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Summary record of the 1304th meeting

Topic:
State responsibility

Extract from the Yearbook of the International Law Commission:-
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16. While the principle was not in doubt, it was open to question what its limitations were and how they should be formulated. It might perhaps be stating the principle too categorically to say that: "Any act or omission by an organ of the State, even if it acted beyond its competence or contrary to internal law, is an act of the State under international law and engages the responsibility of that State". It might be asked—and indeed most writers did ask—whether the interests of the security of international relations were not sufficiently protected when an exception to the principle stated was made for cases in which the lack of competence of the organ in question was absolutely obvious; that was why United States practice had invoked the notion "not only of their real but of their apparent authority". The Commission would have to take a position on that point.

17. On the subject of that possible exception, the formulas proposed by writers and learned societies were very diverse. Some of them expressed the same idea twice: first in positive terms, affirming the responsibility of the State for the acts of an organ that were apparently, though not really, performed within its competence; and secondly in negative terms, excluding State responsibility when the lack of competence was obvious. In his opinion, if that approach was adopted, it was important to distinguish between, on the one hand, the basic rule attributing to the State the acts or omissions of organs which had acted beyond their competence or contrary to the provisions of internal law governing their activities and, on the other hand, the exception by which the conduct of an organ would not be attributed to the State if that conduct was totally foreign to its functions or its lack of competence was manifest.

18. Article 46 of the Vienna Convention on the Law of Treaties [5] might also be taken into consideration. That provision, which was intended to determine in what cases the will of the State must be deemed to have been validly expressed, and which relied on the notion of a manifest breach of a provision of internal law regarding competence, might possibly provide suitable language for stating the principle under study.

19. The Commission would also have to take account of the drafting changes it had made to the articles on State responsibility already adopted, which made it necessary to amend in the same way the text of article 10 as proposed in his report (A/CN.4/264, para. 60).

The meeting rose at 1 p.m.

[5] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5) p. 295.

1304th MEETING

Wednesday, 7 May 1975, at 10.20 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bedjaoui, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

State responsibility

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct or organs acting outside their competence or contrary to the provisions concerning their activity) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10 as proposed by the Special Rapporteur. [3]

2. Mr. REUTER said that he fully supported the views of the Special Rapporteur; any rule other than that proposed in draft article 10 would have the effect of negating the responsibility of the State. It would amount to saying that the State was a legal entity which could only act in conformity with international law and that acts committed in breach of international law were not acts of the State; or, to paraphrase the basic principle of the British Constitution—the King can do no wrong—that the State could not violate international law. Such a rule would be patently absurd.

3. The only question which might arise in connexion with the rule proposed by the Special Rapporteur was that of its limitations, and that question was settled in paragraph 2 of the article. In practice, the cases covered by the article rarely concerned direct relations between States. They usually concerned relations between a private person and a State, and the responsibility of the State was then engaged only at a second stage, after an injury had been caused to a private person. In addition, such cases nearly always involved the use of physical constraint by the armed forces, the police, or officials having some power of direct coercion.

4. The Special Rapporteur had been right in drawing a parallel between draft article 10 and article 46 of the Vienna Convention on the Law of Treaties, [4] though in practice the provision under study would apply almost exclusively to relatively simple cases involving a private person and a public official. But the question with which writers and arbitrators in past cases had been concerned was not only that of the limits of the competence of the organ which had acted. For example, the award made in the *Caire case* (A/CN.4/264, para. 41) and the proceedings of the Committee of Experts for the Progressive Codification of International Law appointed by the League of Nations (*ibid.*, para. 21) contained passages dealing with matters far removed from the theoretical problem of competence. In the award in the *Caire case* reference was made to officials who engaged the responsibility of the State when acting "under cover of their status as organs of the State and making use of

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

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

[3] For text see previous meeting, para. 1.

[4] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 295.

means placed at their disposal as such organs". That passage stressed the material means of constraint, not competence.

5. A further step had been taken in other decisions which had recognized that the State incurred responsibility if an official, exceeding his competence or contravening the rules governing his conduct, acted in a manner which the person affected could not resist. Even if the official in question had manifestly acted illegally, the private person could not escape the means of coercion used against him. An example was the case of foreign motorists who had been arrested in certain countries and ordered to pay a sum of money, failing which they would suffer vexatious investigations. While a public authority might lawfully require payment of a sum of money, it was illegal to demand payment without giving a receipt. There had also been cases in which the armed forces of several countries had committed acts unrelated to military operations. It was now a principle of codified international law that States were responsible for all acts of their armed forces. Hence, it seemed that such cases were outside the traditional scope of State responsibility; at the most they might be brought within it by applying the concepts of *culpa in custodiendo* and *culpa in eligendo*.

