Document:-

A/CN.4/SR.1305

Summary record of the 1305th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1975, vol. I

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.*

some such wording as "... and could be effectively challenged". The addition of those words would obviate the question raised by the reference, in the concluding words of paragraph 2, to the "manifest" character of the organ's lack of competence: should the lack of competence be "manifest" to the persons who took the injurious action, to the person who suffered the injury, or to the international tribunal which later adjudicated the claim?

12. The addition of the words he had suggested might also cover the important point raised by Mr. Ushakov at the previous meeting. It was clearly very difficult to formulate rules to cover all the wrongful acts of the State, both those traditionally covered by the law governing the protection of citizens abroad and the much more serious acts to which Mr. Ushakov had referred, such as agression, breaches of the peace and violations of fundamental rules of international law.

13. The Commission had not yet discussed the question of aggression and other violations of fundamental norms of international law. Those matters would be studied very carefully when it came to consider the second part of the draft on State responsibility. The Commission might then have to revise some of the rules or introduce new rules to cover the cases in question. At the same time, it was clear that most of the cases which would have to be dealt with in the future, either by international tribunals or by diplomatic negotiation, would arise out of injuries to individual aliens rather than out of major violations of international law.

14. The general rule applicable to all cases, however, was that the State could not evade responsibility by pleading that its leaders had acted outside their competence or contrary to the State's constitution or laws. It should be made absolutely clear that no overstepping of competence could relieve the State of responsibility.

15. Mr. TAMMES said that article 10 was the culmination of a long legal history. The Special Rapporteur's scholarly analysis threw light on the general trend in the development of international law: the concept of the internal legal condition of the State had given way gradually to that of its external manifestation, just as in law generally the notion of the will of the subject of law had been replaced by that of the expression of that will.

16. In the theory and practice of State responsibility, that primacy of external acts over internal conditions, such as constitutional limitations, had lagged considerably behind, because of the political situation of the past, to which Mr. Martínez Moreno had referred. It was in self-defence against strongly pressed claims that States had over-emphasized internal conditions. Times had changed, however, and draft article 10 adequately reflected the evolution of international legal thinking, which was also expressed in articles 27 and 46 of the Vienna Convention on the Law of Treaties—provisions in which the validity of external acts clearly prevailed over the internal law of the State. [5]

17. Subject to possible drafting refinements, he therefore saw no objection to paragraph 1 of article 10, which was a remarkable contribution by the Special Rapporteur to legal clarity and to security in international relations.

18. Paragraph 2, on the other hand, raised difficulties, because of the link it established between the act of the State and the manifestation of that act as an act of the State. It was true that the criterion of manifestness was appropriate in article 46 of the Vienna Convention on the Law of Treaties, but that provision operated in the context of good faith: if it was evident to a contracting party that the other party had no competence to conclude treaties, the former could not complain if invalidity was subsequently invoked. In the context of State responsibility, however, the situation was different. States were simply confronted with acts of other States, regardless of the question whether those acts could be believed to be acts of State. Only in rare cases did the credulity of the injured alien play a part.

19. He thought the last part of paragraph 2 was better suited to the relatively minor cases, which called for the exercise of diplomatic protection, than to major violations of the fundamental rules of international law which safeguarded international peace and security. In the latter cases, to which Mr. Ushakov had referred, there could be no doubt that it was only by making use of its "specific functions"—to use the language of paragraph 2—that a State organ could have at its disposal the means of breaking the peace. Since both types of case were likely to occur in the future, the only question that arose was whether the issue should be dealt with in article 10 or in the provisions to be considered at a later stage, dealing with major violations of international law.

