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Summary record of the 1310th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1975, vol. I

in the draft article. The difficulties which had been mentioned related to the formulation.

48. It was important that the position of juridical persons should be covered in paragraph 1. The point could not be avoided on the basis indicated by Mr. Pinto, namely, that States could be responsible for the actions of corporations in certain circumstances, since that was more a question of liability than of the attribution of conduct to the State. Corporations normally acted independently of the State and their acts should, therefore, be seen as private acts. In that respect, he approved of the suggestion made by Mr. Elias.

49. While it was true that article 11 might to some extent be considered superfluous, because the principle in paragraph 1 followed naturally from earlier articles—particularly article 8—that principle was in itself so important that it must be stated; hence the counter-balancing effect of paragraph 2 became necessary. As the Special Rapporteur had warned, however, in the concluding sentences of paragraph 145 of the commentary, the Commission should not attempt to draft primary rules, and it was such an attempt that had caused the difficulty regarding paragraph 2; in his opinion, the phrase "ought to have acted" came within the context of primary rules. He suggested that the object of paragraph 2 should be to delimit the negative effect of paragraph 1 on earlier articles and that that object could be achieved, and the paragraph itself strengthened, by the inclusion of a phrase such as:

> ". . . without prejudice to the attribution to the State of conduct by reason of any provision of the present articles".

50. Mr. USHAKOV said he fully approved of the substance of article 11, but had several reservations on the drafting.

51. In drafting paragraph 2, the Special Rapporteur seemed to have gone beyond the limits of the subject he had intended to deal with in chapter II. For whereas that chapter was intended to deal only with the act of the State under international law, article 11 dealt with a wrongful act of the State, namely, a possible omission by an organ of the State when it ought to have acted in accordance with international law. In referring to the way in which an organ ought to have acted according to a primary rule of international law—which required it to prevent or punish the conduct of an individual—the Commission was taking a subjective element into consideration and leaving the sphere of "acts of the State" to enter that of wrongful acts of the State. Consequently, he considered that paragraph 2 of article 11, as it stood, was almost unacceptable. For the same reason, the wording proposed by Mr. Tammes and by Mr. Elias had no place in chapter II.

52. As drafted, article 11, paragraph 2, also seemed to imply that, in the situations contemplated, any delinquency on the part of an individual was accompanied by an omission by an organ of the State. But that was not always the case. For example, there was no omission by an organ of the State when an ambassador on mission abroad was insulted in a public place by a private individual. Admittedly, the Special Rapporteur had taken the precaution of referring to "any" omission on the part of organs of the State, but that qualification did not seem adequate from the point of view of legal technique.

53. If it was considered necessary to refer in paragraph 2 to " any omission" on the part of organs of the State, the contents of nearly all the preceding articles would have to be repeated in order to make it clear, for example, that not only organs of the State were involved, but also other entities empowered to exercise elements of the governmental authority, and that the organs might have acted contrary to instructions.

The meeting rose at 1 p.m.

1310th MEETING

Thursday, 15 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.

Co-operation with other bodies

[Item 8 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, who was acting as its observer, to address the Commission.

2. Mr. SEN (Observer for Asian-African Legal Consultative Committee) said that in the absence of the Committee's President, who was unfortunately prevented from attending by official business, it was his privilege to represent the Committee before the International Law Commission.

3. The Committee had been gratified to note that the Commission had elected as its Chairman Mr. Tabibi, who had for long been a powerful advocate of Asian-African legal co-operation and had been largely instrumental in promoting the current close co-operation between the two bodies. Mr. Tabibi had been so closely linked with the Committee, particularly through his recent work on the important question of land-locked countries in preparation for the Geneva Conference on the Law of the Sea, that it could almost claim him as one of its own. The Committee was also grateful to the other members of the Commission who had attended its meetings in the past, particularly Mr. Yasseen, who had been a strong supporter of the Committee in the United Nations and other organizations; Mr. Elias, who, as a former President of the Committee, had made an outstanding contribution to the expansion of its role and had given valuable assistance to its member Governments in preparing for United Nations conferences of plenipotentiaries; and Mr. Pinto, one of the architects of the Committee's work on the law of the sea.

