Document:-

A/CN.4/SR.1080

Summary record of the 1080th meeting

Topic:

State responsibility

Extract from the Yearbook of the International Law Commission:-

1970, vol. I

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.

6. The Special Rapporteur had been wise to leave aside, for the time being, any consideration of the problem of risk arising from lawful acts, but in view of the growing importance of space law and the control of nuclear explosions, the Commission should not postpone that topic for too long.

7. With regard to section II of the questionnaire, he could answer questions (*a*) and (*b*) in the affirmative, but question (*c*) raised the extraordinarily difficult problem of imputation. In criminal law, imputation merely qualified an individual as the author of an act, but in international law, imputation to a State meant that an act committed by an individual must be juridically attributed to the State. He would be interested to hear from Mr. Ushakov and Mr. Ustor on the new trend in Soviet law concerning imputation.

8. Sub-paragraph (*a*) of article 2 might be less ambiguous if the word "imputed" were replaced by the word "attributed".

9. He fully agreed with the view expressed in question II (*d*) of the questionnaire, that the objective element in an international illicit act consisted of failure to fulfil an international legal obligation. Mr. Tammes had made a very pertinent observation on that subject,[2] but he himself supported the Special Rapporteur.

10. With regard to the abuse of rights, he agreed with Mr. Tammes that that was a key notion which could not be excluded from the draft articles.[3] In some cases, where there was no overt violation of a rule, abuse of rights might be the only source of law. A classic case involved an arbitral award against seal fishermen who had killed female seals during their breeding season.

11. As to injury as a third constituent element of the international illicit act, he fully agreed with what the Special Rapporteur had raised in paragraph 53 of his report, namely, that it was not an additional element.

12. With regard to section III of the questionnaire, he agreed with several members in rejecting the idea of capacity to commit international illicit acts.

13. His reply to question II (*b*) was that there might be some value in drafting a rule concerning limits to the international delictual capacity of States.

14. Lastly, with regard to the three draft articles prepared by the Special Rapporteur, he agreed with Sir Humphrey Waldock and Mr. Tammes that it was difficult at the present stage to express any judgement, since it was not yet known what position those articles would occupy in the draft as a whole.

15. Mr. ALCÍVAR said that the report presented by the Special Rapporteur was obviously the product of great erudition. In the light of modern doctrine, the Special Rapporteur had taken as his point of departure the existence of an international juridical order which logically imposed obligations on the subjects making up the international community. When a State omitted to fulfil an international obligation, it was committing an illicit act which placed responsibility on the author of that act. Up to that point, he was in absolute agreement with the Special Rapporteur.

16. However, he was inclined to believe that the legal relationship created by the commission of an internationally illicit act was a relationship with the international community, which today was organized by law. Up to a certain point, although not altogether, his thinking was on the same lines as that of Kelsen. The conception of law as both a normative and a coercive order was certainly the closest he came to the pure theory of law.

17. But he also believed that the world was moving with increasing speed towards the centralization of power in the international community, and that led him away from the idea of a similarity between the present legal order and the decentralized order of primitive societies. The nature of the United Nations Charter was that of general international law, and it went beyond the traditional conception of that law as being merely customary law. It might be said that he was trying to proceed too quickly, but it must be remembered that modern international society was evolving quickly. They were confronted with a world in which the vast majority of nations were rising to demand a distributive justice which would at least give them a chance to live, now that they were faced with the misery of underdevelopment and the danger of perishing in a thermo-nuclear blaze.

18. The Special Rapporteur favoured the thesis that two types of legal relationship resulted from an illicit act: that of reparation and that of sanction. However, the articles which had been submitted to the Commission so far did not reflect the position expressed by the Special Rapporteur in his commentary, and he would therefore reserve his final opinion until he knew how it was proposed to balance those two legal situations.

19. The Special Rapporteur had pointed out that the illicit character of the act followed from the violation of obligations laid down in a legal rule, and rejected the common expression which referred to violation of the rule. He was in full agreement with that technical interpretation. The legal rule commanded, prohibited or protected and it included the establishment of obligations and rights. It was therefore the non-fulfilment of those obligations—and possibly the exercise of rights going beyond the limits established in the rule—which constituted the illicit act.

