Document:-

A/CN.4/SR.1303

Summary record of the 1303rd meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

given consideration at an early stage, so that the planning committee, if the Commission decided to establish it, should be able to function during the present session.

The text of the document read:

"1. The Planning Committee of the International Law Commission will consist of five members. The Chairman of the Committee will be the First Vice-Chairman of the Commission. The membership will reflect the composition of the Commission.

"2. The tasks of the Committee will include:

"(*a*) development, on a continuing basis, of a long range program of work;

"(*b*) review of the working methods of the Commission and development of proposals for any appropriate changes in working methods, either in general or for particular items on the Commission's agenda;

"(*c*) examination of the working conditions of the Commission, including the requirements of the Secretariat in supporting the work of the Commission, and formulation of suggestions for any needed improvements.

"3. The representative of the Secretary General or his designee will be invited to attend all meetings of the Committee.

"4. The Committee will submit a report of its decisions and proposals two weeks prior to the close of each session for consideration by the Commission."

33. Mr. USHAKOV suggested that Mr. Kearney's proposal should be considered under item 7 of the agenda: Organization of future work.

34. Mr. BEDJAOUI welcomed Mr. Kearney's proposal that a committee should be set up to plan the Commission's long-term programme of work and to review its working methods. He thought, however, that, as Mr. Ushakov had suggested, the proposal should be dealt with later in the session under item 7 of the agenda, in order not to upset the order of the Commission's work. In order to hasten consideration of the proposal without delaying the Commission's work, he suggested that it should first be considered by the Bureau, or by the enlarged Bureau, and that, when a consensus had been reached, the Commission should be invited to take a decision.

35. The CHAIRMAN said that the enlarged Bureau would examine Mr. Kearney's proposal and report back to the Commission.

The meeting rose at 5.5 p.m.

1303rd MEETING

Tuesday, 6 May 1975, at 11.55 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

State responsibility

(A/CN.4/264 and Add.1;[1] A/9610/Rev.1[2])

[Item 1 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10

1. The CHAIRMAN invited the Special Rapporteur to introduce article 10 of his draft, which read:

Article 10[3]

Conduct of organs acting outside their competence or contrary to the provisions concerning their activity

1. The conduct of an organ of the State or of an entity empowered to exercise elements of the governmental authority which, while acting in its official capacity, exceeds its competence according to internal law or contravenes the rules of that law concerning its activity shall nevertheless be considered as an act of the State under international law.

2. However, such conduct shall not be considered as an act of the State if, by its very nature, it was wholly foreign to the specific functions of the organ or if, even from other aspects, the organ's lack of competence was manifest.

2. Mr. AGO (Special Rapporteur) said that in considering article 10 of the draft articles on State responsibility, the Commission would be continuing its work on the problem of the attribution to the State of an act which could be considered as internationally wrongful and, hence, as generating international responsibility. In draft articles 5 to 9, adopted at its twenty-fifth and twenty-sixth sessions (A/9610/Rev.1, chapter III, section B) the Commission had covered the different classes of conduct which must be recognized as constituting an "act of the State", and had thus stated the different cases in which the subjective condition for the existence of an internationally wrongful act must be considered to be fulfilled.

3. In article 5, it had defined the basic category of acts of the State by affirming the principle that the "conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question". Having established that principle, the Commission had added further particulars to it in article 6, by affirming that "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State". That was a very important provision, for in the practice of States and in the arguments of foreign ministries there was often a traditional tendency to try to relieve the State of its responsibility whenever the organ which had acted was a subordinate organ. The Commission had taken a very clear position on that issue by affirming that, even if the organ which had acted in a certain way was a

[1] *Yearbook ... 1972*, vol. II, pp. 71-160.

[2] *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (see *Yearbook ... 1974*, vol. II, Part One, pp. 157-331).

[3] Text as revised by the Special Rapporteur.

subordinate organ, its conduct must be attributed to the State, and the State must be held responsible for that conduct under international law.

