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Summary record of the 1259th meeting

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of course the case fell within the exception provided for in article 11, paragraph 2. That provision attributed to the State the omissions of its organs which, in dereliction of duty, allowed an individual to act or not to act in a certain way.

32. He suggested that the Commission should approve article 8 in principle and ask the Drafting Committee to find wording that would cover all the cases contemplated. In the English text the words "public functions" should be replaced by the words "State functions" or, better still, "governmental functions".

33. Mr. TSURUOKA said he shared Mr. Ushakov's view that the situations contemplated in article 8 were quite exceptional. The acts referred to in that provision could, for the most part, be attributed to the State only if the State agreed to such attribution, either before or after the act in question. During the discussion on article 7, some members of the Commission had referred to the notion of "public functions" as meaning prerogatives of the State, and it should certainly be understood in that way in article 8. Referring once again to the Japanese national railway company, he said that that company exercised a part of the State authority by delegation, which was not true of the hundred or so other private railway companies in Japan or of the telecommunication companies, although they were regarded as public. The same applied to the watchmen employed by some big companies, who were often ex-policemen; they exercised no police power, although in the performance of their duties they engaged in similar activities. Those cases were outside the scope of article 8, but it would be useful to mention them in the commentary to the article.

34. With regard to disasters, which were not rare in Japan, rescue teams could be formed there immediately after a disaster, could call for mutual assistance and sometimes use constraint. In his opinion it would not be advisable to extend the field of application of article 8 to such spontaneous groups, which were, after all, exceptional.

Organization of work

35. The CHAIRMAN thanked Mr. Reuter and the other speakers who had drawn attention to the need to increase the pace at which the draft articles on State responsibility were being examined. The coming week might well prove to be the last of the present session which the Commission could devote to the first reading of those articles, bearing in mind that absolute priority had to be given to the second reading of the thirty draft articles on succession of States in respect of Treaties. He hoped, therefore, that in the time at its disposal the Commission would press on as far as it could with the first reading of the draft articles on State responsibility.

The meeting rose at 1 p.m.

1259th MEETING

Friday, 17 May 1974, at 10.5 a.m.

Chairman: Mr. Endre USTOR
Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat.

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]
(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State) (*continued*).

1. Sir Francis VALLAT said that the essential problem was not the ideas under consideration, on which there was general agreement, but the manner of expressing them.

2. The cases covered by the present set of articles fell into five categories. The first was that of State organs, regarding which opinions were virtually unanimous, though Mr. Ushakov took a somewhat broader view of that concept than he did. The second was the category of subsidiary territorial entities, which was very close to that of State organs. The third was that of institutions which had governmental functions—a term that was closer to the intended meaning than "public functions". The fourth was an entirely different category: that of persons acting on behalf of the State. The case was really one of agency, and totally different from that of institutional capacity. That point was fundamental to the Commission's handling of the matter. It was significant that, as mentioned in the Special Rapporteur's third report, the Argentine Government had maintained in the Eichmann case, that "even if the volunteers had acted without the knowledge of the Government of Israel, the fact remained that that Government had subsequently approved the act...".[1] It was interesting to see implicit in that comment the two classical ideas of authority and subsequent approval in the absence of authority. In the situations contemplated in article 8, either the individual acted with the authority of the State or, where no such authority existed, the State subsequently approved, adopted or ratified the act, thereby becoming responsible for it. That position was quite distinct from institutional competence and also

[1] See *Yearbook ... 1971*, vol. II, Part One, p. 265.

from the fifth category of cases, namely, emergencies or other exceptional circumstances, in which an individual acted on behalf of the State because there was no recognized authority which could do so. In those cases, it would not be possible to establish authority to act or ratification.

3. He believed that if the draft articles dealt with all those five categories of cases, the necessary ground would have been covered. Nevertheless, he was concerned at the attempts apparently being made to arrive at an exhaustive definition. Should the Commission recognize that it was not feasible to be exhaustive, it would be advisable to make it clear in the draft that, while the acts mentioned in the various articles were attributed to the State, there might be other cases of such attribution for which no provision was made.

4. As to the text of article 8, he had some misgivings about the stress being placed on the question of fact. He understood the intention of the text, but the mere fact that an individual had usurped a governmental function was not in itself sufficient to attribute liability to the State. There had to be some other link between the individual and the State concerned and on that point he shared some of the misgivings expressed by Mr. Ushakov. Hence the emphasis he had placed on the concept of authority or approval in regard to the fourth category of cases.

