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Summary record of the 1517th meeting

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law, had three aims: first, the safeguarding and further development of relations between member States in accordance with international law; secondly, the approximation and harmonization of member States' legislation and legislative policies; thirdly, the adjustment of their laws to the needs of an evolving democratic society.

33. Among the subjects on the Committee's programme more particularly connected with public international law were the question of the privileges and immunities of international organizations, currently being studied from the specific angle of the tax privileges of international officials, and, most important, the European Convention on State Immunity, which had been opened for signature in June 1972 and had entered into force on 11 June 1976, after being ratified by Austria, Belgium and Cyprus. A recent exchange of views arranged by the Committee had shown that the United Kingdom would soon be able to ratify the Convention. In addition, the United States Congress had recently passed a new act on the subject that was entirely compatible with the solutions adopted in the 1972 Convention. Those developments showed the interest which that instrument would not fail to arouse, not only at the European regional level but all over the world, in the development of international law applicable to the important and delicate question of the jurisdictional immunities of foreign States.

34. Also in the sphere of public international law, the Committee had just decided, at the request of members of the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe, to proceed, at its next session, in November/December 1978, to an exchange of views with parliamentary representatives on the 1957 European Convention for the Peaceful Settlement of Disputes[14] and, more particularly, on ways of improving the machinery for the settlement of disputes arising between States members of the Council of Europe. The Parliamentary Assembly considered that the Convention was not adequate, since it had so far been of use in only two cases: that of the North Sea continental shelf and that of the negotiations on the question of the South Tyrol (Alto Adige).

35. Finally, he drew attention to two recent European conventions, signed in November 1977 and in March 1978, which were aimed at organizing mutual assistance in administrative matters between States members of the Council of Europe. The first concerned the service abroad of documents relating to administrative matters, and the second the obtaining abroad of information and evidence in administrative matters. Those conventions would fill an important gap in co-operation between States, for unlike co-operation in civil, commercial and criminal cases, mutual assistance in administrative matters had so far been based almost exclusively on *ad hoc* arrangements, with all the drawbacks they entailed for legal security. Naturally, those two conventions took into account the diversity not only of the administrative structures of member States, but also of the matters covered by administrative law; they had to allow each contracting State to define unilaterally their field of application to itself, while encouraging it gradually to lift such restrictions.

36. The Committee had also undertaken an extensive programme of harmonization of the internal law of States members of the Council of Europe. The basic interest of that programme lay in the particular viewpoint from which it had been planned and was being carried out. The object was, notwithstanding the co-existence of different national legal systems, to strengthen and protect the legal position and rights of individuals—nationals as well as foreigners—vis-à-vis the public authorities and the various pressures exerted on them by society.

37. Among the items on that programme were the protection of the individual against administrative action, including the modalities of the exercise of the discretionary power of administrative authorities and the responsibility of the State for the acts of its agents; measures to facilitate access to the courts, in other words, legal aid and advice, together with the simplification of judicial procedures and reduction of their cost; protection of privacy having regard to electronic data banks, particularly in regard to the transmission of personal data beyond national frontiers; consumer protection; and reform of family law.

38. The European Committee on Legal Co-operation would hold its next meeting at the headquarters of the Council of Europe, in Strasbourg, from 27 November to 1 December 1978, and would be happy to welcome a representative of the International Law Commission.

39. The CHAIRMAN thanked the observer for the European Committee on Legal Co-operation for his statement, which had clearly brought out the various aspects of the fruitful co-operation established between the Commission and the Council of Europe in the sphere of the codification and progressive development of international law.

The meeting rose at 1 p.m.

1517th MEETING

Thursday, 13 July 1978, at 10.10 a.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Castañeda, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

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[14] United Nations, *Treaty Series*, vol. 320, p. 243.

