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Summary record of the 1316th meeting

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

by reason of certain conduct of its own organs connected with that of the organs of the insurrectional movement; for example, because it did not punish those who had committed acts injurious to a foreign State, once the insurrection had been put down.

44. With regard to the presentation of article 12, he noted that some members of the Commission favoured separate articles, an arrangement which would certainly solve many drafting problems, because certain shades of meaning could thus be better expressed. For whereas the act of an organ of a foreign State was automatically attributable to that State by virtue of the preceding articles, the act of an organ of an international organization or of an insurrectional movement would not be as automatically attributable, at least so long as the responsibility of those other two categories of subjects of international law had not been defined in other drafts.

45. Paragraph 5 of article 12 provided a link with the following article, and the Commission might possibly be able to drop it once it had adopted article 13. The latter privision was in no way concerned with the succession of States, as he had clearly indicated in his report.

46. He suggested that the Chairman should ask the members of the Commission whether they would prefer the subject-matter of article 12 to be dealt with in one, two or three articles and whether they were certain that paragraph 1 was not superfluous. He thought those questions were too important to be decided by the Drafting Committee.

47. The CHAIRMAN put the Special Rapporteur's questions to the Commission.

48. Mr. KEARNEY said that the great majority of the members of the Commission was undoubtedly in favour of the inclusion, at some point in the draft articles, of a number of separate paragraphs containing the substance of article 12. The outstanding problems were admittedly serious, but they should be settled by the Drafting Committee. The Commission should not reopen the discussion on the basic issues.

49. The CHAIRMAN, agreeing with Mr. Kearney, said that the Commission should take its final decision on the basis of the work done by the Drafting Committee.

50. Mr. YASSEEN said he thought that in view of the importance of the questions raised by the Special Rapporteur, the Commission itself should answer them. They could not be settled by the Drafting Committee in spite of the discretion it enjoyed.

51. The CHAIRMAN said that there was no need for a vote, since the majority of the members of the Commission had already expressed their preferences with regard to draft article 12 and it would, of course, be on the basis of their views that the Drafting Committee would proceed.

52. Mr. USHAKOV said that, by virtue of a tacit agreement, the Drafting Committee had always been free to make any proposals it thought desirable. Consequently, the Commission should trust it once again.

53. Mr. ELIAS fully agreed with Mr. Ushakov. The Commission would only hamstring the Drafting Committee by giving it detailed instructions.

54. Mr. USTOR said that he fully agreed with the two previous speakers. Personally, he would prefer the present paragraph 1 to be replaced by two separate articles. The reason was that he still had doubts about the clear statement in that paragraph that the territorial State was not responsible for the acts of an international organization—a statement which might cause problems where the territorial State was itself a member of the organization concerned.

55. Sir Francis VALLAT pointed out that the Commission had had a full discussion on article 12. In his opinion it should be referred to the Drafting Committee without further comment. To give the Committee detailed instructions on what it should do would establish an unfortunate precedent.

56. The CHAIRMAN said there was a general feeling that the text of article 12 should be referred to the Drafting Committee and that the Commission should take a final decision on its disposition on the basis of the work done by that Committee.

It was so agreed. [12]

57. Mr. AGO (Special Rapporteur) said he would try to draft three separate articles for submission to the Drafting Committee and to the Commission.

The meeting rose at 12.55 p.m.

[12] For resumption of the discussion see 1345th meeting, para. 19.

1316th MEETING

Monday, 26 May 1975, at 3.10 p.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, 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.