20. Mr. RAMANGASOAVINA said that the situation covered by article 10 was at the limit of cases in which a State could incur responsibility for acts or omissions by its organs or agents. The difficulty was due precisely to the fact that extreme cases were involved. The basic idea underlying paragraph 1 had emerged at the beginning in the twentieth century, despite some hesitation, and had become established in the sixties. It was now generally accepted and could be formulated in several ways, all of which amounted to affirming the responsibility of the State for acts of its organs or of entities vested with governmental authority. It was not easy to choose between the different formulations, for wording that was too categorical might have disadvantages. There could, indeed, be abuse of competence by agents empowered to exercise elements of governmental authority. Thus when an organ or agent of the State exceeded its competence under internal law or broke the rules of that law concerning its activity, the State should not be held responsible. But when such agents were apparently competent or possessed the necessary means to perform their task, it was difficult for private persons to distinguish between their apparent and their real authority. He therefore approved of the wording proposed by the Special Rapporteur in paragraph 1 of article 10, which, although not entirely satisfactory, was better than the other formulas proposed.

21. The limitation imposed in paragraph 2 raised a problem, since in most cases it was very difficult to determine whether an organ's lack of competence was

[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) pp. 293 and 295.

manifest. Moreover, there were cases in which agents of the State normally vested with authority and acting in accordance with the provisions of internal law, could become personally liable if they committed internationally wrongful acts. For example, according to the Nuremberg principles, military personnel must, in certain cases, disobey their superiors and contravene military discipline in order not to be guilty of war crimes.

22. The basic idea of article 10 was therefore acceptable to him, though he appreciated that it was very difficult to formulate, because the provision must be neither too general nor too restrictive. The word "nevertheless" in paragraph 1 seemed inappropriate, because there was no opposition between article 10 and the preceding articles, which, from article 5 onwards, also dealt with cases in which the conduct of an organ of the State was treated as an act of the State under international law. He suggested that since article 10 also affirmed the responsibility of the State, the word "nevertheless" should be replaced by the word "also".

23. He approved of the terms used in paragraph 2, although he understood why some members might doubt the advisability of including a paragraph that limited the responsibility of the State where the act had been committed by an agent whose lack of competence was manifest and who had accordingly acted merely as a private person.

24. Mr. YASSEEN said that, in tracing the history of the question of State responsibility, the Special Rapporteur had outlined the development of the international community and of the functions of the State. The solutions adopted had differed because of the differences in the situations and in the roles assigned to the State. The examples cited by the Special Rapporteur in the early part of his commentary showed that the international community had by no means been founded on the sovereign equality of States. Owing to the flagrant inequality of States at the time, cases of responsibility had been the occasion for a display of authority by some, and for excessive reaction by others, which had often led to denial of responsibility. In many of the cases cited by the Special Rapporteur, one of the opposing States had been in a position to impose a settlement, while the other had had to do all it could to avoid complying with the excessive demands of the adverse party. Hence those cases could not provide the basis for a general rule solving the problem of responsibility. But as the international community had evolved towards increasing equality of States, the solutions adopted had eventually become balanced and had reflected the objective reality of the situation and the requirements for a harmonious settlement. With the growth of State powers, it had now become possible to hold a State responsible for the acts of its organs, even if they had exceeded their competence or acted contrary to government instructions. The only acceptable rule was that the State could not evade its responsibility by claiming that the accused organ had acted contrary to instructions: if the organ had appeared to be a State organ when it had acted, that was enough to engage the responsibility of the State.

