Document:-

A/CN.4/SR.1308

Summary record of the 1308th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

he recalled that an Attorney General of France, wishing to preserve the immunity of the medical profession from prosecution, had declared that "it was not the doctor, it was the man" who had been at fault when a drunken surgeon had committed an act of gross negligence.

53. Mr. AGO (Special Rapporteur) said that for the time being the Commission was concerned only with the subjective element of the wrongful act, namely, the attribution of an act to the State. To say that the conduct of an organ of the State which had acted as an organ was attributable to that State, and that such conduct was not attributable to the State if the organ had acted as a private person, did not mean that the State was responsible in the first case, but not in the second. If the organ had acted as a private person, its act was not an act of the State. But that did not mean that in the case of an act by a private person the State could not be held responsible for the failure of its organs to act if they ought to have prevented or punished the act in question. A person who, although an organ of the State, acted in certain circumstances in a private capacity, came, by reason of that very fact, within the category of private persons. The problem of his conduct then arose in the same way as that of the conduct of a mere private person who had no official functions.

54. Although there were some connexions between articles 10 and 11, they were not such that the two articles need be taken together by the Drafting Committee. Moreover, article 10 was connected just as closely with other articles of the draft.

55. The CHAIRMAN suggested that article 10 should be referred to the Drafting Committee.

It was so agreed. [6]

Membership of the Drafting Committee

56. The CHAIRMAN said that, if there were no objection, he would take it that the Commission agreed that its Drafting Committee should consist of Mr. Quentin-Baxter as Chairman, Mr. Ago, Mr. Elias, Mr. Martínez Moreno, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov and Sir Francis Vallat.

It was so agreed.

The meeting rose at 5.50 p.m.

[6] For resumption of the discussion see 1345th meeting, para. 5.

1308th MEETING

Tuesday, 13 May 1975, at 10.5 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, 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]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce article 11, which read:

Article 11 [3]

Conduct of private individuals

1. The conduct of a private individual or group of individuals, acting in that capacity, shall not be considered as an act of the State under international law.

2. However, the rule enunciated in the preceding paragraph is without prejudice to the attribution to the State of any omission on the part of its organs, where the latter ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so.

2. Mr. AGO (Special Rapporteur) said that in pure theory it was not impossible for the responsibility of a State to be engaged in cases other than those referred to in the draft articles already considered by the Commission (A/9610/Rev.1, chapter III, section B). Long ago, it had been held that any act of a citizen of a State, or of a person in the territory of a State, was an act of that State under international law. Today, that rule was not only repugnant, since the conduct of a private person who was not acting for the State, either permanently or occasionally, could not be attributed to the State, it was also contrary to the conclusion reached by the Commission concerning organs of the State, namely, that their conduct could be attributed to the State only if they had acted in their capacity as organs. At first sight, therefore, it appeared that the conduct of a private individual could not be attributed to the State. Nevertheless, it was from international jurisprudence and practice that the rule must be derived, not from abstract ideas.

3. He wished to make two preliminary remarks. First, if it was to be concluded that the act of a private individual could be attributed to the State, everything must support that conclusion; it must be possible to establish that the act attributed to the State was really the act of an individual and not a different act committed by an organ of the State in connexion with the act in question. If an individual managed to enter a foreign embassy, caused damage there and stole documents, his conduct could not be attributed to the State. What the State, and in particular its police force, would be blamed for, was not having taken adequate measures to protect the embassy. To attribute the act of the individual to the State would amount to accusing it of having failed to fulfil its obligation to respect the inviolability of the embassy, of having wrongly entered it, and of having caused damage there and stolen documents. On the other hand, if it were considered that the private individual alone was

[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.

the author of the act in question and that the State was responsible only for the inaction of its agents, the State could only be accused of not having protected the embassy so as to prevent the act of the individual, or of not having punished the guilty person. That case must therefore be clearly distinguished from the case in which it was a policeman rather than a private person who wrongly entered an embassy; the act of the policeman would then be attributable to the State. In the former case, the internationally wrongful act of the State consisted in an omission on the part of its organs, namely, the failure to take adequate measures for protection or punishment. It must not be concluded from that alone, however, that the conduct of a private individual would itself be attributed to the State when it was accompanied by conduct of certain organs of the State. The fact that organs of the State were to blame for certain conduct in connexion with the act of a private individual did not transform his act into an act of the State. The act of the individual was not attributed to the State if the State was only accused of failure to fulfil its obligation to provide protection against the acts of private persons. Hence it should be determined, in every case, what the State was accused of and whether the alleged breach of an international obligation was the act of the private individual or of one of its organs.