4. One of the main objects of the Committee was to examine, on a regional basis, the problems before the Commission and to make recommendations. In its early years the Committee had had to concentrate on priority issues raised by its member Governments, but the work of the two bodies had fallen into line on the topic of the law of treaties and he firmly believed that their co-operation had contributed greatly to the adoption of the Vienna Convention on that topic. The Committee had also informed its members of the Commission's work concerning internationally protected persons, with the result that some of its own suggestions had been included in the draft articles. The Committee hoped it would soon be able to send its observations on the Commission's draft articles on succession of States in respect of treaties to its member Governments, in preparation for a possible plenipotentiary conference on the subject. In future, the Committee intended to include all subjects discussed by the Commission in its programme of work, taking them up at an early stage in the Commission's deliberations. He hoped it would be possible to achieve greater co-operation between the two bodies after the Committee had completed its work on the law of the sea.

5. With the expansion of its membership, the Committee had broadened the scope of its activities to include the study and preparation of material concerning all legal issues of interest to the United Nations and other international organizations, for the benefit of its members and other Asian and African governments. Its most important work had been done on the law of the sea; it was in the Committee that the concepts of the exclusive economic zone and the archipelagic State had originated. The Committee co-operated closely with the United Nations Environment Programme, so far as the legal aspects of environmental problems were concerned, and with UNCITRAL, UNCTAD, ECE, EEC and other bodies, on questions relating to the international sale of goods, international commercial arbitration and shipping, all of which were matters of vital interest to developing countries. The Committee helped its member Governments by conducting training programmes, collecting legal material, and organizing seminars on common problems. It hoped to hold a seminar on problems of international law for government legal advisers in 1976.

6. Members of the Committee had recognized from the outset that regional interests could best be promoted in the broader context of the world community, and had welcomed a wide range of observers to their meetings. At its sixteenth session, held at Teheran in 1975, the Committee had much appreciated the clear account given by Mr. Ustor of the meticulous care taken by the Commission in its work on succession of States in respect of treaties—a matter of great concern to Asia and Africa, where there were many new States. Another cause for satisfaction had been the presence of many high-level representatives of Latin American States, as the interests of States in that region were practically identical with those of the members of the Committee. The session had been devoted mainly to an evaluation of the Third United Nations Conference on the Law of the Sea and the discussion of specific questions on which further clarification and consultation had appeared necessary in preparation for the recent Geneva session of that Conference, including the economic zone, the patrimonial sea, the continental shelf, the limits of national jurisdiction, passage through straits and the régime for islands and archipelagos. The Committee had also identified certain legal problems relating to the environment and hoped to discuss them further at its next session. Finally, the Standing Committee on trade-law subjects had drafted three model agreements—on agricultural products, machinery and consumer durables—which had been communicated to the governments in the region, the United Nations and other regional organizations for comment, and which the Committee would be submitting to a conference of experts in 1976. In that year the seventeenth session of the Committee would be held, at Kuala Lumpur, and he hoped the Chairman of the Commission would be able to attend.

7. He looked forward to a steady increase in the co-operation between the Asian-African Committee and the International Law Commission, which were both engaged in developing a legal order based on justice, equity and good conscience.

8. The CHAIRMAN thanked Mr. Sen for his statement and for inviting him to attend the Committee's next session. The tradition of the annual exchange of observers between the Commission and the Committee was beneficial to the work of both bodies. He had noted the keen interest which the members of the Committee took in the work of the Commission, which greatly appreciated that interest. The Committee deserved particular praise for the impressive amount of work it had done on the law of treaties and the law of the sea. The wide support it enjoyed, including that of the Latin American States, showed that it had become a third world forum whose deliberations could not but be of value to the Commission. Its success was largely due to the untiring efforts of its Secretary-General, an eminent jurist and scholar who had made a great contribution to the development of international law and of co-operation among members of the Asian-African Committee.

9. Mr. USTOR congratulated Mr. Sen on his clear account of the wide-ranging activities of his vigorous and expanding Committee and said that his own attendance at its sixteenth session had been a most rewarding experience. He had been impressed by the liveliness of the debates, the efficient conduct of business by the President of the Committee and the other officials, and above all, by the untiring efforts of its Secretary-General, who had been the motive force behind the whole session.

10. The members of the Commission were aware that the links between it and the Asian-African Committee were especially close, since article 3 of its Statutes required the Committee to examine questions that were under consideration by the Commission. Although the Committee had recently concentrated on the important topic of the law of the sea, he was confident that it would contribute to the codification of other topics and welcomed Mr. Sen's statement to that effect. It would be

gratifying if other bodies of a similar nature also systematically discussed the topics before the International Law Commission, so as to foster more fruitful co-operation between the regional and central agencies concerned with international law.