20. The obligations and rights were established by what the Special Rapporteur called "primary rules", and the consequences which followed from the violation of those obligations corresponded to what he called "secondary rules". He had emphasized that it was the latter rules which were the subject of the work on which the Commission was engaged. He (Mr. Alcívar) believed, however, that when establishing the different categories of responsibility, it would be impossible to avoid referring specifically to a number of primary rules, particularly the principles of international law incorporated in the United Nations Charter, which were peremptory norms of international public order and ranked as constitutional precepts.

[2] See 1075th meeting, para. 39.

[3] *Ibid.*, para. 40.

21. He was decidedly in favour of using the Special Rapporteur's composite formula for laying down the basic rule on State responsibility. It was true that in international law, unlike internal law, no difference was made between civil and criminal responsibility; but the difference would emerge spontaneously, whatever the terminology used in cataloguing the wide range of State responsibility. The problem was not one of names, but of the legal effect of the illicit act.

22. The use of the expression "*hecho ilícito*" presented certain difficulties in Spanish legal terminology. An *hecho ilícito* was something produced by fault or negligence which was not classed as a criminal offence. The consequence of the *hecho ilícito* was reparation for the injury caused, and that was only one of the aspects which the Special Rapporteur had attributed to State responsibility.

23. An *acto ilícito*, on the other hand, consisted in human conduct which was objectively contrary to law and punishable by penal measures, or which, without being of that nature, involved the loss of a right or of a favourable legal situation, or the aggravation of an existing obligation, or the creation of an obligation to make reparation for the injury caused. As a rule, an *acto ilícito* was imputable to its author by virtue of intention (*dolus*) or fault (*culpa*). The expression *acto ilícito* was a generic one and therefore included criminal offences, civil offences, failure to take due care—culpable negligence—and objectively anti-legal acts which, although not culpable, in exceptional cases created responsibility of their author for the injury caused.

24. He hoped, therefore, that in formulating the Spanish version of article I, the Special Rapporteur would use the words "*acto ilícito*" instead of "*hecho ilícito*". He understood that it was the English version rather than the French which was the real difficulty.

25. With regard to the Special Rapporteur's questionnaire, his answer to question I (*b*) was in the affirmative, although his future position would depend on the approach adopted to each of the subjects mentioned.

26. He had not the slightest doubt about the imputability of the illicit act in international law, but would add that, although the State was the primary subject of imputability, its executive organs were also involved. In view of the Nuremberg judgement, there was no need for him to comment on such a well-recognized principle. The problems still outstanding would be solved with the support of the juridical organization of the international community, and there it was the "conscience of the world" that spoke—to use the phrase employed by the Nuremberg Tribunal—so that more and more headway was being made every day in the progressive development of international law.

27. With regard to section II of the questionnaire, he could answer all the questions affirmatively including question (*g*); indeed, he did not think it was possible to include injury as a third constituent element of the international illicit act. In criminal law an attempt was a thwarted crime, which established much greater responsibility than the commission of a less serious offence, and intent was an important element in the illicit act.

28. He supported the idea that the abuse of rights should be dealt with in the draft articles in so far as that would help to harmonize the rules of positive law with the ideal of justice.

29. Some adverse comments had been made on paragraph 1 of draft article III, which read: "Every State possesses capacity to commit international illicit acts". He himself would prefer some other wording, but must point out that the Special Rapporteur had stated a legal situation which should surprise no one. In the broad sense of the term, legal capacity was the capacity which a man possessed to be the subject of legal relationships; and that led to its being considered, on the one hand, as the capacity to acquire rights and contract obligations, and on the other hand, as the capacity to enter into a commitment and to remain bound by the commission of an illicit act. In the latter sense, of course, it was the capacity of a person to answer for punishable acts or omissions, and it was well known that persons whom the law regarded as lacking capacity were not subjects of civil or criminal liability. He was convinced that what the Special Rapporteur was referring to in that paragraph was capacity and not a faculty; but since a different interpretation was possible, it would be wise to make the wording more precise.

