Document:-

A/CN.4/SR.1202

Summary record of the 1202nd meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1973, vol. I

Organization of Work

1. The CHAIRMAN said that the officers of the Commission, together with the Special Rapporteurs and former Chairmen, had met that morning and considered three questions: first, the organization of the work of the Commission during its present session; secondly, the action to be taken on the request from the Economic and Social Council for the International Law Commission's comments on the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* from the point of view of international penal law (A/CN.4/L.193); thirdly, the date of the elections to fill the casual vacancies in the Commission in accordance with article 11 of its Statute (item 1 of the agenda).

2. On the first question, they had taken into account the fact that the Commission had been instructed by the General Assembly to give the highest priority to the topics of State responsibility (item 2 of the agenda) and succession of States in respect of matters other than treaties (item 3 of the agenda).[1] They therefore recommended that the Commission should consider the topic of State responsibility first, and allocate about three weeks or fifteen meetings to it. The Commission should then consider the topic of succession of States in respect of matters other than treaties, to which it should also allocate about fifteen meetings. If the Special Rapporteur for that topic preferred a later opening date, the Commission might deal first with the topic of the most-favoured-nation clause (item 6 of the agenda). It was suggested that five meetings should be allocated to the latter topic, although some members had thought that seven or eight would be more appropriate.

3. The Commission should next consider, for about five meetings, item 5 (*a*): Review of the Commission's long-term programme of work: "Survey of International Law" prepared by the Secretary-General; and then, for two or three meetings, item 5 (*b*): Priority to be given to the topic of the law of the non-navigational uses of international watercourses. Finally, the Commission should examine item 4: Question of treaties concluded between States and international organizations or between two or more international organizations. If it allocated two or three meetings to that topic, that would leave approximately one week at the end of the session for consideration of the Commission's draft report.

4. On the second question, which was far from easy, it had been noted that it was open to any of the main organs of the United Nations to request the Commission to study a subject. It was not at all certain, however, that the Economic and Social Council's request for the Commission's comments on the report of the *Ad Hoc* Working Group of Experts of the Commission on Human Rights concerning the question of *apartheid* came within the scope of the Commission's object as specified in its Statute, namely, the promotion of the progressive development of international law and its codification.

5. Even if the Commission's role were interpreted as requiring it not to revise the *Ad Hoc* Working Group's draft, but rather to determine the compatibility of the provisions of the draft with the basic principles of international penal law, such an investigation would undoubtedly involve a protracted study. The Commission, however, had to abide by its agenda and the order of priorities laid down for it by the General Assembly, and it could not set them aside to meet a request from another organ.

6. There had been general agreement on the importance of the subject and on the need to respond to the request made by the Economic and Social Council. It was therefore suggested that a small group, consisting of the first Vice-Chairman (Mr. Yasseen), Mr. Reuter and Mr. Ustor, should examine the question and report to the larger group, consisting of the officers of the Commission, the Special Rapporteurs and former Chairmen, which could then make recommendations to the Commission on the action to be taken.

7. With regard to the third question, it was necessary to reconcile two conflicting needs: first, that the casual vacancies on the Commission should be filled as soon as possible, and secondly, that as many members as possible should participate in the election. It was therefore recommended that the Secretariat be asked to get in touch with those members who had not yet arrived at Geneva in order to ensure that some of them at least would be present for the election. The date of the election would be decided in the light of the results of the Secretariat's enquiries, but would not be later than Tuesday, 15 May.

8. If there were no comments, he would take it that the Commission endorsed the Group's recommendations on those three questions.

It was so agreed.

The meeting rose at 12.5 p.m.

1202nd MEETING

Wednesday, 9 May 1973, at 10.5 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.

Filling of casual vacancies in the Commission

(A/CN.4/268 and Add.1 and 2)

[Item 1 of the agenda]

1. The CHAIRMAN suggested that the election to fill the four casual vacancies in the Commission should be held on Tuesday, 15 May 1973. Four members of the Commission were absent, but two of them, Mr. Bedjaoui and Mr. El-Erian, had intimated that they would be

[1] See General Assembly resolution 2926 (XXVII).

able to attend on that date. He suggested that the other two, Mr. Rossides and Mr. Tabibi, should be notified of the date of the election by telegram.

It was so agreed.