25. Thus paragraph 1 of article 10 was not controversial for it stated a principle which was now accepted: the State could no longer invoke internal law to deny its international responsibility, because the acts of its organs were attributable to the State even if they had exceeded their competence according to internal law. But the cases covered by article 10 arose in a particular sphere of State responsibility: that of responsibility for the treatment of foreigners. Could the principle applicable to the treatment of foreigners be extended in general to all forms of responsibility? On that point, he shared Mr. Ushakov's view that neither the principle of article 10 nor the exception to that principle could apply to certain conduct by State organs which was not concerned with the treatment of aliens—for example, acts of aggression committed on the orders of an organ which manifestly lacked competence to give such orders. Could the principle concerning the treatment of foreigners be erected into a general principle applicable to all activities of State organs? Obviously that principle could not be absolute, since logic imposed certain limits on it. The State could not be held responsible for an act committed by one of its organs if, by reason of the nature or the circumstances of the act, that organ could not be regarded as an organ of the State. But could the criterion of the "manifest" lack of competence of the organ, laid down in paragraph 2 of article 10, be applied to limit the principle of State responsibility? For one thing, that criterion might be interpreted subjectively—that was why the Vienna Conference had been careful to define the meaning of the term "manifest" as used in the Convention on the Law of Treaties. [6] Secondly, it was open to question whether the criterion of manifest lack of competence was sufficient to relieve the State of responsibility. That was far from certain, for it was sometimes impossible, even where the lack of competence was manifest, not to attribute to the State the act of a State organ in so far it had acted as such. That concern was apparent in the texts cited in the Special Rapporteur's commentary. Some writers maintained that the lack of competence should be so manifest that it could be stated with certainty that the organ had not acted as an organ of the State.

26. In addition, other conditions had to be fulfilled before the State could be relieved of responsibility: the organ must not have used means placed at its disposal by the State and the injury must have been avoidable. If the means of constraint used by the organ of the State were such that the victim could not avoid the injury, the State must be held responsible, even if the organ's lack of competence was manifest. The discretionary power of the State to choose its organs was, in that respect, the very basis of its responsibility: if the organs of a State exceeded their competence, the State was answerable for their acts in so far as it had been negligent in choosing them or remiss in supervising their activities. Hence, it was not enough to say that the organ's lack of competence had been manifest and that its conduct had been wholly foreign to its functions; the Commission should adopt the viewpoint of the victim, in order to protect the individual. Other criteria should therefore be added to that of manifest lack of competence laid down in para-

[6] *Ibid.*, p. 295, article 46, para. 2.

graph 2, in order to cover two important factors: the use of means placed by the State at the disposal of its organ as such, and the inability of the victim to avoid the injury sustained.

27. Mr. QUENTIN-BAXTER said that State responsibility had always been a discouraging subject for scholars, because of the fragmentary nature of the material available, the sporadic precedents, the uncertainty of the underlying principles and the arbitrary circumstances affecting recourse to adjudication. The admirable commentaries prepared by the Special Rapporteur, however, showed that there was a greater wealth of background material than might at first be thought. There could be no question as to the basic principle, set out in paragraph 1 of article 10, of the primacy of international law over internal law. It was an indisputable proposition that the State could not plead the defects of its own system or its own legal order to justify conduct that caused injury to others.

28. The Special Rapporteur had made a remarkable analysis of the varying tests and criteria which had been adopted by arbitral tribunals or applied in State practice. He agreed with the Special Rapporteur's conclusion that it would be unwise to adopt one or more of those criteria in the text of article 10.

29. The notion of apparent authority called for some comment, because it had played a large part in the evolution of ideas on the responsibility of the State. The notion was valuable in that it did not allow the respondent State an easy escape from responsibility: the State could not excuse itself by denying that it had approved the conduct of its agents.

30. He agreed with the Special Rapporteur that it would be desirable to define the limits beyond which agents acted not in their official capacity, but as private persons. That idea and the history of the earlier drafts were essential to an understanding of the construction of the present article 10 and of its division into two parts.

31. Paragraph 2 of the article, as he saw it, was intended to strengthen the provisions of paragraph 1, not to weaken them. The words "while acting in its official capacity" introduced an element of balance into paragraph 1 and made it possible to argue that a particular case was not one of lack of competence, but of failure to act in an official capacity. Cases of that kind occurred quite often in practice, so care should be taken to ensure that the provisions of paragraph 1 were not abused.

32. The weakness of the notion of apparent authority was that it seemed to place the emphasis on form rather than substance—on appearance rather than reality. A great many of the cases cited in the Special Rapporteur's commentary, on the other hand, illustrated very well the notion of a substantial connexion. An obvious example was the *Youmans case* (A/CN.4/264, para. 40), in which that notion emerged time and time again through the varying reasons given in the award. The soldiers, who had come in response to superior orders, had obviously not been mere assassins who happened to be soldiers. The essential point was the substantial connexion between the role of the agent as an organ of the State and the misuse of authority, and that was the point which, in his opinion, should be stressed in article 10.

