Document:-

A/CN.4/SR.1079

Summary record of the 1079th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1970, vol. I

taking into account all the difficulties that had been mentioned, it might help him if he were asked to choose those organizations which it seemed most advisable to consult on the subject.

94. Mr. ROSENNE said that the last sentence of paragraph 1 could be left as it was. Once the two lists of treaties requested in paragraph 1 had been compiled, they would reveal which organizations had concluded treaties. The Commission could then take its decision in the light of that information.

95. Mr. CASTRÉN said that the formula used in the Sub-Committee's report was a very cautious one and left the Secretary-General full discretion, since it stated "the Secretary-General might consider".

96. He endorsed Mr. Ago's proposal that the words "in particular" should be added.

97. Mr. TESLENKO (Deputy-Secretary to the Commission) said that the list of the organizations that had been invited to Vienna was longer than the one Mr. Rosenne had given, which was the list of organizations that had attended the Conference.

98. He must reserve the Secretary-General's position on the question of the choice of organizations. It would put the Secretary-General in a delicate position if he were asked to make such a choice without the help of an objective criterion. The study of the topic was still in the initial stage; later, when more documentation was available to the Commission, it might itself be able to draw up the list of organizations to be consulted.

99. Mr. BARTOŠ said that if the text of the report were amended as Mr. Ago had suggested, the Commission should put the matter to the vote; he would vote against that amendment.

100. Mr. AGO said that he had not formally proposed any amendment, so there was no need for a vote.

101. Mr. BARTOŠ said that in that case it would be sufficient to mention in the Commission's report that several members had requested that the list of organizations be expanded.

102. The CHAIRMAN said it would be enough if the points raised by Mr. Ago and Mr. Bartoš were recorded in the summary record to the meeting.

103. If there were no further comments, he would take it that the Commission agreed to request the Secretary-General to prepare the documents mentioned in sub-paragraphs (i) and (ii) of paragraph 1 of the Sub-Committee's report (A/CN.4/L.155) with only one change: in the first sentence of sub-paragraph (ii), the words "a full bibliography" would be replaced by the words "as full a bibliography as possible".

It was so agreed.

The meeting rose at 1.20 p.m.

1079th MEETING

Monday, 29 June 1970, at 3.15 p.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, 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 1076th meeting)

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

2. Mr. USTOR paid a tribute to the Special Rapporteur for the skill and elegance with which he had handled a wealth of material in his report. He fully agreed with the view, expressed in paragraph 24, that the notion of international responsibility was extremely complex and was one with respect to which the claims of progressive development of international law might assert themselves more forcefully than they did with respect to other notions. Not much had been done in that direction hitherto, and the life of the international community demanded that a great measure of progressive development should be introduced into the Commission's draft articles on State responsibility. The Commission should not focus its attention exclusively on injuries done to aliens, but should deal with international responsibility in general, including responsibility for the gravest acts in international life, such as aggression, genocide and the use of weapons of mass destruction.

3. The remarks he was about to make were of a tentative character; indeed, they related to a report which was itself, in a sense, provisional.

4. With regard to the delimitation of the subject, he fully agreed with the Special Rapporteur's approach in paragraphs 5 and 6, but thought that the delimitation should perhaps be stated in the draft articles themselves, not only in a commentary. In the first place, the topic of State responsibility, as its title indicated, covered only the responsibility of States, not the responsibility of other subjects of international law, especially international organizations. In the second place, the draft would cover only responsibility for illicit acts and not responsibility for risk. He therefore suggested that it might well begin with an article stating that the international responsibility of a State could derive either from illicit acts or from actions which were not in themselves unlawful, but which could result in injury to another State, or endanger life

or the environment in one or more other States. An alternative method would be to amend the title to read "State responsibility for unlawful acts". In one way or another, however, the articles should show that the draft related only to responsibility for unlawful acts.

5. Article I stated the basic rule; it brought out the notion of an "international illicit act", the meaning of which was defined in article II. Whether that definition was kept in article II or put into a general article on the use of terms was purely a drafting matter. It would, however, be more in conformity with the Commission's practice to have one article defining the terms used throughout the text.

6. "International illicit act" was a rather heavy expression and it would over-burden the text of the draft articles, if used throughout. Moreover, the adjective "international" had the connotation of the opposite of internal, although it was clear that an internal measure, such as the practice of *apartheid*, could constitute an "internationally illicit act".