4. The categories specified in articles 7, 8 and 9 supplemented the fundamental category defined in article 5, namely, the category of organs of the State "having that status under the internal law of that State". From the international point of view, the organization of the State was considered as a unit, and the notion of an "act of the State" was broad, whereas in the context of the internal legal order, the notion of an "act of the State" properly so called was much narrower. It was from the point of view of international law, however, that acts of the State as a subject of international law—the acts which could engage its international responsibility—must be defined. Thus, article 7 affirmed that "The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question." Article 8 laid down that the conduct of a person or group of persons "in fact acting on behalf of the State" "shall also be considered as an act of the State under international law". According to article 9, "The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed."

5. Having thus defined the categories of persons or groups of persons whose conduct could be attributed to the State as a subject of international law and, hence, could engage that State's international responsibility, the Commission now had to settle another question: could all the acts or omissions of those categories of organs be attributed to the State as acts generating international responsibility, or must restrictions be imposed? From the outset, the Commission had made a distinction, particularly in regard to the basic category—that of organs of the State proper—but really in regard to all the categories, between cases in which the organ had acted in its capacity as an organ and cases in which a person who happened to be an organ of the State had acted, in particular circumstances, as a private person. In the latter case, it was obvious that the problem of the State's responsibility only arose as a problem of responsibility for the actions of more private persons. But the matter was not always so simple, and the dividing line between cases was not always so clear. For instance, what was the position when an organ of the State acted as such and in the exercise of its official functions, but in so doing exceeded its competence under internal law or disobeyed the instructions it had received from its superior organs? That was the problem which had caused the most difficulties in the practice of States and in international jurisprudence and doctrine, and to be able to overcome those difficulties two essential considerations must be kept in mind.

6. First, the term "State" must be taken to mean the State as a subject of international law, not the State as a subject of internal law. Thus the fact that, in internal law, an organ which exceeded its competence or acted contrary to its instructions might have a personal responsibility attributed to it and not engage the administrative responsibility of the State as a subject of internal law—a responsibility which varied from one legal system to another—did not necessarily mean that the act of that organ was not attributable to the State in international law. No inferences should be drawn, either positive or negative, for the problem had to be considered in the context of international law.

7. Secondly, where international practice was concerned, the arguments put forward by foreign ministries when protesting against the conduct of an organ of another State sometimes called for reservations; for when one State accused another of having committed an internationally wrongful act, it preferred to use the argument that would be most effective for obtaining compensation. For example, if a superior organ or a government itself had approved the act of a subordinate organ which had in fact exceeded its competence, the complainant State would tend to stress that aspect of the case. But it would be wrong to conclude, from that alone, that according to the claimant government the act of an organ which had exceeded its competence or contravened its instructions could only be attributed to the State if it had been approved by a higher authority. Such an interpretation would go beyond the true significance of the cases drawn from international practice and jurisprudence.

8. International practice, judicial decisions and doctrine showed a very clear, though not absolutely uniform trend, which had appeared at the beginning of the twentieth century, more particularly between 1910 and 1930. That was when positions on the question had been defined and certain errors rejected.

9. The arguments advanced by claimant governments and respondent governments must in any case be treated with caution, for the former obviously tended to affirm that the accused organ had acted only as an organ of the State, whereas the latter sought to prove that the organ had acted as a private person. Those were two extreme positions, neither of which corresponded to reality. Moreover, the fact that reparation had been awarded did not necessarily mean that the injurious act committed by the incompetent organ had been attributed to the State; for the reparation might have been awarded because other organs had done nothing to prevent, disavow or punish the act of the accused organ, although it remained the act of a private person, not of the State.

10. Lastly, when it was a subordinate organ that had acted, the State accused of committing an internationally wrongful act often invoked the rule of prior exhaustion of local remedies and contended that the injured persons must first apply to the domestic courts for reparation of the wrong they claimed to have suffered. But although in many cases a claim asserting the international responsibility of the State could not be brought until local remedies had been exhausted, the fact that those remedies

had not been exhausted did not necessarily mean that the act of the organ was not an act of the State and could not be a source of international responsibility. Thus, if after the exhaustion of local remedies the last authority upheld what had been done by the first authority, the internationally wrongful act was not only an act of the last authority, but an act of all the authorities, from the first to the last, which had contributed to the breach of an international obligation of the State: hence the act of the subordinate organ which had acted first was also attributed to the State. Consequently, no conclusion must be drawn from the confusion which had often arisen between the problem of attribution to the State of the act of an incompetent organ and the problem of exhaustion of local remedies. The existence of the rule on the exhaustion of local remedies showed, on the contrary, that the acts of certain organs were, in principle, attributed to the State, The consequences of that rule were very important for the purposes of determining the amount of reparation to be awarded and the duration of the internationally wrongful act (*tempus commissi delicti*). They were particularly important in regard to arbitration agreements relating to acts committed before or after a certain date.