4. The problem of determining the amount of reparation to be paid had sometimes caused confusion. States had often been ordered to pay a sum corresponding more closely to the damage caused by the individual than to that caused by the accused organ; that was because it was generally more difficult to establish the amount of pecuniary damage resulting from the inaction of an organ of the State than that resulting from the act of a private individual. Once again, the confusion arose from the fact that the damage was considered to be a constituent element of the wrongful act. It was not the damage, however, but the breach of an obligation to act or not to act which was the constituent element of the wrongful act. It was from that breach that damage could result, and it was not necessarily pecuniary damage. The damage, if any, was a material consequence of the internationally wrongful act, not the wrongful act itself. Hence there was no reason why the amount of reparation due because an organ had not taken the necessary preventive or punitive measures should not be assessed according to the damage caused by the act of the individual; but it would be wrong to deduce from that, that the act of the individual was thereby attributed to the State.

5. His second preliminary remark was in the nature of a warning. Once again, the Commission must take care not to codify, at the same time as the rules governing State responsibility, rules relating to other subjects, such as the obligations of States in regard to the treatment of foreigners and the special protection to be given to persons representing foreign States and to the property of such States. Previous attempts to codify the rules of State responsibility had been doomed to failure because they had not managed to avoid that pitfall. The 1930 Codification Conference, for example, had become entangled in considerations relating to the treatment of foreigners.

6. The concept of indirect responsibility had often been mentioned in regard to cases in which State responsibility had been incurred in connexion with the acts of individuals. In both internal and international law, indirect responsibility was the exceptional responsibility of one subject of law for the act of another subject of law. In the cases under consideration there could be no indirect responsibility, because the private individual committing the act was not a subject of international law. There was direct responsibility, inasmuch as the State which had not prevented the act or had not punished the guilty person was responsible for the omission by its organs. The act of the individual was only the catalyst for the wrongful nature of the conduct of the State organs. If an organ failed in its duty to protect an embassy effectively, the wrongfulness of its conduct would become manifest only when a private individual took advantage of that situation to attack the embassy or to enter it and commit offences there. The Commission would have occasion to revert to that question when it examined the objective element of the internationally wrongful act. It would find that there were some acts of the State whose wrongful nature showed itself without the addition of any external event, whereas others required the occurrence of an external event for their wrongful nature to appear.

7. With regard to international jurisprudence, it was necessary to go quite far back in time to understand the historical development which had taken place, and he drew attention to the many cases cited in his report. In the *British Property in Spanish Morocco case* (A/CN.4/264, para. 81), Max Huber, the arbitrator, had expressed some ideas of capital importance for the subsequent development of the principles involved. He had indicated that the acts of individuals could not be attributed to the State and that the State could be held responsible only for a failure on the part of its organs, such as a failure to prosecute offenders. He had also made a distinction, with regard to determination of the reparation payable, between damage caused by the act of the individual and damage caused by the omission of the State. Only the latter damage should, in his opinion, be compensated.

8. The *Janes case* (*ibid.*, paras. 83-85), which had been the subject of an award rendered in 1925 by a Commission presided over by Van Vollenhoven, had related to the murder of a United States national in Mexico by one of his discharged employees of Mexican nationality. The claim had been based on the fact that the Mexican authorities had failed to take proper steps to apprehend the culprit, who had gone unpunished. The United States agent had stressed the complicity of the Mexican State. The President of the Commission had considered that the notion of complicity was purely fictitious and could not provide a basis for reversing the conclusions and attributing the act of the individual to the State. He had taken the view that the delinquencies were different in their origin, character and effects. The majority of the members of the Commission had agreed with that view, but the United States member, Mr. Nielsen, in his dissenting opinion, had nevertheless supported the thesis of complicity or "condonation", which was never to appear again in judicial decisions. He had deduced from that thesis that when a State became an accomplice

because it had not taken preventive measures or had not punished the guilty persons, it took part in the act of the private person concerned and endorsed it. Despite that position, Mr. Nielsen had nevertheless associated himself with the Commission in determining the amount of reparation due.