11. Mr. KEARNEY said that the work of the Committee was closely interlinked with that of the Commission and the relationship was most productive. He drew attention to the report on the Committee's work circulated to the Commission, [1] which, in regard to the law of international rivers, for example, illustrated the problems the Commission would have to face in tackling the same subject. He had also found it interesting to read of the Committee's work on international commercial arbitration and, indeed, all its work connected with UNCITRAL. The collection of the Committee's recommendations would be very useful to lawyers and scholars. If the Committee reviewed future recommendations relating to service of documents and the taking of evidence abroad, it would be worth while examining the conventions prepared by the Hague Conference, especially the provisions relating to machinery for the establishment of a central authority for the service of process and the taking of evidence. The Secretariat of the Committee was preparing a commentary on the question of the protection and inviolability of diplomatic agents and other protected persons, and he hoped it would support the Convention adopted on that subject by the United Nations, which he considered to be most important. [2]

12. Mr. MARTÍNEZ MORENO, speaking also on behalf of Mr. Sette Câmara, thanked Mr. Sen for his excellent report. There was undoubtedly a close intellectual link between bodies dealing with the codification and progressive development of international law. The countries of Asia and Africa and of the other regions of the developing world had serious demographic, economic, social and educational problems, but they could, he thought, be solved through international co-operation within the context of the higher principles of law. It had thus been of great interest to him, as a Latin American jurist, to hear of the Committee's efforts to achieve international solidarity and the advancement of international law.

13. Mr. AGO, speaking also on behalf of the other members from Western European countries, thanked Mr. Sen for his statement and wished the Asian-African Legal Consultative Committee every success in its work. He had had an opportunity of seeing the Committee at work during the session it had held some years ago at Baghdad, and had noted the valuable services which could be rendered to the International Law Commission by bodies of that kind. In their respective regions they studied the Commission's work and made it known more widely than the Commission itself would be able to do. They dealt mainly with matters of particular interest to their own regions and then communicated their views and suggestions to the Commission.

14. The Asian-African Legal Consultative Committee differed from the other similar bodies in that its membership comprised both old States and new States which urgently needed to make their contribution to the solution of current problems of international law. The International Law Commission was gratified by the ever-increasing interest the Committee took in its work, as that enabled it to achieve greater success in its endeavours to prepare truly universal rules of international law.

15. Mr. YASSEEN said he had attended the deliberations of the Asian-African Legal Consultative Committee several times and in various capacities, and he had subsequently told the Commission of the value of the Committee's work and its close links with the Commission. It was thanks to the efforts of Mr. Sen, its Secretary-General, whom he congratulated on his excellent statement, that the Committee had expanded considerably and had become a valid partner for other bodies concerned with the progressive development of international law and its codification. Much of the Committee's success was due to Mr. Sen's devotion, scholarship and patience.

16. Sir Francis VALLAT, speaking also on behalf of Mr. Quentin-Baxter, associated himself with Mr. Ago's remarks and added his appreciation of the lucid report by Mr. Sen. He stressed the great importance he and Mr. Quentin-Baxter attached to the work of the Asian-African Committee. It was encouraging to note the Committee's attention to the question of succession of States in respect of treaties, and he hoped the outcome of its efforts would be positive.

17. Mr. Sen's statement had shown the great value of the interchange between the Committee and the International Law Commission, which had become increasingly aware of the advantages of learning the views of governmental experts at an early stage in its discussions. During the last ten years, the Commission had been successful in producing draft Conventions, but, as exemplified by the Vienna Convention on the Law of Treaties, it had been less successful in securing their ratification and entry into force. He thought Mr. Sen might wish to suggest to the Committee that attention should be given not only to producing draft articles, but also to giving effect to them when they appeared in the form of a convention.

18. Mr. USHAKOV, speaking also on behalf of Mr. Šahović, thanked the observer for the Asian-African Legal Consultative Committee for his excellent statement and referred to the close links between that Committee and the International Law Commission. In accordance with its Statutes, the Committee systematically studied all topics on the Commission's agenda. Because jurists of world renown took part in its deliberations, the Committee's work was useful for international law in general and for the Commission's own work in particular.

19. Referring to his own country, he pointed out that two-thirds of the Union of Soviet Socialist Republics was in Asia, so that the Committee's work was of special interest to Soviet jurists.

20. Mr. ELIAS said that the Commission had grown accustomed to receiving reports of high quality from the Committee, but that the latest was probably the best.

