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Summary record of the 2555th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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passage of the commentary which did not seem to do them justice. In paragraph 154 (*a*) he stated that a State was only responsible if the conduct in question was attributable to it and involved a breach of an international obligation owed by the State to persons or entities injured thereby. But responsibility in international law concerned the relations between States; the subjects of international law were States and not physical or moral persons. The violation of the rights of physical persons by an organ of the State, for example, the rights guaranteed by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights came within the jurisdiction of that State and not an inter-State jurisdiction.

66. With regard to article 5, he was glad that the Special Rapporteur had used, in paragraph 157, the phrase "may exercise international functions". There were of course cases in which political parties or religious organizations were not organs of the State but still exercised functions of authority, sometimes very important ones. It was therefore impossible to endorse the arguments of those speakers who had asserted that only internal law could determine an organ's status. Such arguments were contradicted by the 1969 Vienna Convention, as Mr. Simma had just explained.

67. The last phrase of article 5, which states "provided that organ was acting in that capacity in the case in question", could be deleted because it addressed a rare case, the situation created was perfectly clear, and the text would thus be shorter.

68. Turning to article 7, he said that he had doubts about the responsibility of the component units of a federal State. To disregard the specific elements of a federation would be an unjustifiable error and would cause great complications, as the Special Rapporteur indicated in his comments. The solution might be to insert in article 7 itself a clause incorporating the substance of paragraph 188 of the first report, to read: "exceptional cases where component units in a federal State exercise some limited international competencies, for example, for the purposes of concluding treaties on local issues". That provision might be further expanded to cover regions and not just federal States. Regions had a transboundary dimension, and it would be necessary sooner or later to address their situation.

69. Article 8, subparagraph (*b*), seemed too vague, as the Special Rapporteur himself acknowledged. It should be drafted in more specific terms in order to provide a better definition of the cases which it covered.

70. He too thought that draft articles 5 to 8 and 10 should be sent to the Drafting Committee.

The meeting rose at 1 p.m.

2555th MEETING

Tuesday, 4 August 1998, at 12.10 p.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 5 TO 8 AND 10 (*concluded*)

1. Mr. ECONOMIDES said that he was generally in agreement with the new wording of article 5 (Attribution to the State of the conduct of its organs) proposed in paragraph 284 of the first report of the Special Rapporteur on State responsibility (A/CN.4/490 and Add.1-7) and welcomed in particular the deletion of the provision "having that status under the internal law of that State", for two reasons. The first was that in most cases, the words mostly were redundant, for "organ of the State" meant all the organs of the State which had that status under internal law. Secondly, in a few exceptional cases the provision could be too restrictive. It was possible, for example, that some organs of the State might not have that official status under internal law. Furthermore, Mr. Dugard had cited the different example of the puppet states which had existed in South Africa under the apartheid regime and the puppet state which Turkey had created in northern Cyprus after having invaded and occupied that country in violation of international law. In the *Loizidou* v. *Turkey* case the European Court of Human Rights had found that it was Turkey, and not its puppet state, which had been responsible for the violations of Mrs. Loizidou's rights under the European Convention on Human Rights.

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[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.

2. The words "be considered" should also be deleted, as Mr. Pambou-Tchivounda had proposed (2553rd meeting). The last phrase of new article 5, beginning with the words "and whatever the position", which were purely descriptive, might not be really necessary. But if it was decided to retain that language for the purposes of illustration, it should be supplemented by the insertion of a reference, after the function and position of the organ, to its nature, that is to say, whether it was a central organ or an organ of a territorial governmental entity. It would also be better for the draft articles to give a definition of the term "State", either in article 5 or elsewhere. It should be made clear, for example, that "State" meant any State under international law, whatever its structure or organization—unitary, federal, and so on. Draft articles on State responsibility must in fact define the concept of State, even if only in very general terms.

3. He had some doubts about the new wording of article 8 (Attribution to the State of conduct in fact carried out on its instructions or under its direction and control) proposed in paragraph 284 of the first report, which seemed more restrictive than the former language and reduced the scope of a State's responsibility for unlawful acts. The article stated two restrictive criteria—that instructions must have been given or that direction and control must have been exercised; and the latter two elements were moreover presented as cumulative. Such a provision would allow a State which recruited, financed, trained and owned their regular troops to commit unlawful acts, without giving the troops express instructions and without exercising true control over them, to escape its international responsibility. That issue warranted attention. Moreover, the wording of article 8 (Attribution to the State of the conduct of persons acting in fact on behalf of the State) as adopted on first reading had been more clearly in the progressive development vein.

4. The beginning of article 8, that is to say, the introductory sentence and subparagraph (*a*), were poorly drafted, at least in French, and they should be reworked as follows: "The conduct of a person or group of persons acting on the instructions or under the direction and control of that State is an act of that State." Lastly, subparagraph (*b*), which addressed an extremely specific situation, should be dealt with in a separate provision.