7. He therefore suggested that the expression "illicit act" be used throughout the articles; it would be explained in the article on the use of terms that that expression meant acts contrary to international law. That suggestion was in keeping with the title of the topic, which was "State responsibility", although it clearly meant the international responsibility of States.

8. When article I stated that "Every international illicit act by a State gives rise to international responsibility", it meant, of course, the responsibility of the State committing the international illicit act. It did not, however, answer the question *vis-à-vis* whom the responsibility came into play, in other words, what legal relation or relations came into being as a result of an international illicit act. That problem had been very lucidly explained by the Special Rapporteur: the question arose whether a legal relation came into being only between the guilty State and the injured State. In his introductory statement, the Special Rapporteur had explained that he had an open mind on the vitally important question whether, owing to the seriousness of a particular act, other States, or indeed all States, might have the right to invoke the responsibility of the delinquent State.[1] The Special Rapporteur did not, therefore, maintain the statement in paragraph 22 of his report that "What must be ruled out, it appears, at least at the present stage in international relations, is 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...".

9. The Commission itself, in its report on the work of its twenty-first session, had specifically referred to "cases in which... a particularly serious offence might also give rise to the establishment of a legal relationship between the guilty State and a group of States, or eventually between that State and the entire international community".[2] Equally relevant was article 53 of the Vienna Convention on the Law of Treaties, which defined a peremptory norm of general international law as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted...".[3]

10. He therefore believed that, even at the present stage of development, the idea of reference to the international community of States in cases of very grave violation of international law should not be ruled out. The manner in which such reference would be made would, of course, remain open. Whatever the method chosen by the Special Rapporteur, the question of the legal relation created by the commission of the illicit act should be dealt with in the articles immediately following article I, for otherwise the provisions of that article would remain, as it were, in the air. The situation was ripe for such progressive development. He did not share the Special Rapporteur's belief that the Commission would not have to take a position on that question in the early stages of its work.

11. Article II was, of course, a crucial article: its purpose was to define the international illicit act as a basis of international responsibility. The article was consistent with the statement made by the Commission, in its report on the work of its twenty-first session, that "The starting point should be the imputability to a State of the violation of one of the obligations arising from those rules", that was to say the "rules of international law which laid obligations upon States in one or other sector of inter-State relations".[4]

12. Article II was preceded by 22 pages of commentaries and explanations which testified to the thorough examination the Special Rapporteur had made of all the material available to him. There was one theory, however, which he had not considered: that put forward by Mr. Ushakov.[5] That theory, which prevailed among international lawyers in the USSR, dispensed with the idea of imputation in establishing the responsibility of a State. It deserved very serious consideration, since its purpose was to reduce the elements of uncertainty and subjectivity in the establishment of State responsibility in particular cases. It was obviously applicable in practice, particularly in cases where responsibility came into play for acts of State *stricto sensu*. If the Head of State, the Head of Government or some other duly accredited representative of a State acted on behalf of the State, it would be much too artificial and, for all practical purposes, perhaps futile to consider the imputability of the act.

13. It might, of course, be said that there was no real difference between the approach of the Special Rapporteur and that of Mr. Ushakov, since whenever one of them said that a State was responsible for a certain act, the other could express the same idea by saying that

[1] See 1074th meeting, para. 13.

[2] See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 30, para. 81.

[3] *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).

[4] See *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 10*, p. 30, para. 80.

[5] See 1076th meeting, paras. 20-23.

certain acts of certain people were imputable to the State and that the State was therefore responsible. The difference would then come down to a mere question of terminology. Although he, for his part, was inclined to believe that the difference went deeper than that, he felt sure the Special Rapporteur would give serious consideration to the views of Mr. Ushakov, as he had done to the views of many other writers. It was in the interests of the international community that the rules governing State responsibility should be placed on the most solid foundations, that the identification of an international delinquency should be made as simple and easy as possible, and that the possibility of escaping responsibility for an illicit act should be reduced to a minimum, without of course excluding the possibility of exoneration in such cases as *force majeure*. If agreement could be reached on those aims, it would be possible to adopt a generally acceptable formula for the definition of an illicit act and of the other basic notions relating to State responsibility.