State responsibility (*continued*) (A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1)
[Item 2 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)[1] (*continued*)

1. Mr. REUTER said that the question dealt with in article 25 was relatively simple. It arose from the fact that, in certain cases, a State committing an internationally wrongful act was completely foreign to that act; another State was then recognized as the real author of the act in question. In other cases, a State that had not itself committed an internationally wrongful act might be in some way connected with that act. The nature of the connexion varied widely. In article 25, the Special Rapporteur had tried to determine the elements defining an association with an internationally wrongful act that was sufficiently close to be generally characterized as complicity. There were, of course, special rules covering particular international offences, and participation in some of those offences was so serious a matter as to be regarded in the relevant instruments as an offence equivalent to the main act. For instance, the fact that a State placed its terriory at the disposal of another State, and allowed it to be used by that State to commit an act of aggression against a third State, in itself constituted aggression. In order to establish a general rule applicable to all cases, the Special Rapporteur had proceeded by eliminating certain cases. While fully approving of the Special Rapporteur's conclusions, he wished to draw his attention, and that of members of the Commission, to two of their consequences.

2. The case dealt with in article 25 was clear enough. The Special Rapporteur had rightly rejected the case of instigation; but he had also refrained from attaching consequences to the distinction made by the Commission, in article 19,[2] between international crimes and international delicts. At the time, the Commission had indicated that the effects of that distinction would be perceptible in later articles of the draft. During the consideration of the text that had become article 19, he had himself pointed out that, if that provision were adopted, the Commission would be committed to establishing a differentiated régime of responsibility based on the distinction made.[3] It would have been possible, in article 25, to make a distinction between international delicts and international crimes. For the former, mere instigation could have been considered insufficient, whereas for the latter, instigation could have been considered to justify a sanction. Personally, he would have deplored the attachment of such consequences to that distinction. On the other hand, he would agree, for example, that only international delicts should be subject to prescription, to the exclusion of international crimes. On all other questions, however, the Commission should refrain from formulating general rules applicable to international crimes, and consider them case by case.

3. In his written[4] and oral[5] presentations of article 25, the Special Rapporteur had been discreet on another point. If the Commission based the theory of responsibility on the classical conception that damage was a fundamental element of responsibility, with settlement of cases of responsibility lying in reparation, it would be necessary to decide whether, when there were several authors, they should share the burden of responsibility and the obligation to make reparation. To that end, it would be necessary to distinguish, as in other contexts, between the obligation and the ultimate burden of the obligation. In particular, it might perhaps be necessary to provide for some form of joint responsibility of the authors of an internationally wrongful act and for actions to recover from each other. How was complicity to be sanctioned? Would the accessory be associated with the principal author of the act, and would it be liable, like the latter, to a penalty? How was that penalty, if any, to be determined? Admittedly, the Commission was not called upon to answer those questions at that time, but members should already be considering them. If any member believed that the Commission was not in a position to tackle those questions, he should not accept the general rule stated in article 25, which he, for his part, was able to accept.

4. With regard to the content of article 25, he could accept the term "complicity", but only provided that it was used in a special sense peculiar to international law, and with no analogy with internal law. Otherwise, the Commission would have to engage in subtle distinctions, for which it would find no satisfactory equivalents in the different working languages. If the notion of complicty referred to in article 25 was an independent notion, it would have to be defined.

5. On reading the Special Rapporteur's report and hearing his oral presentation of the article, he had gained the impression that complicity, for the Special Rapporteur, had both a material and an intellectual element. With regard to the material element, the Special Rapporteur had been very brief, confining himself to pointing out the more or less serious nature of participation by a State in the internationally wrongful act of another State. Personally, he doubted whether assistance that was materially too remote could be regarded as complicity. With regard to the intellectual element, mere knowledge might be enough. It would then be sufficient for the author of the wrongful act to know that its assistance would be

[1] For text, see 1516th meeting, para. 4.

[2] See 1516th meeting, foot-note 6.

[3] *Yearbook... 1976*, vol. I, p. 245, 1402nd meeting, para. 61.

[4] A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, paras. 51 *et seq*.

