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Summary record of the 1309th meeting

Topic:
State responsibility

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time came to redraft paragraph 2 of article 11, the Drafting Committee would have to consider that important point.

36. He found considerable merit in the amendment proposed by Mr. Tammes, but it was extremely wide. It expressed a general rule of State responsibility and was probably not a primary rule; but its formulation was so sweeping that it would make article 11 less likely to gain general acceptance by States. The proposed amendment brought out the fact that certain earlier concepts were still valid. In the *Alabama case*, to which Mr. Tammes had referred, the question of confirmation of an illegal act had arisen. The older theories on the subject were not mentioned in recent literature, but they remained valid to some extent and should be taken into account in drafting paragraph 2.

The meeting rose at 1 p.m.

1309th MEETING

Wednesday, 14 May 1975, at 10.10 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. Ustor, Sir Francis Vallat, Mr. Yasseen.

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

[Item 1 of the agenda]

(*continued*)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

ARTICLE 11 (Conduct of private individuals)[3] (*continued*)

1. The CHAIRMAN invited the Commission to continue consideration of draft article 11 as proposed by the Special Rapporteur.

2. Mr. SETTE CÂMARA said that the principle embodied in the two paragraphs of article 11 was sound, and consistent with the philosophy of the draft. It was backed by an extensive and exhaustive analysis by the Special Rapporteur of arbitral awards, State practice, attempted codifications and writers' opinions.

3. The Special Rapporteur's comprehensive exposition demonstrated conclusively that the State could not be held responsible for acts of individuals performed in their private capacity. It might happen—and indeed often did happen—that the acts of individuals totally unconnected with the machinery of the State created a legal situation that involved the State's responsibility. But the source of that international responsibility was not the act of the individuals in question, it was the breach of an international obligation by the State or its organs. The State was thus responsible for a specific act or omission quite distinct from the acts of the individuals concerned. There was very little support in modern times for the theory that the State, by that act or omission, endorsed or condoned the acts of the individuals and became a sort of accomplice. Moreover, since individuals were not subjects of international law, it could hardly be maintained that they could violate an international obligation by their acts; such a violation could only be committed by the State or its organs.

4. The rule that the act of an individual could not be considered as a source of international responsibility was not affected by the fact that the damage caused by that act could be used as a criterion for establishing the amount of reparation. That point was irrelevant, for the Commission had already agreed, in earlier articles, to discard damage as one of the constituent elements of the internationally wrongful act.

5. The many arbitral awards cited by the Special Rapporteur in his report (A/CN.4/264 and Add.1) were virtually unanimous in attributing to the State only responsibility for acts or omissions on the part of its organs which had failed to prevent the wrongful acts of individuals or to punish individuals for such acts. The cases in question involved such omissions as denial of justice, failure to provide adequate protection and failure to prosecute and punish individual offenders effectively and promptly. Two legal relationships were involved: one, which affected the individuals directly, concerned a delinquency against the internal legal order; the other, which affected the State, concerned the breach of an international obligation and hence a delinquency against the international legal order. A striking example of the distinction between the two categories of illicit acts was provided by the *Janes case*, cited in paragraph 83 of the Special Rapporteur's report.

6. The same principle had been stated clearly in Bases of Discussion Nos. 10, 17, 18 and 19 of the 1930 Hague Codification Conference, although at that time the problem had been erroneously confined to damage to the person and property of aliens. The same was true of the merging of those formulations, by the Third Committee of the Conference, into one single text (article 10) which had been adopted unanimously by the Conference (A/CN.4/264, paras. 91-99).

7. With regard to disturbances, riots and popular demonstrations, the Special Rapporteur had made it clear that the same principle would prevail for the purpose of establishing State responsibility. As to the problem of diplomatic agents and other specially protected persons, the Convention adopted on the subject by the General Assembly[4] in 1973 established new international obligations which were a potential source of State

[1] *Yearbook ... 1972*, 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 General Assembly resolution 3166 (XXVIII), annex.

responsibility. The obligation either to prosecute or to extradite an offender might, for instance, make a State liable for its refusal to extradite.

