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Summary record of the 1262nd meeting

Topic:
State responsibility

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

la that took account of that problem as well as Mr. Ushakov's objections.

37. Mr. CALLE Y CALLE said that during the discussion of article 8, Sir Francis Vallat had drawn attention to the various categories of conduct covered by chapter II.[8] He himself wished to draw attention to the fact that the whole of chapter II was intended to define the various sources of conduct which gave rise to State responsibility, because the acts in question were considered as acts of the State according to international law. Article 5, which was the first provision of chapter II, dealt with the conduct of organs of the State, understood as the basic elements of the State structure. In the following articles, however, the term "organ" was used in the wider sense of a subsidiary organ. It was in that wider sense that the term had to be construed in article 9.

38. The provisions of article 9 were necessary, to show that responsibility for the acts of transferred organs or servants rested not on the lending State, as would normally be the case, but on the recipient State. The key condition, for the purposes of that attribution, was that the organ should be effectively under the authority of the State at whose disposal it had been placed. The article added the requirement that the organ should have acted "in accordance with" the instructions of the recipient State. He would prefer to use the broader expressions "under the instructions" and "*bajo las órdenes*" in the English and Spanish texts.

39. He could give a practical example in support of article 9, taken from experience in his own country during the disastrous earthquake of 1970. Among other forms of aid, Peru had been lent manned helicopters by the Soviet army and the United States navy, and a battalion of Swedish military engineers, placed at the disposal of the United Nations, had been lent by that Organization, which had borne the cost of certain relief operations. Clearly, if the foreign military personnel in question had committed any internationally wrongful act, the responsibility should have been borne by Peru and not by the lending State concerned.

40. There could be no doubt that article 9 dealt with a practical phenomenon of contemporary international life. With the growth of multilateral and bilateral technical assistance schemes, it was becoming increasingly common for officials, experts and agents of one country to be lent to another. There were also cases in which States placed their agents at the disposal of an international organization, and it was necessary to protect the lending State from having to bear international responsibility for acts performed by such agents when acting on behalf of the organization.

41. In the case of organs lent by an international organization to a State, difficulties could arise from the fact that the international personnel concerned sometimes retained their privileges and immunities, thereby preventing the recipient State from resorting to local remedies. That State might then be held responsible for its inability to apply sanctions for internationally wrongful acts.

42. He found the provisions of article 9 logical and coherent, and supported their inclusion in the draft.

43. Mr. SETTE CÂMARA supported the proposal to introduce a provision on the use of the term "organ", in order to solve the problem raised by the divergence of views on the subject.

44. Article 9, which dealt with "transferred servants", had its place in the draft and would serve to close any loopholes that might enable a State to escape responsibility. The cases listed in support of the article in the Special Rapporteur's third report[9] showed that its provisions dealt with realities of present-day international life and not with theoretical or academic hypotheses. He found the contents of the article satisfactory and agreed that it should be sent to the Drafting Committee.

45. As to the drafting, he thought it unnecessary to include the words "as a subject of international law" in the title or the words "in international law" in the text, since the title of chapter II showed that the whole chapter dealt with "The act of the State according to international law". In addition, he suggested that the words "that State" should be replaced by the words "the latter State", in order to remove the ambiguity created by the fact that two different States were previously mentioned. The term "legal order" was usually employed only with reference to a State. In the case of an international organization, it seemed more appropriate to refer to its "constitution", "statute", "constitutive treaty" or "constituent instrument".

46. On a point of substance, it was desirable that the article should cover the lending of autonomous public institutions. For example, in Brazil there was a State company called Petrobras, which had the monopoly of oil prospecting and production and which was a typical "public corporation" of the kind mentioned in article 7. It was quite common for that company to lend its services to other South American countries. Since it was not an organ of the Brazilian State, such loans would not fall within the terms of article 9. He would be glad to know the views of the Special Rapporteur on the possibility of covering that case, and also the case of territorial public entities which might place servants at the disposal of foreign States.

The meeting rose at 1 p.m.

[8] See 1259th meeting, para. 2.

[9] See *Yearbook ... 1971*, vol. II, Part One, pp. 269-273.

