authors of conduct which might be considered as an act of the State according to international law; secondly, deciding, within that general context, whether conduct in all the different categories, in certain particular conditions should or should not be attributed to the State according to international law; thirdly, concluding the analysis on a negative note by stating the rules that indicated the categories of conduct for which attribution to the State was excluded, while examining what might be the international situation of the State in relation to such conduct (A/9010/Rev.1, para. 46). The Commission was now at the first stage, and was proceeding from the general to the particular and from the normal to the exceptional.

19. The most normal case was that stated in article 5, under which the conduct of an organ of a State was attributed to that State and could engage its responsibility. Article 7 dealt with a case that was exceptional as compared with that of article 5; for the position in internal law might be quite different from that in international law, since the acts of the entities in question might not be regarded as acts of the State in internal law, and so might not engage its responsibility in internal law. But the Commission should not concern itself with internal law. The rule on exhaustion of local remedies, the importance of which Mr. Tammes had stressed,⁷ might admittedly be very material, but it was not applicable only to the acts of organs of separate public institutions; it was equally valid for the acts of State organs. The Commission would see later, when dealing with the different aspects of the international delinquency, that the act of a particular organ might not

be internationally wrongful if the object of a certain rule of international law could still be attained through the action of another organ distinct from that which had acted contrary to the rule.

20. Article 8 dealt with a more exceptional case than that covered by article 7, for it concerned the attribution to the State of the acts of *de facto* organs, in other words of persons who, while not State organs in law, had acted in fact as though they were State organs. Mr. Reuter had pointed out that such persons had no organic link with the State, but in fact acted as though such a link existed, and had proposed that they should be defined by a cross reference to article 7.⁸ It would be for the Drafting Committee to decide whether that proposal was acceptable.

21. Article 9 dealt with an even more exceptional case: that of the attribution to the State, as a subject of international law, of acts of organs placed at its disposal by another State or by an international organization. Thus there was a logical sequence from article 5 to article 9.

22. Mr. Kearney had drawn attention to the possible overlapping of articles 7 and 8.⁹ In his (the Special Rapporteur's) opinion the two articles did not really overlap. In practice, of course, there were always borderline cases about which it was difficult to decide whether they came within the scope of one article or another. But it was precisely in cases of that kind that interpretation of the rules of international law became necessary. The American Telephone and Telegraph Company, for example, was not a State entity. Normally, if that company committed on its own account an act harmful to States or foreign individuals, the case would come under article 11: the act was that of a private person acting as such, which was not attributable to the State, though that did not prevent the State's responsibility from being engaged in so far as the State was guilty of an omission because it had not done what it should have done to prevent or punish the conduct in question. But if the State had entrusted the company with the exercise of certain prerogatives of public power, then an act committed in the course of such exercise could be attributed to the State and engage its international responsibility as such, by virtue of the rule in article 7. Lastly, it was not impossible that the company's act could be attributed to the State under article 8, if the necessary conditions were satisfied—action as a *de facto* organ or at the instigation of the State. It was clear that all those eventualities might call for different solutions; but the important point was to establish the principles and formulate them as simply as possible.

23. So far as the position of the article was concerned—a question raised previously by Mr. Kearney, and at the present meeting by Mr. Bedjaoui—the logic of chapter II required that the provisions should first indicate what could be attributed to the State and then what could not. Article 8 dealt with the attribution to the State of the act of a person acting as *de facto*

⁵ See 1258th meeting, paras. 10-14.

⁶ *Ibid.*, paras. 19-22.

⁷ *Ibid.*, para. 16.

⁸ *Ibid.*, para. 21.

⁹ *Ibid.*, paras. 10-14.

organ of the State; hence it was in its proper place after articles 5 and 7. Besides, he thought it preferable first to consider the draft articles in the order proposed; the rule under study could hardly be put in an article which had not yet been considered.

24. Like Mr. Ushakov, he thought that the exceptional nature of the situation contemplated in article 8 should be emphasized. Its exceptional nature was evident merely from the position of the article, however, and had been expressly mentioned in his third report. Furthermore, the cases covered by the article, though exceptional, were not very rare, for even the exceptional could be relatively frequent.