8. The importance of the principle was also demonstrated by the occurrence of hijacking attacks against aircraft. Those attacks were carried out by individuals acting in a private capacity, and the State of which they were nationals, or the State in whose territory they had boarded the aircraft, had never been held responsible for such acts. Responsibility could only be based on lack of vigilance on the part of the latter State or failure to prosecute and punish on the part of the State in which the culprits finally landed.

9. The Special Rapporteur's patient research had also revealed that the same general principle was accepted by practically all writers. There had been very meagre support for the attempt to resurrect the medieval theory of the solidarity of the group or for the contention that the State had an obligation to offer some sort of guarantee regarding everything that occurred in its territory. In the case of writers like Charles Rousseau, the affirmation that States could be held responsible for the acts of individuals was simply a question of semantics; the theories of those writers led to the same conclusion, namely, that the source of responsibility was not the acts of individuals, but the obligation to prevent the commission of such acts and to punish the criminals.

10. In the light of those considerations, he supported article 11 without reservation, but wished to add some comments on the drafting. He agreed with the suggestion made by Mr. Tammes and Mr. Kearney that the unsatisfactory English wording "acting in that capacity" in paragraph 1 should be brought into line with the more accurate French text. He had been impressed by the amendment proposed by Mr. Tammes. He considered that it did not embody a primary rule; the substance was implied in paragraph 2 and the amendment did no more than state it expressly.

11. Mr. PINTO said that he agreed with the conclusions embodied in article 11. The conduct of individuals or groups of individuals acting as such was not attributable to the State. The State might, however, be held responsible for its failure to prevent such acts or to punish the culprits.

12. The passage in paragraph 2 concerning State organs which "ought to have acted to prevent or punish" the conduct of individuals must ultimately be interpreted by reference to a rule or standard imposed by international law. At the same time, he thought the reference to an obligation to "punish" was not sufficient, because it covered only the question of punitive action or the application of penalties under criminal law. It was necessary also to cover the question of reparation to the victim, and he suggested that the idea of reparation should somehow be introduced into the text.

13. Although the terms of article 11 were well-rooted in State practice, they did not cover the full range of modern cases. Article 11 dealt only with private individuals or groups of individuals; there was no explicit mention of individuals acting collectively through a legal or juridical person. Until recently, juridical persons had not figured prominently in the cases dealt with by international arbitration, but State enterprises and private companies, in countries where such companies existed, were now becoming increasingly important. It was, of course, possible in theory to say that companies and State enterprises acted through individuals, but in practice that approach would be neither just nor reasonable, either for the plaintiff or for the defendant in a claim. A defendant could not be treated purely and simply as an individual when he was really acting on behalf of a juridical person.

14. Where State enterprises were concerned, it was not possible to say simply that they partook of the character of State organs and should be treated as such. The mere fact that the State had created a separate entity showed its desire to dissociate itself from the activities of that entity, which were usually of a commercial or operational nature. Serious consideration should therefore be given to the question whether the State should be able to dissociate itself from ultimate responsibility for the acts of State enterprises.

15. Nor was it possible to assimilate private companies to the private individuals covered by article 11. In the market economy countries, where private companies existed, they were created in accordance with the applicable laws. All companies were subject to strict controls in the public interest; hence they could not be placed on exactly the same footing as individuals from the point of view of State responsibility. They had neither the same independence nor the same freedom of action as individuals.

16. The possibility of attributing the act of a juridical person to the State could also be affected by the fact that the activities of a particular company might be carried on under the authorization of, or by agreement with, the State, which had created the company. An even more complex situation could arise where a company operated under State authorization, or by agreement with another State or with an international organization.