33. Although as a general rule he did not favour analogies from internal law, he was tempted to draw such an analogy in the present context. In internal law, sovereign immunity had been progressively curtailed and governments had become subject to the same legal controls and judicial processes as private citizens. At the same time, the notion of the responsibility of a commander or an employer had emerged progressively in regard to events occurring in the course of employment. He discerned a parallel between the concept of "in the course of employment" in internal law and that of "in the course of official functions" in international law. In that context, State responsibility should be interpreted widely.

34. The remarks made by Mr. Martínez Moreno and Mr. Ushakov at the previous meeting were a reminder of historical factors which affected some areas of the law. Mr. Martínez Moreno had stressed the impact of intervention and inequality between States on the development of the law governing the duties of States towards aliens.

35. The Commission had decided, some years previously, to prepare a draft in general terms not related solely, or even primarily, to the duties of States towards aliens. One advantage of that decision had been to place those duties in a new context that would enable States to escape from the bondage of history. It was true that most of the precedents relating to State responsibility concerned the treatment of aliens—inevitably so, for it was in that area that most of the litigation had occurred. It would be generally agreed, however, that those precedents could be reflected in more general terms in the broader context of State responsibility. He firmly believed that it was possible to arrive at that result.

36. That being said, he believed that the first part of paragraph 2 of article 10 was a necessary complement to paragraph 1. As he read paragraph 2 and the Special Rapporteur's commentary on it, he found that the words "wholly foreign to the specific functions" kept the exception in paragraph 2 within quite narrow limits. The provisions of paragraph 2 provided a necessary balance to paragraph 1, since the State could not escape responsibility for acts committed by an organ "in its official capacity"—to use the words in that paragraph 1—unless the acts in question were "wholly foreign to the specific functions of the organ" as stated in paragraph 2. Those remarks would, of course, apply mostly to cases relating to treatment of aliens, but they were not confined to such cases; to give but one example, the misbehaviour of a sailor on leave in a foreign port might cause injury to local inhabitants.

37. He had serious doubts, however, about the last part of paragraph 2. The concept of "manifest" lack of competence unnecessarily widened the scope of the exception. The *Mantovani case* (A/CN.4/264, para. 29) was a good illustration; the lack of competence of a police officer to make an arrest in the territory of a foreign country was "manifest", but that was not a good reason for excusing his State from international responsibility.

38. Subject to those remarks, he thought the text of article 10 represented a long step forward on a difficult road.

39. Mr. BILGE noted that all the members of the Commission seemed to agree with the principle stated in article 10, paragraph 1, although some of them had raised questions about the generality of its scope.

40. As the Special Rapporteur had pointed out, article 10 was linked with other provisions of the draft, in particular to articles 5 and 6 (A/9610/Rev.1, chapter III, section B). According to article 5, the conduct of any organ of a State acting in its capacity as an organ, was attributable to that State. That was the provision which should apply to the general cases mentioned by Mr. Ushakov and Mr. Yasseen, including the case in which a Head of State, not being competent to do so, ordered an act of aggression against another State. For article 5 should apply to all cases in which an organ acted in its capacity as an organ, whether it was competent or not. Article 6 provided that the position of the organ in the organization of the State was immaterial for the purposes of the rules governing State responsibility. Article 10 showed a certain parallelism with article 6, since it provided that it was likewise immaterial whether the organ in question had exceeded its competence or contravened the rules of internal law concerning its activity. Thus article 10 introduced a clarification in keeping with the requirements of equity, since every crime must be punished and every injury must be compensated.