Eleventh session of the Seminar on International Law

(resumed from the previous meeting)

1. The CHAIRMAN, speaking on behalf of the Commission, welcomed the participants in the eleventh session of the Seminar on International Law, the direction of which would once again be in the capable hands of Mr. Raton. He hoped that the time spent with the Commission by the young torch-bearers, who would spread knowledge of the Commission's work in the legal world and beyond, would be both pleasant and fruitful. He noted with particular pleasure that many of the participants came from countries of the third world, for it had been his ambition, ever since becoming active in the Sixth Committee of the United Nations General Assembly, to see the countries of Africa, Asia and Latin America play a greater role in the field of international law. That field had for centuries been the exclusive preserve of

western and, particularly, of European countries, and the situation had not really begun to change until after the Second World War. The whole idea behind the Seminar was to give young jurists from the third world a chance to express their views and to see how international law was formulated. He hoped that they would come to Geneva in increasing numbers.

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 13

2. The CHAIRMAN invited the Special Rapporteur to introduce article 13, which read:

Article 13[3]

Retroactive attribution to a State of the acts of organs of a successful insurrectional movement

1. The conduct of an organ of an insurrectional movement whose structures have subsequently become the structures of a new State constituted in all or part of the territory formerly under the sovereignty of the pre-existing State is retroactively considered to be an act of the newly constituted State.

2. The conduct of an organ of an insurrectional movement whose structures have subsequently been integrated, in whole or in part, with those of the pre-existing State is retroactively considered to be an act of that State. However, such attribution does not preclude the parallel attribution to the said State of the conduct, at the aforementioned time, of organs of the government which was at that time considered to be legitimate.

3. Mr. AGO (Special Rapporteur) said that article 13 dealt with the attribution to a State of acts which, at the time of their commission, had been the acts of organs of an insurrectional movement, but which were retrospectively characterized by the fact that the organization of that movement had subsequently become, in whole or in part, the organization of a State. Various situations were possible. It might be—as not infrequently happened—that the objective of the insurrectional movement was not the total destruction of the pre-existing State or the complete replacement of its government, but to secure independence for a region under colonial rule or the secession of a region. If it was successful, an insurrectional movement of that kind established itself as the government of the region which had seceded or of the colony which had become independent. But it was also possible that the aim of the insurrectional movement might be to replace completely the structure of the State against which it was directed. Several cases must then be distinguished. The success of the insurrectional movement might cause all the structures of the pre-existing State to be replaced by those of the movement. In that event, the pre-existing State ceased to exist, a new State was substituted for it and there was no continuity between those two subjects of international law. There could then be no problem of attribution to the new State of acts of the pre-existing State. At the most, a question of succession of States might arise, for it was, precisely, the continuity of the State that had been interrupted. The same was not true of the relations between the insurrectional movement and the State to which it had given birth. There was continuity between them, so that the acts of the insurrectional movement must be attributed to the State it had brought into being.

4. The situation might, however, be more complicated. Sometimes the victory of the insurrectional movement did not result in the complete disappearance of the pre-existing State, but in the merging of its structures with those of the insurrectional movement. Some organs of the pre-existing State disappeared, whereas others remained, thus providing continuity. That was what had usually happened in Latin American revolutions: the countries in which those revolutions had taken place had continued to exist, but the structures of the insurrectional movements had been integrated into the pre-existing structures. The new machinery of State was the result of a combination of old and new structures, which might even be confirmed by a formal agreement. In those cases it was natural to attribute to the State not only the acts of its pre-existing organs, in conformity with articles 5 to 10 of the draft, but also the acts of the successful insurrectional movement.

5. International practice and jurisprudence, which were more or less uniform, recognized the principle of the attribution to the State of the acts of organs of a successful insurrectional movement. They varied only in seeking a justification of that principle, and some of the justifications advanced left much to be desired. For instance, it had been argued that at the time when the acts complained of had been committed, the insurgents had already been exercising the authority of a *de facto* government over at least part of the territory. In itself, that justification was not satisfactory. Sometimes an insurrectional movement had never been a *de facto* government. Besides, if everything depended on whether the insurgents had exercised *de facto* authority, there would be no reason to distinguish between successful and unsuccessful movements. It had also been asserted that, when insurgents were victorious, they were supposed to have represented the true will of the nation from the moment of their uprising. But that was not always so; it could not be claimed that certain well known insurrectional movements had represented the true will of the people from the outset. It should also be noted that if that justification were accepted, there would be no way of justifying attribution to the State of acts of the pre-existing government, where only a change of government had resulted from the victory of the insurgents. Must it be concluded that only the acts of the insurgents were attributable to the State and not the acts of organs of a government which had fought against the will of the people? In his view, the only valid justification lay in continuity.

