Document:-
A/CN.4/SR.1213

Summary record of the 1213th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1973, vol. I

State, but it could also be used in its more ordinary sense of a person acting as an agent in a specific case.

59. Article 5, more or less as drafted, was a satisfactory expression of one of the basic rules to be applied. It dealt with the attribution to the State of the conduct of a person or group of persons regarded as an organ of the State. It avoided the problem of persons who did not have the status of organs of the State, although they might be deemed to be its agents—a problem which was dealt with in article 8.

60. The distinction between an organ and an agent could be illustrated by a recent United Kingdom court decision relating to the New Brunswick Development Corporation.[4] The Corporation was in no sense an organ of the Government of the Province of New Brunswick, but it had been involved in the negotiation of certain contracts on behalf of that Government. Upon being sued as a result of acts performed in connexion with those contracts, it had pleaded sovereign immunity. Although the court had not regarded the Corporation as a Government organ, it had held that it had acted as an agent of the Government with regard to certain specific matters and that to the extent that it had so acted as an agent, the Corporation was entitled to the protection of sovereign immunity. That judgement was, of course, a decision under domestic law and related to sovereign immunity rather than to State responsibility, but the case could serve to illustrate the difficulties that could arise if the term "agent" were introduced into the present draft as though it were equivalent to "organ".

61. He would refrain from discussing other drafting points, which would be considered by the Drafting Committee, but he wished to deal with the problem of titles. The title of chapter II, with the words "act of the State" between quotation marks, was somewhat inelegant. He suggested that it should be redrafted so as to refer to the attribution of acts to the State. It should also reflect the thought that the chapter dealt with the attribution of acts to the State by international law.

62. In the title of article 5, he suggested the deletion of the words "subject of international law", which did not reflect any part of the contents of the article itself and contained an element of definition of the term "State"—a definition which the Commission was not attempting in the present draft.

63. He himself was not in favour of titles in an international convention and had been glad to see them dropped by the 1961 Vienna Conference from the Convention on Diplomatic Relations. The 1963 Vienna Convention on Consular Relations, however, did include titles for each of its articles and had set a pattern for a number of other conventions. He believed that a title should be no more than an indication of the contents of the article and should not be used in any way for purposes of legislation.

64. Mr. RAMANGASOAVINA said he hoped the Commission would be able to examine all the draft articles at the present session, not only because of the importance of the subject, but also because it had been on the agenda for a long time.

65. Generally speaking, article 5 was satisfactory. It was the logical sequel to chapter I. Perhaps the expression "For the purposes of these articles" was not essential, but it had the merit of showing that article 5 was a key provision which conditioned those that followed. And that was why those provisions should be examined as a whole.

66. Article 5 laid down the principle that acts committed by organs of a State involved its responsibility. Articles 6 to 10 dealt with a number of possible cases arising out of article 5.

The meeting rose at 1 p.m.

1213th MEETING

Thursday, 24 May 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

later: Mr. Mustafa Kamil YASSEEN

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Welcome to Mr. Pinto

1. The CHAIRMAN welcomed Mr. Pinto, who had been elected a member of the Commission to fill one of the casual vacancies which had occurred since the last session.

2. Mr. PINTO expressed his gratitude to the members of the Commission for electing him.

State responsibility

(A/CN.4/217 and Add.1; A/CN.4/233; A/CN.4/246 and Add.1 to 3; A/CN.4/264 and Add.1)

[Item 2 of the agenda]

(resumed from the previous meeting)

ARTICLE 5 (Attribution to the State, subject of international law, of acts of its organs) *(continued)*

3. The CHAIRMAN invited the Commission to continue consideration of article 5 in the Special Rapporteur's third report (A/CN.4/246/Add.1).

4. Mr. KEARNEY said he had been glad to find that Sir Francis Vallat supported his suggestion that the titles of the articles should be made shorter. A simpler title should certainly be drafted for article 5.

5. With regard to the substance of the article, it appeared to him to deal with a comparatively simple problem. The State was an abstract entity which could only act through

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[4] [1971] 2 All ER 593.

a person or persons. The purpose of article 5 was to state, in the clearest possible terms, that where persons acted for a State an act of that State was performed.

6. That thesis had been very well expressed by the Special Rapporteur in his commentary, which contained a thorough discussion of the background to the subject and gave a large number of adequate illustrations.