25. He did not think that acts committed during a civil war should be disregarded, as Mr. Ushakov maintained, for that would exclude many cases in which the international responsibility of States was engaged. In his opinion the codification of State responsibility should cover violations of the law of war as well as the law of peace. An article in chapter III should be devoted to defining the most serious international offences; such as war of aggression, massacre of prisoners of war and bombing of civilian objectives. Those cases could not be left out of the draft without indirectly reducing the scope of the rules stated. Besides, it was difficult to define notions like self-defence and reprisals if the law of war was not taken into account. The Commission would have to reflect on that problem.

26. With regard to Mr. Reuter's question whether the two conditions stated in the article were cumulative or separate,¹⁰ the members of the Commission had already answered it by pointing out that there were really two distinct cases. The first case was that of the *de facto* exercise, in an abnormal situation, of a prerogative of public power. Mr. Ramangasoavina had spoken of the spontaneous action of a private person in the event of failure of the machinery of the State.¹¹ In that case there was no connexion between the private person and the State. The private person's action would have to be justified, as Mr. Ramangasoavina had said, by a genuine failure of the authorities to act. In the event of such failure, the action was automatically attributable to the State. The second case was that of a private person who was in reality an agent of the State, as in the cases mentioned by Mr. Bedjaoui, but who was not legally regarded as an organ of the State. In that case there was a connexion between the private person and the State, but not a legal connexion.

27. He did not think it would be advisable to introduce into the article such notions as authorization, approval or ratification, which might provide means of evasion. The only point to be determined must be whether the private person had acted or had not acted on behalf of the State, whatever the State's attitude might be. Hence the real problem was that of evidence, as Mr. Ushakov had pointed out.¹² In the cases cited, States had never challenged the actual principles of at-

tributability to the State and responsibility; but in specific cases they had denied originating the offending act. In that situation it was much more difficult to produce the evidence, for what had to be proved was an act which the State was trying to conceal. The importance of the evidence might perhaps be stressed by stipulating that it must be "established" that the condition laid down in the article was fulfilled.

28. With regard to the contractual liability mentioned by Mr. Kearney,¹³ several members of the Commission had observed that that was a difficult question which had better be held over. He himself considered that it belonged in a different sphere, for contractual obligations did not normally come under international law, but under internal law. Hence, it would be better not to mention that question in the article. Similarly, it would be better not to introduce the question of the criminal liability of individuals into the draft articles, since that question was outside the topic of the international responsibility of States.

29. So far as terminology was concerned, he thought the word "*public*" (*publico*) was very clear in French and Spanish; equivalent terms should therefore be found in English and Russian, for although the English word "public" was certainly not synonymous with the French word "*public*", it would be absurd to abandon the use of the word in French and Spanish for that reason.

30. In conclusion he thought the idea expressed in article 8 was clear and should be adopted. He hoped the Drafting Committee would succeed in formulating it satisfactorily.

31. Mr. USHAKOV said he had never suggested that the cases of international war, civil war or war of liberation should be excluded from the draft. He had merely remarked that some situations were very exceptional and should be dealt with separately. Cases of war could hardly be covered by article 8. He had also referred to article 13, which concerned the entirely exceptional case of successful insurrectional movements. As in other drafts prepared by the Commission, cases of war should form the subject of separate provisions.

32. With regard to evidence, he stressed that in the cases contemplated in articles 5, 6 and 7, responsibility must be proved in conformity with internal law, whereas in the case of article 8, proof was also necessary, but without reference to the internal legal order. The need to produce conclusive evidence should be clear from the text of the article.

33. Mr. AGO (Special Rapporteur) pointed out, in reply, that the cases to which Mr. Ushakov appeared to be referring were not those contemplated in article 8; moreover, they were not expressly mentioned in the commentary. As to the requirement of conclusive evidence in the cases covered by article 8, he had proposed that it should be expressly stipulated.