6. On reflexion, he thought paragraph 2 of article 10 might nevertheless be satisfactory. For the Special Rapporteur had taken the precaution of specifying that the act of the State must be "wholly foreign to the specific functions of the organ" in question, and when an official acted under cover of his authority or used means placed at his disposal by reason of his powers, his act was no longer "wholly" foreign to his functions. The Special Rapporteur had deliberately chosen an abstract formula, whereas more concrete wording had been preferred in the *Caire case*, in the work of the 1930 Codification Conference and by certain writers. It would be useful to consider further the advantages and disadvantages of the two formulations.

7. Mr. BEDJAOUI said that the rule stated in draft article 10 was not only acceptable, but also necessary. The practice of States varied widely: when they were claimants, they were always quick to attribute the acts of its organs to the respondent State, but when they were themselves respondents, they sought by all possible means to relieve themselves of responsibility. The proposed rule would therefore introduce clarity; moreover, it was essential for reasons of equity and security in international relations.

8. In the situation contemplated in article 10, it would not be equitable to make the responsibility of the State depend on proof that the individual who was an organ had acted on instructions from his government. That would be requiring a *probatio diabolica* from the claimant State and would provide loopholes for the respondent State. The Spanish Government had well understood that point when drafting its note to the Italian Government in the case of the Italian nationals in Peru (A/CN.4/264, para. 17); for it had stated that "there would be no practical way of proving that the agent had or had not acted on orders received". It was in that context that it was important to ensure the security of international relations. Officials acting in the performance of their functions, even when they went beyond their competence, represented their government and engaged its responsibility, which was not true of private persons. In the note he had referred to, the Spanish Government had duly stressed that difference by saying that "there is no way to resist the action of these officials, because this action is based on the authority they exercise".

9. Article 10 was thus logically consistent with articles 5 and 7 (A/9610/Rev.1, chapter III, section B), which related, respectively, to the attribution to the State of the conduct of its organs and to the attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority. Those provisions were based on the postulate that the degree of control which the State exercised over its territory gave the measure of its international responsibility. Article 13, on the acts of organs of a successful insurrectional movement, would raise the same kind of question.

10. With regard to the drafting of article 10, he was inclined to prefer a negative formulation, like that of article 2 of the draft prepared by Strupp in 1927, [5] or that of article 1 of the draft prepared by the German International Law Association in 1930, [6] both of which were cited in the Special Rapporteur's report (A/CN.4/264, para. 47). A negative formulation would be more in keeping with paragraph 2 of the proposed article 10, which referred to cases in which there was no competence or even appearance of competence. The act committed was then wholly unrelated to the functions; the individual who was an organ acted merely as a private person. The link between competence and the act performed, which would engage the State's responsibility in the situation covered by paragraph 1, was missing in the case covered by paragraph 2.

11. Mr. KEARNEY congratulated the Special Rapporteur on his excellent commentary and analysis. The positions expressed in draft article 10 were basically correct, and he had been particularly impressed by Mr. Bedjaoui's reference to the principle of equity and security which were reflected in the terms of the article.

12. Like Mr. Reuter, however, he was concerned about article 10, paragraph 2, which, because it attempted to cover a very wide range of possible situations in a few words, might produce effects not intended by its author. What, for example, would have been the outcome of the *Youmans case* (*ibid.*, para. 40) if it had been governed by the provisions of article 10, paragraph 2? Could the killing of civilian aliens by soldiers sent to protect them be considered an act "wholly foreign to the specific functions" of an army, which, at the internal level at least, were to safeguard peace and order? One could hardly rely on practice for an answer to that question for, as Mr. Bedjaoui had pointed out, the attitude of States in such matters depended on whether they were claimants or respondents. Personally, he thought there would be less chance for a State to evade responsibility in such a case if the approach adopted were that of the

[5] See *Yearbook . . . 1969*, vol. II, p. 151.

[6] *Ibid.*, p. 149.

corresponding draft provision prepared at the 1930 Codification Conference (*ibid.*, para. 21), the effect of which would have been to make all acts committed by the military or police under cover of their official capacity acts of the State in international law.

13. The basic condition laid down in article 10, paragraph 1, for the generation of State responsibility, was that the State organ must have acted in its official capacity. But in the *Youmans case*, for example, it was extremely difficult to decide whether the soldiers had been acting *de facto* or *de jure* in their official capacity. To deal with that problem, he suggested that either of the paragraphs of article 10 might contain a provision to the effect that the State incurred international responsibility for the conduct of its organs acting in their official capacity or under the apparent cover of their official capacity.