9. With regard to the practice of States, he thought that the preparatory work for the 1930 Codification Conference could be taken as a starting point (*ibid.*, paras. 91-102). That Conference had given many States an opportunity to express their views in an objective way, whereas when foreign ministries were defending their positions in specific cases, they were inevitably inclined not to be entirely objective. The twenty-three States which had replied to the question put to them on that point by the Preparatory Committee for the Conference, had agreed that the State could not be held responsible for the conduct of an individual and that international responsibility of the State could arise only when its own organs violated an international obligation in connexion with the act of an individual. It had been in the light of those replies that the Committee had prepared the bases of discussion, which had had the unfortunate defect of relating not only to State responsibility, but also to the treatment of foreigners, and had consequently not received the support of a large enough majority to be adopted. Thus the participants in the 1930 Conference seemed to have recognized unanimously that the acts of private persons could not be attributed to the State as a source of international responsibility; but they had not been able to agree on the content of the obligations of States in regard to foreigners. Subsequently, a proposal by China, which had differed from the bases of discussion only in that it accepted the principle of equal treatment for foreigners and nationals, had been adopted without difficulty.

10. After considering the possible responsibility of the State in the simplest cases, namely, those in which private persons caused injury to individual aliens, it was necessary to examine a whole range of much more complex situations, which had given rise to great difficulties owing, once again, to the formulation of rules relating to the primary obligations of States in those situations. The situations in question could be divided into two main categories: cases in which injurious acts had been committed against individual aliens, not by isolated individuals, but during popular demonstrations, riots or disturbances of some kind; and the much more serious cases in which the victims were not mere private persons, but persons entitled to special protection as the official representatives of foreign States.

11. In the first category of cases, the respondent State usually claimed that it had been impossible to foresee and control the actions of the crowd, while the claimant State argued that the accused State had failed to fulfil its international obligations by not taking the necessary steps to prevent or punish such actions. But the dispute between the two parties generally related to the specific circumstances of the case rather than to the principles involved, as was shown by the cases cited in paragraphs 109 to 113 of his fourth report (A/CN.4/264 and Add.1).

12. The second category of cases—those of injuries caused by individuals to foreign official persons entitled to special protection by the States—was the one which had given rise to most difficulties at the international level. The *Janina incident* (*ibid.*, paras. 115-120) was significant in that respect. The Conference of Ambassadors, to which the case had been referred, had affirmed that it was "a principle of international law" that States were "responsible for the political crimes and outrages committed within their territory". But the Special Committee of Jurists, to which the Council of the League of Nations had referred the case, had adopted a position radically different from that of the Conference of Ambassadors. To the question "In what circumstances and to what extent is the responsibility of a State involved by the commission of a political crime in its territory?", the Special Committee had replied by affirming that "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal". And it had added that "The recognized public character of a foreigner and the circumstances in which he is present in its territory entail upon the State a corresponding duty of special vigilance on his behalf". That opinion, which had been approved unanimously by the Council of the League of Nations, including Italy, meant that the representatives of a foreign State must benefit from greater protection than that owed to mere private persons, but that the State was not responsible for an act committed by private persons merely because that act had been committed in its territory; the State was responsible only in so far as it had failed in its duty to provide protection by neglecting to prevent or punish the crime.

13. That conclusion was confirmed by the cases cited in paragraphs 121 to 133 of his fourth report. In all those cases, the question that had arisen had been that of the measures taken by the State to protect the representative of a foreign State. In the *Worowski case* (*ibid.*, paras. 121-125), the Soviet Government had accused the Swiss Government not only of taking "none of the necessary steps to prevent a crime", but also of doing "all in its power to allow the criminals to escape with impunity".

14. In the *case of the attack on the Italian Consul at Chambéry* (*ibid.*, para. 128), the legal expert of the Legal Department consulted by the French Ministry of Foreign Affairs had recognized that "a State has the duty to ensure the punishment of offences committed against aliens in its territory" and that "This obligation is particularly strict when the victim is an official required by his functions to be present in the territory of the State where he was the victim of an offence". He had added that "A State cannot evade this obligation under international law by invoking its legislation . . .".

15. Finally, in the *case of the attack on the Romanian legation at Berne* (*ibid.*, para. 130), the Legal Division of the Swiss Federal Political Department had held that acts which involved the responsibility of the State were, "In principle, acts which contravene international law, in this case, acts contravening the local State's duty to

protect diplomatic missions" and had added that "when the State fails to perform its duties to prevent and punish, or performs them incompletely, it becomes internationally responsible".