17. For those reasons, it was not possible to solve that problem merely by substituting the words "natural or juridical person" for the words "private individual", in paragraph 1 of article 11. He urged that the Special Rapporteur and the Commission should carefully consider whether the State had a special duty because of the nature of the juridical person—which could range from a State enterprise to a commercial company—or by reason of its activity or of a special vigilance required of the State.

18. He had been prompted to make that suggestion because the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, [5] which was before the Third United Nations Conference on the Law of the Sea, contained a passage dealing with the question of responsibility for damage caused by the State or by entities operating under its control or with its authorization. The discussion which had taken place on that passage had revealed a marked reluctance on the part of the interested governments to commit themselves on that aspect of State responsibility. The passage concluded with the statement that "Damage caused by such activities shall

[5] General Assembly resolution 2749 (XXV).

entail liability"; it did not specify to whom the damage was caused or who would be held liable, but those points could not be left unsettled for very long. Nor was the problem to which he had drawn attention confined to the law of the sea.

19. It was desirable, therefore, to explore the question of the conduct of juridical persons in connexion with the provisions of article 11. He agreed with Mr. Tammes that the present opportunity should be taken to make the draft as generally applicable as possible and to reach some conclusion on the responsibility of the State for the acts of State enterprises and private companies. He hoped that the Special Rapporteur would agree to consider whether those legal entities should receive separate treatment or should be regarded as acting through individuals.

20. Mr. ELIAS said there was clearly general agreement on the principle embodied in the two paragraphs of article 11; the drafting could be improved at a later stage.

21. The provisions of article 10 made it clear that so long as the State organ acted in the exercise of some element of governmental authority, the State was held responsible for that organ's acts or omissions; it was immaterial whether the organ had acted *ultra vires* or had attempted to deal with a matter which was wholly alien to its functions. In the cases envisaged in article 10, a State organ which exceeded its competence or acted wholly outside its functions was considered to be acting not in an official, but in a private capacity. There was, consequently, a connexion between the provisions of article 10 and those of article 11. In the situation contemplated in article 10, there was a pretence on the part of the organ to be exercising governmental authority, whereas in the case covered by article 11 there was no such pretence, but the position was very much the same as to the legal effect.

22. Article 11 expressed in positive terms a subsidiary rule without which the preceding articles 1 to 10 (A/9610/Rev.1, chapter III, section B) would be neither precise nor complete. As he saw it, article 11 stated two complementary ideas contained in one and the same basic principle. The first idea was that individuals or groups of individuals who were not exercising governmental authority could not be regarded as committing an internationally wrongful act, so long as they had acted in a private capacity when committing the act or omission in question. The second idea was that the State must accept responsibility, not for the act or omission of an individual, but for the omission of one of its organs.

23. The Special Rapporteur had rightly pointed out that, when those twin aspects of the same problem were being considered, care should be taken not to ascribe the conduct of private persons to the State by attributing responsibility to the State. A striking example was that of a private person who broke into an embassy and stole a valuable document or committed some other unlawful act. The responsibility of the receiving State was engaged, not by the individual's unlawful act, but by the failure of its organs to prevent the act or to punish the offender. The receiving State had a duty of protection, and the failure of the organ to perform that duty rendered the State internationally responsible.

24. He saw some force in the remarks of certain members regarding the use of the words "individual or group of individuals". The difficulty could be largely removed by replacing those words by the words "a person or group of persons", which the Commission had used in article 8. In the original draft, the word "individual" had been used in both the title and the body of article 8, but the Commission, after a very long debate, had replaced it by the word "person". The use of that term would have the advantage of meeting the point raised by some members regarding private companies and State entities, since by all standards of interpretation the term "person" covered both natural persons and juridical persons. With that amendment, article 11 would cover the conduct of individuals, companies, and even State enterprises which did not exercise elements of the governmental authority and were therefore outside the scope of article 7.