State responsibility

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

[Item 2 of the agenda]

INTRODUCTION BY THE SPECIAL RAPPORTEUR

2. The CHAIRMAN invited the Special Rapporteur to introduce his reports on State responsibility.

3. Mr. AGO (Special Rapporteur), introducing his third and fourth reports on State responsibility (A/CN.4/246 and Add.1 to 3, A/CN.4/264 and Add.1), began by reminding the Commission that, in the history of the topic he had given in his first report,[1] he had tried to show why previous attempts to codify the law of State responsibility had failed and to point out the great difficulties of such an undertaking. In particular, he had given warning that when dealing with State responsibility it was dangerous to try at the same time to define the rules placing obligations on States, the violation of which could engage their responsibility: that would mean trying to codify the whole of international law from the point of view of responsibility. The sphere of responsibility properly so called included only the examination of the conditions in which it was possible to establish that an international obligation had been violated by a State and to determine the consequences. The reason why the attempts at codification undertaken so far—in particular by the Hague Conference of 1930, which had studied the responsibility of States for injury caused to aliens in their territory—had failed, was because they had not managed to avoid that danger; by connecting the subject of responsibility with that of the treatment of aliens, the codifiers had confused the definition of the rules governing that particular branch of law with the definition of the rules relating to responsibility proper.

4. The Commission itself had not avoided making the same mistake when it had first placed the topic of State responsibility on its agenda, and it was only after a first unsuccessful attempt at codification that it had reached the conclusion that the international responsibility of States should be studied as a separate and single general problem, in other words, as a situation resulting from any violation of any international obligation whatsoever.[2] It was necessary to postulate the existence of the various substantive rules of international law and to confine the investigation to ascertaining the consequences of violation of the obligations deriving from these rules.

5. He would remind the Commission that, after it had examined the history of the earlier work on the subject, which he had submitted in his first report, it had been agreed that the topic of responsibility should be divided into two main parts: the origin of international responsibility and the content of that responsibility.[3]

6. It was necessary, first, to define the conditions which made it possible to establish the existence of an internationally wrongful act—the source of responsibility—it being understood that an internationally lawful act could also entail responsibility, but that it was preferable to study the consequences of the two kinds of act separately; and secondly, to determine the consequence of the internationally wrongful act or, in other words, to define the content of the responsibility. At the present stage, the Commission was only called upon to study the former aspect of the question, which was the subject of the third and fourth reports he had already submitted, and would be further examined in subsequent reports.

7. The first task was to define the conditions in which an internationally wrongful act could be attributed to the State, in other words, since the State acted through individuals, the conditions in which the act of an individual could be regarded as an act of the State.

8. The next task—and that would be the subject of his fifth report—was to establish what acts of the State were characterized as internationally wrongful, in other words, in what conditions such acts constituted violation of an international obligation of the State. That would involve another very complex notion, that of infringement, for the definition of which it would be necessary to take into consideration a whole group of questions. He had already had occasion, in the past, to mention that a distinction should not be made according to the source of the international obligation infringed—whether it was customary, treaty or other law—and to refer to the distinction which should, on the other hand, be made between wrongful conduct and a wrongful event. He had also pointed out the need to define the scope of the rule of prior exhaustion of local remedies and to settle questions concerning the determination of the *tempus commissi delicti*.

9. In the same context, however, other questions would also have to be taken into consideration, and there the Commission might wish to introduce some progressive development of international law. Up to the present, most writers had considered that in international law responsibility meant, essentially, civil responsibility. But it should now be decided whether internationally wrongful acts as a whole did not include a category of acts, the nature and consequences of which could be different—acts for which, in particular, it was unthinkable that reparation could be made by mere indemnification. That applied, for example, to some international crimes such as the violation of certain obligations essential to the maintenance of peace—in particular, aggression or genocide—the gravity of which could not be compared with the revocation of a mining concession, granted to an alien, for instance. It was in the same spirit that, in the law of treaties, it had been found necessary to recognize the existence of certain peremptory norms, or rules of *jus cogens*. It had to be acknowledged that the rules

[1] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 125.

[2] *Ibid., 1963*, vol. II, pp. 227-228 and vol. I, p. 86, para. 75.

[3] *Ibid., 1970*, vol. II, p. 306, para. 66 (*d*).

of international law varied in degree of importance. That would be seen in the part of his work devoted to the consequences of an internationally wrongful act, but already in the context of the study of infringement, in other words, of the violation of an international obligation, that difference would have to be brought out by drafting an article which would establish a distinction between two categories of infringement. Some infringements must be considered more serious, because fulfilment of the obligations imposed by certain rules of international law was essential to the international community.