5. Lastly, he was concerned about the relationship between attribution, on the one hand, and the definition of internationally wrongful acts and the question of liability for risk, on the other. It might be wiser to make some reserve regarding the final form of the articles until a later stage, when the Commission had considered the basis of liability more fully.

6. Mr. RAMANGASOAVINA said that the *raison d'être* of the article under discussion was to be found in the concrete cases cited by the Special Rapporteur. It was difficult, however, to set out in a clear and precise formula a principle which derived from exceptional situations of the greatest diversity. The situations covered by articles 6 and 7 were clear; they involved organs of the State, or of public institutions under internal law, acting in that capacity. Article 8, on the other hand, applied to persons who, under the internal legal order, lacked the character of State organs or of a separate public institution. They were regarded as acting on behalf of the State, even though they were not vested with authority to do so. From the standpoint of internal law their acts might be legitimate if, for example, they had acted in the interests of the community by assuming public functions to safeguard the national heritage, but from the standpoint of international law their acts were wrongful.

7. The situations contemplated in article 8 were also very different in another respect from those covered by articles 6 and 7. Whereas under articles 6 and 7 the attribution of the acts to the State was automatic, in the case of article 8 the situation had to be analysed and appraised. The acts referred to in article 8 were in the nature of private initiatives or spontaneous actions. In such a situation an international court would have to determine whether the person or persons concerned had really acted on behalf of the State whose responsibility was in question, and to do so, the court would have to rule on the internal legal order and its operation, which might be considered as interference in what was called the reserved domain. The court would have to inquire whether the lawful authorities had failed in their duty and whether the acts performed by private persons were of a kind which ought to have been performed by official organs. If those acts were considered void under internal law, the State was not necessarily relieved of responsibility. In that connexion he referred to the theory of putative acts, according to which an act, although void, could produce legal effects, as in the case of manifestly unlawful acts subsequently endorsed by the competent authorities. An example was the abduction, by private individuals, of persons who were subsequently arrested and tried by organs of the State.

8. So far as the scope of article 8 was concerned, he pointed out that, under draft article 13, the acts of an insurrectional movement whose structures subsequently became those of a new State engaged that State's responsibility. If the insurrectional movement failed, but it was subsequently found that some of its acts had been carried out in the interests of the community, then those acts—if internationally wrongful—must engage the State's responsibility under article 8. In view of the continuity of the State, it was possible to attribute to it the internationally wrongful acts of private persons who took the initiative or acted spontaneously on behalf of the State.

9. To emphasize the exceptional nature of the situations covered by article 8 and to show clearly that the State's responsibility was not engaged automatically, it might be advisable to replace the words "is also considered" by the words "may also be considered".

Mr. Sette Câmara, First Vice-Chairman, took the Chair.

10. Mr. MARTÍNEZ MORENO said that the inclusion of article 8 among the rules on State responsibility was justified. In recent decades there had been a remarkable development in international law in that field. The Guerrero Report of 1926,[2] the Bases of Discussion drawn up by the Preparatory Committee of the 1930 Hague Conference,[3] the preliminary draft on Responsibility of States for damage done in their territory to the person or property of foreigners prepared by the Harvard Law School in 1929[4] and the revised draft prepared in 1961 by Mr. García Amador,[5] had all adopted a much narrower approach to attribution, imputing to the State only acts of organs, agencies and officials of the State acting within their competence.

11. Article 8 quite rightly went much further, though it dealt with a special category of cases in which private

[2] See *Yearbook ... 1956*, vol. II, p. 222.

[3] *Ibid.*, p. 223.

[4] Supplement to *The American Journal of International Law*, vol. 23, special number, April 1929, p. 133.

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

persons performed public functions in exceptional circumstances, without the formal authority of the State. It should perhaps be made clear that in such cases the responsibility of the State, which was responsibility under civil law, did not exclude the liability under criminal law of the persons performing public functions without authority. Joint responsibility on the part of both the State and the person concerned should therefore be admissible, but only if the person could be held responsible for his act under criminal law.

12. Mr. PINTO said that in article 8 the Special Rapporteur had quite rightly tried to express the idea that in certain circumstances a group of persons, who would normally be characterized as private persons, might act in such a way that their action assumed the character of a governmental act, thereby engaging the responsibility of the State. That thesis, from which there appeared to be little dissent, was amply supported by references to principle and practice. However, some doubts had been expressed about the appropriateness or adequacy of the present wording. He agreed with those who would prefer the article to speak of "governmental functions" or the exercise of "State power", rather than of "public functions", which might be ambiguous and create translation problems.

