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Summary record of the 1312th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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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.

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 12

1. The CHAIRMAN invited the Special Rapporteur to introduce article 12, which read:

Article 12[3]

Conduct of other subjects of international law

1. The conduct of an organ of another State or of an international organization acting in that capacity in the territory of a State, shall not be considered as an act of that State under international law.

2. Similarly, the conduct of an organ of an insurrectional movement directed against the State and possessing separate international personality shall not be considered as an act of the State under international law.

3. The rules stated in paragraphs 1 and 2 are without prejudice to the attribution to the State of conduct connected with that referred to in the aforesaid paragraphs which must be considered as acts of the State by virtue or articles 5 to 9.

4. Similarly, the rules stated in paragraphs 1 and 2 are without prejudice to the attribution of the conduct referred to in the aforesaid paragraphs to the subject of international law of which the authors of that conduct are organs.

5. Finally, the rule stated in paragraph 2 is without prejudice to the situation which would arise if the structures of the insurrectional movement were subsequently to become, with the success of that movement, the new structures of the pre-existing State or the structures of another newly constituted State.

2. Mr. AGO (Special Rapporteur) said that article 12 dealt with the various situations in which it might be possible to attribute to the State, as a subject of international law, the conduct of another subject of international law. Draft article 9 (A/9610/Rev.1, chapter III, section B) stated the rule concerning the attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization, if that organ had acted in the exercise of elements of the governmental authority of the State at whose disposal it had been placed. The case to be considered now was that in which an organ of another subject of international law acted in the territory of a State, not in the exercise of elements of that State's governmental authority, but under the authority of the subject of international law of which it was an organ. It was obvious that the conduct of an organ of a foreign State which acted in the exercise of elements of the governmental authority of that foreign State was attributable to the latter. That applied, for example, to the actions of an ambassador representing his country abroad. The conduct of an organ of an international organization was normally the act of that organization. It might be asked, however, whether the State in whose territory the organ of another State or of an international organization had acted could incur responsibility, not for the conduct of that organ, but for the attitude adopted by its own organs in regard to that conduct.

3. That situation was bound to be compared with the one covered by draft article 11, on the conduct of private persons. But whereas it was natural to think that in regard to the conduct of a private person the organs of the State might have adopted an attitude which engaged the responsibility of the State, it was more difficult to imagine that the organs of the territorial State could fail to fulfil an international obligation in the case dealt with in article 12. Such failure could only be of a marginal character, since the conduct of the organ in question was attributed to the State or to the international organization to which it belonged. Possibly, however, the territorial State might be blamed for not having adopted the attitude others were entitled to expect of it in regard to the conduct in its territory of an organ of another State, or even, though that was more exceptional, the conduct of an international organization.

4. Cases of that kind were relatively rare. Generally, what was involved was the conduct of diplomatic or consular agents or, in special situations, acts of armed forces stationed in the territory of a State or the actions of an organ on an official visit. For instance, in 1956, at the height of the cold war, the Government of the Soviet Union had sent a note of protest to the Government of the Federal Republic of Germany, because the American armed forces stationed in Germany had launched, from the territory of the Federal Republic, observation balloons equipped with automatic cameras and radio transmitters; two of those balloons had been intercepted in Soviet air space. Two days earlier a Soviet protest concerning similar acts had been sent to the Turkish Government. Both Governments had been accused of having allowed their territory to be used by organs of the United States to commit wrongful acts. It was worth remarking that in a separate note addressed to the United States Government, that Government had been held responsible for the act of its own military organs. The responsibility of the Government of the Federal Republic of Germany and Turkey had thus been based on passive conduct or toleration on the part of their organs, whereas that of the United States Government had derived from the active conduct of its organs. A similar distinction had been made when the Government of the Federal Republic of Germany had reproached the Austrian Government for not protesting when Mr. Khrushchev, the Chairman of the Soviet Council of Ministers, had compared Chancellor Adenauer to Hitler at a press conference given during a visit he had made to Austria in 1960.

5. The question of the responsibility of the territorial State in cases of that kind had been dealt with in codification drafts, in particular, that prepared by the Harvard Law School in 1929[4] and Mr. García Amador's revised draft of 1961.[5] Both those drafts had recognized the

[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.

[4] Harvard Law School, *Research in International Law* (Cambridge, Mass., 1929), p. 133.

[5] *Yearbook ... 1961*, vol. II, p. 46.

principle that the international responsibility of the territorial State could only be engaged by some conduct of its organs connected with the actions of a foreign organ.

