Document:-

A/CN.4/SR.1075

Summary record of the 1075th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

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Assembly, and not only through the comments of governments, but also through consultations initiated by the Commission. The reciprocal visits of the Chairman of the Committee and the Chairman of the Commission provided an opportunity for studying possible ways of extending the co-operation which had been established.

51. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the observer for the Asian-African Legal Consultative Committee for his interesting statement. He himself had found the Committee's work on the subject of the international sale of goods particularly interesting. He shared the hope expressed by other speakers that the Commission would be represented at future sessions of the Committee.

The meeting rose at 6.10 p.m.

1075th MEETING

Tuesday, 23 June 1970, at 10.10 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]

(resumed from the previous meeting)

1. The CHAIRMAN invited Mr. Ago to resume the introduction of his second report on State responsibility (A/CN.4/233).

2. Mr. AGO (Special Rapporteur) said that the third section of his report dealt with the capacity to commit international illicit acts, a concept particularly dear to German jurists.

3. First of all, the word "capacity" must not be understood in the sense of a faculty or power conferred by law: that had been the mistake made by certain German writers, who had regarded delictual capacity as a particular aspect of the broader concept of the capacity to act. It was, indeed, absurd to suppose that the law could confer the power to violate the rules which it laid down. The terms used—whether "delictual capacity" or "capacity to commit illicit acts"—could therefore be no more than a convenient way of expressing the idea that a State which was materially able to exercise an activity in a given sector was also materially able to commit a breach of its international obligations in the exercise of that activity. It was practically certain that every State had that ability. The Commission, which for the time being was considering only the responsibility of States, need not concern itself with the question whether other subjects of law also had that ability. Moreover, the Commission should not allow itself to be drawn into formulating a rule on that point corresponding to article 6 of the Vienna Convention on the Law of Treaties,[1] which dealt with the capacity to conclude treaties, since the concept was entirely different. What was called "delictual capacity" really had nothing to do with the capacity to act or with any kind of legal power.

4. That being so, the only problem which might arise was that of possible limits to the capacity to commit international illicit acts. In that connexion, certain problems known under the name of vicarious responsibility or responsibility for the act of another must be left aside at once. There might be cases in which, because of a special situation, one State exercised control over the activities of another State and was answerable in its place for any international illicit act the other State might commit. In such cases, there were no limits to the capacity to commit international illicit acts; it was the responsibility which the law attached to such acts that was imputed to a subject other than the author of the delinquency.

5. Similarly, there appeared to be no need to refer to the situation of States members of a federal union, first, because it was evident that any State of that kind which had retained even limited capacity to make agreements with States outside the federation was usually *ipso facto* capable of keeping or violating the undertakings it had thus entered into, and, secondly, because federal States were generally opposed to any reference to a separate international personality of the States members of the federation.

6. The real limits to the capacity to commit international illicit acts must therefore be sought elsewhere. There was a whole series of situations in which the activity of one State might be superimposed on that of another State in its own territory. That happened in the case of protectorates, for example, which had not entirely disappeared; in the case of military occupation, not necessarily in time of war, but also following a state of war which had ceased to exist, or even in time of peace; and when the subject exercising the activity in place of the State was not another State, but an international organization. The occupier might replace certain administrative or judicial organs of the occupied State by elements of its own administration, and if the latter committed a breach of an international obligation of the occupied State it was obvious that the delinquency must be imputed to them. That was not a case of vicarious responsibility, but of original responsibility of the State

[1] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).

exercising the activity, and there was therefore a limit to the delictual capacity of the occupied State.

7. It might be asked whether it would not be better to refrain from mentioning those situations, as had been done in the case of the capacity to conclude treaties, because they were transitory. His answer was in the negative, because, first, some of those situations were not likely to disappear and, secondly, although it might be juridically correct and politically useful to say that, in certain cases, the capacity of a State to conclude treaties was not affected, that did not apply to illicit acts, for if the abnormality of the situation was ignored, there was a danger of imputing the illicit act to a State which could not possibly have committed it, and thus making a gift of impunity to the State which was really guilty. The Commission did not have to take a decision on that question immediately, but it would do well to reflect on it before adopting a final text. For the time being, he was submitting article III, which appeared in paragraph 64 of his report, and would refer the Commission to the two questions relating to section III of chapter I which he had asked in the questionnaire introduced at the previous meeting.