7. There was one point, however—already mentioned by Mr. Ushakov and some other members—which deserved attention: the wording of article 5 left open the possibility of confusion between the conduct of an organ of the State and the conduct of the individuals constituting that organ. There was a very real difference between a court of law as such and the judge who sat in that court, or between a legislature and the members of parliament. In order to bring out that difference more clearly, he suggested that article 5 should be reworded to read: "The conduct of a person or persons who, according to the internal legal order of a State, possess authority to act for or on behalf of the organs of that State and are acting in that capacity in the case in question, is considered as conduct of the State from the standpoint of international law."

8. Mr. USTOR said he fully supported the Special Rapporteur's thesis in article 5. He would, however, make some drafting suggestions, which were very close to the substance. As Mr. Reuter had pointed out, the two were intimately connected.

9. His suggestions were prompted to some extent by the close links between article 5 and article 10 (A/CN.4/264), which was itself linked with other articles of the draft. Since the ideas embodied in those two articles were complementary, the language used in them should be brought into line.

10. For example, article 5 referred to the conduct of "a person or group of persons", whereas article 10 referred to the conduct of "an organ of the State". In the redraft suggested by Mr. Kearney, the words "a person or persons" were used instead of "a person or group of persons". The Special Rapporteur had used the expression "group of persons" to refer to an organized group having some kind of independent existence. It might or might not have the status of a legal entity in a particular legal system, but it would still be a "group of persons". In Hungary, a Ministry was regarded as having a legal capacity independent of the State, though the position had been different in the past.

11. In the case of article 5 the difficulty might be overcome by omitting any reference to persons or groups of persons; only the acts or conduct of the organ of the State would be mentioned, as in the present text of article 10. He would therefore suggest that article 5 be reworded to read: "Acts of State organs shall be considered as acts of the State in international law".

12. Paragraph 1 of article 10 would then be redrafted to state that the rule in article 5 applied whether the organ had acted within its competence according to internal law or had exceeded that competence or contravened the provisions of that law. That provision would be followed by the exception now set out in paragraph 2 of article 10, relating to conduct that was "wholly foreign to the specific functions of the organ". There, it would be appropriate to refer to the conduct of "a person or persons", since the conduct in question would be totally unrelated to the proper functions of the organ.

13. Mr. TSURUOKA joined in congratulating the Special Rapporteur and said he approved of the text proposed for article 5. He supported the principle stated in the article, but stressed that it referred only to normal cases, that was to say those which arose most frequently. It was, moreover, that character of normality which justified the position of the provision at the beginning of chapter II.

14. For the sake of clarity and to emphasize the normal character of the case contemplated, it might be advisable to introduce the idea of omission into article 5. It was true that the term "conduct" could be interpreted as covering both acts and omissions, but it might be useful to be more specific on that point.

15. Similarly, the text of the article would be easier to understand if it were simplified a little and the words "and within their competence" were added after the words "acting in that capacity". It might then read: "The conduct of an organ of the State under the internal law of the State, acting in that capacity and within its competence, is considered under international law as an act of the State".

16. He very much hoped that the Commission would be able to continue its examination of the draft articles on State responsibility during the present session.

17. The CHAIRMAN, speaking as a member of the Commission, said that he fully agreed with the reasoning behind the principle embodied in article 5, and basically also with the formulation of the article. The debate had shown that there was virtual unanimity in support of the principle; the proposals made had been mainly of a drafting character.

18. He strongly supported the view that article 5 should be confined to the legal attribution of acts of State organs. It covered a much more limited field than the wider rules contained in article 1 and in sub-paragraph (*b*) of article 2.

19. Like Mr. Reuter, he thought that the English wording "possess the status of organs" more adequately reflected the real situation than the corresponding language used in the French and Spanish versions. The organ was an abstract entity; the acts of a person were attributed to the State, that person possessed the status of an organ of the State and acted in that capacity. For example, a Minister, as the titular head of his Ministry, acted on its behalf; the titular head could change, but the organ would remain. On that point, the language suggested by Mr. Kearney: "...possess authority to act for or on behalf of..." seemed to provide a satisfactory solution to a difficult problem of drafting.

20. Mr. AGO (Special Rapporteur) replying to the comments made on draft article 5, said that the full debate had had the merit of drawin the attention of members to the interdependence of articles 5 to 13. Although article 5 could not be examined without looking at the subsequent provisions, it would nevertheless be premature to analyse those provisions, as Mr. Ustor had

suggested, before they had been duly put up for discussion and introduced by their author. In the case of article 10, in particular, he would give reasons for the wording he had given it and show how it entailed some degree of progressive development of international law.