[1] *The work of the Asian-African Legal Consultative Committee [1956-1974]*, published by the Secretariat of the Committee at New Delhi (1974).

[2] See General Assembly resolution 3166 (XXVIII), annex.

The Committee had probably been of more direct assistance to the Commission than any other regional organization, for in the past ten years it had studied in detail nearly all the important topics discussed by the Commission, giving its member Governments an insight into the problems the Commission was likely to encounter and an opportunity to make constructive comments. It was pleasing to note, in addition to the co-operation between the Committee and the Commission, the increasing links between the Committee and the Inter-American Juridical Committee, which had been particularly evident at the Committee's meeting at Colombo on the law of the sea. He was sure that the opportunities offered by such co-operation for the exchange of views and the formulation of common positions was of assistance to United Nations conferences.

21. Mr. Sen had referred to the Committee's work on the law of treaties and its role at the Vienna Conference, and to its work on the law of the sea. The strong interest of Asian and African countries in the law of the sea was evident in the Commission itself, in the person of Mr. Pinto, whose expert knowledge of that subject had been recognized by the United Nations. As Sir Francis Vallat had emphasized, however, and as he himself had recently mentioned to members of the Committee, more could be done to encourage its member Governments to demonstrate, through ratification, the importance they attached to the Vienna Convention on the Law of Treaties. The Committee should also give early attention to the question of succession of States, a subject of particular importance to the developing world, and, as Mr. Kearney had mentioned, to the question of the protection of diplomatic agents.

22. He had seen that the New Delhi headquarters of the Committee was a hive of purposeful activity. Behind it all was Mr. Sen, whom he could not thank too much for his notable personal contribution to the work of the Committee and to the part it played in the activities of the International Law Commission.

23. The CHAIRMAN wished Mr. Sen continued success in his efforts to further international co-operation and the development of international law, and asked him to convey the good wishes of the Commission to the members of the Asian-African Legal Consultative Committee.

State responsibility

(A/CN.4/264 and Add.1; [3] A/9610/Rev.1 [4])

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 11 (Conduct of private individuals) [5] *(continued)*

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

25. Mr. USHAKOV said that paragraph 2 of article 11 should refer to the conduct of the State in general and not merely to its wrongful acts. Article 8 (A/9610/Rev.1, chapter III, section B) dealt with the attribution to the State of the conduct of persons in fact acting on its behalf, without specifying whether the conduct was wrongful or not. Similarly, under all the other articles concerning the conduct of organs of a State, it was not only wrongful conduct, but also lawful conduct that was attributable to the State. He therefore suggested that paragraph 2 should be replaced by the following text: "Paragraph 1 is without prejudice to the attribution to the State of its own act". That meant any act, wrongful or not, that was attributable to the State.

26. Furthermore, paragraph 1 or paragraph 2 of article 11 should make it clear that the "conduct of a private individual or group of individuals" meant the conduct, not of any private individuals, but of private individuals subject to the jurisdiction of the State concerned. For only the conduct of private individuals who were subject to the jurisdiction of the State could result in attribution to the State of responsibility for omission.

27. He agreed with the principle stated by the Special Rapporteur in paragraph 1. The conduct of a private individual or of a group of individuals acting as such was not, in principle, attributable to the State—but in principle only, for in practice one could never be sure that the State was not involved directly or indirectly in the individual's action. The Special Rapporteur's commentary showed that in practice specific cases were always very complicated and difficult to settle. The conduct of a private individual or group of individuals could be indirectly provoked by the State—for example, by a propaganda campaign conducted by the State against another State—so that in some cases one might speak of complicity of the State, though not in the legal sense of the term, since the notion of complicity did not exist in international law. In that connexion, Mr. Reuter had rightly pointed to the causal link which might exist between the attitude of the individual and the attitude of the State.

28. With regard to the wording of paragraph 1, he thought that, in addition to the conduct of private individuals or groups of individuals, the conduct of entities not empowered to exercise elements of the governmental authority should be mentioned. The commentary should explain that the expression "group of individuals" could apply to groups of terrorists formed in the territory of a State and acting in that territory or in the territory of another State.

29. He would prefer the word "action" to the word "conduct", which meant acts as well as omissions. In the case of private individuals not empowered to exercise elements of the governmental authority, it was an act rather than an omission which could generate responsibility.