6. For the practice of States, he referred members to the awards made by several mixed commissions early in

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

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

[3] Text as revised by the Special Rapporteur.

the twentieth century, which were cited in paragraphs 200 to 206 of his fourth report (A/CN.4/264 and Add.1). The report mentioned, in particular, an exchange of notes between the United States Ambassador to Mexico and the British Minister to Mexico, regarding reparation for damage caused to foreigners during the Mexican Revolution in 1910. The United States Ambassador, who had held that the attribution to the State of the acts of an insurrectional movement did not depend on the success of that movement, had been overruled by the Department of State, which had confirmed the rule set out in article 13.

7. As in the case of previous articles of the draft, it was in the preparatory work for the Hague Codification Conference of 1930 that the opinions of governments should be sought. The great majority of them had affirmed that where an insurrection was successful and the insurrectionist party, having taken power, had become the government of the State, the latter must be held responsible for damage caused by the insurgents to the person or property of foreigners during the civil war. In the light of that position, the Preparatory Committee for the Hague Conference had drafted a basis of discussion which read: "A State is responsible for damage caused to foreigners by an insurrectionist party which has been successful and has become the Government to the same degree as it is responsible for damage caused by acts of the Government *de jure* or its officials or troops." (*Ibid.*, para. 207.) In the instruction sent in 1959 by the Department of State to the United States Embassy in Cuba, that principle had been reaffirmed in connexion with the Cuban revolution (*ibid.*, para. 208).

8. The same principle had been unanimously accepted by writers. The Harvard Law School had expressed it particularly well in its 1961 draft, in the following terms: "In the event of a revolution or insurrection which brings about a change in the government of a State or the establishment of a new State, an act or omission of an organ, agency, official, or employee of a revolutionary or insurrectionary group is, for the purposes of this Convention, attributable to the State in which the group established itself as the government." (*Ibid.*, para. 212, foot-note 495.)

9. The text of article 13 which he proposed consisted of two paragraphs dealing with two separate cases. In the case contemplated in paragraph 1, the structures of the successful insurrectional movement became those of a new State constituted in all or part of the territory formerly under the sovereignty of the pre-existing State. Some members of the Commission might perhaps wish to change the term "structures", although it had already been adopted in other provisions of the draft. If the word "retroactively" seemed dangerous, it could be deleted without changing the meaning of the article. It would then be for those drafting the commentary to point out that the attribution to the State was retroactive. Paragraph 2 of the article dealt with the case in which the structures of the insurrectional movement were wholly or partly integrated with those of the pre-existing State. It was provided that in such a case the State might be responsible not only for the conduct of organs of the successful insurrectional movement, but also for the conduct, at the same time, of organs of the government then considered to be legitimate.

10. Mr. YASSEEN said he believed that article 13 had its place in the draft, for it did not deal with the responsibility of subjects of international law other than States, but with the responsibility of a State brought into being by a revolutionary or insurrectional movement. The Special Rapporteur had been careful to exclude cases involving succession of States and to confine himself to cases in which some continuity was discernible.

11. Although the theoretical justifications of the principle proposed in article 13 were not satisfactory, there was no denying that it was confirmed by constant practice. It was open to question, however, whether the State which emerged from an insurrectional movement was really the same entity as that movement. True, an insurrectional movement that was destined to be successful constituted an embryo State; but once that State had been established, it might not be advisable to attribute to it what the insurrectional movement had done in exceptional circumstances. That would be rather like attributing to a person of major age what he had done when he had been a minor and still immature. That observation could not affect the rule which practice had derived from the notion of continuity, but it should be taken into consideration in determining the consequences of responsibility and the amount of reparation due. At that stage, it would not be possible to assimilate responsibility for an act attributed to the State proper, to responsibility based on an act of that State committed during its period of gestation.