11. International jurisprudence and State practice had passed through a period of uncertainty in the second half of the nineteenth century, before they had succeeded in establishing a generally recognized principle. On that point, he referred members to the *Star and Herald case*, the *Tunstall case* and the *American Bible Society case*, which were discussed at length in his report (A/CN.4/264, paras. 11 *et seq.*). Towards the end of the nineteenth century there had appeared in the practice of the United States, and in the European practice, the principle of attribution to the State of acts or omissions of its organs which, while acting in their official capacity, had exceeded their competence or contravened the provisions of internal law governing their activities. It could be said that the practice of the United States and European practice had arrived at the same conclusion by slightly different routes. In the *American Bible Society case* Mr. Bayard, the United States Secretary of State had said ". . . it is a rule of international law that sovereigns are not liable, in diplomatic procedure, for damages to a foreigner when arising from the misconduct of agents acting out of the range not only of their real but of their apparent authority". A few years later another Secretary of State had formulated the rule observed by the United States in the following terms: ". . . sovereigns are not liable in diplomatic procedures for damages occasioned by the misconduct of petty officials and agents acting out of the range not only of their real of but their apparent authority". Since then, that idea had prevailed in the United States and had spread to other countries.

12. In European practice an important and rather early case was that of the Italian nationals in Peru. The British and Spanish Governments, having been invited by the Italian Government to state their view on the possibility of attributing to a State the conduct of one of its organs which had exceeded its competence or contravened internal law, had expressed similar opinions. In their view, all governments should always be held responsible for all acts committed by their agents in their official capacity (A/CN.4/264, para. 17). They had thus expressed in positive terms what the United States had expressed in negative terms; the difference between the two positions was really no more than a difference in approach. The European foreign ministries of the time had considered that it was not possible to inquire whether the organ concerned had or had not acted within its competence, whether its conduct had or had not been disavowed or whether it had or had not been in accordance with instructions. What had mattered above all was that the accused State should not be able to find a loophole. By stressing that the organ must have acted within the limits not only of its real, but also of its apparent competence, American practice had also stressed the essential point. Indeed, for the security of international relations it mattered little, when an organ was acting in the exercise of its functions, whether its competence in the internal legal order was real or merely apparent. There again, the essential point was that it was acting in the exercise of its functions.

13. In his report to the Codification Conference of 1930, Mr. Guerrero had argued that the State was not responsible for acts of its organs performed outside their competence as defined by internal law. Subsequently, Mr. Guerrero had had to abandon that position because the contrary view had prevailed at the Conference. In the light of the answers given by governments to a number of questions asked by the Preparatory Committee for the Conference, a basis of discussion had been worked out which, as subsequently redrafted, had become the first sub-paragraph of paragraph 2 of draft article 8 and which read: "International responsibility is likewise incurred by a State if damage is sustained by a foreigner as a result of unauthorized acts of its officials performed under cover of their official character, if the acts contravene the international obligations of the State"(A/CN.4/264, para. 21).

14. In the *Caire case*, Mr. Verzijl, as arbitrator, had put forward some important considerations. Agreeing with the Institute of International Law, he had held that the responsibility of the State existed, whether its organs had acted in conformity with or contrary to the law or the order of a superior authority, and that it also existed when those organs acted outside their competence under cover of their status as organs of the State and making use of means placed at their disposal as such organs (*ibid.*, para. 41).

15. Doctrine had evolved in the same direction as the practice of States. Modern writers were almost unanimous in recognizing that the State was answerable for the conduct of its organs which acted beyond their competence or in breach of the provisions of internal law governing their activity. In addition to the many writers mentioned in his report, Mr. Kouris, a young Soviet author, had expressed support for the same principles since the report had been issued. Mention should also be made of the draft on State responsibility recently prepared by Graefrath and Steiniger, two jurists of the German Democratic Republic. [4]

[4] See *Neue Justiz, 1973, No. 8*, pp. 225-228.