30. The limitation of capacity in special situations caused him some anxiety, though he would not go so far as to reject it. The example of military occupation was frightening, since it was the most serious crime that could be committed against a State, but he could not close his eyes to reality. In the circumstances he preferred to reserve his opinion until the draft had reached a more advanced stage.

31. Mr. KEARNEY, after congratulating the Special Rapporteur on his report, said that he would first like to express qualified approval of the plan suggested and the method followed. That plan was an extremely reasonable approach to what was a most difficult series of problems of international law, because they were not only legal, but also highly political.

32. Judging by the examples already submitted, the Special Rapporteur proposed first to present a number of general rules on the abstract aspect of State responsibility; he feared, however, that rules limited to pure, abstract responsibility might prove to be too metaphysical for the kind of international society that existed in the world today. He agreed with Mr. Yasseen, therefore, that the short series of articles which the Special Rapporteur had in mind would not provide the Commission with a sufficiently broad solution to the many complex problems of State responsibility. If the Commission were to produce more than a mere showcase of legal learning, it would have to work out the many detailed rules to which Mr. Yasseen had referred.[4]

33. His approval of the Special Rapporteur's plan, therefore, was qualified by the assumption that his short series of general and abstract articles was intended to serve as the foundation on which the Commission would

[4] See 1076th meeting, paras. 32-37.

build up a complete and detailed code dealing with all aspects of the problem, both general and specific. That assumption was based on the rather brief reference to the second phase of the Commission's work in the last sentence of paragraph 9 of the report and was confirmed by the Special Rapporteur's observations in paragraph 25.

34. He had also qualified his approval of the Special Rapporteur's method of work because, while the deductive system of thought was of great value in constructing first principles and working out an abstract system, when the Commission came to consider detailed rules on State responsibility, greater emphasis would have to be placed on an inductive approach. In particular, many more examples would be needed, so that the Commission could be sure that everyone was talking about the same thing.

35. He found no serious problems in connexion with article I, though he shared the view expressed by Sir Humphrey Waldock and Mr. Nagendra Singh that the English version was couched in language of considerable obscurity.

36. With regard to the question of sanctions, he agreed with Mr. Thiam that that was a problem to which the Commission should give serious consideration. He himself felt that one of the fundamental objectives of the Commission's work should be to establish a system so complete and self-contained as to eliminate both the need and the ability of individual States to resort to the unilateral application of sanctions as a response to another State's wrongful act or failure to make reparation.

37. That was an extremely difficult aim to achieve; the Commission would have to work out rules not only for determining the existence of responsibility, but also for application of the necessary principles and methods in order to obtain reparation from States which had committed a wrong. As Mr. Yasseen had said, the problems involved had to be settled by the legislative process and the Commission was the key element in that process.

38. With regard to article II, he agreed with Mr. Reuter that the contrast between the subjective and objective elements was not too happily brought out in the English version. It did not seem logically possible to separate the two elements of imputability to the State and conduct that violated an international obligation of the State. He suggested, therefore, that sub-paragraphs (*a*) and (*b*) might be combined to read: "An international illicit act exists where conduct that constitutes a failure to carry out an international obligation of the State is imputed to a State under international law".

39. The question then arose whether the international obligation existed because the conduct was imputed to the State under international law, or whether the conduct was imputed to the State under international law because the international obligation existed. The question might also be put negatively: could a State fail to carry out an international obligation if the act or omission constituting the failure could not be imputed to the State under international law? To his mind, the answer must clearly be in the negative. If, under the rules of international law, conduct was not imputable to the State, the State could not have violated an international obligation.

40. There was no valid reason why the Commission should not deal with the problem of imputation in the draft articles, but it should not allow the existence of rules governing special situations, such as failure to safeguard embassy property from mob violence, to distort what should be the automatic and unquestioning acceptance of the basic principle that a State was responsible for all the official acts of its public officials and servants.