5. Mr. YAMADA said that the part of the Special Rapporteur's excellent first report, on chapter II of part one of the draft (The "act of the State" under international law) and the proposed draft articles, prompted no opposition on his part, but he did wish to make two points. The first concerned the reference to "internal law" in article 5. He agreed with the Special Rapporteur's proposal to delete the reference and with his reasons for doing so. At the same time, to say that the question of knowing whether an organ was or was not an organ of the State was governed by international law was a rather abstract proposition. The domestic organization of the structure of the State had a decisive role, even a conclusive one in some cases, in determining an organ's status. If in a particular State an entity had not been accorded for all practicable purposes the status of an organ of the State, either by domestic organizational law or by other laws, including those conferring on State employees the status of public servant, or by the practice, and if the State had no intention in its treatment of the entity to escape its responsibility, then the act of such an entity could not be attributed to the State. He hoped that the Special Rapporteur would provide a full and detailed commentary on the role of the bona fide domestic organization of the State's structure.

6. Secondly, there was perhaps an overlap between the provisions of article 7 (Attribution to the State of the conduct of other entities empowered to exercise elements of the government authority), paragraph 2, and article 8. Was there a clear difference between the entities referred to in article 7 and the persons or groups of persons referred to in article 8? The Special Rapporteur had called the Commission's attention to the recent trend for privatization of State functions. That question must be adequately addressed in the Drafting Committee. There was in fact a rapid and large-scale transition to smaller government throughout the world. That transition could be effected by various modalities. On the one hand, the State could maintain a monopoly of its functions but delegate them to public agencies or even to private entities. On the other hand, the State might abandon its particular functions entirely to the private sector. Between those two extremes the State might retain an organ to exercise a particular function and at the same time invite the private sector to participate in that same function, in order to improve efficiency by means of competition. In the latter two cases, the acts of non-State entities should not be attributed to the State. The draft articles must be amended to take account of that development.

7. Mr. PELLET said that he did not understand Mr. Yamada's position on the first point. Without a reference to the internal organization of the State as each State determined it in its sovereign freedom, article 7 became virtually useless. Article 7 was necessary precisely because the State was organized in one way or another and divided the governmental authority between itself as a legal person and other entities to which it accorded legal personality pursuant to its internal laws. Mr. Yamada's explanation was no more convincing than the explanation given by the Special Rapporteur, which it followed. The existence of two separate articles, article 5 on the State and its organs and article 7 on the other entities authorized to exercise elements of the governmental authority, was justified only because internal law was taken into consideration. As he had already said, he deeply regretted the deletion of the reference to internal law in article 5 proposed in paragraph 284 of the first report. What was at issue was the State's legal personality, which only internal law could define.

8. Mr. CRAWFORD (Special Rapporteur) said that the existence of legal personality under internal law was not decisive. There were many States in which most of the ministries, if not all indeed, had separate legal personality under internal law. That was true, for example, of many ministries of oil and gas, and equally true of the Trade and Industry Ministry of the United Kingdom of Great Britain and Northern Ireland. Yet those entities were organs of the State. It was thus simply wrong to identify the State with a single legal entity under internal law.

9. Of course, as Mr. Yamada had said, international law did not have an independent concept of what the State ought to be. On the other hand, international law regarded

the "label" which a State affixed to an entity as decisive. Many States did not in fact use the terminology, including the word "organ", of article 5. If an international jurisdiction found in a given case that, pursuant to the constitution and laws of the State in question, an entity had acted in the capacity of an organ of the State, that is to say, as a component unit of its internal structure, the question was settled. But there were more complicated cases, such as that of the police in the United Kingdom. The mere existence of legal personality was not decisive, and many factors had to be taken into consideration. He was not absolutely against a reference to internal law as an important criterion in article 5, but he could not accept a provision which would render decisive the fact that under internal law a State defined an entity as not being an organ of the State.

10. Mr. BENNOUNA said that the disagreement between the supporters and opponents of a reference to internal law should not become a question of principle. The Commission must demonstrate pragmatism and legal realism. Neither side denied that internal law played an extremely important role in attribution or that every State had the right—it was a question of the internal aspect of the right of peoples to self-determination—to organize itself as it saw fit. Nor was it disputed that a State could not rely on its internal law to escape its responsibility, but the internal law of a State could be relied upon to establish its international responsibility. The conclusion must be that there was a continuum between internal law and international law in that connection.

11. Mr. PELLET said that it was indeed a question of principle, namely the principle of the freedom of every State to organize itself as it saw fit. Of course, care must be taken to ensure that the practical considerations mentioned by the Special Rapporteur were taken into account, but that was in fact done in article 4 (Characterization of an act of a State as internationally wrongful), according to which a State could not shelter behind its internal law in order to escape its responsibility. The Special Rapporteur's argument that the functions stemming from the exercise of elements of the governmental authority were distributed differently in different States had its answer in article 7, where it was made clear that, regardless of that distribution, the entity in question could trigger the State's responsibility. The Special Rapporteur had said that he was not against a reference to internal law if it was accompanied by a reference to international law, but what form would such a solution take? The reference to internal law in the draft articles proposed by the former Special Rapporteur, Mr. Roberto Ago,[4] was reasonable.

12. Mr. CRAWFORD (Special Rapporteur) said that there was a crucial difference between article 7, paragraph 2, and article 5. Article 5 provided that the conduct of an organ of the State was attributable to that State in all cases in which the organ acted in that capacity, whereas article 7 provided that the only acts attributable to the State were those resulting from the exercise of elements of the governmental authority. The question arose in many international arbitrations of whether the acts in question were *acta jure imperii* or *acta jure gestionis*. Such a question could not arise in the context of article 5. Article 7 was necessary because of the number of entities which were not organs of the State but exercised State functions, for example, private airlines which exercised functions in connection with immigration. Internal law was certainly the most important factor but it was not the only one, and sometimes even the practice could be more relevant than the texts. In any event, he was convinced that the Drafting Committee would be able to produce language which would comfort the advocates of a reference to internal law in article 5.