41. He found the general rule entirely acceptable, but doubted whether the capacity of the organ should be qualified as "official". The essential point was that the organ should have acted in its capacity as an organ. States could not, of course, be expected to answer for all acts or omissions committed in their territory. The acts of their organs could be attributed to them, but not the acts of private persons. As the Special Rapporteur had said, the rule in article 10 fell half way between two other rules: the rule that the acts of an organ which acted within the limits of its competence were attributable to the State and the rule that the acts of private persons could not be attributed to the State. According to article 10, if an organ of the State, acting as such, exceeded its competence or contravened the rules of internal law concerning its activity, its conduct was nevertheless attributable to the State. That principle must be restricted, however. Some members of the Commission had tried to show that the concept of "functions" could help to determine whether the organ had really acted in its capacity as an organ. In paragraph 2 of article 10, the Special Rapporteur had specifically referred to the criterion of functions in order to place a limit on the general rule and to exclude cases in which the organ had manifestly not acted in its capacity as an organ.

42. In his opinion capacity as an organ was a better criterion than specific functions. Article 10, paragraph 2, stressed the functions of the organ, not its capacity or loss of capacity. When considering article 5, the Commission had decided that the status of an organ would depend on internal law. He considered that the question whether an organ was really acting in its capacity as an organ, or whether it had lost that capacity, should not be settled by internal law. For the sake of the security of international relations, once the status of organ of the State had been conferred by internal law, States should be able to rely on that situation. On the other hand, if it was manifest that an organ had not acted in its capacity as an organ or that it had lost that capacity, its conduct could not be attributed to the State to which it belonged. That was the approach which, he thought, should be adopted in the drafting of article 10, paragraph 2.

43. Mr. SETTE CÂMARA said that the detailed and exhaustive commentary by the Special Rapporteur provided very sound support for the principle underlying the proposed article 10. It would indeed be inadmissible in modern times to question the rule that the State was responsible for the acts of its organs or of entities empowered to exercise elements of the governmental authority, which, acting in their official capacity, exceeded their competence under internal law or contravened the rules of that law concerning their activity. The commentary demonstrated beyond doubt that the nineteenth-century view that States were exempt from responsibility in such cases had long been discarded. Modern thinking, which aimed at ensuring peaceful relations between States through a clear statement of the theory of responsibility, tended to reject any position which would leave a State room to evade its international responsibility for the acts of its organs. In that sense, the general principle embodied in article 10, paragraph 1, was, in his view, in complete harmony with the approach adopted in the draft articles, which was based on what the Special Rapporteur had described as "the whole of responsibility and nothing but responsibility".

44. The replacement in the revised draft of paragraph 1 of the term "public institution" by the more comprehensive phrase "entity empowered to exercise elements of the governmental authority" corresponded to present-day reality. Mr. Ushakov had contended that the responsibility of the State for *ultra vires* acts should be confined to acts of the organs of the State and should not be extended to those of other entities; [7] it was, however, through the ever-increasing number of such entities that a modern State performed a multitude of activities that had formerly been performed by private persons, and the purposes of the general principle stated in paragraph 1 would be defeated if a State could evade its responsibility for activities entrusted to public enterprises which could not properly be considered organs of the State.

45. It should not be forgotten that the reason behind the doctrine of State responsibility for *ultra vires* acts was that the stability of international law required something sounder than the rules of competence under internal law, which a State could alter to suit its own convenience. In that respect, a cornerstone of the system evolved by the Special Rapporteur was the principle that the responsibility of States under international law had no connexion with, and frequently superseded, their responsibility under internal law. He therefore regarded the examples of Latin American practice cited by Mr. Martínez Moreno

[7] See previous meeting, para. 27.

as relics of the time when it had been believed that, in order to avoid abuses by the great Powers, a general formulation of the principles of responsibility should respect the peculiarities of regional practice and the provisions of individual constitutions. If a similar approach were adopted today, it was very doubtful whether it would ever be possible to agree on a rule that would satisfactorily cover the broad principle of integral responsibility of States for wrongful acts. Fortunately, the circumstances which had given rise, in a legitimate reaction, to the Drago doctrine and the Calvo clause, no longer obtained.

