Document:-
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Summary record of the 1313th meeting

Topic:
<multiple topics>

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

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.

Organization of Work

1. The CHAIRMAN announced that at its meeting that morning, the enlarged Bureau had decided to make two recommendations to the Commission. The first was that the study of further improvement of the Commission's methods of work should be entrusted to an informal group of five members: Mr. Elias, Mr. Sette Câmara, Mr. Tsuruoka, Mr. Ushakov and Mr. Kearney, who would be Chairman. The second recommendation was that, on completing consideration of the existing articles on State responsibility, the Commission should devote three weeks to the topic of succession of States in respect of matters other than treaties.

2. If there were no objections, he would take it that the Commission agreed to those recommendations.

It was so agreed.

State responsibility

(A/CN.4/264 and Add.1;[1] A/9610/Rev.1[2])

[Item 1 of the agenda]

(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 12 (Conduct of other subjects of international law)[3] *(continued)*

3. Mr. USHAKOV said that the expression "in the territory of a State", in paragraph 1 of article 12, called for reservations, since not only the State's own territory, but also territory occupied by its armed forces might be involved. Another possibility was the extreme case in which aircraft belonging to one State were on board a warship of another State. In its provisions concerning the conduct of private persons, article 11 did not speak of persons acting "in the territory of the State" concerned. He considered that if the "organ of another State", referred to in paragraph 1 of article 12, acted as an organ of that State, article 5 would be applicable. Hence the part of paragraph 1 which dealt with the conduct of an organ of another State seemed to him to be superfluous.

4. Paragraph 1 affirmed that a State was not responsible for the conduct of an organ of another State present in its territory. He believed that that principle was incorrect, since there might be cases of joint responsibility, in which the State in whose territory the organ of another State had acted was the co-author of the act committed in its territory. If, for instance, a State allowed its territory to be used by the army of another State for purposes of aggression, it was not only the State to which the army belonged that had acted, but also the State which had lent its territory; hence the act could be attributed to both States. The wording used in paragraph 1 was dangerous, because it did not take account of all the possible situations. The expression "organ of another State" might denote either the official representatives of a State in the territory of another State, such as a diplomatic mission, or the armed forces of a State in the territory of another State. The problem was simple in the first case, but extremely difficult in the second. When the Commission had discussed article 9, he had made reservations regarding armed forces placed by one State at the disposal of another State, and had stressed that it was an extremely complicated problem.[4] Personally, he thought it would be better not to settle that question, but to keep to the principles stated in article 5 (A/9610/Rev.1, chapter III, section B).

5. With regard to the conduct of an organ of an international organization, when the armed forces of an international organization acted in that capacity in the territory of a State, it was open to question whether it was only the international organization that acted, or whether the act should not also be attributed to the States whose contingents composed the armed forces of the organization. In that case, too, there might perhaps be a joint act by the international organization and the States which had provided contingents to form its armed forces. In any case, it was very difficult to say who was responsible for the acts of the armed forces of an international organization.

6. That question raised the very difficult problem of the responsibility of an international organization. It became necessary to enquire whether the conduct of its organs must be attributed to the organization itself and whether the States members of the organization had not some share of responsibility. For his part, he thought that question should not be raised at the present stage, because the Commission would find it necessary to define the responsibility of international organizations, and that would lead it into very dangerous ground. The wording of paragraph 1 should therefore be extremely cautious and should not touch on the question of the responsibility of international organizations. Moreover, that question was already settled by article 9, which treated as an act of the State the conduct of an organ placed at its disposal by an international organization—from which it could be inferred *a contrario* that if an organ of an international organization had not been placed at the disposal of a State its conduct was attributable to the organization itself.

7. He noted that paragraph 2 did not specify that the insurrectional movement was acting in the territory of the State in question. Moreover, an insurrectional movement was not necessarily directed against the State: it might be directed against the Government. There were in fact two types of insurrectional movement: revolutionary movements directed against the Government and national liberation movements directed against the State—for instance, in the case of an anti-colonialist struggle. Nor was it clear what was meant by an "insurrectional movement". Was it a national liberation front, a revolutionary movement or a counter-revolutionary movement? That point should be clarified. It would also be better to avoid using the notion of

[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 previous meeting, para. 1.

