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Summary record of the 1306th meeting

Topic:
State responsibility

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as relics of the time when it had been believed that, in order to avoid abuses by the great Powers, a general formulation of the principles of responsibility should respect the peculiarities of regional practice and the provisions of individual constitutions. If a similar approach were adopted today, it was very doubtful whether it would ever be possible to agree on a rule that would satisfactorily cover the broad principle of integral responsibility of States for wrongful acts. Fortunately, the circumstances which had given rise, in a legitimate reaction, to the Drago doctrine and the Calvo clause, no longer obtained.

46. While, subject to minor drafting changes, he fully approved of the terms of paragraph 1, he had doubts about paragraph 2. That paragraph was based on the so-called United States tradition, established by Secretary of State Bayard (A/CN.4/264, paras. 14 and 15), according to which a State was exempt from responsibility when the *ultra vires* character of the acts of individuals or organs acting in its name was too obvious to be ignored by the other interested parties. Through the works of European writers, that doctrine had influenced the formulation of article 8, paragraph 2, second sub-paragraph, of the draft articles adopted by the 1930 Codification Conference (*ibid.*, para. 50) which he found clearer than the paragraph proposed by the Special Rapporteur.

47. He agreed with previous speakers who considered that paragraph 2 was unnecessary. It weakened the general principle of responsibility for *ultra vires* acts, and did so unnecessarily: if an act was "by its very nature" outside the competence of an organ or entity, the lack of competence would be so obvious and striking that the act would be seen as the conduct of a private person acting as such, and would come within the scope of a different article. Should the majority of the Commission be in favour of retaining the idea contained in paragraph 2, he would prefer it to be expressed in paragraph 1, in wording similar to that adopted by the Hague Conference or the learned societies mentioned in the Special Rapporteur's report. As paragraph 2 stood, it constituted an escape clause for States wishing to evade their responsibility and thus departed from the intention of the article to close all such loopholes.

48. Mr. EL-ERIAN said he agreed with the principle of draft article 10 and associated himself with those speakers who had stressed the importance of safeguarding the basic principle that a State should not, in any circumstances, be able to evade its international responsibility or invoke certain pretexts to escape its international obligations. The principle was all the more important because the Commission had decided to extend the scope of the draft articles beyond the traditional context of international responsibility for the maltreatment of aliens.

49. With regard to paragraph 1, he took it that the expressions "organ of the State" and "entity empowered to exercise ... authority" covered what, for instance, was meant by the phrase "official, or employee of the State acting within the scope of the ... authority", used in the Harvard Codification draft quoted by the Special Rapporteur (A/CN.4/264, para. 47).

50. Like other members of the Commission, he had doubts about the exception provided for in paragraph 2. His difficulty did not arise from the reference to "manifest" lack of competence; the Special Rapporteur had pointed out that it would be desirable to keep the wording of article 10 in line with that of article 46 of the Vienna Convention on the Law of Treaties. Furthermore, the word "manifest" was also used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. [8] In his view, there was no objection to using the word since, for the purposes of legislation at least, the idea of something being "manifest" was recognized in both internal and international law; the task of defining the exact scope of the term could be left to the courts. Perhaps the doubts expressed about its use could be dispelled by using the phrase adopted by the 1930 Codification Conference, "... so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage" (*ibid.*, para. 50).

51. He agreed with Mr. Sette Câmara that it would be better to delete paragraph 2. If a majority of the members of the Commission wished to retain an exception, it should be further restricted. There were two points to be borne in mind. First, the analogy with the law of treaties could not be applied *stricto sensu*, because of the difference between the position of an individual who wished to bring a claim against a State and that of a State considering similar action within the context of a treaty relationship. Secondly, while article 10, paragraph 1, related to the conduct of organs acting in their official capacity, but exceeding their competence, and article 11 related to the conduct of private individuals, there could be a third class of cases in which an organ manifestly exceeded its competence or manifestly broke the law concerning its activity. In his view, the responsibility of the State in such cases was not vicarious, and did not arise only if the State had neglected to prevent a wrongful act. Nor should the organ in question be regarded as an individual by reason of the fact that it had acted outside its competence. On the contrary, the mere fact that the author of the act was an organ of the State meant that the State was responsible for his conduct, although the responsibility would naturally not be the same as if the organ had acted within its competence.

The meeting rose at 1.05 p.m.