12. As to the words "retroactively" and "structures", he thought the first could be deleted without any harm, the second might be retained, as it well conveyed the idea of an essential organization.

13. Mr. AGO (Special Rapporteur) explained that the notion of continuity, as he understood it, was present in all cases, even when a small insurrectional movement became a State *pleno jure*. Article 13 was concerned with the attribution of an act, however, not with responsibility. When the time came to determine the consequences of wrongful conduct, certain extenuating circumstances might have to be taken into account, including, for example, the fact that the insurrectional movement had been fighting against an all-powerful State. Hence attribution to the State of the conduct of an organ of an insurrectional movement did not entail attribution of responsibility equal to that which would be attributed to it for acts of its own organs.

14. Mr. SETTE CÂMARA said that the Special Rapporteur had, as usual, presented the draft article with such thoroughness and lucidity that there could be very little room for doubt about the essence of its underlying principle. To establish the continuity of responsibility when a successful insurrectional movement had set up a new government, some writers spoke of the confirmation of the will of the State and others of the embryo of the new State already existing in the insurrectional movement itself. The Special Rapporteur related the continuity between the former State and the new State to a "potential source of international responsibility" justifying attribution of

the wrongful acts to the new State, which made it necessary to affirm that acts committed by a person or group of persons acting as organs of the insurrectional movement were retroactively considered to be acts of the newly constituted State.

15. He himself had some doubts about the criterion of retroactivity, for explaining the continuity of responsibility. In the first place, what was retroactive? If, as the Special Rapporteur seemed to intend, it was the attribution which took place *a posteriori*, what was assumed was the prior existance of a wrongful act which had not been attributable, at the time of its commission, either to the pre-existing State or to the insurrectional movement itself, even if it had possessed international personality. If it were otherwise, the subsequent attribution would in either case inevitably be considered as a case of succession of the new State or government to the obligations deriving from the responsibility of the former State or government for the wrongful act. On the other hand, it would be going too far to say that it was the existence of the wrongful act that was established retroactively, although such a position would be consistent with the rest of the draft articles, and particularly with article 3 (A/9610/Rev.1, chapter III, section B), since, at the time when the act had been committed, the new State had not existed and consequently could not have had anything attributed to it under international law or have violated an international obligation.

16. The Special Rapporteur had, of course, resorted to the theory of retroactivity in order to avoid the difficulties of dealing with a problem of succession of States or of governments, as the case might be. In the situation under consideration, however, succession did occur, and it would be extremely difficult to separate the problems of responsibility, or rather of obligations flowing from the establishment of responsibility, from the problems of succession themselves.

17. Moreover, in the many arbitral awards cited by the Special Rapporteur there was not a single reference to retroactive attribution to a State of the acts of organs of a successful insurrectional movement. All the umpires concerned had upheld the principle of continuity in their different ways, most of them by affirming that the new government was responsible for the acts of successful revolutionists, which was the approach embodied in Basis of Discussion No. 22 drafted by the Preparatory Committee for the 1930 Codification Conference. (A/CN.4/264, para. 170.)

18. There was no doubt that, if the problem was considered from the point of view of succession, serious difficulties would arise with regard to the theory of retroactivity in cases where the international obligations violated were conventional ones. If, for example, the insurrectional movement was a liberation movement and the revolutionaries violated provisions of an international treaty, thereby committing an internationally wrongful act, such an act could not, in his opinion, be retroactively attributed to the new State in spite of the "clean slate" rule. It would be safer, and more consistent with the positions adopted in previous articles, simply to state the principle that the newly constituted State would be responsible for the conduct of persons or groups of persons who had acted as organs of a successful insurrectional movement, without trying to elaborate theoretical machinery for the enforcement of that principle.