8. With regard to the continuation of the work, the report he would submit to the Commission at its next session would comprise the part relating to problems of imputation of responsibility. After defining the two basic elements constituting the international illicit act as a source of responsibility, the next step was to inquire in what cases an activity—an act or an omission—could be imputed to a State which was a subject of international law as an act giving rise to responsibility. The questions to be successively answered would be: What organs of the State could commit illicit acts? What attitude should be taken to acts committed by organs of the State in breach of its internal law or beyond the limits of their competence? What attitude should be taken to acts of organs of public institutions other than the State, acts of individuals acting for the State in specific sectors, and so on? Then it would be necessary to examine the objective element of responsibility, in other words to determine in what conditions an act imputed to a particular State could be defined as failure to fulfil an international obligation. That introduced the problem of fault *(culpa)*, the question of the exhaustion of local remedies and other questions such as the relationship between conduct and events in international delinquencies. In that context there also arose the problem of the *tempus commissi delicti*. Lastly, to conclude the first part of the study of responsibility, would come an examination of the circumstances in which certain conduct was not of an illicit character and, hence, did not give rise to responsibility. In the light of those remarks, he asked members to answer the last question in his questionnaire, namely, whether the Commission accepted the broad outline of the plan he had suggested and the method he had followed.

9. Mr. RUDA said that the Commission was confronted with a very difficult problem; it had already defined what might be called the primary rules, but it now had to deal with the secondary rules—those which determined the consequences of the non-fulfilment of obligations established under the primary rules.

10. In considering the three important draft articles proposed by the Special Rapporteur, he wished to draw particular attention to the statement, in paragraph 10 of his report, that they were being put forward "with a view to the eventual conclusion of an international codification convention". In the same paragraph, the Special Rapporteur had said that the positions taken by international law writers would be mentioned, "having particular regard to the most recent trends in different countries". Then, in paragraph 24, he had gone on to say that the principle to be established from the outset was "the unitary principle of responsibility, which it should be possible to invoke in every case".

11. In his questionnaire the Special Rapporteur had invited the Commission's views on three fundamental problems, namely, the sources of State responsibility, the conditions in which the international illicit act existed and the capacity to commit such acts.

12. Article I aptly reflected the notion of the illicit act as a source of responsibility, and the fundamental rule that any conduct of a State regarded by international law as an illicit act involved international responsibility on the part of that State. The Special Rapporteur had correctly justified that rule by invoking the existence of an international juridical order and the obligations which that order imposed on States; he had made a most interesting analysis of the theories that could be applied to the various situations which might arise in that connexion.

13. The Special Rapporteur had then stated that an international illicit act could lead either to an obligation to make reparation or to some sanction or punishment. Although those ideas were theoretically separable, it was, he thought, rather difficult to distinguish between them.

14. The Special Rapporteur had gone on to say that the new trend in international law was to reject the Drago doctrine, especially where only minor acts of an economic character were concerned. In any case, it must be admitted that an international illicit act created a new relationship between the State committing the act and the State injured by it. He wished to reserve his own position concerning the Special Rapporteur's interpretation of that new trend.

15. New problems came to mind when one considered that the new legal relationship could extend not only to the guilty State, but also to other States and to international organizations. The State which committed an international illicit act could thus incur responsibility towards all States. In article I, the Special Rapporteur had adopted a clear and simple formula which was not open to criticism; he (Mr. Ruda) suggested, however, that in the commentary a clearer reference should be made to the scope of the concept of international responsibility referred to in paragraph 25. Such a broad definition of responsibility might lead to some rather complicated legal problems.

16. Article II dealt with the basic problem of the conditions in which an international act could be considered

illicit. The Special Rapporteur had correctly pointed out that the international conduct of a State could be either an act or an omission. He had also been correct in saying that imputation to a State, which was an abstract entity, was governed by international and not by municipal law.

17. It was better, he thought, to use the words "non-fulfilment" of an obligation than to speak of its "violation". The illicit nature of an act existed in the non-fulfilment of a legal duty, which might come about as the result of a judicial decision.

18. With regard to article III, on the capacity to commit international illicit acts, he agreed with the substance of that article, but would prefer rather different wording in paragraph 1.

19. Lastly, with regard to the Special Rapporteur's questionnaire, he could reply affirmatively to the questions under I and II, except II (*e*). He reserved his position on question III (*a*), but would reply affirmatively to question III (*b*) and to question IV.