1262nd MEETING

Wednesday, 22 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. Šahović, 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]
(continued)

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. AGO (Special Rapporteur) said that the substance of the problem should not be neglected. Some members of the Commission had said that article 9 raised a drafting problem, while others had said that there was a problem of terminology. He himself did not think it was only a problem of drafting or terminology, for he was convinced that words had no meaning in themselves, but only the meaning given to them. In his opinion, it mattered little whether one spoke of "organs" or "agents"; the important point was to agree on the reality it was desired to describe.

2. In French terminology, as in Italian and Spanish terminology, the term "organ" did not raise any problems, because it covered both the most important and the least important organs of the State. There were individual organs, such as the President of the Republic, and collective organs, such as parliament; but there were also other organs, within the framework of the executive power and the administration. Mr. Ushakov was right in saying that a member of parliament was not an organ of the State, because a parliament was a collective organ which could only act collectively. But there were other organs which were both collective and composed of individual organs: for example, a government was a collective organ, but each of its members was an organ which could act individually on behalf of the State. Similarly, all the members of the administration, at all levels of the hierarchy, were always organs of the State, and they could act on behalf of the State.

3. With regard to the translation of such terms into other languages, the definition of the term "organ" given in *The Oxford English Dictionary* seemed to confirm that that term was used correctly in the English version of article 9, though there was some doubt in constitutional law, because certain writers preferred the term "agent". Some Russian writers seemed to use the terms "organ" and "official" interchangeably in the cases covered by article 9.

4. It was, however, relatively seldom that the higher organs of a State committed internationally wrongful acts. Of course, the president of a republic or the parliament of a State could decide to wage a war of aggression, but the most frequent wrongful acts were committed by officials, including those of low rank. He therefore proposed that the terminology used should be unambiguous and cover all the possibilities for internationally wrongful acts.

5. Sir Francis VALLAT said that after that very helpful explanatory statement he wished to clarify his own position on the problem raised by the term "organ". He had not objected to the use of that term; he had simply felt misgivings that English-speaking lawyers might take it to refer more to the juridical concept of the entity than to the individual servant. In that perspective, the act of a minor official was regarded as an act of the State because it constituted the act of an organ—in the sense of an entity—and thereby engaged the responsibility of the State. He was therefore concerned that if too much emphasis was placed on the concept of an "organ", many English-speaking lawyers would not immediately understand that it was intended to include the act of individual agents. That point was particularly relevant to article 9. It was essential that the article should be understood to cover not simply the case of a State placing one of its organs, as a juridical entity, at the disposal of another, but also the more frequent case of a State placing the persons who worked for one of its organs at the disposal of another State. He had been content to leave the matter to the Drafting Committee because he thought the words "who have been placed at the disposal of another State" could very well be taken to mean placing an organ at the disposal of another State through the instrumentality of the individual servant concerned.

6. Mr. PINTO said he agreed with the principle stated in article 9. The article dealt with situations which occurred in practice and had to be covered. For instance, his own country, some two years previously, had borrowed some small military units from friendly Asian States to deal with certain internal defence problems, and those forces had operated under the command of the authorities of the recipient State. He could also cite the example of engineers loaned by the Government of his country to another Asian country; it was expected that, under the agreements being negotiated, those engineers would have the status of civil servants of the recipient State and would act under the direction of its authorities. The provisions of article 9 dealt with that type of situation very aptly.

7. With regard to the use of the term "organ", he himself understood that term in the sense used by the Special Rapporteur. He was grateful to Mr. Ushakov, however, for raising a problem which had led to clarification in the subsequent discussion, and he agreed with Mr. Yasseen that the matter could well be dealt with by a definition.

8. He supported the two concurrent requirements for attributing responsibility to the recipient State, but felt some misgivings about the formulation of the second; he suggested that it should be amended to read: "act within the scope of that State's authorization". That form of words was preferable, because instructions might not be given in a particular case.

9. In the case of a foreign expert on loan to a country, the so-called "hold harmless clause" was often used to protect the expert from claims arising out of his acts which might be brought by third parties. In the classic case, that clause operated in such a way that the recipient State stepped into the shoes of the expert and conducted the suit in his place. The Government of his country had resisted the inclusion of that clause in tech-

nical assistance agreements, largely because it had been found almost impossible to apply under its own procedural laws. Even the "hold harmless clause", however, was not absolute and did not protect the expert from claims arising out of his gross negligence or wilful misconduct. He therefore agreed in principle with Mr. Tsuruoka's suggested addition of the saving clause "unless otherwise agreed between those States or between the State and the international organization concerned". A clause of that type would provide for the exceptions in question.