13. Mr. ROSENSTOCK said that nobody was denying that the State was free to organize itself as it wished, but he could not see the logic according to which that freedom would have a decisive influence on the international responsibility of the State for the act of one of its entities.

14. Mr. HAFNER said that excessive importance should not be attached to the separate legal personality of an entity in order to justify saying that it was not an organ of the State. The word "organ" was not in fact used in the Austrian Constitution, but the Austrian Parliament, for example, was indeed regarded as an organ of the State. Accordingly, the fact that an entity had a separate legal personality from that of the State was not decisive. He would like to know whether the Special Rapporteur thought that a central bank would fall within the scope of article 5 or of article 7.

15. Mr. CRAWFORD (Special Rapporteur) said that he endorsed Mr. Hafner's comments on the role of legal personality in attribution and on the term "organ". There could not be a general rule for central banks. Some such banks enjoyed so much independence that they would fall within the scope of article 7, paragraph 2, while others were so closely connected to and controlled by the State that they would come under article 5. But it must be made clear that the fact that a State declared that its central bank was independent, when it was not, could not be decisive for the purposes of article 5.

16. Mr. LUKASHUK said that, in view of the principle embodied in article 4, the issue in article 5 was not about the provisions of internal law but about the function of the entity in question, irrespective of the law. If some members wanted internal law to be mentioned in article 5, it was easy to do so, perfectly logically, by adding at the end of the article the words "under internal law".

17. Mr. ILLUECA outlined the genesis of the draft articles under the aegis of the former Special Rapporteur, Mr. Roberto Ago, and pointed out that in paragraph 146 of his first report, the current Special Rapporteur stated that when first proposing the group of articles the former Special Rapporteur had used the term "imputability" and that the same term had been used by ICJ in later cases. "Imputability" had currently been replaced by "attribution". In view of the reasons advanced, following the former Special Rapporteur,[5] for using "imputability" and of the term's use by the Court, the Commission should perhaps think seriously about the question and examine the possibility of reverting to "imputability", which was much better, in Spanish at least.

[4] See *Yearbook . . . 1971*, vol. II (Part One), pp. 214 et seq., document A/CN.4/246 and Add.1-3.

[5] See 2553rd meeting, footnote 4.

18. The reference to internal law should be retained in article 5. Contrary to what some members seemed to fear, in particular the Special Rapporteur, such a reference would not invest internal law with absolute, exclusive or overwhelming importance. The reference to internal law did not prevent the responsibility of a State coming into play when there was a violation of international law, even if the provisions of its internal law conflicted with the international law. The principle was in fact embodied, for treaty purposes, in article 27 of the 1969 Vienna Convention.

19. During the debate some members had manifested a certain coolness towards or even mistrust of States in connection with the way in which they described the entities which exercised their powers. Such mistrust was unjustified, and the choices made by States in that area deserved the greatest respect. The problem was no doubt one of drafting, and it was certainly possible to reconcile the different positions. The positions of Mr. Pellet and Mr. Hafner were both logical and legally well-founded; they should therefore be taken into account by the Drafting Committee. It should also give serious consideration to the proposal by France, in the comments and observations received from Governments on State responsibility (A/CN.4/488 and Add.1-3), referred to in paragraph 159 of the first report, to replace the vague term "organ of the State" by "any State organ or agent" both in article 5 and in articles 6, 7, 9, 10, 12 and 13.

20. Mr. HAFNER asked the Special Rapporteur what criteria would be used to define an organ of the State in article 5 if the reference to internal law was deleted. It would be useful to mention in the commentary the criteria for defining what an organ of the State was, especially as article 7 referred to "an entity which is not part of the formal structure of the State". An explanation of that point should be given in the commentary.

21. Mr. CRAWFORD (Special Rapporteur) said that he acknowledged the need to define what an organ of the State was, especially as most States did not use the term "organ". Many factors must be taken into consideration in that connection, including the structure of the organ, its responsibility vis-à-vis the central Government, and whether its employees had the status of public servants. It would also be necessary to examine what the courts had decided in the similar context of State immunity, where distinctions had had to be made between the State and its various entities. He had certainly never said that internal law was not relevant, only that the State could not redefine itself in order to enjoy immunity before the courts of other States by recourse to a legal provision stating that a certain entity was not an organ of the State. Such a provision was relevant but could not be decisive.

22. Mr. GALICKI said that it had become essential to define what an organ of the State was, and that it was impossible to disregard internal law in that connection. Article 5 used the term "organ of the State", and the members of the Commission were in agreement that international law did not define "organ". Nor did the term appear in the legislation of all States, a fact which might create problems. Article 7 referred to "an entity which is not part of the formal structure of the State". It might therefore be possible to replace "any State organ " in article 5 with "any entity which is part of the formal structure of the State". That language covered both the organs and the agents of the State and it might even satisfy the advocates of the retention of a reference to internal law in article 5. The use of the same language would establish a clear distinction between the entities referred to in article 5 and those referred to in article 7. However, if the Commission decided to retain the current wording of article 5, it should be borne in mind that the concept of organ of the State had its origins in internal law and that every State was free to decide which of its organs should be regarded as organs of the State. The differences between internal legislations in that regard certainly created difficulties, but States could not be deprived of their sovereign right to decide what was part of the formal structure of the State and what was excluded therefrom.