20. Mr. TABIBI said he congratulated the Special Rapporteur on his outstanding report and noted with satisfaction that he had adopted a cautious approach to a complex subject which had caused much difficulty in the past. In his opinion, the Special Rapporteur had been right in deciding to consider only the responsibility of States and to leave other subjects of international law for the future.

21. He agreed that the three basic articles of the Special Rapporteur's draft should be included in a convention, though he preferred to keep an open mind as to the final shape they might take.

22. There was no doubt that any conduct of a State which was in violation of international law must be considered an act generating responsibility on the part of that State. There were numerous examples of such violations in the practice of States and in judicial decisions, some of which had called for punitive sanctions. Lately, however, international law had undergone great changes as a result of the emergence of many new States and the coming into force of the United Nations Charter as a positive instrument of international law. Doctrine and practice should always be respected where they were in line with the fundamental principles of the Charter.

23. He could not agree, however, that the rules for establishing State responsibility and the rules for taking punitive action against violations of international law were necessarily part and parcel of each other. Under the Charter, for example, the failure of Members of the United Nations to meet their financial obligations called for the suspension of their right to vote, although in practice that sanction had never been applied. It was necessary to think in terms of the machinery actually in use in the United Nations and not to invoke that machinery as a means of pressure by the strong Powers against the weak. On the other hand, violations of basic principles of international law, such as those connected with human rights, the self-determination of peoples and nations, armed attacks, and slavery, were of a different character; they directly affected the community of nations and therefore called for international action and sanctions.

24. With regard to the draft articles themselves, he agreed with the cardinal principle expressed in article I, though a specific reference should be added to acts which were prohibited by international law and by the United Nations Charter. He agreed with the substance of article II and was prepared to accept paragraph 1 of article III, but he thought that paragraph 2 tended to confuse the general rule and was therefore unnecessary.

25. Mr. SETTE CÂMARA said that past efforts to codify the rules of international law governing State responsibility had been largely confined to the question of responsibility for injury to the person or property of aliens in the territory of a State; he commended the Special Rapporteur for taking the subject out of those narrow limits and tackling the problem of State responsibility in general. As the three articles proposed were unlikely to meet with serious opposition in the Commission, he would confine his remarks to the text of the Special Rapporteur's report.

26. He could accept the reasons given in paragraph 5 for confining the present study to the responsibility of States, provided that the importance of the responsibility of subjects of international law other than States was not underrated. Postponement of work on the question of responsibility arising out of lawful activities, such as those connected with space exploration and nuclear research, as was proposed in paragraph 6 on the grounds of the different nature of the responsibility involved, was also acceptable in the initial stage of the present study, but only as a practical expedient. The Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space was already considering drafts dealing with responsibility under such conditions.[2]

27. He also shared the view, expressed in paragraph 7 of the report, that a clear distinction should be maintained between the determination of principles governing the responsibility of States for internationally illicit acts, which the Commission had agreed to study, and any attempt to define the rules which placed obligations on States and whose violation could give rise to responsibility. That would help the Commission to avoid discussions on the nature of international law and its foundations.

28. The principle, stated in paragraph 12, that any conduct of a State regarded by international law as an illicit act engaged the responsibility of that State in international law was indisputable. International responsibility for illicit acts, as the Special Rapporteur pointed out, was a corollary to admission of the existence of a valid international legal order. However, to accept a connexion between the doctrine of State responsibility and the affirmation of an international legal order would be going beyond the premise adopted by the Special Rapporteur, and would open the way for the admission of penal

[2] See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 21*, Annex III, Appendix II.

responsibility, at least for acts resulting in an injury *erga omnes*.

29. The problem was whether the new relationship arising from the illicit act would entail only a subjective right of the injured State to obtain reparation and an obligation of the State which had committed the act to make reparation, or whether the legal order would impose additional sanctions for the breach of international obligations. With regard to the discussion in paragraphs 15 to 18 on the legal consequences of an illicit act in terms of sanctions as distinct from reparation, he agreed with the Special Rapporteur that the Commission should not now embark on a discussion of consequences other than the direct single relationship. But the Commission should state clearly that it did not intend thereby to deny the existence of consequences other than the mere obligation to make reparation for injury. The United Nations Charter made the international community appear to be organized, at least theoretically, on a coercive basis. Coercive measures were expressly provided for in Chapter VII of the Charter and had been applied on many occasions by the Security Council. Whether or not such sanctions were effective was another matter.