34. The CHAIRMAN suggested that draft article 8 should be referred to the Drafting Committee for con-

¹⁰ *Ibid.*, para. 22.

¹¹ See previous meeting, para. 7.

¹² See 1258th meeting, para. 25.

¹³ *Ibid.*, para. 12.

sideration in the light of the comments and suggestions made by the members of the Commission.

*It was so agreed.*¹⁴

Mr. Ustor resumed the chair:

ARTICLE 9

35. The CHAIRMAN invited the Special Rapporteur to introduce article 9, which read:

Article 9

Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization

The conduct of a person or group of persons having, under the legal order of a State or of an international organization, the character of organs and who have been placed at the disposal of another State, is considered to be an act of that State in international law, provided that those organs are actually under the authority of the State at whose disposal they have been placed and act in accordance with its instructions.

36. Mr. AGO (Special Rapporteur) said that draft article 9 served to complete the catalogue of acts attributable to the State and capable of engaging its responsibility. The article dealt with the acts of organs placed at the disposal of a State by another State or by an international organization. It was important to specify at the outset that the organs in question must really have been placed at the disposal of the State. That was not the case, for example, where the organs of a State performed certain functions in foreign territory in their capacity as organs of that State, such as ambassadors, consuls, or armed forces stationed abroad. French writers used the term "*organes prêtés*" (organs lent), whereas English writers used the rather imprecise expression "*transferred servants*". The essential point was that the organ lent should be effectively under the control and authority of the State at whose disposal it was placed.

37. In his third report he had given a number of examples of organs placed at the disposal of a State.¹⁵ With the intensification of inter-State relations and the development of bilateral and multilateral assistance programmes, such situations would probably occur more frequently in the future. Obviously, the draft should not deal with cases—obsolete, it was to be hoped—in which a State claimed to place police or other forces "at the disposal" of a State under its domination, which was in fact equivalent to an absorption or a usurpation of functions. It was clear, moreover, that such organs continued to depend on their home State and remained under its control and authority.

38. The jurisprudence and the practice of States which he had quoted in his third report,¹⁶ showed that it was on the basis of the effectiveness of the control and authority exercised by the State to which the organ had been lent that its responsibility had been considered to

be engaged by the internationally wrongful acts of that organ. In that connexion, he referred in particular to the *Nissan Case* of which an account was given in paragraph 208 of his third report.¹⁷

39. Without going into the question of the responsibility of international organizations, he had cited, in his third report, certain cases involving international organizations, in order to show that the principle stated in article 9 was also recognized for the acts of organs placed by States at the disposal of international organizations. Sometimes the organ placed at the disposal of an international organization by a State continued to carry out the instructions of that State and the responsibility of the international organization was not engaged. But the organ might act on the instructions of the international organization, in which case the organization would be responsible. That was what had occurred in the dispute between the Belgian Government and the United Nations, following the intervention of the United Nations force in the Congo in 1961.¹⁸ Another instance worth mentioning was the *Romano-Americana Case*,¹⁹ in which damage had been caused to an American company by the act of an organ of the United Kingdom placed at the disposal of Romania under an agreement between those two countries.

40. Writers were almost unanimous in accepting the principle stated in article 9. Since his third report had appeared, other writers had expressed the same view, in particular in Poland, the Soviet Union and the German Democratic Republic.

41. Mr. REUTER said he approved of draft article 9. He suggested that the cases relating to international organizations which the Special Rapporteur had cited in his third report should also be mentioned in the commentary to the article. Without going into the question of the responsibility of international organizations, he wished to point out that certain judicial decisions had recognized a joint responsibility of the State and the international organization concerned. Those questions had often raised great difficulties, particularly in the European communities.

42. As in the case of the preceding article, he wondered whether the two conditions stated at the end of the text were cumulative. It seemed necessary, first, that the organs lent should be "actually under the authority of the State at whose disposal they have been placed" and secondly, that they should "act in accordance with its instructions". Perhaps it was going too far, however, to require that they should be acting on instructions. That wording suggested that instructions were necessary, whereas an organ could act spontaneously, act in error or be corrupted, in which cases there were no instructions from the State; moreover, it was difficult to imagine that a State would give instructions to commit a breach of international law. In his opinion it mattered little whether the State alleging the internationally

¹⁴ For resumption of the discussion see 1278th meeting, para. 14.