23. Mr. MIKULKA said that he was not sure that Mr. Galicki's proposal was valid. An entity was a fiction: although the term could be applied to territorial governmental entities, it could not designate either the Government or the Parliament of a State. In any event, that was not the usual meaning of the term. It would therefore be a mistake to transfer the idea of entity from article 7 to article 5. As it stood, the Special Rapporteur's article 5 appeared adequate, but he would nevertheless like to know what the Special Rapporteur thought about Mr. Lukashuk's proposal. The adoption of that proposal might perhaps satisfy the members who wished to retain a reference to internal law but avoid attaching too much weight to it, as the Special Rapporteur wished.

24. Mr. ROSENSTOCK said that, as far as the scope of the application of articles 5 and 7 was concerned, an overlap would be unimportant but a void would constitute a serious problem.

25. Mr. CRAWFORD (Special Rapporteur) said that he had himself thought about the solution proposed by Mr. Lukashuk, for he understood the doubts of some members of the Commission, even if he thought them unjustified. As he had already explained several times, he had never claimed that internal law was not important or that it should be disregarded. To some extent he shared Mr. Galicki's position, but thought that it would be useful to preserve the existing terminological distinctions between the two articles. Mr. Lukashuk's proposal might be considered in the Drafting Committee and it might provide comfort for some members. In reply to Mr. Pellet, who thought that the question was one of principle, he pointed out that the definition of the State, including its various organs, for the purposes of State immunities had never given rise to any problems, and nobody had thought it necessary at the time to say that internal law should determine the meaning of terms in international conventions.

26. He drew the Commission's attention to the opinion which he had stated in paragraph 284 of the first report concerning article 5, namely that the term "any State organ ", in the context of article 5, avoided the question of whether the organ exercised elements of governmental authority within the meaning of article 7, paragraph 2. The only question was whether an organ of the State was acting in that capacity. Organs of the State performed many acts whose status for the purposes of immunity or other purposes—*acta jure gestionis*—was not relevant for

the purposes of attribution. It was possible, for example, to conclude commercial contracts which committed the State, and if they had been concluded with an entity subject to United Nations sanctions, there would be a violation of the international obligations of the State concerned. Only two questions arose with respect to article 3 (Elements of an internationally wrongful act of a State). First, was the conduct attributable to the State? If it was the conduct of an organ of the State, the answer was yes. Secondly, did the conduct constitute a violation of the international obligations of the State?

27. Mr. HE said that he was happy with the structure of part one, chapter II, and the proposals contained therein. The new chapter II and its articles constituted a considerable improvement over the text considered on first reading. However, he was not sure that all the elements relating to the act of the State had been included in the proposed text. As several members had stressed, the concept of organ and agent of the State had changed considerably. The new article 7 (Attribution to the State of the conduct of separate entities empowered to exercise elements of the governmental authority), proposed in paragraph 284 of the first report, dealt with entities which were not part of the formal structure of the State but were empowered by the internal law of the State to exercise elements of governmental authority. However, entities which were not empowered by internal law to exercise such powers could carry on activities on the instructions of the State or under its direction and control. Did such entities fall within the definition given in article 7, paragraph 2, or within the category of the groups of persons addressed in article 8? As currently drafted, articles 7 and 8 were not clear on that point. He supported the Special Rapporteur's position on use of the term "attribution", for the reasons given in the first report, without prejudice to the use of "imputability" in other contexts, following the example of ICJ. He would like the draft articles to be sent to the Drafting Committee as quickly as possible.

28. Mr. AL-KHASAWNEH said that he was not entirely convinced of the need to delete the reference to internal law, for the reasons given by Mr. Hafner and for three other reasons. First, to draft a provision on the basis of the principle that the State was going to try to escape its responsibility by omitting expressly to specify in its internal law the organs whose conduct could be attributed to the State meant a presumption of bad faith on the part of the State; that contradicted the fundamental principle that good faith must be assumed at the outset. Secondly, the problems which might be caused by a reference to internal law could be solved by adopting a broad definition of law in the commentary. Lastly, a State's responsibility could still be triggered by its subsequent attitude to the conduct in question: whether it approved that conduct, displayed due diligence, and so on. The other changes to article 5 were acceptable, including the incorporation of article 6.

29. The new wording of article 7 constituted an improvement on the earlier language. The retention of the provision "provided the entity was acting in that capacity in the case in question", which had been deleted from article 5, was justified by the fact that the article was addressing entities which, in normal situations, did not act on behalf of the State. However, the provision would be clearer if it read "provided that it is established that, in the case in question"; it might also be useful to expand the scope of the rule to cover not only the fact of having acted in that capacity in the case in question but also in similar cases. The wording of article 8 made it even less necessary to delete the reference to internal law in article 5.