[5] 1516th meeting.

used for wrongful purposes. If the Commission confined itself to knowledge, that could take it very far, for from the moral point of view the mere fact of knowing that the assistance provided might be used for a wrongful purpose was reprehensible.

6. By using the words "in order to enable" in the text of the article, the Special Rapporteur seemed to be requiring intention in addition to knowledge. Material participation would thus have to be accompanied by guilty intent. That was the first time that wrongful intent had come into play in defining an international delict. He wondered whether the Commission really meant to define the material element of participation and whether it was necessary to distinguish that element from the intellectual element. If the Commission considered that the material element should consist of aid or direct assistance in the wrongful act, it followed that it would be adopting not only the element of knowledge, but also the element of intent. That was another point that should be given mature consideration.

7. Mr. CASTAÑEDA endorsed the general approach adopted in article 25 and, bearing in mind the political nature of its provisions, particularly welcomed the scientific precision with which it had been drafted.

8. The Special Rapporteur had been right, in his view, to make a basic distinction between participation in the form of direct assistance by one State to another, and participation arising out of the existence of a particular relationship between two States. He had also been right to exclude certain different, albeit related, situations that did not, however, amount to participation. For example, when two States, acting in concert, attacked a third State, there were two separate acts of aggression, but no participation.

9. Similarly, mere incitement to commit an internationally wrongful act did not amount to participation: as the Special Rapporteur had said in his report, it would be wrong to draw an analogy with internal criminal law, because the concept of incitement in that law had "its origin and justification in the psychological motives determining individual conduct",[6] which obviously did not apply to relations between States. He agreed with the Special Rapporteur's analysis of the problem of "puppet" States, and considered that the decision of the Board of Commissioners set up under the Convention of 1831 between the United States and France, which he had cited in that connexion,[7] underlined the relevance of the distinction drawn.

10. He also agreed that the use or threat of use of armed force by a State to make another State breach its international obligations should be considered, under modern international law, as having the effect of placing the second State in a position of dependence on the first that was incompatible with a situation of complicity. The same applied in general to coercion, which, although it obviously had legal consequences, could not be assimilated to complicity. Those cases came within the sphere of vicarious responsibility.

11. The formula adopted in article 25 was therefore correct; it emphasized the objective element of aid and assistance, while also taking account of the subjective intent to "enable or help" a State to commit an international offence. Nevertheless, its application was bound to raise serious problems, because of the complexity of the subject and the state of international law in general.

12. One of the most difficult problems was that of intent, which had already arisen when the Commission had been trying to define aggression. For instance, if one State supplied another with small arms solely as replacements, and those arms were subsequently used in an attack on a third State, it would be very hard to determine whether or not there had been any intention to participate in, or prior knowledge of, that act. There again it might prove difficult in practice to classify situations as clearly as the Special Rapporteur had classified them in his report. Very complex situations could arise, such as civil wars, concerning which it would be necessary to take account of the various international rules on the conduct of States in the event of civil strife. Lastly, the Commission would also have to consider the important question whether a separate legal régime should be established for complicity, apart from the régimes established for related questions.

Co-operation with other bodies (*concluded*)

[Item 11 of the agenda]

Statement by the Observer for the Inter-American Juridical Committee

13. The CHAIRMAN invited Mr. López Maldonado, Observer for the Inter-American Juridical Committee, to address the Commission.

14. Mr. LÓPEZ MALDONADO (Observer for the Inter-American Juridical Committee) said that the Committee had recently had the honour of welcoming Mr. El-Erian, who had given a very interesting account of the work of the International Law Commission.

15. He noted from the Commission's report to the General Assembly on the work of its twenty-ninth session that it intended to pay due attention to topics on the agenda of, *inter alia,* the Inter-American Juridical Committee, when reviewing its own programme of work.[8] In that connexion, he wished to refer, first, to the items that the Committee would be considering at its forthcoming session, to be held in Rio de Janeiro in July and August 1978. The agenda

[6] A/CN.4/307 and Add.1 and 2 and Add.2/Corr.1, para. 63.

[7] *Ibid.*, para. 64.