10. He agreed with those members who found that the rule, as drafted in article 9, might be rather too rigid in that it referred only to the responsibility of the recipient State; but he had not read article 9 as excluding the responsibility of any other State or of an international organization. If there was any doubt about the matter, he would favour the inclusion of an additional paragraph on the lines proposed by Mr. Tammes.[1] A provision of that kind would serve to establish the parallel liability of the lending State where it placed the organ at the disposal of the recipient State for a wrongful purpose, such as aggression. The principle should be that, where the purpose for which the organ was lent was wrongful in itself, the lending State and the recipient State were jointly responsible.

11. During the discussion of article 8, he had suggested that in deciding whether or not responsibility should attach to the State for the acts of private persons, the internal law of the State should play a part, though not necessarily a decisive one.[2] Article 9, in requiring that the act should be in accordance with the recipient State's instructions, followed the practice of giving a role to local law and he agreed with that approach. During the discussion of article 8, however, several members had taken the view that the situation covered by that article was one in which local law was impossible to apply because a real lacuna existed. He wished to place on record his view that, under article 8, internal law must have a role in determining responsibility.

12. Article 8 dealt with certain extraordinary situations in which the normal law-enforcement agencies had temporarily disappeared. It would be wrong, however, to describe the situation as one in which law and order had broken down to the point of being non-existent. The law of the country was still there and it could still play a part in determining international responsibility. In fact, the acts in question, although not specifically required by internal law, were either acts permitted by that law or on which the law was silent, or acts which had been approved or should be deemed to have been approved by the State subsequently. His reason for stressing the role of internal law was that it was the people of a State who ultimately had to pay when the State was held responsible. The question he asked himself was whether, in a given case, the people ought to feel able to accept the responsibility and burden of restitution or performance. He believed that the law created and enforced by the people should constitute the link between the people and responsibility. Hence a role, though not a decisive role, should be given to internal law.

13. Mr. USHAKOV said he doubted whether the English text of article 9 really corresponded to the French text. In his opinion, the words "actually under the authority of the State" did not have exactly the same meaning as the words *"relèvent effectivement de l'autorité de l'Etat"*.

14. Mr. AGO (Special Rapporteur) said he only assumed responsibility for the French text he had drafted. His knowledge of English did not enable him to see a very definite difference between the two phrases referred to by Mr. Ushakov, but, if there was a difference, the two texts should be brought into line. In his opinion, however, the important point was to render the terms *"autorité"* and *"effectivement"*, which, as Mr. Bedjaoui had emphasized at the previous meeting, were the two essential terms in the present context.

15. He also wished to clear up a misunderstanding by defining the meaning of the words "act in accordance with its instructions", to which there had been a number of reactions. He had not meant that the organ which committed the wrongful act must have acted, in the case in question, in accordance with instructions from the recipient State. What he had meant was that the organ must receive instructions from the recipient State only, which ruled out the possibility of its continuing to receive instructions from its home State.

16. Mr. REUTER said that at the previous meeting Mr. Bedjaoui had put a very pertinent question and Mr. Ushakov had expressed some genuine fears which ought to be taken into account. He, too, wished to put a number of questions. In the first place, he wondered whether article 9 related only to cases in which there was an agreement between the two States concerned and whether the expression "placed at the disposal of another State" should be interpreted as referring to such an agreement. If so, that would exclude certain situations which Mr. Ushakov wished to be reserved—in particular coercion and war. In that case the Inter-Allied Control Council in Germany, which had been an organ of the Allied States, but had also represented the German State, would not come within the scope of the proposed provision, since there had been no agreement between the German State and the Allies.

17. If the only situation to be covered was that in which there was an agreement between the two States, then relations between the two States which had signed the agreement must be distinguished from relations with third States. In relations between the two signatory States, it was the agreement which determined how responsibility was to be attributed to one State or the other. But many agreements were silent on the point, so that article 9 would be a residuary rule: its purpose would be to settle points that were not settled by the agreement.

18. As to relations with third States, in principle, the provisions of an agreement between two States could not be invoked against a third State. Hence, the object

[1] See previous meeting, para. 26.