30. Mr. FERRARI BRAVO said that, whatever the fate of the reference to internal law in article 5, it would still be present in the sense that the term "acting in that capacity", could refer only to internal law, even if it was developed by international law. The earlier wording was therefore preferable. But article 5 gave rise to a more important problem, one connected with the deletion of the provision "provided that organ was acting in that capacity in the case in question". The Special Rapporteur had replaced it with "whether the organ exercises constituent, legislative, executive, judicial, or any other functions", but the interrelationship between those two clauses remained to be clarified by the Drafting Committee. The Drafting Committee would also have to study articles 5 and 7 in conjunction with each other because, depending on the structure of the State in question, the same situation could come under either article 5 or article 7. It was odd that in article 8 the Special Rapporteur did not go as far as his predecessor. The language which he used instead of "acting on behalf of the State" reduced the scope of the responsibility and complicated the attribution of the conduct to the State.

31. Mr. GOCO said that in many countries with written constitutions, the constitution and administrative law determined all the organs and other entities authorized to exercise elements of the governmental authority. Those elements of authority could include "constituent" functions, which were essential and reserved for the State, or "administrative" functions, which the State could entrust to the private sector. The Special Rapporteur's proposed language—"whether the organ exercises constituent, legislative, executive, judicial or any other functions" therefore seemed restrictive and redundant as long as the meaning of "organ" was clear. It would also be useful to differentiate article 5 from article 7 by means of the criterion of forming part of the formal structure of the State.

32. With regard to the choice between "attribution" and "imputability", it was necessary to establish that the conduct in question was ultimately the conduct of individuals or groups of individuals acting within the general framework of the Government. Perhaps it would be better to speak about the conduct of the Government and not of the State. The problems raised by privatization could be solved by applying the criterion of governmental intervention or links with governmental activities.

33. Mr. CRAWFORD (Special Rapporteur) said that there seemed to be a general agreement on the new title of chapter II and on the merging of articles 5 and 6. Some members even thought that the content of article 6 would be better placed in the commentary, but two points of clarification contained in article 6 ought to be retained in article 5, in one form or another, since they made the purpose and scope of that article clearer. The phrase "acting in that capacity" was also needed in article 5 in order to underline the difference between article 5 and article 7, that is to say, that the attribution of the conduct to the

State was the rule in the case of organs of the State but the exception in the case of entities which were not part of the formal structure of the State.

34. The several statements on the very complicated question of the relationship with internal law pointed to a fear, totally unjustified, of excluding all reference to internal law. The concepts of capacity, organ, function, and organization of the State all depended on the law, but also on the practice, and "the law" was not understood by everyone to include the practice. It was even possible that "organ" might have a specific meaning in international law. It was largely by means of an analysis of the structure of the State that the shape of the concept of "organ" could be determined. Mr. Lukashuk's proposal might perhaps solve the problem. In any event, his own proposal was a response to the very clear concern of several Governments to prevent the definition of the entity in question in internal law from being used to escape a responsibility which would normally be attributed to the State.

35. With regard to the deletion of paragraph 1 of article 7, the elimination of any mention of territorial governmental entities might in fact lead to mistaken interpretations, but the problem could perhaps be solved by transferring the reference to article 5. Its retention in article 7 would only create countless overlaps between the two articles. The reference to internal law in paragraph 2 of article 7 should be retained owing to the exceptional nature of the situations addressed, which was flagged earlier in the article, and all the situations in which a non-State entity was not authorized by internal law would then come under article 8.

36. Article 8 contained two provisions which were in fact rather distinct but not so distinct as to require two separate articles. The reformulation of the French version of the introductory part of the article by Mr. Economides was undoubtedly an improvement. It had never been his intention in subparagraph (*a*) to reduce the scope of the article by replacing "on behalf of" by "on the instructions or under the direction and control of". The latter formulation might indeed appear very broad but it was also vague, in what was an important article. Clarification was required in that connection, especially since the former Special Rapporteur, Mr. Ago, the author of the initial version of article 8, had subsequently explained the article in an obviously too restrictive sense. He had himself therefore tried to restore the true scope of article 8 in the light of the statements in which the former Special Rapporteur restricted the scope of the term "on behalf of" exclusively to cases in which express instructions had been given.[6] No member of the Commission had proposed such a restriction, but the Drafting Committee should see to it that the scope of article 8 did not become too broad either, for the omnipresence of the State meant that, in extreme situations and by natural causality, anything could be attributed to it. In their broadest meaning, the terms "on behalf of" or "under the control of" might extend the scope of article 8 to include conduct which should not be attributed to the State—any conduct of a public enterprise for example. His proposed language was designed to exclude that natural causality and to indicate as clearly as possible where the outer limit was located.

[6] See *Yearbook . . . 1971* (footnote 4 above), pp. 262-267.

37. Article 8, subparagraph (b), addressed a very specific situation but one for which some case law did exist and which must therefore be covered by the draft articles. However, the title of article 8 really covered only subparagraph (a), and it might therefore have to be amended. Lastly, the principle stated in article 10 (Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity) was accepted by everyone, and the debate had not thrown up anything which could not be solved by the Drafting Committee.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished to refer articles 5, 7, 8 and 10 to the Drafting Committee.

It was so agreed.