6. The organ in question might belong to a subject of international law which was not a State or an international organization, but, for instance, an insurrectional movement directed against the territorial State or its Government. Many different cases of that kind had been dealt with by foreign ministries and arbitral tribunals. For such cases to come within the scope of article 12, the insurrectional movements in question must really be subjects of international law. Very often those cases had been assimilated to cases of riots, disorders or popular uprisings, which were in no way acts of subjects of international law. Insurrectional movements were not States, they were simply potential States; but they could nevertheless be separate subjects of international law. In the context of article 2, the only cases to be considered, were those in which the insurrectional movement and the pre-existing State both continued to exist, or in which that State had succeeded in putting down the insurrection after it had committed the internationally wrongful act. It often happened that the claim procedure lasted longer than the insurrectional movement; but if the accused movement had disappeared when the claim was presented and had replaced the pre-existing State, or if it had become a new State established on part of the territory of the pre-existing State, the case would come within the scope of article 13, not of article 12.

7. It was clearly a very delicate matter to attribute to a State the act of an organ of an insurrectional movement directed against it, since the State could not generally be accused of failing to take the necessary measures to prevent that organ from acting. Once the movement had been put down, however, the State might more easily be charged with failure to punish the offenders. Since, in the cases contemplated, the insurrectional movement had its own international personality, it was clearly possible to attribute the conduct of an organ of such a movement to the movement itself. By its very nature, however, an insurrectional movement was of a temporary nature, and for other reasons, too, it was difficult to take proceedings against it. Besides, the fact of addressing a protest or claim to an insurrectional movement might be interpreted as tacit recognition, which often made States hesitate to lodge a complaint against such a movement.

8. Generally, where the insurrectional movement did not succeed in replacing the pre-existing State or in forming a separate State, the organs of the movement reverted to being private persons once the movement ceased to exist. In that case claims were made against the "legitimate" State, which could be accused of having failed to prevent the acts in question or to punish the guilty persons. It was necessary to bear in mind the exceptional nature of the special conventions that had sometimes been concluded between the territorial State and other States after a revolution. In those conventions the territorial State had, in a way, undertaken to make reparation for all damage caused by the insurrection. In principle, however, States only accepted responsibility for the conduct of their organs which had failed to fulfil their obligations of protection in regard to foreign States and their nationals, or which had not taken the necessary punitive measures.

9. As early as the nineteenth century, mixed commissions had been established to examine international claims made as a result of damage caused by insurrectional movements; many of the cases were cited in paragraphs 161 to 166 of his fourth report (A/CN.4/264 and Add.1). The mixed commissions, which had generally been rather restrictive, had only accepted attribution of the conduct of organs of insurrectional movements to the "legitimate" State if that State should, and could, have taken measures against them and had omitted to do so.

10. With regard to the practice of States, he referred once again to the request for information sent to governments by the Preparatory Committee for the 1930 Codification Conference. Although the relevant question had related to damage done by private persons engaged in riots or other internal disturbances, the great majority of governments had replied that the State was not responsible for damage done by insurgents and incurred international responsibility only if, being able to do so, it had failed to take the preventive or punitive measures it was bound to take (*ibid.*, para. 169). It was in that sense that the relevant bases of discussion for the Conference had been drafted. The practice of foreign ministries was to apply more or less the same principle, and doctrine itself had followed the same course. Most writers held that conduct contrary to international law could be attributed to an insurrectional movement and make it responsible. On the other hand, the territorial State could only be held responsible for a wrongful omission on the part of its organs connected with the actions of the insurgents.

11. As to the drafting of article 12, it was necessary first to establish the principle of non-attribution to the State of the conduct of organs of another subject of international law, but a distinction should be made between, on the one hand, the organs of States and international organizations and, on the other hand, the organs of insurrectional movements. Two provisos were then required, concerning the possible failure of organs of the territorial State to perform their duty of prevention and punishment and the possible attribution of the conduct in question to an insurrectional movement. Lastly, it was necessary to reserve the case in which the structures of an insurrectional movement subsequently became the new structures of the pre-existing State or those of a new State. That case would be covered by article 13.

12. Mr. USTOR said that article 12 dealt with the attributability of the conduct of three categories of "other subjects of international law": other States, international organizations and insurrectional movements possessing separate international personality. In regard to all three of them, the Special Rapporteur concluded that the conduct in question was not attributable to the State in whose territory it occurred. As in the situation contemplated in article 11, the responsibility of the territorial State only came into play in the event of violation by its organs of that State's international obligation to

prevent, and possibly punish, wrongful acts. That conclusion was logical and well supported, but he had some doubts on a number of points.