41. The notion of abuse of rights should, he thought, be dealt with as a separate topic. With regard to question II (*f*) of the questionnaire, he agreed with those members who had said that they were not sure what was the distinction between illicit conduct and illicit events.

42. To question II (*g*) he would reply that if the question was merely whether the definition in article II was acceptable without a specific reference to injury, his answer would be in the affirmative. But if the question was whether the draft articles could be completed without any reference to injury, he must reply that he doubted very much whether that would be possible.

43. It was necessary to distinguish between injury as constituting evidence of the existence of the violation of an international obligation and injury as determinative of the problem of damages or reparation. That distinction was ignored in the key sentences in paragraph 54 of the report, which read: "The extent of the material injury caused may be a decisive factor in determining the amount of the reparation to be made. But it cannot be of any assistance in establishing whether a subjective right of another State has been impaired and so whether an international illicit act has occurred". That seemed to him an overstatement, since the fact of injury obviously could be, and usually was, a factor which determined that the right of another State had been impaired. It seemed essential to develop, at an early stage of the draft articles, the fact that injury did play an important part in determining the failure to carry out an obligation.

44. With regard to article III, he shared the views of those members who had questioned the need for a paragraph dealing with capacity to commit international illicit acts; if article II had any meaning in so far as it referred to the failure to carry out an international obligation, then paragraph 1 of article III would seem to be superfluous.

45. The problem dealt with in paragraph 2 of article III would have to be taken up some time, but he doubted whether it was necessary at the present stage to include a clause dealing with exceptions. Certainly, if such a clause was drafted, it should refer to a reasonable number of exceptions and not single out the example of military occupation.

46. All the other questions in the questionnaire he would answer in the affirmative.

47. Mr. ROSENNE said that the classical Roman lapidary quality of the Special Rapporteur's work reminded him of a saying by Boileau which the late

Gilberto Amado used to quote: "*ce que l'on conçoit bien s'énonce clairement*".

48. He proposed to make a few remarks on the questionnaire submitted by the Special Rapporteur. His silence on any given question would indicate that provisionally he was not in disagreement with the proposition it contained, though he was not necessarily able fully to subscribe to it at the present stage.

49. The prime question was that of the meaning of "responsibility". The topic was a vast one and it was therefore necessary to keep it within manageable proportions at every stage. He believed it was necessary first to deal with terminology and, in particular, with the question whether there was any difference of substance between the concept of "liability" and that of "responsibility" and, if so, what that difference was.

50. The problem was not merely one of terminology; it was not a technical matter to be left to the Drafting Committee or to the language services, it was a question of substance which applied as much to the draft articles as to the commentaries. The translator's note to paragraph 27 of the report, on the use of the expression "illicit act" as the translation of "*fait illicite*", was extremely revealing; it was of special significance that the problem arose only in respect of the English version and not in respect of the Spanish or Russian versions. Personally, he believed that the most neutral and most general expression was "wrongful act". The word "wrongful" carried the meaning of "contrary to law or established rule" and also that of "unjustifiable". The word "act", which covered conduct, applied both to acts of commission and acts of omission. The expression "wrongful act" would thus incorporate the idea that a State could be answerable to another international person which might have been harmed by the impugned conduct.

51. He could not fully subscribe to the Special Rapporteur's statement, in paragraph 27 of his report, that "It is obvious, in any event, and almost goes without saying, that the choice of one particular term rather than another does not affect the determination of the conditions for, and characteristics of, an act generating international responsibility, with which most of the articles in this first part of this report will be concerned". Such expressions as "guilty State", which appeared in several places in the report, could be a source of confusion by creating an association of ideas that could quickly lead to an incorrect conclusion, and they were prejudicial to the establishment and functioning of a workable international legal order. The terms "answerable" or "responsible" were not necessarily, or always, the equivalent of "guilty".