[2] See 1259th meeting, para. 14.

of article 9 would be to establish an objective criterion with the sole purpose of protecting the third State, which was unaware—and perhaps had a right to be unaware—of the agreement. If that were so, two further questions arose. First, were the factual criteria by which a third State could attribute responsibility to one or other of the two signatory States entirely different from those adopted in a different situation in article 8? Secondly, if the purpose of article 9 was to protect third States, were those States entitled, in a doubtful case, to choose between the two signatory States? Should they not be regarded as jointly responsible? He recognized that the last question was difficult to answer at present, because it involved problems connected with the notion of joint authorship of an offence.

19. Mr. MARTÍNEZ MORENO said that he fully supported article 9, the provisions of which were both logical and well-drafted. He thanked the Special Rapporteur for explaining that the words "in accordance with its instructions" were intended to make it clear that the person or group of persons concerned must not be receiving instructions from the sending State or organization. At one point, he himself had understood those words as intended to exclude objective liability, so that the responsibility of the recipient State would only exist in the event of an actual wrongful act being committed.

20. In the light of Mr. Bedjaoui's comments, he urged that it should be stipulated that the organ must have been placed at the disposal of the recipient State with its consent. There had been cases in which a foreign organ had been imposed on a State. One example was the Hapsburg Emperor Maximilian, of whom it could rightly be said that, notwithstanding the invitation he had ostensibly received from certain circles in Mexico, he had been imposed upon that country as Emperor by Napoleon III.

21. With regard to responsibility for the acts of experts placed at the disposal of a State by an international organization, he suggested that some provision should be made for certain possible exceptions. International experts had been known to make mistakes in their forecasts of a country's food production. Even if such a mistake happened to cause injury to a third State, it would be going too far to allow that State to hold responsible the recipient State which had employed the international expert. Possibly the problem could be solved by stating that the recipient State was responsible "as general rule" for the acts of persons placed at its disposal by an international organization.

22. The CHAIRMAN, speaking as a member of the Commission, said that a case going back to 1603 was cited by Satow, in which the Duc de Sully, who had been sent on a special embassy to King James I by the King of France, had asked the Mayor of London for the services of an executioner to behead a French member of his mission whom he had condemned to death for killing an Englishman in a quarrel. The Mayor had counselled moderation, and the offender, after being surrendered to English justice, had been pardoned by King James I.[3] Had the Duc de Sully obtained the services of the executioner, the latter would have been a "transferred servant"—an organ of the executive power of one State placed at the disposal of another. If the interests of a third State had been affected as a result of the act of that organ, the question would have arisen whether the responsibility rested on the English or on the French Crown.

23. In the light of examples of that kind, he thought that article 9 was perhaps couched in unduly categorical terms. The recipient State was not always solely responsible; if the purpose for which the organ or agent had been lent was itself wrongful, responsibility would be shared by the lending and the recipient States.

24. Mr. QUENTIN-BAXTER said he had himself referred to the lacuna in the law as a particular justification for article 8, but he did not think that such a position was basically at variance with the thesis presented by Mr. Pinto. The test of whether a person in fact performed public functions or acted on behalf of a State must in some sense relate to the law and administration of that State. That principle was embodied in article 7 as well as in article 8. Even in the case of a lacuna, the philosophy of law might justify the contention that, in a certain sense, a State whose temporary inability to discharge its obligations had produced a lacuna should be responsible for what had been done to fill it. However, the text of article 8 might be justified by State practice, if that was found to be sufficiently consistent.

25. The cogency of article 9, even if interpreted in the very narrow sense attributed to it by Mr. Ushakov, could be amply illustrated. There had been a surprising number of cases in which even major organs of a State had acted for another State. For over a century the enactments of the United Kingdom Parliament known as the British North America Acts had in fact been Canada's Constitution, which until quite recently could only be changed by the United Kingdom Parliament, acting in a purely ministerial capacity at the request of the Canadian Government, but exercising no discretion of its own. That legislative action was unquestionably attributable only to Canada. For New Zealand, the highest court of appeals was still, for most purposes, the Judicial Committee of the Privy Council, which in practice, though not by law, met in London, with facilities provided by the United Kingdom Government, and was composed mostly of English and Scottish judges. When it considered an appeal from New Zealand, however, it acted solely as a New Zealand court. The position and functions of that organ had never been questioned.