[4] See *Yearbook ... 1974*, vol. I, p. 49, paras. 5 *et seq.*

"separate international personality", which was much too subjective. It was very difficult to determine by objective criteria whether an insurrectional movement possessed separate international personality. The question arose from what moment it was possible to speak of an insurrectional movement whose conduct was not attributable to the State under international law. If the Commission succeeded in delimiting the problem and defining the notion of an "insurrectional movement", he would be in favour of paragraph 2. The succeeding paragraphs depended on the first two, which raised extremely delicate problems.

8. Mr. BEDJAOUI said that article 12 dealt with the case—complementary to, but different from, that dealt with in article 9—in which a person or persons committed a wrongful act in the territory of a State, acting as an organ either of another State, or of an international organization, or of an insurrectional movement. The problems were in reality very different, according to which of those three authorities the agent or agents in question belonged to; so much so, that he was inclined to recommend that they should be dissociated and dealt with in separate articles.

9. Where an organ of one State acted in the territory of another State, two kinds of situation might arise. The situation contemplated by the Special Rapporteur, in which an organ of a foreign State—for example, a Head of State on an official visit or a mission—committed a wrongful act in which the territorial State clearly played no part, was a simple situation and raised no great problem. The opposite situation, in which the territorial State might appear to be an accomplice or co-author of the wrongful act committed by another State in its territory or from its territory, was much more serious and should be covered either by article 12 or by a separate provision. But although that situation was more serious, the problem it raised was not more difficult to solve in theory.

10. There were, on the other hand, much more delicate intermediate situations, which were far more difficult to settle equitably. He would leave aside the case of military occupation, which might give an army or an occupying authority occasion to commit an internationally wrongful act in the territory of the occupied State. He was thinking rather of problems such as that of the granting of military bases by one State to another, either under a mutual defence agreement or simply on a lease. The wrongful acts committed from such bases could, as had recently been seen, give rise to grave tension and complicated situations. Perhaps the time had not yet come to provide for objective responsibility, direct or indirect, of the territorial State by reason of its acceptance of the risks inherent in the establishment of foreign bases in its territory. That problem should, however, be kept in mind.

11. He would not dwell on the question of the conduct of an international organization, regarding which he agreed with the comments made at the previous meeting by other members of the Commission, but would deal mainly with a few problems relating to insurrectional movements. There, he saw three problems, relating to the starting point chosen, the search for a specific solution to the problem of the responsibility of insurrectional movements, and the delimitation of the subject assigned to the Special Rapporteur.

12. With regard to the first point, some members of the Commission had questioned whether the existence of an internal conflict justified the assumption that the problem of the international legitimacy of an insurrectional movement was settled. It was that international legitimacy which the Special Rapporteur had taken as his starting point when he had adopted as a working hypothesis the case of an insurrectional movement possessing international personality. That approach to the question seemed perfectly justified. For the Special Rapporteur did not maintain that all insurrectional movements must possess international personality, any more than he maintained the converse; he merely dealt with the case in which an insurrectional movement did possess international personality. The question how and why it possessed that personality was not part of the subject under study; it belonged to another sphere.

13. For insurrectional movements, there were only two mutually exclusive positions: either they represented nothing, or they had international status. In the first case they came under article 11, which dealt with the conduct of private persons. In the second case, they possessed international personality and, consequently, came under article 12. Thus both of the possible positions were covered. The draft did not take sides; each position was assumed to have been established in advance. That approach should enable the Commission to avoid endless discussions on difficult problems, such as those of international personality, belligerency, and recognition or non-recognition.

14. Moreover, the problem of international legitimacy had been finally settled for one of the two classes of insurrectional movement, namely, anti-colonial national liberation movements. For about twenty years a three-stage process had been going on in the United Nations, which had progressed from the moral and legal justification of anti-colonialism to the affirmation that colonialism was incompatible with the purposes and principles of the Charter, and had culminated in the total and final condemnation of colonialism as an unlawful phenomenon by General Assembly resolution 1514 (XV) of 14 December 1960, on the granting of independence to colonial countries and peoples. The modern view was that colonialism was a threat to peace and security, which could attract the sanctions provided for in the Charter. The right of peoples to self-determination had become an inviolable principle of *jus cogens*, and colonialism had become an intrinsically unlawful phenomenon, which implied that the subjugation of peoples to foreign rule was unlawful, in so far as that rule was contrary to the Charter, constituted a denial of human rights and jeopardized world peace, that peoples had a right to exercise their sovereignty and that repressive measures and any armed action directed against dependent peoples were unlawful. Ever since the adoption of resolution 2105 (XX) in 1965, the General Assembly had regularly affirmed "the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination

and independence" and had reiterated urgent appeals for "moral and material assistance to the liberation movements".