25. The Special Rapporteur had been careful not to introduce the concept of reparation into article 11, for reasons that were both sound and obvious. Those reasons were connected with the Commission's decision on article 3 dealing with the elements of an internationally wrongful act of a State. It had been agreed that those elements were two in number: first, there must have been an act or omission attributable to the State under international law; secondly, there must have been a breach of an international obligation of the State. After much discussion, the Commission had decided that the concept of damage did not constitute an essential element of the internationally wrongful act, and it would be totally inconsistent with that decision to introduce the notion of reparation into article 11.[6] An internationally wrongful act could occur in the absence of any damage—*injuria sine damno*. Conversely, there could be damage without a wrongful act having been committed—*damnum sine injuria*. In the cases covered by article 11, the amount payable as reparation for the internationally wrongful act was not necessarily measured in terms of the damage done by the individuals, and the fact that the extent of financial or economic loss was taken into account in quantifying the reparation did not alter the position.

26. With regard to the drafting, he suggested that the words "acting in that capacity" should be replaced by "acting as such". Paragraph 2 should be reformulated in more positive terms, avoiding the awkward expression "where the latter ought to have acted". The introductory words "However, the rule enunciated . . ." should also be eliminated. As redrafted, paragraph 2 would simply state that the conduct of a private person or group of persons could be the source of international responsibility of the State if its organs had failed to take action to prevent or punish such conduct, thereby contravening the obligations of the State under international law.

27. Mr. TSURUOKA said that the principle stated in article 11, paragraph 1, was a well-established rule of international law and no country questioned its validity. Article 11 might therefore seem superfluous, were it not that the principle it stated was the result of a long process of development of practice, judicial decisions and doctrine, whose course, beset with obstacles, the Special Rappor-

[6] See *Yearbook . . . 1973*, vol. I, pp. 19-28 and 119.

teur had traced in his commentary. He considered, therefore, that article 11 was necessary. Paragraph 2 should be retained because it would facilitate the interpretation and application of the principle stated in paragraph 1. He thought, however, that the commentary should explain, with the help of specific examples, what was meant by the "conduct of an organ" and the "conduct of a private individual or group of individuals". The interpretation and application of article 11 would be easier if the distinction made by the Special Rapporteur between persons acting as organs and persons acting as private individuals were illustrated in the commentary by specific examples.

28. With regard to the wording of the article, he supported the remarks made by Mr. Elias concerning the English version of paragraph 1 and Mr. Kearney's comments on paragraph 2. In the text proposed by Mr. Tammes, [7] he thought that the words "conduct contravening international law" might be misinterpreted—a point to be noted by the Drafting Committee.

29. Mr. REUTER said that he approved of article 11 as proposed by the Special Rapporteur and thought the text should be referred to the Drafting Committee. The comments made on the drafting of the article arose out of the difficulties involved in translating into English a text which had been very well thought out in French, and out of the fact that article 11 had to be read in conjunction with articles 5, 8 and 10, which might perhaps involve some changes in terminology.

30. Article 11 was essentially self-evident: if it did not appear in the draft articles, the substance of international law would not be changed, for its only purpose was to explain the consequences of what had been stated in preceding articles and what would be stated in subsequent articles.

31. The question of attributability dealt with in article 11, was quite separate from that of the definition of the wrongful act and that of damage, but those three questions were closely connected. Hence it was perfectly natural to allude, in the commentary and in the debate, to the problem of damage and to the actual nature of the wrongful act, in connexion with the attribution of responsibility. But the Commission should take care not to touch on those two questions in the text of the draft articles, or it would come to a dead end.

32. The question of damage raised the problem of direct and indirect causality, for there was a causal link between the attitude of the State and the attitude of the individual, in so far as it was the State's failure to act which enabled the individual to cause damage. But that was a problem the Commission would meet with later and the time to deal with it had not yet come.

33. Mr. Pinto had referred to the problem of damage as it arose in the specific case of contractual liability, [8] in which responsibility for an act committed by several persons was, by agreement, attributed to a single person. It seemed that, for the time being, it was not possible for the Commission to deal with that problem.