19. The saving clause in paragraph 2 was judicious, except in regard to the problem of retroactivity. Since the State was the same subject of international law, the conduct of persons or groups of persons acting as organs of the former government, which had been considered legitimate at the time of such conduct, was attributable to the State.

20. Mr. USHAKOV said that article 13 raised not only a purely legal problem, but also a politico-legal problem—that of the legitimacy of a successful insurrectional movement. In article 12 it had been possible to avoid the question of the legitimacy of an insurrectional movement, for the State was not responsible for the acts of any insurrectional movement in so far as that movement was outside its jurisdiction and control. But the situation in regard to article 13 was entirely different, since it dealt with successful insurrectional movements and hence raised the question of the legitimacy of such movements. An insurrectional movement could be fomented and directed against a State by another State or by a group of foreign States, and the question therefore arose whether the successful insurrectional movement was legitimate in the eyes of international law. If it was not internationally legitimate, the problem of responsibility and attribution did not arise. In his opinion, the legitimacy of the successful insurrectional movement was the most important issue raised by article 13.

21. The article also raised a legal problem: was it correct to speak, in paragraph 1, of a "new State", rather than a new "subject of international law"? After all, it was not the State itself that changed, since its population and territory remained the same; it was the governmental authority. In his opinion, therefore, it was the same State, but a new subject of international law. However, when a capitalist State changed into a socialist State, for example, it was open to question whether it was the same State or a new one. If it was a new State, the question of succession of States arose. Writers were divided on that issue, which had not been finally settled either in theory or in practice.

22. Paragraph 2 of article 13 was not self-evident, and could only be understood in the light of the Special Rapporteur's commentary.

23. Mr. TAMMES said that article 13 introduced into the draft on State responsibility the time element, to which the Commission had given much attention when discussing succession of States. In the drafts on succession of States, the Commission had attempted to draw up a complete typology of possible cases of the replacement of one sovereignty by another in a certain territory.

24. Paragraph 1 of article 13 dealt with the case of a new State being constituted in part of the territory of a pre-existing State—the case which the Commission had described as "separation" in the context of State succession. In 1974, when adopting article 33 (Succession of States in case of separation of parts of a State) of the draft articles on succession of States in respect of treaties

(A/9610/Rev.1, chapter II, section D), the Commission had accepted some measure of continuity with regard to treaties in cases of separation. Similarly, the Special Rapporteur now proposed continuity of responsibility between what he called, in paragraph 194 of his report, the "embryo State" and the new State formed by separation. Although the object was different, the basic idea of continuity was the same in both cases. The solution proposed by the Special Rapporteur therefore deserved support, in that it proposed the passing of responsibility when the movement preparing the separation had successfully become the structure of the new State.

25. Paragraph 1 of article 13 also dealt with the case in which the change affected the whole territory of the State and was so radical that the continuity of the existence of the State was broken. That situation had not been discussed by the Commission in connexion with State succession, because it was generally considered not to affect the continuity and identity of the State, so that no succession occurred. In the rare cases of a break in continuity, the break had coincided with far-reaching territorial changes, as in the case of Austria after 1918. In the absence of generally recognized precedents of State succession in an identical territory, it would perhaps be better to leave that hypothetical and perhaps controversial case outside the scope of the present draft articles. Moreover, so far as the retroactive effect was concerned, there was no real practical difference between that case and the third type of case considered in article 13—that in which no State succession occurred, there was complete continuity and, in keeping with a long and consistent practice, responsibility passed from the insurgent phase to the phase of recognition of power or participation in power by integration.

26. He suggested that, so far as the diversity of cases was concerned, the draft of article 13 should be simplified to some extent, along the lines of the formulas reproduced by the Special Rapporteur in the foot-notes to paragraph 212 of his report.