[8] A/CONF.67/16, article 77, para. 2.

1306th MEETING

Friday, 9 May 1975, at 10.45 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, 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. 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 of organs acting outside their competence or contrary to the provisions concerning their activity)[3] *(continued)*

1. The CHAIRMAN invited the Special Rapporteur to reply to comments by members of the Commission.

2. Mr. AGO (Special Rapporteur) said he was glad to note that the members of the Commission considered the principle stated in paragraph 1 of article 10 to be established. The question dealt with in that article, far from being theoretical, as some might have believed, was of undeniable practical importance. The principle had been justified on various grounds by the members of the Commission. Mr. Kearney had referred to the notions of equity and the security of international relations; Mr. Bedjaoui had referred to the State's control of its own territory and the consequences of that control; Mr. Hambro, Mr. Quentin-Baxter and Mr. Tammes had spoken of the primacy of international law over internal law. Mr. Martínez Moreno had given a historical account of the issue to explain why some countries had, in certain circumstances, come to adopt a position at variance with the principle; but he had stressed that times had changed and that conditions were now such that the principle could be generally accepted.

3. The only difficulties that arose were how to apply the principle and how to formulate it. Mr. Tsuruoka had pointed out that where practical application was concerned, political considerations sometimes prevailed over legal ones. There was, indeed, no denying that in certain spheres, such as diplomatic protection, the State did not have the duty to protect, but only the faculty of protecting, its nationals abroad. In order not to impair its relations with a particular State, the State in question sometimes preferred not to give its diplomatic protection, thus putting its political interests first. His answer to that argument was that diplomatic protection was concerned with the application of responsibility, whereas the problem before the Commission was how to define responsibility and determine the acts of the State which engaged its responsibility, regardless of whether that responsibility was applied or not.

4. Some members had mentioned that the principle that the State was responsible for all the acts of its armed forces had been codified in one of the Hague conventions.[4] But that very specialized Convention could not provide a basis for the drafting of the article under consideration, since it went beyond the responsibility of States for internationally wrongful acts and made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons.

5. Nearly all the members of the Commission had pointed out that the cases provided by international practice and jurisprudence, or cited by writers on international law, were mainly cases of injury caused to private persons, and that in those cases the use of coercion was frequent. On the latter point, he observed that in a number of cases it was an omission or a denial of justice that was held against the respondent State, not the use of coercion. On the other hand, it was true that many cases related to violation of the international legal obligations of the State regarding the treatment of foreigners. But the Commission should go beyond international practice, jurisprudence and doctrine, and formulate a really general rule to cover all cases of violation of international obligations, and especially of the basic obligations of the State, whether they concerned security, peace, the sovereignty and the independence of States, or the protection of fundamental human rights. Reference had sometimes been made to the obligations the State assumed, not towards another State, but towards the international community as a whole; with the evolution of international law, the variety and number of those obligations tended to increase.

6. As to the question whether it would be better to express the rule under discussion in positive or in negative terms, most of the members of the Commission seemed to favour a positive formula. Mr. Kearney, for example, had maintained that a positive formulation reduced the possibilities of evading responsibility. Mr. Ushakov and Mr. Ramangasoavina, who shared that view, had even made reservations about the use of the word "nevertheless", which seemed to them to give a negative character to the formula he had proposed. Mr. Bedjaoui would prefer, on the contrary, to emphasize the negative character of the formula in order to give greater prominence to the exception. Like the majority of members of the Commission, he (the Special Rapporteur) thought it would be better to state the principle that certain acts were attributable to the State, even when the authors had acted beyond their competence under internal law or had contravened provisions of that law.

7. As far as the actual drafting of paragraph 1 was concerned, the first question was whether to mention only the organs of the State or also those of other entities empowered to exercise elements of the governmental authority. His personal view was that the case of an *ultra vires* act committed by an organ of such an entity should also be covered. For instance, if a foreign ambassador serving in Rome travelled to Sardinia, he would be under the protection both of the Italian State and of the autonomous region of Sardinia. If he was injured by the conduct of a member of the Sardinian police acting beyond his competence or contrary to his orders, that would be regarded as an act of the State. An example Mr. Tsuruoka was fond of quoting was that of the private police of the Japanese National Railway Company, who might have to intervene on a train because of a bomb warning; if, contrary to the orders of his

[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 1303rd meeting, para. 1.