13. Unlike article 7, article 8 was clearly intended to cover exceptional situations in which the State's responsibility was engaged. Since private persons did not as a rule perform governmental functions, it was necessary to state a principle whereby they might, in certain circumstances, be deemed to perform governmental functions, thereby engaging the responsibility of the State, but at the same time to circumscribe that idea by limiting it to the type of circumstances the provision was intended to cover. Such a limitation was introduced by the reference to persons in fact performing public functions or acting on behalf of the State. That raised the problem of how to determine whether the function performed was a public, or governmental, function and whether the person was acting as an agent of the State. Could some principle of implied agency be recognized, or did the reference apply only to cases in which the State had expressly authorized such action, for example, by proclamation or statute? What was considered a public function in one country might be considered a private function in another. The solution might lie in drafting a body of rules that would provide equitable answers to those questions in a given situation.

14. While wholeheartedly supporting the idea of the primacy of international law and the rule that internal law must conform to it in all material respects, he thought that some role, although not necessarily a decisive one, would have to be assigned to the State's internal law if the principle in article 8 was to be stated satisfactorily and suitably circumscribed. That could perhaps be done by removing the phrase "under the internal legal order" from its present position, where it did not seem necessary for the description of the persons in question, and placing it after the word "but" in the phrase "but in fact perform". Alternatively, the words "in any manner authorized, permitted or approved by the State" might be inserted after the words "on behalf of the State". The "internal legal order" would in that context mean not merely statute law, but the State's entire regulatory system, which might well indicate, for example, the limits within which a private citizen was entitled to act on his own initiative to safeguard public interests. If the regulations authorized or condoned violence, the State might be responsible for any international consequences of such an act. It therefore seemed wise to limit the acts of private persons attributable to the State to those which were beneficial to the State and were reasonable in the circumstances. The authorization of such acts under the State's internal law would be evidence that the State considered them to be beneficial and reasonable in the circumstances of the particular case, which would generally be of an exceptional nature. To allow internal law such a role need not affect the primacy of international law, as it would still be possible for international law to impose a minimum international standard, to which internal law would have to conform. Reference to such a standard would make it difficult for a State to manipulate its internal law or interpret it in such a way as to escape responsibility in the case of an act attributable to it. Attribution would, of course, depend in each case on the evidence available and the degree to which proof was possible.

15. One of the questions prompted by article 8 was whether the nationality of the persons referred to would be relevant. For example, would the acts of foreign experts performing governmental functions in a developing country, under a United Nations programme, be attributable to the State they were assisting? There was also the question of the attribution of acts by private persons in wars of national liberation, although that question should not perhaps be considered at present, as its political implications would greatly impede the Commission's progress. He agreed with Mr. Reuter that the principles of attribution in cases of responsibility for contractual obligations might best be dealt with separately.

16. Mr. EL-ERIAN said that article 8 usefully supplemented article 7, in so far as it dealt with the difficult situations in which acts committed by *de facto* agents of the State without its formal authority could be attributed to the State. The wording and the underlying principle were entirely acceptable. Attribution was generally based on the exercise of authority and effective control by the State, and he agreed with the Special Rapporteur that, where State organs had been placed at the disposal of another State on a purely formal basis, but had in fact continued to function under the exclusive control of the State to which they belonged, the latter State was responsible for their actions.

17. The Special Rapporteur had also made it clear that article 8 dealt with the responsibility of States and not of international organizations. Cases of responsibility had in fact arisen in connexion with United Nations observers and members of United Nations emergency forces.

18. He had not yet studied Mr. Kearney's proposal, but might wish to comment on it when the Commission took up article 11.

19. Mr. QUENTIN-BAXTER thought the wording of article 8 should make it clear that the article dealt with exceptional situations. Sir Francis Vallat had suggested one way of doing that. There were two types of situation involved: situations in which the State subsequently recognized the person or group pf persons as an organ or agent of the State, and which would therefore be covered by article 7; and those exceptional situations which were not covered by other provisions and for which article 8 was necessary. Situations in the latter category might also not be covered by the kind of provision proposed by Mr. Pinto, for in an emergency situation, such as an insurrection or a change of government, there might be no effective internal legal order.