27. Mr. RAMANGASOAVINA said that, as usual, the Special Rapporteur's report gave the historical background of the article under consideration and a detailed analysis of several judicial decisions. Article 13 should not raise many difficulties, since the principles stated, both in paragraph 1 and in paragraph 2, had already been applied in several arbitrations and in the settlement of various disputes. The Special Rapporteur's report showed, moreover, that similar provisions had already been proposed during the preparatory work for the Hague Codification Conference of 1930.

28. Article 13 did, however, raise some problems of practical application. The acts of an insurrectional movement were attributable to the State only if the movement was successful—either completely, in that it replaced the previous government, or partly, in that it became integrated with the structures of the pre-existing State. If it was not successful, its acts, by virtue of article 12, were not attributable to the State. The problem of the "separate international personality" of the insurrectional movement did not arise in article 13 as it did in article 12, for by reason of its success, the movement automatically acquired the status of a subject of international law, since it wholly or partly replaced a State which was a subject of international law. Thus what happened to the victims of an insurrectional movement depended, to some extent, on the fortunes of war. If the movement did not succeed, its acts would not be attributable to the State, which would consequently not be bound to make reparation for the damage caused by those acts. For example, if an insurrectional movement caused damage to the staff and property of the embassy of a foreign country, which it accused of supporting the government it was fighting against, and was then defeated, the State would not be required to make reparation for the damage caused by the acts of that movement. If, on the other hand, the insurrectional movement was successful, the State would be required to indemnify the victims. In the first case, the State might, under the terms of an agreement, voluntarily offer compensation to the victims of the insurrectional movement, but it was not required to do so by the draft articles. In such a case, how could the victims obtain reparation? He was accordingly concerned about the practical consequences of article 13, even though he agreed with the principle.

29. Nevertheless, he was prepared to accept draft article 13. In his opinion, the word "retroactively", in paragraph 1 was superfluous, because the case was one in which retroactivity was necessarily involved, whether it was mentioned in the text or not. He believed that the provision in the second sentence of paragraph 2 was necessary.

30. Mr. KEARNEY said he considered, like Mr. Sette Câmara, that it would not be desirable to emphasize the theoretical bases of the rules under discussion. Some of the illustrations by analogy, such as the comparison with an embryo that became a child, or a child that became a man, were more a source of controversy and confusion than of enlightenment. It would seem enough to note that an insurrectional movement had sufficient identity with the government it later became, to provide an adequate foundation for the rules under discussion.

31. He welcomed Mr. Tammes's suggestion for simplifying article 13, in the sense that a successful revolution which replaced the governmental structure within an entire country did not affect the continuity of the States; it simply brought about a change of government. On the basis of that widely accepted thesis, paragraph 1 of article 13 might be simplified so as to concentrate on situations in which the new State was constituted by a process of decolonization or separation of part of a State. In cases of that kind, a newly constituted State did emerge.

32. Paragraph 2 should concentrate on changes of government. The Special Rapporteur had not mentioned changes of government, but the introduction of a reference to such changes would clarify the idea conveyed by the phrase "whose structures have subsequently been integrated". That phrase was presumably intended to refer to changes in governmental structure.

33. In his opinion, the specific reference to retroactivity could be omitted without any substantial effect on the rules proposed. That would make it possible to avoid

the problems which were invariably raised by a specific reference to retroactivity.

34. Mr. HAMBRO said that the Special Rapporteur, in his admirable report, had put forward very convincing arguments in support of the principles stated in article 13. Nevertheless, the article raised in his mind the same doubts as he had expressed about article 12, and for the same reasons. He appreciated that his was a minority view, but he hoped it would be possible for the Drafting Committee to simplify the texts of articles 12 and 13 so as to make it clear that they did not deal with topics other than State responsibility—in particular succession of States and governments. He agreed with Mr. Tammes's suggestion for simplification.

35. He had stronger views on the subject of retroactivity, which involved more than a matter of terminology. The situation contemplated in paragraph 2 of article 13 really involved a question of succession. A State was held responsible for the acts performed by a body which, at the time of performing them, had not been a State organ. Retroactivity was generally recognized by legal opinion as being contrary to fundamental legal principles. Hence he welcomed the Special Rapporteur's willingness to remove the reference to retroactivity from article 13.