15. The international legitimacy of insurrectional liberation movements was therefore evident from two points of view. First, intervention on behalf of colonized countries was lawful. It was not intervention prohibited by contemporary international law; on the contrary it was an international duty, and the codified principles of non-intervention and of the prohibition of the use of force had had to be reformulated in terms taking that situation into account. [5] Secondly, and as a corollary, any form of support for a colonial Power now constituted a form of intervention contrary to international law. The advisory opinion on the continued presence of South Africa in Namibia, given by the International Court of Justice on 21 June 1971, left no doubt on that point. [6]

16. Moreover, the territory of a colony was not, in law, the territory of the colonial State. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, [7] affirmed that: "The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination . . ."

17. Although insurrectional movements in the nature of civil wars could still, in some cases, be treated as internal conflicts, the same was not true of insurrectional liberation movements. Anti-colonial wars of liberation had come to be recognized as international conflicts, with all the legal consequences that implied. The use of force by liberation movements had received justification and legal expression, so that the colonial Power could no longer invoke against those movements or against States assisting them, Article 51 of the Charter, on self-defence or Article 2, paragraph 7, of the Charter, on the duty not to intervene in the domestic affairs of any State.

18. In that context, it was debatable whether the colonial State had an obligation to prevent or punish the conduct of the insurrectional movement, for the movement possessed an international status and indeed a new "legal order" distinct from that of the colonial State and was situated, moreover, in territory which was now regarded as separate from that of the metropolitan country and in which the latter's presence was considered unlawful.

19. The second point he wished to discuss concerned the responsibility of insurrectional movements. Besides the case of an insurrectional movement directed against a territorial State, which was dealt with in paragraph 2 of article 12, there were other cases, in particular that of an insurrectional movement directed against a State other than the territorial State. That was the situation when an insurrectional movement set up a provisional government in exile in a third State. It might then happen that a provisional government which was in rebellion against a certain State, but had settled in the territory of another State, caused damage to the latter State or to yet another State. That situation was not covered by paragraph 2 of article 12. In such a case, the only possible solution was to attribute to the insurrectional movement possessing international personality the wrongful act engaging its own responsibility. There were precedents for that solution in practice. For example, the British Government had asked the nationalist Government of Burgos and Salamanca for reparation for damage it had suffered during the Spanish war. It had also happened that governments in exile set up by national liberation movements had responded favourably to claims by foreign States arising out of wrongful acts. The Special Rapporteur had not taken that practice into account in his draft article 12. He had proceeded from the principle that an insurrectional movement was essentially provisional, which was not always the case. History provided many examples of insurrectional movements which had lasted for decades, like the "long march" by the communist troops of Mao Tse-Tung until their victory in 1949, or the war in Indo-China which had lasted for thirty years and had resulted in the formation of a provisional government, the PRG.

20. For the purpose of exonerating the territorial State from all responsibility, the Special Rapporteur had placed on an equal footing, in article 12, three separate subjects of international law; the State, an international organization and an insurrectional movement. But just as he attributed the wrongful conduct of an organ to the State or the international organization to which the organ belonged, so he should attribute responsibility for its wrongful conduct to the insurrectional movement possessing international personality. That would do no more than reflect the fact that the movement had international rights and duties. But the Special Rapporteur seemed to be in a dilemma: either he must enter the realm of succession of States, or he must proceed as though the insurrectional movement had engaged its responsibility from the outset, though it would not become effective until after victory—which explained why the Special Rapporteur had made the responsibility retroactive. In his (Mr. Bedjaoui's) opinion, recourse to retroactivity was always a rather dubious legal technique.