30. The Special Rapporteur's contention, in paragraph 21, that there was an order of priority between the two consequences of an internationally illicit act and that the claim for reparation must precede the application of sanctions when possible, seemed to be sound. He had doubts about the affirmation in paragraph 22 that, at least at the present stage in international relations, it seemed necessary to rule out the "idea that as a result of an international illicit act general international law can create a legal relationship between the guilty State and the international community as such, just as municipal law creates a relationship between the person committing an offence and the State itself". Although analogies with municipal law were always dangerous and sometimes fallacious, it could be said that acts such as the repeated rejection by Rhodesia and South Africa of indisputable obligations incumbent on all Members of the United Nations had justified and prompted the application of sanctions, and that the community of States, as legally organized by the United Nations Charter, had acted as a person injured by such acts.

31. He agreed with the suggestion in paragraph 25 that, in its commentary to the rule it adopted, the Commission should point out that the term "international responsibility" was used in a general sense and irrespective of whether it referred only to the guilty State's obligation to restore the rights of the injured State, or whether it also covered the faculty of the injured State itself, or of other subjects, of imposing sanctions for the illicit act. The wording proposed for article I would be acceptable on that understanding.

32. With regard to the suggested conditions for the existence of an international illicit act, he thought that the subjective element, consisting of conduct imputable not to the individual or group of individuals who were the actual authors, but to a State as a subject of international law, should not be taken to imply outright rejection of individual responsibility for grave illicit acts, such as war crimes. State responsibility could then be engaged parallel with individual responsibility and be translated into either reparation or sanctions. That position had in fact been taken by the Commission in its earlier work.

33. He agreed with the condition that the State to which the conduct in question had been legally imputed must, by that conduct, have failed to fulfil an international obligation, and that the conflict between the State's actual conduct and the conduct required of it by law constituted the essence of the delinquency. The Special Rapporteur had rightly emphasized responsibility for illicit acts resulting from failure to fulfil international obligations. The suggestion in paragraph 49 of the report that the problem of abuse of rights need not be discussed for the time being, as it would involve examining the primary rules of international law which set the proper limits on the exercise of rights, was acceptable, although abuse of rights could become an important source of illicit acts and should be considered at an early stage in the Commission's future work.

34. The statement in paragraph 1 of article III was indisputable and the limitations in paragraph 2 were obviously necessary. However, the delictual capacity of States which were members of federations was a controversial problem and many speakers at the Conference on the Law of Treaties had categorically rejected the attribution of international personality to such States. He doubted whether article III was altogether necessary, since it seemed to state what was obvious in paragraph 1, while paragraph 2 limited the capacity to commit international illicit acts to States and it would be contradictory to adopt a rigid formula which excluded from that capacity subjects of law which had been expressly included in Mr. García Amador's bases of discussion,[3] such as semi-sovereign entities, political subdivisions of States, individuals and international organizations.

35. He could give an affirmative answer to all the questions in the Special Rapporteur's questionnaire with the exception of question II (*e*). Regarding question II (*f*), he did not quite understand how events could give rise to State responsibility.

36. Mr. TAMMES said that in 1963 an initial distinction had been made between primary rules of international law, which had a direct bearing on the conduct of subjects of international law, and secondary rules, which were of a functional nature and were intended to ensure observance of the primary rules.[4] The Special Rapporteur's second report was clearly concerned with secondary rules. Precisely what role the three proposed articles would play in the future draft was not yet known, but paragraph 91 of the Special Rapporteur's first report[5] gave some indication of the practical consequences of the distinctions made in those three articles.

[3] See *Yearbook of the International Law Commission, 1956*, vol. II, pp. 219-221.

[4] See *Yearbook of the International Law Commission, 1963*, vol. II, p. 227 *et seq.*

[5] Op. cit., *1969*, vol. II, Document A/CN.4/217.

37. Like the Special Rapporteur, he regarded article I as the fundamental rule containing the essential elements of State responsibility—an objective element of violation of a law, a subjective element of unlawful conduct in the form of an act or omission by a State, not by human beings not juridically identifiable with the State, and, lastly, the definition of State responsibility.