14. A further point to be considered was that, whatever the nature of the act committed, State responsibility would be engaged by the conduct of certain State organs, such as the armed forces, police, and para-military bodies, because it was by the authority of the State that they were provided with the means to cause damage. Cases had occurred such as that in which a naval captain, acting entirely on his own initiative, had abused his position to shell a place in a neutral foreign country; the Commission should ensure that the State would not be able to evade responsibility in such cases by claiming that the actions of the organ were wholly alien to its functions or manifestly beyond its competence.

15. Mr. ELIAS praised the Special Rapporteur's comprehensive commentary and introductory statement and said that draft article 10, paragraph 1, should now be acceptable to all members of the Commission, with, at the most, only minor reservations. The proposed wording of paragraph 2 was less satisfactory, however, owing to the difficulty of determining the criteria to be used to qualify the general rule laid down in paragraph 1.

16. It had been suggested that paragraph 2 should be reworded to take account of the actions of armed forces, police and similar bodies. He agreed with the view that the problem was not confined to government officials of that kind, but arose also in regard to many other persons who could be seen as acting on behalf of the State or of other bodies exercising elements of governmental authority. In that connexion, he pointed out that the British concept of the exercise of "ostensible authority" differed slightly from the concept of the exercise of "actual or apparent competence" discussed in the report (A/CN.4/264, para. 58). The British concept denoted circumstances in which a State or a State organ held out an individual or group of individuals as having authority, whether apparent or actual, to perform acts which the public or, for the purposes of international law, the international community, would see as resembling those which fell within the scope of the authority vested in the organ. According to that notion, it was possible, in many situations, to consider an individual as performing an act of the State.

17. The real problem was how to marry the two parts of paragraph 2. He agreed with the Special Rapporteur that the Commission could not do better in the second part of the paragraph than to employ the word "manifest", which was the term employed in article 46 of the Vienna Convention on the Law of Treaties and had been selected by the Vienna Conference after a long debate. Like Mr. Reuter, however, he had difficulty in distinguishing acts in respect of which an organ was manifestly incompetent from acts which were wholly foreign to its specific functions. The treatment of both notions in the same clause might cause the reader to lose sight of the essential idea to be conveyed. He therefore suggested that paragraph 2 should be divided into two sections, the first dealing with acts or omissions extraneous to the functions which an organ was authorized to perform, and the second with cases in which its lack of authority or competence was manifest.

18. Mr. ŠAHOVIĆ said that the existence of the rule stated in article 10 was clearly demonstrated by the Special Rapporteur's report and his oral presentation. That rule, which was the foundation of the theory of State responsibility in modern international law, also met the need to strengthen legality in the international order. But while he could only endorse the principle stated in paragraph 1 of the article, he had doubts about the wording of paragraph 2 and even doubted the need for it.

19. The formulation of article 10 was discussed by the Special Rapporteur in paragraphs 58 and 59 of his report (A/CN.4/264), where he distinguished between the main rule and the subsidiary rule, but also referred to the limitative and exceptional nature of the latter. The exact purport of paragraph 2 should be made clear. As he saw it, the provision was a negative statement of the rule stated in positive terms in paragraph 1. It should be noted, moreover, that the difference between the terms "competence" and "specific functions" was not clear from the text of article 10. Perhaps it would be better to model the provision on the idea of acting in the capacity of a State organ, which had been adopted in article 5, for example.

20. To make article 10 easier to apply, he thought paragraphs 1 and 2 could be combined, so that the second part of the new text would merely qualify the general rule.

21. Mr. MARTÍNEZ MORENO said he fully supported the principles which the Special Rapporteur had embodied in draft article 10 and his arguments in support of those principles. He pointed out, however, that Latin American writers had long expressed reservations concerning the subject-matter of the article.

22. At the 1930 Codification Conference, for example, Mr. Guerrero had tried to defend the traditional position of the Latin American countries regarding the international responsibility of States, which was that precedents and practice should be regarded in the light of historical situations. It was not that Latin American States were opposed to the acceptance of international responsibility in cases of flagrant violation of the rights of foreigners; but they remembered that in the past claims had often been backed by threats or even, as in the case of the bombardment of Maracaibo, by actual violence. It was for that reason that the constitutions of many Latin American States contained provisions which

prohibited the recovery of State debts by force—the Drago-Calvo doctrine—stressed the rule concerning the exhaustion of local remedies, stipulated that a denial of justice must have occurred before a claim could be brought through the diplomatic channel, and reaffirmed the principle of non-intervention. Examples were provided by articles 19 and 20 of the Constitution of El Salvador. Furthermore, in Latin America, States disclaimed responsibility for injury to aliens in the event of civil war. The Latin American States would be more willing to accept the draft if it took account of their national legislation.

