Document:-

A/CN.4/SR.1311

Summary record of the 1311th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

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.

required of it, and what constituted adequate punishment. [4] Such questions clearly could not be answered in the text of the article, and to deal with them only in the commentary would be considered by many to be unsatisfactory. There were also other duties which might engage the State's responsibility, for example, the duty to comply with the terms of an extradition treaty. Certain acts or omissions on the part of State organs that amounted to complicity or quasi-complicity might also involve the State's responsibility in cases of wrongful conduct by private individuals. Thus there were both theoretical and practical reasons for not introducing such notions into the text. He would support a redraft of paragraph 2 along the lines suggested by Mr. Ushakov, which might then read: "Paragraph 1 is without prejudice to the attribution to the State of conduct which, according to other articles in this chapter, constitutes an act of the State". If the Commission considered, like Mr. Bilge, that such a rule would be too sterile, the sentence might continue: "as, for example, failure to prevent or punish . . .". It would then be clear that the enumeration of duties required of the State was not exhaustive.

6. The CHAIRMAN, speaking as a member of the Commission, said that article 11 was one of the most important in the draft, especially when read in the context of international relations in the modern world. Without the acceptance of such rules, there would be more anarchy—individuals would be able to commit wrongful acts with impunity by attributing them to a State, and States would be able to use individuals to commit wrongful acts, while disclaiming responsibility or failing to take the action required by their obligations. He therefore supported the basic idea expressed in article 11, and was prepared to accept paragraph 1 as drafted by the Special Rapporteur. He had no objection to the text of paragraph 2, which might, however, be clarified along the lines suggested by earlier speakers, especially Mr. Elias. [5]

7. He invited the Special Rapporteur to reply to members' comments on draft article 11.

8. Mr. AGO (Special Rapporteur) said that in the comments of members of the Commission on article 11, he thought he could distinguish three schools of thought.

9. First there were those—the most numerous—who had stressed the importance of the article and its essential link with the preceding articles. Those belonging to that first group, which included Mr. Yasseen, Mr. Elias, Mr. Tsuruoka, Mr. Reuter, Mr. Hambro, Mr. Martínez Moreno, Mr. Ramangasoavina, Mr. Šahović, Mr. Bilge and Mr. Tabibi, had supported his thesis and recognized that it was consistent with the method adopted by the Commission hitherto. They had approved the proposed text on the whole, and had suggested only drafting amendments designed to reflect more precisely the essential idea contained in the article. They had spoken against any change liable to alter the significance and scope of the rule deriving from the historical development of the relevant practice and jurisprudence, and had opposed any formulation, in that context, of primary rules the breach of which could engage the responsibility of the State. They had emphasized that the rule stated in article 11 should not apply exclusively to the particular case of the violation of obligations deriving from rules of international law relating to the status of foreign individuals—although those were the commonest cases in practice—but should apply to all cases of responsibility —in other words, to all cases in which there was a breach of an international obligation of the State. In their view, the fundamental principle should be that the act of a private person who exercised no element of governmental authority was never attributable to the State. Mr. Sette Câmara had emphasized, in that connexion, that in matters of State responsibility the act of a private person could only come into consideration as a catalyst for the wrongful nature of the act of the State or its organs. [6] Some members of the Commission had also stressed the need to draw attention to the relationship that must exist between the act of the private person and the act or omission of the organs of the State connected with the act of the private person, before one could speak of the attribution of any act to the State as an act generating responsibility. It had also been emphasized that the primary rules must not be touched on.

10. As to the drafting of the article, Mr. Šahović had considered that the text perhaps followed too closely a rule laid down in former times, which related mainly to the responsibility of States for the treatment of foreigners. Mr. Ramangasoavina, on the other hand, had observed that the field to be covered by the rule was one in which there was a great diversity of concrete cases. Hence the rule should be stated as simply as possible, so as to be adaptable to every possibility, and so that those responsible for interpreting it could place each concrete case in its own context. And that was what he had tried to do.

11. Beside that first group, which supported draft article 11, there were, among its critics, a second and a third group whose positions were radically opposed to it: either their proposals tended to give some place in the article to the statement of a primary rule on the status of aliens, or they feared that, as it stood, the article already introduced into the draft a rule which was in fact a primary rule.

12. He wished to protest vigorously against the charge of adopting an abstract approach, which had been made against him by two members of the second group, Mr. Kearney and Mr. Quentin-Baxter. That charge seemed to him all the more undeserved as he had presented in his report a detailed analysis of judicial cases and examples of State practice, and had followed a strictly inductive method in arriving at the rule stated in article 11. Those who spoke of abstraction should not forget that the statement of a rule of law was the necessarily abstract formulation of what existed in concrete reality. It was a judgement formulated in abstract terms, which had to be interpreted by a series of concrete judgements. A rule could not be other than abstract: those who had tried to produce another formulation of the rule

[4] See 1309th meeting, paras. 34 and 35.