34. Moreover, if the Commission undertook to define the wrongful act, it might be venturing on to very difficult ground, for the extent of State responsibility was not clear. An omission concerning observance of neutrality and an omission concerning the protection of foreigners were, indeed, two different things. The *Alabama case* [9] was certainly interesting and the notion of "reasonable diligence" had played an important historical role. But that notion had not been accepted later, when the Hague Conference had tried to define State responsibility. That was when the formula now proposed by Mr. Tammes had been adopted—the idea of the use of means at the disposal of States. That idea, however, was not applicable in all spheres. For example, in regard to space activities the State was fully responsible for all the actions of private individuals who took off from its territory. Hence it could not justify itself by pleading that it had used all reasonable means at its disposal.

35. With regard to the protection of foreigners, the wording proposed by Mr. Tammes was satisfactory, particularly for developing countries, which did not wish to be held responsible for failing to use means they did not possess. In other spheres, on the other hand, the responsibility of the State went far beyond the use of all reasonable means at its disposal. For instance, in the matter of protection of diplomats, the wording proposed by Mr. Tammes was insufficient because the State must have at its disposal the means necessary for such protection and could not invoke the notion of "reasonable use" to disclaim responsibility. Mr. Tammes' proposal was interesting, but he thought the Commission should not open a discussion which might lead it to anticipate the study of problems relating to the wrongful act and damage.

36. Mr. HAMBRO said that, while he did not dispute that individuals could sometimes be subjects of international law, the Commission was not dealing with that question or with the problem of reparation, but with State responsibility. Certain aspects of the question of the activities of companies, raised by Mr. Pinto, were covered in other articles which referred to the activities of State entities. While the problem was certainly of interest, the Commission would be wise to avoid discussing it in connexion with the draft articles, since it was a matter which came within the scope of primary rules, or the conventional rather than the general law of State responsibility.

37. It was his feeling that paragraph 2 of article 11 impinged on the primary rules of international law and that it would therefore be preferable to place it elsewhere in the draft. The main part of the article was undoubtedly paragraph 1, and that provision required no comment since the Special Rapporteur had covered the matter so well and all members of the Commission were in agreement on the general principle.

38. Mr. ŠAHOVIĆ said he believed that draft article 11 faithfully reflected the state of contemporary international law. Nevertheless, the Special Rapporteur's fourth report (A/CN.4/264 and Add.1) prompted him to make

[7] See previous meeting, para. 22.

[8] See 1307th meeting, para. 22.

[9] See previous meeting, para. 21.

a few comments. In paragraph 145 the Special Rapporteur said that if a factor of progressive development of international law was to be taken into account in drafting the applicable rule, that factor could, in his view, be represented only by the desire to eliminate from the subject any possible uncertainty, any trace of ambiguity. The Special Rapporteur had added that there was no need to dwell on the fact that the rule in question should be defined *in toto* and not only in relation to a specific topic, such as that of acts causing injury to aliens. He (Mr. Šahović) agreed that the Commission should formulate a general rule applicable to all conceivable situations, but he noted that most of the cases cited in the report related to the status of aliens. The Special Rapporteur's reasoning was based almost entirely on cases of that kind. It would therefore be desirable to consider, in the commentary to article 11, whether that provision could really be applied to all possible cases, in view of the recent trend of international relations and the current needs of the international community.

39. Like the Special Rapporteur, he considered that the act of the individual should be regarded as catalysing the wrongfulness of the conduct of organs of the State. Hence, the question whether to refer to individuals and groups of individuals or to persons and groups of persons was not purely a matter of terminology. It was necessary to consider how the phenomenon of catalysis would operate in internal law, and in doing so one could not avoid the problems raised by the conduct of private companies, State enterprises or multinational companies. Before departing from the wording proposed by the Special Rapporteur, the Commission should try to define the terms used, taking into account all other subjects of law, such as legal persons, whose conduct could have implications for State responsibility at the international level.