36. Mr. ELIAS said that article 13 was generally acceptable subject to some minor changes. The underlying principles were clear and the Special Rapporteur's analysis made their acceptance inevitable.

37. The problem facing the Commission was not, perhaps, as difficult as might at first appear: it had to be decided whether the acts or omissions of a successful insurrectional movement were to be attributed to the State and, if so, for what reasons. The Special Rapporteur's account of the precedents and opinions of writers showed that there was general agreement on the attribution to the State of the acts or omissions in question. He had pointed out in paragraph 212 of his report (A/CN.4/264 and Add.1) that the origin of the matter went back to the text drawn up by the Preparatory Committee for the 1930 Hague Codification Conference and that it had been explicitly dealt with in five subsequent codification drafts: the two Harvard Law School drafts of 1929 and 1961, the Inter-American Juridical Committee draft of 1965 and Mr. García Amador's two drafts of 1958 and 1961.

38. There were three possible cases. The first was that in which the pre-existing State ultimately succeeded in its fight against the insurgents and the structure of the State continued unchanged; in that case it was only right that the State should be held responsible only for the acts or omissions of its own organs during the revolutionary period. The second case was that in which the insurrectional movement succeeded in overthrowing the government and replaced it; in that case the acts of the organs which had been replaced could not be attributed to the successful insurrectional movement. The third case was that of the partial success of the insurrectional movement and the amalgamation of the two contending forces; in that case, the acts of all organs that had taken part in the struggle should be attributed to the new State formed of elements of both parties. The system proposed by the Special Rapporteur in article 13 conformed with that approach. The third case was covered by paragraph 2 of the article.

39. In paragraph 199 of his report the Special Rapporteur clearly indicated that the decisive criterion for attribution to the new State of acts or omissions of the organs of an insurrectional movement was the idea of continuity. The idea of legitimacy, to which Mr. Ushakov had drawn attention, should be duly taken into consideration, but should not be over-emphasized; it had not troubled the Commission in connexion with paragraph 2 of article 12.[4] The Commission should not get involved in a discussion on questions of the legitimacy or legality of revolutionary governments; delving into such problems could only lead to the adoption of unsound solutions. It should concentrate on the concept of continuity, which made it possible to attribute to the new State the acts of the successful insurrectional movement.

40. He agreed that the word "structure" should be replaced by a more neutral term, even though it had already been used in other articles. Expressions such as "apparatus of government" or "machinery of government", which the Special Rapporteur himself had used in his report, might prove helpful.

41. He agreed that the reference to retroactivity should be dropped, as it was unnecessary. The temporal issue was not of primary importance in that particular context; what mattered was that the acts of an insurrectional movement which had succeeded should be attributed to the new State. The concept of retroactivity, if retained in the article, would give rise to intractable problems.

42. Mr. CALLE Y CALLE said that he supported article 13, which followed on the provision, in article 12, that the conduct of the organs of an insurrectional movement could not be attributed to the State.

43. Latin America, had produced a wealth of legal writings on the subject of insurrectional movements, uprisings and disturbances. The general rule was that a State was not responsible for injuries resulting from such events, except in the case of negligence on the part of its organs. Where no such negligence existed, the injuries in question were deemed to result from acts by private individuals.

44. Article 12, paragraph 2, and article 13 dealt with a special category of insurrectional movements—those which had acquired legal personality in consequence of recognition by States and by the international community. Such movements had the capacity to engage their international responsibility for wrongful acts; they had a responsibility of their own while the insurrection lasted. If the movement was successful, it filled the vacuum created by the displacement of the State structures. The case was clearly not one of State succession, because there was legal continuity despite the restructuring of the State.