13. With regard to the conduct of other States, he suggested that separate provision should be made for the important case of obvious complicity by a State which consented to the use of its territory for the commission of unlawful acts against a third State. There was similar complicity when a State should have known in advance that its territory would be used for an unlawful purpose by the organs of another State admitted to that territory. An obvious example was aggression committed by one State, with the assistance of another, against a third State. Even if the assistance consisted only in permitting the use of its territory, the assisting State could be considered an aggressor under the definition of aggression adopted by the General Assembly in 1974. [6] He urged, therefore, that the important question of complicity should be covered either by a separate article or at least in the commentary, with a reference to the Assembly's definition of aggression.

14. So far as the conduct of an international organization was concerned, the Special Rapporteur's commentary was very brief. The conclusion that the conduct of an international organization was not attributable to the State was probably correct, but there was room for improvement in the drafting. The text as it stood spoke only of the conduct of organs of an international organization acting "in the territory of a State". That restriction was clearly unwarranted. Nor was it really correct to say that the conduct of an international organization could be purely and simply assimilated to the conduct of private individuals, as paragraph 151 of the Special Rapporteur's commentary seemed to suggest. The question whether the State concerned had itself participated in the decision of the organ of the international organization was surely material in that respect. To take a simple example, an international organization might violate a treaty concluded with State B by terminating it in breach of its provisions. State A as a member of the organization had voted for the termination of the treaty. The termination having caused damage to State B, it took measures of retaliation against State A. Clearly, State A could not contend that the decision of the international organization was not attributable to it. Cases of that kind should be given careful consideration, since they cast doubt on the Special Rapporteur's conclusion that the conduct of an organization could never be attributable to a State.

15. He reserved his position on insurrectional movements and would only make some preliminary comments. In the first place, an insurrectional movement was directed not "against the State", but against the government. Secondly, article 12 was related to article 8, which dealt with the conduct of a person or group of persons acting in fact on behalf of the State. Under article 8, the conduct of such private persons was considered to be an act of the State. In article 12, paragraph 2, the Special Rapporteur appeared to reach a different conclusion, although the conduct was that of persons acting on behalf of an organ of an insurrectional movement which possessed a separate international personality. That difference should be clarified and more fully explained.

16. There was also a close connexion between the provisions of paragraphs 5 of article 12 and those of article 13.

17. Mr. SETTE CÂMARA said that the provisions proposed for dealing with the three cases covered by article 12 were soundly grounded in the practice of States, arbitral awards and the opinions of writers, which had been so well explored by the Special Rapporteur in his report. There was little room for controversy regarding substance, so he would confine his remarks to the wording and structure of the proposed provisions.

18. In the title, the words "other subjects of international law" needed to be expanded. That expression ordinarily meant subjects other than States; but since article 12 dealt not only with the conduct of international organizations and insurrectional movements, but also with that of States other than the territorial State, he suggested that the title should be amended to read "Conduct of a person or group of persons acting as organs of another State or of other subjects of international law", or possibly "Conduct of organs of another State or of other subjects of international law".

19. In paragraph 1, after the words "of an organ", a reference to "entities empowered to exercise elements of the governmental authority" should be inserted, in order to take into account the constant proliferation of such entities in the modern State, as the Commission had done in article 11. [7]

20. With regard to the conduct of organs of international organizations, he would be grateful if the Special Rapporteur could give some concrete examples to serve as a basis for the proposed provision. No one denied that every international organization must be the subject of international responsibility. One writer had pointed out that within an organization's headquarters, there was no local law to characterize the acts and omissions of international officials, and the same was true where an organization administered territory or organized military operations.

21. Paragraph 2 dealt with the case of an insurrectional movement and stated the rule that persons acting on behalf of such a movement did not engage the responsibility of the State against whose government the insurrection was directed. An insurrectional movement was, of course, in itself proof of the inability of the State authorities to control the area where the movement operated, particularly if it had acquired such dimensions as to be recognized as having international personality. As the Special Rapporteur had pointed out in paragraph 153 of his report (A/CN.4/264 and Add.1), the main responsibility fell on the movement itself, which was perfectly capable of wrongful acts.

22. The responsibility of the territorial State for failing to exercise vigilance and afford protection would accordingly be of an exceptional nature; hence the saving clause in paragraph 3. Yet the territorial State could

[6] General Assembly resolution 3314 (XXIX), annex.