26. Those might be considered vestigial cases, but in fact similar practices might become more common. In Western Europe, for example, there were international arrangements whereby certain treaty provisions were not only incorporated in the domestic law of the countries subscribing to the arrangements, but tended to be interpreted by an international tribunal, rather than by domestic courts. The parties to such arrangements were obliged to give effect in their own laws and, if appropriate, through the machinery of their own courts, to decisions reached by the international tribunal. For the purposes of article 9, such decisions would have to be

[3] Sir Ernest Satow, *A Guide to Diplomatic Practice*, Fourth edition (1957), p. 206.

considered as part of the law of the States at whose disposal the tribunal had been placed.

27. It was sometimes convenient for a very small country with many calls on its educated manpower not to have to provide certain administrative institutions itself. For example, New Zealand's Auditor-General, who was responsible for presenting to the New Zealand Parliament an independent account of all matters of government finance, bore the same responsibility *vis-à-vis* the Government of Western Samoa. When dealing with Western Samoan affairs, the Auditor-General and his officers acted solely under the authority and at the behest of the Western Samoan Government, at whose disposal they had been placed. However, the arrangements made by the New Zealand Government had a bearing on the extent to which they could carry out those duties adequately, in so far as New Zealand law determined the selection of the Auditor-General and his officers and provided for the necessary machinery. Similarly, New Zealand Government agencies were placed at the disposal of the Government of Western Samoa to assist with such matters as technical control and safety standards in civil aviation.

28. The main question raised by Mr. Ushakov, however, was not one of definition or drafting, but whether there was a distinction in principle, which the article should recognize, between a case in which an organ as such was placed at another Government's disposal and one in which only the services of an individual were made available to another Government. The comments made so far suggested that the article should have the wider application. Mr. Tabibi had mentioned the case of United Nations experts sent to fill high-ranking posts in national administrations. If, as the result of an internal upheaval, such an expert came to occupy a position of political importance in the country concerned, the question would arise whether the functions in fact performed were consistent with the terms on which the expert had been recruited and made available by the Organization. Allowance must be made for such situations.

29. The extent to which individual States concluding agreements on the loan of organs could make their own terms should be determined by their obligations under general international law. Mr. Tammes and others had rightly raised the question of overriding loyalty to United Nations principles in such matters. Article 9 did not, therefore, seem too categorical in placing responsibility on the State to which the person or organ was lent. The words "actually under the authority" had considerable effect, indicating the obverse point of view that the State or organization providing an expert or institution did not escape responsibility if it did less than place the person or institution completely under the control of the recipient State.

30. He agreed, on the whole, with the remarks made by Sir Francis Vallat about the wording of article 9. A United Nations expert recruited in one part of the world for an assignment in another part, and linked to the United Nations only by his employment for that purpose, would not be considered an organ in the natural or ordinary meaning of the word as used in English, but the use of the words was logical in the context of the present draft. Nevertheless, it would be advisable to consider other possibilities.

31. Mr. EL-ERIAN said that he accepted the rule in article 9 and the criteria it specified.

32. With regard to the scope of the article, he noticed that the commentary referred to a number of cases of responsibility arising out of situations of armed conflict. In that connexion, he drew attention to the position taken by the Commission in several of its drafts, and expressed in the following terms in its report on the work of its twenty-third session: "Moreover, and as in the case of previous topics, the Commission did not think it advisable to deal with the possible effects of armed conflict on representation of States in their relations with international organizations. The reasons for this are stated in the commentary on article 79, which relates to non-recognition of States or Governments or absence of diplomatic or consular relations".[4] If the Commission decided to retain those examples in the commentary, it would be necessary to specify that it did so without prejudice to the responsibility of the lending State. Quite apart from the liability incurred by the recipient State for any specific wrongful act committed by the transferred servant, the lending State would be responsible on a different plane if it had knowingly placed its servants at the disposal of the recipient State for a wrongful purpose; the actual transfer of the services would, in that case, constitute an internationally wrongful act in itself.

33. He also wished to comment on the use of the term "organ" in relation to international organizations. In the Commission's draft articles on the representation of States in their relations with international organizations, paragraph 1 (4) of article 1 defined the term "organ" as meaning

> (*a*) any principal or subsidiary organ of an international organization, or
>
> (*b*) any commission, committee or sub-group of any such organ, in which States are members.[5]

With that definition of an organ of an international organization, it was difficult to regard a single official as constituting an organ. It was true that the Special Rapporteur in his third report had made it clear that he intended to cover both individual and collective organs,[6] but article 9 itself did not specify that important fact, and while in the case of a State the term "organ" could cover both collective organs and individuals, the same was not true of international organizations. A technical assistance expert lent to a State by an international organization, for example, could hardly be described as an "organ".