16. In all the cases cited, attention had always been drawn to the duty of the State to provide greater protection for foreigners having official status. But the responsibility of the State had been acknowledged only when its organs had violated their obligations in that respect. Thus the principle had been recognized that the State was not responsible for the acts of private persons as such.

17. The great majority of writers, starting with the Italian jurist Anzilotti, upheld that same position. An argument could hardly be based on the codification drafts already prepared, for they had been animated mainly by the desire to establish a primary rule of international law by defining the obligations of the State in regard to foreigners. The draft prepared by Mr. García Amador [4] had had the same defect as that submitted to the 1930 Hague Codification Conference and would probably not have led to any practical results if it had been submitted to an international conference.

18. Article 11, paragraph 1, stated the rule that "the conduct of a private individual or group of individuals, acting in that capacity, shall not be considered as an act of the State under international law", while paragraph 2 stated the principle that the State was answerable for the conduct of its organs when they failed in their international duty to provide protection against the act of the individual. In affirming that principle he had not been trying to define the primary obligations of the State; it was in each specific case that it would be necessary to determine whether the obligation existed and whether it had been violated. The obligation of the State could be summarized by two questions. First, could the State have taken action to prevent the offence committed by the individual and had it done so? Secondly, could the State have taken action to punish the individual for the offence committed and had it done so? Protection *ex post facto* was part of general protection, since punishment was a deterrent.

19. Mr. TAMMES said that paragraph 1 of article 11, which strictly distinguished the individual from the State, was the outcome of a long development which had been admirably described by the Special Rapporteur in his report. Few States would now accept the idea of the collective solidarity of the social group as a source of responsibility of the State for the acts of all persons under its jurisdiction—an idea mentioned in paragraphs 138 and 139 of the report (A/CN.4/264 and Add.1). That idea had some attraction, however, if only from the point of view of simplicity. As a matter of drafting, he found the French expression "*agissant en tant que tels*" better than the English "acting in that capacity"; the French wording was more neutral.

20. Paragraph 2 had the advantage of not trying to formulate the primary international rule the integrity of which the State organs ought to have preserved against any adverse conduct of individuals, such as the rule concerning the protection of aliens, diplomats and other foreign organs.

21. At the same time, the Commission should not miss the opportunity of making full use of the very numerous precedents, so admirably described by the Special Rapporteur in his report. In that connexion, he wished to draw attention to an additional case, that of the *Alabama*, [5] in which a group of individuals in the United Kingdom during the American Civil War had committed acts preparatory to violating, abroad, the rules of neutrality, and the United Kingdom authorities had failed to prevent those acts. The case did not relate to the protection of foreigners within the territory of a State, but to the protection of a foreign State against the conduct of private persons outside its territory. In the arbitral award in that case, made at Geneva in 1872, it had been clearly decided that the territorial Power must use due diligence "as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties". Those words referred to the duty of a State to prevent any action "to carry on war against a Power with which it is at peace" and not to tolerate such warlike action by individuals on its territory. He urged that the present opportunity should be taken to generalize the rule he had just quoted, which could be considered as a declaration of non-intervention made in advance.

22. As it now stood, paragraph 2 of article 11 was rather empty; its contents would follow from the logic of the draft articles as a whole. It could, of course, be useful as a reminder, in view of past controversies, but he suggested that, if possible, it should be made more useful by amending the second half of the sentence, after the words "attribution to the State", to read: "of any omission to use all reasonable means at its disposal to prevent and punish any conduct contravening international law by natural or legal persons under its jurisdiction".

23. The expression "all reasonable means at its disposal" could be replaced by any one of a number of other phrases also appearing in the Special Rapporteur's commentary to article 11. The term "persons", or the extended form "natural or legal persons" was to be found in modern legal texts relating to the law of the sea and to the environment, such as the Stockholm Declaration. [6] It would cover nationals outside the territory, but under the jurisdiction of the State, as well as persons within the territorial jurisdiction.

24. The proposed amendment was in keeping with the teachings of the *Trail Smelter arbitration* [7] and the *Corfu Channel case* [8] and did not go beyond the framework of the general rules of State responsibility. It

[4] See *Yearbook ... 1961*, vol. II, pp. 46-54.

[5] See Oppenheim, *International Law* (7th ed.), vol. II, pp. 714 *et seq.*; for full text of the award, see *British and Foreign State Papers*, vol. LXII, p. 233.