52. He agreed that within the general context of the international wrongful act it might become possible gradually to outline a concept of "crime" in international law, as was stated in paragraph 23 of the report. That development, however, would probably take place at a later stage, when the general concepts of responsibility and of international community interest had been acceptably clarified. In that connexion, the discussions which had taken place at the Vienna Conference on the Law of Treaties about the proposed article 5 *bis*[6] had shown that the membership of the United Nations was not the same as the universal international community.

53. For the time being, therefore, he thought it would be better to keep within the realm of "civil responsibility" and to establish its component elements, as well as any lawful justifications for the acts in question and the modalities for the resolution of outstanding questions between States regarding alleged responsibility. Such a course would conform with the terms of General Assembly resolution 799 (VIII), which referred to the codification of the principles of international law governing State responsibility as being "desirable for the maintenance and development of peaceful relations between States".

54. That brought him to the question of imputability. It was necessary to break down that abstract and confusing expression into its component elements and to establish accurately its function in the scheme of things and how it was verified. Imputability was the mechanism by which the State, or other international person concerned, and the act were brought into a mutual relationship which introduced the concept of responsibility. Viewed in a broader context, imputability was a term which applied in general not only in relation to wrongful acts, but also in relation to rightful and creditable acts. Therefore, in analysing its elements, it was necessary not to be confined to precedents culled from the books dealing with State responsibility. It was essential to avoid optical illusions and facile analogies with domestic legal systems. The concept of imputability referred to the process through which a juridical person—the State or other subject of international law—became answerable according to international law for the act of an individual.

55. Imputability was, he submitted, always a matter for the law, not for the courts as such, to determine. In internal law systems, the courts operated to apply predetermined and objective law in order to determine whether a given act was or was not imputable to a juridical person. Imputability did not really arise when a mere individual alone was involved.

56. It had always been his understanding that in the doctrine of international law the same basic concept applied. There, imputability was a conclusion reached by the application of international law. The label "subjective" or "objective" might not be of any great moment in that connexion. He was rather afraid that any serious attempt to displace the concept of imputability from its central place would lead rapidly to a state of anarchy.

57. On the other hand, he had doubts about the advisability of using the word "impute" or its derivatives in the draft articles; it would certainly not be used in the introductory articles, since one of the prime functions of codification would be to clarify what was meant by imputability and how it was to be established. He

[6] *United Nations Conference on the Law of Treaties, Second Session, Official Records*, pp. 229-252 and 343-344 (United Nations publication, Sales No.: E.70.V.6).

had been much impressed by Mr. Castañeda's remarks on that question.

58. In thinking about the question of imputability he had begun to doubt whether the distinction between "primary" and "secondary" rules, in the sense described in paragraph 11 of the report, could be fully or consistently maintained. Basically, the distinction was sound and valid, but the Commission should not allow itself to become the prisoner of its own dialectic. He was not at all certain that imputability operated in an identical way regardless of the content of the primary rule non-observance of which was the generator of answerability. At all events, he would not take that as axiomatic, but rather as a hypothesis which needed to be proved.

59. Those doubts were strengthened by the very concept of normative causality discussed in paragraph 52 of the report. It would be necessary to have made substantial advances in the examination of that difficult aspect before the Commission could reach definitive conclusions on how far the distinction between primary and secondary rules could be carried in the codification of the present topic.

60. With regard to the subject of abuse of rights, and going back to the framework of General Assembly resolution 799 (VIII), the question was whether the responsibility engendered by abuse of rights had not threatened the maintenance and development of peaceful relations between States. The contents of the Secretariat memoranda in documents A/CN.4/165[6] and A/CN.4/209,[7] on the one hand, and a close reading of the collections of resolutions of the Security Council and of the political organs of the General Assembly since 1946, on the other hand, led him to think there might be more in the context of political jurisprudence than was to be found in the classical legal treatment of the topic. The prolonged discussions at the Vienna Conference leading to the adoption of article 66 of the Vienna Convention on the Law of Treaties[8] should encourage the Commission to look more closely at political jurisprudence of that kind. The matter needed to be scrutinized much more closely before a viable conclusion could be reached.