10. The Commission would also have to consider, in the first part of its study, problems such as the participation of several States in one and the same wrongful act, and the responsibility of one State for the act of another. There would then remain to be considered, in another chapter, the circumstances, such as *force majeure*, act of God, consent of the injured State, legitimate application of a sanction, self-defence, and so on which, exceptionally, prevented an otherwise wrongful act from being wrongful.

11. That was an outline on the work before the Commission. From now on it should no longer consider the topic in general terms, but proceed to examine the concrete problems. It should begin by considering whether it could propose articles stating the general principles governing the topic as a whole, then pass on to deciding what constituted an act of the State in international law, in other words, to the question of the attribution of certain conduct to the State as a subject of international law, and finally, it should establish in what circumstances such conduct could be characterized as an international infringement and hence as an internationally wrongful act. The broad lines of the plan he proposed had received general support in the Sixth Committee.

12. With regard to article 1 (A/CN.4/246) which laid down as a principle that every internationally wrongful act of a State involved the international responsibility of that State, the real problem in stating such an apparently obvious principle was to avoid saying something which might subsequently prove incorrect or embarrassing. For instance, it would be a mistake to say that an internationally wrongful act entailed the obligation to make reparation, for the simple reason that the Commission did not yet know what conclusions it would reach on the consequences of an internationally wrongful act, which might be something other than reparation. Similarly, it would be wrong to reverse the proposition and say that responsibility was the consequence of an internationally wrongful act, since responsibility, though of a different character, could also result from a lawful act. The formulation used in article 1 thus left the way open for subsequent study of responsibility for acts which were not internationally wrongful.

13. Unlike some writers, who had felt it necessary to specify the reasons why a wrongful act engaged the responsibility of the State, the Commission did not have to find theoretical justifications for the rule; it need only state the principle in international law. That being so, the Commission would notice that the articles he had proposed did not precede his explanations of the reasons for their formulation, but, on the contrary, followed the reasoning of which they were the outcome, which was itself based on a study of the practice of States, case law, the literature and the earlier attempts at codification. That had seemed to him to be the best way to avoid introducing into the text of the draft articles any difficulties which might subsequently make it necessary to recast them.

14. He thought the best way to proceed would be for members to express their opinions on the draft in general and then examine the various articles in turn, as he introduced them.

Draft articles submitted by the Special Rapporteur

15. The CHAIRMAN invited the Commission to begin consideration of the Special Rapporteur's draft articles.

Article 1

16. *Article 1*

Principle attaching responsibility to every internationally wrongful act of the State

Every internationally wrongful act of a State involves the international responsibility of that State.

17. Mr. YASSEEN said that the Special Rapporteur, in his excellent introduction, had clearly explained why the Commission had chosen a certain method. A clear distinction had to be drawn between the rules of responsibility proper and the substantive rules, violation of which could engage the responsibility of the State. In that respect, he approved of the procedure followed by the Special Rapporteur and adopted by the Commission. He also approved of the method of work proposed by the Special Rapporteur, which was to consider the draft, article by article.

18. Article 1 was the key article, because it laid down the principle of responsibility in international law. The lapidary wording suggested by the Special Rapporteur was entirely appropriate. The principle needed no justification; it was already part of positive international law and was essential to any legal system worthy of the name. He therefore approved of the formulation proposed by the Special Rapporteur.

19. Mr. ELIAS said that the draft articles submitted by the Special Rapporteur represented an accurate summary of the viewpoints of those members who had participated in the first debate on the subject.[4]

20. The principle of State responsibility was a universal one and almost as indispensable, in another sphere, as that of *jus cogens*. There was no real difference of opinion on that point, and the bases for general uniformity and unanimity were well set out in paragraphs 31 and 32 of the Special Rapporteur's third report (A/CN.4/246). Of course, those members who had not participated in

[4] See *Yearbook of the International Law Commission, 1967*, vol. I, pp. 225-228 and *1969*, vol. I, pp. 104-117.

the first discussion were entitled to express their views, but he personally considered that article 1, as formulated by the Special Rapporteur, was correct and indeed indispensable.

21. Mr. KEARNEY, congratulating the Special Rapporteur on his reports, said he could testify from his own experience that they had already elicited highly favourable reactions in legal circles. During the previous year, for example, he had served on a study group on environmental law appointed by the American Society of International Law, where the reports had attracted much attention and had been referred to on a number of occasions in most flattering terms.