38. He was inclined to regard article II as a statement of doctrinal problems, and ample evidence of that was given in the report. Sub-paragraph (*a*) of the article made it clear that the term "conduct" covered passive as well as active conduct. The examples given in paragraphs 50 to 52 of the report gave the impression that the distinction made in sub-paragraph (*b*) concerned the formulation of primary rules of international law, rather than of secondary rules on State responsibility. That distinction was certainly not always easy to make in practice. For example, armed attack as such was illicit conduct, but under a general prohibition of aggression it only gave rise to international responsibility if it actually took place, as an external event.

39. With regard to the discussion, in paragraphs 44 to 46, of the relative merits of expressions such as "violation of international law", "failure to carry out an international obligation" and "breach of an obligation", he doubted whether it was wrong to speak of a violation of international law or of rules of international law on the grounds that a rule was law in the objective sense, whereas the subject of law could only fail to carry out its subjective duty or obligation. Article 6 of the United Nations Charter referred to violations of the Principles contained in the Charter. In a draft declaration[6] it had prepared, the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States also referred to violations of international law. In many languages it was usual to speak of violations of the law, even if the obligation in question flowed from a personalized legal instrument, or from the decision of a court or international organization.

40. With regard to the Special Rapporteur's conclusion in paragraphs 47 to 49 that the problem of abuse of rights did not belong to the topic of State responsibility, he must point out that in certain legal situations there was no clearly defined interaction of rights and obligations and the rights remained undivided in law. Disputes in such cases could only be decided on the basis of a reasonable balance between the interests of the parties. State responsibility did not then arise from the violation of a primary rule of international law, but was determined, in the absence of such a rule, by the parties themselves or by an impartial authority on the basis of general rules providing for the settlement of disputes with "due regard for" or "reasonable regard for" the mutual interests of the parties concerned. International instruments dealing with such matters as freedom of the seas, lunar exploration and activities which could threaten mankind or its environment were cases in point. Strict rules would no doubt be worked out in time, but it would be a lengthy process. The problem of abuse of rights could only be finally solved by rules of State responsibility and the question should not, therefore, be left aside indefinitely because it was considered too difficult.

41. The text proposed for article III seemed to have been drafted more with the idea of inducing the Commission to express its views on a perplexing question than of the formulation of a precise rule. It would perhaps be wiser not to use the word "capacity" in the context of State responsibility. Of course, the term was used in the Convention on the Law of Treaties, but the capacity to conclude treaties was an entirely different concept from the capacity to commit international illicit acts, as the Special Rapporteur himself had pointed out. The term had been used by German writers particularly interested in the question of the possible responsibility of each State in a federation, as distinct from the responsibility of the federation as an international entity. It was a question that had also arisen in regard to the British Dominions. However, he was not sure that the question of the capacity of member States of a federation to conclude treaties was as theoretical and as obsolete as the Special Rapporteur claimed in paragraph 60. With the progressive organization and integration of States, a pre-federal stage would be reached, when it would no longer be clear who would bear the responsibility for failure to fulfil an international obligation.

42. Article III, paragraph 2, did not seem to provide for the situation in which a State was prevented from discharging its international obligations by the occupation of its territory. Only a State or organization whose organs had themselves acted could be held responsible. In the case of material impossibility or necessity, positive or negative illicit conduct was not imputable to the State which appeared to have acted or omitted to act, but to the State which had caused the act or omission. That did not involve a legal operation, but merely the establishment of a fact. One aspect not covered by paragraph 2 was the responsibility of the occupying State, especially with regard to the performance of the international obligations of a territorial State, as long as the occupied State was unable to act. That, however, was essentially a question of succession.

43. Mr. CASTRÉN said he associated himself with the congratulations which had been expressed to the Special Rapporteur on his excellent report. In the introduction and the detailed commentaries on the three general rules he was proposing, he had brought out clearly the principal characteristics and consequences of international illicit acts.

44. The plan and the method of work adopted by the Special Rapporteur and explained in the introduction seemed to be carefully weighed and satisfactory from every point of view. He agreed with the Special Rapporteur that the Commission should first consider the question of State responsibility for international illicit acts, leaving aside for the moment the problem of so-called responsibility for risk. The order in which the

[6] See *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18*, para. 83.

different questions were to be considered was given in detail in paragraphs 8 and 9. The programme of work was truly enormous and it would probably take several years to formulate all the rules. Some of the questions to be considered were very complex: the question of self-defence, for instance, and questions relating to the circumstances in which the conduct imputed to a State could not be regarded as wrongful.