45. Paragraph 1 of article 13 dealt with two cases: the first was that in which a "new State" was constituted in the entire territory formerly under the sovereignty of the pre-existing State; the second was that of the

[4] For text see 1312th meeting, para. 1.

emergence of a new State in part of the territory of the pre-existing State. It was appropriate to refer to the emergence of a new State in the second case, but not in the first. Where the whole of the territory was affected, there was no change either in territory or in population; there was only a change of government. The provisions of paragraph 1, which were adequate for the case of separation of part of the territory of a State, were unsuitable for the case in which the whole territory was taken over by a successful insurrectional movement.

46. The continuity of the State was even clearer in the case envisaged in paragraph 2. In that paragraph, the use of the term "structures" was acceptable, and preferable to the enumeration in the 1961 Harvard draft: "an organ, agency, official or employee" (A/CN.4/264, para. 212, foot-note 495). It would be even more unsatisfactory to refer to an "organization".

47. He supported the text of article 13 proposed by the Special Rapporteur. Its contents were in line with earlier codification drafts, but the formulation was clearer and consistent with the provisions of the preceding articles.

The meeting rose at 6 p.m.

1317th MEETING

Tuesday, 27 May 1975, at 10.10 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Elias, Mr. Hambro, Mr. Kearney, 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 13 (Retroactive attribution to a State of the acts of organs of a successful insurrectional movement)[3] (*continued*)

1. Mr. QUENTIN-BAXTER said he approved of article 13, which was supported by a learned commentary prepared by the Special Rapporteur. That commentary, like the entire report (A/CN.4/264 and Add.1), was in itself a remarkable contribution to international law. The report would be of great value not only to scholars and university students everywhere, but also to legal advisers to States. Studies of that kind had the further advantage that, being published in the *Yearbooks* of the Commission, they could be obtained in several languages, both easily and cheaply.

2. In formulating the text of article 13, the Special Rapporteur had wisely avoided theoretical controversies and had based its provisions on what was virtually a uniform State practice. It might at first sight appear arbitrary that the nature of a claim should depend on the success of an insurrectional movement. On reflection, however, it would be seen that the risk involved was inherent in life and common to all systems of law. If the person or entity against whom a claim had been lodged disappeared and could not be reached through the channels of the law, the victim had no redress. If, on the other hand, that person or entity existed and was not protected by any lack of status, it was right and proper that a claim should be possible. It was instinctively on that basis that State practice had evolved the two essential rules in the matter. The first was the rule of the immediate responsibility of the State for the actions of its organs. The second was the residual rule of the responsibility of the State for matters arising within its jurisdiction.

3. In line with those thoughts, he shared the views of those who had criticized the reference to retroactivity. It was not just a matter of avoiding an unsatisfactory and somewhat alarming term. The very concept of retroactivity was out of place in that context. It was not the purpose of article 13 to attribute responsibility retrospectively to an entity which had not previously had such responsibility. The provisions of the article merely recognized the sensible principle that one had to wait for the domestic situation to become clear before attaching an international obligation. That approach was based on the fundamental principle of non-interference in the domestic affairs of a State. The provisions of article 13 thus achieved a delicate balance between matters of domestic concern and matters which involved international responsibility.

4. For his part, he found article 13 easier to accept than the principle in paragraph 2 of article 12,[4] which dealt with a situation of disequilibrium where one of the actors on the international stage was not a State. The situation contemplated in article 13 had its origin in the attempts made by the international community to draw a line between matters of international interest and matters which should be settled at the domestic level. It should be remembered that the United Nations had views about the state of the world which sometimes involved a characterization of international status. Those views coexisted with the older rules of an international society which had not been institutionalized at the international level. As a result, there existed certain very sensitive areas presenting considerable difficulties. It was for that reason that the topics of recognition and personality of the State had not been accepted as priority topics for codification. For the same reason, the Commission, when dealing with a particular topic, had always taken care not to trespass inadvertently on matters which were not strictly within the scope of that topic. Paragraph 2 of article 12 gave rise to problems of that order. It was difficult to

[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. 2.

[4] For text see 1312th meeting, para. 1.