ARTICLES 9 AND 11 TO 15 *BIS*

39. Mr. CRAWFORD (Special Rapporteur), introducing articles 9 and 11 to 15 *bis* of part one, chapter II, of the draft articles, contained in chapter II, section C, of his first report, said that the main articles on attribution, the consideration of which the Commission had just concluded, were supplemented in chapter II by articles on sometimes very specific problems, some of which took the form of negative provisions. The articles did not say that certain conduct was not attributable to the State as an exception to the main articles but that the conduct was not attributable to the State unless it could be so attributed pursuant to the draft articles. It was obvious that such an approach was logically invalid: article 3 provided that State responsibility came into force only if the conduct was attributable to the State; subsequent articles provided that certain conduct was attributable to the State; and then came further articles providing that other conduct was not attributable to the State unless it could be so attributed pursuant to the draft articles. Those latter articles might have some explanatory value but they were logically invalid. However, some of them, in particular article 13 (Conduct of organs of an international organization), addressed very serious problems. They were perhaps unnecessary as articles but some of their elements were necessary or raised important questions. Draft articles 9 and 11 to 15 *bis* addressed four different problems: the problem of the organs of the State acting on behalf of another State (arts. 9 and 12); the problem of international organizations acting on behalf of States (arts. 9 and 13); the problem of insurrectional movements (arts. 14 and 15); and the problem raised by articles 11 and 15 *bis*, which did not fall into any category.

40. It was difficult to offer definitive solutions to the problems addressed in articles 9 (Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization) and 12 (Conduct of organs of another State), because they would have to be revisited under chapter IV (Implication of a State in the internationally wrongful act of another State) and because articles 27 (Aid or assistance by a State to another State for the commission of an internationally wrongful act) and 28 (Responsibility of a State for an internationally wrongful act of another State) did not exhaust the question of joint action by States. The comments received so far showed that States would not object if the Commission

considered the problem of joint action in greater detail than in the draft articles, and he intended to do so in his next report. The conclusions reached by the Commission on article 9 following the forthcoming debate would therefore be only provisional.

41. However that might be, it often happened that States acted on behalf of other States and that questions of attribution then arose. That was the situation addressed by article 9, which dealt with the conduct of organs placed at the disposal of a State by another State. Except in the case covered by article 9, the fact that an organ was acting in the territory of another State did not mean that its conduct could be attributed to that other State; that point was made in article 12.

42. It frequently happened that States placed their organs at the disposal of other States for the exercise of various functions. A number of very interesting examples of such situations were given in his first report: one classical example, far from unique, in paragraph 220, was that of the United Kingdom Privy Council, which had acted as the final court of appeal for a number of independent States within the Commonwealth. It was clear in such cases that the appeal court in question was acting as a jurisdiction of last resort of the State in which the appeal had been lodged, and that any problem which might be caused by its decisions was therefore attributable to that State. Another example was that of the Auditor-General of New Zealand[7] who had acted as auditor in another State in accordance with its Constitution and was thus acting in the capacity of auditor of that State with all the consequences of such action (para. 227).

43. The commentary to article 9[8] stressed that the concept of "placed at the disposal of" must be given a restrictive interpretation, and that was an important point. For example, the European Court of Human Rights had found that Swiss customs and police officers exercising their functions in Liechtenstein had not been placed at the disposal of Liechtenstein for the purposes of responsibility, for they were exercising, with the agreement of Liechtenstein of course, elements of Swiss governmental authority (para. 224).[9] Although that was a very specific case, article 9 did seem useful and, insofar as it concerned States, he recommended its retention.

44. Turning to article 12, he said that it was odd that the commentary[10] did not analyse the *Corfu Channel* case, which was indeed the *locus classicus* of a State acting in the territory of another State. ICJ had made it very clear in that case that the fact that conduct had occurred in the territory of a State was not sufficient for attributing it to that State. Nevertheless, under article 12, the fact that the conduct had taken place in the territory of the State was not legally relevant: it did not reverse the burden of proof and did not *ipso facto* bar attribution, not that anybody had ever suggested that it should. Why then should that factor be singled out? Paragraph 1 of article 12 could of course be explained in the commentary, but the article did not seem to have any use, and it also created the problem of implying that the fact that a State was acting in the territory of another State with its consent was not legally relevant—which was not accurate. That fact was not legally sufficient, but that was another matter. Many factors were legally relevant but not legally sufficient, but there was no reason for addressing them in draft articles. They could be dealt with in the commentary. For those reasons he proposed that article 12 should be deleted and that the situation which it addressed should be dealt with in the commentary to article 9 or, which was perhaps preferable, in the context of joint action by States in chapter IV.

45. The second problem requiring solution concerned international organizations. Article 9 addressed the case in which organs were placed at the disposal of a State by an international organization, and article 13 contained another negative-attribution clause on international organizations acting in the territory of a State. Several difficulties arose in that connection. First, while it was easy to find convincing cases in which organs of the State had been placed at the disposal of other States in accordance with article 9, it was very difficult to find similar examples relating to organs of international organizations. There were of course one or two examples which might be discussed, but no patent case was known. Moreover, the United Nations prohibited its organs from engaging in that type of practice, as did the European Union. Thus, the first difficulty with article 9 was that it addressed a situation of which there were no examples.

46. A second difficulty appeared in article 13. While the acts of a State in the territory of another State were legally significant and relevant but not sufficient for the purposes of attribution, as the decision in the *Corfu Channel* case had confirmed, the fact that an international organization carried on activities in the territory of a State was not legally relevant. International organizations had no territory but they must of course operate somewhere. It could not be asserted, for example, that since the United Nations had its Headquarters in the United States of America its conduct was attributable *prima facie* to the United States. An international organization must by definition be relatively independent of the host State. It was therefore peculiar to assert that its conduct in any given territory was a ground for attribution.