23. He suggested that, in order to forestall the problems that might arise when the draft articles came to be discussed by the Sixth Committee of the General Assembly, the Commission should study the replies to the questionnaire sent to States in preparation for the 1930 Codification Conference, and also enquire whether the Constitutions of any African or Asian States contained provisions similar to those in force in Latin America. In a matter as delicate as that of State responsibility, it was important to take account of both doctrinal opinion and traditional attitudes.

24. Mr. USHAKOV said he fully endorsed the principle stated in paragraph 1 of article 10, but had some reservations regarding paragraph 2 and the commentary. The weaknesses of the commentary were due, he thought, to the method followed in the past by the writers who had dealt with State responsibility and the conferences of plenipotentiaries concerned with that topic. In the past, State responsibility had been considered exclusively with regard to damage sustained by foreigners in the territory of the State concerned, so that practice and judicial decisions related almost solely to that aspect of the subject. Consequently, nearly all the cases cited by the Special Rapporteur in his commentary concerned damage sustained by foreigners, which explained the weakness of the commentary and its conclusions. When the Commission had begun its work on State responsibility, it had decided to leave aside the question of State responsibility for damage sustained by foreigners. That question, which was on the Commission's long-term programme of work, was now raised in the following form: what were the obligations of States to foreigners?

25. In his revised draft on State responsibility, submitted in 1961, Mr. García Amador had dealt solely with injuries caused to the person or property of aliens in the territory of the State. [7] But it was not the damage suffered by private persons which engaged the State's responsibility; it was cases in which the fundamental principles of international law were violated—in other words, where international peace and security were endangered. Hence it was those cases which were the Commission's main concern. Article 10, paragraph 2, should accordingly be understood as referring, not to damage caused to foreigners, but to international crimes—and aggression was now regarded as the most serious crime under international law, according to the definition recently adopted by the General Assembly. [8] Paragraph 2 was therefore quite unacceptable. For although it was possible to accept some restriction of the principle stated in paragraph 1 where it applied to damage suffered by private persons, no such restriction could be accepted in the case of violations of international law such as aggression, breach of the peace or threat to peace. It was obvious that if the head of a State ordered a military attack against another State, although he was not empowered to do so by the constitution of his State, so that his lack of competence was manifest, he nevertheless engaged the responsibility of the State, which would be held responsible for the aggression.

26. The restriction set out in paragraph 2 was accordingly valid only in the particular case of damage sustained by foreigners, where internal redress was possible, so that there could be a question of denial of justice. Those were the cases contemplated in the note addressed by the Austrian Government to the Preparatory Committee for the 1930 Codification Conference, in the conclusions of that Conference and in Mr. García Amador's revised draft of 1961—all of which were cited in paragraph 50 of the Special Rapporteur's report (A/CN.4/264). In the case of diplomats, on the other hand, the situation was not the same, because no redress could be obtained in the courts of the State concerned, and consequently there could be no question of denial of justice. The restriction introduced in paragraph 2 was in any case unacceptable in regard to international crimes or other serious violations of the principles of international law, because in those cases any conduct *ultra vires* of an organ of the State was an act of the State. The case of damage sustained by foreigners was the only possible exception to the principle stated in paragraph 1, and that case was not really within the scope of the draft articles.

27. He fully approved of the principle stated in paragraph 1 of article 10, but had reservations about the expression "entity empowered to exercise elements of the governmental authority". He was not convinced that the paragraph should cover entities which did not form part of the State structure proper and which were not organs of the State in the broad sense of the term, like territorial entities. He did not think that such entities could act beyond their competence. As Mr. Reuter had said, they had physical means of constraint, but they could not act under cover of official functions. They did not act as organs, but rather as private persons, even though they were legal persons. Hence the State was responsible by reason of omission, for failing to prevent the conduct of the entity in question. He therefore doubted whether it was advisable to introduce in paragraph 1 the idea of "an entity empowered to exercise elements of the governmental authority".

28. He also had some reservations about the drafting of paragraph 1. The expression "in its official capacity" seemed ambiguous and he would prefer the expression "in that capacity"—that was to say, in its capacity as an organ—used in article 5; the words "contravenes the rules of that law concerning its activity", might be implicit in the words "exceeds its competence according to internal law"; and the word "nevertheless" might well be superfluous.