45. The length of the previous codification drafts on State responsibility varied greatly and several of them were not complete. He noted that the Special Rapporteur took the view that responsibility comprised relatively few principles which could be formulated concisely, and therefore proposed to submit to the Commission a draft of twenty to thirty fairly succinct articles to cover all the points. On the other hand, on every point there were many complex questions which had to be examined and settled first, and that meant preparing lengthy commentaries.

46. He found the text of the three articles, which dealt with different aspects of international illicit acts, entirely satisfactory. The commentaries were very full, clear and convincing, and they showed that the Special Rapporteur's ideas were generally accepted by the majority of writers and in international jurisprudence and State practice.

47. The rule stated in article I was simple, undeniably just and drafted in general and flexible terms so as to cover all cases of responsibility. He agreed with the Special Rapporteur's statement in paragraph 20 that international law had not worked out a distinction between civil and penal offences comparable to that established in municipal law; in paragraph 22 that general international law could not, as a result of international illicit acts, create a legal relationship between the guilty State and the international community as such, in the same way as municipal law created a relationship between the person committing an offence and the State; in paragraph 27 that, in French, the expression *"fait illicite international"* was preferable to the other expressions used; in paragraph 28 that the formula stating that an international illicit act was a source of responsibility should be such that it did not lend itself to an interpretation which would automatically exclude the existence of another possible source of international responsibility; and in paragraph 29 that it was preferable to provide, in general, that every international illicit act gave rise to international responsibility, without specifying that such responsibility necessarily attached to the State which committed the illicit act.

48. The two sub-paragraphs of article II contained all the elements, with the possible alternatives, which had to be present for the existence of an international illicit act. In his commentary, the Special Rapporteur dealt very carefully—in the light of the literature, juridical decisions and established practice—with all the important problems connected with the rule stated in the article, and explained the reasons in favour of his text. It was correct, as he said in paragraph 31, that an international illicit act contained a subjective element—conduct attributable to the State—and an objective element—the failure of the State to fulfil an international obligation incumbent on it—and, as he said in paragraph 35, that where a State had been held responsible for injury caused by individuals, it was really a case of responsibility of the State for omissions by its organs, which had failed to take appropriate measures to prevent or punish the individual's act. The Special Rapporteur made an important point in paragraph 40, when he said that an individual's conduct could be imputed to a State as an international illicit act only by international law. The observation that "The imputation of an act to the State as a subject of international law and the imputation of an act to the State as a person under municipal law are two entirely distinct operations which are necessarily governed by two different systems of law" was correct. The reasoning by which the Special Rapporteur arrived at the conclusion that the expression "breach of an obligation" was preferable to the expression "breach of a rule" was very convincing. He shared the Special Rapporteur's view, expressed in paragraph 46, that in international law the idea of the breach of an obligation was equivalent to that of the impairment of the subjective rights of others, and he accepted his exposition and conclusion in paragraphs 47 to 49 on the question of abuse of rights. Similarly, he agreed that, in order to accuse a State of failure to fulfil an international obligation, it was not always sufficient to show that the State had been negligent; it was sometimes necessary for some harmful external event to have taken place as a result of its failure to act. On the other hand, the Special Rapporteur had, on the whole, been right, in paragraphs 53 and 54, not to include the element of injury among the conditions for the existence of an international illicit act.

49. The Special Rapporteur was quite justified in proposing to include in the draft a provision on the capacity of States to commit international illicit acts, and he accepted the wording of article III which dealt with that point. Paragraph 1 of the article laid down an incontestable rule, subject to the exception stated in paragraph 2, which was the necessary complement to paragraph 1. The exceptional situations referred to in paragraph 2 could, unfortunately, still arise, as recent events had shown, and rules applicable to such regrettable situations as military occupation should be formulated in order to avoid injustices in the matter of responsibility. In paragraph 59, the Special Rapporteur rightly emphasized that the limits concerned were limits to the capacity to commit illicit acts, not limits to the responsibility which the law attached to such acts, and very properly added that, in the case of occupation, where the occupying State was guilty of international illicit acts in the occupied territory, those acts must be imputed to the occupier and entailed its direct responsibility. If the organs of a State were replaced, in its territory, in a broad specific sector of activity, by those of another State or of another subject of international law such as the United Nations, it was to the latter that the acts committed by its organs were imputable and it was the latter which must assume the entire responsibility for such acts.