[7] See previous meeting, paras. 21 and 23.

rarely be accused of failure to exercise vigilance and afford protection, for as pointed out in paragraph 154 of the report, the activities of an insurrectional movement were more often than not completely beyond its control.

23. The principle underlying paragraph 5 was well grounded in State practice and legal opinion, but he had a reservation about the use of the word "structures". It was not the structure of an insurrectional movement which survived in the event of victory. Revolutionary movements were often military or para-military, and when victorious not infrequently maintained the pre-existing structures. The important point was that the victorious movement then formed a new government in the territorial State or formed the government of a new State on part of the territory. He therefore suggested that paragraph 5 should be reworded so as to eliminate the references to "structures". It might read: "The rule stated in paragraph 2 is without prejudice to the situation which would arise if the insurrectional movement were subsequently to become, with the success of that movement, the new government of the pre-existing State, or the government of another newly constituted State".

24. Another way of overcoming the difficulties to which he had drawn attention would be to divide article 12 into two separate articles. The first, modelled on article 9, would deal with the conduct of organs of a State other than the territorial State or of an international organization; the second would deal with insurrectional movements and might be combined with article 13. The relevant saving clauses would, of course, be attached to each of the two new articles.

25. Mr. REUTER said that the text of article 12 proposed by the Special Rapporteur, excellent though it was, raised many very serious problems. Even the title of the article called for reservations, for whereas States could be called "subjects of international law", in the case of international organizations and insurrectional movements that designation would certainly give rise to discussion.

26. Article 12 dealt with the conduct of States, international organizations and insurrectional movements. As Mr. Ustor and Mr. Sette Câmara had said, those were three totally different things, and it might not be possible to retain, in one and the same article, provisions concerning the three classes of problems.

27. With regard to the conduct of the State, Mr. Ustor had raised two questions that ought to be considered. The first, which was relatively simple, concerned the words "in the territory of a State". The inclusion of those words was justifiable in so far as the principle that the conduct of an organ of another State was not considered as an act of the State was so obvious that the reason for stating it must be given. But the reason why the principle had been stated was, precisely, that in certain cases the two States had some physical connexion. But the connexion could take other forms, so it might be thought that the words "in the territory of a State" should perhaps be replaced by a more complex formula. If the Commission nevertheless decided to retain the wording proposed by the Special Rapporteur, he would propose saying "*even if* it acted in the territory of a State".

28. The second question raised by Mr. Ustor was more serious: it had to be decided whether the draft articles in general should deal with the question whether one act could be attributed simultaneously to several States. Mr. Ushakov had rejected the idea of complicity in public international law. The notion of an "accessory", known to criminal law, could also be rejected, but the question none the less remained under what conditions one and the same act could be attributed to several States at the same time. Perhaps the problem could only be solved by the device of simultaneous attribution to two States; or perhaps the Commission could rest content with the solution offered by article 12, which consisted in attributing the act to only one State, while reserving the possibility of attributing an equivalent offence to the other State.

29. With regard to international organizations, he did not think the conduct of an international organization was necessarily attributable to the organization itself. That was implied in the text proposed by the Special Rapporteur, for an international organization could not act "in that capacity" if it did not possess international personality. The same question had already arisen in connexion with the Convention on International Liability for Damage Caused by Space Objects, which provided for a kind of joint responsibility of the organization and its members. [8] He therefore believed that a rather cautious formula should be found in order to avoid the constraint of an unduly narrow definition of an international organization.

30. The draft articles also raised the problem of the recognition of international organizations, at least where regional organizations were concerned. That was a very serious matter, because the problem of recognition could also arise in regard to States and Governments.

31. With regard to insurrectional movements, he was not sure that the capacity of such a movement could be determined solely by objective criteria as in the past, when an insurrectional movement had acquired international personality on reaching a certain size. It might be asked whether the capacity of an insurrectional movement did not now also depend on its recognition. Yet, in all the precedents he had cited and in the text proposed, the Special Rapporteur had taken the relatively simple position based on the text of pure "effectiveness". In international relations, however, when there was an internal conflict, the problem might arise of the international, not the constitutional, legitimacy, either of the government or of the insurrectional movement itself. That problem had already arisen in the context of decolonization and would continue to arise in cases of aggression. The very clear principles stated in article 12 would therefore need some modification—if only in drafting—if the Commission decided to take account of the question of international legitimacy. His own view was that it could not ignore that question.