46. While, subject to minor drafting changes, he fully approved of the terms of paragraph 1, he had doubts about paragraph 2. That paragraph was based on the so-called United States tradition, established by Secretary of State Bayard (A/CN.4/264, paras. 14 and 15), according to which a State was exempt from responsibility when the *ultra vires* character of the acts of individuals or organs acting in its name was too obvious to be ignored by the other interested parties. Through the works of European writers, that doctrine had influenced the formulation of article 8, paragraph 2, second sub-paragraph, of the draft articles adopted by the 1930 Codification Conference (*ibid.*, para. 50) which he found clearer than the paragraph proposed by the Special Rapporteur.

47. He agreed with previous speakers who considered that paragraph 2 was unnecessary. It weakened the general principle of responsibility for *ultra vires* acts, and did so unnecessarily: if an act was "by its very nature" outside the competence of an organ or entity, the lack of competence would be so obvious and striking that the act would be seen as the conduct of a private person acting as such, and would come within the scope of a different article. Should the majority of the Commission be in favour of retaining the idea contained in paragraph 2, he would prefer it to be expressed in paragraph 1, in wording similar to that adopted by the Hague Conference or the learned societies mentioned in the Special Rapporteur's report. As paragraph 2 stood, it constituted an escape clause for States wishing to evade their responsibility and thus departed from the intention of the article to close all such loopholes.

48. Mr. EL-ERIAN said he agreed with the principle of draft article 10 and associated himself with those speakers who had stressed the importance of safeguarding the basic principle that a State should not, in any circumstances, be able to evade its international responsibility or invoke certain pretexts to escape its international obligations. The principle was all the more important because the Commission had decided to extend the scope of the draft articles beyond the traditional context of international responsibility for the maltreatment of aliens.

49. With regard to paragraph 1, he took it that the expressions "organ of the State" and "entity empowered to exercise ... authority" covered what, for instance, was meant by the phrase "official, or employee of the State acting within the scope of the ... authority", used in the Harvard Codification draft quoted by the Special Rapporteur (A/CN.4/264, para. 47).

50. Like other members of the Commission, he had doubts about the exception provided for in paragraph 2. His difficulty did not arise from the reference to "manifest" lack of competence; the Special Rapporteur had pointed out that it would be desirable to keep the wording of article 10 in line with that of article 46 of the Vienna Convention on the Law of Treaties. Furthermore, the word "manifest" was also used in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. [8] In his view, there was no objection to using the word since, for the purposes of legislation at least, the idea of something being "manifest" was recognized in both internal and international law; the task of defining the exact scope of the term could be left to the courts. Perhaps the doubts expressed about its use could be dispelled by using the phrase adopted by the 1930 Codification Conference, "... so apparent that the foreigner should have been aware of it and could, in consequence, have avoided the damage" (*ibid.*, para. 50).

51. He agreed with Mr. Sette Câmara that it would be better to delete paragraph 2. If a majority of the members of the Commission wished to retain an exception, it should be further restricted. There were two points to be borne in mind. First, the analogy with the law of treaties could not be applied *stricto sensu*, because of the difference between the position of an individual who wished to bring a claim against a State and that of a State considering similar action within the context of a treaty relationship. Secondly, while article 10, paragraph 1, related to the conduct of organs acting in their official capacity, but exceeding their competence, and article 11 related to the conduct of private individuals, there could be a third class of cases in which an organ manifestly exceeded its competence or manifestly broke the law concerning its activity. In his view, the responsibility of the State in such cases was not vicarious, and did not arise only if the State had neglected to prevent a wrongful act. Nor should the organ in question be regarded as an individual by reason of the fact that it had acted outside its competence. On the contrary, the mere fact that the author of the act was an organ of the State meant that the State was responsible for his conduct, although the responsibility would naturally not be the same as if the organ had acted within its competence.

The meeting rose at 1.05 p.m.

[8] A/CONF.67/16, article 77, para. 2.

1306th MEETING

Friday, 9 May 1975, at 10.45 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.