[4] The Hague Convention of 1907 (IV) respecting the Laws and Customs of War, article 3. See J. D. Scott, *The Hague Conventions and Declarations of 1899 and 1907*, 3rd ed. (New York, 1918), p. 103.

superiors, a member of that police force searched the diplomatic bag of a passenger, his conduct should be covered by the provision under consideration. Hence it was important to find a sufficiently general formula to cover all cases.

8. Some members of the Commission had said that in view of the drafting of the preceding articles, the capacity in which the organ acted need not be described as "official". He was quite willing to accept that view, but he could not accept any of the other expressions suggested. The expression "under cover of their status as organs" seemed too picturesque; the expressions "under the colour" and "ostensible authority" might be excellent in English, but were untranslatable; the expression "real or apparent authority" was vague and might provide loopholes. Lastly, the expression "making use of means placed at its disposal" was not acceptable, because a policeman, instead of using his own weapon, might use a private person's weapon to kill a diplomat, or might incite a private person to commit the act; in either case it would be an act of the State. Besides, the latter expression was not appropriate for cases of omission, which were just as common as cases of commission. Consequently, it would be better simply to provide that the organ in question must have acted in its capacity as an organ, though it would be necessary to explain in the commentary to article 10 that that formula should be understood as applying to all kinds of situations.

9. Some members had questioned whether cases of lack of competence need really be distinguished from cases of contravention of instructions. In his opinion, that distinction was indispensable, because it might happen that the conduct of an organ, though remaining within the limits of its competence, was contrary to special instructions. Thus one contingency did not rule out the other, and it would be dangerous not to mention both.

10. Some members of the Commission had referred to cases in which personal liability was added to the State's responsibility and had even mentioned the Nuremberg trial. But questions of that nature ought not to be introduced into a discussion which should bear only on the attribution to the State of internationally wrongful acts which gave rise to responsibility of the State itself.

11. Since the views expressed by members on paragraph 1 of article 10 were in agreement, the following new wording should not raise any difficulties:

> "1. The conduct of an organ of the State or of another entity empowered to exercise elements of the governmental authority shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened the rules of that law concerning its activity, provided that it acted as an organ."

12. With regard to paragraph 2, Mr. Šahović had inquired whether it stated a secondary rule or limited the primary rule in paragraph 1. The intention had been to place limitations on the primary rule, like those reflected in doctrine, judicial decisions and codification drafts on the subject. While some members had been in favour of limitations of that kind and had commented only on the drafting, others had expressed doubts about the need for paragraph 2 and considered the stipulated exception too broad. In particular, Mr. Ushakov feared that the provision might be made a generally applicable rule, whereas it was not applicable to cases other than violations of the obligations of States towards foreigners. If, for example, an executive organ sent troops abroad without previously obtaining the constitutionally necessary consent of a legislative organ, and thus manifestly exceeded its competence, its act would be attributable to the State.

13. The only reason why he had included a paragraph 2 in draft article 10 was to take account of the opinion of the great majority of writers, who recognized limitations of the general principle. So far as he was personally concerned, as early as 1939 he had held a contrary view, when he had written that it was immaterial whether, "from the point of view of the internal legal order of the State, the act of the organ must be characterized as a valid act or as an invalid or wrongful act, for even if the act is invalid or wrongful, it is still an act performed by a person in his capacity as an organ and taking advantage of that capacity ... In conclusion, then, international law considers any conduct of an organ having acted in that capacity in the case in point as an act which may possibly be characterized as a wrongful act attributable to the State". [5] He was still equally convinced that no exceptions should be made in specific cases of responsibility. The obligations assumed by States in regard to the treatment of foreigners were also obligations under international law, and the general rule should cover them entirely.

14. Mr. Kearney thought that in practice it would be difficult to determine whether the conduct of an organ was foreign to its "specific functions", and that the use of those words might provide a loophole for States. Mr. Tammes and Mr. Ushakov had pointed out that the word "manifest" referred to a situation very different from that contemplated in article 46 of the Vienna Convention on the Law of Treaties. [6] It appeared that an analogy could not be drawn between the case of the State which concluded an agreement with another State and the case of a State which committed a wrongful act. Mr. El-Erian had distinguished three classes of situations, the first of which included acts or omissions attributable to a State because they were acts of an organ of that State, or of an entity empowered to exercise elements of the governmental authority, which had acted within its sphere of competence and in accordance with its instructions. On the other hand, there were cases in which the organ had not acted as an organ, but as a private person. Even though there was no act of the State in such cases, the responsibility of the State might nevertheless be engaged, not under article 10, but under article 11, if other organs of the State had not taken the necessary

[5] R. Ago, "Le délit international", *Académie de droit international, Recueil des cours*, 1939-II, vol. 68, p. 472. (Translated by the Secretariat.)