21. The third problem raised by article 12 was that of the demarcation of the topic assigned to the Special Rapporteur; from that point of view it was mainly paragraph 5 that was open to criticism. Incidentally, the word "structures", which occurred three times in that paragraph, was inappropriate. If the expression "structures of the insurrectional movement", which later became the new structures of the pre-existing State or the structures of another, newly constituted State, was intended to mean the organs of the insurrectional movement, that expression was not at all satisfactory. The organs of an insurrectional movement were provisional; they were

[5] See General Assembly resolutions 2131 (XX) and 2160 (XXI).

[6] *I.C.J. Reports 1971*, p. 16.

[7] General Assembly resolution 2625 (XXV), annex.

suited to the struggle, but not to the ensuing period of peace. If the expression meant the ideology, the political trend, the power philosophy or the ethico-political conception of the insurrectional movement, then it had no place in article 12. It would be better to find a formula of the kind suggested by Mr. Sette Câmara, [8] if paragraph 5 was necessary at all.

22. As to the justification and scope of paragraph 5, the paragraph seemed to be concerned, not with the responsibility of States, but with the succession of States or of governments in respect of responsibility. It would be possible to avoid dealing with succession of States in paragraph 5 of article 12 and in article 13, by providing in article 12, paragraph 2, that the insurrectional movement, which had international rights and duties by reason of its international personality, could assume responsibility for its wrongful acts. Article 13 dealt with the situation in which the insurrectional movement was victorious. To cover that case without encroaching on the subject of the succession of States, it should be specified that the insurrectional movement did not succeed to the responsibility of the territorial State, but assumed its own responsibility; in other words, after the restoration of peace it continued to bear the responsibility that could have been attributed to it during the period of insurrection. That responsibility must be assumed by the insurrectional movement within the framework of its own continuity, when it became the definitive authority of the pre-existing State or of a new State.

23. Mr. ELIAS said it was evident from his scholarly commentary and from his presentation of article 12 that the Special Rapporteur had appreciated that the article raised problems relating not only to its legal implications, but also to its political undertones. The Special Rapporteur had, of course, concentrated on the legal issues, but they were so inextricably bound up with the political issues that it was not possible to dispose of one set of problems without the other.

24. He found the draft of article 12 less satisfactory than articles 10 and 11, partly for reasons beyond the Special Rapporteur's control. He was opposed to dealing in one and the same article with a number of different matters which could be more satisfactorily dealt with in separate articles.

25. As it stood, article 12 attempted to deal with the conduct of three different kinds of subjects of international law: States other than the territorial State; international organizations; and insurrectional movements possessing separate international personality. Their only common factor was the requirement of international personality. Apart from that factor, the problems raised by the conduct of those three subjects of international law were so different that they should have received separate treatment.

26. In any case, the content of paragraph 2, on the conduct of organs of insurrectional movements, was not suitable for article 12. It should either form the subject of a separate article or be transferred to article 13. In that connexion it was significant that paragraph 5, which was a saving clause relating to paragraph 2, anticipated problems dealt with in article 13.

27. On the question of the conduct of an organ of another State, he agreed with Mr. Sette Câmara that the title, as it stood, did not cover that aspect of the problem. The expression "other subjects of international law" did not embrace a State other than the territorial State. He also agreed with Mr. Ushakov's interesting suggestion about the need to clarify the relationship between paragraph 1 of article 12, which dealt with the conduct of an organ of another State acting in that capacity in the territory of a State, and article 5, which dealt with the attribution to the State of the conduct of its organs. [9]

28. The question of the conduct of an organ of an international organization raised problems which had been mentioned by other speakers. It was not possible to deal with that question, or, for that matter, with that of the conduct of an organ of another State, without considering how the particular organ came to act in the territory of the State concerned. For example, the action of occupation forces or forces stationed at a foreign base, raised delicate issues regarding the possible responsibility of the territorial State.

29. He would certainly not go so far as Mr. Ushakov who had suggested the deletion of paragraph 1 of article 12. The provision in that paragraph was as essential to the draft articles as the residuary rules contained in articles 1 to 9 (A/9610/Rev.1, chapter III, section B).

30. With regard to the conduct of insurrectional movements, the provision in paragraph 2 appeared to have been drafted on the assumption that the Commission would not go into questions of legitimacy or recognition, or into the reasons for the presence of the insurrectional movement in the territory in question. Yet those issues were very real. He could think of a number of examples, such as that of the Palestine Liberation Organization, which raised the question of the extent to which the movement concerned could be assumed to have a separate international personality. Another illustration was provided by the rebellion which had taken place in Nigeria some years previously; the secessionist movement had then been recognized by only four States Members of the United Nations, which at that time had numbered over 120. A number of bodies and institutions operating internationally had dealt with the rebel régime while it had lasted, but none of them had ventured to make any claim against Nigeria.