61. On the question of injury, he was compelled to admit that he was not at all certain of its real meaning. Of course, the question of damage arose in close connexion with the reparation due, in other words, with the liquidation of the abnormal legal relationship generated by the act creative of the condition of answerability. In a sense, injury was notionally a constitutive element of the act generative of answerability, but it was a specific kind of injury, similar to the special kind of breach of a treaty referred to in article 60, paragraph 2 (*b*) of the Vienna Convention.[9] As the International Court of Justice had stated in its judgement of 5 February 1970 in the *Case concerning the Barcelona Traction, Light and Power Company Limited*, responsibility was the necessary corollary of a right.[10]

62. He agreed, of course, that there was a general international interest in the continued observance of the rules of international law. At the same time, it would not be proper to frame the present articles in such a way as to convey the impression that every State was entitled at all times to exact observance of all those rules. A State needed something more than general interest; it must show some right which was at the same time direct and specific.

63. In a sense, the concept of injury operated as a limiting factor and as a deterrent to too undisciplined and far-reaching an approach to the topic. That had been surely the *ratio decidendi* of the International Court of Justice in the *Barcelona Traction* case.

64. As he had already said in 1965, in connexion with the law of treaties, he had always had great difficulty in understanding the concept of *capacité d'agir* (capacity to act), which seemed a highly abstract generalization that needed to be given concrete expression according to the different circumstances in which it arose.[11] In paragraph 58 of his report, the Special Rapporteur had explained that he was not using the term "capacity" to correspond with the German notion of *Deliktsfähigkeit* (delictual capacity), a proposition with which he (Mr. Rosenne) fully agreed. Unfortunately, if it were written into a draft article, that term could lead to misunderstandings and even to a juridical absurdity. For example, the contents of article III could be paraphrased as: "Every State can commit international illicit acts" or even "Every State may commit international illicit acts". Such a statement would be simultaneously a truism and an inexactitude, and in any event it was not necessary for the purposes of the present draft. Accordingly, while he understood and accepted the underlying basis which the Special Rapporteur had had in mind, he believed it would be unwise to attempt to formulate a rule such as that contained in paragraph 1 of article III.

65. His conclusion was that the three articles now before the Commision needed to be completely recast as a matter of presentation and, at the same time, probably slightly adjusted as a matter of formulation.

66. The draft should begin with a positive statement indicating what the whole draft related to, followed by appropriate reservations as to matters it did not touch on. Paragraph 5 of the report was determining in giving the necessary orientation. It showed that there was need for an article—modelled on article 1 of the Vienna Convention on the Law of Treaties—stating that the draft applied to responsibility owed by States to States. Such a provision would make an article on capacity *per se* redundant.

67. The next provision would state the essential of what was understood by responsibility, the wrongful act which

[6] See *Yearbook of the International Law Commission, 1964*, vol. II, p. 125.

[7] Op. cit., *1969*, vol. II, p. 114.

[8] *United Nations Conference on the Law of Treaties, Official Records:* see discussions on article 62 *bis* at both sessions and Second Session, pp. 188 *et seq.* (United Nations publications, Sales Nos.: E.68.V.7 and E.70.V.6).

[9] Op. cit., Documents of the Conference, document A/CONF. 39/27 (United Nations publication, Sales No.: E.70.V.5).

[10] *I.C.J. Reports 1970*, p. 33, para. 36.

[11] See *Yearbook of the International Law Commission, 1965*, vol. I, p. 25, para. 31.

was imputed—not imputable—to a State causing injury, even if metaphysical, to another State. That provision would be followed by all the necessary reservations, such as the responsibility of a State to an international organization, or of an international organization to a State or to another organization, and the responsibility of other subjects of international law and of States whose capacity was limited.

68. Finally, he did not believe that the question of procedure for determining whether responsibility existed or did not exist in concrete cases could be neglected even at the present preliminary stage. Even if, as the Special Rapporteur had said in another connexion some years previously, any effort to combine rules of substance and rules of procedure might lead to dangerous confusion, at the same time, as the Special Rapporteur had then recognized, the development of substantive international law was bound to demonstrate more clearly the need for parallel development of the international law of procedure.