[6] 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.

action to prevent the act or to punish the guilty party. But that did not alter the fact that the act committed by the organ as a private person could not be attributed to the State. In an intermediate class, Mr. El-Erian had included cases in which the organ had acted as such, but had exceeded its competence or had contravened its instructions.

15. The basic principle was that the conduct of its organs were attributed to the State when they had exceeded their competence while remaining within the apparent limits of their functions. In his report, he had tried to show the historical development of the relevant principles. That development had more or less stopped at the case of manifest lack of competence of the organ, excluding attribution to the State where the organ had neither real nor apparent competence. The Commission might now consider going a step further. If it wished to strengthen the rules on State responsibility and thus contribute to the progressive development of international law, it might decide to abandon all exceptions, so as not to permit States to evade their responsibility. On the other hand, if it wished to keep to pure codification, the exception should be included in article 10. It was, in reality, only in a certain international climate, which had now changed considerably, that exceptions were valid. In the interests of the security of international relations, it might be better to abolish all limitations of the principle laid down in paragraph 1.

16. He therefore proposed that either paragraph 1 alone should be retained, or the idea expressed in the present paragraph 2 should be retained in a separate paragraph, but placed in a different context. Instead of saying that a certain conduct was not attributable to the State when it was wholly foreign to the functions of the organ or when the lack of competence was manifest, the provision would stipulate that the only case of non-attribution was that in which the act was so foreign to the functions of the organ that it was manifest that it had acted not as an organ, but as a private person. That case would come within the scope of article 11. Such a radical step could not be taken, however, unless the Commission held a fresh discussion and justified it.

17. Mr. USHAKOV, referring to paragraph 1 of article 10, said that the alternative of competence according to internal law and the rules of internal law concerning the activity of the organ was not very satisfactory. In both cases article 10 referred to internal law, although the rules or the instructions given to the organ might emanate from another organ and would not necessarily have the character of rules of internal law. The Drafting Committee should try to find better wording.

18. After a brief discussion in which Mr. ŠAHOVIĆ, Mr. ELIAS, Mr. TSURUOKA, Mr. YASSEEN and Mr. EL-ERIAN took part, Mr. AGO (Special Rapporteur) suggested that article 10 should not be referred to the Drafting Committee immediately, but that there should be further discussion on the question whether or not to retain paragraph 2.

It was so agreed.

The meeting rose at 12.50 p.m.

1307th MEETING

Monday, 12 May 1975, at 3.5 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, 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. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, 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 of organs acting outside their competence or contrary to the provisions concerning their activity)[3] *(continued)*

1. Mr. AGO (Special Rapporteur) said that the Commission now had to decide whether to retain or to drop the exception provided for in article 10, paragraph 2, and what wording to adopt. In the light of the views expressed by members during the discussion he proposed the following redraft of article 10:

"The conduct of an organ of the State or of another entity empowered to exercise elements of the governmental authority shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity, provided that it acted as an organ.

"[The conduct of the organ shall not be attributable to the State in those cases only in which it is manifest that the organ acted only in a private capacity]."[4]

2. The second paragraph, in square brackets, did not seem absolutely indispensable, as it only confirmed the principle stated in the first; but that was for the Commission to decide.

3. Mr. TSURUOKA said that the notion of an "organ" was a notion of international law, or a notion of internal law recognized and confirmed by international law. The words "acted only in a private capacity" would add to that notion and make it more precise, so he was in favour of retaining the second paragraph.

4. Mr. SETTE CÂMARA thanked the Special Rapporteur for his redraft of article 10. He still considered, however, that the article should consist of the first paragraph only. The second paragraph referred to an organ said to have "acted only in a private capacity". The reference was clearly to individuals belonging to an organ and acting as individuals, not in an official capacity.

[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 1303rd meeting, para. 1.

[4] cf. text proposed at the previous meeting, para. 11.