[6] *Report of the United Nations Conference on the Human Environment, Stockholm, 1972* (United Nations publication, Sales No. E.73.II.A.14), p. 3.

[7] United Nations, *Reports of International Arbitral Awards*, vol. III, p. p. 1905.

[8] *I.C.J. Reports 1949*, p. 4.

would have the advantage of allowing for the enormously increased legislative means at the disposal of the modern State when compared with the traditionally liberal State.

25. Another possibility would be to abandon the presumptive approach of paragraph 2 and state a positive rule attributing to the State any omission to use all reasonable means at its disposal.

26. With regard to article 11 as it stood, he had two points to put to the Special Rapporteur. The first arose from the fact that the article was not confined to the protection of foreigners against persons in the territory of the State held responsible. He suggested that, in view of that fact, it would be better to use a wider expression than "individuals", so as to cover all persons or entities against whose conduct protection was afforded by international law.

27. His second point was connected with the restrictive stand taken by Max Huber in the *British Property in Spanish Morocco case* cited in paragraph 81 of the Special Rapporteur's report; in view of the doctrinal controversies on the matter, there would be some advantage in stating explicitly, in article 11, the rejection of the old theory.

28. Mr YASSEEN said that the rule in article 11 might appear evident, but it assumed its full importance when one considered that the development of international law consisted not only in finding logical solutions, but in finding solutions accepted by all States as rules of law. To deduce that fundamental rule, it had been necessary to explore international jurisprudence and go into the history of the relevant cases. In formulating the rule, the Special Rapporteur had been faithful to positive international law, which did not recognize the responsibility of the State for the acts of private persons. He had also been faithful to the method adopted by the Commission, for he had confined himself to stating the secondary rules governing State responsibility, without trying to draw up material rules on the obligations of States. In that respect, the amendment proposed by Mr. Tammes departed to some extent from the method followed by the Commission, since it referred to a material obligation imposed on States with regard to the protection of aliens: and that was a primary rule, not a secondary rule regarding the implementation of responsibility.

29. Article 11 was very clearly worded and showed that the real source of State responsibility was not the act of the private person concerned, but the violation of an obligation incumbent on the State itself. The Special Rapporteur had made a laudable effort to remove any misunderstanding on that point, by clearly affirming that a State could be held responsible only in connexion with an offence committed by a private individual, because it had violated an international obligation. He thought that paragraph 2 was necessary in order to affirm that principle. The wording was acceptable, but he doubted whether the final words "and failed to do so" were really necessary.

30. Mr. KEARNEY said that article 11 and its impressive commentary were a monumental achievement. He cautioned the Commission, however, against excessive abstraction in legal formulas.

31. An important issue had been raised by Mr. Tammes in suggesting the use of the word "persons". It was significant that both article 8 and article 12 referred to the conduct of "a person or group of persons", not to that of "a private individual or group of individuals" as did article 11. It was essential to introduce uniformity into the terminology used throughout the articles; in order to serve as a legal tool, the draft would have to be clear as to the persons—whether individuals or legal entities—to whom the various provisions referred. Article 11 should cover both natural persons and legal persons or entities, all of them acting in a private capacity. In view of the way in which international law was developing, it was highly desirable to take legal personality into account in the present context.

32. In paragraph 2, he found considerable ambiguity in the words "where the latter ought to have acted". In particular, it was necessary to determine whether it was domestic law or international law that constituted the basis for the use of the word "ought". To him, it was obvious that the obligation derived from international law, but the point should be made clear so as to avoid future controversies.

33. He was concerned about the fact that the provisions of paragraph 2 were restricted to omissions on the part of organs of the State. There could well be some positive acts by State organs which had the same effect. The Special Rapporteur's commentary gave two examples of disputes over the effect of general amnesty laws on the punishment of individuals in situations such as those described in paragraph 2. An amnesty law did not constitute an omission on the part of the State; it was a positive act of legislation.

34. He was also concerned about the use of the formula "to prevent or punish", which he found much too absolute. The obligation of a State to prevent certain acts was not of an absolute character; that point had been made very clear in the opinion given in 1955 by the Legal Division of the Swiss Federal Political Department in the case of *the attack on the Romanian legation at Berne*, cited in paragraph 130 of the Special Rapporteur's report, which pointed out that the obligation depended on the domestic situation. The opinion added that "The State must exercise due diligence; it is not required to prevent every incident without exception ...". Some passages in that opinion perhaps went further than many members of the Commission were prepared to go, but they did point clearly to the relative character of the State's obligations in the matter.