20. He did not agree that the reference to public functions created any special difficulty for common law countries, although the term "public corporation" might well do so. The term "public functions" was in general use and clearly understood. There was a body of case law applying the distinction between private and public acts. The term might create difficulties in cases of sovereign immunity, but was unlikely to do so in the situations under discussion. It did not need a precise definition for the purposes of article 8. In practice, it would generally be unnecessary to refer to the criteria laid down in articles 7 and 8 to determine whether or not the State was responsible. For example, the extent to which the State owned or controlled a railway would not greatly affect the outcome of cases involving international responsibility. The present wording of the articles was reasonably sound and adequate for the limited purpose of attribution. When all the articles had been completed, the apprehension expressed about the broad character of the provisions under discussion might prove to be unfounded.

21. Mr. BILGE said he noted that several members of the Commission doubted whether it was advisable to retain article 8. He himself approved of the principle stated in that provision, which was quite distinct from articles 7 and 11. The attribution to the State of the conduct of persons who "in fact perform public functions" was perfectly acceptable. That contingency, although very exceptional, should be provided for in the draft articles, since the organization of a State could be momentarily paralysed. Article 8 reflected the Special Rapporteur's concern to cover all the acts attributable to the State.

22. As to the case of persons who "in fact act on behalf of the State", he doubted whether it was really distinct from the case of persons who "in fact perform public functions". It would seem that the activities in question were mainly those of secret civilian or military services. Whatever the personnel to whom such secret tasks were entrusted, they were always more or less linked to the State. But the definition of State organs varied within the same legal system, according to the point of view adopted, and for the purposes of responsibility a very broad definition was generally applied. Thus it appeared that all the activities of persons who in fact acted on behalf of the State were really carried out by organs of the State or under the control of the State, whatever the appearances might be. In view of the link that always existed between those persons and the State, he thought that the notion of an "organ of the State" might be construed as broadly as possible, so that the activities in question would be covered by articles 5 and 6.

Mr. Ustor resumed the Chair.

23. Mr. SETTE CÂMARA said he thought that the phrase "as a subject of international law" could be omitted from the title of article 8, because the word "State" was always used in that sense in the draft articles, without regard to the concept of the State embodied in its own internal law. The reference to persons who "in fact perform public functions" raised a problem. What was a "public function", and could it be performed without some form of authorization by, or the knowledge of, the State? Without resorting to internal law, as in Mr. Kearney's draft,[6] it was doubtful whether any grounds could be found for attributing to the State the acts of private persons acting as self-appointed organs of the State in certain exceptional circumstances. Some legal nexus must exist between such persons and the State in that particular situation, but if it had been established beforehand under internal or international law, those persons would cease to be private persons and become organs of the State while those circumstances prevailed. They would then be covered by article 5 and a separate article would not be needed.

24. The main purpose of the draft was to establish State responsibility in broad terms and to avoid loopholes which might diminish that responsibility. As Mr. Ushakov had pointed out, the Commission was trying to establish rules for normal situations and not for exceptional circumstances such as natural disasters and war, internal or external. War had its own rules and it had been the Commission's policy not to consider them when dealing with normal relations between nations. The problems arising out of the *de facto* performance of public functions were dealt with by States on the basis of general principles, and he doubted whether the draft should contain an article dealing with *de facto* situations and not specific legal problems. Moreover, a State was unlikely to accept responsibility for the acts of persons who in many cases acted against its interests or threatened its very existence.

25. The cases mentioned in paragraph 189 of the Special Rapporteur's third report[7] were clearly extreme situations in which authority had collapsed and other authorities had established themselves without regard for constitutional procedures. The case cited in paragraph 190 would be covered by article 7. The *Zafiro* case, mentioned in paragraph 192, did not appear to support an approach to the problem of *de facto* officials along the lines of article 8, since the vessel had been under the command of a naval officer and had undeniably been used for State purposes in naval operations. The statement in paragraph 194, supporting "The attri-

[6] See previous meeting, para. 11.

[7] See *Yearbook ... 1971*, vol. II, p. 263.

bution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf or at its instigation (though without having acquired the status of organs, either of the State itself or of a separate official institution providing a public service or performing a public function)", was indisputable, but article 8 went much further, by including situations in which it would be difficult to prove that a person was acting on behalf of the State or at its instigation.