21. Several members had well understood one of the main points of his preliminary considerations, namely, that it was necessary to rely on reality rather than on theory. The theories had great merits, but they were dangerous when it was claimed, out of fondness for a particular theory, that the reality should be adapted to it. Some writers had gone so far as to maintain that a certain practice was contrary to logic.

22. All the theories nevertheless contained some truth and it was only after studying them that he had been able to propose the pragmatic method he recommended. For instance, the traditional theory was no longer acceptable when it claimed that any act which was not attributed to the State by internal law could not be attributed to it by international law; it had the merit, however, of emphasizing that the organization of the State came under internal law. The same applied to the theory which claimed for international law a monopoly of the attribution of acts to a State at the international level; that theory could no longer be supported when it reached the conclusion that it was international law which determined and governed the organization of the State. Similarly, the monist theory rightly invoked the primacy of attribution under international law, but it went astray when it claimed that the State organized itself by virtue of a delegation of international law. Consequently, the theories should be taken as a guide only in so far as they gave a correct interpretation of the facts, and it must never be forgotten that practice was the decisive factor.

23. As Mr. Bartoš and, especially, Mr. Elias had pointed out, it was by virtue of its sovereignty that the State determined its organization. Normally, international law was not concerned with that. It nevertheless presupposed the organization of the State and sometimes made use of it, in particular for the purpose of attributing an act to a State as a subject of international law. The attribution was often the same in internal law as in international law, but not always.

24. With regard to the comments of Mr. Hambro, he explained that when he affirmed that international law presupposed the organization of the State determined according to its internal law, he was not claiming that international law was not called on to interpret or to apply internal law. On the contrary, it was clear from article 5 that international law relied mainly on the internal legal order of the State for determining what acts could be attributed to it, and it was obvious that that principle made it necessary to examine internal law, and to interpret and apply it. But that did not mean that international law adopted the rules of internal law.

25. The criterion adopted by international law in considering the internal organization of the State was, above all, the need for clarity and security in international relations. Every State should be in a position to know when the acts of another State could be attributed to that State; and it was also necessary to guard against means of evasion.

26. To express all those ideas, it was necessary to proceed step by step and draft a series of articles which complemented each other. For that purpose the pragmatic method must be adopted, but it was possible that on some points the Commission might consider it advisable to propose that States should modify certain practices, relying on one trend rather than another. It was therefore important to ascertain the main trend of international practice and, if possible, to clarify it.

27. With regard to article 5 itself, Mr. Sette Câmara had expressed doubts about the need to retain the words "For the purposes of these articles". Personally, he would like to retain those words, not only because they had already been used by the Commission in other legal instruments, but also in order to show that article 5 referred to the determination of acts of the State from the standpoint of international responsibility. From that point of view the acts considered as acts of the State were much more numerous than in other spheres, in particular, the conclusion of treaties.

28. To follow up a comment by Mr. Reuter, who had pointed out that the link between article 5 and the provisions which followed and completed it was shown by the use of the word "also", he thought the words "above all" or "in the first place" could be inserted in article 5, if desired, to show that that provision was neither absolute nor exclusive and that it was supplemented by the provisions which followed.

29. It was clearly understood, as Mr. Ushakov had pointed out, that chapter II related only to the attribution of an act to a State, without, for the moment, qualification of the act as either lawful or wrongful. That operation came later. It should be noted, however, that the attribution in question was normative and did not consist in establishing a mere link of causality, since it always consisted in attributing to a State the acts of natural persons. That normative character followed from the use of the words "international law" in the text of article 5, but further explanations should be given in the commentary.

30. As to the notion of an organ, that involved the whole theory of the organization of the State. In his view an organ was always an instrument capable of acting, whereas the State was not; an organ was necessarily composed of persons. Mr. Ushakov feared that to follow George Scelle, for whom the State did not exist, would lead to the conclusion that there could be no State responsibility, but only responsibility of natural persons. It was obvious that such a theory was entirely foreign to the present draft. Mr. Kearney and the Chairman had expressed doubts about the use of the word "organ", because they regarded an organ as an abstraction. His own view was, on the contrary, that in the last analysis an organ was nothing but a human being or collection of human beings. The person who acted for the State was an organ; when he acted it was the State that acted.

31. Those different views reflected the various ways in which members of the Commission understood the most familiar notions. As a compromise, he would suggest —though regretfully—that, by its choice of terms, the Commission should avoid defining an "organ of the

State". He accordingly accepted the idea put forward by Mr. Ustor. It would be advisable, however, to make it clear in the wording Mr. Ustor had proposed, that the organs referred to were only those considered to be organs under the internal legal order.