16. While the principle was not in doubt, it was open to question what its limitations were and how they should be formulated. It might perhaps be stating the principle too categorically to say that: "Any act or omission by an organ of the State, even if it acted beyond its competence or contrary to internal law, is an act of the State under international law and engages the responsibility of that State". It might be asked—and indeed most writers did ask—whether the interests of the security of international relations were not sufficiently protected when an exception to the principle stated was made for cases in which the lack of competence of the organ in question was absolutely obvious; that was why United States practice had invoked the notion "not only of their real but of their apparent authority". The Commission would have to take a position on that point.

17. On the subject of that possible exception, the formulas proposed by writers and learned societies were very diverse. Some of them expressed the same idea twice: first in positive terms, affirming the responsibility of the State for the acts of an organ that were apparently, though not really, performed within its competence; and secondly in negative terms, excluding State responsibility when the lack of competence was obvious. In his opinion, if that approach was adopted, it was important to distinguish between, on the one hand, the basic rule attributing to the State the acts or omissions of organs which had acted beyond their competence or contrary to the provisions of internal law governing their activities and, on the other hand, the exception by which the conduct of an organ would not be attributed to the State if that conduct was totally foreign to its functions or its lack of competence was manifest.

18. Article 46 of the Vienna Convention on the Law of Treaties [5] might also be taken into consideration. That provision, which was intended to determine in what cases the will of the State must be deemed to have been validly expressed, and which relied on the notion of a manifest breach of a provision of internal law regarding competence, might possibly provide suitable language for stating the principle under study.

19. The Commission would also have to take account of the drafting changes it had made to the articles on State responsibility already adopted, which made it necessary to amend in the same way the text of article 10 as proposed in his report (A/CN.4/264, para. 60).

The meeting rose at 1 p.m.

[5] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5) p. 295.

1304th MEETING

Wednesday, 7 May 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

State responsibility

(A/CN.4/264 and Add.1; [1] A/9610/Rev.1 [2])

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct or organs acting outside their competence or contrary to the provisions concerning their activity) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10 as proposed by the Special Rapporteur. [3]

2. Mr. REUTER said that he fully supported the views of the Special Rapporteur; any rule other than that proposed in draft article 10 would have the effect of negating the responsibility of the State. It would amount to saying that the State was a legal entity which could only act in conformity with international law and that acts committed in breach of international law were not acts of the State; or, to paraphrase the basic principle of the British Constitution—the King can do no wrong—that the State could not violate international law. Such a rule would be patently absurd.

3. The only question which might arise in connexion with the rule proposed by the Special Rapporteur was that of its limitations, and that question was settled in paragraph 2 of the article. In practice, the cases covered by the article rarely concerned direct relations between States. They usually concerned relations between a private person and a State, and the responsibility of the State was then engaged only at a second stage, after an injury had been caused to a private person. In addition, such cases nearly always involved the use of physical constraint by the armed forces, the police, or officials having some power of direct coercion.

4. The Special Rapporteur had been right in drawing a parallel between draft article 10 and article 46 of the Vienna Convention on the Law of Treaties, [4] though in practice the provision under study would apply almost exclusively to relatively simple cases involving a private person and a public official. But the question with which writers and arbitrators in past cases had been concerned was not only that of the limits of the competence of the organ which had acted. For example, the award made in the *Caire case* (A/CN.4/264, para. 41) and the proceedings of the Committee of Experts for the Progressive Codification of International Law appointed by the League of Nations (*ibid.*, para. 21) contained passages dealing with matters far removed from the theoretical problem of competence. In the award in the *Caire case* reference was made to officials who engaged the responsibility of the State when acting "under cover of their status as organs of the State and making use of

[1] *Yearbook ... 1972*, vol. II, pp. 71-160.

[2] *Official Records of the General Assembly, Twenty-ninth Session, Supplement No. 10* (see *Yearbook ... 1974*, vol. II, Part One, pp. 157-331).

[3] For text see previous meeting, para. 1.

[4] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 295.