26. The draft should include some provision dealing with the problem of *de facto* officials, but not in the broad terms of article 8. The Drafting Committee might find a suitable approach by studying the text in conjunction with Mr. Kearney's interesting proposal for rearranging articles 7, 8 and 11 to avoid overlapping. The references in that proposal to internal law were not perhaps in accordance with the Special Rapporteur's approach, though draft article 8 itself referred to the internal legal order. As Mr. Quentin-Baxter had pointed out, it should be remembered that as a rule an international claim would not be submitted before the remedies available under the internal legal order had been exhausted. Most of the cases covered by article 8 were likely to be settled through such remedies.

27. He agreed with Mr. Reuter that the Commission should not, at the present stage, consider the problem of State liability for breach of contractual obligations, which was a vast, complex subject, closely linked with the problems of the law of treaties.

Co-operation with other bodies

[Item 10 of the agenda]

Statement by the Observer for the Inter-American Juridical Committee

28. The CHAIRMAN invited Mr. Gómez Robledo, Observer for the Inter-American Juridical Committee, to address the Commission.

29. Mr. GÓMEZ ROBLEDO (Observer for the Inter-American Juridical Committee) paid a tribute to the Commission for its important contribution to the codification and progressive development of international law and emphasized the great interest taken in its work on the American continent. He expressed the hope that an observer for the Commission would be able to attend the forthcoming session of the Inter-American Juridical Committee, which was to open on 23 September 1974 at Rio de Janeiro. The opening of that session had been deferred because of the United Nations Conference on the Law of the Sea, which was to be held at Caracas in June 1974.

30. In 1973, the Committee had dealt with a number of matters, including, in particular, the preparatory work for the forthcoming Inter-American Specialized Conference on Private International Law; a resolution and studies on territorial colonialism in America; a report on a régime for the exploration and utilization of the international sea-bed area; and studies on the subject of conflicts of jurisdiction between the United Nations and the inter-American system.

31. In America, and particularly in Latin America, the codification of private international law—and the unification of the law on certain subjects relevant to international trade—had been pursued as vigorously as the codification of public international law. The Bustamante Code[8] of 1928 was partly in force, and a large number of treaties concluded at the two South American congresses on private international law, held at Montevideo in 1888 and 1939, were in force in the southern part of the continent. The Inter-American Specialized Conference on Private International Law, to be held at Panama in January 1975, was expected to explore the possibility of bridging the gap between those two systems, although that task was not formally on its agenda, which included such specific items as commercial companies—multinational companies, in particular—international sale of goods, international bills of exchange, international commercial arbitration and shipping. The Inter-American Juridical Committee had prepared draft conventions on most of those topics for submission to the Conference.

32. In a continent dedicated to freedom, like the American continent, it was unthinkable that dependent territories of any kind should continue to exist, and the Committee, anxious to implement the relevant General Assembly resolutions on the elimination of colonialism, in particular resolutions 1514 (XV) and 2621 (XXV), had kept on its agenda for the last few sessions the topic of territorial colonialism in America, both extra-continental and intra-continental. On 18 February 1974, the Committee had adopted, by the unanimous vote of all the Latin American members present, a resolution which expressly referred in its preamble to the cases of Belize, the Falkland Islands and the Canal Zone of Panama. The position in regard to the Canal Zone under the 1903 Treaty between Panama and the United States, as amended in 1936 and 1955, had been recognized by the Committee as fundamentally affecting Panamanian sovereignty. In the operative part of the resolution, the Committee had offered its full co-operation in the study and settlement of that problem and had suggested that the General Assembly of the Organization of American States (OAS) should appoint a special commission urgently to recommend measures which would lead to the abolition within a short time, of all forms of colonialism, neo-colonialism and usurpation of territory by alien States in the American continent.

33. The Committee had closely followed developments in regard to the law of the sea. Although naturally mindful of regional interests, it had always tried to suggest approaches and solutions that were generally acceptable to the international community as a whole. At the twenty-fifth session of the International Law Commission, the Observer for the Committee had explained the position it had taken on that subject in February 1973, with particular reference to the concept

[8] League of Nations, *Treaty Series*, vol. LXXXVI, p. 254.