¹⁵ See *Yearbook ... 1971*, vol. II, Part One, p. 267, para. 200.

¹⁶ *Ibid.*, p. 269, paras. 203 *et seq.*

¹⁷ *Ibid.*, p. 271.

¹⁸ *Ibid.*, p. 273, para. 212.

¹⁹ See G. H. Hackworth, *Digest of International Law*, vol. V, pp. 702-705 and 840-844.

wrongful act could or could not prove that there had been instructions from the State to which the organ had been lent.

43. Mr. TABIBI said he supported the underlying principle of article 9, because the kind of case it applied to was quite common, especially in newly established States, which were often assisted by experts from international organizations or from other States, who might commit acts that were wrongful under international law. There was no machinery for the settlement of disputes arising out of such acts, and it might be difficult to persuade a government to accept responsibility for them. Admittedly, the cases article 9 was intended to cover were not quite the same as those he had in mind, but they might still be difficult to settle without appropriate machinery, as had been demonstrated in the Nissan case, cited by the Special Rapporteur.

44. The circumstances of each wrongful act committed by a person or organ placed at the disposal of a State by another State or by an international organization might be different. For example, United Nations operational, executive and administrative personnel (OPEX) were in a different position from other United Nations experts, because they were generally employed by the recipient States as high-ranking civil servants and were often placed in charge of banks, municipalities or postal services. They were in positions of responsibility and their promotion and salaries were determined by the recipient government, but they were nevertheless answerable only to the United Nations. If they committed a wrongful act, no direct proceedings could be instituted against them and any charges had to be referred to the Secretary-General of the United Nations. It would be useful if article 9 could be made to cover such cases.

45. Sir Francis VALLAT said he supported the proposed text of article 9, subject to one or two points of drafting and his agreement with Mr. Reuter's remarks.

Commemoration of the twenty-fifth anniversary of the opening of the first session

[Item 2 of the agenda]

46. The CHAIRMAN suggested that the Commission's twenty-fifth anniversary commemorative meeting should be held on Monday 27 May, and that statements should be made by Mr. Suy, the Legal Counsel, by the President of the International Court of Justice, or, if he was unable to be present, by a former member of the Commission who was now a judge of the Court, and by the former Chairmen of the Commission who were present.

It was so agreed.

Question of treaties concluded between States and international organizations or between two or more international organizations.

[Item 7 of the agenda]

47. Mr. REUTER (Special Rapporteur) said he understood that the Commission intended to devote two or

three meetings during the week of 10-14 June to consideration of his report. In order to save time, and as he thought the report was of secondary importance, he asked members of the Commission to consider departing from the method of work traditionally followed in examining the main reports and to submit their first comments to him in writing during the next three weeks.

The meeting rose at 6.5 p.m.

1261st MEETING

Tuesday, 21 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. Sahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, 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]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 9 (Attribution to the State, as a subject of international law, of the acts of organs placed at its disposal by another State or by an international organization) (continued).

1. Mr. ELIAS said that the generally recognized principle underlying article 9, embodied three ideas: that an organ and its services might be transferred or lent to a State by another State or an international organization; that such a transfer or loan carried with it the power to control the organ, bringing it within the authority of the recipient State; and that, to be attributable to the recipient State, an act or omission by such an organ must be within the scope of that State's ostensible authority. The essential considerations were the purpose of the transfer, the degree of authority to be exercised by the recipient State, and whether the organ concerned had carried out its assignment rightly or wrongly under international law. The present formulation of the rule seemed appropriate, subject to the alignment mentioned by the Special Rapporteur and some drafting amendments to make it clear that the recipient State could be held responsible only for acts which fell within its ostensible authority.

2. Mr. YASSEEN said he approved of the rule stated in article 9. Owing to the closer links of co-operation between States, and between States and international organizations, the cases contemplated in article 9 would