35. As to the obligation to punish individuals who committed certain offences, he referred to the discussions on that subject held by the Commission in connexion with the protection of diplomatic agents. [9] Similar discussions on the extent of the obligation to punish had taken place during the formulation of the various conventions on the protection of aircraft against attacks. Different views had been expressed on the question whether a State fulfilled its obligations by simply introducing the case into the normal machinery of justice. When the

[9] See *Yearbook ... 1972*, vol. I, discussions on item 5 of the agenda.

time came to redraft paragraph 2 of article 11, the Drafting Committee would have to consider that important point.

36. He found considerable merit in the amendment proposed by Mr. Tammes, but it was extremely wide. It expressed a general rule of State responsibility and was probably not a primary rule; but its formulation was so sweeping that it would make article 11 less likely to gain general acceptance by States. The proposed amendment brought out the fact that certain earlier concepts were still valid. In the *Alabama case*, to which Mr. Tammes had referred, the question of confirmation of an illegal act had arisen. The older theories on the subject were not mentioned in recent literature, but they remained valid to some extent and should be taken into account in drafting paragraph 2.

The meeting rose at 1 p.m.

1309th MEETING

Wednesday, 14 May 1975, at 10.10 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. 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 11 (Conduct of private individuals)[3] *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of draft article 11 as proposed by the Special Rapporteur.

2. Mr. SETTE CÂMARA said that the principle embodied in the two paragraphs of article 11 was sound, and consistent with the philosophy of the draft. It was backed by an extensive and exhaustive analysis by the Special Rapporteur of arbitral awards, State practice, attempted codifications and writers' opinions.

3. The Special Rapporteur's comprehensive exposition demonstrated conclusively that the State could not be held responsible for acts of individuals performed in their private capacity. It might happen—and indeed often did happen—that the acts of individuals totally unconnected with the machinery of the State created a legal situation that involved the State's responsibility. But the source of that international responsibility was not the act of the individuals in question, it was the breach of an international obligation by the State or its organs. The State was thus responsible for a specific act or omission quite distinct from the acts of the individuals concerned. There was very little support in modern times for the theory that the State, by that act or omission, endorsed or condoned the acts of the individuals and became a sort of accomplice. Moreover, since individuals were not subjects of international law, it could hardly be maintained that they could violate an international obligation by their acts; such a violation could only be committed by the State or its organs.

4. The rule that the act of an individual could not be considered as a source of international responsibility was not affected by the fact that the damage caused by that act could be used as a criterion for establishing the amount of reparation. That point was irrelevant, for the Commission had already agreed, in earlier articles, to discard damage as one of the constituent elements of the internationally wrongful act.

5. The many arbitral awards cited by the Special Rapporteur in his report (A/CN.4/264 and Add.1) were virtually unanimous in attributing to the State only responsibility for acts or omissions on the part of its organs which had failed to prevent the wrongful acts of individuals or to punish individuals for such acts. The cases in question involved such omissions as denial of justice, failure to provide adequate protection and failure to prosecute and punish individual offenders effectively and promptly. Two legal relationships were involved: one, which affected the individuals directly, concerned a delinquency against the internal legal order; the other, which affected the State, concerned the breach of an international obligation and hence a delinquency against the international legal order. A striking example of the distinction between the two categories of illicit acts was provided by the *Janes case*, cited in paragraph 83 of the Special Rapporteur's report.

6. The same principle had been stated clearly in Bases of Discussion Nos. 10, 17, 18 and 19 of the 1930 Hague Codification Conference, although at that time the problem had been erroneously confined to damage to the person and property of aliens. The same was true of the merging of those formulations, by the Third Committee of the Conference, into one single text (article 10) which had been adopted unanimously by the Conference (A/CN.4/264, paras. 91-99).

7. With regard to disturbances, riots and popular demonstrations, the Special Rapporteur had made it clear that the same principle would prevail for the purpose of establishing State responsibility. As to the problem of diplomatic agents and other specially protected persons, the Convention adopted on the subject by the General Assembly[4] in 1973 established new international obligations which were a potential source of State

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[1] *Yearbook ... 1972*, 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 General Assembly resolution 3166 (XXVIII), annex.