of the "patrimonial sea" or "economic zone".[9] At its session held at the beginning of 1974, the Inter-American Juridical Committee had undertaken the study of the régime of the international sea-bed area. The resolution it had adopted on that subject contained certain novel elements which deserved comment. In the first place, the Committee had reaffirmed its position that the limits of the international sea-bed area should coincide with those of the areas of national jurisdiction, which extended to a maximum distance of 200 nautical miles measured from the baseline of the territorial sea, or with the outer limit of the continental rise, where that limit extended beyond 200 miles. Thus the Committee, following in that respect the Santo Domingo Declaration,[10] had adopted a geomorphological criterion for defining the outer limit of the continental shelf, as opposed to the mixed criterion, combining depth and exploitability, adopted in the 1958 Geneva Convention on the Continental Shelf.[11] Another novel feature of the resolution was the inclusion of minerals in suspension in the waters of the high seas as belonging to the international sea-bed area, and hence to the common heritage of mankind.

34. The Committee's resolution went beyond the terms of General Assembly resolution 2749 (XXV), which established separate régimes for the sea-bed and its subsoil, and for the superjacent waters. The Committee was well aware that it was proposing a departure from that resolution, but it had done so because it believed that minerals in suspension were, by their nature, outside the scope of fisheries and that their inclusion in the sea-bed régime conformed with the spirit, if not the letter, of General Assembly resolution 2749 (XXV).

35. The Committee had also dealt with the difficult problem of the authority or institution which would be called upon to administer or manage the international sea-bed area. In view of the very great diversity of proposals at present under consideration by the international community, the Committee had adopted an eclectic approach. It had stressed, however, that, regardless of the régime adopted, the exploration and exploitation of the area must constitute an international public service under the supervision of organs genuinely representing the international community.

36. The Inter-American system was undergoing a process of revision; that was particularly true in regard to the Charter of the Organization of American States[12] and the Inter-American Treaty of Reciprocal Assistance.[13] In that revision, the question of the co-ordination of the United Nations system with that of the Organization of American States (OAS)—or of conflicts of jurisdiction between the two organizations—had once again come to the fore. After the unduly high regional expectations of the period between 1945 and 1948, and the subsequent disillusionment, the time had perhaps come for an objective and dispassionate reappraisal of the scope of the jurisdiction of regional organizations in conformity with the Charter of the United Nations, the supremacy of which was expressly recognized by the Charter of the OAS. Because of the manifestly legal character of that question, the Committee had placed it on its agenda and had appointed two rapporteurs, both of whom had submitted reports, which would be considered at the Committee's session in September 1974. As one of those rapporteurs, he had confined himself to a restatement of the abundant existing material, dividing his report into four chapters: (1) pacific settlement of disputes; (2) self-defence; (3) coercive measures, and (4) peace-keeping forces. He had done his best to interpret the United Nations Charter in accordance with the decisions of the General Assembly and the Security Council.

37. In conclusion, he expressed the hope that the increasingly close and fruitful co-operation between the International Law Commission and the Inter-American Juridical Committee would contribute to the establishment of an international order based on peace and justice.

38. The CHAIRMAN thanked the Observer from the Inter-American Juridical Committee for his very interesting statement.

39. Mr. TABIBI also thanked the Observer for the Inter-American Juridical Committee, and said that in Asia, internationalists followed that Committee's work with great interest, bearing in mind, in particular, the long Latin American experience in the development of international law. There was a great similarity between the problems of Latin America and those of Asia and Africa, which led to a similarity in approach. Co-operation among jurists of the two regions was well illustrated by the growing numbers of Latin American jurists who had attended as observers the two most recent sessions of the Asian-African Legal Consultative Committee.

40. With regard to the Latin American position on the law of the sea, he felt bound to express the fears of the land-locked countries—two of them South American—which accounted for nearly half the total number of developing countries. Claims for wide extensions of the territorial sea and the new concept of the "patrimonial sea" would, if successful, place the land-locked countries still further away from the high seas; they would also reduce the area of those seas and the extent of the common heritage of mankind. He earnestly hoped that the forthcoming Conference at Caracas would take that fact sufficiently into account. The African countries, for their part, had acknowledged the right of the land-locked countries among them to an equal share of the living resources of the sea, but the question of the other resources remained to be settled.

41. In conclusion, he stressed the value to the whole world community of exchanges of views between regional bodies engaged in codification work, and between those bodies and the Commission.

42. Mr. HAMBRO thanked the Observer for his very lucid account of the work of the Inter-American Juridical Committee. In Norway, there was a deep apreciation of the important contribution made by Latin American

[9] See *Yearbook ... 1973*, vol. I, pp. 129 and 130, paras. 50-58.