14. The experience of the Commission showed that the less theoretical questions were brought into a discussion, the greater were the chances of achieving practical results. That was a direct consequence of the fact that, although members of the Commission belonging to different schools of thought might be unable to agree on theoretical points, they did not find it too difficult to agree on practical solutions. For those reasons he urged that, in continuing the work on the topic, a more pragmatic approach should be adopted than was reflected in the present report. Such an approach would, of course, demand a certain self-restraint and even self-sacrifice on the part of a scholar of the stature of the Special Rapporteur, but that sacrifice would be rewarded by the recognition and gratitude of the General Assembly and the international community, which eagerly awaited a set of articles setting out the modern rules on State responsibility.

15. He had serious doubts about the advisability of retaining the provision in paragraph 1 of article III. Internal law analogies were not, of course decisive in international law, but he ventured to ask whether, in municipal law, it had ever been enacted that all men possessed the capacity to commit crimes and illicit acts.

16. With regard to paragraph 2 of article III, he understood the Special Rapporteur's concern. His own country—Hungary—had suffered foreign occupation for a long time and the problem had arisen of the legality or nullity of acts commited and treaties concluded on behalf of the occupied country during the period of occupation. He was not opposed to the inclusion of a provision on that subject, but he did not think it should appear in the introductory articles, because it was not of a general character. Consideration might be given to the inclusion, elsewhere in the draft, of a provision explicitly reserving the problems arising out of a military occupation as belonging to another branch of international law.

17. In conclusion, he commended the Special Rapporteur for his efforts to build a solid foundation for the Commission's future work on State responsibility.

18. Mr. NAGENDRA SINGH said he associated himself with the tributes paid to the Special Rapporteur for his systematic and exhaustive report. He would only comment on the articles themselves, beginning with article II, because the constituent elements of State responsibility must be determined before article I could be understood. As article II defined the conditions for the existence of an international illicit act, it had to be examined first.

19. He agreed with the Special Rapporteur on the following constituent elements which gave rise to State responsibility: *first*, a subjective element, which was an act or omission; *second*, the fact that the said act or omission was attributable to a State under international law; *third*, an objective element, which was the failure to fulfil an international obligation of the State. He believed, however, that the element of injury, which the Special Rapporteur had ruled out, should also be included as a constituent element. That was a controversial point depending on the concept of injury.

20. It was significant, however, that both the Permanent Court of International Justice and the International Court of Justice had recognized injury as an element of the international illicit act, and the concept had a place in authoritative writings on international law. He urged that further research should be done before injury was ruled out. In the English-speaking world, including both the USA and the Commonwealth, the factum of injury was recognized. The Continental concept of State responsibility without injury had the backing of the Spanish-speaking world. The Special Rapporteur would have to reconcile these two approaches in his attempt at codification.

21. In the *Case concerning the factory at Chorzow* the Permanent Court had held it to be a principle of international law, and even a general principle of law, that any breach of an international obligation which caused an injury gave rise to the obligation to make reparation for such injury.[6] Such writers as Anzilotti and Oppenheim had laid stress on the concept of injury: Oppenheim had spoken of "internationally injurious acts" and had stressed that such acts could result either in direct injury to a State or in injury to an individual and through him to the State to which he belonged.[7] There was the conception of original and vicarious responsibility which, though old-fashioned, was still basically quite correct; he would speak of that aspect later in greater detail. In many legal writings, injury appeared as the very *raison d'être* of international responsibility; in international law, injury was equated with the breach of an obligation.

22. The Special Rapporteur had stated, in paragraph 53 of his report, that "Often, however, what those who assert the requirement of an injury have in mind is not so much damage done to a State at the international level as injury caused to an individual at the municipal level". For his part, he would submit that injury could be

[6] P.C.I.J., Collection of Judgments, Series A, No. 17 (1928), Judgment No. 13, p. 29.

[7] *Oppenheim's International Law* (Lauterpacht), eighth edition, 1955, Vol. I, paras. 157-162.

sustained by the State itself; a State could be injured by an unjustified intervention or by a breach of treaty obligations. The reparation, of course, could take different forms: compensation, restitution, or a mere apology or declaration giving satisfaction. It was not necessary, therefore for the injury to be such as to cause economic damage. It was sufficient if a State was hurt by a breach of an international duty by another State. Apology was sufficient, without payment of any compensation, for an injury sustained by a State consequent on a breach of an international obligation by another member of the international community.