47. The proposition contained in article 13 was therefore rather problematical from that standpoint. And there was a third difficulty: since the adoption of the draft articles, major questions of principle had emerged with respect to the responsibility of States for acts of international organizations—either joint action by States within the framework of international organizations, or decisions taken by States in international organizations proposing or adopting projects which were or were deemed to be damaging to other States, or the specific responsibility of the members for the acts or debts of an international organization.

48. That fundamental issue of the law of international organizations must be examined. The work which had produced the language of article 9 with respect to interna-

[7] *Controller and Auditor-General* v. *Davison*, New Zealand, Court of Appeal, Judgment of 16 February 1996, *International Law Reports* (Cambridge, 1997), vol. 104, pp. 526 et seq.

[8] See 2553rd meeting, footnote 9.

[9] Council of Europe, Applications Nos. 7289/75 and 7349/76, *X and Y* v. *Switzerland*, decision of 14 July 1977, *Yearbook of the European Convention on Human Rights*, 1977, vol. 20 (The Hague, Martinus Nijhoff, 1978), pp. 372-413.

[10] See 2554th meeting, footnote 5.

tional organizations and of article 13 was certainly praiseworthy but poorly managed. Article 9 was adequate for organs of the State but not for international organizations, since it complicated rather than simplified things. On a provisional basis, therefore, it was necessary to delete the reference to international organizations in article 9 and to delete article 13. In order to avoid any misunderstanding, it would be necessary to insert an express reservation based on article 73 of the 1969 Vienna Convention. He intended to insert in the general saving clause of the draft articles a reservation which would read:

> "These draft articles are without prejudice to any question which may arise with respect to the responsibility under international law of an international organization or of a State for the conduct of an international organization."

That would make it possible to consider the issue in the context of the law of international relations, where it rather seemed to belong.

49. The third problem was connected with the question of the conduct of organs of an insurrectional movement. The draft articles had tried to solve it as in the preceding cases by devoting two articles to it. It was odd that the authors of the draft articles had spent more time on those secondary problems than on the principal problems posed by attribution which the Commission had already begun to consider. Article 14 (Conduct of organs of an insurrectional movement) contained a negative-attribution clause on insurrectional movements, characterizing the responsibilities of such movements and of States in the terms of other articles in the same chapter. In contrast, articles 9 and 15 (Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State) contained the only positive-attribution clauses in the whole series of articles under consideration.

50. Article 15 dealt first of all with the acts of an insurrectional movement which became the new Government of a State (for example, the case of a civil war resulting in a change of government). Paragraph 2 dealt with insurrectional movements whose acts led to the creation of a new State. It created a rule which did not fit well in the classical framework of international law but seemed well-established, that is to say, that the conduct of organs of an insurrectional movement which became the Government of a new State was attributable to the new State, a situation which introduced an element of retroactivity. There was, for example, the case of the conduct of Poland's National Committee during the period preceding the recognition of the new Polish State in 1919. The basic assumption of the clause on insurrectional movements was that a State was not responsible for the acts of insurrectional movements committed outside the fundamental elements of authority addressed in articles 5, 7 and 8 and the special cases addressed in article 15. Those articles had been criticized in the subsequent doctrine on insurrectional movements on the ground that they did not make a distinction between national liberation movements and internal insurrectional movements having no legal status or only a very limited one under international law, for the purposes of application of certain provisions of the law of armed conflicts, for example. No matter how well-founded such criticism might be, it disregarded the distinction which had to be made between attribution and violation of obligation. It was obvious that an insurrectional movement was different from a liberation movement under international law for specific purposes.

51. The very famous paragraph 4 of article 1 of Protocol I to the Geneva Conventions of 12 August 1949, which had given rise to much controversy, drew a distinction between liberation movements and insurrectional movements falling within the scope of Protocol II. Questions had to be asked about the obligations which such movements must fulfil and the rules which they must apply, but that had nothing to do with attribution. The Commission must concern itself exclusively with attribution to a State and not with the attribution of conduct to the movements in question.

52. Notwithstanding the relevance of that criticism, which should be discussed in detail in the commentary, it was still necessary to deal with the case of insurrectional movements on the basis of the important arbitration case law on their responsibilities. Since there had been no objection on the part of Governments, he proposed to combine articles 14 and 15 into a single negative-attribution article, the text of which was reproduced in paragraph 284 of his first report, in order to preserve the substance of the two articles but in a more condensed form.

53. As stated in the commentary to articles 14 and 15, a State was not generally responsible for the acts of insurrectional movements. The new article could reasonably be included among the negative-attribution articles by providing for two exceptions to the negative clause. That amounted to saying that the conduct of an organ of an insurrectional movement established in opposition to a State or its Government was not regarded as an act of that State under international law unless the insurrectional movement became the new Government of that State (an aspect substantially covered in article 15, paragraph 1) or unless the conduct was regarded as an act of that State pursuant to other articles (a situation comprehensively covered in article 14). The difference was that the State's responsibility would not be engaged in respect of acts occurring within the framework of an insurrection which were not committed by the insurrectional movements themselves.

54. He had tried to convey that nuance by using the term "the conduct of an organ of an insurrectional movement" and to take into account at least the general terms of the principle contained in Protocols I and II to the Geneva Conventions of 12 August 1949 and in the jurisprudence as to the threshold beyond which an insurrectional movement became an organization and up to which its activities were limited to local rioting or disturbances which fell within the scope of other rules. That concept was reflected in the phrase "established in opposition to a State or to its Government".