22. The only point he wished to raise at present was the difference between the responsibility of a State for an internationally wrongful act and its responsibility for an act which was not wrongful as such, or, to use the common-law expression, a case in which there was "liability without fault".

23. Current developments were tending to make the distinction between those two cases less and less clear. Environmental pollution raised a whole series of problems of responsibility as to circumstances in which the probability of risks as compared with the fact of wrongful action was a governing factor. The use of outer space involved similar problems. He need only refer to an experiment carried out by his own country a few years ago, in which a vast quantity of small copper needles had been launched by rocket into the upper atmosphere in order to obtain certain scientific information. That experiment had called forth protests by astronomers all over the world, who had feared that it might interfere with their own scientific work. Was there a question of responsibility there ? Protests had also been made against the proposed introduction of supersonic transport aircraft, since it had been feared that their discharges might change the ozone content of the upper atmosphere and thus indirectly increase the incidence of cancer. As problems of that character would inevitably become more numerous and more urgent, he hoped the Special Rapporteur would give some thought to the question how soon the Commission would be able to deal with that aspect of State responsibility.

24. Lastly, he fully agreed with the Special Rapporteur's formulation of article 1, although he was inclined to question whether the English word "involves" had quite the same connotation as the French word "*engage*".

25. The CHAIRMAN said he had similar doubts about the use of the Spanish word "*entraña*".

26. Mr. BARTOŠ said he wished to commend the Special Rapporteur on the clarity of his statement. In article 1, he had been right to lay down the principle of the responsibility of the State for any internationally wrongful act, without qualifying it with exceptions which might nullify the principle. Exceptions should be kept to the minimum where the principle of State responsibility was concerned. That principle was particularly necessary at the present time and should be formulated as clearly as possible. That was what the Special Rapporteur had done in article 1, the wording of which he found perfectly acceptable.

27. Exceptions were very dangerous, because some States considered that they were entitled to make *de facto* changes in the international public order, which was tantamount to reneging on their international obligations. Wrongful acts were sometimes justified on the grounds that it was by unlawful means that a lawful order had been established—an argument advanced by certain heads of State and even by some jurists. It was therefore necessary to affirm objectively that every internationally wrongful act of a State involved its international responsibility, without restriction. The degree of gravity of the responsibility would not be always the same, as the Special Rapporteur had said, since it would depend on the gravity of the wrongful act, but the existence of such responsibility, whatever its degree, must be affirmed.

28. The principle formulated in article 1 thus satisfied the requirements of the international public order, in its new, present-day sense, which the Commission had approved. As soon as an international public order existed, any violation of it was a source of international responsibility and liable to sanctions which should be provided for in international law. If a wrongful act could be attributed to a State, the international responsibility of that State was engaged automatically. The responsibility would not be the same in every case, but it must be determined by international law. What had to be done at the moment was not to define wrongful acts and degrees of responsibility, but to establish the actual principle of the responsibility of the State. The formulation proposed by the Special Rapporteur was entirely satisfactory in that respect, since it did not allow States to plead exceptions.

29. Mr. HAMBRO said that he found himself in agreement with nearly all the contents of the Special Rapporteur's impressive reports.

30. Work on State responsibility was somewhat different from the work undertaken by the Commission on other topics. Because of the approach adopted by the Special Rapporteur, the articles on State responsibility would be much more general than the provisions in the Commission's other drafts; that fact would to some extent colour the treatment of the topic.

31. As the Special Rapporteur had pointed out, it might become necessary at a later stage to deal with different qualities of responsibility according to the acts involved, such as international criminal acts. There was, however, one kind of act which deserved special attention: he was thinking of problems connected with the protection of the human environment, which had been much in the minds of international lawyers ever since the *Trail Smelter* arbitration.[5]

32. Similarly, consideration would have to be given to the problem of State responsibility for acts which had formerly been regarded as lawful, but which in the light of recent scientific developments must now be considered wrongful, and there progressive lawyers had a role to play; it was their duty to shift the frontier

[5] See *American Journal of International Law*, vol. 35, 1941, pp. 684-736.

between what was legal and what was illegal. They had to come out squarely in favour of international law, international responsibility and international organization, and move away from an unduly narrow emphasis on national interests and national sovereignty.