23. He also wished to comment on the question of terminology, which was extremely important in the present instance. The French-speaking members of the Commission had been satisfied that "*fait illicite*" was the proper expression to use in that language; the corresponding Spanish "*hecho ilícito*" had been accepted by the Spanish-speaking members. In the English-speaking world, however, the term "illicit" would not be accepted. It had not been used in important text books of international law or in leading decisions of the Permanent Court of International Justice and the International Court of Justice. In municipal law, the term "illicit" was used in connexion with matrimonial matters and also in excise legislation where "illicit distillation" was defined. He therefore suggested that the term "illicit act" should be replaced either by "wrongful act" or by "unlawful act". His own preference was for "wrongful act".

24. It would also create confusion to refer to an "international illicit act. What was meant in the present instance was "an internationally wrongful act" or an "internationally injurious act". The act could well be an internal act having international repercussions. The word "international" should therefore be dropped, along with the word "illicit".

25. He suggested that, in sub-paragraph (*b*) of article II, the reference to "an external event" should be dropped, and the words "failure to carry out an international obligation" be replaced by "breach of an international obligation". He would also prefer to say that certain conduct was "attributable" to a State in international law, rather than that it was "imputed" to a State. The word imputed hurt the traditional concept of sovereignty of a State and it was doubtful if the USSR would accept it. The article could therefore be reworded to read:

> "A State becomes engaged in international responsibility for acts of omission or commission which according to international law are attributed to it and constitute a breach of international obligations thereby causing injury to another State or States."

26. If an internationally wrongful act was to be defined, it could perhaps be defined as "An act or omission attributable to a State under International Law which constitutes a breach of international obligations". There was no need to mention an "external event", as there might be none; it might be an internal event having external repercussions.

27. He emphasized the importance of the distinction between original and vicarious responsibility. According to *Oppenheim*, a State bore original responsibility for its own, that was to say its government's, actions and for such actions of its agents or private individuals as were performed at the government's command or with its authorization. The State bore vicarious responsibility for certain unauthorized injurious acts of its agents or subjects, and even of aliens resident in its territory.[8] If such persons committed an internationally injurious act without authorization, vicarious responsibility required the State not only to apologize, but also to compel those persons to make reparation, as far as possible, for the wrong done, and to punish them if necessary. A State complying with those requirements would incur no blame for such acts, but a State refusing to do so would thereby commit an international delinquency and its vicarious responsibility would become original responsibility. A suitable reference to the distinction between vicarious and original responsibility, though it might look outmoded, appeared to be necessary, as it would help to secure acceptance of the basic principles of State responsibility, particularly in developing countries, where the plea could not be raised that, if the acts were not authorized by the government, a State could not be held responsible for them. The concept of vicarious responsibility would help people to appreciate the position better than the blunt statement "attributed to the State". Again, to make codification clear and precise, the circumstances in which a State agent was acting—for example, personally or officially—should be clearly brought out in the articles yet to be drafted.

28. It might thus be useful to specify whose internationally injurious acts would be considered as acts of the State itself and hence as international delinquencies. He believed that all such acts performed by a Head of State or by members of a government acting in that capacity, and all acts of officials or other individuals commanded or authorized so to act by the government, would fall into that category. Acts committed by a Head of State or members of a government acting not in their official capacity, but in a purely personal capacity, and not on behalf of the State, but simply as individuals, might not be international delinquencies as such, but the State concerned would bear a vicarious responsibility for such acts and be liable to pay damages or make appropriate amends. The Commission would have to consider whether such a clear-cut distinction could in fact be made or not. It might be useful to indicate to whom a State was responsible. There were also various kinds of responsibilities to international organizations which needed to be mentioned.