40. With regard to the relationship between article 11 and other provisions of the draft, he pointed out that article 8, sub-paragraph (*b*) dealt with a situation similar to that covered by article 11.

41. The obligations of the State had been divided by the Special Rapporteur into three categories, according to whether they related to injury inflicted by individuals on individual aliens, to injury caused to individual aliens as a result of riots or other disturbances or to injury caused to persons entitled to special protection. Since modern positive international law was now tending to stress certain obligations of States, in particular those relating to the treatment of persons entitled to special protection, he thought the rule stated in article 11 might go so far as to indicate that the responsibility of the State was engaged by reason of such obligations. The Convention on International Liability for Damage Caused by Space Objects, [10] to which Mr. Reuter had alluded, imposed a general obligation which applied both to private companies and to State organizations.

42. The drafting of article 11 should perhaps be amended, because the article was part of a chapter entitled "The act of the State under international law". It might be better to head the article "Conduct of organs acting by omission", rather than "Conduct of private individuals". Perhaps it would also be preferable to state in a single paragraph the primary rule, which in the present version of article 11 was contained in paragraph 2. As Mr. Reuter had said, the rule in paragraph 1 followed from the preceding provisions and it was not strictly necessary to state it.

43. The proposals made by Mr. Tammes and Mr. Elias should be considered by the Drafting Committee.

44. Mr. QUENTIN-BAXTER said he had no doubts at all either about the principle set out in draft article 11 or about the imperative need to balance the statement in paragraph 1 of the article by that in paragraph 2. Like other speakers, however, he wondered whether balance had in fact been achieved by the inclusion of paragraph 2, or whether the article did not place undue emphasis on the absence of State responsibility in the particular case of the conduct of private individuals.

45. He agreed with previous speakers and with the Special Rapporteur that both parts of article 11 were, in a sense, inevitable corollaries of the preceding articles; in that respect there was no imbalance. Taken alone, however, paragraph 1 could have an unbalancing effect, and in that respect he supported the view that the Commission should look more widely to the context of the rule. While he had no doubt that the basic rules set out in the draft articles would prove acceptable to the representatives of States, they might be concerned over the distillation of the wealth of the commentary into such concise principles. Those whose legal tradition was empirical, for example, might be uneasy over the degree of abstraction involved, while others might be unused to the terminology employed or, having become accustomed to working with uncodified law, might think that codification must always show very substantial advances. For those reasons, he was very sympathetic to the view of other speakers that ways should be sought to reflect more of the commentary and, if possible, to include concrete elements, in the draft article. The amendment proposed by Mr. Tammes was of great interest in that respect.

46. Like other speakers, however, he had difficulties with that proposal. Some international obligations might rank higher than others, with the consequence that, as Mr. Reuter had pointed out, the use of "all reasonable means" at the disposal of the State might not always be an appropriate test. He agreed with Mr. Tsuruoka about the problem raised by the phrase "conduct contravening international law". In view of the importance of ensuring a balance between paragraphs 1 and 2, he would be happier if paragraph 2 of the article began forthrightly with a statement to the effect that the rule enunciated in paragraph 1 would in no way prevent the attribution of responsibility to the State in the circumstances in question. He would also prefer the word "omission" to be replaced by the word "failure", since the latter word could cover both an act and an omission.

47. Sir Francis VALLAT observed that there was general agreement that the Special Rapporteur had made out an overwhelming case, in his commentary and opening statement, for the principle and the saving clause contained

[10] General Assembly resolution 2777 (XXVI), annex.

in the draft article. The difficulties which had been mentioned related to the formulation.

48. It was important that the position of juridical persons should be covered in paragraph 1. The point could not be avoided on the basis indicated by Mr. Pinto, namely, that States could be responsible for the actions of corporations in certain circumstances, since that was more a question of liability than of the attribution of conduct to the State. Corporations normally acted independently of the State and their acts should, therefore, be seen as private acts. In that respect, he approved of the suggestion made by Mr. Elias.