69. In one way or another, the question of machinery had been touched upon in several of the working papers submitted to the Commission's Sub-Committee on State Responsibility in 1963.[12] Since the word "procedure" was so liable to misinterpretation, he was prepared to use a circumlocution such as machinery or modalities for establishing the existence of a case of responsibility and the solution of the question. The situation was very similar to that which had confronted the Commission in 1963, when it had first dealt with the invalidity and termination of treaties. Now, as then, the Commission must face up to the question of machinery at the initial stage and not discard it on the specious ground that it related to another branch of international law.

70. To indicate the point of contact and the modalities of operation of the means mentioned in the United Nations Charter for the settlement of questions and differences arising out of the interpretation and application of the codified law of State responsibility, would be a worthwhile effort in the direction of the progressive development of international law. It would, moreover, conform with the letter and the spirit of the draft Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States, adopted by the Drafting Committee of the 1970 Special Committee.[13]

71. Subject to those reservations and speaking generally, he accepted the broad outline of the plan suggested by the Special Rapporteur and the method he had followed.

72. Mr. USHAKOV said that, in order to avoid any misunderstanding, he wished to make it clear that the notion of imputation was, of course, known in Soviet internal law. As in all systems of internal law, however, it was intimately linked with the concept of fault (*culpa*). In that sense, it would be said that fault could not be imputed to a child or to a person of unsound mind. It was because of the link with the concept of fault that most Soviet writers rejected the notion of imputation in international law, since in contemporary international law the concept of fault was not accepted.

73. However, there was sometimes a problem of attribution of an international illicit act when the State which had committed the act denied it. But then it was other subjects of international law, not international law itself, which attributed the act to the State. Sub-paragraph (*a*) of article II would be acceptable if it were drafted on that basis.

74. Sometimes it was the very existence of an act which had to be established. That was another question, on which he would refer members to paragraph 2 of article 36 of the Statute of the International Court of Justice, which dealt with the jurisdiction of the Court in all legal disputes concerning, *inter alia*, "the existence of any fact which, if established, would constitute a breach of an international obligation".

75. Moreover, article II of the Special Rapporteur's draft referred to failure to carry out an international obligation. According to the Soviet interpretation of international law, States had, on the one hand, rights, and, on the other hand, duties and obligations. If, in that article, the concept of obligation did not also include the duties of States, then it should be carefully explained what was meant by an obligation.

76. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur's report came up to the Commission's highest expectations. However, the intellectual effort which had gone into that report might lead to the emphasizing of distinctions of which the international community might not be fully aware. The political overtones with which it was charged made State responsibility a very difficult subject to deal with.

77. The Special Rapporteur had not limited his consideration to cases of injury done to aliens, but had taken up the subject in its widest connotation. At the same time, however, he had limited it to responsibility arising from unlawful activities as distinct from responsibility for lawful activities, also called responsibility for risk.

78. The limits to the scope of the report also limited the ability of the Commission to visualise the direction in which the Special Rapporteur was moving. Some questions could not be answered fully until the Commission knew what proposals he would be making in connexion with some of the concepts with which he would deal in later articles.

79. In paragraphs 22 and 23 of his report, the Special Rapporteur had outlined the different conceptions of responsibility: first, the traditional notion; secondly the position of such writers as Kelsen and Guggenheim, that the legal order was a coercive order; and thirdly, the more reasonable view that State responsibility should give rise to both sanctions and reparation.

80. Situations could arise in which reparation would not be enough and some sanction would be necessary. He could think of the example of a strong State shelling,

[12] See *Yearbook of the International Law Commission, 1963*, vol. II, pp. 237-259.

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

from territory under its control, innocent villages in a neighbouring African country. It would not be enough just to state the law of State responsibility, because the African State concerned would not be able to enforce that responsibility.