[5] *Ibid.*, para. 26.

[6] *Ibid.*, paras. 3 *et seq.*

in article 11 had also proposed abstract definitions. He recognized that codification did not have only advantages, for it might sometimes be better not to state a certain rule in precise terms, and to leave it to emerge from the totality of particular cases. But the Commission's task was, precisely, to codify. Moreover, in certain systems of law to which codification was repugnant, when practice was very abundant, as it was in regard to the subject under study, a "restatement" was made, which was only a way of trying to define, by a necessarily abstract formula, the rule which followed from the practice.

13. As all the necessary elements were to be found in the analyses of cases presented in the report, Mr. Tammes had given way to the temptation to define the rule on the primary obligations of the State. [7] But in his (the Special Rapporteur's) opinion that was what should not be done. The rule in the *Alabama case*, which Mr. Tammes had spoken of generalizing, seemed rather old, and he thought that in any event it would be better to rely on more recent cases. But if the Commission referred to that rule or to other rules of the same kind, it would be going beyond the limits it had set itself by deciding to codify only the principles relating to State responsibility. If it had to define the corresponding obligations of the State, it would be entering an extremely complicated sphere, for, as Mr. Tammes himself had said, the range of situations was extremely wide. In that case the Commission would not be able to confine itself to a single rule; it would have to lay down a whole series of separate rules. For the obligations of the State towards foreign individuals were not the same as its obligations towards the representatives of foreign States or in regard to the property of foreign States. To speak, as Mr. Tammes had done in his proposal, of the obligation of the State to use "all reasonable means" at its disposal, would be to adopt a formula that was very vague and difficult to translate into practice. Consequently, he thought it would be dangerous to take that course.

14. Mr. KEARNEY had questioned whether the draft should always refer to an "omission" on the part of organs of the State and had cited the example of an amnesty law, which in his opinion constituted an act, not an omission. In reality, however, it was not the amnesty law that constituted a breach of the State's obligation: it was the application of that law in the particular case—in other words, the absence of punishment. He recognized, however, that there could sometimes be both an act of the State and an omission and, in order to take account of both possibilities, he proposed the use of the word "conduct", which covered both an act and an omission.

15. Mr. Kearney and Mr. Quentin-Baxter seemed to fear an imbalance between paragraph 1 and paragraph 2 of article 11, which would be further accentuated by Mr. Ushakov's proposal. [8] What they really feared was that paragraph 2 would amount, in certain cases, to a denial of State responsibility. But he had always affirmed that the State was responsible when its organs, by their acts or omissions, violated an international obligation in connexion with the act of a private person. He wished to stress, however, that what was attributable to the State was not the act of the private person, it was the act or the omission by the organ of the State.

16. Mr. Pinto wished to broaden the base of the rule in article 11 by introducing the notion of reparation. [9] That would be a mistake, because it would imply that there had been a wrongful act—that the wrongfulness of the act had been established. And as Mr. Ushakov had rightly pointed out, article 11 referred only to the attribution of an act to the State, when it was not yet known whether the act was lawful or wrongful. In that connexion, he drew particular attention to the danger that always arose in practice of confusing the State's obligation to punish the act of the individual, with the problem of reparation. The obligation to punish was not a form of reparation: to prevent and punish was a primary obligation of the State, whereas the obligation to make reparation implied that there had been a wrongful act on the part of the State—that there had been failure to fulfil a primary obligation. Reparation was thus the consequence of the wrongful act. If the State had not been guilty of any breach of its international obligations in regard to prevention and punishment, it had not committed any wrongful act and, consequently, owed no reparation. It would be dangerous, therefore, to introduce the idea of reparation into the draft articles.

17. Mr. Pinto had also urged that legal persons should be mentioned in the text of the article. [10] As Sir Francis Vallat and Mr. Ustor had pointed out, however, the fact that a body corporate had been constituted under a certain legal system or had its headquarters in a certain country and consequently possessed the nationality of that country and was subject to its jurisdiction, did not change the situation in any way: the legal entity was still a purely private person and, if it was acting in a purely private capacity, its acts were not attributable to the State. In that respect, therefore, no distinction need be made between a legal person and a natural person.

18. Where the sea and outer space were concerned, there was a danger of leaving the sphere of responsibility for wrongful acts and entering that of responsibility by reason of the risk inherent in an activity, which Mr. Kearney had called "liability". Those two forms of responsibility should not be dealt with in one and the same rule.