49. While it was true that article 11 might to some extent be considered superfluous, because the principle in paragraph 1 followed naturally from earlier articles—particularly article 8—that principle was in itself so important that it must be stated; hence the counter-balancing effect of paragraph 2 became necessary. As the Special Rapporteur had warned, however, in the concluding sentences of paragraph 145 of the commentary, the Commission should not attempt to draft primary rules, and it was such an attempt that had caused the difficulty regarding paragraph 2; in his opinion, the phrase "ought to have acted" came within the context of primary rules. He suggested that the object of paragraph 2 should be to delimit the negative effect of paragraph 1 on earlier articles and that that object could be achieved, and the paragraph itself strengthened, by the inclusion of a phrase such as:

> ". . . without prejudice to the attribution to the State of conduct by reason of any provision of the present articles".

50. Mr. USHAKOV said he fully approved of the substance of article 11, but had several reservations on the drafting.

51. In drafting paragraph 2, the Special Rapporteur seemed to have gone beyond the limits of the subject he had intended to deal with in chapter II. For whereas that chapter was intended to deal only with the act of the State under international law, article 11 dealt with a wrongful act of the State, namely, a possible omission by an organ of the State when it ought to have acted in accordance with international law. In referring to the way in which an organ ought to have acted according to a primary rule of international law—which required it to prevent or punish the conduct of an individual—the Commission was taking a subjective element into consideration and leaving the sphere of "acts of the State" to enter that of wrongful acts of the State. Consequently, he considered that paragraph 2 of article 11, as it stood, was almost unacceptable. For the same reason, the wording proposed by Mr. Tammes and by Mr. Elias had no place in chapter II.

52. As drafted, article 11, paragraph 2, also seemed to imply that, in the situations contemplated, any delinquency on the part of an individual was accompanied by an omission by an organ of the State. But that was not always the case. For example, there was no omission by an organ of the State when an ambassador on mission abroad was insulted in a public place by a private individual. Admittedly, the Special Rapporteur had taken the precaution of referring to "any" omission on the part of organs of the State, but that qualification did not seem adequate from the point of view of legal technique.

53. If it was considered necessary to refer in paragraph 2 to " any omission" on the part of organs of the State, the contents of nearly all the preceding articles would have to be repeated in order to make it clear, for example, that not only organs of the State were involved, but also other entities empowered to exercise elements of the governmental authority, and that the organs might have acted contrary to instructions.

The meeting rose at 1 p.m.

1310th MEETING

Thursday, 15 May 1975, at 10.10 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. Ustor, Sir Francis Vallat, Mr. Yasseen.

Co-operation with other bodies

[Item 8 of the agenda]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, who was acting as its observer, to address the Commission.

2. Mr. SEN (Observer for Asian-African Legal Consultative Committee) said that in the absence of the Committee's President, who was unfortunately prevented from attending by official business, it was his privilege to represent the Committee before the International Law Commission.

3. The Committee had been gratified to note that the Commission had elected as its Chairman Mr. Tabibi, who had for long been a powerful advocate of Asian-African legal co-operation and had been largely instrumental in promoting the current close co-operation between the two bodies. Mr. Tabibi had been so closely linked with the Committee, particularly through his recent work on the important question of land-locked countries in preparation for the Geneva Conference on the Law of the Sea, that it could almost claim him as one of its own. The Committee was also grateful to the other members of the Commission who had attended its meetings in the past, particularly Mr. Yasseen, who had been a strong supporter of the Committee in the United Nations and other organizations; Mr. Elias, who, as a former President of the Committee, had made an outstanding contribution to the expansion of its role and had given valuable assistance to its member Governments in preparing for United Nations conferences of plenipotentiaries; and Mr. Pinto, one of the architects of the Committee's work on the law of the sea.