81. The Special Rapporteur had been right in saying that there were situations which could lead to the establishment of the concept of an international crime. He was glad to note that the Special Rapporteur had not shied away from the concept of modern international law which had been accepted at the Vienna Conference on the Law of Treaties. Traditional international law had regarded treaties concluded under duress as valid, but the Vienna Conference had acknowledged that error or fraud could vitiate consent and invalidate treaties. It had even gone so far as to accept the notion of peremptory norms of international law from which no derogation was possible by treaty. It was therefore appropriate to think, not of an international society, but of an international community which would evolve concepts of public policy.

82. The notion of abuse of rights was not viewed with much favour by lawyers from the common law countries; the concept of unjust enrichment, however, was known to the common law. Even in the civil law countries, it was significant that there existed few judicial decisions relating to the abuse of rights. As far as international law was concerned, there was a paucity of State practice and judicial precedent in the matter, but it was not justified to exclude the important concept of abuse of rights from the Commission's study, especially in view of the acceptance of rules of *jus cogens*. He therefore urged that the question of the abuse of rights should engage the Commission's attention at an early stage.

83. With regard to injury, it seemed unduly subtle to ask whether it should be considered as a third constituent element of an international illicit act. In any event, it would be difficult to formulate practical rules of international law on State responsibility without reference to injury. There was a logical relationship between reparation and damage.

84. It seemed to him that there was a danger that the articles might be too abstract and might draw distinctions which could be understood by legal minds, but were not suitable for the international community.

85. He would find it very difficult to support the provisions of article III, paragraph 1, on the capacity to commit international illicit acts. The analogy with the law of treaties was not very apt. The question of the capacity to conclude treaties had served to emphasize the equality of States. In the present instance, there was no need to stress the notion of capacity in connexion with the commission of wrongs. The emphasis should be placed on liability for wrongdoing rather than on the power to commit wrongs. A provision such as article III, paragraph 1, would be unnecessary if the notion of liability were fully stressed, possibly by a provision to the effect that no State should be free from responsibility.

86. With regard to the limitation of capacity specified in article III, paragraph 2, it was undesirable to single out the particular case of military occupation. It would be better to reserve the question of exceptions to responsibility until the Commission had proceeded further in its work.

87. With regard to article II, he agreed with the other English-speaking members of the Commission in finding the expression "international illicit act" unsuitable. The term "illicit" was a synonym of "illegal", but it had also a moral connotation. In the present context, he preferred the expression "wrongful act".

88. The subtle distinction made in the two sub-paragraphs of article II could no doubt be perceived intellectually, but it must be remembered that the Commission was drafting a convention for persons who would not be able to appreciate such a level of abstraction.

89. Article I was a very difficult provision. For the reasons he had already stated, he would suggest that the opening words be amended to read: "Every wrongful act of a State . . .". As for the rest of the sentence, he had serious doubts about the use of the words "gives rise to" and would prefer a statement to the effect that every wrongful act of a State engaged that State's international responsibility.

90. He had no doubt that, in his next report, the Special Rapporteur would clear up many of the doubts which had been expressed by members during the present discussion and would broaden some of the concepts which appeared in the first three articles so as to relate them more closely to the facts of international life.

91. The wealth of literature, legal decisions and State practice which had been examined by the Special Rapporteur was apparent from the fact that the footnotes exceeded in length the text of his report. The report showed the range of his scholarship and his ability to put together often disparate ideas. He hoped that, under the leadership of the Special Rapporteur, it would be possible for the Commission to prepare a set of draft articles which would gain general if not unanimous acceptance.

The meeting rose at 1 p.m.

1081st MEETING

Thursday, 2 July 1970, at 10.10 a.m.

Chairman: Mr. Taslim O. ELIAS

Present: Mr. Ago, Mr. Alcívar, Mr. Bartoš, Mr. Castañeda, Mr. Castrén, Mr. Kearney, Mr. Nagendra Singh, Mr. Rosenne, Mr. Sette Câmara, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Humphrey Waldock, Mr. Yasseen.