31. In conclusion, he suggested that article 12 should be split into three separate articles, one of which would deal with the matter that was now the subject of paragraph 2. The saving clauses in paragraphs 3, 4 and 5 might appear as exceptions in the appropriate articles.

32. Mr. ŠAHOVIĆ observed that the last articles of chapter II of the draft and, in particular, the article 12,

[8] See previous meeting, para. 23.

[9] *Ibid.*, para. 37.

dealt with special cases. In those provisions, the Special Rapporteur had tried to take account of the realities of international life.

33. In his written and oral presentation of article 12, the Special Rapporteur had dealt mainly with the problems raised by insurrectional movements. His analysis of judicial decisions, practice and international doctrine had been centred on cases of that kind. The problem referred to in paragraph 1 of the article, on the other hand, namely, the conduct of an organ of a State or of an international organization, was dealt with only very briefly and considered only from the point of view of article 9. And the commentary to article 9 was hardly more detailed on that point. Only by a process of deduction could it be concluded that the rule applicable to an organ of a State could also be applicable to an organ of an international organization. Since such cases seemed relatively rare in comparison with those involving insurrectional movements, it might be better not to devote a separate provision to them, but simply to mention them in article 9. The cases to which article 9 applied, and those covered by paragraph 1 of article 12, differed by reason of the capacity in which the organ in question had acted; and it was precisely that question of capacity which had caused the members of the Commission the greatest difficulties in regard to article 12.

34. He therefore proposed that all questions relating to insurrectional movements should be dealt with in a separate article. The very existence of paragraph 5 of article 12 showed that the relationship between article 12, paragraph 2, and article 13 could not be disregarded. Another solution would be to draft a saving clause which would refer to the questions covered in paragraphs 1, 3 and 4.

35. In the circumstances, he had little to add to the comments made by other members of the Commission on the text proposed by the Special Rapporteur. In view of the difficulties raised by article 12, it was important to draft it without haste, being careful to use appropriate terminology.

The meeting rose at 1 p.m.

1314th MEETING

Thursday, 22 May 1975, at 10.5 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, 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 (Conduct of other subjects of international law)[3] *(continued)*

1. The CHAIRMAN invited the Special Rapporteur to give any additional explanations he thought necessary regarding draft article 12.

2. Mr. AGO (Special Rapporteur) said that in his oral presentation of the article he had perhaps dwelt more on what he thought it should contain than on the problems it should not cover. As several members of the Commission considered that article 12 presented certain risks, he would like to explain three points.

3. First, the reason why he had thought it advisable to devote only one article to the conduct of an organ of a foreign State, of an international organization or of an insurrectional movement, was that article 12 was really intended only as a complement to the preceding article. According to article 11,[4] the actions of private persons not exercising any element of the governmental authority were not attributable to the State; nevertheless, the State was not exempt from all responsibility if, in connexion with such actions, its organs had adopted an attitude which could be attributed to it and which could be found wrongful under international law. The reference in article 11 to conduct of the State connected with that of the persons, groups or entities mentioned in that provision did not, moreover, settle the question whether the State had acted by commission or omission, or in complicity. It was quite a different case when the person who had acted in the territory of a State performed no official function for that State, but was an organ of another subject of international law. In the light of article 5 and the following articles (A/9610/Rev.1, chapter III, section B), the conclusion might be reached that, since the conduct of such a person was attributable to the other subject of international law in question, the territorial State would be free of all responsibility, even though it had itself adopted a wrongful attitude in connexion with that conduct. The purpose of article 12 was, therefore, to specify that, when the conduct of a person was attributable, not to the territorial State but to another subject of international law, the territorial State might nevertheless have attributed to it as a possible source of responsibility, conduct connected with that of the person in question. Since what was at issue was the conduct of an organ of another subject of international law, whatever it might be, he thought the case could be covered by a single article. He would have no objection to devoting

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[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 1312th meeting, para. 1.

[4] See 1311th meeting, paras. 21 and 23.