34. Lastly, he would welcome clarification of the concluding words of article 9 "and act in accordance with its instructions". With the wording as it stood, the case of a transferred servant who acted outside his instruc-

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[4] *Yearbook ... 1971*, vol. II, Part One, p. 283, para. 55.

[5] *Ibid.*, p. 284.

[6] *Ibid.*, p. 267, para. 199.

tions and, in so doing, committed an internationally wrongful act, would not be covered. The State lending its servant would not be responsible, because he had been acting under the authority of the recipient State, and the latter State could disclaim responsibility because he had been acting outside his instructions.

35. Mr. BILGE said that he approved of the rule on attribution of responsibility laid down in article 9 and was convinced that it would be frequently applied in the future, owing to the increasingly close links being forged between States for purposes of co-operation.

36. The article under consideration seemed to cover two cases: first, the case in which an organ of a State or of an international organization was lent to another State or placed at its exclusive disposal; and secondly, the case in which the organ was simultaneously in the service of the State or international organization to which it belonged and in the service of the recipient State, being used by both for common purposes. The two cases seemed to be combined in article 9, but in his opinion the second did not come within the scope of the article.

37. With regard to the proviso at the end of article 9, according to which the organ must be actually under the authority of the State at whose disposal it was placed, he thought the organ should be genuinely at the disposal of the State, without, of course, being imposed on it. The exclusive loan of an organ, particularly in the technical assistance field, was generally the result of a request by the beneficiary State which gave rise to an agreement. Consequently, the proviso was acceptable where exclusive loans were concerned. On the other hand, when an organ was simultaneously in the service of the two States, it remained under the authority of the home State although it was partly used by the beneficiary State, and in that case the proviso was not acceptable. He therefore suggested that the word "real" (*réelle*) should be inserted before the words "authority of the State".

38. With regard to the "instructions" referred to in article 9, he pointed out that in the *Chevreau Case*[7] the British Consul had replaced the French Consul in the performance of his consular duties, so that he had not needed to receive any special instructions. On balance, he thought the words "in accordance with its instructions" should be replaced by the words "on its behalf" (*pour le compte de ce dernier*). Whether the loan of the organ was total or partial, it was always placed under the authority of the recipient State and acted on its behalf, so its actions could be attributed to that State.

39. Mr. RAMANGASOAVINA said he would confine his remarks to questions concerning the interpretation of article 9, the provisions of which he found perfectly acceptable. By using the words "the conduct of a person or group of persons having, under the legal order of a State ... the character of organs" the Special Rapporteur had meant to stress that the agents or organs lent really belonged to the State. The strictness of that wording might cause difficulties, however, since the agents or organs placed at a State's disposal were not necessarily governed by the legal order of the lending State. That was the situation when they were called upon to perform a very technical mission and the States concerned did not conclude an agreement showing that they possessed the status of organs in the legal order of the lending State. The wording of article 9 should therefore be made more flexible in that respect, so as to cover cases such as those in which members of youth movements or civilian or paramilitary volunteer corps were sent abroad, for example, to fight an epidemic, and did not possess the character of organs in the sending State's legal order.

40. The second condition laid down at the end of article 9, namely, that the organs lent must act in accordance with the instructions of the State at whose disposal they were placed, was intended to make it clear that the organs were attached to the recipient State. That condition was acceptable in so far as the organs in question were actually under the authority of the State at whose disposal they were placed. Owing to the technical nature of their tasks, however, they sometimes acted according to their own rules and even exceeded the instructions given them by the recipient State. In such cases, the principle laid down in article 10 could be applied, namely, that the responsibility of a State could be engaged even if one of its organs exceeded its competence. Consequently, he was unable to accept the final proviso of article 9; for when an organ exceeded the instructions given to it by the recipient State, it was not the lending State which should be held responsible. For example, if a body specializing in submarine prospecting was carrying out drilling on the continental shelf of the State at whose disposal it had been placed and extended its activities to the continental shelf of a neighbouring State, it could not be argued that the responsibility of the recipient State was not engaged because the body in question had exceeded its instructions.

41. Article 9 would be less categorical if the words "and act in accordance with its instructions" were deleted, even though the idea of effective control by the recipient State had to be introduced elsewhere in the article.