29. He believed that the question of abuse of rights warranted further study and should not be excluded from the Commission's codification work. The principle involved in abuse of rights was of vital importance in an age when scientific experimentation in one State, which would be an entirely lawful act, might quite easily cause injury to another State. There was, for example, a clear instance of conventional regulation of a nuisance committed by private persons which affected injuriously the

[8] Op. cit., para. 149.

territory of a neighbouring State. On 15 April 1935, a Convention had been signed by Canada and the United States for the settlement of difficulties arising out of the complaint of the United States that fumes discharged from the smelter of the Consolidated Mining and Smelting Company in British Columbia were causing damage to the State of Washington. In the *Trail Smelter Arbitration* arising out of that Convention it had been held, in 1941, that under international law no State had the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State.[9] Though that was a controversial subject and some speakers had felt that it should be omitted, he would submit that it should be taken up last and not rejected outright without a close and proper examination.

30. He agreed with Mr. Ushakov that the wording of article III, paragraph 1, raised certain difficulties. Since there were virtually no limits to the capacity to commit internationally injurious acts, it was perhaps unnecessary to deal with capacity at that stage. Although capacity to conclude treaties provided a valid precedent, it might be better to adopt a different approach. According to *Oppenheim*, an international delinquency could be committed by any member of the family of nations, whether a full sovereign, half sovereign or part sovereign State. However, a half sovereign State could commit an international delinquency only in so far as it had an international status and corresponding international duties of its own. The circumstances of each case decided whether the delinquent half sovereign State was answerable directly to the wronged State for its neglect of an international duty, or whether the sovereign State, federation or protectorate to which the delinquent State was attached must bear a vicarious responsibility for the delinquency.[10] The federating states of the United States of America, for example, had no international status, since all international relations were conducted by the Federal Government, so they could not commit an international delinquency. The United States Government would bear a vicarious responsibility for any internationally injurious act committed by one of the states of the Union. Those were all problems of capacity to commit an injurious or wrongful act and had to be mentioned. The best approach would be one involving the use of the words "may commit" or "could commit", but not "capacity to commit", which could be easily misunderstood.

31. He thought that paragraph 2 of article III could have given a more striking example of the limitation of capacity than that of the occupation of territory; the difficulties raised by federal systems might perhaps have been mentioned. In any case, it seemed somewhat unwise to try to draft an article dealing with capacity before articles on other important aspects of State responsibility had been formulated.

32. Mr. THIAM congratulated the Special Rapporteur on the excellent report he had submitted to the Commission, in which he had tried, not always successfully, to avoid sacrificing essentials to specific aspects of responsibility, while still taking those aspects into account sufficiently to avoid over-simplification. A reading of the report had brought out two problems with which he proposed to deal.

33. The first was connected with the criterion for responsibility. The Special Rapporteur had stated that the source of responsibility was the international illicit act. He (Mr. Thiam) doubted whether it could be said that the international illicit act in itself sufficed as a source of responsibility. Responsibility was always linked with reparation for an injury and it was difficult to see how the concept of injury could be left entirely out of account when speaking of responsibility. The Special Rapporteur himself admitted as much when he said, in paragraph 46 of his report, that "it seems perfectly legitimate, in international law, to regard the idea of the breach of an obligation as the exact equivalent of the idea of the impairment of the subjective rights of others". That being so, it would be better to state clearly that the idea of injury could not be dissociated from the concept of responsibility. Moreover, the idea of injury so dominated the subject-matter of responsibility that provision had been made to impute responsibility to the State for a lawful act, precisely because reparation must be made for the injury and, consequently, a basis had to be found for responsibility. It would therefore be well to introduce the idea of injury into the draft, especially as the main point was to bring responsibility into play and it would be vain to do that solely by invoking the illicit act.

34. More thought should also be given to the concept of abuse of rights, which the Special Rapporteur rejected as a possible source of responsibility because every State could allege that it had acted in the exercise of its sovereignty, which was unlimited. It therefore seemed necessary to limit the exercise of sovereignty.

35. The second problem he wished to examine was that of the scope of responsibility. The Special Rapporteur had himself put the question whether, in studying responsibility, everything which might have the character of a sanction, in the penal sense of the word, should automatically be excluded. That question was important, first, because even in internal law it was difficult to make a clear distinction between civil and criminal responsibility, since the same act could give rise to both, and secondly, because in practice there was a very close relationship between criminal law and civil law, even in regard to procedure. Similarly, in international law it was sometimes difficult to say whether a measure taken had the character of reparation or of a sanction. Hence there was no denying that the idea of a sanction could be introduced in international law. It was, of course, understandable that young States should be opposed to it, since they were not in a position to apply sanctions themselves, but might have disproportionate sanctions imposed on them. It might be pointed out to them, however, that in practice no powerful State could impose sanctions on a weak State without setting off a solidarity reaction, which was a guarantee for defenceless States. It seemed necessary, therefore, to re-examine the problem of sanctions, having

[9] *Annual Digest and Reports of Public International Law Cases*, 1938-1940, Case No. 104, p. 317.