32. In the light of Sir Francis Vallat's warning against the use of certain terms,[1] he observed, with regard to the use of the word "organ", that natural persons, without being organs of the State, could in certain cases be characterized exceptionally as organs or *de facto* organs. But the Commission need not enter into those details at present.

33. He thought it would be better not to adopt the wording proposed by Mr. Kearney, in order not to widen the theoretical divergences in the Commission. It would be preferable to refer to organs of the State rather than to persons.

34. With regard to the titles of chapter II and article 5, he was anxious to retain the phrase "*fait de l'Etat*", which clearly showed that the State had acted, that it had committed an act of omission. It remained to find an equivalent formula for the English version.

35. In reply to a comment by Mr. Tsuruoka, he pointed out that the notion of conduct had been defined in article 2, sub-paragraph (*a*), as "an action or omission". That definition was valid for the whole draft and there was no reason to introduce the word "omission" into article 5.

36. Many members had expressed the hope that the discussion on the draft articles could be continued at the present session. Personally, he would be delighted, but it should be remembered that the Commission had decided to devote most of the session to three topics. Moreover, even three weeks would not be sufficient for a thorough examination of chapter II. It should perhaps be explained to the General Assembly that the Commission thought it inadvisable to submit its draft articles for discussion piecemeal. If the General Assembly considered a few articles which could only be fully understood in relation to other provisions, that could only lead to fruitless discussions. It would be better to inform the General Assembly of the progress of the Commission's work on the topic and submit the complete text of the articles in chapter II the following year. In order to do that, the Commission would have to devote six weeks to the topic of State responsibility in 1974.

37. Mr. USHAKOV thanked the Special Rapporteur for his efforts to reconcile the different views expressed. Personally, he considered the attribution of an act to a State to be a legal operation, since it did not only involve the attribution of conduct, but was always linked with characterization. Taken separately, however, the attribution was not exclusively legal, if considered from the point of view of conduct alone.

38. The CHAIRMAN suggested that article 5 be referred to the Drafting Committee for consideration in the light of the discussion.

It was so agreed.[2]

Mr. Yasseen, First Vice-Chairman, took the chair.

[1] See previous meeting, para. 58 *et seq.*

[2] For resumption of the discussion see 1226th meeting, para. 7.

ARTICLE 6

39. *Article 6*

Irrelevance of the position of an organ of the State in the distribution of powers and in the internal hierarchy

For the purposes of determining whether the conduct of an organ of the State is an act of the State in international law, the questions whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the hierarchy of the State, are irrelevant.

40. The CHAIRMAN invited the Special Rapporteur to introduce article 6 of his draft (A/CN.4/246/Add.2).

41. Mr. AGO (Special Rapporteur) said that the Commission had recognized, when examining article 5, that the principle stated in that article was neither absolute nor exclusive. It was now called upon to see whether there were any exceptions to that principle or, in other words, to establish whether there were any organs whose conduct might not be considered as an act of the State.

42. In the past, the tendency of practice, jurisprudence and, above all, doctrine had been to consider that only organs responsible for external relations could commit acts which could be regarded as acts of the State giving rise to international responsibility. More recently, however, it had been found that that view was untenable and that the conduct of organs responsible for internal activities could also give rise to international responsibility. According to another school of thought, now also generally abandoned, only the acts of organs other than legislative and judicial organs should be taken into consideration for purposes of attribution to the State from the international standpoint. The impunity of legislative organs was claimed to be justified by State sovereignty and the primacy of internal law, and that of judicial organs by the independence of the judiciary. Lastly, certain writers and some arbitrators had made a distinction between the conduct of superior organs and that of subordinate organs.

43. The first question to be settled, therefore, was whether it was only the conduct of organs of certain sectors of the State that could constitute an act entailing international responsibility. Practice and doctrine showed that such was not the case and that the conduct of all organs of the State—constituent, legislative, executive, judicial and others—could involve the State's international responsibility.

44. For example, if a State failed to enact certain legislation which it had committed itself by treaty to enact, that omission would obviously be an internationally wrongful act which might involve its international responsibility. Moreover, acts by legislative organs could give rise to responsibility for another reason; for the rules of international law often imposed an obligation without expressly stating that legislative measures had to be taken to fulfil it, but the absence of such measures made it impossible to fulfil the obligation and thus caused the State to commit an internationally wrongful act. With regard to the judicial power, it had been amply demonstrated by writers that the acts of its organs could engage the international responsibility of the State. The principle of the unity of the State, in other words, the principle

that there was no distinction to be made between the different branches of power when it came to considering the conduct of an organ as an act of the State from the standpoint of international law, was firmly established by doctrine, jurisprudence and State practice, as members could see from paragraphs 145-149 of his third report.