[10] *International Legal Materials*, vol. XI, number 4, p. 892.

[11] United Nations, *Treaty Series*, vol. 499, p. 312.

[12] Op. cit., vol. 119, p. 48.

[13] Op. cit., vol. 21, p. 93.

jurists to the work of codification. He personally owed a great debt of gratitude to certain outstanding Latin American jurists: at the International Court of Justice it had been his privilege to work with President Guerrero of El Salvador and with Judge Alvarez of Chile, that great pioneer in the codification and progressive development of international law.

43. Mr. CALLE Y CALLE, speaking also on behalf of the other three Latin American members, Mr. Sette Câmara, Mr. Martínez Moreno and Mr. Castañeda, expressed his gratitude to the Observer for his excellent account of the work of the Inter-American Juridical Committee, which constituted the legal conscience of Latin America. The Committee had undertaken a number of important tasks, including the gigantic task of codifying private international law. It was considering the problem of the survival of colonialism on the American Continent and had approached that problem not from the political angle; but from the standpoint of legal rules and principles. The Observer had done well to emphasize the process of revision which the inter-American system was undergoing. His remarks were especially relevant to the Inter-American Treaty of Reciprocal Assistance, which had been concluded under "cold war" conditions and clearly needed revision in the light of present-day concepts of security.

44. He attached great importance to continued co-operation between the Inter-American Juridical Committee and the Commission, and hoped that the Commission would be represented by an observer at the Committee's forthcoming sessions.

45. Mr. KEARNEY, speaking also on behalf of Sir Francis Vallat and Mr. Quentin-Baxter, congratulated the Observer for his lucid summary of the recent activities of the Inter-American Juridical Committee. He was impressed by the volume of work handled by the Committee—in particular, by the nine treaties on private international law which covered an enormous variety of subjects. That work, however, raised the important question of the relationship between the activities of regional bodies and those of world, or general, organizations. The Inter-American Specialized Conference on Private International Law should examine that question. To give but one example, it was desirable that the efforts to standardize the form of bills of lading should lead to the establishment of a single régime for all such instruments used in world trade.

46. Mr. AGO associated himself with the tributes paid to the Observer for his excellent statement on the work of the Inter-American Juridical Committee. There was not time to comment on all the activities of the Committee, but its work on the law of the sea alone offered ample food for thought: it showed how far the world had moved since the Commission had dealt with that topic less than twenty years previously. It was clear that the development of the law was affected by the development of techniques for the exploration and utilization of the resources of the sea. He had been particularly impressed by the Observer's remarks on minerals in suspension in the waters of the high seas, which he understood to include manganese compounds that had only recently attracted great interest.

47. The distinction between developing and developed countries did not appear to be very relevant to utilization of the resources of the sea-bed, since geography and the degree of development were not related. A highly developed country like Switzerland could be just as land-locked as Afghanistan. As far as Latin America was concerned, in addition to two land-locked countries, it included a number of countries in the Caribbean whose geographical position was quite similar to that of Mediterranean States like Greece and Italy and thus completely different from that of oceanic States such as Argentina or Brazil. The efforts made by the Inter-America Juridical Committee to arrive at balanced solutions satisfactory to all countries would be of great value to the world community as a whole.

48. Mr. ELIAS, speaking on behalf of the five African members of the Commission, thanked the Observer for his very instructive statement. The codification work of the Inter-American Juridical Committee had been followed with admiration in Africa, particularly during the past decade. The papers submitted and the statements made by Latin American observers to the Asian-African Legal Consultative Committee at its 1972 and 1973 sessions had provided evidence of a common approach by Latin American and African jurists to the problems of the law of the sea. The Asian-African Legal Consultative Committee had been at first somewhat hesitant about what was now known as the "patrimonial sea". In time, however, more and more countries had come round to the view that it was necessary to extend the outer limits of their exclusive economic zone. There remained, nevertheless, the question whether fisheries should be subject to the same régime.

49. The topics dealt with by the Inter-American Juridical Committee included several which were also being discussed by the Asian-African Committee. The problem of colonialism, although it existed in Latin America only on a very small scale, provided another link between the two regions.

50. He hoped arrangements would be made to ensure that henceforth the Commission would be represented at the sessions of the Inter-American Juridical Committee, since the exchange of views between regional bodies and the Commission was of very great importance for the work of codification.