[10] *Oppenheim*, op. cit., para. 152.

particular regard to the gravity of the offence, and to consider whether it might not be possible to state a number of principles or rules governing the subject at the bilateral level. States should know that it was not enough to make reparation. A sanction could have a preventive character.

36. With regard to terminology, he saw no objection to using the term "illicit act", since it was accompanied by explanations making it quite clear that it denoted either an action or an omission. The essential point was to know what was meant. On the other hand, it was to be feared that to use the expressions "vicarious responsibility" or "responsibility for the act of another" might be to transfer to international law a concept of internal law which did not have the same meaning. Responsibility for the act of another required a relationship of authority between two persons. But that was not how the problem arose in international law, in which it was always the State that acted, even though it acted through its organs. Either a State was sovereign or it was not, and in the latter case no responsibility could be imputed to it. Further consideration should therefore be given to that notion.

37. He did not think it was appropriate, either, to speak of "capacity to commit international illicit acts"; that idea seemed to derive too directly from the concept of legal capacity in internal law. In international law, since the State was regarded as a subject of international law, it was not necessary to add that a sovereign State had the capacity to commit international illicit acts, especially as that wording was ambiguous.

38. It was also difficult to consider new States separately, because responsibility was the counterpart of sovereignty. That did not mean that problems connected with the behaviour of new States did not arise, but they were special problems of secondary importance, which should be considered as the Commission's work progressed.

39. Mr. BARTOŠ said that, in view of the short time at the Commission's disposal, he would confine himself to the questionnaire submitted by the Special Rapporteur at the 1074th meeting.

40. In reply to question I (*a*), he stressed that the Special Rapporteur, in his report, had not specified the different kinds of responsibility, namely, political, financial and moral responsibility, but had confined himself to the notion of responsibility in general, which covered all the aspects of State responsibility, because he had wished to consider the general legal order of the international community. The fundamental question which should be given priority was that of the source of responsibility. The Special Rapporteur regarded the forms and content of responsibility as being of secondary importance. He (Mr. Bartoš) therefore favoured the composite formula proposed, which in no way prejudged the content of responsibility. He did not think that responsibility was necessarily linked to reparation. For one thing, all responsibility did not lead to reparation or satisfaction, and for another, reparation and satisfaction were part of the material and moral consequences of responsibility, which the Commission did not intend to consider for the moment.

41. He therefore approved of the formula according to which the source of responsibility lay in the violation of the international legal order. The sovereignty of States was in no way incompatible with their responsibility. For if the too general conception of the sovereignty of States were taken to justify the conclusion that it was not possible to assign responsibility to them, that would be equivalent to denying that they could have any obligations at all.

42. On question I (*b*), he maintained that the responsibility of a State could be engaged for an illicit act, for an act that was not illicit but was harmful to other States, and lastly for the act of another. The Special Rapporteur, moreover, had rightly explained what constituted responsibility for the act of another.

43. There was no need to dwell too long on questions of terminology. That aspect of the Special Rapporteur's work should, on the whole, be approved; the terminology could be studied in greater detail at a later stage.

44. The subjective and objective elements of the international illicit act, referred to in question II (*a*), must always be regarded as indissolubly linked, not by analogy with internal criminal law, which should be disregarded, but in accordance with the facts of diplomatic history. It might happen that a State had, subjectively, no intention of committing a violation, but that it was objectively linked to other States which became guilty of a violation. That link could be objectively so close that the State concerned could not successfully claim exemption from responsibility by invoking the absence of the subjective element in its own case.

45. As to question II (*b*), there was no doubt that the subjective element could consist in an omission as well as an act. That was most clearly demonstrated by the *Corfu Channel Case*.[11]

46. So far as imputation was concerned (question II (*c*)), analogies between internal law and international law should be avoided. The concept of imputation was especially important in the case of an omission constituting an international illicit act. Conventions imputing responsibility to a State which had not taken the precautions or carried out the inspections required under their provisions were becoming more and more numerous; examples were the conventions concluded on narcotics and on space law. The Special Rapporteur ought therefore to study the legal operation of imputation and its consequences for State responsibility.