33. He fully approved of the formulation of draft article 1.

34. Mr. REUTER said he wished to join in the tributes paid to the Special Rapporteur on his report. He approved of his order of priorities. The relationship between responsibility for wrongful acts and responsibility for lawful acts was very important, but it raised a delicate question which it would be preferable to examine later. The same applied to the concept of an "international crime", which the Special Rapporteur had been a little reluctant to define.

35. He had very mixed feelings about article 1 and could only accept it with reservations. For the term "*engage*", used in the French version, meant that State responsibility came into existence from the moment when an internationally wrongful act was committed, which was not necessarily the case. The expression "*met en cause*" might be preferable, because as soon as a wrongful act occurred the question of the international responsibility of the State arose, which did not mean that such responsibility necessarily existed.

36. It might be asked whether the existence of injury was essential for affirming the existence of responsibility. But did that mean material or moral injury ? It could even be argued that every wrongful act involved moral injury and that the whole world sustained moral injury every time an internationally wrongful act was committed somewhere, which was obviously difficult to accept. Thus it could be said that an internationally wrongful act of a State engaged its international responsibility indirectly—which meant affirming that such responsibility existed—only on condition that the relationship between the concept of injury and the concept of responsibility was defined.

37. He agreed with Mr. Bartoš about the impossibility of admitting legal exceptions without restriction. But there could be justifying circumstances, as in the case of reprisals other than by force of arms, in so far as they were permitted by international law. Hence he could only accept article 1 in its present form subject to exceptions.

38. Mr. THIAM said he joined with the other members of the Commission in congratulating the Special Rapporteur on his report. He would, however, appreciate some further particulars as to the scope of his subject. The Special Rapporteur had expressed his intention of examining, during the initial phase, the problem of State responsibility for internationally wrongful acts. Was that merely a first stage, or did the Special Rapporteur consider that his task was only to consider that aspect of the problem of responsibility ? That seemed to him to be an important point, since responsibility also existed for acts that were not wrongful.

39. Then again, with regard to article 1, if it was accepted that the concept of international responsibility was more or less linked with the concept of injury, was it possible to affirm that every internationally wrongful act of a State involved that State's international responsibility, without reference to the question of injury ? It might, indeed, be asked whether every internationally wrongful act automatically caused injury and consequently involved the responsibility of the State. Personally, he was of the opinion that so long as an act caused no injury it did not involve responsibility, because there was no injury to redress.

40. Mr. SETTE CÂMARA, after paying a tribute to the high quality of the Special Rapporteur's reports, said that the clear-cut provision of article 1 gave evidence of the objectivity and pragmatic approach which were apparent throughout his treatment of the subject of State responsibility. The Special Rapporteur had admirably disentangled the subject from the fetters of its past connexion with the treatment of aliens.

41. Article 1 contained the basic norm which governed the whole topic. As pointed out by the Special Rapporteur, it was important not only because of what it contained, but because of what it omitted. In its present wording, it avoided a number of controversial subjects, such as responsibility arising from lawful acts, without closing the door to their consideration at a later stage. The doubts expressed by Mr. Reuter and Mr. Thiam could be examined when the Commission took up certain other articles of the draft.

42. On the question of drafting, he agreed with those members who had expressed doubts about the English and Spanish words used to render the French verb "*engage*".

43. Mr. RAMANGASOAVINA said he was not completely satisfied with the wording of article 1, because in his opinion the idea of State responsibility was linked with a number of concepts, not only with that of the internationally wrongful act.

44. He agreed with Mr. Thiam that lawful acts could also cause injury and, consequently, engage the responsibility of the State. In private law, any act causing injury involved the responsibility of the person who committed it, and required reparation, even if the act causing the injury was not intentional. Similalry, a State might, without any intention to harm, and even in a humanitarian spirit, carry out scientific experiments the consequences of which caused injury requiring reparation. It should therefore be stated from the outset that the responsibility of the State could be engaged by acts other than internationally wrongful acts.

The meeting rose at 12.35 p.m.

1203rd MEETING

Thursday, 10 May 1973, at 10.15 a.m.

Chairman: Mr. Jorge CASTAÑEDA

Present: Mr. Ago, Mr. Bartoš, Mr. Bilge, Mr. Elias, Mr. Hambro, Mr. Kearney, Mr. Ramangasoavina, Mr. Reuter, Mr. Sette Câmara, Mr. Tammes, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Mr. Yasseen.