42. Mr. USHAKOV said that when an organ of a State was placed at the disposal of another State, the object was to help the latter in the exercise of its State power. The organ lent replaced another organ and acquired the status of an organ in the State at whose disposal it was placed; it was in that capacity that, by its conduct, it could engage the recipient State's responsibility. On the other hand, technical experts or consultants placed at a State's disposal by another State under economic, technical or cultural assistance programmes, were not called upon to exercise public power in the State to which they were sent. No matter whether such persons had previously been officials or ordinary private persons, they were merely under the authority of the State at whose disposal they were placed, but that State was not directly responsible for their conduct. If they committed internationally wrongful acts, the State's responsibility could only be engaged if its own organs ought to have prevented those acts. Such responsibility by reason of omission could be incurred through the

[7] *Ibid.*, p. 269, para. 203.

conduct of any private person present in a State's territory and had nothing to do with the article under consideration. It should be noted, in that connexion, that all persons present in a State's territory were "actually under the authority" of that State, but their conduct need not necessarily be regarded as the conduct of the State.

43. Turning to the examples cited by the Special Rapporteur and by other members of the Commission, he said that all the cases not concerned with the loan of armed forces were irrelevant for the purposes of article 9. If a State sent military personnel to help a State which had suffered an earthquake, that personnel came under the authority of the State at whose disposal it was placed, but did not directly engage that State's international responsibility by its conduct. If a State did not have among its nationals a judge qualified to act as president of the supreme court and asked another State to place a person having the required qualifications at its disposal, it was not an "organ" that was lent to it, but an ordinary private person. In the *Chevreau Case*, the British Consul had been appointed as a natural person, not as an "organ", to replace the French Consul. If a State applied to another State for the services of an executioner, he would not be sent as an "organ", and he could not perform his duties until he had been appointed by the requesting State. As to persons placed at the disposal of a State to organize its judiciary, they would merely be acting as consultants, without exercising any part of the recipient State's public power.

44. It thus appeared that, with the exception of armed forces, no State organ could be placed at the disposal of another State. Nor could international organizations place at the disposal of a State any natural or legal person who could exercise a part of its State power. If such organizations seconded experts or officials, they were ordinary private persons in the recipient State and did not possess the status of organs of the international organization in any way.

45. The example given by Mr. Quentin-Baxter, which related to organs that were held to be simultaneously organs of New Zealand and of the United Kingdom, and to exercise public powers in both countries, was not a case of organs lent, but of State organs proper, within the meaning of draft articles 5 and 6.

The meeting rose at 1.05 p.m.

1263rd MEETING

Thursday, 23 May 1974, at 10.15 a.m.

Chairman: Mr. Endre USTOR

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, 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]

(continued)

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. AGO (Special Rapporteur), replying to the comments made on draft article 9, said that that provision covered only persons or groups of persons who, though placed at the disposal of a particular State, were, and continued to be, organs of the State or international organization which had sent them. In that respect, paragraph 200 of his third report[1] might perhaps require clarification. There were some situations which did not come under the article in question: for example, when a person who had the character of an organ in a State lost that character when he was placed at the disposal of another State, in which he acquired the character of an organ of that other State. In such a case, internationally wrongful acts committed by that person were attributable to the recipient State in accordance with article 5. Thus, if the President of the Supreme Court of a State resigned his office and agreed to go and carry out similar duties in another State, he lost the character of an organ in his home State and acquired that character in the recipient State. It was also necessary to rule out the case in which a State or an international organization sent to another State an expert who did not have the character of an organ; such an expert could carry out his mission either as a private person or as an organ of the recipient State, but not as an organ of one State lent to another. Article 9 covered only cases in which an organ of a State or an international organization was placed at the disposal of another State and did not lose the character of an organ of the sending State or international organization.

2. There were then various possibilities within the framework of the recipient State. It could make the necessary arrangements for the foreign organ placed at its disposal also to become its own organ in its internal legal system; the person or group of persons concerned would then have the character of organs in both States. If the recipient State did not make such arrangements, it was also possible that the persons or groups of persons concerned might be *de jure* organs in the lending State and *de facto* organs in the recipient State. On the other hand, it was clear that cases of co-operation by substitution, which occurred when a State substituted its own organs for the organs of another State, should be excluded from the scope of article 9, as Mr. Bedjaoui had said.[2]

[1] See *Yearbook ... 1971*, vol. II, Part One, p. 267.

[2] See 1261st meeting, para. 31.