30. Mr. MARTÍNEZ-MORENO said that there was clearly no difference of opinion on the two basic principles underlying article 11, namely, that the conduct of a private individual or group of individuals acting as such should not be considered as an act of the State under

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

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

[5] For text see 1308th meeting, para. 1.

international law, but that if organs of the State failed to take action to prevent or punish such conduct when they ought to have done so, the State should be held responsible. The Special Rapporteur had rightly stated those principles as clearly as possible, without referring to secondary matters such as reparation, which had tended to confuse earlier drafts on the subject. There was still some confusion in international juridical circles concerning such matters. For example, in a dispute between El Salvador and Honduras over the destruction of property belonging to nationals of El Salvador in Honduras, one of the mediators had maintained that, since the property had been insured, there had been no loss and that hence there was no international responsibility on the part of Honduras to make reparation.

31. Mr. Tammes, Mr. Pinto and Mr. Elias had made valuable proposals, which the Special Rapporteur would no doubt take into account in his final draft. It might well be wise to mention juridical persons and entities as well as individuals. Although responsibility which did not flow from the direct relations of the individual with the State should be treated separately, there were often indirect links which complicated cases, and wording on the lines proposed by Mr. Elias [6] might raise the confusing issue of indirect responsibility. It was important to keep the statement of the two basic principles absolutely clear. He agreed with Mr. Quentin-Baxter and Sir Francis Vallat that paragraph 1 should in no way diminish the principle of a State's responsibility in cases where its organs had failed to act as they should have done. The wording proposed by Mr. Ushakov for paragraph 2 would evade the problem of cases in which the State's organs had failed to prevent or punish the internationally wrongful act of an individual or group of individuals.

32. Mr. RAMANGASOAVINA said that article 11 contained two entirely acceptable principles drawn from a searching study of State practice, doctrine and jurisprudence. Paragraph 1 stated a settled principle, which could hardly be challenged, and paragraph 2 an independent principle which constituted an exception and a limitation applying to the principle stated in paragraph 1. States had the duty to take appropriate action to prevent or punish the conduct of the individual. The difficulty of applying the principle stated in paragraph 2 lay in the appraisal of the measures really taken by the State and the measures it ought to have taken; for it was necessary to make a value judgement on the measures taken by the State to prevent or punish the act of the individual. In his opinion, the word "omission" was not enough, since an examination of the cases cited in the Special Rapporteur's report (A/CN.4/264 and Add.1) showed that they differed very widely and that sometimes there was either tacit or manifest complicity by organs of the State—for example, when a service had operated defectively.

33. An analogy could be drawn between the responsibility of the State in international law and liability in criminal law, since the State was held answerable if it had failed to prevent an offence when it had the means to do so. For example, the State had an absolute duty to prevent any act likely to harm an alien; if it failed in that duty, it incurred responsibility. But the application of the physical means necessary for preventing a wrongful act was judged differently in different cases. The State's performance of its duty might be limited by the impossibility of preventing the commission of the wrongful act; thus the State was not responsible if it had made the necessary effort to prevent the act of a private individual, but had failed.

34. He would be in favour of using the expression "failed to act", suggested by Mr. Elias, as it conveyed not only the idea of omission, but also that of deficiency or lack of diligence. He would like that idea to be introduced into the text of article 11 submitted by the Special Rapporteur. Otherwise, that text seemed preferable to the one proposed by Mr. Elias, because it was more analytical. He thought, however, that the word "*éventuelle*" weakened the word "*omission*", and preferred the expression "any omission", used in the English text.

35. Mr. BILGE observed that the rule laid down in paragraph 1 was the culmination of a long process of development of practice, jurisprudence and doctrine. That rule, according to which the conduct of a private individual or group of individuals acting in that capacity could not be considered as an act of the State under international law, might seem self-evident, but it was not a product of pure logic: it was the epitome of two centuries' experience. The cases cited in the Special Rapporteur's report showed that there had, in fact, been some resistance on the part of States. In presenting the rule in its present form, the Special Rapporteur had been careful to avoid the risk of confusion with other notions, such as complicity and indirect responsibility of the State. He (Mr. Bilge) accepted the rule in paragraph 1, which was a general rule of State responsibility and did not apply only to the treatment of aliens. It was the corollary of the rule laid down in article 5 (A/9610/Rev.1, chapter III, section B), according to which only the conduct of a State organ acting in that capacity could be attributed to the State, but it had to be stated expressly.