[8] *Yearbook... 1977,* vol. II (Part Two), p. 133, doc. A/32/10, para. 131.

for that session was divided into two main groups of subjects. The first group consisted of three priority items: the principle of self-determination of peoples and its sphere of application; the legal aspects of co-operation in the transfer of technology, a question closely connected with that of multinational corporations; revision of the inter-American conventions on industrial property, with particular reference to patent and trademark law. The last of those items had been under consideration for more than 10 years and it was hoped to draft an instrument that would reflect the principles of the 1967 Paris Convention for the Protection of Industrial Property, and embody the new principles laid down in treaties concluded between the countries of the Carthagena Agreement [known as the Andean Pact].

16. The second group of subjects that the Committee would be discussing at its forthcoming session, which had no priority, included, first, the question of the classification of international economic and commercial offences. Under that item, which was closely related to the study the Committee was preparing on multinational corporations, the question of bribery and related offences would be considered. It was hoped to prepare an instrument that would provide guidance in drafting legislation on that question. Other subjects in the second group included nationalization and expropriation of foreign property under international law; jurisdictional immunity of States; settlement of international disputes relating to the law of the sea; territorial colonialism in the Americas; the role of law in social change; measures to promote the accession of non-autonomous territories to independence within the American system; and, lastly —more an administrative than a legal matter—revision of the Committee's rules of procedure.

17. Referring next to the work accomplished by the Committee during the two-year period 1976-1978, he said that, in the sphere of public international law, a draft inter-American convention on extradition was under consideration, pursuant to resolution 107 adopted by the Tenth Inter-American Conference (Caracas, 1954). That was a delicate matter, given its political implications, and the aim was to prepare a single instrument—taking account of the close connexion between the right of asylum and the institution of extradition—that would promote international legal co-operation in that sphere in the Americas. Existing multilateral conventions and bilateral treaties had proved to be ineffective in practice owing to the differences in the various national legal systems.

18. With regard to international judicial co-operation, a first specialized Inter-American Conference on Private International Law, held in Panama in January 1975, had resulted in six conventions, most of which had since been ratified. The General Assembly of OAS, at its fifth regular session, held the same year, had decided to convene a second Inter-American Conference on Private International Law. To that end, the Committee had drafted conventions on the following subjects: enforcement of foreign awards and judgements; evidence in foreign law; conflict of laws in regard to cheques; conservation measures in civil, mercantile and labour cases; and general rules of private international law. Two main trends of opinion had emerged from the Committee's discussion on the last question. One was that there should be only a single convention, dealing with the nationality, civil status, capacity and legal domicile of foreigners. The other was that, in accordance with the modern trend, separate conventions should be prepared and their ratification facilitated; the Convention on Private International Law (known as the "Bustamente Code"), drawn up for the Americas at the Sixth International Conference of American States (Havana, 1928), had unfortunately been ratified by only a few States. It had therefore been decided to draft three separate conventions on the subject in the immediate future. The Committee had also adopted a resolution on the transport of goods by road and by sea, with particular reference to bills of lading.

19. In addition, the eighth General Assembly of OAS had entrusted the Committee with two tasks. The first concerned the question of terrorism, which had been considered by a working group of the Committee on Juridical and Political Affairs and by the Permanent Council of OAS. Although the matter was being examined in the United Nations, it had been considered that the political differences in the American system were less irreconcilable, and it had therefore been concluded that the General Assembly of OAS should establish guidelines for the drafting of instruments to deal with the growing threat of terrorism throughout the continent. On that basis, the General Assembly of OAS had recommended that the Permanent Council, in co-operation with the Inter-American Juridical Committee, should prepare a series of draft conventions on aspects of international terrorism, in particular the taking of hostages, which were not covered in the Washington Convention of 1971.[9] It had further recommended that a socio-economic study should be made of the underlying causes of terrorism, and that governments should be consulted on the possibility of convening conferences for the adoption of the proposed instruments.