51. Mr. USHAKOV thanked the Observer for his very interesting statement and stressed the part played by the American continent in the codification of international law. Speaking also on behalf of Mr. Tsuruoka, he said he hoped that the Inter-American Juridical Committee would continue its work with success and that the Commission would receive documents enabling it to follow the Committee's progress.

52. The CHAIRMAN associated himself with the members' expressions of appreciation of the work of the Inter-American Juridical Committee. The regional and universal bodies engaged in codification had the same aim: the peaceful organization of the world. He expressed the Commission's best wishes for the successful continuation of the Committee's work and assured the Observer that every effort would be made to provide for

representation of the Commission at the Committee's next session.

The meeting rose at 1.10 p.m.

1260th MEETING

Monday, 20 May 1974, at 3.10 p.m.

Chairman: Mr. Endre USTOR
Later: Mr. José SETTE CÂMARA

Present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Calle y Calle, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Yasseen.

Welcome to Mr. Šahović

1. The CHAIRMAN welcomed Mr. Šahović among the members of the Commission.

2. Mr. ŠAHOVIĆ thanked the members of the Commission for the confidence they had shown in him by electing him to the seat that had been held by Mr. Bartoš. He paid a tribute to his predecessor, who had made an important contribution to the development of contemporary international law, and assured the Commission that he would do his best to discharge his duties.

Appointment of a Drafting Committee

3. The CHAIRMAN said that following consultations held by the Chairman of the Drafting Committee, it was proposed that the Commission should appoint a drafting committee of thirteen members: Mr. Hambro, the Chairman, Mr. Ago, Mr. Calle y Calle, Mr. Elias, Mr. El-Erian, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Reuter, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat and Mr. Thiam, the Commission's Rapporteur.

It was so agreed.

State responsibility

(A/CN.4/246 and Add.1-3; A/CN.4/264 and Add.1; A/9010/Rev.1)

[Item 3 of the agenda]
(resumed from the previous meeting)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 8 (Attribution to the State, as a subject of international law, of acts of private persons in fact performing public functions or in fact acting on behalf of the State) (*continued*).

4. Mr. BEDJAOUI said he accepted the wording of article 8. At first, he had been somewhat hesitant about the place the article should occupy in the draft as a whole and had thought it might be inserted between articles 10 and 11. For articles 5, 6, 7, 9 and 10 related to the conduct of organs of the State or of separate public institutions, whereas article 11, like article 8, related to the conduct of private persons, and he had therefore thought that article 8 might be placed after article 10, so that it would introduce article 11. On further consideration, however, and in view of what the Special Rapporteur had said, he thought the Special Rapporteur had wished to stress the public character of the mission rather than the private character of the agent. Like the Special Rapporteur, he considered that the basic criterion for the application of the article was the public character of the mission, not the legal nexus which could exist between the person who had committed the act and the State itself. The private character of the agent was, indeed, less decisive than the public character of the mission, because one could speak of *de facto* agents or *de facto* officials. It was, however, necessary to agree on the meaning of the public character of the mission: for example, abductions were not carried out by public missions, but by missions that were usually repudiated by the State. In that connexion, he stressed that article 8 covered a very wide range of situations, in particular, the case of chartered companies mentioned by the Special Rapporteur in his third report,[1] which were really private companies that had appropriated attributes of public power for their own advantage.

5. Article 8 raised the problem of the engagement of the responsibility of the State, because that responsibility was limited in internal law. Thus attribution to the State of acts of private persons was subject, in internal law; to certain prior conditions which varied from country to country, such as the exceptional nature of the event which had motivated the act—accident, war, etc.—impossibility of the regular authority acting legally, the existence of exceptional circumstances at the time when the damage was caused, the public character of the act, etc. But the article did not formally refer to internal law for determining the public character of the act.

6. That problem could also arise in connexion with the subversive activities of multinational companies.

7. Another point worth noting was that the Organization of African Unity (OAS) was trying to adopt a code of ethics condemning political crimes committed against opponents of a régime who had taken refuge in foreign territory.

8. Referring to the case of the hijacking of an aircraft which had been carrying Algerian leaders during the Algerian war of independence, he asked whether the Special Rapporteur, who had taken part in the arbitration of that case, considered that it came under article 8 or article 10. If it was considered that the pilot of the aircraft in question was in fact an agent of the French

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[1] See *Yearbook ... 1971*, vol. II, Part One, p. 263, footnote 382.