[7] See *Yearbook ... 1961*, vol. II, pp. 46-54.

[8] See General Assembly resolution 3314 (XXIX), annex.

29. To sum up, he would be in favour of deleting paragraph 2 of article 10, or retaining it only for cases of damage suffered by private persons, because that paragraph would nearly always enable the accused State to evade its responsibilities.

The meeting rose at 1 p.m.

1305th MEETING

Thursday, 8 May 1975, at 10.5 a.m.

Chairman: Mr. Abdul Hakim TABIBI

Members present: Mr. Ago, Mr. Bilge, Mr. El-Erian, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Martínez Moreno, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Reuter, Mr. Šahović, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Yasseen.

State responsibility

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

[Item 1 of the agenda]

(continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 10 (Conduct of organs acting outside their competence or contrary to the provisions concerning their activity) *(continued)*

1. The CHAIRMAN invited the Commission to continue consideration of draft article 10 as proposed by the Special Rapporteur. [3]

2. Mr. TSURUOKA said he fully approved of the Special Rapporteur's approach to the problem of State responsibility: it was by the careful analysis and interpretation of facts, practice, precedents and doctrine that the Commission would be able to establish the principles to be applied in that sphere, without being a prisoner of pure logic. In his opinion, it was practice that was of the greatest importance, and it would be wrong to adopt too systematic an approach.

3. So far as substance was concerned, he had no difficulty in accepting the principle stated in paragraph 1 of article 10. In dealing with a problem of that kind, however, it was not always wise to adopt a strictly legal standpoint. The claimant State should try to satisfy all those who considered themselves injured, but without impairing good relations between the States concerned. In that respect, Mr. Guerrero's conclusions (A/CN.4/264, para. 21) were very wise and practical, and could serve as a guide to many foreign ministries. The Commission should pay particular attention to the diplomatic and political aspects when trying to establish a rule of law on the subject.

4. With regard to the wording of article 10, he thought the phrase "in its official capacity" did not reflect the distinction to be made between the apparent competence and the real competence of the accused organ. That distinction was most important, for it was the key to determining whether or not the conduct of an official was attributable to the State. He hoped, therefore, that the phrase in question would be clarified in the commentary by examples.

5. The points raised by Mr. Ushakov were very important and should be taken into consideration. [4]

6. Mr. HAMBRO said that, like most other speakers, he could accept paragraph 1 of article 10 without difficulty. In the discussion which had taken place, there had been unanimity on one very important point: the primacy of international law had to be accepted on the question of the competence of State officials. No rule of internal law, whether constitutional or legislative, could divest the State of its responsibility within the limits set by international law.

7. It was his firm belief that the provision in paragraph 1 gave expression to a well-established rule of international law. Mr. Martínez Moreno had spoken of certain measures taken in the past to obtain compensation for injuries to aliens, which had had the character of basically illegal acts of intervention, and had also referred to the remedies to such situations sought by Latin American jurists—remedies which had sometimes conflicted with the principle stated in paragraph 1. Those remedies had been mentioned as a historical example, however, and it was clear that the rule in paragraph 1 of the article proposed by the Special Rapporteur was now accepted without question throughout the world.

8. At the same time, it was necessary to state the rule in paragraph 1 explicitly because, even at the present time, statements were occasionally made that implied a reversion to the sovereignty dogma, which could undermine the rule in question and, with it, the very essence of international law.

9. Paragraph 2 of article 10 involved considerable difficulties, even though its underlying principle was acceptable. Clearly, cases were bound to arise in which responsibility could not be imposed on the State, but it was very difficult to devise a formula to cover those cases without going too far.

10. Attention had been drawn at the previous meeting to the *Youmans case* (A/CN.4/264, para. 40). Cases of that kind raised a very serious question. The essential point was that the individual victim was powerless when facing a group of soldiers, commanded by an officer, who committed acts totally alien to their duties. The individual had no power to act; if he protested, he might lose not only his property, but even his life. It would be quite wrong in such cases to allow the State to refuse to pay compensation on the grounds that the officer concerned had acted completely outside his authority. He had been clothed with the authority of the State and had the power—given to him by the State—to enforce his point of view.

11. Perhaps the problem might be solved, at least partly, by the addition, at the end of paragraph 2, of

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

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

[3] For text see 1303rd meeting, para. 1.

[4] See previous meeting, paras. 24 *et seq.*