[8] See General Assembly resolution 2777 (XXVI), annex, article XXII.

32. In its discussions, he thought the Commission should distinguish between the three very different questions of the State, international organizations and insurrectional movements. The question of insurrectional movements could, if necessary, be considered in the context of article 13.

33. In regard to principles, the Commission ought to consider whether it should not distinguish between movements directed against the State—secessionist movements—and movements directed against a government. That was an important question, because the problem of transmission of the obligations which might arise out of the acts of either side was not unrelated to the problem of succession of States, so that it was not the same in both cases. The Commission should also examine the problem of recognition. Lastly, it should consider whether the present cases of international legitimacy—the result of aggression or colonialism—did not make it necessary to reconsider some of the problems referred to in article 12.

34. Mr. EL-ERIAN said that in view of the intricate nature of the article, he would make only preliminary remarks at that stage. He agreed with Mr. Reuter that it was perhaps too ambitious to try to cover the three distinct kinds of situation in one single article. A great variety of situations could arise that would involve exclusive, concurrent, direct or indirect responsibility. Whereas article 9 dealt with situations in which a State or an international organization had lent an organ to another State, and based the responsibility of the territorial State for the acts of that organ on its exclusive authority over the organ, article 12 affirmed, conversely, that the conduct of an organ of a State or of international organization acting in that capacity should not be considered as an act of the State in whose territory the organ had acted. The underlying principle of article 12 and the Special Rapporteur's approach raised no difficulties. In his commentary the Special Rapporteur had referred, in foot-note 318 (A/CN.4/264, para. 148) to a situation in which there was real complicity on the part of the organs of the territorial State in the wrongful act of an organ of another State, and had maintained that, so long as there had been no lack of diligence or prudence on the part of the territorial State, the other State incurred responsibility for the act. Such an important point should not be relegated to a foot-note; it should at least be given a prominent place in the commentary if it could not be covered in the text of the article itself.

35. The reference to "international organizations" should not raise difficulties if the expression was taken to mean such organizations as the United Nations, which had a universal vocation. In 1949, the International Court of Justice, in an advisory opinion on reparation for injuries suffered in the service of the United Nations, [9] had conceded international personality to the United Nations on an objective basis, even vis-à-vis non members. However, there were other international organizations whose international personality was far from established. In practice, the conduct of an organ of an international organization performing a function in the territory of a State should not raise legal difficulties, since the organ would have been accepted by the State. An international organization which had the capacity to enter into a contract or a treaty with a State in which its organ was to operate, would clearly be responsible for the acts of that organ.

36. So far as the question of insurrectional movements was concerned, he agreed with Mr. Sette Câmara that article 12 might be divided into two separate articles. But since article 13 dealt with insurrectional situations, the provisions in paragraphs 2 and 5 of article 12 were perhaps unnecessary. The Special Rapporteur had tried to deal with the question of recognition in terms of separate international personality, but it was difficult to see how to determine whether such a personality had been established. In that respect, the Special Rapporteur had departed from the traditional rules of international law, which applied the criterion of recognition by other States. Where there was a constitutional government, the legal situation would depend on which States recognized a rebellion as an insurrection and a state of belligerency and which did not. There were also rules governing the succession of States: where there was a *de facto* government, the government of the new State succeeded to the obligations and responsibilities of the government which had acted as a *de facto* government.

37. Mr. USHAKOV said that paragraph 1 of article 12 was unnecessary in so far as it dealt with the conduct of an organ of a State, for that question had already been dealt with in previous articles. It was unnecessary to say in paragraph 1 of article 12 that the conduct of an organ of one State could not be attributed to another State, since article 5 (A/9610/Rev.1, chapter III, section B) already laid down that the conduct of any State organ having that status under the internal law of that State and having acted in that capacity was considered as an act of the State concerned. In stating that principle article 5 did not specify whether or not the State's organ had acted in the territory of the State. The only exception to article 5 was that provided for in article 9, which dealt with the conduct of an organ lent by one State to another State. The principle stated in paragraph 1 of article 12 was not an exception to the principle in article 5, so it need not be mentioned. Besides, it was not clear exactly what was meant by the words "in the territory of a State". Did they refer to territory occupied by another State?

The meeting rose at 6 p.m.

1313th MEETING

Wednesday, 21 May 1975, at 11.25 a.m.

Chairman: Mr. Abdul Hakim TABIBI

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

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[9] *I.C.J. Reports 1949*, p. 174.