19. With regard to the proposal by Mr. Elias, he said that the source of international responsibility was never the act of a private individual, but always and exclusively the act of an organ of the State. It was an error, from which practice and judicial decisions had not always been exempt, to believe that the act of a private person could become a public act and a source of responsibility.

20. The third group he had mentioned included those who, like Sir Francis Vallat and Mr. Ushakov, feared that, in article 11, paragraph 2, the Commission was

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

[8] See previous meeting, paras. 25 *et seq.*

[9] See 1309th meeting, para. 12.

[10] *Ibid.*, paras. 13 *et seq.*

undertaking the statement of a primary rule, and who had accused him of having departed to some extent from the fundamental principle he had himself adopted. But he had never tried to define the primary obligations of the State; he had merely assumed the existence of a rule allegedly broken by the State, and the reason why he had referred to "any omission" (*omission éventuelle*) was precisely that, as Mr. Ushakov had pointed out, the act attributable to the State was not necessarily wrongful. He recognized, however, that in the rule he had formulated in article 11 one could, in fact, discern a shift from the subjective element of attribution to the State, to the objective element of breach of an international obligation.

21. In the light of the comments made during the discussion, he proposed the following new version of paragraph 1:

> "1. The conduct of a person, group of persons or entity acting in a purely private capacity shall not be considered as an act of the State under international law."

22. His reasons for using the French word "*personne*" instead of the word "*particulier*"—which, as Mr. Reuter had said, was perfectly appropriate in French, since it covered both natural persons and legal persons—were that the word "*particulier*" was difficult to translate into the other languages and that the word "*personne*" had been used in other articles. The expression "group of persons" took into account Mr. Ushakov's remark that offences for which the responsibility of the State was engaged were often not the acts of isolated persons, but of organized gangs. The word "entity" had been provisionally introduced into the text to meet Mr. Pinto's wish, although the word "person" also covered legal persons. The entities in question could be entirely private entities or entities able to exercise elements of the governmental authority, but which, in the case in question, had been acting in a purely private capacity, like the railway company referred to by Mr. Tsuruoka. [11] Thus the new paragraph 1 took account of all the possible situations.

23. Taking into account the comments made by Mr. Kearney, [12] he suggested the following new version of paragraph 2:

> "2. The rule stated above is without prejudice to the attribution to the State of any conduct connected with that of the persons, groups or entities referred to in paragraph 1, which must be considered as an act of the State by virtue of the foregoing articles."

24. The word "conduct", which covered both an act and an omission, was used to denote both an act of the State and an act of a private person. Mr. Ushakov had said that it was difficult to see how conduct of a private person which could engage the responsibility of the State could be anything other than an act. But a private person could also be capable of "commission by omission"—for example, if he did nothing to prevent a crime being committed against a foreigner in his presence. The organs of the State, on the other hand, were most often guilty of omission, though the possibility of a kind of complicity of a State organ going beyond mere failure to prevent or punish, should not be ruled out. A whole range of intermediate situations could be envisaged, which might involve elements other than mere failure to prevent or punish, including the extreme case in which the act of an individual became an act of the State because it was proved that the individual had, in fact, acted on behalf of the State. The word "conduct" was therefore preferable, since it allowed for all the possibilities, whether of omission or of commission.

25. He had also considered that the words "by virtue of the foregoing articles" were preferable to the words "according to international law" proposed by Mr. Kearney, since it was, precisely, the relevant international law that the Commission was trying to codify. The purpose of paragraph 2 was to show that, if there was a connexion between the conduct of the State and the conduct of the private person, the rule stated in paragraph 1 must not prevent the attribution to the State of its own act.

26. Mr. KEARNEY said that the redraft proposed by the Special Rapporteur was entirely acceptable. It dealt adequately with most of the problems mentioned in the discussion.

27. Mr. USHAKOV said that he too was satisfied with the new text proposed by the Special Rapporteur.

28. Mr. EL-ERIAN said that the redraft proposed by the Special Rapporteur was acceptable. He had one comment to make on the Special Rapporteur's explanation that the word "conduct" was meant to denote both acts and omissions, and his example of the representatives of a State being attacked, while the bystanders made no attempt to intervene. There was an analogy with the rule of fault by omission in criminal law, but in that particular case only an omission on the part of a person who had a duty to take action could be considered a wrongful act.

29. The CHAIRMAN suggested that draft article 11 should be referred to the Drafting Committee.

It was so agreed. [13]

The meeting rose at 11.30 a.m.

[11] See 1306th meeting, para. 7.

[12] See 1308th meeting, paras. 31 *et seq.*

[13] For resumption of the discussion see 1345th meeting, para. 10.

1312th MEETING

Tuesday, 20 May 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

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