55. In paragraph 2 of article 15 a distinction had to be made between the cases in which an insurrectional movement achieved its ends and became the Government of the new State or the new Government of the former State and the no doubt commoner case in which, in civil wars in particular, a movement might cause the partition of the country, so that the Government, in order to safeguard national unity, concluded an agreement with the movement in question for creation of a Government of national

reconciliation. Article 15 could not apply in that case, because it would be unwise and unrealistic to attribute to the State the conduct of the insurrectional movement prior to the agreement. The Drafting Committee would have to endeavour to accommodate that point, for otherwise existing Governments which had been neither overthrown nor replaced and had shown a spirit of conciliation by incorporating elements of insurrectional movements in the Government would be too heavily penalized: they would in fact pay for their policy of reconciliation by being required to shoulder the full responsibility for the acts committed by the insurrectional movements during the insurrection.

56. The last question concerned the attribution to a State of acts which were not connected with the conduct of an organ, or the conduct of an entity referred to in article 7, paragraph 2, or the conduct referred to in article 8, or the conduct in the special cases cited in article 9 or article 15: the acts of private persons. The problem with article 11 (Conduct of persons not acting on behalf of the State) in its current wording was that it seemed to say that the conduct of private persons was not attributable to the State without really saying that. It often happened that the responsibility of States was triggered. If a way was found to take account of the very extensive commentary to article 11 in the draft articles and make the limits of attribution to the State clear, article 11 would no longer be necessary.

57. There was a second problem which did not appear in the draft articles, for reasons which had originally been rather vague but which had currently become clearer as a result of the case concerning *United States Diplomatic and Consular Staff in Tehran*, in which it had been established by the courts which heard the case at the time that the Government of the Islamic Republic of Iran had endorsed the conduct of the private parties concerned. And that was not the only example. There was also the *Lighthouses* case ,[11] which had established that the Greek Government had endorsed the conduct of the independent Government of Crete before the annexation of Crete by Greece. The Government had been deemed responsible *ab initio* for that conduct despite the widely held view that a new State did not usually succeed to the State responsibility of the predecessor State.

58. The cases in which a State endorsed conduct which was not attributable to it included the case of civil conflicts in which an administration or territory could escape the control of the State but in which, under the peace agreement, the Government ratified the acts which had occurred in the territory and accepted responsibility for them. There were thus many situations in which the State endorsed conduct which was not its own. For the purposes of article 15, a distinction must be drawn between conduct which was merely approved by the State and conduct which was truly endorsed (as in the case concerning *United States Diplomatic and Consular Staff in Tehran* and the *Lighthouses* case). It was for that purpose that he had proposed new article 15 *bis* (Conduct of persons not acting on behalf of the State which is subsequently adopted or acknowledged by that State), the text of which was reproduced at the end of paragraph 284 of the first report. The point might seem elementary, but it was necessary, for the purposes of attribution, for the State to accept that the conduct in question should be treated as its own conduct. Article 15 *bis* was therefore an essential addition to chapter II for the regulation of the situations which he had just described, and it had the added benefit of preserving the essence of article 11 in a clearly more workable article. The very long commentary to article 11 should be reproduced in the commentary to article 15 *bis* to explain and clarify the exceptions to the rule of attribution.

59. By preserving article 9 on the organs of the State, by combining articles 14 and 15 into a single article (which had the added benefit of not giving more space to insurrectional movements than they warranted), by adopting article 15 *bis*, which contained a provision previously appearing in article 11, and by adopting a saving clause on international organizations, the Commission would not only preserve the substance of the draft articles but substantially improve them as well.

The meeting rose at 1.10 p.m.

2556th MEETING

Wednesday, 5 August 1998, at 10.10 a.m.

Chairman: Mr. João BAENA SOARES

Present: Mr. Addo, Mr. Al-Baharna, Mr. Bennouna, Mr. Brownlie, Mr. Candioti, Mr. Crawford, Mr. Dugard, Mr. Economides, Mr. Elaraby, Mr. Ferrari Bravo, Mr. Galicki, Mr. Goco, Mr. Hafner, Mr. He, Mr. Illueca, Mr. Kabatsi, Mr. Kateka, Mr. Kusuma-Atmadja, Mr. Lukashuk, Mr. Melescanu, Mr. Mikulka, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Simma, Mr. Yamada.

State responsibility[1] (*continued*) (A/CN.4/483, sect. C, A/CN.4/488 and Add.1-3,[2] A/CN.4/490 and Add.1-7,[3] A/CN.4/L.565, A/CN.4/L.569)

[Agenda item 2]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 9 AND 11 TO 15 *BIS* (*continued*)

1. Mr. HAFNER said that the set of draft articles under consideration raised very complicated problems, espe-

[11] Decision of 24/27 July 1956 (France *v.* Greece) (UNRIAA, vol. XII (Sales No. 63.V.3), pp. 161 et seq.).

[1] For the text of the draft articles provisionally adopted by the Commission on first reading, see *Yearbook . . . 1996*, vol. II (Part Two), p. 58, document A/51/10, chap. III, sect. D.

[2] Reproduced in *Yearbook . . . 1998*, vol. II (Part One).

[3] Ibid.