50. It followed from what he had said that his answers to the twelve questions asked by the Special Rapporteur

in his questionnaire, on the three sections of chapter I, were in the affirmative, and that he accepted the broad outline of the plan suggested by the Special Rapporteur and the method he had followed.

The meeting rose at 1.10 p.m.

1076th MEETING

Wednesday, 24 June 1970, at 9.45 a.m.

Chairman: Mr. Richard D. KEARNEY

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Nagendra Singh, Mr. Reuter, Mr. Rosenne, Mr. Ruda, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Thiam, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.

State responsibility

(A/CN.4/233)

[Item 4 of the agenda]
(continued)

1. The CHAIRMAN invited the Commission to continue consideration of the Special Rapporteur's second report on State responsibility (A/CN.4/233).

2. Mr. REUTER congratulated Mr. Ago on his excellent report, with which he was in general agreement, except for a few minor points he would mention later. The Special Rapporteur had been right to begin by seeking to establish the most fundamental principles and then to proceed from the general to the particular. Such a method presupposed, of course, that until the work was completed, it would always be possible to revert to the general principles in order to amplify and clarify them. He wished to point out, however, that whereas the first two articles were of a general character, article III was not quite on the same level. He did not dispute the usefulness of that article; at the most it might be asked, as the Special Rapporteur himself had done, whether it was necessary to express the idea stated in paragraph 1, since it followed from the general principles previously stated. Moreover, in his oral presentation of the report, the Special Rapporteur had referred, in connexion with article III, to the possibility of intervention by an international organization. He himself was not sure whether, in dealing with imputability, it would not be necessary to refer to plurality, or whether the problem of the relationship between imputation to a State and imputation to an international organization could be avoided.

3. The method adopted by the Special Rapporteur was not only an excellent one, it was the only one possible. For in all legal systems, apparently even in the common law countries, there was a general régime of responsibility and several special régimes. At any rate, that was the situation in international law, and it was with the general régime that the study of the subject must begin if insuperable difficulties were to be avoided. That was the principle which the Special Rapporteur had followed and the word *"une"*, which preceded the words *"responsabilité internationale"* in the French text of article I, clearly suggested that there were several categories of responsibility.

4. But although it might be generally agreed that there was a general régime which should be studied first, there might perhaps be disagreement on whether a particular element came under the general régime or a special régime and whether a given special régime should have priority. The Special Rapporteur, in his capacity as such, had been exceedingly cautious. He himself would like to state his views at once on the problem of penal responsibility or, as it might also be called, the problem of sanctions. The term "sanctions" applied both to "enforcement" and to "punishment". As he saw it, all matters relating to enforcement lay outside the sphere of responsibility. The second aspect of penal responsibility came under a special régime and not under the general régime of responsibility. Punishment was a very serious matter; it was permissible only in special cases and subject to all kinds of safeguards. Admittedly, there was no lack of precedents, in particular very numerous arbitral awards concerning Latin America, in which the principles of a purely reparatory responsibility appeared to be outmoded. In some cases, insurance principles had served as a guide, while in others, decisions had a penal flavour. Remarkable though those precedents might be from the standpoint of international law, they might none the less explain the cautious attitude of some Latin American countries. That was why he believed that responsibility under the ordinary law should contain no penal element and that that was in keeping with the interests of the small and weak countries.

5. In the nineteenth century, sanctions had perhaps been applied for many acts which had not been serious and had not been applied for acts which deserved them. Today, reference was made to the judgement in the *Case concerning the Barcelona Traction, Light and Power Company, Limited*,[1] because of the possibility opened up by its paragraph 34. But in paragraph 91, the Court plainly stated that, even in matters of human rights, the problem of a sanction had been solved only on the regional level. The Court thus appeared to believe that a special responsibility was involved. Article 60 of the Vienna Convention on the Law of Treaties[2] was undoubtedly another example of special responsibility. It did not say that the violation of any treaty in the world, in other words violation of the *pacta sunt servanda* rule, gave

[1] *I.C.J. Reports 1970*, p. 3.

[2] *United Nations Conference on the Law of Treaties, Official Records*, Documents of the Conference, document A/CONF.39/27 (United Nations publication, Sales No.: E.70.V.5).