45. It remained to be seen whether, for the purpose of attributing to a State conduct capable of generating international responsibility, a distinction should be made between "superior" and "subordinate" organs in accordance with a theory of which Borchard had been the principal upholder, but which had now been abandoned. That theory had been largely based on confusion with the application of the rule of the exhaustion of local remedies, according to which there was no violation of an international obligation so long as there remained, at the internal level, an organ capable of securing its fulfilment. Admittedly, an act was not finally characterized as internationally wrongful so long as local remedies had not been exhausted, but it was considered as an act of the State from the beginning. For supposing that the act or omission of a subordinate organ was confirmed at every successive stage and it had to be finally declared that the State had committed an internationally wrongful act, it would not be the final decision at the highest level which conferred its wrongful character on the act, but the combined conduct of the different organs starting with that of the subordinate organ.

46. The confusion arose from the fact that the problem was stated not, as it should be, in terms of attribution to the State of the conduct of the organ, but directly in terms of responsibility. In terms of attribution, the act or omission of a subordinate organ was an act of the State. Moreover, as members could see from paragraphs 153-160 of his third report, State practice, jurisprudence and doctrine no longer made any distinction based on the rank of organs of the State for purposes of attributing conduct to the State. Were it otherwise, the Commission would have to engage in progressive development of international law by taking a stand against such a criterion.

47. Lastly, it went without saying that no distinction should be made between State officials according to where they worked or whether their duties were permanent or temporary, remunerated or honorary.

48. Mr. KEARNEY said there could be no doubt about the substance of article 6, as formulated by the Special Rapporteur, unless one invoked the theory of the late Professor Borchard, which seemed to have been generally abandoned some time ago.

49. The article did raise certain drafting problems, however, particularly for common-law countries, because it was drafted in the form of a rule of evidence rather than a direct or positive rule. Apart from that, the only real problem was whether the three "questions" in the article concerning the organ of the State were sufficiently inclusive. In his opinion, the relative totality of governmental power was satisfactorily covered by the categories listed by the Special Rapporteur.

50. He proposed that article 6 be revised to read:

The act or omission of any organ of the State is conduct of the State under international law

(*a*) Whether that organ is exercising constituent, legislative, executive, judicial or any other governmental power;

(*b*) Whether its activities are internal or international in character;

(*c*) Without regard to the position of the organ in the structure of the State.

51. Mr. USHAKOV, reverting to article 5, said that organs, like the persons who formed them, could change or disappear, but their acts remained. Perhaps the Drafting Committee should try to express that idea by referring to persons "who are, or were, organs".

52. With regard to article 6, he approved of the use of the words "or other", but wondered whether it might not be desirable to express the idea—which might not be evident in the other possibilities covered by those words—that what was meant was the exercise of the public power.

53. In the French version, it would be better to speak of the "*caractère*" of the functions rather than their "*nature*". Furthermore, there was no point in making a distinction, sometimes difficult to establish, between international and internal functions; it would be better just to say something like "regardless of the character of its functions".

54. Mr. RAMANGASOAVINA said he approved of the substance of article 6. As to the drafting, it would be more logical to reverse the order of the various parts of the sentence in the French version and say: *Aux fins de la considération du comportement d'un organe comme un fait de l'Etat sur le plan du droit international, ledit organe peut appartenir indifféremment au pouvoir constituant, législatif, exécutif, judiciaire ou autre, ses fonctions être de caractère international ou interne, et sa position supérieure ou subordonnée dans la hiérarchie de l'organisation de l'Etat.* That formulation was more direct than the present wording. The Drafting Committee would have to see that the other language versions were harmonized.

55. Mr. HAMBRO said he agreed with nearly all the points made by the Special Rapporteur in his introduction of article 6. He also agreed with much of what Mr. Kearney had said, though he was inclined to wonder whether his proposed redraft did not sin by oversimplification.

56. He hoped the commentary to the article would mention, for the benefit of the general reader, what the Special Rapporteur had said about local remedies with reference to the question whether the organ held a superior or a subordinate position in the hierarchy of the State.

57. Mr. SETTE CÂMARA said he agreed with the substance of article 6 as submitted by the Special Rapporteur, because his formulation embodied the principle of the unity on the State with respect to its international responsibility.