36. With regard to the principle stated in paragraph 2, the Special Rapporteur had warned the Commission of the danger of trying to define the obligations of the State, when it was concerned solely with the problem of the attribution of responsibility, and had pointed out that the 1930 Hague Codification Conference had failed in its task because it had tried to establish primary rules on the subject. Paragraph 2 performed a most useful function by affirming that the act of the private individual and the act of the State or its organ were two independent acts which must be treated separately, any idea of direct or indirect complicity of the State being rejected, though the existence of a causal link between the two acts was recognized. It was those two elements which made paragraph 2 so difficult to draft.

37. He had some reservations about the three proposals made in regard to paragraph 2. The text proposed by Mr. Tammes [7] contained three elements which he found hard to accept. First, it would introduce a primary rule;

[6] See previous meeting, paras. 24-26.

[7] See 1308th meeting, para. 22.

secondly, it would impose some limitation on the State's duty to protect; thirdly, it was debatable whether the conduct of a private individual could contravene international law. The text proposed by Mr. Elias was also in the nature of a primary rule, and at that stage it did not yet seem appropriate to speak of the "source" of the international responsibility of the State. Mr. Ushakov's proposal made too categorical a distinction between the act of a private individual and the act of the State. In his opinion, the link between the act of the State and the act of the private individual should be clarified, but not denied.

38. He approved of the text submitted by the Special Rapporteur, though he thought it could be improved in the light of the comments made by the members of the Commission during the discussion.

The meeting rose at 1.00 p.m.

1311th MEETING

Friday, 16 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. USTOR expressed agreement with the underlying principle of article 11. Other articles in chapter II, particularly articles 5, 7, 8, 9, 10, 12 and 13 also dealt with attribution, indicating the circumstances in which the conduct of organs of a State were attributable to the State, but article 11 dealt with the conduct of individuals or groups of individuals acting in their private capacity, which was not, therefore, attributable to the State. The article might be drafted differently; it might provide, for example, that conduct in cases other than those governed by the other articles of chapter II was not attributable to the State and could not be considered an act of the State. In strict logic, as some members had pointed out, paragraph 1 of article 11 was superfluous, for it stated what was obvious from the other articles. Nevertheless, he shared the view of the Special Rapporteur and other members that, for the sake of clarity and conformity with traditional practice, the rule had to be stated as a corollary to, and logical conclusion from, the other articles.

3. The question whether the term "private individuals" or "persons" or some other term should be used in paragraph 1 of article 11 could be left to the Drafting Committee to decide. Whatever term was used, paragraph 1 should cover the cases indirectly alluded to in article 10, under which the conduct of an organ of the State or other entity empowered to exercise governmental authority was attributable to the State even if the organ or entity had exceeded its competence or contravened the instructions concerning its activity, provided that it had acted in its official capacity. The Drafting Committee might therefore consider how to provide in article 11 for cases in which an organ of the State had acted, not in its official capacity, but as a private individual or group of individuals, in which case its conduct would not be attributable to the State.

4. The question of the conduct of juridical persons, particularly bodies corporate in which the State had an interest or which acted under its instructions, appeared to be beyond the scope of the Commission's present endeavour. It was a wide subject, which raised delicate issues of private international law and entered the domain of primary rules that the Commission wished to avoid. For the purpose of State responsibility it would be sufficient to indicate that the provisions of the draft did not exclude the attribution to the State of the acts of juridical persons, particularly when they were empowered to exercise elements of governmental authority. But the mere fact that a body corporate had been constituted under the State's internal law, or had its headquarters in the State's territory, or was controlled by nationals of the State, did not make its acts attributable to the State, any more than the acts of a natural person were attributable to a State solely by reason of that person's nationality. Nationality was nevertheless a link between a person and the State, and Mr. Ushakov had mentioned jurisdiction as another such link. The absence of any link between the person concerned and the State would exonerate the State *a priori* from responsibility, but matters of nationality and jurisdiction were so delicate and complex that it would be unwise to burden the text of article 11 with any reference to them.

5. With regard to paragraph 2, he agreed in principle with Sir Francis Vallat and Mr. Ushakov that it would be dangerous to enumerate, even indirectly, primary rules the breach of which would engage the State's responsibility, or to single out certain duties of States in connexion with the conduct of private individuals, especially if it was not made clear that the enumeration was not exhaustive. As Mr. Reuter had pointed out, the notions of prevention and punishment raised many questions as to the extent of a State's duty, the degree of diligence

[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 1308th meeting, para. 1.