20. The second task entrusted to the Committee by the General Assembly of OAS had been to prepare, in co-operation with the Inter-American Commission on Human Rights, a draft convention defining torture as an international crime. The contributions made by Mr. Ago and Mr. Reuter would be extremely useful to the Committee in that work.

21. Lastly, a course in international law, attended by leading professors and legal experts from all over the continent, was held annually under the auspices of OAS and of the Committee. Each member country was awarded one fellowship, and the Committee contributed to travel and subsistence costs. He would be pleased to provide the Chairman with a copy of the

[9] Convention to Prevent and Punish the Acts of Terrorism taking the form of Crimes against Persons and related Extortion that are of International Significance, signed at Washington, D.C., 2 February 1971.

publication issued at the end of each course. In addition, a centre was being established for the exchange of information on the teaching of subjects connected with international relations in the Americas.

22. He thanked members for their attention, and expressed the hope that the Commission would be represented at the forthcoming session of the Committee.

23. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee, on behalf of the Commission, for his interesting account of the Committee's numerous activities, of which the Latin American members of the Commission, in particular, had reason to be proud. Unfortunately, it would be difficult for the Commission to be represented at the Committee's next session, which was to be held very shortly, but the Commission would certainly send an observer to the following session.

24. He had noted the many important subjects on which the Committee was working, including the question of the jurisdictional immunities of States. The Commission had set up a working group on that question, which it would probably consider at one of its future sessions. The Committee's work on the law of the sea would be of particular interest to those members of the Commission who were taking part in the session of the United Nations Conference on the Law of the Sea. As for the preparation of a draft inter-American convention on extradition, that was a particularly fitting project, in view of the tradition of asylum established on the Latin American continent.

25. He had been most interested to learn of the work in progress on a number of draft conventions dealing with private international law, and of the measures being taken to combat terrorism. Although the efforts of the United Nations to conclude a general convention on terrorism had not met with success, the General Assembly had established an *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages,[10] and had adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[11]

26. With regard to the proposed convention defining torture as an international crime, he pointed out that, under the terms of article 19 of the draft articles on State responsibility[12] prepared by Mr. Ago, "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being" was an international crime.

27. In conclusion, he expressed his appreciation of the high level of the co-operation established between the Commission and the Inter-American Juridical Committee.

The meeting rose at 11.55 a.m.

[10] General Assembly resolution 31/103.

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

[12] See foot-note 2 above.

1518th MEETING

Monday, 17 July 1978, at 3.05 p.m.

Chairman: Mr. José SETTE CÂMARA

Members present: Mr. Ago, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. El-Erian, Mr. Francis, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Uskahov, Mr. Verosta, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/307 and Add.1 and 2 and Add.2/ Corr.1)

[Item 2 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)*

ARTICLE 24 (Breach of an international obligation by an act of the State not extending in time)[1] (*concluded*) *and*

ARTICLE 25 (Breach of an international obligation by an act of the State extending in time)[2] (*concluded*)

1. Mr. AGO (Special Rapporteur) recalled that the Commission had decided, at its 1513th meeting, in the title of article 26, that the word "time", should be replaced by the words "moment and duration". In order to indicate clearly that articles 24 and 25 also related to the *tempus commissi delicti,* those two provisions should be entitled respectively "Moment and duration of the breach of an international obligation by an act of the State not extending in time" and "Moment and duration of the breach of an international obligation by an act of the State extending in time".

2. In the French text of article 25, paragraph 3, the words "une succession de comportements" should be replaced by the words "une succession d'actions ou omissions", in view of the English version of that provision and the fact that the words "actions or omissions" had already been used by the Commission in other provisions of the draft.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 25 (Complicity of a State in the internationally wrongful act of another State)[3] (*continued*)

3. Mr. USHAKOV approved the substance of article 25, but had some comments to make on its draft-

* Resumed from the 1513th meeting.

[1] For text, see 1513th meeting, para. 1.

[2] *Ibid.*.

[3] For text, see 1516th meeting, para. 4.