47. The definition of the objective element of the international illicit act, proposed in question II (*d*), clearly showed that the subjective element and the objective element could not be dissociated, since only failure to fulfil an international legal obligation was necessarily conduct imputable to the State which was bound by that obligation.

48. Like several members of the Commission, he was of the opinion that abuse of rights (question II, (*e*)) should be considered as a special source of international

[11] *I.C.J. Reports 1949*, p. 4.

responsibility. It frequently happened that powerful and technically advanced States could, even when exercising their rights, cause difficulties for other States. For instance, at the time of the *rapprochement* between Serbia and France, Austria-Hungary had carried on a Customs war against Serbia to prevent the exportation of Serbian livestock. Austria-Hungary had claimed that it had the right to permit or to refuse the passage of the livestock through its territory as it saw fit. A similar situation had arisen in the Near East a few years ago in connexion with oil. The problem had also arisen in connexion with the land-locked countries. On the one hand, States had invoked their right not to permit the creation of an international right-of-way through their territory; on the other hand, the land-locked countries had maintained that refusal of the right of passage constituted an intolerable abuse of rights. A Convention had been concluded in 1965,[12] under the auspices of the United Nations, in which the right to passage in such cases was recognized. Problems of the same kind might arise in regard to the supplying of water to African countries suffering from drought. It might be doubted whether the sovereignty of a State should go so far as to prevent other States from living.

49. The distinction between illicit conduct and illicit events, proposed in question II (*f*), was justified. But an effort should be made to bring those two cases as close together as possible.

50. Injury (question II, (*g*)) might be disregarded if the international illicit act was taken as the point of departure; for injury was then only the consequence of the fact which had generated responsibility. On the other hand, where abuse of rights was concerned, it might perhaps be necessary to take injury into consideration as a constituent element of the abuse. It might be asked whether the injury must necessarily be a material injury or whether the notion of moral injury could be accepted. In international law, there were sanctions for moral injury. They could be applied when the national flag had been insulted. For example, he had once seen a military detachment present arms before a flag which had been thus dishonoured.

51. The idea of capacity to commit international illicit acts, referred to in question III (*a*), could be accepted, but it was necessary to provide for other exceptions than the case of military occupation. He would therefore be in favour of a more flexible formula, covering, in particular, cases of direct or indirect pressure on a State, which could exempt it from responsibility. It must not be forgotten that States which were sovereign in law were not necessarily sovereign in fact.

52. For that reason it was, of course, desirable to mention the possibility of there being limits to the international delictual capacity of States (question III, (*b*)), subject to the reservation he had just made.

53. In conclusion, he thought the Commission should not only approve the Special Rapporteur's proposals as a whole, but should congratulate him on having done work the success of which would be particularly valuable in an international community in which breaches of international law were so frequent.

The meeting rose at 6 p.m.

1080th MEETING

Tuesday, 30 June 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Eustathiades, Mr. Kearney, 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. CASTAÑEDA, after paying a tribute to the Special Rapporteur for the high quality of his report, said that he was basically in agreement with his understanding of the problem.

3. As to question I (*a*) of the Special Rapporteur's questionnaire,[1] he agreed that a composite formula should be adopted that would not prejudge the highly controversial issue of the content of responsibility, in connexion with which the Commission would have to answer the question whether sanctions could be applied in the field of State responsibility and whether they could be of a punitive nature. He was glad the Special Rapporteur had not asked the Commission to take a position on that point.

4. He agreed with Mr. Ustor that the formula finally adopted should make it clear that responsibility could arise out of both illicit and non-illicit acts.

5. He agreed with Mr. Nagendra Singh that it was not really necessary to insert the word "international" before the words "illicit acts". Purely international illicit acts, such as piracy and genocide, were comparatively rare. What had to be considered were acts committed on the internal level which had international repercussions.

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[12] Convention on Transit Trade of Land-locked States, United Nations, *Treaty Series*, vol. 597, p. 42.

[1] See 1074th meeting, para. 1.