58. As to the drafting, however, in the phrase "the constituent, legislative, executive, judicial or other power", he questioned the use of the word "power". Since most State constitutions still adhered to Montesquieu's conception of the tripartite structure of the State, was it possible to speak of such a thing as the "constituent power"? The constituent authority was, of course, at

one time the very basis of a State, but once the constitution had come into force, that authority became the legislative power.

59. There could be no doubt that the legislative, executive and judicial branches of a State could commit internationally wrongful acts, but sometimes such acts were committed by one branch against the will of another. The executive power of his own country, for example, had on one occasion wished to abide by a certain international obligation, but had been over-ruled by its own Supreme Court.

60. In his opinion, it was clearly not important whether the functions of the organ were of an international or an internal character. It was likewise irrelevant whether the organ held a superior or a subordinate position in the hierarchy of the State, since sometimes a minor employee, such as a Customs official, could commit an internationally wrongful act of a serious nature.

61. He suggested that the Commission approve article 6 provisionally and refer it to the Drafting Committee.

62. The CHAIRMAN,* speaking as a member of the Commission, said that were it not for differences of opinion on points of detail, it might be considered that article 6 was superfluous and that a fuller commentary to article 5 would suffice. But in view of the differences of opinion to which the application of the rule set out in article 5 had given rise at certain times, it was preferable to retain article 6.

63. Everything stated in article 6 was correct. It was essential to provide, by using the words "or other", for the possible existence of powers other than the constituent, legislative, executive and judicial powers, which might be established by the constitutions of some countries. It was useful to mention the constituent power, since positive law now recognized that the constitution formed an integral part of the internal law of a State, whose responsibility might be engaged if a provision of its constitution was contrary to an international obligation. It was also useful to mention the judicial power, for although people talked about the independence of the courts, there were nevertheless abundant cases on record in which denial of justice appeared as a cause of State responsibility. Lastly, it had to be stated clearly, as was done in article 6, that the international or internal character of the functions of the organ and its position in the hierarchy played no part in the attribution of an act to the State. Borchard's theory was unacceptable and, besides, it was incompatible with the rule in article 5.

64. He therefore approved the substance of article 6 and would leave it to the Drafting Committee to review the wording.

65. Mr. ELIAS said he agreed with other speakers in finding the substance of article 6 acceptable. Like Mr. Kearney, however, he thought that it should be reworded in such a way as to avoid enumerating three characteristics of the organ of the State and then concluding that they were all irrelevant. He himself could not recall any provision in a draft convention which stated a rule of law in quite that way.

66. He proposed that article 6 be revised to read:

The attribution to a State of the internationally wrongful act of its organ is not affected by the fact that

(*a*) The organ belongs to the constituent, legislative, executive, judicial or other power;

(*b*) Its functions are of an international or internal character; or

(*c*) It holds a superior or a subordinate position within the State.

67. That formulation would avoid the use of the expression "act of the State", which countries with common-law systems might find it difficult to accept. It would also omit the reference to "hierarchy", and perhaps some other word could be found to replace the word "power".

68. The CHAIRMAN suggested that article 6 be referred to the Drafting Committee, on the understanding that the Special Rapporteur would reply at a later meeting to the various points that had been raised and that his remarks would be communicated to the Drafting Committee.

It was so agreed.[3]

The meeting rose at 1.10 p.m.

* Mr. Yasseen.

[3] For resumption of the discussion see 1215th meeting, para. 3.

1214th MEETING

Friday, 25 May 1973, at 10.5 a.m.

Chairman: Mr. Mustafa Kamil YASSEEN

Present: Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Pinto, Mr. Ramangasoavina, Mr. Sette Câmara, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat.

Most-favoured-nation clause

(A/CN.4/213; A/CN.4/228 and Add.1; A/CN.4/257 and Add.1; A/CN.4/266)

[Item 6 of the agenda]

1. The CHAIRMAN invited the Special Rapporteur to introduce his third and fourth reports on the most-favoured-nation clause (A/CN.4/257 and Add.1; A/CN.4/266).

2. Mr. USTOR (Special Rapporteur) said that the idea that the Commission should study the most-favoured-nation clause had originated in 1964, during the discussion on the law of treaties at the sixteenth session. Mr. Jiménez de Aréchaga had then proposed that a provision on the most-favoured-nation clause should be included in the draft on the law of treaties to ensure that the clause was formally reserved from the operation of the articles dealing with the problem of the effect of